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**COMMUTING LIFE WITHOUT PAROLE SENTENCES: THE NEED
FOR REASON AND JUSTICE OVER POLITICS**

By

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A Dissertation Submitted to the Faculty of

Fordham University School of Law

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COMMUTING LIFE WITHOUT PAROLE SENTENCES: THE NEED FOR REASON AND JUSTICE OVER POLITICS

Abstract

In the last thirty years, life without parole (LWOP) sentences have flourished in the United States. Of course the very reason for a LWOP sentencing scheme is to incarcerate the convicted defendant until death. But under the Pardon Clause of the Constitution, as well as under state laws granting the Governor the pardoning power, inmates serving LWOP sentences might be eligible for early release by commutations.¹ On the one hand, the possibility of clemency could be regarded as an impermissible loophole that could be used on a case-by-case basis to undermine the certainty of a LWOP sentencing system. On the other hand, those who are concerned about prison overcrowding, and those who want to reward a prisoner who has rehabilitated himself, would certainly favor the increasing use of clemency to provide early release for many LWOP inmates.

This dissertation tests whether commuting LWOP sentences is a fair early release procedure. This dissertation will also provide suggestions on how to regulate the commutation power as applied to LWOP inmates so as to make it consistent with the principles behind a LWOP sentencing scheme. This dissertation concludes that while commuting LWOP sentences can be justified under certain circumstances, the application of commutation in many American jurisdictions is arbitrary and inconsistent with the premises of LWOP. The dissertation provides suggestions for bringing more fairness into the commutation process as applied to LWOP inmates.

¹ U.S.C.A. CONST. Art. II, § 2, cl. 1. The clause provides: “The President ... shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”

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Introduction

Larry Lee Fisher was 34 years old when convicted on April 14, 1994, of Robbery in the Second Degree and sentenced to serve life without the possibility of parole as required by Washington's Persistent Offender Accountability Act, the so-called "Three Strikes" law. After ten years of imprisonment, he was granted a Conditional Commutation authorized by Governor Christine O. Gregoire. Under the commutation, Mr. Fisher's sentence is going to end at December 23, 2015, as long as he fulfills all the terms described in this Conditional Commutation.²

According to the Governor, the following facts justified Mr. Fisher's commutation:³ a) Mr. Fisher has served a far longer sentence than the maximum sentence for his third conviction without the three strikes law;⁴ b) Mr. Fisher has shown remorse to his past crime;⁵ c) Mr. Fisher has successfully participated in appropriate programs, such as mental health treatment and substance abuse programs;⁶ d) Mr. Fisher has shown considerable rehabilitation by participating in positive programs offered in prison.⁷

The commutation is conditional --- Mr. Fisher is subject to a number of obligations, including the successful performance in re-entry programs both before and after release,⁸ and the fulfillment of life-long obligations concerning post release supervision.⁹ Furthermore, Fisher's commutation could be revoked if he commits an offense of any type or violates the post release conditions set forth in this commutation order.¹⁰

² See Diana Hefley, *Clemency in 3-strikes cases gives inmate shot at release*, HERALDNET, Jan. 8, 2013, <http://www.heraldnet.com/article/20130108/NEWS01/701089913?page=single>; see also *CONDITIONAL COMUTATION OF LARRY LEE FISHER*, HERALDNET, <http://heraldnet.com/assets/pdf/DH12998818.pdf>. [hereinafter *CONDITIONAL COMMUTATION*]

³ See *id.* *CONDITIONAL COMMUTATION*.

⁴ As the Commutation states, "Mr. Fisher is now 54 years old. To date, Mr. Fisher has been incarcerated on Snohomish County Superior Court Cause No. 94-1-00147-1 for over 18 years. The maximum sentence for Robbery in the Second Degree in Washington State, without the three strikes law, is 120 months". *Id.* at 1.

⁵ As the Commutation states, "Mr. Fisher accepted legal responsibility and expressed remorse for all of his past crimes and apologized for his actions to his victims and the state of Washington at his Clemency Board hearing". *Id.*

⁶ As the Commutation states, "Mr. Fisher recognizes that his criminal behavior was due to his abuse of alcohol and drugs and untreated mental illnesses. During his incarceration, he has participated in mental health treatment and substance abuse programs". *Id.*

⁷ As the Commutation states, "Mr. Fisher has shown considerable rehabilitation during his period of incarceration. He has taken advantage of positive programming opportunities offered in prison". *Id.* at 2.

⁸ Mr. Fisher should successfully complete a period of re-entry programs. These programs contain a period of re-entry program in total confinement, a successive period of work release program in a lower level of custody, and the final term of community custody under the supervision of the state with a dozen of conditions. *Id.* at 2-3.

⁹ Mr. Fisher should comply for the whole life with the post release conditions, which include regularly reporting to a correctional officer, abstaining from alcohol, drugs, and firearms, having no contact with the victims or their family member, and etc. *Id.*

¹⁰ *Id.* at 3-4.

The conditional commutation issued to Mr. Fisher is very much like a parole release warrant, the issuance of which is grounded on the petitioner's successful rehabilitation during incarceration, requires the petitioner to serve a period of post release supervision and provides for revocation of parole release based on the petitioner's violations of law. But when such a parole-like conditional commutation is granted to LWOP inmates, it will produce a systematical inconsistency in the application of LWOP sentences. While functioning as a parole release in allowing the LWOP inmates to leave prison, commuting the sentences of LWOP inmates undoubtedly conflicts with the premise of a LWOP sentencing scheme, which is established to prohibit inmates who are sentenced to life sentence from being released on the ground of rehabilitation.

Although the new development of commuting the sentences of LWOP inmates can be thought of as a recognition of developing standards of human decency, this article addresses the concern that the current application might cause conflicts that would prejudice the value of consistency and finality in the criminal justice system. This article argues that the commutation power as applied to LWOP inmates should be subject to standards that guide executive discretion. This article will provide suggestions on how to regulate the commutation power as applied to LWOP inmates so as to make it consistent with the principles behind a LWOP sentencing scheme, and to integrate that power with other methods of providing early release such as parole.

Part I of this article describes and analyzes the new phenomenon of commuting sentences of LWOP inmates. Part I includes a discussion and analyzes the history of the clemency power and the history of the development of the life without parole sentence. Part II discusses whether the commutation of LWOP inmates is by its nature inconsistent with the intended certainty of LWOP sentencing. Part III proposes a system of guided discretion to assure that an executive, when deciding whether to commute a LWOP sentence, is acting properly within substantive sentencing choices and procedural protections; this part concludes that a system of guided discretion, analogous to that employed at sentencing by a district court under the Sentencing Guideline, will best assure that commutation decisions will be fair and consistent with established sentencing policy. Part IV sets forth model commutation guidelines and explanatory notes, to provide an example of a system of guided discretion --- one that will tend to assure that commutation decisions are made for reasons that do not undermine the LWOP sentencing scheme, and are made free of any stain of outside influence or personal politics.

I. Commuting LWOP Sentences

A. LWOP Sentencing in America

1. Prior to the Late 1960s: No Gradation of LWOP Sentences

From the early 20th Century to the late 1960s, life sentences without parole eligibility were rarely used in America. In this period, the rehabilitative ideal dominated American penal philosophy and the indeterminate sentencing regime took hold,¹¹ resulting in judges and parole authorities having the most power to decide how long a convict would serve his or her sentence.¹² Life sentences were imposed either in the form of an indeterminate sentence with a fixed minimum term of years of imprisonment, *e.g.*, 25 years to life,¹³ or in a mandatory form without any minimum term fixed. In both types of life sentences, the parole board¹⁴ had the authority to permit such prisoners parole release. States running a mandatory life sentence would set a minimum term after which the parole authority would be allowed to consider early release for lifers.¹⁵ By 1970, only 7 states --- Massachusetts, Michigan, Mississippi, Nebraska, Nevada, Pennsylvania and West Virginia --- precluded parole eligibility for those sentenced to life.¹⁶

¹¹ See Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 695 (2010) [hereinafter Gertner, *A Shot History*].

¹² Judges had the authority to sentence convicted defendants either to probation or to prison, while parole boards decided when prisoners were released. See Michael Tonry, *Twenty Years of Sentencing Reform: Steps Forward, Steps Backward*, 78 JUDICATURE 169, 170-71 (1995) [hereinafter Tonry, *Twenty Years*]. Both the sentencing court and the parole board had wide discretion under this regime. See CYNDI BANKS, 3 CRIMINAL JUSTICE ETHICS, THEORY AND PRACTICE, 113 (2013).

¹³ See MARC MAUER, RYAN KING & MALCOLM YOUNG, THE SENTENCING PROJECT, THE MEANING OF "LIFE": LONG PRISON SENTENCES IN CONTEXT, 4 (2004), available at http://www.sentencingproject.org/doc/publications/inc_meaningoflife.pdf [hereinafter MAUER, THE MEANING OF "LIFE"].

¹⁴ Parole is a conditional release of an inmate before the expiration of his or her full term of imprisonment. The idea of parole is to encourage inmates to become law-abiding persons by rewarding them early release on their good conduct during the incarceration. See 10 PAUL F. CROMWELL, ROLANDO V. DEL CARMEN & LEANNE FIFTAL ALARID, COMMUNITY BASED CORRECTIONS (2002). The concept of parole was introduced to the United States from Europe in the late 19th century. Parole was first used in the United States in New York in 1876. In 1907, New York became the first state that formally adopted a parole system. By 1942, all states and the federal government had such parole systems. See SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE (1998); see also TODD R. CLEAR, GEORGE F. COLE & MICHAEL DEAN REISIG, AMERICAN CORRECTIONS (2010).

At the federal level, the federal Sentencing Reform Act of 1984 abolished parole. The rationale for abolishing parole was that the discretion exercised by parole boards was one of the major causes of disparity in sentencing. See STEPHEN A. SALTZBURG AND DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: INVESTIGATIVE CASES AND COMMENTARY 1550 (10th ed. 2014).

¹⁵ In Rhode Island, a state that did not adopt indeterminate sentencing, a life sentence was a mandatory sentence. But the state allowed the parole board to release lifers after they had served a minimum term of twenty years of imprisonment. See Edward Lindsey, *Indeterminate Sentence Release on Parole and Pardon*, 6 J. AM. INST. CRIM. L. & CRIMINOLOGY 807, 808 (1915).

¹⁶ The listing of states is based on a data collection produced by the Death Penalty Information Center (DPIC). But two corrections have to be made to that data. First, the State of Maine should be recognized as a state that prohibits parole eligibility for life sentences in 1976. Maine took several back and forth steps in precluding parole eligibility for lifers. Maine enacted life sentences in 1841. When the parole law was

2. Schick v. Reed: Commuting the Death Penalty to a LWOP Sentence

The first move to impose the LWOP sentence was made by the President, using the pardoning power under Article II of the Constitution¹⁷ to grant conditional commutations¹⁸ to some convicted defendants who were sentenced to death. In the landmark case of *Schick v. Reed*,¹⁹ the Supreme Court endorsed the executive branch's use of determinate life sentencing conditioned on no parole eligibility. In 1954, Master Sergeant Maurice L. Schick was sentenced to death by a military court-martial for killing an eight-year old girl.²⁰ In 1960, President Eisenhower commuted his sentence from death to life imprisonment with the condition that he would not thereafter be eligible for parole.²¹ Schick challenged the validity of the condition of no-parole attached to his life sentence.²² He argued that President Eisenhower had exceeded

established in 1913, the Parole Board of Maine was established and authorized to release all offenders on parole including lifers. Subsequently, the Act of 1944 removed the Parole Board's authority in cases of "any person convicted of an offense the only punishment for which prescribed by the law is imprisonment for life..." (R. S. ch. 136, § 12). However, later revisions in the law extended the possibility of parole to prisoners serving life sentences. Lifers could achieve parole eligibility after 30 years (P. L. 1953, ch. 382). In 1969, the 30 years' minimum was reduced to 15 years (P. L. 1969, ch. 280). However, Maine abolished parole in 1976. See DONALD ANSPACH, PETER LEHMAN & JOHN CRAMER, MAINE REJECTS THE INDETERMINACY, A CASE STUDY OF FLAT SENTENCING AND PAROLE ABOLITION 17 (1984), available at National Criminal Justice Reference Service, <https://www.ncjrs.gov/pdffiles1/Digitization/94367NCJRS.pdf>. Since then, a person sentenced to life in Maine has not been eligible for parole.

Secondly, the State of Nebraska precluded parole eligibility for lifers when the parole law was enacted in 1969. As noted in *Poindexter v. Houston*, 275 Neb. 863 (2008), under Nebraska law, NEB. REV. STAT. § 83-1,110, a defendant serving a life sentence for first degree murder was not eligible for parole until the Board of Pardons commuted his life sentence to a term of years. See Thomas Davidson, *Year That States Adopted Life Without Parole (LWOP) Sentencing*, DEATH PENALTY INFORMATION CENTER (Aug. 2, 2010), <http://www.deathpenaltyinfo.org/year-states-adopted-life-without-parole-lwop-sentencing>; see also *Gilbert v. State*, 549 A.2d 737, 738, at n. 2, n. 3. (Me., 1988); see also LARRY LINKE & PEGGY RITCHIE, NATIONAL INSTITUTE OF CORRECTIONS, RELEASING INMATES FROM PRISONS: PROFILES OF STATE PRACTICES, NATIONAL INSTITUTE OF CORRECTIONS 43 (2004), <http://static.nicic.gov/Library/021386.pdf>.

¹⁷ U.S.C.A. CONST. Art. II, § 2, cl. 1. The clause provides: "The President . . . shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."

¹⁸ A commutation generally means a reduction of sentence, which derives from the pardoning power vested in the Constitution. As stated in *In re Opinion of the Justices*, 190 Mass. 616, 78 N.E. 311 (1906), "[t]he commutation of a sentence is a pardon upon condition that the convict voluntarily submits to a lighter punishment." A conditional commutation is one applied only if certain stated circumstances are satisfied. As stated in *Schick v. Reed*, 419 U.S. 256, 262 (1974), conditions could be applied in "[v]arious types, . . . [in] both penal and nonpenal . . . nature". Typical conditions were that the felon be confined at hard labor for a stated period of time, or that he serve in the Armed Forces. See *Schick*, 419 U.S. at 262, n. 3. Another condition commonly set is that the commuted convict must behave as a law-abiding citizen. See 3 U.S. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, 216 (1939) [hereinafter U.S. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S SURVEY]. In *Schick*, the Court held that conditional commutation of the death sentence to a no parole eligible life sentence is constitutional. See *Schick*, 419 U.S. at 268.

¹⁹ *Schick v. Reed*, 419 U.S. 256 (1974).

²⁰ *Id.* at 257.

²¹ *Id.*

²² *Id.* at 257, 267.

his Article II commutation powers in attaching the stipulation.²³ The Court rejected his claim and upheld the conditional commutation.²⁴ Though “the Court [was] actually dealing with the scope of the President’s [clemency] power,”²⁵ by upholding the constitutionality of the conditional commutation, the Court was clearly of the view that there was a need for determinate true life sentences at least in certain circumstances.²⁶

3. *The 1970s: Emergence of LWOP Sentences as An Alternative to the Death Penalty*

The next foray into determinate LWOP sentencing occurred when the Supreme Court reviewed the constitutionality of the death penalty. In 1972 the Supreme Court held, in *Furman v. Georgia*,²⁷ that the application of the death penalty under then-existing statutes was unconstitutional --- as those statutes could be applied in an arbitrary and capricious manner.²⁸ In response to *Furman*, states imposing capital punishment were pushed to rewrite their death penalty statutes, and “roughly two-thirds of the States promptly redrafted their capital sentencing statutes in an effort to limit jury discretion and avoid arbitrary

²³ *Id.* at 257, 259.

²⁴ *Schick*, 419 U.S. at 268.

²⁵ See Julian H. Wright, *Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?* 43 VAND. L. REV. 529, 535 (1990).

²⁶ The specific need for attaching a no parole eligibility condition to the commutation of a death penalty to a life imprisonment was made necessary by the nationwide adoption of the parole laws, which, in most states, were applied to prisoners sentenced to life imprisonment. The executive’s specification of the no parole condition purported to preclude the parole board’s discretionary decision to release the commuted lifers on parole. Early in the 20th Century when parole emerged in the United States, in some states, such as California, the governor had at times commuted a death sentence to life imprisonment without possibility of parole. See 3 U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S SURVEY, *supra* note 18, at 216.

Before parole laws were enacted in the United States, the executive had no need to specify the no parole condition in commuting a death sentence to a determinate life imprisonment. In *Ex parte Wells*, in which the Supreme Court reviewed whether the President could grant a conditional pardon where President Fillmore pardoned Wells on the condition that Wells remain in prison for life, the Supreme Court reasoned that “[a] conditional pardon when accepted by a convict is the substitution, by himself, of a lesser punishment than the law has imposed upon him, and he cannot complain if the law executes the choice he has made.” *Ex parte Wells*, 59 U.S. (18 How.) 307, 315 (1855). As Wells’s conditional pardon was actually a commutation, *Wells* was interpreted by subsequent cases to mean that the President has power to commute sentences under the pardoning power vested in the Constitution. See *Ex parte Harlan*, 180 F. 119 (C.C.N.D. Fla. 1909); *Harlan v. McGourin*, 218 U.S. 442 (1910); *Biddle v. Perovich*, 274 U.S. 480 (1927). Since there were no parole laws when Wells was commuted, the executive order of commutation simply confined the commuted murderer in prison until his death.

²⁷ *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

²⁸ *Id.* at 239-40. In a 5-4 decision, the five Justices in the majority could not produce a common rationale, and could only agree on a short ruling that the imposition of the death penalty constituted cruel and unusual punishment under the Eighth Amendment. But the Court in *Furman* did not rule the death penalty *per se* unconstitutional, and thus left room for state lawmakers to rewrite death penalty sentencing statutes to pass constitutional muster. In some states, death penalty statutes already had been declared unconstitutional under state constitutional provisions analogous to the Eighth Amendment. The California Supreme Court, for example, struck down California's death penalty statute prior to *Furman* on the ground that it violated article I, § 6 of the California Constitution's prohibition of “cruel or unusual punishments.” *People v. Anderson*, 6 Cal.3d 628, 656-57, 493 P.2d 880, 899, 100 Cal. Rptr. 152, 171 (1972).

and inconsistent results.²⁹ Four years later, after a temporary moratorium on executions, the Supreme Court in *Gregg v. Georgia*,³⁰ upheld the constitutionality of death penalty sentencing statutes so long as they 1) set forth standards that guided the discretion of the sentencer, 2) bifurcated the guilt and sentencing phases, and 3) were sufficiently narrowed to certain crimes and perpetrators.³¹ But the Court rejected the mandatory death penalty without any other alternative sentencing choice in *Woodson v. North Carolina*,³² in which the Court held that mandatory death penalty statutes violated the Eighth Amendment.³³

In response to *Woodson*, States that maintained the death penalty had to provide non-death alternatives in capital cases.³⁴ In this context, LWOP, as distinguished from the traditional parole-eligible life sentence, was enacted as an independent gradation of punishment and specifically used as an alternative to the death penalty. By 1994, of the 38 death penalty states,³⁵ 26 provided for a LWOP sentence as an alternative to capital punishment, either as the sole alternative to the death penalty or as an alternative to the death penalty accompanied with the other alternative of traditional life sentence with

²⁹ *Pulley v. Harris*, 465 U.S. 37, 44 (1984); *see also* *Sumner v. Shuman*, 483 U.S. 66, 70-72 (1987) (discussing general history of death penalty legislation in years following *Furman*).

³⁰ *Gregg v. Georgia*, 428 U.S. 153 (1976). *Gregg* is used to refer to the series of cases the Supreme Court delivered on July 2, 1976 in setting forth the constitutional death penalty sentencing schemes. The series of cases are *Gregg v. Georgia*, 428 U.S. 153 (1976), *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Jurek v. Texas*, 428 U.S. 262 (1976).

³¹ *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). Regarding the bifurcated sentencing procedure, which divides the trial of capital cases into guilt-innocence phase and sentencing phase, the Court in *Gregg* did not discuss whether the judge or the jury enjoyed the decisive power in entering a sentencing decision. In *Ring v. Arizona*, the Court held that the Sixth Amendment requires a jury to find the aggravating factors necessary for imposing the death penalty. *See* *Ring v. Arizona*, 536 U.S. 584, 608 n. 6, 609 (2002).

³² *Woodson v. North Carolina*, 428 U.S. 280 (1976).

³³ *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976). North Carolina made “death the mandatory sentence for all persons convicted of first-degree murder.” *See* *Woodson v. North Carolina*, 428 U.S. 280, 286-7 (1976). Louisiana also enacted the same mandatory sentence for first-degree murder. *See* *Roberts*, 428 U.S. at 331. The Court reasoned that the mandatory death penalty statutes impermissibly disregarded the circumstances of the particular offense and the character and propensities of the offender, and were inconsistent with contemporary standards of decency. *See* *Woodson*, 428 U.S. at 301-4; *Roberts*, 428 U.S. at 333, 335-36.

³⁴ The term “capital case” refers to a case in which the sentence of death might be employed. The Supreme Court struck down the death penalty for the crime of rape, in *Coker v. Georgia*, 433 U.S. 584 (1977), on the ground that the death penalty is grossly disproportionate and excessive for the crime of rape “which does [not] involve the unjustified taking of human life” (*Coker*, at 598), and in *Kennedy v. Louisiana*, 554 U.S. 407 (2008), on the ground that it is unconstitutional to impose the death penalty for the crime of raping a child, when the victim does not die and death was not intended (*Kennedy*, at 413). Thus the death penalty is reserved for the most serious crime --- murder. Different states provide different names to specify the offense that would be subject to the death penalty. Arizona uses the name of first degree murder. *See* ARIZ. REV. STAT. ANN. § 13-751(A) (2013). Washington uses the name of aggravated first degree murder. *See* WASH. REV. CODE ANN. § 10.95.030 (Westlaw 2013). Arkansas uses the name of capital murder. *See* Ark. Stat. Ann. § 5-4-602 (1987). Georgia uses the name of murder. *See* GA. CODE ANN. § 16-5-1 (Westlaw 2013). Utah uses the name of aggravated murder. *See* UTAH CODE ANN. §76-5-202 (Westlaw 2013).

³⁵ Data is derived from a database produced by the Death Penalty Information Center (DPIC). *See* *States With and Without the Death Penalty*, THE DPIC, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Nov. 20, 2014).

parole eligibility.³⁶ The remaining 12 states provided a traditional life sentence with parole eligibility as the sole alternative to the death penalty. Eventually, traditional life sentences with parole eligibility as the sole alternative to capital punishment disappeared. By 2013, of the 32 death penalty states,³⁷ 24 provide the LWOP sentence as the only alternative to the death penalty,³⁸ and 8 provide both LWOP sentence and the traditional life sentence with parole eligibility as alternatives to the death penalty.³⁹ The federal and military justice systems provide the options of life imprisonment with the possibility of parole, life imprisonment without the possibility of parole, and death in the capital case.⁴⁰

Meanwhile, in the states that abolished the death penalty after *Furman*, the sentence of LWOP was deemed to be the most appropriate substitution to the death penalty in punishing the most serious murder crimes.⁴¹ In these states, there are two approaches to employ the sentence of LWOP in cases involving the most serious murder crimes --- providing mandatory LWOP sentence or providing LWOP sentences with alternative sentences. By 2013, of the 18 no-death-penalty states, (except for Alaska, which doesn't have the sentence of LWOP), 8 provide mandatory LWOP sentences in the most serious murder cases,⁴² and 9

³⁶ See *Simmons v. South Carolina*, 512 U.S.154, 168 n.7 (1994).

³⁷ See *supra* note 35 (That data indicates that between 1993 and 2013, 6 states have moved away from the death penalty).

³⁸ See ALA. CODE § 13A-5-46(e) (Westlaw 2013); ARIZ. REV. STAT. ANN. § 13-751(A) (Westlaw 2013); ARK. CODE ANN. § 5-4-601(b)(1) (Westlaw 2013); CAL. PENAL CODE ANN. § 190.3 (Westlaw 2013); COLO. REV. STAT. ANN. § 18-1.3-1201 (Westlaw 2013); DEL. CODE ANN., Tit. 11, § 4209(a) (Westlaw 2013); FLA. STAT. ANN. § 775.082(1) (Westlaw 2013); IDAHO CODE § 18-4004 (Westlaw 2013); IND. CODE ANN. § 35-50-2-3(a) (Westlaw 2013); KAN. STAT. ANN. §21-4635 (a) (2005); LA. CODE CRIM. PROC. ANN. Art. 905.6 (Westlaw 2013); MO. REV. STAT. § 565.020.2 (Westlaw 2013); NEB. REV. STAT. §§28-105, -303, 29-2520 to -2524 (Westlaw 2013); N.H. REV. STAT. ANN. § 630:5(V) (Westlaw 2013); N.C. GEN. STAT. §15A-1371(a1) (Westlaw 2013); OHIO REV. CODE ANN. §2929.03(A) (Westlaw 2013); ORE. REV. STAT. § 163.105 (Westlaw 2013); 61 PA. CONS. STAT. §331.21 (Westlaw 2013); S.C. CODE ANN. §16-3-20(A) (Westlaw 2013); S.D. CODIFIED LAWS § 24-15-4 (Westlaw 2013); TENN. CODE ANN. §39-2-202(b) (Westlaw 2013); TEX. PENAL CODE § 12.31(a) (2005); VA. CODE ANN. §53.1-151(B1) (Westlaw 2013); WYO. STAT. §§ 6-2-101(b), 7-13-402(a) (Westlaw 2013).

³⁹ See GA. CODE ANN. § 16-5-1 (Westlaw 2013); KY. REV. STAT. ANN. §532.030(4) (Westlaw 2013); MISS. CODE ANN. §99-19-103 (Westlaw 2013); MONT. CODE ANN. § 46-18-202(2) (Westlaw 2013); NEV. REV. STAT. § 175.554(4) (Westlaw 2013); OKLA. STAT. ANN. tit. 21, § 701.9(A) (Westlaw 2013); UTAH CODE ANN. §76-5-202 (Westlaw 2013); WASH. REV. CODE ANN. § 10.95.030 (Westlaw 2013). Regarding the State of Vermont, although the US Department of Justice currently categorizes Vermont as a non-death penalty state (and has since 1988), Vermont maintains the death penalty as punishment for treason and has three statutes governing death penalty procedure. See TRACY SNELL, DEPARTMENT OF JUSTICE, CAPITAL PUNISHMENT, 2012 - STATISTIC TABLES, <http://www.bjs.gov/content/pub/pdf/cp12st.pdf>; see also VT. STAT. ANN. tit. 13, §2303(a) (Westlaw 2013).

⁴⁰ See Steven J. Mulroy, *Avoiding “Death by Default”: Does the Constitution Require a “Life Without Parole” Alternative to the Death Penalty?* 79 TUL. L. REV. 401, 410 (2004).

⁴¹ The term “the most serious murder crimes” is intended to encompass the “capital crimes” that used to be punished by the death penalty in the respective jurisdictions. As the death penalty is no longer applicable in non-death penalty states, the term of “capital crimes” is no longer a legal term in these states. For example, Connecticut renames the crime of “capital felony” as “murder with special circumstances”, when Connecticut abolished the death penalty in 2012. See CONN. GEN. STAT. ANN. § 53a-54b; PA 12-5—SB 280.

⁴² CONN. GEN. STAT. ANN. § 53a-35a (Westlaw 2013); HAW. REV. STAT. § 706-656 (Westlaw 2013); IOWA. CODE. ANN. § 902 (Westlaw 2013); MD. CODE ANN., CRIM. LAW § 2-203 (Westlaw 2013); MASS. GEN. LAWS ANN. Ch. 265, § 2 (Westlaw 2013); MICH. COMP. LAWS ANN. § 791.234 and § 791.244

provide alternatives to the LWOP sentence --- either a traditional life sentence with parole eligibility, or a certain term of imprisonment.⁴³

4. The Sentencing Reform Era: Expanding the Applicability of LWOP Sentences

The wide acceptance of LWOP sentences as an alternative to the death penalty led to a rise in LWOP statutes in the late 1970s and early 1980s. Beginning in the 1970s, the punishment philosophy generally shifted from a prime focus on rehabilitation to include consideration of retribution or “just deserts”.⁴⁴ The indeterminate sentencing that was based on the rehabilitative ideal was widely rejected⁴⁵ and the goal of sentencing turned to assuring the certainty and severity of punishment.⁴⁶ Consequently, the Federal government and many states shifted from indeterminate to determinate sentencing⁴⁷ by implementing multiple sentencing reforms, including enacting sentencing guidelines,⁴⁸ enacting mandatory minimum

(Westlaw 2013); MINN. STAT. ANN. § 609.106 (Westlaw 2013); WIS. STAT. ANN. § 973.014 and § 939.50 (Westlaw 2013).

⁴³ See 720 ILL. COMP. STAT. ANN. 5/9-1.1, 730 ILL. COMP. STAT. ANN. 5/5-8-1 and 730 ILL. COMP. STAT. ANN. 5/5-4.5-20(a) (2012); ME. REV. STAT. ANN. tit. 17-A, § 1251 and tit. 34-A, § 5801 (Westlaw 2013); N.J. STAT. ANN. § 2C:11-3 (Westlaw 2013); N.M. STAT. ANN. § 31-20A-2 (Westlaw 2013); N.Y. PENAL LAW § 70.00 (McKinney 2013) and N.Y. CRIM. PROC. LAW § 400.27 (McKinney 2013); N.D. CENT. CODE ANN. § 12.1-32-01 (Westlaw 2013); R.I. GEN. LAWS ANN. § 12-19.2-1 and § 11-23-2 (Westlaw 2013); W. VA. CODE ANN. § 62-3-15 (Westlaw 2013); VT. STAT. ANN. tit. 13 § 2303 and § 2311 (Westlaw 2013).

⁴⁴ Judge Lynch has briefly described the changes in sentencing goals and sentencing schemes that happened in the late twentieth century, as follows:

The late twentieth century saw wholesale changes in sentencing philosophy and practice. The conventional wisdom about the primary purpose of sentencing shifted away from rehabilitation as a dominant philosophy and toward retribution or “just deserts.” The method of sentencing shifted away from broad judicial discretion to be exercised on a case-by-case basis and toward narrower authority constrained by rules laid down by legislatures or sentencing commissions. The form of sentences changed from indeterminate terms of imprisonment whose actual length would be determined by parole boards long after sentence was passed, to fixed or determinate sentences, with parole often abolished. The length of sentences increased, as the public sought greater security and less mercy, perhaps even less justice. Thus, the law of sentencing changed, from a legal regime that was famously characterized by Marvin Frankel in the 1970s as literally lawless, to one in which, in many states and especially in the federal jurisdiction, there is an extraordinarily rich and complicated body of substantive and procedural sentencing law.

See Gerard E. Lynch, *Sentencing: Learning From, and Worrying About, the States*, 105 COLUM. L. REV. 933, 933-934 (2005).

⁴⁵ See Sanford H. Kadish, *Fifty Years of Criminal Law, an Opinionated Review*, 87 CAL. L. R. 943, 979 (1999).

⁴⁶ See PAUL J. HOFER, ET AL., U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 11 (2004) (noting that the goals identified in the Sentencing Reform Act for the new system including reducing sentencing disparity, assuring certainty and severity of punishment and increasing the rationality and transparency of punishment).

⁴⁷ See Tonry, *Twenty Years*, *supra* note 12, at 170.

⁴⁸ Before the Federal Sentencing Guidelines were established, sentencing guidelines had been used in a few states. See ROBIN L. LUBITZ & THOMAS W. ROSS, U.S. NATIONAL INSTITUTE OF JUSTICE, SENTENCING GUIDELINES: REFLECTIONS ON THE FUTURE, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE 1 (2001),

sentence legislation, eliminating parole release,⁴⁹ narrowing time off for good behavior,⁵⁰ promoting truth in sentencing reform,⁵¹ and enacting “three strikes” laws.⁵² In this sentencing reform movement, the

available at <https://www.ncjrs.gov/pdffiles1/nij/186480.pdf>. In 1984, Congress passed the Sentencing Reform Act, which established the Sentencing Commission and delegated the Commission the legislative power to establish sentencing guidelines for federal judges. After a long process, the Commission promulgated the Sentencing Guidelines, which took effect in 1987. See Richard Husseini, *The Federal Sentencing Guidelines: Adopting Clear and Convincing Evidence as the Burden of Proof*, 57 U. CHI. L. REV. 1387, 1387 (1990); see also Joseph S. Hall, *Guided to Injustice? The Effect of the Sentencing Guidelines on Indigent Defendants and Public Defense*, 36 AM. CRIM. L. REV. 1331, 1338 (1999). The goals of the Guidelines are consistency, uniformity and proportionality of sentencing. See UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL ch. 1 at 2 (1990).

⁴⁹ Parole is a hallmark of the indeterminate sentencing system. By the mid-1970s, indeterminate sentencing and parole were widely attacked because of, among other things, the failure of rehabilitative programs in preventing recidivism, sentencing disparities among the persons who had committed the same crime, and unwarranted sentencing discretion. See Kate Stith & Steve Y. Koh, *Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 227 (1993) (summarizing the criticism of the flaws in the administration of the parole laws). The Sentencing Reform Act of 1984 abolished parole at the federal level. Several states, including California, Maine, Oregon, in the 1980s, followed the trend in enacting determinate sentencing schemes and abolishing parole. See CAL. PENAL CODE §§ 1170, 3000 (2013); ME. REV. STAT. ANN. tit. 17-1 §§ 1151-1264 (2013); OR. REV. STAT. §§ 161.535-161.737 (2013). During the 1990s’ truth in sentencing movement, more states, including Arizona, Delaware, Kansas, North Carolina, Ohio, Virginia and Wisconsin eliminated discretionary parole release. Even in the states that did not formally abolish or eliminate parole laws, the parole board’s discretionary authority to release prisoners was limited, as the truth-in-sentencing laws required that prisoners serve at least 85 percent of the announced sentence. By the beginning of this Century, 16 states and the federal government had abolished parole. Another 5 states had abolished discretionary parole for certain violent offenses or other felony crimes. See JOHN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 65 (2003); see also LINKE & RITCHIE, *supra* note 16. In the 16 states that still maintain discretionary parole release practices, nearly all of these states have set up restrictive standards that parole-eligible prisoners must meet, and most of these states have enacted parole guidelines to reduce arbitrary decisionmaking on the part of parole boards. See *id.* PETERSILIA, at 71-72.

⁵⁰ “Good time” laws existed before parole laws. Good time laws, known as “commutation laws”, are used to help the prison warden maintain prison discipline by rewarding the prisoner certain time off his sentence in return for his “good behavior.” See RONALD L. GOLDFARB & LINDA R. SINGER, AFTER CONVICTION: A REVIEW OF THE AMERICAN CORRECTION SYSTEM 262 (1973); see also KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 17 (1998). The Federal “Good time” law was introduced in 1875. It rewarded prisoners 5 days off per month for maintaining good conduct. See Act of Mar. 3, 1875, ch. 145, 18 Stat. 479-80. In the Act of 1910, the good time rate was set to 10 days per month. See 18 U.S.C. §§ 4161-62 (1982) (repealed 1984). The Sentencing Reform Act of 1984 reduced the good time off rate to approximately 54 days per year. See 18 U.S.C. § 3624(b) (1988).

⁵¹ Truth in sentencing is a legislative means of restoring public confidence in the criminal justice system by requiring offenders to serve their full (or almost full) sentences. The U.S. Congress authorized incentive grants to States to build or expand correctional facilities through the Violent Offender Incarceration and Truth-in-Sentencing Incentive Grants Program in the 1994 Crime Act (Pub. L. No. 103-322, 108 Stat. 1796 (1994)). 27 states and the District of Columbia have established truth-in sentencing laws, which require that prisoners convicted of selected violent crimes must serve not less than 85% of the announced sentence. See U.S. BUREAU OF JUSTICE ASSISTANCE, NATIONAL ASSESSMENT OF STRUCTURED SENTENCING, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE 33 (1999), available at <https://www.ncjrs.gov/pdffiles/strsent.pdf>; see also PAULA M. DITTON & DORIS JAMES WILSON, U.S. BUREAU OF JUSTICE STATISTICS, TRUTH IN SENTENCING IN STATE PRISONS, BUREAU OF JUSTICE STATISTICS 2 (1999), available at <http://www.bjs.gov/content/pub/pdf/tssp.pdf>; PETERSILIA, *supra* note 49, at 68.

imposition of the determinate sentence of LWOP was extended in many jurisdictions to non-homicide cases, drug cases and “three strikes” law violations.

(a) *Non-homicide Serious Felonies*

LWOP sentencing was first extended to punish non-homicide felonies during the trend of eliminating parole release. In this trend, many traditional parole-eligible life sentences that used to be imposed to punish certain non-homicide felonies were upgraded to LWOP sentences. In Florida, LWOP sentences are imposed for kidnapping,⁵³ sexual battery,⁵⁴ lewd or lascivious molestation,⁵⁵ and armed robbery⁵⁶, which are categorized as life felonies.⁵⁷ By 2010, at least 37 states provided for LWOP sentences for certain non-homicide offenses,⁵⁸ which include kidnapping, sexual battery, burglary, robbery, carjacking, and battery.⁵⁹

(b) *Drug Offenses*

During the “War on Drugs”,⁶⁰ legislatures extended LWOP sentences to punish certain drug offenses. Since President Nixon officially declared the nation’s “War on Drugs” at press conference on June 17 in

⁵² “Three Strikes” laws, which arose through the 1990s, addressed the public fear of the rising crime rate and early release of repeat offenders. See ELSA CHEN, IMPACTS OF THREE STRIKES AND TRUTH IN SENTENCING ON THE VOLUME AND COMPOSITION OF CORRECTIONAL POPULATIONS, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE 1-5 (2001), <https://www.ncjrs.gov/pdffiles1/nij/grants/187109.pdf>. Punishing a habitual-offender with aggravated penalties, up to life imprisonment, has a long history in the Anglo-American legal system. These enhancing punishment laws were common in England and the United States through the 20th century. But habitual-felon statutes that required LWOP were not used widely until the 1990s. “[In the early 1990s], several states and the federal government have augmented their habitual offender statutes by enacting new, highly publicized ‘three strikes and you’re out’ laws that severely limit the discretion of prosecutors and judges.” WALTER J. DICKEY, THREE STRIKES: FIVE YEARS LATER 1 (1998).

⁵³ FLA. STAT. § 781.01.

⁵⁴ *Id.* § 794.011.

⁵⁵ *Id.* § 800.04.

⁵⁶ *Id.* § 812.13.

⁵⁷ Florida has five degrees for felony offenses, including felony in the third degree, felony in the second degree, felony in the first degree, life felony and capital felony. A capital felony is punishable by death or life imprisonment without the possibility of parole. A life felony is punishable by forty years to life imprisonment, or probation for the remainder of life, and a fine of up to fifteen thousand dollars. See FLA. STAT. §§ 775.081, 921.0022. See also *Year 2000 State of Florida Crime and Punishment Chart*, NATIONAL CRIME AND PUNISHMENT LEARNING CENTER, <http://www.crimeandpunishment.net/FL/> (last visited Sep. 10, 2013).

⁵⁸ See Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentencing in the United States*, 23 FED. SENT. REP. 27, 27 (2010).

⁵⁹ For example, juvenile offenders in Florida have received LWOP sentences for kidnapping, sexual battery, robbery, battery, burglary, and carjacking. See PAOLO G. ANNINO ET AL., JUVENILE LIFE WITHOUT PAROLE FOR NON-HOMICIDE OFFENSES: FLORIDA COMPARED TO NATION 6 (2009), available at http://www.law.fsu.edu/faculty/profiles/annino/Report_juvenile_lwop_092009.pdf.

⁶⁰ Drug control in the United States began in the 1910’s when the Harrison Narcotics Act was enacted in 1914. The Supreme Court decision in *Webb v. United States*, 249 U.S. 96 (1919), which held that prescriptions of narcotics for maintenance treatment was not within the discretion of physicians and thus

1971,⁶¹ legislatures not only expanded drug offenses, but also increased the lengths of drug offense sentences.⁶² On the federal level, the Anti-Drug Abuse Act of 1986⁶³ mandated that offenders convicted of possession with intent to distribute certain quantities of drugs are punishable by life sentence without parole eligibility.⁶⁴ Mandatory life sentence without parole eligibility is additionally applicable to principals convicted of conducting a continuing criminal enterprise involving drug transactions.⁶⁵ Congress enacted the Amendment to the Anti-Drug Abuse Act⁶⁶ that increased penalties for drug offenses and created new federal offenses. On the state level, New York and Michigan took the lead in establishing tough penalties against drug offenses. New York, in 1973, enacted the first state-level tough sentencing law for drug offenses,⁶⁷ known as the Rockefeller Drug Laws. Under these laws, a serious drug offender could be sentenced to a life sentence.⁶⁸ Michigan, in 1973, passed the toughest drug law in the country, the “650-Lifer Law”,⁶⁹ which mandated LWOP sentences for the sale, manufacture or possession of 650 grams of cocaine or heroin.⁷⁰ The constitutionality of the sentence of LWOP was challenged in *Harmelin v.*

not privileged under the Harrison Narcotics Act, virtually initiated the drug prohibition era in America. Congress continually enacted strict sentencing laws for drug offenses, such as The Boggs Act of 1951, the Narcotic Control Act of 1956, and the Single Convention of Narcotic Drugs of 1961. President Richard Nixon officially declared the nation’s War on Drugs in 1971. Subsequently, Congress passed a series of acts, including the Comprehensive Drug Abuse Prevention and Control Act of 1970, The Anti-Drug Abuse Acts of 1986 and 1988, The Crime Bill of 1994, and the 1998 Higher Education Act, which resulted in the lengthening of sentences for drug offenders and the expansion of drug offenses. See JAMES P. GRAY, 2 WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS 22, 27 (2011); see also Franklin E. Zimring, *Imprisonment Rates and the New Politics of Criminal Punishment*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 145 (David Garland ed., 2001) (noting that the second phase of prison growth occurred during the period from 1985 to 1992, correlating to the war on drugs).

⁶¹ President Nixon announced the creation of a Special Action Office for drug abuse prevention. See DOUGLAS A. MCWAY, ED., DRUG WAR FACTS (6th ed., 2007).

⁶² See Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335 (1995) (noting that during the drug war, legislators enact legislation against drug crimes with harsher penalties).

⁶³ Public Law 99-570.

⁶⁴ The 1986 Act mandated a sentence of ten years to life, without probation or parole, for first offenders convicted of possession with intent to distribute larger quantities of drugs. The designated quantities were 1 kilogram of heroin, 5 kilograms of cocaine mixture, 100 grams of PCP, 50 grams of crack, 1000 grams of marijuana, or 10 grams of LSD. See 21 U.S.C. 841(b)(1)(A)(1) (1988).

⁶⁵ See GRAY, *supra* note 60, at 27.

⁶⁶ Public Law 100-690.

⁶⁷ Act of May 8, 1973.

⁶⁸ See Peter A. Mancuso, *Resentencing after the “Fall” of Rockefeller: The Failure of the Drug Law Reform Act of 2004 and 2005 to Remedy the Injustice of the New York Rockefeller Drug Laws and the Compromise of 2009*, 73 ALB. L. REV. 1535, 1537-39 (2010) (noting that the Rockefeller Drug Laws expanded the list of felonies, which in consequence escalated the punishment of certain statutorily categorized serious drug offenses to a life sentence without parole).

⁶⁹ Public Act 368 of 1978.

⁷⁰ See MICH. COMP. LAWS. ANN. §§ 333.7401, 7403, 7407 (1978); see also Patrick Affholter & Bethany Wicksall, *Eliminating Michigan’s Mandatory Minimum Sentences for Drug Offenses*, Michigan Senate 1

Michigan,⁷¹ by a defendant who was convicted under the Michigan law of possessing more than 650 grams of cocaine, and sentenced to a mandatory term of life in prison without possibility of parole. A majority of the Supreme Court ruled that Harmelin's sentence, though harsh, was not banned by the Eighth Amendment's Cruel and Unusual Punishment Clause. Today, LWOP sentences are used to punish drug offenders in the federal system and in a handful of states, such as Alabama,⁷² Michigan,⁷³ Mississippi,⁷⁴ Texas⁷⁵ and Virginia.⁷⁶

(c) *Habitual Offenders*

"Three strikes" laws also account for the increasing use of LWOP sentences. "Three strikes" laws are designed to mandate enhanced long term imprisonment for offenders who are convicted of a third felony.⁷⁷ The penological theory underlying the "three strikes" laws is to incapacitate these habitual offenders, who are allegedly unable to be rehabilitated.⁷⁸ States vary in defining the strike zones and the number of strikes that are required to sentence the defendant "out". Violent crimes always count as a strike, but non-violent crimes, such as drug offenses, escape, treason, and *etc.*, are often defined as strikeable offenses too. Punishment enhancement is mostly imposed upon the third conviction, but some states impose enhanced punishment to a second conviction or a fourth conviction.⁷⁹ The enhanced punishment for habitual felons could reach to life imprisonment with or without parole possibility, depending on the jurisdiction.⁸⁰

(2002),
<http://www.senate.michigan.gov/sfa/publications%5Cnotes%5C2002notes%5Cnotesnovdec02affholterwicksall.pdf>.

⁷¹ Harmelin v. Michigan, 501 U.S. 957 (1991).

⁷² ALA. CODE § 13A-12-231(3)(d) (1995).

⁷³ MICH. COMP. LAWS §§ 333.7401, 333.7403.

⁷⁴ MISS. CODE ANN. § 41-29-139(f) (West 2011).

⁷⁵ Dane Schiller, *Drug Crime Sends First-Time Offender Grandmom to Prison for Life*, CHRON (May 22, 2012 12:27pm), <http://www.chron.com/news/houston-texas/article/First-time-offender-grandma-doing-life-for-drug-3547226.php>.

⁷⁶ VA. CODE ANN. § 18.2-248.

⁷⁷ See DICKEY, *supra* note 52.

⁷⁸ See JOAN R. PETERSILIA, PETER W. GREENWOOD & MARVIN LAVIN, CRIMINAL CAREERS OF HABITUAL FELONS (1978); PETER W. GREENWOOD & ALLAN ABRAHAMSEN, SELECTIVE INCAPACITATION (1982); Kathleen Auerhahn, *Selective Incapacitation And the Problem of Prediction*, 37 CRIMINOLOGY 703 (1999); KATHLEEN AUERHAHN, SELECTIVE INCAPACITATION AND PUBLIC POLICY: EVALUATING CALIFORNIA'S IMPRISONMENT CRISIS (2003).

⁷⁹ See generally JOHN CLARK, JAMES AUSTIN & D. ALAN HENRY, NATIONAL INSTITUTE OF JUSTICE, "THREE STRIKES AND YOU'RE OUT": A REVIEW OF STATE LEGISLATION I (1997), available at <https://www.ncjrs.gov/pdffiles/165369.pdf> (describing the rapid expansion of three strikes laws between 1993 and 1995); see also Michael Vitiello, *Three Strikes: Can We Return to Rationality?* 87 J. CRIM. L. & CRIMINOLOGY 395, 400 (1997) (noting that "three strikes" laws in different states vary in a number of ways).

⁸⁰ In California, the defendant must be sentenced to "an indeterminate term of life imprisonment" if he has two or more prior "serious" or "violent" felony convictions. Such life sentence is parolable on the date calculated by the statute. CAL. PENAL CODE ANN. §§ 667(e)(2)(A) (West 1999), 1170.12(c)(2)(A) (West Supp. 2002). In Mississippi, the Three Strikes law requires that a person convicted of a felony who has two

The first so-called “three strikes” law was enacted by Washington State in 1993.⁸¹ California enacted “three strikes” in 1994, and it was the toughest enhancement statute in the country.⁸² California law allowed enhanced punishment on the second conviction, did not require the previous conviction to be for a violent crime, and allowed the third strike to apply to any violent or nonviolent felony.⁸³ Congress enacted “three strikes” laws in the Violent Crime Control and Law Enforcement Act of 1994,⁸⁴ which mandated life imprisonment without release for an offender convicted of a federal offense, if the offender had two prior state or federal convictions for qualifying offenses.⁸⁵ The Three Strikes phenomenon spread quickly. Between 1993 and 1995, 24 States and the Federal Government enacted “Three Strikes” laws.⁸⁶ Arizona became the 25th state enacting the “three strikes” law in 2006⁸⁷ and Massachusetts became the 26th state in 2012.⁸⁸ Although the enhanced punishment of life sentence imposed in Three Strikes laws have been challenged for the alleged violation of the Eighth Amendment, the Supreme Court, in *Ewing v. California*,⁸⁹ relying on *Rummel v. Estelle*,⁹⁰ ruled that a life sentence imposed under the Three Strikes law --- even though for relatively minor felonies --- did not violate the Cruel and Unusual Punishment Clause of the Eighth Amendment. Today, all 50 states, the federal government, and the District of Columbia have employed either three strikes laws or habitual offender statutes to impose enhanced sentences to criminal recidivists.⁹¹ The federal government⁹² and at least 25 states impose LWOP sentences to recidivist felons.⁹³

prior separate felony convictions and has served one or more years for each prior conviction, with any one of such felony convictions being for a crime of violence, shall be sentenced to life imprisonment without parole. MISS. CODE ANN. § 99-19-83 (1994).

⁸¹ WASH. REV. CODE ANN. § 9.94A.030 (West 1994).

⁸² A.B. 971, 1994 CAL. STAT. 12 (Codified at CAL. PENAL CODE § 667).

⁸³ See FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 4 (2001).

⁸⁴ Public Law 103-322 (1994).

⁸⁵ 18 U.S.C. § 3559 (c) (1994).

⁸⁶ See CLARK, AUSTIN & HENRY, *supra* note 79.

⁸⁷ ARIZ. REV. STAT. ANN. § 13-706 (2006).

⁸⁸ MASS. GEN. LAWS ANN. ch. 279, § 25(b) (2012).

⁸⁹ *Ewing v. California*, 538 U.S. 11 (2003).

⁹⁰ *Rummel v. Estelle*, 445 U. S. 263 (1980) (holding that the mandatory life sentence imposed upon petitioner, who was convicted of a third felony, obtaining \$120.75 by false pretenses, did not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments).

⁹¹ AMERICAN CIVIL LIBERTIES UNION, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES, 35-36 (2013).

⁹² 21 U.S.C.A. §§ 860, 849, 861, 841(B)(1)(A) (West 2010).

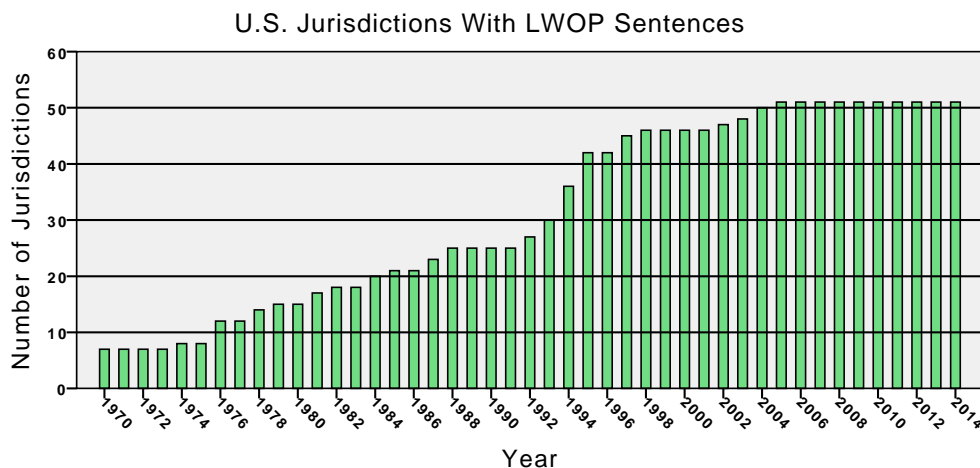
⁹³ The states that impose LWOP sentences to habitual offenders include: Alabama, Arizona, Arkansas, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Jersey, North Carolina, Oklahoma, South Carolina, Tennessee, Virginia, Washington, and Wisconsin. See ALA. CODE 1975 §§ 13A-5-9 (c) (3)-(4); ARIZ. REV. STAT. ANN. § 13-706 (2006); ARK. CODE ANN. § 5-4-501 (2011); FLA. STAT. ANN. § 775.082(9); GA. CODE ANN. § 17-10-7(b)(2); HAW. REV. STAT. §§ 706-661, 706-662; 730 ILL. COMP. STAT. ANN. 5/5-4.5-95,

5. From the 1980s: Increasing Imposition of LWOP Sentences

Fueled by the tough-on-crime policy, the sentencing reform movement, and the introduction of drug laws and “three strikes” laws, the use of LWOP sentences is on the rise.

The increasing imposition of LWOP sentences could be inferred from its gradual adoption by states (See Table 1). In 1970 there were less than 10 states adopting LWOP sentences. In the early 1990s, 30 states adopted LWOP sentences. A tide of expansion of LWOP sentences resulted from sentencing reform in the 1990’s. Since 2005, all American jurisdictions but Alaska,⁹⁴ have instituted LWOP sentencing schemes. Obviously, the growth of the states adopting LWOP sentencing schemes definitely contributes to the past four decades’ increasing imposition of LWOP sentences.

Table 1



Source: Data obtained from the Death Penalty Information Center (DPIC), Years That States Adopted LWOP Sentencing (2010), at <http://www.deathpenaltyinfo.org/year-states-adopted-life-without-parole-lwop-sentencing>.

Note: The U.S. jurisdictions include the 50 states, the District of Columbia and the federal government. In the federal level, the sentence of LWOP was enacted in 1988 as an alternative sentence contained in the death penalty statutes. The revised DPIC information include: Maine enacted LWOP sentences in 1976 when parole was abolished in its 1976 Criminal Code and Nebraska enacted LWOP sentences in 1969 when its parole law was established.

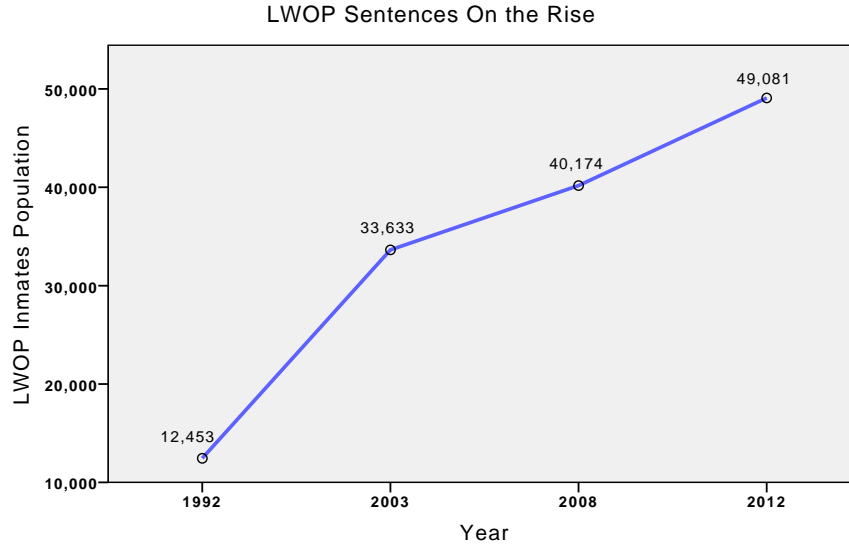
The increasing imposition of LWOP sentences could be directly drawn from the yearly-recorded LWOP inmate population. Though there is no official agency managing the national statistics of the number of LWOP inmates, the limited data obtained by the Sentencing Project demonstrates that the imposition of LWOP sentences is on the rise (See Table 2). As shown in this graph, the population of prisoners serving LWOP sentences rose from 12,453 in 1992 to 49,081 in 2012, which accounts for a 394%

5/3-3-3 (West 2012); IOWA CODE §§ 902.14(1), 902.1; LA. REV. STAT. ANN. § 15:529.1; MD. CODE. CRIM. LAW § 14-101(b)(1); MASS. GEN. LAWS ANN. ch. 279, § 25(b) (2012); MICH. COMP. LAWS ANN. § 333.7413(1) (West 2012); MINN.STAT. § 609.3455; MISS. CODE ANN. § 99-19-83; MONT. CODE ANN. § 46-18-219; NEV. REV. STAT. ANN. § 207.010 (2009); OKLA. STAT. ANN. tit. 63, § 2-415(D)(3); S.C. CODE ANN. § 17-25-45; WASH. REV. CODE §§ 9.94A.570, 9.94A.030(36); WIS. STAT. § 939.62(2m)(b)2; *see also* CLARK, AUSTIN & HENRY, *supra* note 79, at 7-8 (listing the three strikes law states that employ LWOP sentences, such as Indiana, New Jersey, North Carolina, Tennessee, Virginia).

⁹⁴ Alaska is the only state that has not provided for LWOP sentencing. *See* THE DPIC, YEARS THAT STATES ADOPTED LWOP SENTENCING (2010), at <http://www.deathpenaltyinfo.org/year-states-adopted-life-without-parole-lwop-sentencing>.

increase. The increase of the LWOP inmate population might be considered a predictable result in light of the U.S. march toward mass incarceration over the past decades. But in fact the rate of increase of the LWOP inmate population is even higher than the growth of the prison population.

Table 2

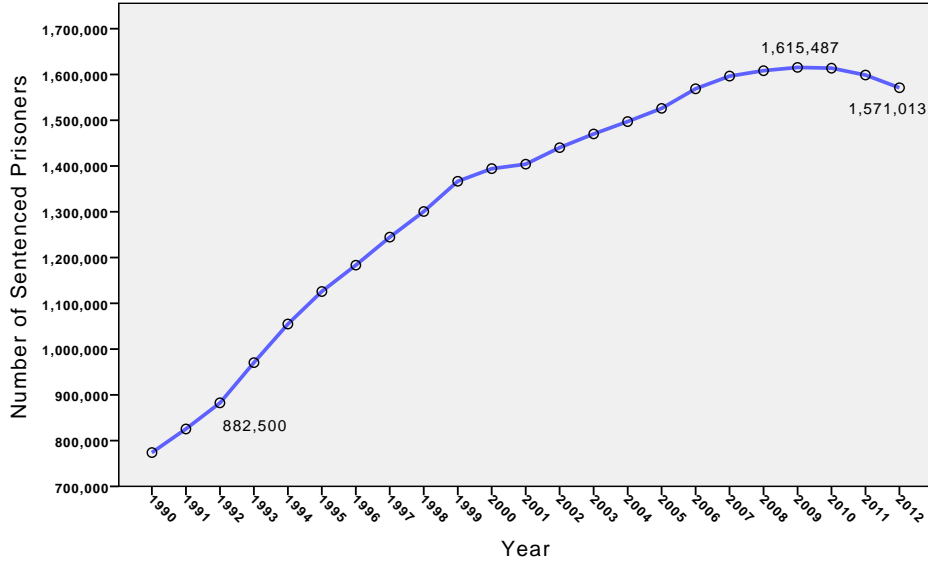


Source: Figures obtained from Ashley Nellis, The Sentencing Project, *Life Goes On: The Historic Rise in Life Sentences in America* (2013).

In the past two decades, the U.S. inmate population has grown exponentially, although --- after the national inmate population reached the peak of 1,615,487 in 2009 --- a slight inmate population decrease occurred each year between 2009 and 2012 (See Table 3). Between 1992 and 2012 the LWOP inmate population increased by 394%, while the population of incarcerated prisoners increased from 882,500 to 1,571,013, a rate of 178%. This data shows that the growth rate of the LWOP inmate population is more than twice that of the national inmate population. According to the data presented in Table 2 and Table 3, in 1992, LWOP inmates made up 1.41% of the U.S. prisoners. By 2012, LWOP inmates made up 3.12% of the U.S. Prison population. This data also indicates the growth rate of the LWOP inmate population is faster than that of the national inmate population.

Table 3

Yearend Sentenced Prisoners Population 1990-2012



Source: Bureau of Justice Statistics. Figures for 1990-1997 obtained from BOJ: Prisoners in 1997; Figures for 1998-1999 obtained from BOJ: Prisoners in 1999; Figures for 2000-2001 obtained from BOJ: Prisoners in 2011; Figure for 2012 obtained from BOJ: Prisoners in 2012 - Advance Counts.

Note: Counts based on prisoners with a sentence of more than 1 year. Excludes transfers, escapes, and those absent without leave. Includes other conditional release violators, returns from appeal or bond, and other admissions.

LWOP inmates are disproportionately distributed among states. A handful states incarcerate the major population of LWOP inmates. By 2012, LWOP inmates in the five states of Florida, Pennsylvania, Louisiana, California, and Michigan, and the federal system account for more than half (61.2%) of the LWOP inmate population nationwide (See Table 4).⁹⁵ In 2004, the seven states of Alabama, California, Florida, Illinois, Louisiana, Michigan, and Pennsylvania have each incarcerated over 1000 LWOP inmates.⁹⁶ In 2012, the number of jurisdictions with more than 1000 LWOP inmates grew to 11 states: Alabama, California, Florida, Illinois, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, North Carolina, and Pennsylvania, plus the federal level (See Table 4).⁹⁷

Table 4

⁹⁵ ASHLEY NELLIS, THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 5 (2013).

⁹⁶ See MAUER, THE MEANING OF “LIFE”, *supra* note 13, at 3.

⁹⁷ See NELLIS, *supra* note 95 at 6 Table B.

Number of LWOP Inmates By Jurisdiction In 2012

Jurisdiction	Total	Jurisdiction	Total	Jurisdiction	Total	Jurisdiction	Total
Alabama	1,507	Indiana	113	Nebraska	236	South Carolina	988
Alaska	0	Iowa	635	Nevada	491	South Dakota	181
Arizona	441	Kansas	21	New Hampshire	79	Tennessee	317
Arkansas	528	Kentucky	99	New Jersey	70	Texas	538
California	4,603	Louisiana	4,637	New Mexico	0	Utah	105
Colorado	606	Maine	55	New York	246	Vermont	14
Connecticut	70	Maryland	380	North Carolina	1,228	Virginia	774
Delaware	386	Massachusetts	1,045	North Dakota	27	Washington	623
Florida	7,992	Michigan	3,635	Ohio	408	West Virginia	276
Georgia	813	Minnesota	102	Oklahoma	780	Wisconsin	229
Hawaii	47	Mississippi	1,518	Oregon	180	Wyoming	28
Idaho	122	Missouri	1,063	Pennsylvania	5,102	Federal	4,058
Illinois	1,600	Montana	53	Rhode Island	32	Total	49,081

Source: Data obtained from Ashley Nellis, The Sentencing Project, *Life Goes On: The Historic Rise in Life Sentences in America* (2013).

Notes: Hawaii and Virginia did not respond to several requests for data in 2012; therefore, 2008 figures are provided for these states.

It is foreseeable that the LWOP inmate population will steadily grow for a long time, for there are hardly any releasing schemes that would allow a LWOP inmate to be released from confinement. A LWOP inmate could possibly leave prison in only two ways: death or getting his/her sentence commuted or pardoned.⁹⁸ But the growth rate of the LWOP inmate population will become slower than that of the past two decades, provided that legislatures and the Supreme Court do not expand the current application of LWOP sentences. This is because the two major reasons for the increase in LWOP inmates --- expansion of LWOP-eligible crimes and wide expansion of jurisdictions applying LWOP sentences --- have already occurred.

B. Commutation: A Form of Clemency

Clemency,⁹⁹ which is sometimes confused with the more narrow term “pardon”,¹⁰⁰ generally refers to the practice of mercy or leniency to remit criminal condemnations against an individual.¹⁰¹ In the United

⁹⁸ The executive clemency power to commute or pardon is the only scheme that could grant early release to an individual who has suffered a LWOP sentence imposed by the court. The following section will discuss the executive power to commute.

⁹⁹ Clemency is a broad term in the context of the criminal justice system, referring to all actions of grace granted by the chief executive. Its fundamental feature is mercy and leniency. It comes from the ancient practice of pardon, which is an act of forgiveness. See Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 573 (1991) [hereinafter Kobil, *Quality*] (noting that the clemency power is the power to remit punishment as an act of mercy); see also 3 OXFORD ENGLISH DICTIONARY 309 (2d ed. 1989) (Clemency is defined as “[m]ildness or gentleness of temper, as shown in the exercise of authority or power; mercy, leniency”); see also 3 U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S SURVEY, *supra* note 18, at 1-9 (historical review of the development of the pardon power).

¹⁰⁰ Pardon is the oldest form of clemency. In this article, pardon is referred to a particular form of clemency. See Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 N.Y.U. REV. L. & SOC. CHANGE 43, 44 n. 9. (1998) (noting that “pardon” is a distinct form of clemency).

¹⁰¹ See Kobil, *Quality*, *supra* note 99, at 575-78. Chief Justice Marshall defined the pardoning power as “an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the

States, the clemency power is vested by federal and state constitutions in the executive.¹⁰² The Pardon Clause of the Constitution provides that “the President ... shall have Power to Grant Reprieves and Pardons for Offences Against the United States, except in Cases of Impeachment.”¹⁰³ Because the text of the Pardon Clause in the Constitution is written in general terms, the Supreme Court has served the role of interpreter to enhance the meaning and operation of the Pardon Clause. Under the Supreme Court’s construction,

individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.”
United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833).

¹⁰² See Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 413, 413-14 (1999); see also U.S. DEP’T OF JUSTICE, NAT’L GOVERNORS’ ASS’N CENTER FOR POLICY RESEARCH, GUIDE TO EXECUTIVE CLEMENCY AMONG THE AMERICAN STATES (1988) [hereinafter U.S. DEP’T OF JUSTICE, GUIDE TO EXECUTIVE CLEMENCY] (containing information about the practice of clemency and an earlier study of clemency procedures).

¹⁰³ U.S. CONST. art. II, § 2.

clemency in the United States can now be grant in five different forms:¹⁰⁴ pardons,¹⁰⁵ commutations,¹⁰⁶ amnesties,¹⁰⁷ reprieves,¹⁰⁸ and remissions of fines and forfeitures.¹⁰⁹

¹⁰⁴ Most commentators agree that clemency in America could be granted in one of five forms. See James N. Jorgensen, *Federal Executive Clemency Power: The President's Prerogative to Escape Accountability*, 27 U. RICH. L. REV. 345, 348 (1993) (listing five forms of clemency); see also Kobil, *Quality*, *supra* note 99, at 575 (listing five forms of clemency). Some believe there are ten types of clemency available to executives. But these ten types of clemency power can be generalized into the five common types. See WILLARD HARRISON HUMBERT, *THE PARDONING POWER OF THE PRESIDENT* 22 (1941). In practice, in addition to the five common types, some States have special forms of clemency. Florida recognizes the restoration of Florida civil rights, resident rights, and the right to own and possess a firearm as forms of clemency. Minnesota offers "pardon extraordinaire" and the expungement of records as forms of clemency. See U.S. DEP'T OF JUSTICE, *GUIDE TO EXECUTIVE CLEMENCY*, *supra* note 102, at 164-65; see also 1 U.S. DEP'T OF JUSTICE, *ATTORNEY GENERAL'S SURVEY*, *supra* note 18 (recording state clemency procedures).

¹⁰⁵ A pardon is the broadest of the clemency mechanisms and it effectively nullifies both a conviction and a sentence. See James R. Acker & Charles S. Lanier, *May God--or the Governor--Have Mercy: Executive Clemency and Executions in Modern Death-Penalty Systems*, 36 CRIM. L. BULL. 200, 204 (2000). The Supreme Court ruled in *Ex Parte Garland* that a pardon "reaches both the punishment prescribed for the offense and the guilt of offender, and where pardon is full, it releases the punishment, and blots out of existence the guilt, so that in the eye of the law, the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity. There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment". *Ex Parte Garland*, 71 U.S. (4 Wall) 333, 380 (1866). In *Ex Parte Wells*, the Court ruled that a pardon could be granted with a condition in a case where President Fillmore pardoned Wells on the condition that Wells remain in prison for life. See *Ex Parte Wells*, 59 U.S. (18 How.) 307 (1855).

¹⁰⁶ Commutation is the substitution of a milder punishment for the heavier one imposed by the court. See Kobil, *Quality*, *supra* note 99, at 576; see also GOLDFARB & SINGER, *supra* note 50, at 343 (noting that commutations are often granted to shorten the offender's sentence to time served or to make her immediately eligible for parole). In *Ex Parte Wells*, the Court affirmed the commutation as a specific form by holding that "the President's power to do so [to commute a death sentence to a life sentence] exists under the Constitution of the United States." See *Ex Parte Wells*, 59 U.S. (18 How.) at 315. In *Biddle v. Perovich*, the Court held that commutation could be effected without the consent of the recipient. See *Biddle*, 274 U.S. at 487.

¹⁰⁷ Amnesty usually refers to clemency granted to a large number of offenders, many of whom have not yet been prosecuted. See JOHN M. MATHEWS, *THE AMERICAN CONSTITUTIONAL SYSTEM* 168 (1st ed. 1932) (noting that amnesty differs from pardon in that it applies to whole classes of persons or communities rather than to individuals). The Supreme Court, in *Armstrong v. United States*, ruled that the pardoning power included the power to grant amnesty. See *Armstrong v. United States*, 80 U.S. (13 Wall) 154 (1872). In *United States v. Klein*, the Court ruled that amnesty could be granted with a condition by holding that the President could "annex to his offer of pardon any conditions or qualifications he should see fit." *United States v. Klein*, 80 U.S. (13 Wall) 128 (1872).

¹⁰⁸ A reprieve is generally understood to be a "temporary postponement of punishment." See Kobil, *Quality*, *supra* note 99, at 578; see also Molly Clayton, *Forgiving the Unforgivable: Reinvigorating the Use of Executive Clemency in Capital Cases*, 54 B.C. L. REV. 751, 755 (2013) (noting that a reprieve is a limited form of clemency that postpones or delays a scheduled punishment). In *Ex parte United States*, the Supreme Court declared that "reprieve ... is the withdrawing of a sentence for an interval of time." *Ex Parte United States*, 242 U.S. 27, 43-44 (1916).

Commutation is a form of executive clemency power that reduces the judicially imposed sentence to a less severe sentence.¹¹⁰ Commutation is different from pardon. Pardon releases the punishment and blots out the existence of guilt.¹¹¹ Pardon must be accepted or it is nugatory.¹¹² In contrast, “commutation merely substitutes lighter for heavier punishment. It removes no stain, restores no civil privilege, and may be effected without the consent and against the will of the prisoner”.¹¹³

1. Prior to the Late 18th Century: Development of Pardoning Power

At the time the Pardon Clause was written into the U.S. Constitution, the only form of executive clemency was the “pardon” --- it was not broken down into pardon, commutation and so forth. But acts of commutation were certainly not unknown. In ancient and Medieval times, the criminal justice system was so underdeveloped that the death sentence was unfairly applied to a wide range of crimes,¹¹⁴ and self-defense, accident and insanity did not justify or excuse the criminal conduct.¹¹⁵ The pardoning power was often the remedy for reducing the unfair harshness of the imposed sentence --- today that would be known as commutation.¹¹⁶

Pardon in ancient Athens rested with the people and was very rarely used.¹¹⁷ Romans developed a more functional pardoning system and skillfully used the pardon power to control public unrest.¹¹⁸ England

¹⁰⁹ Remission of fines and forfeitures is the power to remove the disabilities that prevent a person from exercising any power over his property, unless the property has been vested in another person. *See* Illinois Central Railroad v. Bosworth, 133 U.S. 92, 103 (1890).

¹¹⁰ *See* Margaret Colgate Love, *Of Pardons, Politics, and Collar Buttons: Reflections on the Presidents Duty to Be Merciful*, 27 FORDHAM URB. L. J. 1483, 1500-06 (2000) [hereinafter Love, *Reflections*] (noting that a commutation is an executive act of mercy or leniency in mitigating the consequences of a sentence against an individual); *Biddle v. Perovich*, 274 U.S. 480 (1927) (affirming the president’s commutation power); *People ex rel. Patrick v. Frost*, 133 App. Div. 179, 117 N. Y. Supp. 524 (2d Dep’t 1909) (affirming the governor’s commutation power).

¹¹¹ *Ex Parte Garland*, 71 U.S. (4 Wall) at 380.

¹¹² *In re Charles*, 115 Kan. 323, 222 Pac. 606, 608 (1924).

¹¹³ *Id.*

¹¹⁴ In the 18th Century, the death penalty in England was widely applied to offenses against public order, against the administration of justice, against property and against person. *See* LEON RADZINOWICZ, 1 A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 77-78 (1948).

¹¹⁵ *See* SOL RUBIN, THE LAW OF CRIMINAL CORRECTION 653 (2nd ed. 1973).

¹¹⁶ In England, by 1819, at least 220 offenses were capital offenses. Because of the use of the pardoning power, only a small percentage of death-sentenced defendants were executed. For example, in 1818, only 97 of the 1,254 defendants sentenced to death in England were executed. *See* KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 17 (1989).

¹¹⁷ In Athens, the signature of 6,000 people was required for a pardon. *See id.* at 16; *see also* 3 U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S SURVEY, *supra* note 18, 8-9.

¹¹⁸ *See* MOORE, *supra* note 116, at 16-17 (“The Romans were accustomed to pardoning (and executing) criminals on coronation days and local holidays, when the colonial rulers were most interested in subduing crowds”).

adopted the pardon scheme as a central component of the royal prerogative of the Crown,¹¹⁹ and planted the scheme in the American colonies.¹²⁰ After America gained independence, the new republic of the United States incorporated the pardoning scheme¹²¹ by writing the Pardon Clause into Article II, section 2 of the Constitution.

2. From the Late 18th Century to the Mid-19th Century: Emergence and Constitutionality of Commutation

Commutation was not distinguished from the pardoning power until punishment was more finely graded from death to life imprisonment to a term of years or even days.¹²² Before the American colonies gained independence, the range of punishments only included corporal punishment, transportation and the death penalty.¹²³ In that context, a pardoned convict could be either set free with no condition¹²⁴ or subject to the condition of branding, transportation, hard labor or penal servitude.¹²⁵ Beginning in the late 18th century, the establishment of prison as the standard method of punishment initiated the new era of fine gradations in sentencing.¹²⁶ Accordingly, pardons could be granted with the condition of enforcing a lesser

¹¹⁹ See Stanley Grupp, *Some Historical Aspects of the Pardon in England*, 7 AM. J. LEGAL HIST. 51, 55 (1963) (noting that in England, the pardon power was essential to the Crown); see also Kobil, *Quality*, *supra* note 99, at 585-89 (noting that to avoid the Crown's pardoning power's arbitrariness, the British parliament finally implemented restrictions on the pardoning power); 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 88-89 (1883) (noting that pardon was regularly considered in all cases in which the death penalty was imposed).

¹²⁰ See CHRISTEN JENSEN, THE PARDONING POWER IN THE AMERICAN STATES 3-4 (1922) (noting that in most Colonial charters the King delegated the pardon power and made provisions for its exercise); see also 3 FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATE, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (1909) (demonstrating that the pardon power was delegated by the charters of the colonies in the Colonial era).

¹²¹ See William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 500-506 (1977).

¹²² See Elkan Abramowitz & David Paget, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 138 (1964).

¹²³ See HARRY ELMER BARNES & NEGLEY K. TEETERS, NEW HORIZONS IN CRIMINOLOGY 285-321 (3rd ed. 1959) (noting the treatment of offenders in ancient and medieval times).

¹²⁴ In the Middle Ages, Germanic law provided that a condemned man could be spared if a pure virgin of good repute demanded marriage to him. In Switzerland, a wife who had borne seven sons, one by one, was allowed to cut the rope of a condemned man and so pardon him. By another custom, the criminal could be spared if the rope broke during the hanging. See RUBIN, *supra* note 115, at 658-59.

¹²⁵ See Clive Emsley, Tim Hitchcock & Robert Shoemaker, *Crime and Justice - Punishments at the Old Bailey*, OLD BAILEY PROCEEDINGS ONLINE, available at <http://www.oldbaileyonline.org/static/Punishment.jsp#benefit-of-clergy> (last visited October 1, 2014); see also BARNES & TEETERS, *supra* note 123, at 296 (noting that England began to use the punishment of transportation when the first law authorizing deportation was passed in 1597); FREDERIC WILLIAM MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 480 (1919) (noting that the King of England had the power to grant a conditional pardon by pardoning a condemned criminal on condition of his going into penal servitude).

¹²⁶ Prior to 1776, there were no prisons that were used to incarcerate convicts. Though there had been prisons in the form of dungeons for centuries in England before then, they were used only for detention or custody for those awaiting trial. See RUBIN, *supra* note 115, at 22; see also BARNES & TEETERS, *supra* note

term of years of imprisonment.¹²⁷ Under the doctrine that “the greater power includes the lesser”,¹²⁸ such conditioned pardon was gradually recognized as a distinctive form of clemency, known as commutation.

As more and more states disassociated the power of commutation from the power to pardon, Pardon Clauses were amended. In 1846, New York took the lead in specifying the pardoning power of commutation in the state constitution, providing that “The Governor shall have the power to grant reprieves, commutations and pardons after conviction, for all offenses except treason and cases of impeachment ...”¹²⁹ Other states followed.¹³⁰ Today, 40 states have specifically included the commutation power in their constitutions.¹³¹ In the states with constitutions that do not mention commutation, the power to commute sentences is held to be a specific form of the clemency power. On the Federal level, the Pardon Clause has not been amended to specify commutation as a permissible form of the president’s pardoning power, but the Supreme Court, in *Biddle v. Perovich*,¹³² has ruled that the Pardon Clause includes the President’s power to commute sentences.

3. The Use of Commutation

The use of commutation can be divided into three phases. The first phase is the period prior to the introduction of parole in America in the late 19th Century. During this period, the major early release schemes were operated in two forms: 1) good-time laws, which allowed inmates early release on the ground of good conduct; and 2) executive power to pardon.¹³³ Pardon was widely used in the form of

123, at 328-29. Pennsylvania established penal reform in its first constitution of 1776 by providing that imprisonment at hard labor substituted for corporal punishment other than capital punishment. Under the Act of 1786, the Act of 1789, and the Act of 1790, “comprehensive and humane system of imprisonment at labor became known as the penitentiary, a ‘Pennsylvania System’, and was largely followed in other states.” WILLIAM W. SMITHERS, TREATISE ON EXECUTIVE CLEMENCY IN PENNSYLVANIA 30 (1909).

¹²⁷ In other words, “when capital punishment was the mandatory penalty fixed for most crimes instead of imprisonment for a term of years, commutation could not be used.” GOLDFARB & SINGER, *supra* note 50, at 343.

¹²⁸ *Ex parte Wells*, 18 How. 307 (U. S. 1855); *In re Charles*, 115 Kan. 323, 226 Pac. 606; *McDowell v. Conch*, 6 La. Ann. 365 (1851); *State ex rel. Daniel v. Rose*, 29 La. Ann. 755 (1877); *In re Opinion of the Justices*, 210 Mass. 609, 98 N. E. 101 (1912); *In re Opinion of the Justices*, 190 Mass. 616, 78 N. E.311 (1906); *In re Kennedy*, 135 Mass. 48, 51 (1883); *In re Court of Pardons*, 97 N. J. Eq. 555, 562, 129 Atl. 624, 627 (1925); *Cook v. Freeholders of Middlesex*, 26 N. J. L. 320, 329 (1857); *Contra: Ex parte Janes*, 1 Nev. 819 (1865); *State v. Twitty*, 11 N. C. 193 (1825).

¹²⁹ N.Y. CONST. 1846, art. IV, § 5 provides, “The Governor shall have the power to grant reprieves, commutations and pardons after conviction, for all offenses except treason and cases of impeachment ...”

¹³⁰ MICH. CONST. 1850, art. 5, § 11 provides, “He may grant reprieves, commutations and pardons, for all offenses except treason and cases of impeachment ...” PA. CONST. 1874, art. IV, § 9, provides, “He shall have power to remit fines and forfeitures, to grant reprieves, commutations of sentence and pardons, except in cases of impeachment ...”

¹³¹ The 10 states that do not have commutation written in their constitutions are Connecticut, Florida, Kansas, Minnesota, Mississippi, New Hampshire, Rhode Island, Texas, Vermont, and Virginia. *See* SIMONE R. RICHARDSON, EXECUTIVE CLEMENCY BY PARDON: A GUIDE TO PARDON SUCCESS ch. 9 (2011).

¹³² *Biddle v. Perovich*, 274 U.S. 480 (1926).

¹³³ Parole as an early release scheme was adopted and developed in America in the late 19th Century. *See supra* note 14.

commutation in this period to discharge prisoners in order to control the size of the prison population.¹³⁴ According to William Crawford, an English commissioner who in 1833 visited all but two American prisons, half of the inmates at that time were discharged through commutations.¹³⁵ From 1790 to 1820, Pennsylvania granted 896 pardons, most of which were commutations.¹³⁶ Between 1828 and 1866, Massachusetts granted commutation to 12.5 percent of all prisoners.¹³⁷

The second phase in the exercise of the commutation power is the period between the adoption of parole scheme in the early 20th Century, and the 1970s, when the death penalty was brought to constitutional review.¹³⁸ During this period, because granting early release on the basis of rewarding good behavior in prison was promoted by the parole system, the need for commutation was significantly reduced.¹³⁹ In this era, the ideal of rehabilitation dominated American sentencing schemes, and parole was applied to all imprisonment sentences, even life sentences.¹⁴⁰ Consequently, the commutation power was generally used in only one context --- commuting death penalty sentences to sentences of LWOP. In Florida, between 1924 and 1966, out of 255 death cases, 59 (23.1%) were commuted.¹⁴¹ From 1961 to 1970, out of 1,155 death sentences nationwide, 182 were commuted --- a ratio of 15.8%.¹⁴² Meanwhile, commutation in this era was also applied to prisoners who were sentenced to life in those few states where statutes did not provide parole release for life sentences. Commutation in this context was used to relieve the harshness of the statutory life sentence, which did not take consideration of individualized sentencing. For example, the Pennsylvania 1941 Parole Act precluded parole eligibility for all offenders who had received a life sentence.¹⁴³ In Pennsylvania, commutation became the method for making lifers eligible for parole, in order to avoid harshness in the sentencing scheme. Between 1932 and 1967, 607 lifers in

¹³⁴ Michael Serrill, *Determinate Sentencing: The History, the Theory, the Debate*, 3 CORRECTIONS MAGAZINE 3, 5 (1977).

¹³⁵ See BLAKE MCKELVEY, *AMERICAN PRISONS: A STUDY IN AMERICAN HISTORY PRIOR TO 1915*, 18 (1968).

¹³⁶ See SMITHERS, *supra* note 126, at 36.

¹³⁷ See WALKER, *supra* note 14, at 101-02.

¹³⁸ *The Case of Furman v. Georgia*, 408 U.S. 238 (1972), which invalidated then-existing death penalty statutes and consequently forced the states to revise their death sentence provisions, not only marked an important point in the American history of death penalty sentencing reformation, but also marked the point of decline in the commutation of death penalty cases.

¹³⁹ Ronald S. Everett & Deborah Periman, "The Governor's Court of Last Resort: An Introduction to Executive Clemency in Alaska," 28 ALASKA L. REV. 57, 69 (2011) (noting that from 1900 to the mid-1970s, when the philosophy of rehabilitation dominated America's penological theory, the indeterminate sentence coupled with parole became more common and consequently the need for pardon changed).

¹⁴⁰ See *infra* notes 230-232 and accompanying text.

¹⁴¹ Margaret Vandiver, *Quality of Mercy: Race and Clemency in Florida Death Penalty Cases, 1924-1966*, 27 U. RICH. L. REV. 315, 322 (1992).

¹⁴² Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 264 (1990-1991).

¹⁴³ Pennsylvania established a parole law in the Act of 1941 (P.L.861, No.323), which, by section 17 authorized the Board to grant parole to those serving terms of life imprisonment, but by section 21, barred convicts sentenced to death or life imprisonment from being released on parole. See JON E. YOUNT, *PENNSYLVANIA: PAROLE AND LIFE IMPRISONMENT*, 9 (2004) http://www.prisonpolicy.org/scans/yount/PA_parole.pdf.

Pennsylvania were released on parole when their sentence was commuted.¹⁴⁴ In addition, commutation was also used to accelerate the parole eligibility in cases where prisoners were required to serve a minimum term of imprisonment before parole was eligible.¹⁴⁵ The Pennsylvania 1941 Parole Act provided that a convict could be released on parole after “the expiration of the minimum term of imprisonment fixed by the court in its sentence or by the Pardons Board in a sentence which has been reduced by commutation.”¹⁴⁶

The third phase in the use of commutation is the modern era. In this period, commutation has experienced a decline as a result of two major movements in sentencing reform --- 1) the return of death penalty statutes; and 2) the 1980s sentencing reform movement toward determinate sentences. The decline in commutations has been noted by several concerned commentators.¹⁴⁷ The commutation of death penalty sentences has shrunk dramatically.¹⁴⁸ Of course during the period between *Furman* and Gregg, there could be no such commutations because the death penalty had been struck down.¹⁴⁹ But when the death penalty was reinstated, the likelihood of commutation was substantially reduced from the pre-*Furman* period. From 1979 through 1988, of the 2,535 death sentences imposed, only 63 were commuted --- a ratio of 2.5%. This ratio is significantly lower than the 15.8% rate of commutations in the pre-*Furman* period. The decline in commuting death sentences has been attributed to the reforms in death penalty sentencing --- individuality, proportionality, narrowing, etc. --- that were implemented to accommodate the Court’s decision in *Furman*.¹⁵⁰ Executives apparently determined that these reforms had reduced the need for commuting death penalty sentences on grounds of harshness and unfairness.¹⁵¹

¹⁴⁴ See *id.* at 10, citing THE PENNSYLVANIA PRISON SOCIETY, THE NEED FOR PAROLE OPTIONS FOR LIFE-SENTENCED PRISONERS (July 6, 1993).

¹⁴⁵ See GOLDFARB & SINGER, *supra* note 50, at 344.

¹⁴⁶ Pennsylvania 1941 Parole Act § 21.

¹⁴⁷ See Margaret Colgate Love, *Fear of Forgiving: Rule and Discretion in the Practice of Pardoning*, 13 FED. SENT. REP. 125, 126 (2001) [hereinafter Love, *Fear of Forgiving*] (noting the numbers of commutations each year began to drop off beginning with the Reagan Administration); see also Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501, 1509 (2000) (noting clemency is less frequently used than in the past).

¹⁴⁸ See Daniel T. Kobil, *How to Grant Clemency in Unforgiving Times*, 31 CAP. U. L. REV. 219, 223, n. 20 (2003) [hereinafter Kobil, *Grant Clemency*] (listing research that has recognized the decline of executive clemency in capital cases); see also Michael A.G. Korengold et al., *And Justice for Few: The Collapse of the Capital Clemency System in the United States*, 20 HAMLINE L. REV. 349, 359 (1996) (noting that in the post-*Gregg* period, commutations in capital cases have been granted less frequently); LINDA E. CARTER, UNDERSTANDING CAPITAL PUNISHMENT LAW 256 (2004) (noting the use of executive clemency in commuting capital punishment steadily decreased from 1972 to the present); Bedau, *supra* note 142, at 255; Adam M. Gershowitz, *The Diffusion of Responsibility in Capital Clemency*, 17 J.L. & POL. 669, 675-77 (2001); Austin Sarat, *Memorializing Miscarriages of Justice: Clemency Petitions in the Killing State*, 42 LAW & SOC’Y. REV. 183, 186 (2008).

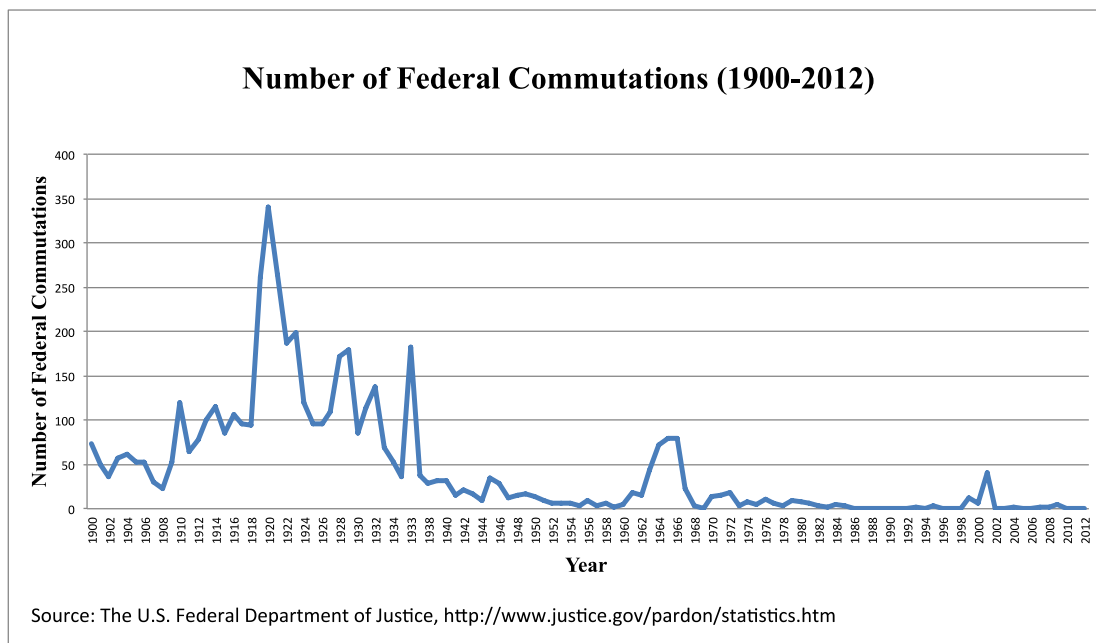
¹⁴⁹ After the Court struck down the death penalty in *Furman* in 1972, the death penalty statutes were suspended and the U.S. was thus led to a period of *de facto* moratorium on the death penalty. This short period of death penalty moratorium also brought the halt of commutations of death sentences. See Bedau, *supra* note 142, at 263.

¹⁵⁰ See *supra* notes 27-34 and accompanying text.

¹⁵¹ As shown by a study conducted in the pre-*Furman* era, the reasons that led to commutation of death sentences during that time included doubt about guilt; sentencing disparities; lack of fair procedures in investigation or trial; lack of consideration of mitigating circumstances; rehabilitation of inmates; lack of consideration of the defendant’s mental or physical deficiencies either during or after the commission of the crime; recommendations of the prosecution and the trial judge; political pressure and publicity; and the

Moreover, after the sentencing reform movement launched in the 1980s, commutation was significantly constrained as applied to parole-ineligible life sentences. For example, Pennsylvania previously granted a large number of commutations to lifers to make them eligible for parole. From 1967 to 1978, there were 346 commutations granted to parole-ineligible lifers.¹⁵² However, beginning in 1979, commutation of life sentences in Pennsylvania declined dramatically. Only 40 LWOP sentence commutations were granted between 1979 and 2012.¹⁵³

Table 5



Although there are no empirical studies demonstrating the atrophy of the use of commutation in the states nationwide, the decline of commutation at the federal level can be documented. As shown in the above graph, commutation at the federal level was frequently used in the early 20th Century. After reaching a peak in 1920, the use of commutation steadily declined. Starting from the 1970s, the President rarely granted commutations, with the exception that President Clinton granted 40 commutations in 2001 before he left office. During the 8 years of George W. Bush’s administration from 2001 to 2009, only 11 commutations were granted. In President Obama’s first term, he granted only one commutation.¹⁵⁴

clemency authorities’ views against capital punishment. See Abramowitz & Paget, *supra* note 122, at 160-77.

¹⁵² From 1967 to 1970 there were 95 life sentence inmates granted commutation. See Michael “Mikal” Wilson, *Lifers Incorporated*, http://www.realcostofprisons.org/materials/GLI-Commutation_Committee.pdf; From 1971 to 1978, there were 251 commutations granted to life sentence inmates. See *Applications for Commutation of Life Sentence*, PA BOARD OF PARDONS, http://www.portal.state.pa.us/portal/server.pt/community/statistics/19543/commutation_of_life_sentence_1_971_-_present/765885 (last updated October 8, 2014).

¹⁵³ See *Applications for Commutation of Life Sentence*, PA BOARD OF PARDONS, http://www.portal.state.pa.us/portal/server.pt/community/statistics/19543/commutation_of_life_sentence_1_971_-_present/765885 (last updated October 8, 2014).

¹⁵⁴ See OFFICE OF THE PARDON ATTORNEY, CLEMENCY STATISTICS, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/pardon/statistics.htm> (Updated August 2014).

However, at the end of 2013, President Obama granted commutations to 8 federal inmates who were convicted of crack cocaine offenses that he deemed to be unduly harsh --- 6 of the 8 were sentenced to life without parole.¹⁵⁵ It is noteworthy that these recent efforts of President Obama to grant more commutations are retroactive relief for a particular group of drug offenders, who would have received significantly shorter terms of imprisonment if they had been sentenced under the current law, the Fair Sentencing Act of 2010.¹⁵⁶ As confirmed by then-Attorney General Holder, President Obama plans to grant more commutations to non-violent drug convicts who would have spent less time in prison under current law.¹⁵⁷

4. Summary: the Decline of the Use of Commutation and Its Possible Explanation

Generally speaking, the use of commutation has gone through a marked decline from its emergence to the present day. There are several hypotheses to consider in explaining the decline. First, prior to the adoption of the parole system, commutation was largely used to release prisoners early in order to control the size of the prison population. As the function of discharging prisoners (and controlling the prison population) was taken over by parole boards, the use of commutation would logically decrease. Executives could relieve themselves from the burden of reviewing a large number of early release applications, leaving them to the parole boards, and could focus on reviewing the applications from the inmates who were sentenced to death or life imprisonment.

Second, the number of death penalty inmates qualified for commutation was reduced by the implementation of death penalty statutes that narrowed the penalty and provided for substantive and procedural protections in its implementation --- including guided discretion, bifurcated guilt and sentencing phases, and mandatory consideration of individualized circumstances and mitigation factors.¹⁵⁸ Also, appeal from a death penalty sentence is mandatory and appellate courts have usually conducted searching review, especially as compared to review of other criminal cases.¹⁵⁹ It is not surprising, then, that executives might be unwilling to commute capital sentences imposed under all these restrictions.¹⁶⁰

Third, the “tough-on-crime” political environment, pervasive in the political culture of the last three decades, probably chills an executive’s willingness to grant commutations --- especially those executives who are seeking another term in office or in another office.¹⁶¹ Governors, and the President, undoubtedly

¹⁵⁵ See Charlie Savage, *Obama Commutes Sentences for 8 in Crack Cocaine Cases*, N.Y. TIMES, Dec. 19, 2013, <http://www.nytimes.com/2013/12/20/us/obama-commuting-sentences-in-crack-cocaine-cases.html?pagewanted=all& r=0>.

¹⁵⁶ See *id.*

¹⁵⁷ See Josh Gerstein, *Holder: Obama to Dramatically Expand Drug Clemency*, POLITICO, updated April 21, 2014, <http://www.politico.com/story/2014/04/eric-holder-barack-obama-drug-clemency-105865.html>.

¹⁵⁸ See *supra* notes 30-31 and accompanying text.

¹⁵⁹ See Bedau, *supra* note 142, at 269 (noting that appellate courts play a significant role in rectifying the unfairly imposed death sentence).

¹⁶⁰ See *id.* (noting that “the performance of trial and appellate courts in capital cases is a powerful factor in rationalizing gubernatorial refusal to commute death sentences”) (footnote omitted).

¹⁶¹ See *id.* (noting that one reason that could explain the decline of death penalty commutations is that a governor who commutes a death sentences may be committing political suicide); see also Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1349 (2008) (noting that the “tough-on-crime” policy resulted in a dramatic decline in the number of clemencies granted in most jurisdictions); Kathleen Cokie Ridolfi & Seth Gordon, *Gubernatorial Clemency Powers: Justice or Mercy?* 24 CRIM. JUST. 26, 33 (2009) (noting that the political trend of harsher sentences makes executives unwilling to use the clemency power); Paul Cobb, *Reviving Mercy in the Structure of Capital*

fear that a commutation will paint them as soft-on-crime, costing them, or other members of their party, elections or reelections.¹⁶² The most famous example arose in the 1988 presidential campaign between then-Massachusetts Governor Michael Dukakis and then-Vice President George H.W. Bush.¹⁶³ Before the campaign, Governor Dukakis had released on furlough the inmate Willie Horton, who had been sentenced to a life sentence without parole for murder. Horton committed a homicide shortly after his release. Attacked as a soft-on-crime politician by Bush, Dukakis lost his president campaign. Obviously, this prevailing political sense of being tough on crime has led to fewer executives willing to grant commutations, especially to LWOP inmates.

C. Data on Commutations of LWOP Sentences

LWOP sentences are designed to incarcerate prisoners until they die in prison. However, LWOP sentences could be commuted to a lesser sentence under the executive's pardoning power. Although it is difficult to collect national data demonstrating the number of commutations of LWOP sentences, the practice of some individual states and the federal government is available to give some indications of how frequently (or infrequently) LWOP sentences are commuted.

The practice of commuting LWOP sentences began in the early 20th Century. The frequency of the use of commutations to LWOP inmates is tightly tied to the underlying sentencing policy. Accordingly, when sentencing policy shifted from rehabilitation to tough-on-crime, the use of commutations went through a dramatic decline.

1. Before the 1970s: Commutation Used as Parole to Release Parole-Ineligible Life Inmates

Before the 1970s, commutation of parole-ineligible life sentences¹⁶⁴ was routinely granted as a result of the prevalence of the rehabilitation ideal. From the beginning of the 20th century to the mid-1970s, American sentencing philosophy was dominated by principles of prisoner rehabilitation and reintegration.¹⁶⁵ It was widely believed that the offender's "sickness", presented as propensity to commit a

Punishment, 99 YALE L. J. 389, 394 (1989) (noting that the executives' unwillingness to exercise the pardoning power is caused by political considerations); Love, *Fear of Forgiving*, *supra* note 147, at 126 (noting that there is a common sense that the exercise of pardoning power could get executives into political trouble); Clayton, *supra* note 108, at 777 (noting that the "tough on crime" atmosphere leads to executives' fear of using the clemency power); Rapaport, *supra* note 147, at 1509 (contending that the reemergence of retribution ideology in contemporary America is the principal cause of the decline of clemency).

¹⁶² See Bedau, *supra* note 142, at 268 (noting that politicians' fear of being marked by his/her rival as "soft on crime" deters the commutation of death sentences); see also Clayton, *supra* note 108, at 777 (noting that one of the factors that resulted in the decline of the clemency grants is the "tough-on-crime" political atmosphere).

¹⁶³ See Clayton, *supra* note 108, at 777 (describing the presidential campaign between then-Massachusetts Governor Michael Dukakis and then-Vice President George H.W. Bush).

¹⁶⁴ The term here used to refer to life sentences which are not eligible for parole is "parole-ineligible life sentences", instead of "LWOP sentences", because before the mid-1970s, the sentence of LWOP was not a distinguished gradation of punishment. Legislators enacted the sentence of LWOP as an independent punishment in the 1970s in order to provide an alternative to the reinstated death penalty. See notes 18-25 and accompanying text.

¹⁶⁵ See Francis T. Cullen & Paul Gendreau, *Assessing Correctional Rehabilitation: Policy, Practice, and Prospects*, in 3 CRIMINAL JUSTICE 2000: POLICIES, PROCESSES, AND DECISIONS OF THE CRIMINAL JUSTICE SYSTEM 109, 109 (Winnie Reed & Laura Winterfield eds., 2000), https://www.ncjrs.gov/criminal_justice2000/vol_3/03d.pdf.

crime, could be “cured” through proper rehabilitation.¹⁶⁶ Driven by the enthusiasm towards the rehabilitative ideal, parole release was available to almost all prisoners, including those who were sentenced to life imprisonment. In that context, a life sentence mostly meant that lifers could be released after the completion of a term from 8 to 20 years’ of imprisonment.¹⁶⁷ Only in very rare circumstances was a life sentence excluded from parole release. For example, the Pennsylvania 1941 Parole Act did not allow parole release for lifers.¹⁶⁸ But in accordance with the then-prevailing rehabilitation ideal, commutation was routinely granted to those parole-ineligible life inmates in order to make them eligible for parole release. In Pennsylvania, between 1932 and 1967, there were 607 lifers released on parole after their sentence was commuted.¹⁶⁹ In Connecticut, before 1980, “[m]ore than seventy-five percent of Connecticut’s prisoners serving life sentences had their eligibility for parole accelerated by the Board through a grant of clemency and ninety percent of those inmates were then granted parole within their first year of eligibility.”¹⁷⁰

2. After the 1970s: the Decline in Commuting LWOP Sentences

Beginning in the 1970s, as discussed above, the rehabilitative ideal lost its intellectual and political dominance; the predominant sentencing policy changed to crime prevention and punishment, i.e., “tough-on-crime.” As described earlier, legislatures enacted mandatory minimums, truth-in-sentencing laws, and “three strikes and you’re out” schemes. In this environment, governors who were concerned about their political careers were of course reluctant to grant commutations. Consequently, commutation of LWOP sentences was extremely constrained. So for example, commutations of LWOP sentences in Pennsylvania dropped from 951 (for the period between 1932 and 1978)¹⁷¹ to 40 (for the period from 1979 to 2012).¹⁷² Governors in Massachusetts at one time routinely commuted LWOP inmates. From 1970 to 1990, there were 102 commutations of LWOP sentences granted.¹⁷³ But from 1991 to 2010, there have only been 4

¹⁶⁶ See Alfred Blumstein, *American Prisons in a Time of Crisis*, 4 LAW, SOC’Y & POL’Y 13, 13-14 (Lynne Goodstein & Doris Layton MacKenzie eds., 1989); Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1016 (1991).

¹⁶⁷ Kentucky law, 1914 Ky. Acts, provided that lifers could apply for release on parole after a minimum of 8 years of imprisonment was served. The Rhode Island statute, 1915 R.I. Acts & Resolves, provides for parole after a minimum of 20 years of imprisonment was served.

¹⁶⁸ Pennsylvania established a parole law in the Act of 1941 (P.L.861, No.323), which, by section 17 authorized the Board to parole those serving terms of life imprisonment, but by section 21, barred convicts sentenced to death or life imprisonment from being released on parole. See Yount, *supra* note 143.

¹⁶⁹ See Yount, *supra* note 144.

¹⁷⁰ *Dumschat v. Board of Pardons*, 618 F.2d 216, 219 (2d Cir. 1980) (per curiam).

¹⁷¹ From 1932 and 1967, there were 607 parole-ineligible lifers commuted. See *supra* note 164. From 1967 to 1970, there were 95 life sentence inmates granted commutation. See Michael “Mikal” Wilson, *Lifers Incorporated*, THE REAL COST OF PRISONS PROJECT, http://www.realcostofprisons.org/materials/GLI-Commutation_Committee.pdf (last visited October 1, 2014); from 1971 to 1978, there were 251 commutations granted to life sentence inmates. See *Applications for Commutation of Life Sentence*, PA BOARD OF PARDONS, http://www.portal.state.pa.us/portal/server.pt/community/statistics/19543/commutation_of_life_sentence_1_971_-_present/765885 (last updated Mar. 8, 2012).

¹⁷² See *Applications for Commutation of Life Sentence*, PA BOARD OF PARDONS, http://www.portal.state.pa.us/portal/server.pt/community/statistics/19543/commutation_of_life_sentence_1_971_-_present/765885 (last updated Mar. 8, 2012).

¹⁷³ See Chris Black, *Horton Case Keeping the Jail Cells Shut*, THE BOSTON GLOBE, July 8, 1990.

commutations of LWOP sentences.¹⁷⁴ Connecticut, which used to grant a large number of commutations to LWOP inmates,¹⁷⁵ has prohibited all commutations to LWOP inmates since 1981.¹⁷⁶

Other available data yields similar results --- commutation of a LWOP sentence has been a rarity in the past few decades.¹⁷⁷ In California, from 1965 to 1990, no commutation was issued to a LWOP inmate.¹⁷⁸ The available data shows that there was only one commutation of a LWOP sentence issued in California in 2010.¹⁷⁹ In Michigan,¹⁸⁰ from 1983 to 1993, the governor commuted the sentences of LWOP inmates convicted of first degree murder on an average of one per year.¹⁸¹ In Nebraska, the state ordinarily issues commutations, but in a very limited number, to LWOP inmates to allow them to apply for parole release.¹⁸² From 1970 to 1990, a total of only 32 commutations were issued to life sentence inmates in

¹⁷⁴ See GORDON HAAS & LLOYD FILLION, CRIMINAL JUSTICE POLICY COALITION, LIFE WITHOUT PAROLE: A RECONSIDERATION, 17 (2010), available at http://www.realcostofprisons.org/materials/Haas_LWOP.pdf.

¹⁷⁵ See *supra* note 171 and accompanying text.

¹⁷⁶ In a formal reply to the chairman of the Board of Pardons and Paroles, the attorney general of Connecticut clearly states that commutation is not allowed for a sentence that is ineligible for parole. See OFFICE OF THE ATTORNEY GENERAL, OPINION NO. 2007-17, 1 (2007).

¹⁷⁷ The states differ in recordkeeping and access to grants of commutation. In most states, information about commutation can be accessed only upon formal request. Some states publicize general information of commutation on their official websites, but not information about, for example, the number of clemency grants or the details of any particular clemency grant. See *California Clemency Policy*, CRIMINAL JUSTICE POLICY FOUNDATION, <http://www.cjpf.org/clemency/find-your-state/california> (last visited October 2, 2014) (noting that commutations in California are not automatically publicized and might be obtained upon formal request); see also *Applications for Commutation of Life Sentence*, PA BOARD OF PARDONS, http://www.portal.state.pa.us/portal/server.pt/community/statistics/19543/commutation_of_life_sentence_1971_-_present/765885 (last updated Mar. 8, 2012) (Pennsylvania publicizes the number of life sentences commuted by the Governor at the end of each term of office). The author directly contacted the relevant Board in all 50 states about their data, and received data from about 20 states.

¹⁷⁸ Editorial, *No Parole Means What It Says*, SAN FRANCISCO CHRONICLE, April 13, 1990 (citing a governor's study covering all commutations of death and LWOP sentences).

¹⁷⁹ Sara Kruzan, a Californian who was sentenced to life without parole for killing her abusive pimp, was granted clemency by Governor Jerry Brown. See *Governor Grants Clemency to Sara Kruzan; Kruzan's Life Without Possibility of Parole Sentence Commuted*, NATIONAL CENTER FOR YOUTH LAW, http://www.youthlaw.org/press_room/press_releases/2011_press_releases/governor_grants_clemency_to_sara_kruzan_kruzan_s_life_without_possibility_of_parole_sentence_commuted/ (last visited Nov. 11, 2013); see also Paige St. John, *Jerry Brown Allows Release of Woman Imprisoned at 16 for Killing Pimp*, LOS ANGELES TIMES, Oct. 26, 2013, <http://articles.latimes.com/2013/oct/26/local/la-me-pc-sara-kruzan-20131026>.

¹⁸⁰ The mandatory life law for first degree murder in Michigan has existed since 1931. It provides that "conviction for first-degree murder carries penalty of life without possibility of parole and no lesser sentence may be imposed." MICH. COMP. LAWS § 750.316.

¹⁸¹ Richard C. Dieter, *Sentencing for Life: Americans Embrace Alternatives to the Death Penalty*, in THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 116, 119 (Hugo A. Bedau ed., 1997).

¹⁸² Nebraska does not have a sentence entitled LWOP. But the flat life sentence, which is imposed without a fixed minimum sentence, has been practically used as a life without parole sentence since 1969. The law of Nebraska provided that "Every committed offender shall be eligible for release on parole upon completion of his minimum term less reductions granted in accordance with this act, or, if there is no

Nebraska. After almost two decades' in which no commutations were issued, the governor of Nebraska issued 4 commutations for LWOP inmates between 2009 and 2013.¹⁸³ In Vermont, there have been only 2 commutations issued to LWOP inmates as of 2012.¹⁸⁴ In some states, no commutation of a LWOP sentence has ever been issued. For example, in Montana, there are 45 inmates serving a LWOP sentence as of 2012 and no commutation has been issued to those inmates yet.¹⁸⁵ New Mexico has had no chance of issuing LWOP sentence commutations until recently, because it was not until 2012 that the first LWOP sentence was issued in New Mexico.¹⁸⁶

According to the limited accessible information, it is reasonable to believe that, in the past few decades, among the limited number of commutations of LWOP inmates, most of the commutations went to those convicted of murder, though LWOP sentences are applied to first degree murders, habitual offenders, and drug offenders under current laws. (The exception would be the drug defendants' sentences recently commuted by President Obama.) For example, in the states of Massachusetts and Nebraska, the limited commutations to LWOP inmates could only be issued to murderers, for LWOP sentences in these states are applied only to first degree murder.¹⁸⁷ In Nevada, a LWOP inmate who was convicted of murder was commuted in 1999.¹⁸⁸ In 2013, one LWOP first degree murder sentence was commuted in Louisiana¹⁸⁹ and one in Illinois.¹⁹⁰ In states that impose a LWOP sentence on habitual offenders or drug offenders,

minimum, at any time." NEB. REV. STAT. § 83-1,110 (1) (Cum. Supp. 1969). This statute was interpreted in *Poindexter v. Houston*, to mean that a person receiving a flat life sentence for first degree murder in Nebraska is not eligible for parole until the Nebraska Board of Pardons commutes his or her sentence to a term of years. *See Poindexter v. Houston*, 275 Neb. 863, 868 (2008) (noting that the minimum term of Poindexter's life sentence was indefinite and thus it was impossible to apply the parole law to his life sentence). In Nebraska, a flat life sentence with no parole eligibility is applied only to class IA felony. *See* NEB. REV. STAT. § 28-105.

¹⁸³ Figure is obtained from the Nebraska Board of Pardons upon the author's inquiry.

¹⁸⁴ Figure is obtained from the Vermont Department of Corrections upon author's inquiry.

¹⁸⁵ Figure is obtained from Montana Department of Corrections upon author's inquiry.

¹⁸⁶ Figure is obtained from New Mexico Corrections Department upon author's inquiry.

¹⁸⁷ In Massachusetts, parole is not eligible for prisoners serving a life sentence for murder in the first degree. *See* M.G.L.A. 127 § 133A. In Nebraska, a prisoner serving a life sentence for first degree murder is not eligible for parole. *See supra* note 183.

¹⁸⁸ Joel Kinney, sentenced to life in prison without the possibility of parole for a fatal shooting in a barroom robbery in Las Vegas in 1980, had his sentence commuted in 1999 and was allowed to apply for parole immediately. By then, he had served 19 years on his sentence. *See Man Serving Life Sentence Wins Clemency from Pardons Board*, LAS VEGAS SUN, Dec. 8, 1999, <http://www.lasvegassun.com/news/1999/dec/08/man-serving-life-sentence-wins-clemency-from-pardon-board/>.

¹⁸⁹ Shelby Arabie, who was sentenced to life sentence for killing during a drug deal gone sour in 1984, had his life sentence reduced to 45 years of imprisonment in July of 2013. By then, he had served 29 years of his sentence. In Louisiana a life sentence is life-long unless the parole board releases the prisoner. *See* Lauren McGaughy, *Jindal Commutes Sentence of Angola Lifer Shelby Arabie*, NOLA.COM | THE TIMES PICAYUNE, Jul.12, 2013, http://www.nola.com/crime/index.ssf/2013/07/jindal_angola_commutes_life_se.html; *see also* MAUER, THE MEANING OF "LIFE", *supra* note 13, at 6 (noting that in Louisiana parole is not available for a life sentence).

¹⁹⁰ Peggy Jo Jackson, who was sentenced to life without parole for killing her abusive husband in 1987, was freed on parole when she was granted commutation in 2013. *See* Blake Wood, *Illinois Innocence Project*

commutation appears to be especially rare. One LWOP sentence commutation was issued to a drug offender in 2012 in Washington.¹⁹¹ There was one commutation issued to a drug offense LWOP inmate in 2008 in Florida.¹⁹²

On the federal level, since life sentences became LWOP sentences in 1987,¹⁹³ very few have been commuted. As of 2012, only one commutation was granted to a LWOP inmate,¹⁹⁴ which was issued in 2008, by former President George W. Bush, to a drug offender, who was sentenced to LWOP in 1996.¹⁹⁵ However, as discussed above, President Obama in 2013 broke the tradition and issued grand commutations to 6 federal LWOP inmates who were convicted of drug offenses.¹⁹⁶ As endorsed by the Department of Justice, the President intends to issue more commutations on harsh drug offenses before the end of his Term.¹⁹⁷ Thus, more commutations will be likely issued to LWOP inmates who were convicted of drug offenses --- bringing front and center the question of what standards should be applied to evaluate the cases of LWOP inmates fairly and equitably.

3. Increasing Commutation Applications From LWOP Inmates in the Future

In sum, during the past decades, under the prevailing tough-on-crime policy, executive commutations issued to LWOP inmates were stringently constrained. However, it is reasonable to think that in the foreseeable future there will be more applications for commutation coming from LWOP inmates.

First, the steadily growing LWOP inmate populations will expand the pool of inmate candidates that will have a strong incentive to apply for commutations. Given that legislatures so far appear reluctant to repeal the LWOP sentencing laws, the number of new LWOP inmates will likely always be higher than the

Helps Free Peggy Jo Jackson From Prison, ST. LOUIS POST-DISPATCH, Mar. 29, 2013, <http://interact.stltoday.com/pr/local-news/PR032913035212376>; see also University of Illinois Springfield Innocent Project, *The Peggy Jo Jackson Case*, <http://www.uis.edu/innocenceproject/cases/exonorees/peggyjojackson/> (last visited Nov. 12, 2012).

¹⁹¹ Larry Lee Fisher, a drug offender, after serving almost 20 years of his life sentence, got his sentence commuted in 2012 by Governor Chris Gregoire. See Diana Hefley, *Clemency in 3-Strikes Case Gives Inmate Shot at Release*, HERALD NET, Jan. 8, 2013, <http://www.heraldnet.com/article/20130108/NEWS01/701089913?page=single>.

¹⁹² Information is obtained from Florida Department of Corrections upon author's inquiry.

¹⁹³ A life sentence became LWOP when Congress abolished parole in the Comprehensive Crime Control Act of 1984 (Pub. L. No. 98-473 § 218(a)(5)) for federal crimes committed beginning in November 1987.

¹⁹⁴ Figure is obtained from the website of U.S. Department of Justice. The published federal clemency recipients' list could only be retrieved from 1989, which demonstrates that at that point only one LWOP inmate received a commutation. According to the statistics published by the Department of Justice, there were no commutations issued in 1987 or 1988. See OFFICE OF THE PARDON ATTORNEY, CLEMENCY RECIPIENTS, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/pardon/recipients.htm> (last visited Nov. 2, 2013); see also OFFICE OF THE PARDON ATTORNEY, CLEMENCY STATISTICS, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/pardon/statistics.htm> (Updated August 2014).

¹⁹⁵ See OFFICE OF THE PARDON ATTORNEY, COMMUTATIONS GRANTED BY GEORGE W. BUSH (2001-2009), U.S. DEP'T OF JUSTICE, <http://www.justice.gov/pardon/bush-comm.htm> (last visited Nov. 2, 2013) (Reed Raymond Prior's life sentence was commuted to expire on February 23, 2009 and was subject to ten years' supervised release).

¹⁹⁶ See *supra* note 156 and accompanying text.

¹⁹⁷ See *supra* notes 157-158 and accompanying text.

number of LWOP inmates leaving prison either by death or commutation. Moreover, new LWOP sentencing laws will have more offenders sentenced to LWOP. For example, Massachusetts passed a habitual offender law in 2012, which provides a LWOP sentence for defendants convicted of three designated felonies.¹⁹⁸ As shown above, the population of prisoners serving LWOP inmates has steadily risen in the past three decades.¹⁹⁹ So it follows that executives will be considering an ever-increasing number of applications for clemency filed by LWOP inmates.

Second, it is also likely that more drug offenders sentenced to life without parole will be seeking (and possibly eligible for) commutation. The commutations issued to drug offenders by President Obama at the end of 2013 has sent a message that sentencing fairness for non-violent drug offenders should be rethought --- if necessary, by commutation.²⁰⁰ Under criteria announced by the Department of Justice, non-violent drug offenders who have served at least 10 years of their prison sentence are qualified to apply for commutation.²⁰¹

Third, as more LWOP inmates will have completed a significant portion of their prison time, they will become more likely to have their sentences commuted. The accessible records and the news reports regarding LWOP sentence commutations,²⁰² indicates that commutations are more likely to be issued to those who have completed a significant amount of years of imprisonment. For example, a commuted LWOP inmate in Nevada served 19 years of his sentence before he was commuted in 1999.²⁰³ A commuted LWOP inmate in Louisiana served 29 years of his sentence.²⁰⁴ Another commuted LWOP inmate in Illinois severed 26 years of his sentence.²⁰⁵ Obviously, as time passes by, there will always be new LWOP inmates who reach the level of having served a significant term of their imprisonment. Thus, the population of LWOP inmates qualified for commutation will steadily increase every year.

So it appears that the question of commuting LWOP sentences will become a substantial legal and public policy question at both the State and Federal level. However, there are a number of questions related to granting leniency to LWOP inmates that must be answered before the executive branch is well prepared to decide whether to grant or to deny this new wave of commutation applications from LWOP inmates. First, does commutation conflict with the sentencing policy that is used to support LWOP sentences? On the one hand, commutation, as a form of clemency, is widely recognized as an expression of mercy exercised by the executive branch by shortening the length of a judicially-imposed sentence. On the other

¹⁹⁸ 2012 MASS. ACTS § 41.

¹⁹⁹ See table 2 in this article.

²⁰⁰ The Anti-Drug Abuse Act of 1986 initially created a severe sentencing disparity for crack cocaine and powder cocaine offenses. Offenders, who were arrested for possessing crack cocaine, faced much more severe penalties than those in possession of powder cocaine. The Fair Sentencing Act of 2010 (Public Law 111-200) reduced the disparity between the amount of crack cocaine and powder cocaine that would trigger certain federal criminal penalties, from a 100:1 weight ratio to an 18:1 weight ratio.

²⁰¹ See *Announcing New Clemency Initiative, Deputy Attorney General James M. Cole Details Broad New Criteria for Applicants*, DEPARTMENT OF JUSTICE, April 23, 2014, <http://www.justice.gov/opa/pr/2014/April/14-dag-419.html>.

²⁰² It is hard to access concise statistics from official resources regarding the terms of imprisonment that commuted LWOP inmates have served before they were granted commutation. The most accessible information could be derived from news reports.

²⁰³ See *supra* note 184.

²⁰⁴ See *supra* note 185.

²⁰⁵ See *supra* note 186.

hand, the sentencing policy of LWOP sentences is to provide a most certain and most grave punishment for a selected group of serious offenders. It would appear that a decision to make a certain crime punishable by such a serious and certain sentence leaves little room for decisions based on mercy; any such decision would appear to undermine the very purpose of a LWOP sentencing scheme. Second, if the practice of commuting LWOP inmates can ever be supported, are there any standards that will prevent the executive from exercising the clemency power arbitrarily? The clemency power proved at various points in history to be a significant tool for curing the injustices of harsh and undifferentiated sentencings. But the clemency power has been exercised with few if any standards or guiding principles since the power was adopted in the federal and state constitutions. Executives often make the clemency decisions on the base of their own personal sense of justice or according to the political factors thought relevant at the time.²⁰⁶

The following parts of this article will explore whether commuting LWOP inmates is a justified practice, and will provide suggestions about how to provide some relief for LWOP prisoners by commutation in a principled fashion without substantially undermining the system of justice.

²⁰⁶ See Beau Breslin & John J.P. Howley, *Defending the Politics of Clemency*, 81 OR. L. REV. 231, 232 (2002) (“the clemency process involves an elected official and her or his appointees who regularly take into account the potential reaction of the news media, political allies and adversaries, special interest groups, as well as the implications for a future political career, whenever he or she makes a decision.”).

II. Commuting LWOP Sentences: Undermining the LWOP Sentencing Scheme?

A LWOP sentence is by definition designed to permanently incarcerate an inmate. But in some instances, a LWOP sentence may not mean life-long incarceration. As state and federal constitutions have vested the executive with the pardoning power, a LWOP inmate could walk out of prison by way of executive commutation. That possibility raises an obvious tension between the LWOP sentencing scheme and the executive's power of commutation. Is the practice of commutation a loophole of the LWOP sentencing scheme? The concern is that the certainty of the LWOP sentencing scheme --- and the legislative decision that conviction of certain crimes should be subject to that certainty --- will be undermined by executive decisionmaking. This section will address that tension and discuss whether there is a rationale that supports the practice of commutation of LWOP sentences.

A. Diminished Certainty of LWOP Sentencing Caused by Commutation

While the legislature bars the door against the LWOP inmates' release on parole, the back door of executive clemency might be open for possible release. For example, the Oklahoma Board of Pardon and Parole recommended that Cathy Sue Lamb's sentence of life without parole be commuted to life. Lamb had been convicted of first degree murder and sentenced to LWOP in 1991.²⁰⁷ If the Board's recommendation was approved by the Governor, Lamb would have been eligible for parole in 2006.²⁰⁸ Although this commutation recommendation was declined by Governor Keating, it raised awareness that the certainty of LWOP sentences might be undermined by the executive's commutations.

Ron McDaniel, a member of the Homicide Survivors Support Group, advocated that, "Life without parole is life without parole. You're given the impression that they (the convicted inmates) will die in prison."²⁰⁹ Many Oklahoma prosecutors became aware of this loophole for the first time and expressed the hope that commutation of LWOP sentences would occur rarely or never.²¹⁰ The Oklahoma state legislature enacted a law to make it tougher for LWOP inmates to gain release through commutation. As provided by the new law, a LWOP inmate whose sentence is commuted to life has to serve 38 years and 3 months' imprisonment before being eligible to obtain clemency.²¹¹ The legislature could not prevent commutation of LWOP sentences, but did act to limit their impact.²¹²

²⁰⁷ Bob Doucette, *Loophole Lets Inmates Seek Parole Board Changes Life Sentence Policy*, NEWSOK, March 9, 2002, <http://newsok.com/loophole-lets-inmates-seek-parole-board-changes-life-sentence-policy/article/2784964>.

²⁰⁸ Oklahoma law in 1987 added LWOP sentences as the optional sentence for first degree murder. 1987 OKLA. SESS. LAW SERV. 96 § 1. Oklahoma law also provides that a LWOP sentence for first degree murder could be commuted. 1987 OKLA. SESS. LAW SERV. 96 § 4. Additionally, Oklahoma law provides that inmates, who committed a crime prior to July 1, 1998, are eligible for parole release after the completion of one-third of their sentences. OKLA. STAT. ANN. tit. 57 § 332.7 (1998). Under the policy of the Oklahoma Board of Pardon and Parole, any inmate serving forty-five years or more, including a life sentence, shall be considered for parole or clemency after serving fifteen years. *Fields v. State*, Okla. Crim. App., 501 P.2d 1390, 1394 (1972).

²⁰⁹ Bob Doucette, *Loophole Lets Inmates Seek Parole Board Changes Life Sentence Policy*, NEWSOK, March 9, 2002, <http://newsok.com/loophole-lets-inmates-seek-parole-board-changes-life-sentence-policy/article/2784964>.

²¹⁰ *Id.*

²¹¹ The new law provided that offenders who committed a listed crime on or after March 1, 2000, are eligible for parole upon serving eighty-five percent (85%) of the sentence, excluding those offenders serving a sentence of life without parole. OKLA. STAT. ANN. tit. 21, § 12.1 (1999). As the policy regards the serving time of a life sentence as 45 years, the 85% of the life imprisonment comes to 38 years and 3

A number of other examples indicate the tension between LWOP sentencing and executive commutation. In 1994, Reginald McFadden, whose sentence was commuted from LWOP to a life sentence, committed a series of murders right after he was released on parole.²¹³ McFadden's murder charge might well have cost then-Governor Mark Singel the race for his second term of office. Another well-publicized case, as discussed above was that of Willie Horton, who, while serving a LWOP sentence, raped and killed a woman on a furlough granted by Massachusetts Governor Michael Dukakis.²¹⁴ Even though Horton was granted a furlough, not commutation, the societal and political pushback against release of LWOP inmates -- no matter whether it was temporary or permanent --- was evident. Another example is that of Maurice Clemmons, who was released immediately after his LWOP sentence was commuted, and then found responsible for the November 29, 2009 murder of four Seattle-area police officers.²¹⁵

The tension between the certainty of LWOP sentencing and the possibility of commutation --- and the public outcry occurring when commuted lifers commit crimes --- has led some Governors to establish a policy of prohibiting commutation of LWOP inmates. New York Governor Mario Cuomo, when explaining his repeated vetoes of death penalty legislation, emphasized that life imprisonment without the possibility of parole means a sentence of death in incarceration with no chance of release by parole or clemency.²¹⁶ Connecticut Governor Malloy also delivered the same message by stressing, "Let's throw away the key and have them [LWOP inmates convicted of murder] spend the rest of their natural lives in jail."²¹⁷ In these cases, the certainty and permanence of LWOP is posited as a justification for rejecting the death penalty --- and it can be assumed that any possibility that such a sentence would be reduced would correspondingly undermine the argument against the death penalty.

But even in death penalty states, the certainty of a LWOP sentence is stressed, as the sentence serves as an important alternative. Thus, a former assistant attorney general from Alabama has stated that "life without parole in Alabama means just that --- no parole, no commutation, no way out until the day you die,

months. *See* Required Service of 85% of Sentence Where Life Imprisonment is An Option, Vernon's Okla. Forms 2d, OUJI-CR, 10-13B.

²¹² The governor could freely commute any sentences, as the commutation power vested by the Oklahoma constitution is not limited by any legislation. *See* Okla. Att'y Gen. Op. No. 2012-17 (Oct. 10, 2012).

²¹³ Reginald McFadden, a Pennsylvania LWOP inmate, had his sentence commuted to life with the possibility of parole in 1994. He was convicted of multiple murders in New York State shortly after his parole release gained from commutation. Joseph Berger, *Accused Serial Killer and 92 Days of Freedom*, N.Y. TIMES, April 4, 1995.

²¹⁴ *See* Margaret Colgate Love, *Reinventing the President's Pardoning Power*, 20 FED. SENT. REP. 5, 7 (2007) [hereinafter Love, *Reinventing*].

²¹⁵ Maurice Clemmons was sentenced in Arkansas to 108 years of imprisonment --- likely a LWOP sentence. His sentence was commuted by then-Governor Mike Huckabee and he was released on parole right after the commutation in 2000. *See* *Huckabee Granted Clemency To Maurice Clemmons, Person Of Interest, In Ambush That Killed 4 Cops*, HUFF POST, May 25, 2011, http://www.huffingtonpost.com/2009/11/29/multiple-police-officers-_n_373119.html; *see also* Mark Schone, *Huckabee Helped Set Rapist Free Who Later Killed Missouri Woman*, ABC NEWS, Nov. 30, 2009, <http://abcnews.go.com/Blotter/mike-huckabee-clemency-freed-maurice-clemmons-washington-cop-shooter-suspect/story?id=9207095>; *Maurice Clemmons*, WIKIPEDIA.ORG, http://en.wikipedia.org/wiki/Maurice_Clemmons.

²¹⁶ Governor Mario M. Cuomo, *New York State Should Not Kill People*, N.Y. TIMES, June 17, 1989.

²¹⁷ Peter Applebome, *Death Penalty Repeal Goes to Connecticut Governor*, N.Y. TIMES, April 11, 2012.

period.²¹⁸ And in the State of Washington, commutation of LWOP sentences for aggravated first degree murder is prohibited by statute.²¹⁹

Indeed the certainty of a LWOP sentence as an alternative could in some way be seen as benefiting a capital defendant. The Supreme Court has held that if the executive has the power to commute a LWOP sentence, a jury in a capital case can be informed of that fact.²²⁰ And several states require courts to instruct the jury of possible clemency in capital cases should they decide on a sentence of LWOP.²²¹ As one commentator has stated:

Ample empirical evidence exists that jurors' fear of the offender's future release via parole plays a substantial, if not predominant, role in capital sentence deliberations. Sometimes this fear is the primary factor in the jury's decision to impose a death sentence. One study involving a review of 280 Georgia trials in which the jury returned a death verdict revealed that jurors asked questions about defendants' parole eligibility if given a life sentence in twenty-five percent of the cases.²²²

So if LWOP is subject to clemency (for anything other than proof of innocence) there is a risk that the capital punishment consideration may be skewed in favor of death.

The above facts and circumstances indicate a concern that the governor's power of commutation might undermine LWOP sentencing policy --- a policy based on punishment, deterrence, and the perceived need of consistency and finality in sentencing for certain crimes. The following sections will analyze whether commuting LWOP sentences constitutes a loophole that undermines the policy of LWOP sentencing.

B. The Rationale for --- and Limitations on --- LWOP Sentencing

LWOP sentences are intended to be permanent. Life sentence without possibility of parole "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days."²²³ This description of LWOP sentences provides what is at first glance a shocking

²¹⁸ Dieter, *supra* note 181, at 116.

²¹⁹ WASH. REV. CODE § 10.95.030 (1981).

²²⁰ *California v. Ramos*, 463 U.S. 992 (1983) (proper to inform jury of the risk to society of the defendant's future dangerousness).

²²¹ *See, e.g.*, Art. I, § 16 of the Louisiana Constitution (allowing the legislature to enact a law "to require a trial court to instruct a jury in a criminal trial that the governor is empowered to . . . commute or modify a sentence of life imprisonment without benefit of parole to a lesser sentence which includes the possibility of parole . . . or may allow the release of an offender either by reducing a life imprisonment or death sentence to the time already served by the offender or by granting the offender a pardon."). The statute authorized by the Louisiana Constitution is La. Code Crim. Proc. Ann. art. 905.2(B). The constitutional provision was made necessary after the Louisiana Supreme Court invalidated the statute on the ground that it violated the capital defendant's right to fair treatment under the Louisiana Constitution. *State v. Jones*, 639 So. 2d 1144 (La. 1994). For more on the use of clemency-possibility instructions in capital cases, see Blaine LeCesne, *Tipping the Scales Toward Death: Instructing Capital Jurors on the Possibility of Executive Clemency*, 65 U. CIN. L. REV. 1051 (1997).

²²² Blaine LeCesne, *Tipping the Scales Toward Death: Instructing Capital Jurors on the Possibility of Executive Clemency*, 65 U. CIN. L. REV. 1051, 1062 (1997).

²²³ *Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989).

impression: that the rehabilitative purpose of a punishment is rejected. To understand the rationale of LWOP sentences and the rejection of rehabilitation as a factor in punishment, it is necessary to learn about the emergence and development of LWOP sentencing schemes.

1. Murder Cases: Retribution and Deterrence

As discussed above, the emergence of LWOP sentences is attributed largely to its role as a substitute for the death penalty. After the Supreme Court ruled the mandatory death penalty unconstitutional,²²⁴ state legislatures found LWOP sentences to be a “next-best” alternative to the death penalty. By 2013, all of the 32 death penalty states have provided LWOP sentences as the only alternative to the death penalty for defendants convicted of capital crimes.²²⁵

There are two aspects of early correctional practice that could explain the start of LWOP sentences as an alternative to the death penalty: lifers’ traditional routine early release on parole, and the traditional practice of parole exclusion for murderers. Before the 1970’s, a life sentence did not mean incarcerating an inmate for a lifelong term. From the time that the parole system was set up in this nation in the late 19th century, parole release was *per se* available to all convicts who were sentenced to serve an indeterminate term of imprisonment, including those sentenced to serve life sentences. Prisoners committed for life were allowed to apply for release on parole after the completion of a certain term of imprisonment, for example, 20 years in Rhode Island,²²⁶ 8 years in Kentucky,²²⁷ 10 years in Louisiana, 11 years in Illinois, 10 years in Michigan, 10 years in New Mexico, and 20 years in Pennsylvania.²²⁸ There is no doubt that the parole release of lifers had significantly deviated a life sentence from its supposed severity. So when the time came to devise a sentence that would serve as an alternative to the death penalty, it is no surprise that legislatures began to think differently about the parole eligibility for life sentences. Lawmakers were unlikely to be interested in having a murderer sentenced to life as an alternative to the death penalty, and then be released on parole after a completion of 10 or 20 years of imprisonment. In this context, the sentence of LWOP was invented to prevent the possibility of parole from undermining a punishment intended to be severe enough to provide an alternative to the death penalty.

In addition, the sentence of LWOP could be thought to be derived from the traditional practice of excluding parole possibility for murderers. When the rehabilitative ideal flourished in the nation in the first half of the 20th Century, it was not applied to offenders who were sentenced to death; offenders who were sentenced to death were legislatively excluded from parole release. Before *Furman*, conviction of a large array of crimes --- not only first degree murder, but crimes such as rape, kidnapping, robbery, burglary, arson, and train-wrecking was punishable by death.²²⁹ That broad coverage indicates that many legislatures traditionally considered that offenders who have committed these severe crimes did not deserve the chance of rehabilitating themselves. Following that line of thought, it is reasonable to assume these legislatures determined that murderers, having committed the most severe crime there is, do not deserve the chance of rehabilitation. Thus, when there arose the need to find an alternative punishment to the death penalty, which was constrained to the most severe crime of murder, such alternative punishment should, in the logic of the legislature, be a parole ineligible sentence. In that context, the sentence of LWOP derives from the

²²⁴ *Woodson v. North Carolina*, 428 U.S. 280 (1976).

²²⁵ See Note 29, *supra*, and accompanying text.

²²⁶ 1915 R. I. Acts & Resolves.

²²⁷ 1914 Ky. Acts.

²²⁸ See MAUER, THE MEANING OF “LIFE”, *supra* note 13, at 6-8.

²²⁹ See Leonard D. Savitz, *Capital Crimes as Defined in American Statutory Law*, 46 J. CRIM. L. & CRIMINOLOGY 355, 358 (1955).

traditional concept that murderers, who have committed the most severe crime, do not deserve, or have forfeited, the chance of rehabilitation.

Accordingly, LWOP sentences, as primarily invented to be a substitute for the death penalty, are created to punish the most severe crime of murder. In that sense, when the sentence of LWOP is applied to punish the crime of murder, the legislature is indicating that it serves the penal goals of retribution and deterrence: retribution in that the legislature has concluded that the severe punishment is proportionate to the severe crime; deterrence in the sense that such a severe punishment could deter individuals from committing such severe crimes.²³⁰

2. Habitual Offenders: Deterrence and Incapacitation

Beginning in the 1980s, as discussed above, LWOP was expanded to include habitual offenders and drug crime offenders.²³¹ As discussed above, under three strikes laws, habitual offenders, who are convicted of three or more serious criminal offenses, may be subject to a LWOP sentence.²³² For example, the California law was designed “to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.”²³³ Although the Three Strikes laws have been subject to proportionality challenges based on the Eighth Amendment prohibition against cruel and unusual punishment,²³⁴ the Supreme Court has basically concluded that the constitutional prohibition on grossly disproportionate sentences does not extend to noncapital sentences --- except, perhaps in egregious cases where the crimes, though cumulative, are trivial.

In *Solem v. Helm*,²³⁵ the Court applied proportionality review on the basis of “objective criteria”²³⁶ and overturned the life sentence without possibility of parole for a defendant who had committed seven

²³⁰ There is no intent here to get involved in the arguments over whether or not the retribution or deterrence goals are theoretically justified or empirically provable. Rather the goal is to consider the grounding of LWOP sentencing in light of the goals apparently expressed by the legislatures, and whether the possibility of clemency substantially undermines those goals.

²³¹ See the historical treatment in Section I, *supra*.

²³² See *supra* notes 79-80 and accompanying text.

²³³ CAL. PENAL CODE ANN. § 667(b).

²³⁴ In the landmark case of *Coker v. Georgia*, 433 U.S. 584 (1977), the Supreme Court ruled that a state cannot apply the death penalty on the crime of raping an adult woman because to do so would violate the proportionality requirement of the Eighth Amendment. The proportionality review originated in capital cases, but the Court has not established a clear or consistent path for courts to follow in determining whether a particular sentence for a term of years is subject to the proportionality review. The Court has gone back and forth in applying the proportionality review in noncapital cases, including *Rummel v. Estelle*, 445 U.S. 263 (1980), *Solem v. Helm*, 463 U.S. 277 (1983), and *Harmelin v. Michigan*, 501 U.S. 957 (1991). These cases stand for the proposition that the Eighth Amendment has a “narrow proportionality principle” as applied to non-capital sentences. *Harmelin*, 501 U.S. at 996. In *Ewing v. California*, 538 U.S. 11 (2003), and the companion case *Lockyer v. Andrade*, 538 U.S. 63 (2003), the Court rebuffed proportionality challenged to “Three Strikes” laws.

The Court says that the proportionality review for non-capital offenses is “narrow” but it means “very narrow” as in “so narrow as to never apply.” The Court in *Solem* did strike down a LWOP sentence for a habitual offender, but that case has certainly been narrowed by cases such as *Harmelin* and *Ewing*. What was notable in *Solem* is that the defendant had committed non-violent, relatively trivial felonies. Consequently, the likelihood of a successful proportionality argument against a non-capital sentence, including one imposed under a Three Strikes law, is to say the least remote.

²³⁵ *Solem v. Helm*, 463 U.S. 277 (1983).

nonviolent and relatively trivial felonies. But in the most recent case of *Ewing v. California*,²³⁷ the Court rejected a proportionality challenge to California's Three Strikes law²³⁸, as applied to a repeat felon with a lengthy felony and misdemeanor record, to 25 years to life imprisonment for his conviction of felony grand theft of three golf clubs valued near \$1,200. A plurality of three Justices (O'Connor, Kennedy, and Chief Justice Rehnquist) determined that the sentence was "justified by the State's public safety interest in incapacitating and deterring recidivist felons, and amply supported by [the petitioner's] long, serious criminal record,"²³⁹ and declared that the case was not the "rare case" that would be subject to "gross disproportionality" review.²⁴⁰ In *Ewing* the Court declared that the Three Strikes Law was a "rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated."²⁴¹

These crucial cases reflect the Court's reluctance to tie the hands of state legislatures,²⁴² who are entitled to make their own judgments on what sentences provide for sufficient deterrence and incapacitation of habitual offenders.²⁴³ While the Court in *Solem* struck down the sentence of LWOP when imposed on a habitual criminal who committed non-violent and minor felonies, *Ewing* indicates that a sentence of LWOP is permissible as to a recidivist felon who has at least one conviction for a serious or violent felony. In that context, when a LWOP sentence is constitutionally applied under Three Strikes laws, the purposes of the sentence of LWOP are the same as that of life sentences with parole possibility: deterrence and incapacitation of repeat offenders. As stated in *Rummel*, "the primary goals [of a recidivist statute] are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time."²⁴⁴ The length of the incapacitation is "based not merely on that person's most recent

²³⁶ The Court ruled that courts must consider three factors in deciding whether a sentence is proportionate to a specific crime: (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions. *Solem v. Helm*, 463 U.S. 277, 292 (1983). The Court reasoned that all the offenses committed by Helm were nonviolent felonies and relatively minor. However, life imprisonment without possibility for parole was the harshest penalty possible in South Dakota, reserved for offenses such as murder, manslaughter, kidnapping, and arson. *Solem v. Helm*, 463 U.S. 277, 296-97 (1983).

²³⁷ *Ewing*, 538 U.S. at 30.

²³⁸ At the time of *Ewing*, the California Three Strikes Law provided that a defendant who had been convicted of two or more prior "serious" or "violent" felonies, and who committed any new felony, must receive "an indeterminate term of life imprisonment." (CAL. PENAL CODE ANN. §§ 667.5 & 1192.7 (West Supp.2002)). In 2012, the Three Strikes law was amended by Proposition 36, also known as the Three Strikes Reform Act. The new law requires that a defendant's new offense must also be a "serious" or "violent" felony before a life sentence can be imposed on the offender. *See* CAL. PENAL CODE § 1170.126.

²³⁹ *Ewing*, 538 U.S. at 29.

²⁴⁰ *Id.* at 30.

²⁴¹ *Id.*

²⁴² Margret Raymond, "No Fellow in American Legislation": *Weems v. United States and the Doctrine of Proportionality*, 30 VT. L. REV. 251, 264 (2006).

²⁴³ *Rummel v. Estelle*, 445 U.S. 263 (1980).

²⁴⁴ *Id.* at 284.

offense but also on the propensities [a recidivist] has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes.”²⁴⁵

3. Drug Laws: Deterrence and Retribution

As discussed in Section I, the expansion of LWOP sentencing is also seen in anti-drug laws. As applied in some states, LWOP sentences can be imposed on drug only offenders,²⁴⁶ habitual drug offenders,²⁴⁷ or habitual offenders with a drug offense conviction.²⁴⁸ Although there are challenges against the constitutionality of LWOP sentences as applied to drug offenders, the Supreme Court in *Harmelin v. Michigan*²⁴⁹ ruled that a mandatory sentence of LWOP on a first offender for possession of a large quantity of drugs was not constitutionally disproportionate under the Eighth Amendment. There was no opinion for the Court, but the controlling opinion is that of Justice Kennedy’s concurrence.²⁵⁰ In the concurring opinion, Justice Kennedy applied the constitutional proportionality approach in examining whether the sentence of LWOP was grossly disproportionate to the crime of possession of more than 650 grams of cocaine. He stressed the pernicious effects of large-scale drug activity on society, and stated that “the Michigan Legislature could with reason conclude that the threat imposed to the individual and society by possession of this large an amount of cocaine --- in terms of violence, crime, and social displacement --- is momentous enough to warrant the deterrence and retribution of a life sentence without parole.”²⁵¹ Thus Justice Kennedy

²⁴⁵ *Id.* at 284-85.

²⁴⁶ FLA. STAT. ANN. § 893.135(1)(b)2 (West 2014) (the first degree felony of trafficking in cocaine is punished by life imprisonment; the defendant is ineligible for any form of discretionary early release except pardon or executive clemency or conditional medical release under 947.149); MICH. COMP. LAWS ANN. § 333.7401(2)(a)(i)-(iv) (narcotic drug manufacturing and delivery penalties ranging from less than twenty years to life imprisonment); MISS. CODE ANN. § 41-29-139(f) (mandatory LWOP for drug manufacture or distribution in aggregate amounts).

²⁴⁷ GA. STAT. § 16-13-30(d) (for second or successive conviction for trafficking in controlled substances, judge may impose life). MICH. COMP. LAWS ANN. §§ 333.7413(1)(a)-(b) (mandatory life sentence for second and subsequent conviction for violation of 333.7401(2)(a)(ii) or (iii)).

²⁴⁸ ALA. CODE. §§13A-5-9(c)(4) (LWOP for habitual felon with Class A felony), 13A-12-231 (defining a number of drug trafficking crimes as Class A felonies); DEL. CODE ANN. tit. 11, § 4214 (b) (LWOP for habitual criminal with specifically enumerated drug felony); IDAHO STAT. §§ 19-2514 (person convicted for third time of felony may be sentenced to life), 37-2732B(a)(1) (designating trafficking in marijuana as felony); S.C. CODE ANN. §§ 17-25-45(B)(1), (C)(2)(a)-(b) (LWOP for third conviction of serious offense including trafficking controlled substances), 44-53-370(e) (defining trafficking controlled substances with various aggregate amounts and penalties); WIS. STAT. § 939.62(2m) (mandating LWOP for “persistent repeaters” based on commission of at least three “serious felonies”, and the “serious felonies” are statutorily include various violations of Chapter 961, Uniform Controlled Substances Act).

²⁴⁹ *Harmelin v. Michigan*, 501 U.S. 957 (1991).

²⁵⁰ Justice Kennedy’s concurrence was the narrowest view on which five members of the Court could agree. Justices Scalia and Thomas contended that the Eighth Amendment proportionality analysis applied only to death penalty cases, but they did agree with Justice Kennedy that if the proportionality analysis did apply, the Michigan LWOP statute met constitutional muster. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds”).

²⁵¹ *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring).

recognized the state legislature's authority to impose a sentencing policy that excluded any consideration of rehabilitation, at least for certain crimes.²⁵²

On the opposite of the expanding scope of LWOP sentences, the Supreme Court has recently limited the use of LWOP sentencing for juvenile offenders. In *Graham v. Florida*²⁵³, the Court banned the use of LWOP sentences for juveniles who committed non-homicide offenses. And in *Miller v. Alabama*²⁵⁴, the Court held that a *mandatory* sentence of LWOP on a juvenile offender is unconstitutional even for those juveniles who commit even the most serious murders. The rationales of *Graham* and *Miller* can be summarized as follows: 1) LWOP as applied to juveniles is especially serious given the likely term of years of such a sentence as applied to a youth, with no hope for release;²⁵⁵ 2) such a serious penalty requires individualized sentencing for defendants as is the case with the death penalty;²⁵⁶ and 3) a juvenile's "diminished culpability" and "great prospects for reform" must be considered.²⁵⁷ Although these rulings have imposed substantial limitations on the use of LWOP sentences upon juveniles,²⁵⁸ there is no indication that the Supreme Court is launching a full-scale review of LWOP sentences under the Eighth Amendment. *Graham* and *Miller* are, on their face, limited to review of LWOP sentences on individuals who committed crimes as juveniles. When an individual commits a crime as an adult, the LWOP sentence will be reviewed under the far more deferential standards of *Harmelin* and *Ewing*.

The above overview of the development of LWOP sentencing indicates that a LWOP sentence is designed to serve the purposes of retribution, deterrence, incapacitation, and certainty and finality in sentencing. Obviously, the rehabilitation goal is rejected. This rejection of rehabilitation as a goal of sentencing can be explained by the fact that legislatures often "accord different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation."²⁵⁹ To understand the rejection of the rehabilitation goal in LWOP sentencing --- and the complication raised by the possibility of clemency --- it is necessary to analyze the process of parole.

C. The Rationale and Development of Parole

1. Basis of Parole: Rehabilitation

The concept of parole, along with the indeterminate sentencing scheme, grew from the penological ideal of rehabilitation. As discussed by Francis Allen, rehabilitation is a belief that an important purpose of punishment is to effect a change in the character, attitudes and behavior of convicted offenders so as to

²⁵² *Harmelin*, 501 U.S. at 1008-09 (Kennedy, J., concurring).

²⁵³ *Graham v. Florida*, 560 U.S. 48 (2010).

²⁵⁴ *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

²⁵⁵ In *Graham*, the Court likened the sentence of LWOP for juveniles to the death penalty in its harshness. *See Graham*, 560 U.S. at 69 (2010) (LWOP sentences "share some characteristics with death sentences that are shared by no other sentences").

²⁵⁶ *See Miller*, 132 S. Ct. at 2467 ("[t]reat[ment] [of] juvenile life sentences as analogous to capital punishment makes relevant here a second line of our precedence, demanding individualized sentencing when imposing the death penalty") (citation omitted).

²⁵⁷ *See Miller*, 132 S. Ct. at 2464.

²⁵⁸ The Court in *Miller* did not bar the imposition of a LWOP sentence on a person who committed a murder while a juvenile. Rather it held that the sentence could not be imposed automatically. *Id.*

²⁵⁹ *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring).

strengthen the community's social defense but also to contribute to the welfare of the individual.²⁶⁰ To put it simply, the purpose of parole is to provide an opportunity for an inmate to rehabilitate his character and become a law-abiding person.²⁶¹

2. Early Stages: Failed Application of Rehabilitative Ideal Under Unconstrained Parole Scheme

The practice of parole is a successor of an early correctional practice of “ticket-of-leave”, which was originally implemented by Britain in its Australian colony.²⁶² It allowed prisoners to win early release based on their good behavior.²⁶³ The American prison system adopted the early release idea in the 1870s, beginning with the establishment of the Elmira Reformatory.²⁶⁴ The concept was that a prisoner could be fit for release only after being reformed by training and education provided by the reformatory.²⁶⁵ This new understanding of lawbreakers’ reformatory treatment was also called the “rehabilitative ideal”,²⁶⁶ upon which the correctional system was eventually refashioned. The most remarkable changes were the development of indeterminate sentencing and the establishment of the parole system. Prisoners would undergo three phases to gain freedom --- restraint custody, reformatory treatment, and conditional release on parole before absolute discharge.²⁶⁷ The state of New York, in 1877, first introduced the indeterminate sentence and the possibility of parole,²⁶⁸ and the practice of indeterminate sentencing and parole spread rapidly in the nation in the first two decades of the 20th century. By 1900, twenty states had implemented parole statutes. By 1922, forty-four states, Hawaii, and the federal government had adopted a parole system.²⁶⁹

However, at the beginning of the development of parole and reformation, the rehabilitation ideal was not applied in practice quite the same as was intended. “Neither of the two essential tasks of parole, the fixing of prison release time or post-sentence supervision, was carried out with any degree of competence or skill.”²⁷⁰ The paroling authority maintained great discretionary power in granting or refusing parole based on an investigation and consideration of each case, but the state statutes did not provide any clear

²⁶⁰ FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981).

²⁶¹ See CROMWELL, DEL CARMEN & ALARID, *supra* note 14, at 10.

²⁶² A. Keith Bottomley, *Parole in Transition: A Comparative Study of Origins, Developments, and Prospects for the 1990s*, 12 *CRIME & JUST.* 319, 323 (1990).

²⁶³ Edward Lindsey, *Historical Sketch of the Indeterminate Sentence and the Parole System*, 16 *J. AM. INST. CRIM. L. & CRIMINOLOGY* 6, 13 (1925) [hereinafter Lindsey, *Historical Sketch*].

²⁶⁴ *Id.* at 21.

²⁶⁵ *Id.* at 23.

²⁶⁶ FRANCIS A. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE: ESSAYS IN LAW AND CRIMINOLOGY* (1964).

²⁶⁷ Lindsey, *Historical Sketch*, *supra* note 263, at 23.

²⁶⁸ Edward Lindsey, *A Brief Comparative Study of Indeterminate Sentence and Parole Statutes*, 16 *J. AM. INST. CRIM. L. & CRIMINOLOGY* 70, 70 (1925) [hereinafter Lindsey, *A Brief Comparative Study*] (noting that New York was the first state introducing indeterminate sentencing and parole).

²⁶⁹ Lindsey, *Historical Sketch*, *supra* note 263, at 69.

²⁷⁰ DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* 162 (1980).

rules on what such investigation and consideration should be.²⁷¹ The state parole statutes did not articulate the need for after-care and supervision over the parolee after release from incarceration.²⁷² The promise of early release was used to obtain the inmates' institutionalized good conduct in custody. Parole became a tool "to make better prisoners rather than better residents of the community".²⁷³ Moreover, in places like California, parole release was used on a regular basis not to promote rehabilitation but rather to relieve prison overcrowding.²⁷⁴ So the rehabilitative ideal that generated the system of parole was never faithfully implemented in these early stages.²⁷⁵

3. Changes to the Parole System to Employ the Rehabilitative Ideal

Starting in the late 1910s, it became clear that the public and policy makers wanted the use of parole to be more protective of society and more useful to paroled offenders, rather than a routine release process.²⁷⁶ New Jersey took the lead in implementing a system that furthered the rehabilitation ideal seriously. It established a procedure that focused more on the reeducation and training of individuals in correctional and penal institutions.²⁷⁷ Soon states began to establish correctional treatment programs inside prisons, including individual and group counseling, therapeutic milieus, behavioral modification, vocational training, work release and furloughs, and college education.²⁷⁸ Also, parole supervision and after-care service towards the rehabilitation of offenders became the mission assigned to paroling authorities.²⁷⁹ The rehabilitative ideal --- that lawbreakers could be changed into law-abiders --- dominated the country until the 1970s.²⁸⁰ In short, the parole system in America started as a practical alternative to executive clemency, then came to be used as a mechanism for controlling prison growth, and gradually developed a distinctively rehabilitative rationale, incorporating the promise of help and assistance as well as surveillance.²⁸¹

²⁷¹ Lindsey, *A Brief Comparative Study*, *supra* note 268, at 80.

²⁷² *Id.* at 82.

²⁷³ Winthrop D. Lane, *A New Day Opens for Parole*, 24 J. CRIM. L. & CRIMINOLOGY 88, 92 (1933).

²⁷⁴ Bottomley, *supra* note 262, at 325.

²⁷⁵ Lindsey, *Historical Sketch*, *supra* note 263, at 23.

²⁷⁶ *See* Lane, *supra* note 273, at 98.

²⁷⁷ *See id.* at 99.

²⁷⁸ *See* Donald R. Cressey, *The Nature and Effectiveness of Correctional Techniques*, 23 L. & CONTEMP. PROBS. 754, 754 (1958) (noting that the new conception of "correctional techniques" places more emphasis on the specific methods used in attempts to change individual criminals; prisoners may be enrolled in prison schools, ordered to work, given vocational counseling and training, or engaged in individual or group psychotherapeutic interviews); *see also* JOHN IRWIN, *PRISONS IN TURMOIL* 44 (1980) (noting that in the 1950s, correctional institutes were geared toward care and treatment, which operated in the form of three types of programs, therapeutic, academic, and vocational); Edgardo Rotman, *The Failure of Reform: United States, 1865-1965*, in *THE OXFORD HISTORY OF PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 169, 181 (Norval Morris & David J. Rothman eds., 1995) (noting that during the progressive era, an outstanding example of the innovative prison management was to provide prisoners individualized treatment, including physical, mental, social, and vocational programs).

²⁷⁹ *See* Lane, *supra* note 273, at 101-02.

²⁸⁰ ROTHMAN, *supra* note 270; MCKELVEY, *supra* note 135, at 296.

²⁸¹ Bottomley, *supra* note 262, at 325.

4. Sentencing Reform Era: Modern Challenges and Elimination of Parole

In the early 1970s, the rehabilitative ideal and indeterminate sentencing faced significant attacks from a number of fronts.²⁸² On the one hand, the effectiveness of the rehabilitative program was called into question.²⁸³ Rehabilitative efforts were tagged as “nothing works,” given the statistics of inmates who returned to crime.²⁸⁴ On the other hand, the discretionary power of parole boards was criticized as it led to arbitrariness and disparities.²⁸⁵ Meanwhile, crime rates were rising in America. “Law and order” became the controlling policy, and the predominant sentencing purpose shifted from rehabilitation to “just deserts”.²⁸⁶ As discussed above, determinate sentencing and abolition of parole were widely embraced. The abolition of parole began with Maine in 1975.²⁸⁷ By 1984, at least eleven states and the federal government had abolished parole.²⁸⁸ Jurisdictions that abolished parole generally adopted determinate sentencing schemes, allowing only very narrow discretion to judges. The majority of states that abolished parole allowed early release by good-time reductions, and maintained the after-release supervision.²⁸⁹

It is noteworthy that, in states without a parole release system, alternative methods of managing the prison population were invented. States developed accelerated release programs for certain categories of offenders in case the prison populations reached certain specified limits above maximum capacity.²⁹⁰ For

²⁸² See generally ALLEN, *supra* note 260; Kevin Reitz, *Sentencing*, in THE HANDBOOK OF CRIME AND PUNISHMENT (Michael Tonry ed., 1998).

²⁸³ See Cressey, *supra* note 278, at 770 (noting that no direct evidence has shown the techniques used to correct criminals to be effective or ineffective); see also Walter C. Bailey, *Correctional Outcome: An Evaluation of 100 Reports*, 57 J. CRIM. L. & CRIMINOLOGY 153, 160 (1966) (observing that there is slight evidence supporting the efficacy of correctional treatment); James Robison & Gerald Smith, *The Effectiveness of Correctional Programs*, 17 CRIME & DELINQUENCY 67, 80 (1971) (review of California correctional program shows no evidence supporting the program’s claim of superior rehabilitative efficacy); ROBERT MARTINSON, WHAT WORKS? QUESTIONS AND ANSWERS ABOUT PRISON REFORM 22, 48 (1974) (based on evaluations of treatment studies the author concluded that rehabilitative efforts failed in preventing recidivism; this conclusion subsequently was referred to by the influential phrase of “Nothing works”).

²⁸⁴ DOUGLAS LIPTON, ROBERT MARTINSON & JUDITH WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES (1975) (This research, although later challenged, was the major research that undermined the penological rehabilitation ideal).

²⁸⁵ See MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973) (attacking the exercise of discretion in sentencing and parole decisions); see also KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969) (noting the lack of explicit criteria and principles underlying parole board decisions); JANET SCHMIDT, DEMYSTIFYING PAROLE 21 (1977) (noting that parole authorities generally do not clarify the reasons for granting or denying parole).

²⁸⁶ See Cullen & Gendreau, *supra* note 165, at 123.

²⁸⁷ See Bottomley, *supra* note 262, at 322.

²⁸⁸ The states are California, Colorado, Indiana, Illinois, Minnesota, Connecticut, North Carolina, Washington, Florida, New Mexico, and Idaho. See *id.* at 341 n. 4.

²⁸⁹ See Barbara Krauth, *Parole: Controversial Component of the Criminal Justice System*, in OBSERVATIONS ON PAROLE: A COLLECTION OF READINGS FROM WESTERN EUROPE, CANADA, AND THE UNITED STATES 51, 53-54 (Edward E. Rhine et al. eds., 1987).

²⁹⁰ NATIONAL INSTITUTE OF CORRECTIONS, PAROLE IN THE UNITED STATES 7 (1985).

example, the Michigan Emergency Overcrowding Act required that when prisons went over their official capacity for thirty days, all parole eligibility dates are to be moved forward by ninety days.²⁹¹ Additionally, the rehabilitative ideal, which used to be served by parole and post-release supervision, is promoted by “supervised release”. The Federal Sentencing Reform Act of 1984, aiming to ensure “honesty in sentencing and to reduce sentencing disparity,”²⁹² abolished indeterminate sentencing and parole and created supervised release. Supervised release is analogous to a special parole release scheme. As emphasized by Congress, supervised release is designed to “ease the defendant’s transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release.”²⁹³ However, supervised release is different from parole in that it is ordered *by the court* at the time the sentence is imposed, while parole is an administrative decision made subsequent to the court’s sentence, which in effect reduces the judicially imposed sentence in favor of a discretionary administrative decision, and allows the parolee to serve the remainder of his sentence in the community.²⁹⁴ Supervised release has also been adopted by a number of states that abolished their parole systems.²⁹⁵

States that did not abolish parole introduced parole guidelines, sentencing guidelines, and determinate sentencing legislation for one or more categories of offense.²⁹⁶ The U.S. Board of Parole first adopted parole guidelines in 1974. The introduction of parole guidelines was to overcome the criticisms of uncontrolled discretion, disparities, and lack of explicit criteria and reasons for grant or denial of parole.²⁹⁷ Under the parole guidelines, the parole release determination was based on two major considerations: offense seriousness and a “salient factor score” indicating the risk of reoffending.²⁹⁸ States that maintained parole systems severely restricted parole to insure that prisoners, or certain classes of prisoners, served a large proportion of their sentences, typically eighty-five percent.²⁹⁹ All parole states have provided parole supervision.³⁰⁰

²⁹¹ BUREAU OF JUSTICE STATISTICS, SETTING PRISON TERMS (1983); *see also* Oklahoma Prison Overcrowding Emergency Powers Act, 57 OKL. ST. ANN. §576-576 (providing that whenever the Oklahoma prison population exceeds 95% of capacity for more than thirty days, all inmates who are not classified above a medium security level, not incarcerated for a violent offense, and not incarcerated for a second or subsequent offense, receive 60 days credit for their sentence).

²⁹² Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988).

²⁹³ S. Rep. No. 225, 98th Cong., 1st Sess. 124 (1983).

²⁹⁴ U.S. Sentencing Guidelines Manual ch. 7, pt. A(2)(b) (2011).

²⁹⁵ Supervised release is given the name of “post-release supervision” in New York, North Carolina, Ohio, and Virginia. States like Arkansas, Illinois, and Minnesota, use the term “supervised release”. *See generally* LINKE & RITCHIE, *supra* note 16.

²⁹⁶ *See* GRAY CAVENDER, PAROLE: A CRITICAL ANALYSIS 60 (1983).

²⁹⁷ Albert W. Alschuler, *Sentencing Reform and Parole Release Guidelines*, 51 U. COLO. L. REV. 237, 238 (1980).

²⁹⁸ *See* Don M. Gottfredson et al., *Making Paroling Policy Explicit*, 21 CRIME & DELINQUENCY 34 (1975); *see also* PIERCE O’DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM (1977); DON M. GOTTFREDSON ET AL., GUIDELINES FOR PAROLE AND SENTENCING (1978).

²⁹⁹ *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, TRUTH IN SENTENCING 1 (1999).

³⁰⁰ *See general* LINKE & RITCHIE, *supra* note 16.

5. Modern Parole System: Moderate Application of Rehabilitative Ideal

After a century's experiment, the practice of parole has evolved significantly, adapting to social and political changes. Basically, the modern parole system is still based on the purpose of rehabilitation. But that purpose has been tempered by considerations of fairness and consistency in sentencing. Release decisions are now less arbitrary and more rationalized based on the more formalized parole decision considerations, including review of institutional behavior, crime severity, criminal history, incarceration length, mental illness, and victim input.³⁰¹ Moreover, parole decisions are more moderate because weight is given to the concept of "just deserts".³⁰² Crime severity and criminal history now heavily influence the parole decisionmaking process.³⁰³ Finally, more efforts have been put into supervision after release to enhance offenders' reintegration into the community.³⁰⁴ Successful reentry is the major goal in the states with parole systems as well as the jurisdictions with a supervised release scheme. While it is true that the states and the federal government have provided numerous post-release conditions to protect the community,³⁰⁵ it is also true that they have provided post-release support and services to assist inmates returning to the community.³⁰⁶ It is notable that post-release supervision has significantly expanded in the

³⁰¹ Joel M. Caplan, *What Factors Affect Parole: A Review of Empirical Research*, 71 FED. PROBATION 16, 16 (2007).

³⁰² Some parole proponents criticize the fact that in the modern parole system the rehabilitative ideal has been undermined by the injection of "just deserts". However, this reform of the parole system could also be considered as a logical evolution from a radical rehabilitative ideal to a more moderated rehabilitative ideal. See HOWARD ABADINSKY, *PROBATION AND PAROLE: THEORY AND PRACTICE* 214 (5th ed. 1994) (noting that the modern parole system has morphed from a rehabilitative mechanism into a form of deferred retributive sentencing); see also JOHN C. RUNDA, EDWARD E. RHINE & ROBERT E. WETTER, *THE PRACTICE OF PAROLE BOARDS* 13 (1994) (The study finds that a modified just deserts philosophy prevails in the modern parole decision making process).

³⁰³ See Beth M. Huebner & Timothy S. Bynum, *An Analysis of Parole Decision-making Using a Sample of Sex Offenders: A Focal Concerns Perspective*, 44 CRIMINOLOGY 961, 964 (2006) ("Individuals serving time for more serious crimes are less likely to be released on parole and serve a larger proportion of their sentences than less serious offenders" (citations omitted)); see also Daniel Weiss, *California's Inequitable Parole System: A Proposal to Reestablish Fairness*, 78 S. CAL. L. REV. 1573, 1574-76 (2005) (noting parole in California for lifers, who have committed murder, is mostly denied solely on the severity of the offense).

Empirical research has demonstrated that the modern parole release decision process is more offense-based. See Caplan, *supra* note 301, at 17 (citing empirical research conducted by Turpin-Petrosino in 1999, which demonstrates that the seriousness of the crime plays an influential role in parole release decisions).

³⁰⁴ See AMY L. SOLOMON ET AL., *PUTTING PUBLIC SAFETY FIRST: 13 PAROLE SUPERVISION STRATEGIES TO ENHANCE REENTRY OUTCOMES* 3 (2008) ("Parole supervision is only part of the [reentry] solution, but it is an essential part, given its mandate to manage offenders released from prison"); see also TONY WARD & SHADD MARUNA, *REHABILITATION* 3-7 (2007) (noting that reentry is simply a re-branding of the concept of rehabilitation).

³⁰⁵ The Sentencing Guidelines provide mandatory standard conditions of supervised release and additional recommended special conditions, designed to assure protection of the community. U.S.S.G. § 5D1.3 (2013).

³⁰⁶ See generally LINKE & RITCHIE, *supra* note 16.

era of sentencing reform. The portion of prisoners released to community supervision has risen from 50-60% for the period from 1923 and 1960 to more than 80% by the end of the 20th Century.³⁰⁷

D. Rationales for Commutation

The rationales that would justify the exercise of the clemency power --- of which commutation is a part --- are best revealed in the history of the adoption and exercise of that power. At common law, the clemency power was maintained by the King, who could “either before attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical.”³⁰⁸ Based on its historical practice, it is commonly recognized that clemency is an act of mercy or leniency in the exercise of authority or power.³⁰⁹ Thus, the fundamental feature of clemency is mercy in alleviating the punishment an individual has received.

However, mercy itself cannot sufficiently justify the use of clemency power in all cases, because any act of mercy must be evaluated within the broader system of punishment and its values of deterrence, retribution, and consistency.³¹⁰ Moreover if the clemency power is used merely on the executive’s personal whim in the “name” of mercy --- for example, the clemency power in history was often exercised on to promote the King’s own personal objectives³¹¹ --- such a pretextual exercise conflicts with the legal principle of the rule of law, which requires that a nation should be governed by law instead of a person’s unconstrained power. Unconstrained discretion in the exercise of clemency raises concerns of inequitable treatment: why was mercy shown to one person but not to all in similar circumstances?³¹² The risk is real that an executive’s use of the clemency power could be exercised not to promote justice but rather to promote the executive’s subjective interests in certain individual cases --- perhaps because that individual has money or influence that others do not have. Thus, besides the fundamental feature of mercy, there must be more specific features that could define and justify the exercise of clemency power in the system of criminal justice. This section will consider the possible rationales that have been found in history and commentary to support the proper exercise of clemency.

I. Justice-Enhancement

The first rationale that justifies the exercise of the clemency power is justice-enhancement.³¹³ This rationale is well-revealed in some of the historical uses of the clemency power. The concept of clemency

³⁰⁷ See JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 46, Figure 3.2 (2005).

³⁰⁸ EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 233. (4th ed. 1669).

³⁰⁹ See 3 OXFORD ENGLISH DICTIONARY 309 (2nd ed. 1989); see also Kobil, *Quality*, *supra* note 99, at 573 (noting that the clemency power is the power to remit punishment as an act of mercy).

³¹⁰ See Jeffrie G. Murphy, *Mercy and Legal Justice*, in FORGIVENESS AND MERCY 162, 167 (Jeffrie G. Murphy & Jean Hampton, eds., 1988) (“Temperings [of justice] are tamperings [with justice].”).

³¹¹ See Henry Weihofen, *Pardon: An Extraordinary Remedy*, 12 ROCKY MNTN. L. REV. 112, 114 (1940) (noting that the acts of clemency could be used for “mercy, clemency, justice or merely personal whim”).

³¹² See George Rainbolt, *Mercy: In Defense of Caprice*, 31 NOUS 226, 226 (1997) (describing this problem as the “dilemma of mercy”).

³¹³ Professor Kathleen Dean Moore is the leading scholar arguing that the legitimacy of clemency is to serve the ends of justice. See MOORE, *supra* note 116. Professor Daniel Kobil believes that the exercise of the clemency power is justified by two rationales: “justice-enhancing” and “justice-neutral”. “Justice-enhancing,” means that clemency “ensure[s] that our penal system operates fairly, so that each person is

originated from the mediaeval era when the criminal law was extremely harsh and rigid. At that time, the King's pardoning power was the only resource for a defendant seeking to obtain mercy from a harsh punishment, often for what would now be considered a minor crime.³¹⁴ As Blackstone has described, the pardon power was "to soften the rigors of the general law, in such criminal cases as merit an exception from punishment."³¹⁵ The need for a safety valve to protect against unjust punishment was one of the principal reasons that clemency is included in the U.S. Constitution. As Hamilton asserted, the "benign prerogative of pardoning" was essential to make exceptions in favor of "unfortunate guilt".³¹⁶ Thus, the use of clemency --- though an act of mercy --- is justified when it is used for the purpose of ensuring that justice was administered. Such justice-enhancing use of clemency is also well-illustrated in the famous lifeboat case of the *Queen v. Dudley and Stephens*.³¹⁷ In that hard case, the defendants killed and ate the cabin boy after they had been drifting at sea on a small emergency boat with no food or drink for days. The court rejected the defendant's claim of necessity, convicted them of murder and sentenced them to death.³¹⁸ But to ease the harshness of the sentence imposed to the defendants under the circumstance, the Crown commuted the punishment to six months' imprisonment.³¹⁹

The justice-enhancing use of clemency should not be an intrusion on the justice-delivering function that the judicial system preserves. Consequently the clemency power, as a justice-enhancing device, should, be exercised only after the exhaustion of judicial relief --- as a remedial mechanism to correct the unjust results that are beyond the reach of a fallible judicial system. The Supreme Court in several cases has recognized the justice-enhancing function of clemency --- and its applicability only when the judicial system itself cannot provide relief. In *Ex parte Grossman*,³²⁰ the Court emphasized that "executive clemency exists to provide relief from harshness or mistake in the judicial system."³²¹ In *Herrera v. Collins*, the Court acknowledged that, when the judicial system failed to provide a just result, executive clemency serves as a last measure safety valve to protect innocent defendants and the integrity of the judicial system.³²² As Justice Rehnquist declared, executive clemency is the fail-safe in the legal system that prevents miscarriages of justice.³²³ In *Dretke v. Haley*,³²⁴ Justice Kennedy observed that, "[t]he

rendered her due." Meanwhile, clemency could also be used in a way that is "justice-neutral" --- unrelated to principles of justice. See Kobil, *Quality*, *supra* note 99, at 579, 622.

³¹⁴ See Melvin M. Belli, *The Story of Pardons*, 80 CASE AND COMMENT, 26, 29 (1975); see also Samuel Williston, *Does a Pardon Blot out Guilt?* 28 HARV. L. REV. 647, 659 (1915).

³¹⁵ 4 W. Blackstone, Commentaries, 390-91.

³¹⁶ THE FEDERALIST No. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

³¹⁷ Regina v. Dudley & Stephens, 14 Q.B.D. 273 (1884).

³¹⁸ Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 318-19 (1996) ("Justifications are said to identify acts that produce morally preferred states of affairs.... Excuses, in contrast, are said to identify circumstances in which an act is wrongful but the actor blameless." (footnotes omitted)).

³¹⁹ See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 136 n.2 (6th ed. 1995).

³²⁰ *Ex parte Grossman*, 267 U.S. 87 (1925).

³²¹ See *id.* at 120-21.

³²² *Herrera v. Collins*, 506 U.S. 390, 412-17 (1993).

³²³ *Id.* at 411-12.

³²⁴ *Dretke v. Haley*, 541 U.S. 386 (2004).

clemency power can correct injustices that the ordinary criminal process seems unable or unwilling to consider.”³²⁵

The judicial system is unfortunately not perfect. Even though it provides safeguards to limit the possibility of wrongful conviction or unjust sentences --- including appellate and habeas corpus review --- it might still happen occasionally that an individual defendant would not receive just results. Legislatures certainly do not always enact just criminal laws and procedures: examples include harsh sentencing for crack offenses and the automatic death penalty statutes discussed earlier in this article. But even if the laws are flawlessly formed, a particular result can be problematic because of various forms of human error, including prosecutorial and judicial bias,³²⁶ and underfunded or simply incompetent defense lawyers.³²⁷ Furthermore, even if both the system and its personnel are operating properly, newly discovered evidence might retroactively indicate an unjust result --- but the time limit on a newly discovered evidence claim could result in the denial of any judicial relief.³²⁸

It follows that clemency --- when operating in furtherance of justice-enhancement --- is appropriate as a fail-safe mechanism in a narrow band of cases: cases where there has been a fundamental error and, most importantly, that error cannot be corrected by the system of appellate review, habeas corpus, or any other form of collateral relief. That narrow band of cases falls into two categories: excessive sentencing and wrongful conviction.

First, clemency --- specifically commutation --- could be used to lessen a sentence that is excessive even though not disproportionately so under the limited protection provided by the Supreme Court.³²⁹ The

³²⁵ See *id.* at 399 (Kennedy, J., dissenting).

³²⁶ See, e.g., David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1742-44 (1998) (revealing that race played a significant role in influencing capital sentencing); *Batson v. Kentucky*, 476 U.S. 79 (racial discrimination in peremptory challenges of jurors); *Tumey v. Ohio*, 273 U.S. 510 (1927) (biased judge).

³²⁷ See James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1839-41 (noting that thirty-nine percent of the reversals of capital convictions or sentences in state court and twenty-seven percent of those in federal court were due to incompetent lawyering and ineffective assistance of counsel); *McFarland v. Scott*, 512 U.S. 56 (1994) (Blackmun, J., dissenting from denial of certiorari) (relying on studies to conclude that “compensation for attorneys representing indigent capital defendants is perversely low”).

³²⁸ In *Herrera v. Collins*, petitioner Herrera claimed his innocence based on newly discovered evidence ten years after the case was initially tried. The Supreme Court refused the petitioner’s request for an evidentiary hearing based on his new evidence, and ruled that Herrera had previously received all the judicial process he was due. The Court held that a claim of actual innocence based on newly discovered evidence is not ground for federal habeas relief. *Herrera v. Collins*, 506 U.S. 390 (1993).

Jurisdictions commonly have time limits on newly discovered evidence claims, the rationale being to promote finality and that any such claims beyond the time period can be resolved through the clemency process. See FED. R. CRIM. P. 33 (“Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty.”).

³²⁹ As noted by Professor Ridoifi, clemency should be used to temper harsh results in a retribution-based judicial system. Kathleen V. Ridoifi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and Rightful Claim to Clemency*, 24 N.Y.U. REV. L. & SOC. CHANGE 43, 85-86 (1998) (arguing that clemency is an appropriate response when an unjust sentence is imposed as a result of changing standards or judicial confusion); see also MOORE, *supra* note 116, at 129-130 (arguing that retribution principles are the only

well-known use of clemency to avoid a harsh sentencing result comes from England, in which the death penalty was regularly commuted because the death penalty was the sole punishment for all felonies.³³⁰ A modern example would be President Obama's recent use of the clemency power to commute the sentences of certain defendants who were sentenced under the outdated sentencing laws for non-violent drug convictions, and received extremely harsh --- though statutorily permitted and constitutionally valid --- sentences in drug cases.³³¹ Similarly, the outgoing governor of Ohio, Richard Celeste, commuted the sentences of twenty-five battered women who were convicted of killing or assaulting their abusive mates.³³² That grant of clemency was appropriate as it corrected sentences that were rendered before the criminal law of self-defense was adequately taking into account the relevance of battered women syndrome.³³³ Clemency might also be useful if a sentence was issued in error and that error cannot be corrected through judicial review, because the time for such review has expired.³³⁴

Second, clemency properly can be used to correct wrongful convictions that are out of the reach of the judicial system.³³⁵ It is true that the judicial system has provided multiple remedial procedures to avoid an unfair result that could be caused by errors in fact finding, the trial's procedure, or the judge's interpretation of law. Where those procedures are in place, executive clemency is not necessary, and its application can

justification for punishment, and thus clemency should only be exercised where the punishment exceeds the crime).

³³⁰ See MOORE, *supra* note 116, at 17.

³³¹ The reason given by President Obama for the commutations was to reduce the harsh sentences on these drug offense inmates, who would have received a significantly shorter sentence under the current law, as established by the Fair Sentencing Act of 2010. See Charlie Savage, *Obama Commutes Sentences for 8 in Crack Cocaine Cases*, N.Y. TIMES, Dec. 19, 2013, <http://www.nytimes.com/2013/12/20/us/obama-commuting-sentences-in-crack-cocaine-cases.html?pagewanted=all&r=0>.

³³² Joan Krause, *Of Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women Who Kill*, 46 Fla. L. Rev. 699, 703 (1994).

³³³ Doctor Lenore Walker first developed "Battered Woman Syndrome", which refers to the effects of physical or psychological abuse on many women. This syndrome helps to explain how women become entrapped in abusive relationships. See LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 17-40 (1984); see also Lenore E. Walker, *Battered Women and Learned Helplessness*, 2 VICTIMOLOGY 525, 525 (1978). Beginning in the 1980s, in most jurisdictions, courts began admitting expert testimony on the battered woman syndrome in the trial court as part of a claim of self-defense. Subsequently, a number of states have passed legislation that allows the use of expert testimony on the syndrome. See Note, *Developments in the Law-Legal Responses to Domestic Violence: Battered Women Who Killed Their Abusers*, 106 HARV. L. REV. 1574, 1582-86 (1993).

³³⁴ See, e.g., *United States v. Gilbert*, 640 F.3d 1293 (11th Cir. 2011), where Gilbert was subjected to an enhanced sentence as a career offender, but a subsequent Supreme Court decision determined that the career offender enhancement did not apply to cases like Gilbert's. However, the defendant could not obtain habeas relief because his petition would have been considered a successive petition, barred by 28 U.S.C. §2255(h). Given the fact that Gilbert could obtain no judicial relief for what amounted to an error in sentencing, clemency could be considered an appropriate and even necessary avenue for relief.

³³⁵ Professor Kathleen Ridoifi argues that clemency may be properly used as to mete out justice when the system proves itself incapable of reaching a just result. See Kathleen V. Ridoifi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and Rightful Claim to Clemency*, 24 N.Y.U. REV. L. & SOC. CHANGE 43, 78 (1998); Professor Henry Weihofen expressed the same idea, that clemency should be used to correct the wrongs that the judicial system is incapable of correcting. See Weihofen, *supra* note 311, at 118. Since 1989, there have been at least 1,326 wrongful convictions. National Registry of Exonerations, www.law.mich.edu/special/exoneration/Pages/detailist.aspx (last visited November 1, 2014).

be thought to intrude improperly on the designed plan of the legislature --- clemency could operate as an evasion of the procedural requirements instituted by the legislature to assure fair and equitable process for all claimants, as well as finality and certainty of judicial results. But those remedies of direct and collateral review do not provide relief for claims of newly discovered innocence evidence after a certain time period.³³⁶ So in some cases there will be no way within the judicial system to overturn wrongful convictions that are possibly caused by eyewitness misidentification, unavailable or improper forensic science, false confessions, and the like.³³⁷ Until legislatures enact new laws that would provide efficient avenues to those wrongfully convicted individuals in proving their innocence with evidence discovered significantly after trial,³³⁸ clemency should be used to provide a last ditch remedy for correcting the wrongful convictions. In *Herrera v. Collins*, the Supreme Court clearly delivered the message that executive clemency plays the significant role of “the fail safe” in the criminal justice system.³³⁹ The Court noted that executive clemency is a historic remedy for preventing miscarriages of justice where judicial process has been exhausted.³⁴⁰ Thus, those claims of actual innocence based on evidence discovered too late for the judicial review process can properly be addressed through executive clemency.³⁴¹

It should be noted that the form of clemency addressed to wrongful convictions is a pardon. This dissertation, while discussing the clemency power in broad strokes, is concerned specifically with the issues and controversies that arise when an executive is deciding whether to *commute* the sentence of a criminal who has been sentenced to life without parole. Granting a pardon to a LWOP inmate, on the ground of unjust conviction, raises no issues any different from granting a pardon to any other person who has been unjustly convicted. Therefore in Part IV, which sets forth standards for commuting LWOP sentences, unjust conviction is not considered.

³³⁶ It is very hard for wrongfully convicted individuals to meet time limitations for filing new trial motions on the ground of newly discovered innocence evidence. According to the statistics presented in *Herrera*, the time limits in most states could range from 60 days to three years. Only 15 states allow new trial motions based on newly discovered evidence to be filed more than three years after conviction. *See Herrera*, 506 U.S. at 410-11; *see also* Fed. R. Crim. P. 33 (three-year time period).

³³⁷ *See The Causes of Wrongful Conviction*, INNOCENT PROJECT, <http://www.innocenceproject.org/understand/>, (last visited Jun. 24, 2014); *see also* C. Ronald Huff, Arye Rattner & Edward Sagarin, *Guilty Until Proved Innocent: Wrongful Conviction and Public Policy*, 32 CRIME & DELINQ. 518, 524-33 (1986); Arye Rattner, *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, 12 L. & HUMAN BEH. 283, 285-86 (1988); Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59, 99-105 (1989).

³³⁸ It should be noted that legislatures have enacted new laws to address --- at least with respect to DNA evidence --- the problem of inadequate appellate protection to those wrongfully convicted individuals who could not file new trial motions based on newly discovered evidence. Congress passed the Innocence Protection Act (IPA) (18 U.S.C. § 3600) in 2004 to permit DNA testing for federal inmates who assert their innocence. The statutes provide that exculpatory results excuse any time bar that would otherwise preclude a new trial or resentencing motion. 47 states have adopted a similar provision. *See Myrna S. Raeder, Feature, Postconviction Claims of Innocence*, 24 CRIM. JUST. 14, 15 (2009). Where these statutes are operative, clemency is not necessary to remedy an unjust conviction, and indeed the use of clemency where statutory relief is applicable seems both unnecessary and intrusive on the legislative solution. Of course, these statutes are not protective if DNA was not found or collected at the scene of the crime. Crimes like robbery and drug offenses are unlikely to have been subject to DNA collection. The statutes do not cover newly discovered evidence such as eyewitnesses or physical evidence.

³³⁹ *See Herrera*, 506 U.S. at 415.

³⁴⁰ *See id.* at 411-12.

³⁴¹ *See id.* at 417.

2. Utilitarian Use of Clemency

The second rationale that has been found to justify the exercise of the clemency power is the utilitarian use of clemency.³⁴² The utilitarian grounds for clemency were emphasized by Hamilton in the Federalist Papers as the principal reason for providing the President the power to pardon. As noted by Hamilton, a well-timed offer of pardon to people in rebellion could be essential to the preservation of the government.³⁴³ The most notable utilitarian use of clemency has been exercised by American presidents in those very limited occasions where it was required to promote public policy, such as to preserve the peace and stability of the country. For example, President Washington pardoned several people involved in the Pennsylvania Whiskey Rebellion; President Adams pardoned the participants in a Pennsylvania insurrection; President Carter pardoned certain people who had not registered for the mandatory draft during the Vietnam War; President Ford pardoned President Nixon; and President George H.W. Bush pardoned certain officials involved in the Iran-Contra scandal.³⁴⁴

The utilitarian use of clemency has also been seen in other cases. For instance, the English Crown employed pardons to provide cheap labor for its colonies; felons were pardoned with the condition that they agreed to travel to the colonies and work on the plantations.³⁴⁵ The English Crown also used pardon to promote criminal justice interests --- an accomplice could be pardoned if he provided testimony that would incriminate codefendants.³⁴⁶ In modern times, medical clemency is systematically used to release terminally ill inmates.³⁴⁷ “Utilitarian” in this sense could be a cynical attempt to reduce expenses, but could also be looked at as a compassionate act that would promote the public good. Generally speaking, the utilitarian use of clemency is for the sake of state interest or state welfare.

3. Redemptive Use of Clemency

The third rationale that has been argued to justify the use of the clemency power is to award redemption, i.e., to promote the rehabilitative ideal. Professor Elizabeth Rapaport is the leading scholar advocating the use of clemency in promotion of redemption. She criticizes the retributivist model for

³⁴² Professor Kobil divided the clemency power into “justice enhancing” and “justice neutral” categories. “Justice neutral” refers to a use of clemency for a purpose other than reaching a just result as to the particular individual. That would include the use of clemency on utilitarian grounds. See Kobil, *Quality*, *supra* note 99, at 579 (referring to the “justice-neutral” use of clemency); see also Kobil, *Grant Clemency*, *supra* note 148, at 222 (2003) (Professor Kobil noted that “Yet few, myself included, would argue that such utilitarian remissions of punishment [by clemency] are illegitimate”, and “clemency should be used to further [redemptive] goals as well”).

³⁴³ THE FEDERALIST No. 74, at 449 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (“But the principal argument for reposing the power of pardoning in [the President] is this: in seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth.”).

³⁴⁴ See Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 589-90 (2001) (exemplifying the cases where presidents exercised the pardon power in pursuit of restoring domestic tranquility).

³⁴⁵ See Kobil, *Quality*, *supra* note 99, at 588.

³⁴⁶ See Kobil, *Quality*, *supra* note 99, at 589.

³⁴⁷ For example, the State of Virginia provides clemency for terminally ill offenders who (1) are diagnosed as terminally ill, (2) are not eligible for parole (because terminally ill inmates who are eligible for parole can seek relief through the parole board), and (3) have family or other persons willing and able to assume responsibility for the offender’s care. See Virginia Department of Corrections Operating Procedure No. 820.2 (2014), <https://vadoc.virginia.gov/about/procedures/documents/800/820-2.pdf>.

failing to consider a prisoner's post-conviction achievements. She emphasizes that clemency should also be used to promote the "'redemptive' goals of criminal justice: rehabilitation and reconciliation of the offender, victim, and community."³⁴⁸ Rapaport argues that the redemptive value of commutation is consistent with the contemporary goals of reducing crime rates, recidivism rates and crime control costs.³⁴⁹ She concludes that the clemency process should credit individual inmates who undergo positive personal transformations.³⁵⁰

A good example of the possible redemptive use of clemency is the case of Precious Bedell. Bedell was convicted of murder for the death of her child. During her time at the state's Bedford Hills Correctional Facility, Bedell became a success story of rehabilitative incarceration and an inspiration to other inmates. She earned her bachelor's and master's degrees, worked her way into a position of trust at the prison's Children's Center, started a Parents as Reading Partners program and helped write handbooks about foster care, imprisoned parent's rights and responsibilities, and rage control.³⁵¹ Although Bedell did not receive clemency, her case has been trumpeted as an outstanding example of the success of rehabilitation, supporting an argument that clemency should be used to encourage and promote such outstanding conduct.

Besides a case of successful rehabilitation, heroic service might be another way that would demonstrate the transformation and self-improvement of the inmate, arguably justifying the use of clemency on the ground of redemption. For instance, Dr. Samuel Mudd, who had been involved in the Lincoln assassination, was pardoned for his heroic service of fighting a yellow fever epidemic in prison.³⁵² Today, the redemptive purpose of clemency is more often disfavored,³⁵³ but it has not been completely rejected. A number of states and the federal government prescribe rehabilitation as a consideration in the clemency decision.³⁵⁴

4. Disuniformity in Application of Standards for Issuing Clemency

In sum, use of the clemency power has been supported on three grounds: justice-enhancing, utilitarianism (i.e., promoting social policy, such as peace and stability), and redemption. These three rationales have been applied to support the exercise of commutation both at the state and the federal level. But American jurisdictions vary greatly in regulating the discretion that the Executive has to award

³⁴⁸ Rapaport, *supra* note 147, at 1503. Other scholars also express the same idea that clemency should be justified to award an inmate's redemption. See Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 33 (2005); see also Love, *Reflections*, *supra* note 110, at, 1483; Love, *Reinventing*, *supra* note 214, at 12 (promoting pardon can be used to recognize and reward rehabilitation).

³⁴⁹ Rapaport, *supra* note 147, at 1530.

³⁵⁰ *Id.* at 1524.

³⁵¹ Syracuse, *Inspiring inmate turns life around behind bars*, Nov. 22, 1999, http://lubbockonline.com/stories/112299/nat_112299040.shtml.

³⁵² See Rapaport, *supra* note 147, at 1523-24.

³⁵³ See Clayton, *supra* note 108, at 758.

³⁵⁴ See e.g., State of Tennessee Board of Parole, Application for Commutation, <http://www.tn.gov/bopp/Docs/BP%200044%20Commutation%20Application.pdf> (providing that rehabilitation is one factor that would be considered in issuing commutation); see also State of Montana, http://bopp.mt.gov/adminrules/admin_rule_20.25.901a.mcp.x (rehabilitation used as a factor in commutation); Hoffstadt, *supra* note 344, at 580 n. 80 (noting that the Pardon Attorney regulations confirm the function of a pardon as a rehabilitative reward to prisoners who have demonstrated good conduct for a substantial period of time).

clemency on these three (or any other) grounds. Most of the state executives are allowed to commute a sentence with complete discretion, without objective criteria.³⁵⁵ Such states do not provide explicit guidelines specifying in what circumstances a commutation would be granted, and allow applicants to set forth any reason that they think would warrant executive relief.³⁵⁶ Only the federal government and a very few states have promulgated statutes or regulations governing the administration of this executive power.³⁵⁷ Some states provide strict circumstances that would warrant a commutation, such as innocence, rehabilitation, and justification for committing the crime, excessive punishment, or terminal illness.³⁵⁸ Some states allow their Governors to consider any factors beyond the prescribed circumstances in issuing a commutation.³⁵⁹ On the federal level, according to the United States Attorneys' Manual, the factors that would warrant a commutation include excessive punishment, terminal illness, and meritorious services.³⁶⁰

³⁵⁵ Scholars have noted that, clemency procedures are largely lacking in standards and that clemency decisions are highly discretionary. *See* Bedau, *supra* note 142, at 257; *see also* Gershowitz, *supra* note 148; Kobil, *Quality*, *supra* note 99, at 614 (proposing that the institution of clemency would be improved by the adoption of consistent, principled standards to govern the use of clemency); Mary-Beth Moylan & Linda E. Carter, *Clemency in California Cases*, 14 BERKELEY J. CRIM. L. 37, 48(2009).

³⁵⁶ For example, the State of Arizona does not specify any factors that will be considered to issue a commutation. *See* 400.13.G ARIZONA BOARD OF EXECUTIVE CLEMENCY POLICY (2011). The State of Arkansas allows the applicants to explain the reasons why the applicants think the Governor should grant the relief requested. *See* Arkansas Pardon Department, Pardon Application, <http://governor.arkansas.gov/office/Documents/executiveClemencyApp.pdf>; the State of Virginia uses conditional pardon to commute sentences and require the applicants to submit an explanation of why the Governor should grant pardon. *See* Virginia Office of the Secretary of the Commonwealth, Conditional Pardon, <http://www.commonwealth.virginia.gov/judicialsystem/clemency/conditionalPardon.cfm>; The State of Michigan requires commutation applicants to state reasons why they should be granted a commutation. *See* Michigan Department of Corrections, Commutation and Pardon Application Instructions (July 2011), http://www.michigan.gov/documents/corrections/application_for_pardon_or_commutation_-_current_prisoner_331014_7.pdf.

³⁵⁷ *See* Kobil, *Quality*, *supra* note 99, at 605 n. 235 (listing state statutes regulating the exercise of clemency).

³⁵⁸ For example, the State of Montana provides the possibility of commutation only to those who could prove innocence, rehabilitation, justification for committing the crime, or excessive punishment. *See* MONT. ADMIN. R. §20.25.901A (2) (2012). In the State of Tennessee, under the rules established by the Governor, commutation is only issued to one who 1) has made exceptional strides in self-development, or 2) is suffering (or has a family member suffering) from a life-threatening illness, or 3) has been rehabilitated. *See* State of Tennessee Board of Parole, Application for Commutation, <http://www.tn.gov/bopp/Docs/BP%200044%20Commutation%20Application.pdf>.

³⁵⁹ Washington sets no limitation on the factors that would be considered when determining the issuance of commutation. But the state lists examples of factors that the pardon board would consider in recommending clemency to the governor, which include (1) the seriousness of the offense, (2) the impact on the victims, (3) whether there is a significant and documented need for clemency, (4) acceptance of responsibility, remorse, and atonement, (5) personal development and positive life changes since the offense occurred, (6) the offender's criminal history and other relevant background, (7) whether the individual has complied with all obligations imposed by the court, (8) the amount of time elapsed since the offense occurred, (9) the risk or benefit to the community. *See* Washington State Clemency and Pardons Board Policies (revised and adopted Dec. 7, 2012) <http://www.governor.wa.gov/office/clemency/documents/policies.pdf>.

³⁶⁰ The Manual notes that appropriate grounds for considering commutation have traditionally included disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government by the petitioner, e.g., cooperation with investigative or prosecutorial efforts that have not been adequately rewarded by other official action. United States Attorney's Manual § 1-2.113.

In 2014, the Obama Administration initiated a new plan with detailed criteria to expand the use of commutations to correct the excessive punishment imposed on those federal inmates who would have received a significantly lower sentence had it been imposed under the Fair Sentencing Act of 2010.³⁶¹

According to the current state and federal government practice, the considerations that would warrant the issuance of clemency are generally based on the three rationales as follows:

- Enhancing justice: battered woman syndrome,³⁶² innocence,³⁶³ justification in committing the crime,³⁶⁴ or excessive or erroneous punishment;³⁶⁵
- Benefiting state welfare: terminal illness, cooperation in prosecuting crime;³⁶⁶
- Promoting the value of redemption: rewarding rehabilitation,³⁶⁷ or meritorious services.³⁶⁸

³⁶¹ The inmates who are eligible for the new federal commutation plan must fit the following requirements: (1) currently serving a federal sentence in prison and, by operation of law, likely would have received a substantially lower sentence if convicted of the same offense today; (2) non-violent, low-level offenders without significant ties to large-scale criminal organizations, gangs, or cartels; (3) already served at least 10 years of their sentence; (4) do not have a significant criminal history; (5) have demonstrated good conduct in prison; and (6) with no history of violence prior to or during their current term of imprisonment. *See Remarks as Prepared for Delivery by Deputy Attorney General James M. Cole at the Press Conference Announcing the Clemency Initiative*, DEPARTMENT OF JUSTICE, April 23, 2014, <http://www.justice.gov/opa/speech/remarks-prepared-delivery-deputy-attorney-general-james-m-cole-press-conference>.

³⁶² California used to specify battered woman's syndrome as a reason that would warrant a commutation or pardon. But in August 2013, California abolished the specification of factors that would warrant a commutation, and requires applicants to state the reasons for why a commutation should be issued. *See* Office of the Governor State of California, Application for Clemency (Feb. 2007), <http://www.recordgone.com/public/templates/default/pdf/California-Pardon-Application.pdf>; *see also* Application for Executive Clemency (Aug. 2013), http://gov.ca.gov/docs/Application_for_Executive_Clemency.pdf;

³⁶³ Montana specifies innocence as a factor that would be considered in issuing a commutation. *See* Mont. Admin. R. §20.25.901A(2)(a) (2012). Other states similarly mention innocence as a factor, such as Virginia. *See* Virginia Office of the Secretary of the Commonwealth, *Absolute Pardons and Writ of Actual Innocence*, <http://www.commonwealth.virginia.gov/JudicialSystem/Clemency/absolutePardon.cfm>.

³⁶⁴ This factor of justification in committing a crime aims to warrant commutation for those inmates whose explanatory defense was not considered during the trial. Battered women's syndrome is a defense that has been a ground for commutation. Montana is one state that specifies a justification factor as one consideration in issuing a commutation. *See* Mont. Admin. R. §20.25.901A(2)(c) (2012).

³⁶⁵ Texas provides that the commutation of a sentence could only be issued to the inmate who has been subject to excessive punishment. *See* 37 TEX. ADMIN. CODE § 143.52 (d) (2012). Montana specifies the factor of excessive punishment as one consideration in issuing a commutation. *See* Mont. Admin. R. §20.25.901A(2)(d) (2012).

³⁶⁶ Virginia grants a special form of pardon, named medical pardon, to inmates who are suffering terminal illness and with a life expectancy of three months or less. *See* Virginia Office of the Secretary of the Commonwealth, *Conditional Pardon*, <http://www.commonwealth.virginia.gov/judicialsystem/clemency/conditionalPardon.cfm>; *see also* William W. Berry III, *Extraordinary and Compelling: A Re-examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850, 885-87 (2012) (analyzing why state commutation would justify compassionate release, which includes terminal illness, debilitating physical conditions that prevent inmate self-care, and death or incapacitation of the only family member able to care for a minor child).

E. The Tension Between Certain Grounds for Commutation and a LWOP Sentence

As discussed above, there are three possible grounds for clemency that are appropriate, i.e., that are justified by something other than the executive's personal predilections or interests: (1) enhancing justice, such as correcting wrongful conviction or excessive punishment; (2) benefiting state welfare, such as releasing the inmates who are terminally ill; or (3) rewarding redemption, such as release of inmates who have shown significant rehabilitation or provided meritorious services. Any rationale outside these historically-established grounds are likely to devolve into personal politics, political payoffs, or simply countermanding the will of the legislature.

But these established forms of clemency may raise tension in certain cases if applied to a LWOP inmate --- particularly the third established ground of rehabilitation.

The sentence of LWOP distinguishes itself from all other term-imprisonment sentences for its particular feature of rejection of the rehabilitative ideal. The rehabilitative ideal was based on the premise that every offender deserves the chance of reintegrating back to society based on his/her good behavior. However, after more than a half-century's experiment, the rehabilitative ideal was tempered as legislatures began taking into account the severity of offenses and the history of the offender. The more severe the crime and the more serious the criminal history of the offender, the less of a chance that rehabilitation would work, and therefore the less of a chance that parole should be available. That balancing analysis led legislatures to an embrace of LWOP --- where the perceived seriousness of the crime and danger of the offender completely outweigh any interest in rehabilitation. Put another way, the likelihood of rehabilitation is considered so minimal in these circumstances that it is thought better to apply a bright-line rule of sentencing. That rule avoids case-by-case determinations and, moreover, could be perceived as promoting deterrence in the certainty of its application. For good or ill, legislators have made the determination that in certain circumstances a case by case approach to rehabilitation is not justified.

Another consideration supporting LWOP sentencing, as discussed above, is that it operates as a political and social policy alternative to the death penalty --- part of the selling point of rejecting the death penalty, either in individual cases or as a state-wide policy, is that the LWOP defendant will never set foot on the streets. Policymakers could surely conclude that the rehabilitation ideal would severely undermine LWOP as a viable alternative to the death penalty. Indeed it could even be the case that a defendant who is subject to the alternative of the death penalty or LWOP would be disadvantaged if LWOP is not air-tight. If the jury thinks that there is even a possibility that the defendant could be released, they may opt for the death penalty.

Consequently, as applied to LWOP, the three rationales supporting commutation need to be refined and altered, at least in part. There would appear to be no conflict with the policies of LWOP sentencing if the executive commutes the sentence for justice-enhancing reasons. It is of course possible that a LWOP sentence is imposed unjustly, or it is subsequently determined that the sentence of LWOP was excessive or erroneous. In such instances, it may occur that the LWOP inmate is not able to obtain judicial relief for any

³⁶⁷ Rehabilitation is one factor that is specified as relevant in issuing commutation in many states, such as Montana and Tennessee. *See* Mont. Admin. R. §20.25.901A(2)(b) (2012); *see also* State of Tennessee Board of Parole, Application for Commutation, <http://www.tn.gov/bopp/Docs/BP%200044%20Commutation%20Application.pdf>.

³⁶⁸ In Massachusetts, under the Executive Clemency Guidelines, consideration of commutation is limited to four factors of rehabilitation, terminal illness, unjustified incarceration, and meritorious services. The state exemplifies meritorious services as cooperation with an investigation or prosecution that has not already been rewarded by other official action. *See* The Commonwealth of Massachusetts Executive Department, Executive Clemency Guidelines (May 27, 2007), <http://www.mass.gov/eopss/docs/pb/patrick-clemency-guidelines.pdf>.

number of reasons --- such as new and less harsh sentencing laws do not apply retroactively.³⁶⁹ In these limited cases, the possibility of commutation appropriately works as a fail-safe mechanism to correct the injustice for which the judicial remedy is out of reach. The recent commutations by President Obama for those drug offense LWOP inmates, who were excessively punished by the out-of-date drug law,³⁷⁰ has perfectly demonstrated the justified use of commutation to LWOP inmates on the ground of enhancing justice. In such cases, the commutation of LWOP sentences on the ground of enhancing justice does not appear to intrude upon the sentencing policy of LWOP sentences. Rehabilitation is not involved in such a commutation decision; and any uncertainty in a LWOP sentence would not appear to be troubling because if the LWOP sentence is unjust it really should not have applied in the first place.

Second, there appears to be no conflict with LWOP sentencing policy if a commutation were ever to be issued to a LWOP inmate on the unlikely ground of benefiting state welfare. As revealed in history, Presidents have from time to time issued pardons to preserve the peace of the nation.³⁷¹ For example, President Andrew Johnson issued a full pardon and amnesty to persons who participated in insurrection or rebellion in the Civil War.³⁷² It stretches the mind a bit to think of a possibility of issuing a commutation to a LWOP inmate for the purpose of promoting public policy. But there are two examples in current practice that appear sound. First is the use of commutation for inmates who are terminally ill and faced with imminent death.³⁷³ The release of dying LWOP inmates on the one hand benefits the state welfare by relieving the correction department's fiscal pressure in prison health care cost, and on the other hand it would not increase any risk of public safety caused by the releasee's reoffending (assuming it is found as a fact that the inmate's death is imminent). The early release of terminally ill LWOP inmates would also promote the integrity of the state by expressing human sympathy to these dying inmates. In such cases, commutation of LWOP inmates on the ground of benefiting state welfare would not appear to conflict with the sentencing policy supporting LWOP. That is so for two reasons: 1) the release is not based on the rehabilitative ideal that has been rejected by the LWOP sentencing scheme; and 2) LWOP does not fail as a marketable alternative to the death penalty, because surely the public, or a jury, would not be concerned about the air-tight nature of the LWOP alternative if the only exception was that the inmate was terminally ill and presented no risk to the public.

Another current example of a policy-based commutation is when the inmate, while in prison, has cooperated in the prosecution of crime. Consider a three-striker, sentenced to LWOP even though the underlying offenses are not severe, who is the only eyewitness of the murder of a prison guard. It is of course strong public policy to bring the perpetrator to justice. However the witness will probably be very reluctant to testify and understandably so. And the sanction traditionally employed on reluctant witnesses -- contempt of court -- is unlikely to move our LWOP inmate because he is already in jail for good. So incentives may well be thought necessary to prosecute this serious crime. And given the stakes, a prosecutor might well find that prison-based incentives (privileges, etc.) are not enough to get our witness

³⁶⁹ The Fair Sentencing Act of 2010 does not contain any express statement of retroactivity. Thus, all the federal courts have refused to grant relief to defendants already serving harsh sentences under the pre-FSA statutes. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010); *see also* Jeff Lazarus, *Making the Fair Sentencing Act Retroactive: Just Think of the Savings ... Clause*, 61 CLEV. ST. L. REV. 713, 719 (2013). It could also happen that an error in sentencing is discovered after appellate and collateral review have run out. *See, e.g.,* United States v. Gilbert, 640 F.3d 1293 (11th Cir. 2011) (error in sentencing could not be adjudicated because the claim would have been made in a successive habeas petition).

³⁷⁰ *See supra* notes 155-57 and accompanying text.

³⁷¹ *See supra* notes 343-44 and accompanying text.

³⁷² Andrew Johnson, *Proclamation of Amnesty and Reconstruction*, May 29, 1865, Civil War Era NC, <http://history.ncsu.edu/projects/cwnc/items/show/13> (last visited Jan. 11, 2015).

³⁷³ *See supra* 347 and accompanying text.

to testify. An executive, considering all the costs and benefits, may conclude that it is worth the cost of commutation for the benefit of prosecuting a serious crime. This exception to the finality of LWOP can be found to be consistent with the LWOP sentencing policy, so long as a fair (and reviewed) finding has been made that the prosecution would founder without the witness's testimony and that the importance of prosecuting the crime outweighs the societal cost of commutation of a LWOP inmate.³⁷⁴ Again, there is no conflict with the legislative decision that rehabilitation is irrelevant, because the commutation is not based on a finding that the witness has rehabilitated himself --- it is based on a finding that the benefits of prosecuting a serious crime outweigh the costs to society of releasing a LWOP inmate. And legislatures are surely aware of the fact that sometimes hard choices are necessary in trading one criminal off against the other --- indeed that is the basis of most prosecutions, and providing benefits for cooperation is a sanctioned practice, even if a witness has committed a serious crime.³⁷⁵

Another possible public policy basis for commutation is prison overcrowding. As applied to LWOP inmates, the release on grounds of overcrowding is largely hypothetical --- if anyone is going to be released, it stands to reason that LWOP inmates are going to be the last ones out the door. But it is certainly a problem if the certainty and finality of LWOP sentencing is undermined by decisions made by the Executive to release LWOP inmates on grounds of overcrowding. That is simply an irrational system.

So far the discussion has been limited to commutations for justice-enhancing and for public policy purposes. What about commutation that is redemptive, i.e., that recognizes a prisoner's rehabilitation? Here there is a problem. When commutation is issued to a LWOP sentence on the ground of promoting redemption, there will be a serious conflict with the LWOP sentencing policy. In this circumstance, the commutation a) countermands the legislative determination that the crime and the offender are such that rehabilitation is not a legitimate possibility as a bright-line rule; b) countermands the legislative determination that the offender has committed crimes so serious that they should never be released regardless of rehabilitation, i.e., that LWOP is a punishment that fits the crime; and c) undermines the marketability of LWOP as an alternative to the death penalty, because the very reason it is a palatable alternative lies in the certainty that the inmate will not be released.

As discussed above the redemptive use of commutation has been exercised to reward two types of post-conviction achievement that demonstrate an inmate's positive personal transformation: rehabilitation and meritorious service.³⁷⁶ But these rehabilitative grounds have been rejected as relevant by the legislature

³⁷⁴ As to how such findings should be made, see the section on standards for commuting LWOP sentences, Part IV, *infra*.

³⁷⁵ See United States Sentencing Guideline 5K.1: Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

- (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
- (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (3) the nature and extent of the defendant's assistance;
- (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
- (5) the timeliness of the defendant's assistance.

In Part IV, I make the argument that an executive considering commutation of a LWOP inmate on grounds of cooperation should undertake an analysis similar to that of the sentencing judge under Guideline 5K.1.

³⁷⁶ See *supra* 348-50 and accompanying text.

that has adopted LWOP.³⁷⁷ Thus, unless the LWOP sentencing policy is changed by the legislature or struck down by the Supreme Court as unconstitutional, the executive power to commute a LWOP sentence should not be exercised on the ground of rehabilitation.³⁷⁸ In other words, commuting a LWOP sentence on the ground of rehabilitation simply defies the legislative determination by opening exactly the same door towards early release on rehabilitation that has been legislatively closed to LWOP inmates.³⁷⁹

In sum, because legislatures have specifically rejected rehabilitation as a relevant ground for sentencing to LWOP, and because the certainty of LWOP sentencing promotes deterrence values and provides a public policy alternative to the death penalty, an executive should not commute a LWOP sentence on the ground of rehabilitation. Commuting a LWOP inmate on the ground of rehabilitation would send to the public a confusing message that a LWOP inmate, who is legislatively deprived of the chance of early release on parole, is still able to be released from prison through commutation --- a disguised parole. Overall, commuting a LWOP sentence constitutes a loophole against the LWOP sentencing policy when the commutation is parole-like, issued in whole or in part on the basis of the LWOP inmate's rehabilitative behavior.

³⁷⁷ See the rationales for LWOP sentencing in part B of Section II, *supra*.

³⁷⁸ Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1, 9 (1988) (noting that the doctrine of legislative supremacy rests on the deeply embedded premise of the American political system that, within constitutional limits, the legislature has authority to prescribe rules of law that bind all other governmental actors within the system).

³⁷⁹ The contention here is not that the power of commutation *cannot* be used to commute the sentence of a LWOP inmate on grounds of rehabilitation. The pardon power in both the Federal and State constitutions may raise constitutional separation of powers questions that are not discussed in this article. The contention is rather that an executive, as a matter of policy, should not undermine the legislative judgments supporting the certainty of LWOP sentencing by commuting a LWOP sentence on grounds that have already been rejected as irrelevant by the legislature.

III. The Need for a System of “Guided Discretion” in Commuting LWOP Sentences

As discussed above, there are few guidelines for exercising the executive’s clemency power. The lack of guidelines is especially evident when it comes to clemency decisions regarding LWOP inmates. Such decisions are not essentially unconstrained as to procedure; they are also bereft of any recognition of whether they are being made inconsistently with the established rationales for clemency. The lack of guidelines in regulating the commutation of LWOP sentences is likely not only to cause confusion and unfairness, but it may also lead to commutation decisions that undermine the very premises of LWOP sentencing.

The goal of this section is to establish the importance of regulating the commutation of LWOP sentences. I will first describe the current situation and demonstrate that the unconstrained commutation of LWOP sentences is an unwise exercise of executive discretion. Second, I will argue that the most rational system of clemency is one that is analogous to the guided discretion that the judiciary exercises under the Federal Sentencing Guidelines.

A. Commuting LWOP Sentences: An Unfettered Discretionary Power

Generally speaking, the clemency power is vested by state and federal constitutions in the executive without substantive or procedural constraints.³⁸⁰ At the Federal level, the Constitution provides that the clemency power is not made subject to legislative or judicial oversight.³⁸¹ The Supreme Court has been reluctant to place any restrictions on the clemency power, reasoning that “clemency has not traditionally ‘been the business of the courts.’”³⁸² In the very few cases on the subject that the Court has reviewed, it has determined that the limitations of the clemency power should only be found in the Constitution itself.³⁸³ Lower courts have applied the Supreme Court’s hands-off approach. For example, in *Hoffa v. Saxbe*, the federal district court held that the President’s pardon power is totally within his discretion.³⁸⁴

What constraints on the clemency power might exist in the Constitution itself? In *Ohio Adult Parole Authority v. Woodard*, Justice O’Connor, in a separate opinion, argued that the Due Process Clause assured

³⁸⁰ See MOORE, *supra* note 116, at 217 (“[T]he President’s [pardon] power remains unlimited, unchecked, and unreviewable.”); see also Duker, *supra* note 121, at 535 (“Alone among the powers enumerated in the Constitution, the power to pardon proceeds unfettered.”).

³⁸¹ See Ridolfi, *supra* note 100, at 52 (“[T]he pardoning power is part of the overall Constitutional scheme”); Note, *Executive Revision of Judicial Decisions*, 109 HARV. L. REV. 2020, 2034 (1996) (noting that the pardon power “does not violate the constitutional scheme of separated powers but is rather an integral part of that scheme”).

³⁸² *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 284 (1998) (O’Connor, J., concurring in part and concurring in the judgment) (quoting *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) (“Unlike probation, pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review.”)).

³⁸³ *Schick*, 419 U.S. at 267 (“We therefore hold that the pardoning power is an enumerated power of the Constitution and that its limitations, if any, must be found in the Constitution itself.”).

³⁸⁴ *Hoffa v. Saxbe*, 378 F. Supp. 1221, 1225 (D.D.C. 1974) (“We hold that the President may exercise his discretion under the Reprieves and Pardons Clause for whatever reason he deems appropriate and it is not for the courts to inquire into the rationale of his decision.”).

“some minimal procedural safeguards” in state clemency proceedings in capital cases.³⁸⁵ Justice O’Connor’s speaking by way of example, stated that judicial review over a clemency decision would “be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process”.³⁸⁶ So while judicial limitations on clemency decisions might be possible, it is clear that they would be very limited.³⁸⁷

Nor has Congress shown an inclination to try to regulate the executive clemency power. Congress has established the Administrative Procedures Act³⁸⁸ (APA) and the Freedom of Information Act³⁸⁹ (FOIA) to constrain the actions of executive agencies in carrying out the law through formal and open-to-the-public proceedings, such as conducting meetings involving primary decisionmakers in public,³⁹⁰ publishing proposed agency rules in the Federal Register and soliciting public input,³⁹¹ producing a written record justifying any rulemaking or adjudicatory decision that follows a hearing,³⁹² and making available to the public their procedural rules, substantive policies, final opinions, and other decisional documents.³⁹³ However, as held by the Supreme Court, the President is not an “agency” for purposes of the APA.³⁹⁴ As a result, the APA and FOIA do not apply to the President’s discretionary power of clemency.

It follows that whatever meaningful limitations on the clemency power should be established, they must come from the executive branch itself. On the federal level, when the President grants clemency, he always seeks recommendations from the Justice Department's Office of Pardon. Although the process of the Pardon Attorney in reviewing clemency applications is subject to Justice Department regulations, the Attorney’s recommendations are purely advisory and thus the President could grant clemency for any

³⁸⁵ *Woodard*, 523 U.S. at 289 (1998) (O’Connor, J., concurring in part and concurring in the judgment) (emphasis omitted).

³⁸⁶ *Id.*

³⁸⁷ Besides the mild limitations imposed by due process, there is another constitutional provision that could logically constrain the President’s clemency power: the Equal Protection Clause. To take an extreme case, if a black and a white prisoner present identical cases for clemency, and the President, because of racial bias, grants clemency to the white prisoner but not to the black prisoner, then a court could conceivably grant relief. But it is clear that the constraints imposed by the Equal Protection Clause on the clemency power are mild. It would be difficult if not impossible to prove racial bias, as this is not going to be admitted by the Executive. And any inference of racial discrimination resulting from a pattern of decisions is unlikely to be found given the infrequent and random nature of clemency decisions. On the difficulty of showing that executive decisions regarding the criminal justice system violate the Equal Protection Clause, see *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (rejecting an equal protection claim of selective prosecution and noting the deference required when a court is asked to “exercise judicial power over a ‘special province’ of the Executive.”).

³⁸⁸ Administrative Procedures Act, Pub. L. 79–404.

³⁸⁹ Freedom of Information Act, 5 U.S.C. § 552; Pub. L. 89-487.

³⁹⁰ 5 U.S.C. § 552b (1994).

³⁹¹ *Id.* § 553.

³⁹² *Id.* § 557.

³⁹³ *Id.* § 552.

³⁹⁴ *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) (“[T]he President is not an agency within the meaning of the [Administrative Procedures] Act.”).

reason he considers appropriate.³⁹⁵ On the state level, as discussed above, only a handful of states promulgate statutory or administrative standards regulating the use of the clemency power.³⁹⁶ Such limitations include requirements about the permissible types of information in reference to the character, rehabilitation or other personality aspects of the clemency applicants,³⁹⁷ or due process rights for clemency applicants.³⁹⁸

In sum, the exercise of the clemency power is, in general, a standardless process. Mostly, executives can make clemency decisions on any substantive basis and under any procedure that is not completely arbitrary. And of course the lack of standards applies to commuting LWOP sentences as well.

As discussed in the former section, commuting a LWOP sentence should be based only on two substantive grounds: 1) enhancing justice, such as correcting excessive or erroneous punishment, where judicial review has expired; and 2) benefiting state welfare, such as releasing inmates who have a terminal illness.³⁹⁹ In contrast, the rehabilitative function of clemency should not be extended to a LWOP inmate. But to date federal and state governments have not recognized that commutation as to a LWOP inmate should be limited to its proper substantive uses and should not extend to rehabilitation.

The absence of principled standards governing the exercise of commutation on LWOP sentences, (particularly that there is no prohibition on the rehabilitative use of commutation on LWOP inmates) has resulted in harmful impacts to the criminal justice system --- and to the political career of some executives. In the following part, I will focus on the positive consequences resulting from a rationalized and regularized process for commuting LWOP sentences. The argument here is not that clemency decisions can be constitutionally or statutorily constrained. Rather the argument is that executives should establish substantive and procedural standards on the decision whether to commute LWOP sentences --- in order to promote fairness and so as not to undermine the legislative determination establishing LWOP sentencing.

³⁹⁵ Department of Justice Executive Clemency, 28 C.F.R. §§ 0.035, 0.036, 1.1-1.11 (2000). Section 1.11 provides:

The regulations contained in this part are advisory only and for the internal guidance of Department of Justice personnel. They create no enforceable rights in persons applying for executive clemency, nor do they restrict the authority granted to the President under Article II, section 2 of the Constitution.

³⁹⁶ See, e.g., COLO. REV. STAT. § 16-17-102 (2012) (“Good character previous to conviction, good conduct during confinement in the correctional facility, the statements of the sentencing judge and the district attorneys, if any, and any other material concerning the merits of the application shall be given such weight as to the governor may seem just and proper, in view of the circumstances of each particular case, a due regard being had to the reformation of the accused.”); WASH. REV. CODE ANN. § 9.94A.728 (2010) (“The governor, upon recommendation from the clemency and pardons board, may grant an extraordinary release for reasons of serious health problems, senility, advanced age, extraordinary meritorious acts, or other extraordinary circumstances”).

³⁹⁷ Such states include Connecticut, Delaware, Florida, Indiana, Louisiana, Michigan, Nebraska, Pennsylvania, South Dakota, and Utah. See Dorne & Gewerth, *supra* note 102, at 435.

³⁹⁸ States like Arizona, Georgia, Illinois, Indiana, Kansas, Massachusetts, Montana, and Washington list some partial due process rights for pardon applicants, such as written notice, right to be represented by a privately hired attorney, right to be heard, right to a record of the proceedings, and so forth. See *id.*

³⁹⁹ As discussed above, the use of the clemency power for state welfare purposes might extend to political decisions such as granting amnesty to draft-evaders or pardoning public officials. But it is extremely unlikely that such political considerations could ever extend to releasing an inmate who has committed crimes that justify a LWOP sentence.

B. The Historical Trend Toward Guided Discretion in Sentencing

Historically executive discretion was necessary to adjust sentences after the fact⁴⁰⁰ at a time when punishment was not tailored narrowly by penal statutes to fit the individual defendant.⁴⁰¹ However, in the modern sentencing regime, the court has discretion to tailor the imposed sentences to fit the character, social history, and potential for recidivism of the offender.⁴⁰² This section describes that system of guided judicial discretion, in order to determine whether it can provide guidance for setting up a similar system of guided discretion for commutation decisions --- the argument being that if guided discretion works for setting a sentence at the outset, it should also work for determining the appropriateness of a sentence at the time a commutation is sought.

1. *Wide Judicial Discretion in the Indeterminate Sentencing Era*

Discretion in criminal sentencing has undergone great changes during the 20th Century. In the early 20th Century, legislatures and courts began rejecting the concept that defendants convicted of the same crime should receive “the identical punishment without regard to the past life and habits of a particular offender.”⁴⁰³ Reformation and rehabilitation of offenders was the predominate penal philosophy.⁴⁰⁴ The indeterminate sentencing system was invented in order to impose individualized sentences that were fit for each offender’s progress towards rehabilitation.⁴⁰⁵ Sentencing judges had broad discretion in determining an individualized sentence;⁴⁰⁶ parole officials at the same time possessed unfettered discretion to decide

⁴⁰⁰ Alyson Dinsmore, *Clemency in Capital Cases: the Need to Ensure Meaningful Review*, 49 UCLA L. REV. 1825, 1833 (2002) (“When death sentences were mandatory, and therefore not individually tailored by definition, clemency served as a means of adjusting sentences post hoc.”).

⁴⁰¹ See *supra* note 114-16 and accompanying text.

⁴⁰² See John C. Coffee, Jr., *The Future of Sentencing Reform: Emerging Legal Issues in the Individualization of Justice*, 73 MICH. L. REV. 1361, 1362 (1975). An individualized sentence imposed on an offender is based upon a variety of considerations. These factors might include: (1) the need to protect society, (2) the need to deter both the individual defendant and other potential defendants generally, (3) the need (or desire) to “denounce” the violation of important social norms, (4) the need to reward the defendant who pleads guilty for his cooperation with the prosecution, (5) the inclination to punish the defendant if the judge is particularly repulsed by his actions or character, and (6) the need to maintain some degree of equality between the sentences imposed upon higher and lower income criminals. See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 35-51 (1968).

⁴⁰³ *Williams v. New York*, 337 U.S. 241, 247 (1949).

⁴⁰⁴ As stated in the Declaration of Principles promulgated by the National Congress of Prisons 1870, [Crime is] a moral disease, of which punishment is the remedy. The efficiency of the remedy is a question of social therapeutics, a question of the fitness and the measure of the dose [P]unishment is directed not to the crime but to the criminal The supreme aim of prison discipline is the reformation of criminals and not the infliction of vindictive suffering. AMERICAN CORRECTIONAL ASSOCIATION, *TRANSACTIONS OF THE NATIONAL CONGRESS OF PRISONS AND REFORMATORY DISCIPLINE* (1870). See, e.g., David Rothman, *Sentencing Reform in Historical Perspective*, 29 CRIME & DELINQUENCY 631 (1983).

⁴⁰⁵ See Andrew von Hirsch, *The Sentencing Commission's Functions*, in ANDREW VON HIRSCH, ET AL., EDS, *THE SENTENCING COMMISSION AND ITS GUIDELINES* 3 (1987) (“[W]ide discretion was ostensibly justified for rehabilitative ends: to enable judges and parole officials familiar with the case to choose a disposition tailored to the offender's need for treatment.”).

⁴⁰⁶ See MICHAEL TONRY, *SENTENCING MATTERS* 6 (1995) (“Subject only to statutory maximums and occasional minimums, judges had authority to decide whether a convicted defendant was sentenced to probation or to jail or prison.”).

when to release offenders.⁴⁰⁷ Judges enjoyed wide discretion to impose a term of probation or imprisonment of any length within the high maximum penalties designated by the statutes.⁴⁰⁸ There were no standards to assist or confine the judge's discretion in making the sentencing decision.⁴⁰⁹ Federal and state judges possessed full discretion to use any information about the offender and alleged prior crimes that they thought relevant in determining the appropriate sentence.⁴¹⁰ Judges were not obliged to provide reasons for the sentence they imposed,⁴¹¹ and appellate review of sentencing decisions did not exist.⁴¹² However, after about 75 years of practice under this system of indeterminate sentencing, which was designed to serve the rehabilitative needs of criminal defendants, it was apparent that there was an unjustified disparity in sentences imposed on similarly situated offenders.⁴¹³ The findings of unwarranted sentencing disparity caused by unregulated judicial discretion soon prompted legislative response.

2. Limiting Judicial Discretion in the Sentencing Reform Act

Beginning in the 1960s, a wave of criticism was fired against the uses and abuses of unfettered judicial sentencing discretion.⁴¹⁴ In the words of Judge Marvin Frankel, the judges who were making

⁴⁰⁷ See Victoria J. Palacios, *Go and Sin No More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567, 568 (1994) (“Traditionally, a parole board's unfettered discretion determined when an offender could leave prison. Within broad parameters set by the legislature, the authority of parole decision makers has been extensive and far-reaching.”).

⁴⁰⁸ See, e.g., 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE, OR, PLEADING, EVIDENCE, AND PRACTICE IN CRIMINAL CASES 606 (1866) (“[I]n some of our States the statutes fix only the maximum of punishment, leaving the court to go as low as it sees fit.”); see also STITH & CABRANES, *supra* note 50, at 11. For example, the federal bank robbery statute provided that an offender “shall be fined not more than \$5,000 or imprisoned not more than twenty years, or both.” Bank Robbery Act of 1934, Pub. L. No. 73-235, § 2(a), 48 Stat. 783, 783.

⁴⁰⁹ See FRANKEL, *supra* note 285, at 8.

⁴¹⁰ *Williams*, 337 U.S. at 245, 252 (holding due process not violated if sentencing judge considers defendant's prior criminal record without permitting witness confrontation on that subject).

⁴¹¹ See Reitz, *supra* note 284, at 543.

⁴¹² See STITH & CABRANES, *supra* note 50, at 9.

⁴¹³ A number of studies have revealed sentencing disparity in the indeterminate sentencing regime. A 1974 study by the Federal Judicial Center presented clear evidence that disparities existed between the sentencing practices of individual judges under the then-existing indeterminate sentencing system. According to the study, 50 judges in the Second Circuit, who were presented with identical actual pre-sentence reports, assigned widely different sentences based on the same facts, ranging from as much as 20 years plus a heavy fine to 3 years and no fine. ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, *THE SECOND CIRCUIT SENTENCING STUDY 6-7* (1974). Prominent scholars have also criticized the sentencing disparity caused by judges' unwarranted discretion. See James M. Anderson et al., *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 274 (1999) (defining “disparity” as “solely that variation caused by the identity of the decision maker”). Congress also concluded that sentencing disparities caused by the judicial preferences and biases were unfair. See S. Rep. No. 98-225, at 45 (1983) (“Sentencing disparities that are not justified by differences among offenses or offenders are unfair both to offenders and to the public.”).

⁴¹⁴ See, e.g., ALLEN, *supra* note 266; Fred Cohen, *Sentencing, Probation and the Rehabilitative Ideal: The View from Mempa v. Rhay*, 47 TEX. L. REV. 1 (1968); see also Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972) (observing that sentencing judges, empowered with nearly unbridled discretion to sentence offenders to any penalty within a wide range afforded by statute, ultimately relegated the sentencing process to a subjective endeavor where the judge's individual predilections, not

sentencing decisions in the indeterminate sentencing regime were “[l]eft at large, wandering in deserts of uncharted discretion.”⁴¹⁵ Judicial discretion was “terrifying and intolerable for a society that professes devotion to the rule of law.”⁴¹⁶

This judicial discretion was substantially limited when Congress enacted the Sentencing Reform Act of 1984.⁴¹⁷ After a decade of debate, Congress chose to create an independent agency known as the United States Sentencing Commission to structure judicial discretion in federal sentencing.⁴¹⁸ On November 1, 1987, Congress enacted the Federal Sentencing Guidelines crafted by the Federal Sentencing Commission. These guidelines were intended to eliminate unwarranted sentencing disparity,⁴¹⁹ and provided judges with explicit direction in the form of binding guidelines that prescribed the kinds and lengths of sentences appropriate for every class of federal offender.⁴²⁰ Sentencing judges were required by the sentencing guidelines to consider the offense of conviction and the criminal history of the offender and determine the sentence within the provided sentencing grid.⁴²¹ Judges were bound to follow the Guidelines except in two circumstances (known as “departures”):⁴²² (1) on the government’s motion, based on a defendant’s substantial assistance to authorities;⁴²³ and (2) in “exceptional cases”,⁴²⁴ in which the court found

objective sentencing criteria, governed the sentencing process. The disparity in sentences that resulted from such a normless sentencing paradigm was substantial and ultimately led to a Guidelines-driven sentencing structure); JESSICA MITFORD, *KIND AND USUAL PUNISHMENT* (1973).

⁴¹⁵ See FRANKEL, *supra* note 285, at 7-8.

⁴¹⁶ See *id.* at 5.

⁴¹⁷ The Sentencing Reform Act of Oct. 12, 1984, Pub. L. No. 98-473, §§ 211-38, 98 Stat. 1987 (1984) [hereinafter SRA], was part of the Comprehensive Crime Control Act of 1984.

⁴¹⁸ The Commission is charged with the task of promulgating “guidelines ... for use [by] a sentencing court in determining the sentence to be imposed in a criminal case” 28 U.S.C. §§ 994(a)(1) (1988).

⁴¹⁹ See UNITED STATES SENTENCING COMMISSION, *SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS* 8 (1987).

⁴²⁰ Sentencing judges must carefully consider the Section 3553(a) factors and impose a sentence that is sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing. 18 U.S. Code § 3553(a); see also Douglas A. Berman, *A Common Law For This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 *STAN. L. & POL’Y REV.* 93, 97 (1999) [hereinafter Berman, *A Common Law*] (quoting S. Rep. No. 98-225 at 51 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3234) (A sentencing Guidelines system is “intended to treat all classes of offenses committed by all categories of offenders consistently.”).

⁴²¹ See, e.g., U.S. Sentencing Guidelines Manual (2013) (hereinafter U.S.S.G. (2013)). The sentencing table contained in the Sentencing Guidelines set the sentencing range for different crimes. The sentencing table takes two primary factors into consideration: the severity of the crime and the criminal history of the defendant. The offense levels are listed along the horizontal axis, which consists of forty-three offense level categories, and the criminal history categories are listed along the vertical axis, which consists of six criminal history categories. The sentence that should be imposed is listed where the two intersect on the table.

⁴²² The Commission set out in sections 5K2.1-2.16 of the Sentencing Guidelines Manual a number of bases for departure, which were not factored into the basic Guidelines calculations.

⁴²³ U.S.S.G. § 5K1.1 (2009); see also 28 U.S.C. § 994(n).

aggravating or mitigating circumstances “of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission.”⁴²⁵ The Sentencing Reform Act also required judges to state the reasons for an imposed sentence in open court, and to issue a written statement of reasons for sentences imposed outside the guideline range.⁴²⁶ The statement of reasons provided the groundwork for appellate review of departures.⁴²⁷ As the reform movement progressed, many states joined the trend in curtailing judicial discretion in sentencing and established sentencing systems with mandatory minimum sentences, presumptive sentences, and sentencing guidelines.⁴²⁸

The Sentencing Commission intended to promote sentencing uniformity and avoid unwarranted sentencing disparity by establishing the mandatory sentencing matrix. But the Commission also recognized the need of some limited sentencing flexibility, and so provided guided departure provisions that allowed the judges to exercise a limited amount of discretion in imposing a sentence outside the Guidelines’ range.⁴²⁹ Although the Commission sent out a message that sentencing flexibility was welcome, the Commission also believed that departures would rarely occur, because the Guidelines were intended to be comprehensive, accounting for the factors that should be taken into account in sentencing; the Commission also contemplated that if departures were properly made, the Guidelines could be amended to account for the factors found relevant by sentencing courts, so that the need for departures would become less frequent over time.⁴³⁰ But given the rigid and mandatory nature of the Guidelines, and the limits on departures, it is

⁴²⁴ U.S.S.G. §§ 5K2.1-2.16 (2009). These included such aggravating factors as death (§ 5K2.1), physical injury (§ 5K2.2), extreme psychological injury (§ 5K2.3), and such mitigating factors as victim conduct (§ 5K2.10), coercion or duress (§ 5K2.12), and diminished capacity (§ 5K2.13).

⁴²⁵ 18 U.S.C. § 3553(b)(1).

⁴²⁶ 18 U.S.C. §§ 3553(c)(1)-(2).

⁴²⁷ 18 U.S.C. §§ 3742(a)-(b). 18 U.S.C. s 3742(a) provides that a defendant may appeal “an otherwise final sentence” if the sentence “was imposed for an offense for which a sentencing guideline has been issued by the Sentencing Commission ... and the sentence is greater than the sentence specified in the applicable guideline.” Similarly, under 18 U.S.C. s 3742(b), the government may appeal a sentence “imposed for an offense for which a sentencing guideline has been issued by the Sentencing Commission ... and the sentence is less than the sentence specified in the applicable guideline.”

⁴²⁸ See Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1318 (2005); see also Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 10 (2005) (Minnesota became the first state to adopt comprehensively the guidelines reform model in 1978. Pennsylvania and Washington followed suit by creating their own guidelines in 1982 and 1983 respectively. Many states created sentencing commissions to develop comprehensive guidelines schemes.).

⁴²⁹ See Edward R. Becker, *Flexibility and Discretion Available to the Sentencing Judge Under the Guidelines Regime*, 15 FED. PROBATION 10, 10 (1991) (noting that “[t]he most widely recognized avenue of flexibility under the guidelines is the sentencing judge’s ability to depart from the prescribed sentencing range”).

⁴³⁰ “[T]he Commission believes that despite the courts’ legal freedom to depart from the guidelines, they will not do so very often ... because the guidelines, offense by offense, seek to take account of those factors that the Commission’s data indicate made a significant difference in pre-guidelines sentencing practice.” The Commission explained in its Manual, “The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.” See U.S.S.G. ch. 1, pt. A, at 6 (1995).

not surprising that most sentencing judges and scholars viewed the Guidelines as unduly restrictive limitations on “the judges” sentencing discretion.⁴³¹

3. Advisory Sentencing Guidelines After Booker

Although the SRA was designed intended to implement a mandatory sentencing grid to bind judicial discretion in sentencing, the Supreme Court in *United States v. Booker*,⁴³² struck down the provisions that made the Guidelines mandatory, as violating the Sixth Amendment's jury trial guarantee. The Court's decision consists of two majority opinions. The first ruling came on the heels of the rule of *Apprendi v. New Jersey*⁴³³ and *Blakely v. Washington*⁴³⁴ in which the Court held that any fact (other than a prior conviction) that is necessary to support a sentence exceeding the maximum authorized by the legislature must be admitted by the defendant or proved to a jury beyond a reasonable doubt.⁴³⁵ The *Booker* “Sixth Amendment” majority found that the Sentencing Guidelines violated the Sixth Amendment after *Apprendi* because they required sentences to be increased when judges at sentencing proceedings found certain facts (such as the amount of drugs involved or the amount of losses caused in a financial crime) --- and those findings would be used to raise the sentence beyond the Guideline for the basic crime for which the defendant was convicted.

To correct the problem of the Sixth Amendment violation, the *Booker* “remedial” majority ruled that the proper remedy for the Sixth Amendment violation was to sever two provisions of the Sentencing Reform Act that made the Guidelines mandatory.⁴³⁶ The Court removed 18 U.S.C. § 3553(b)(1), thus rendering the Guidelines effectively advisory and outside the scope of *Apprendi*.⁴³⁷ The Court stated that in applying the advisory Guidelines, sentencing judges were required to “consider” the factors set forth in Section 3553(a) in imposing a sentence.⁴³⁸ Section 3742(e), which previously provided for *de novo* review

⁴³¹ See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 97 (2003) (noting that “[t]he Sentencing Guidelines make plea bargaining a cause for concern... because they curtail the judge's discretion”); see also Sharon L. Davies, *Study Habits: Probing Modern Attempts to Assess Minority Offender Disproportionality*, 66 LAW & CONTEMP. PROBS. 17, 19 (2003) (recognizing an “age of sentencing guidelines which simultaneously limit the discretion of sentencing judges while conferring greater outcome-producing power on prosecutors”); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L. J. 1681, 1697 (1992) (“The Guidelines Manual is a code of changing regulations that substantially constrain the wide ranges within which judges formerly exercised discretion.”); Vincent L. Broderick, *The Importance of Flexibility in Sentencing*, 78 JUDICATURE 182, 182 (1995).

⁴³² *United States v. Booker*, 543 U.S. 20 (2005).

⁴³³ *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

⁴³⁴ *Blakely v. Washington*, 542 U.S. 296 (2004).

⁴³⁵ *Booker*, 543 U.S. at 244 (Stevens, J., delivering the opinion of the Court in part).

⁴³⁶ *Id.* at 245 (Breyer, J., delivering the opinion of the Court in part).

⁴³⁷ *Id.* at 259.

⁴³⁸ *Id.* at 259-60.

As provided by 18 U.S.C. § 3553(a), the court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—

of a district court's sentencing decision, was also excised, for it contained "critical cross-references" to the other excised portions.⁴³⁹ The Court noted that the standard of appellate review in the newly revised guidelines was review for "reasonableness".⁴⁴⁰

The subsequent Supreme Court cases of *Gall v. United States*⁴⁴¹ and *Kimbrough v. United States*⁴⁴² clarified the role of appellate courts reviewing sentences for "reasonableness" and enhanced the legacy of *Booker* in expanding the discretion of district courts in sentencing.⁴⁴³ In *Gall* the Court held that courts of appeals may not presume that a sentence falling outside the range recommended by the Federal Sentencing Guidelines is unreasonable.⁴⁴⁴ Instead, appellate courts must apply a "deferential abuse-of-discretion

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of the defendant set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

⁴³⁹ *Booker*, 543 U.S. at 260.

⁴⁴⁰ *Id.* at 264.

⁴⁴¹ *Gall v. United States*, 552 U.S. 38 (2007).

⁴⁴² *Kimbrough v. United States*, 552 U.S. 85 (2007).

⁴⁴³ See Ryan Scott Reynolds, Note, *Equal Justice Under Law: Post-Booker, Should Federal Judges Be Able to Depart from the Federal Sentencing Guidelines to Remedy Disparity Between Codefendants' Sentences?*, 109 COLUM. L. REV. 538, 560, 563-64 (2009) (noting that both cases expanded district courts' discretion and that some courts of appeals have responded by reconsidering their treatment of particular sentencing factors).

⁴⁴⁴ *Gall*, 522 U.S. at 47.

standard,” according due respect to “the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance [from the Guidelines].”⁴⁴⁵

In *Kimbrough*, the Court held that judges, in applying the now-advisory Guidelines, were free to reject the Guidelines' 100-to-1 ratio that treated one gram of crack cocaine as equivalent to one hundred grams of powder cocaine.⁴⁴⁶ The *Kimbrough* Court determined that the Sentencing Commission did not exercise its “characteristic institutional role” in formulating the crack cocaine Guideline,⁴⁴⁷ and thus the district judge was better situated to formulate a sentence that met the requirements of Section 3553(a).⁴⁴⁸ The Court indicated that the district courts are now free to impose a sentence outside the sentencing range “based solely on policy considerations, including disagreements with the Guidelines,”⁴⁴⁹ provided the sentence was framed “in line” with the requirements of Section 3553(a).⁴⁵⁰

In the above series of decisions, the Supreme Court has effectively made the Guidelines advisory. Under the advisory sentencing regime, the sentencing court still has to consider the Guidelines ranges, but the court is able to tailor the sentence above or below the Guidelines range in its discretion.

As discussed earlier, the clemency power is essentially unconstrained by Federal and State Constitutions. In this sense, the executive's power to exercise clemency is roughly analogous to a sentencing judge's power to sentence under a system of indeterminate sentencing --- under that system the sentencing judge is free, with very few limitations, to set a sentence within very broad limits. An unconstrained system of clemency suffers similar infirmities as those found in indeterminate sentencing schemes --- disparity, subjectivity, and unfairness. As discussed above, the Federal Sentencing Guidelines remedied many of those problems of indeterminate sentencing, by implementing a system of guided discretion. This article advocates that for the same reason, an analogous system of guided discretion should be implemented to control the executive's decision to commute LWOP sentences.

C. Guided Discretion: The Cornerstone of Fair Sentencing

The United States has spent the last century exploring how to establish a sentencing system that could deliver fair sentencing results. The basic problem is how to regulate judicial discretion in sentencing. Over the last century's efforts in seeking a fair sentencing scheme, Congress has generally developed two approaches: “unguided discretion” and “guided discretion.” In this section, I will demonstrate that a “guided discretion” sentencing scheme is the best scheme to guarantee fair sentencing results; and that a similar approach of guided discretion will be the best way to assure fairness and justice in commutation decisions.

1. Definition and Premise

To conduct the following discussion, it is important to clarify a number of basic concepts.

(a) *Scope*. The scope of the following discussion is confined to the correlation between the sentencing approach employed by sentencing judges and sentencing outcomes. The length of the sentence that an

⁴⁴⁵ *Id.* at 51-52.

⁴⁴⁶ *Kimbrough*, 522 U.S. at 109-10.

⁴⁴⁷ *Id.* at 109.

⁴⁴⁸ *Id.* at 110.

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.* at 110-11.

offender actually serves is affected by inputs from multiple sources. These inputs include: 1) prosecutors have discretion to bring or drop the charges; 2) defense lawyers could provide effective or ineffective assistance of counsel; 3) the jury has the power to convict or acquit; 4) judges have discretion in deciding the length of sentence; 5) parole authorities in states with parole have the discretion to shape the sentence towards the prisoner's rehabilitation; and 6) the executive has the discretionary clemency power to reduce an individual sentence. The analysis of correlation between the judicial sentencing approach and sentencing outcomes is necessarily limited to judicial sentencing decisions. It is the study of judicial sentencing decisions that will lead us to the analogy for guided discretion of clemency decisions.

(b) *Discretion*. Trial judges are entrusted with sentencing discretion in announcing a particular sentence appropriate to the defendant. According to Dworkin, "The concept of discretion is at home in only one sort of context; when someone is in general charged with making decisions subject to standards set by a particular authority.... Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction".⁴⁵¹ A sentencing judge's sentencing discretion could be either "unguided" or "guided". The "unguided discretion" sentencing approach was employed in the indeterminate sentencing era, as discussed above, in which sentencing judges acted completely on their own discretion (within very broad sentencing ranges established by the legislature) in considering any factors relevant to an individual criminal case. The "guided discretion" sentencing approach is that employed in the Sentencing Guideline era, under which judges refer to guidelines to consider the established factors relevant to an individual offender in reference to the severity of the offense and the offender's criminal history.⁴⁵²

(c) *Sentencing outcomes*. Sentencing outcomes in the following discussion refers to the sentences determined by sentencing judges for a convicted criminal defendant. The actual length of sentence, which is affected by decisions of the parole board and executive commutation is not the relevant consideration for this discussion. The death penalty is also excluded from the discussion of sentencing outcomes, for there are particular proceedings directing whether to impose a death sentence in capital cases.

(d) *Sentencing goal*. The ultimate goal of sentencing is to seek a fair and just sentence for each individual. Sentencing justice is comprised of three components: 1) Consistency (i.e., that similarly situated offenders are treated similarly);⁴⁵³ 2) Individualized sentencing;⁴⁵⁴ and 3) Proportionality (i.e., that the punishment fits the crime, as determined in light of interests in retribution, deterrence, rehabilitation, and incapacitation).⁴⁵⁵ In the following section I argue that a system of guided discretion is superior to a system

⁴⁵¹ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 31 (1977).

⁴⁵² It must be conceded that *Booker* and its progeny have made the Sentencing Guidelines no longer mandatory, but merely advisory, thus allowing sentencing judges to impose a sentence outside the sentencing grids. See *Booker*, 543 U.S. 220 (2005). In fact, whether the guidelines are mandatory or advisory, both types are within the "guided discretion" approach, for because even if only advisory, sentencing judges are required to consult with the guideline factors when making sentencing decisions. In other words, the advisory guideline is merely a revised "guided discretion" approach, which intends to make the guidelines more workable in delivering fairer sentencing outcomes. See section the part of C(2)(a)(ii) in section III, *infra*.

⁴⁵³ See, e.g., FRANKEL, *supra* note 285 (emphasizing the need to avoid unwarranted disparities in sentencing).

⁴⁵⁴ Jeffrey S. Sutton, *An Appellate Perspective On Federal Sentencing After Booker And Rita*, 85 DENV. U. L. REV. 79, 79-81(2007) (noting the importance of individualization in sentencing and that it has always been a priority in federal sentencing).

⁴⁵⁵ The concept of proportionality is embodied in the Sentencing Guidelines. As required by 18 U.S.C. § 3553(a), district courts should impose a sentence sufficient, but not greater than necessary, to meet the four purposes of sentencing set forth in subsection 3553(a)(2) --- retribution, deterrence, incapacitation, and rehabilitation.

of unguided discretion in achieving these goals --- and thus that a similar system of guided discretion is superior in implementing a fair and just system of commutation decisions.

2. Guided Discretion: An Approach That Better Promotes Consistency in Sentencing, Without Sacrificing Individualized Sentencing

The American experience with sentencing in the 20th Century provides a strong indication that the “guided discretion” approach is superior to “unguided discretion” in assuring sentencing consistency.

The “unguided discretion” sentencing approach in the indeterminate sentencing era did not emphasize consistency in sentencing.⁴⁵⁶ Fueled by unbridled enthusiasm for the penal philosophy of rehabilitation, the goal of sentencing in that indeterminate era was merely to impose individualized sentence geared toward the offender’s rehabilitation. Judges could consider any sentencing factor they found relevant to the individual offender.⁴⁵⁷ Arguably, the “unguided discretion” sentencing approach employed in the indeterminate era succeeded in achieving the sentencing goal of individualization. However, as revealed by pre-Guidelines sentencing practice and scholarship, such unguided discretion resulted in actual and perceived gross sentencing disparities,⁴⁵⁸ and inevitably failed in achieving the sentencing goal of consistency.

In response to the “unguided discretion” approach’s failure to achieve the sentencing goal of consistency, sentencing guidelines were invented to reduce sentencing disparities.⁴⁵⁹ The sentencing guidelines system has in fact substantially reduced the unjustifiable sentencing disparities at both the state and federal level.⁴⁶⁰ And what makes the sentencing guidelines system a success in producing consistent

⁴⁵⁶ FRANKEL, *supra* note 285, at 25 (citing statistics showing significant disparities in federal sentencing decisions).

⁴⁵⁷ See Gertner, *A Short History*, *supra* note 11, at 695-96 (2010) (“Crime was a ‘moral disease,’ whose cure was delegated to experts in the criminal justice field, one of whom was the judge... [I]t made no more sense to limit the kind of information that a judge should get at sentencing to exercise his or her “clinical” role than to limit the information available to a medical doctor in determining a diagnosis”. “Consistent with this view of judges as the sentencing experts, Congress took a back seat, prescribing a broad range of punishments for each offense, and intervening only occasionally to increase the maximum penalty for specific crimes in response to public demand”).

⁴⁵⁸ See Richard Singer, *In Favor of “Presumptive Sentences” Set by a Sentencing Commission*, 24 CRIME & DELINQUENCY 401, 402 (1978) (Unguided sentencing resulted in a “gross disparity in sentencing, with different sentences imposed upon similar offenders who have committed similar offenses by the same judges on different days, different judges on different days, different judges on the same day, and different judges in different jurisdictions.”); see also Tonry, *supra* note 406, at 7 (“Unwarranted disparities, explicable more in terms of the judge’s personality, beliefs, and background than the offender’s crime or criminal history, have repeatedly been demonstrated.”).

⁴⁵⁹ Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 35 (2000) (noting that “reformers believed that sentencing guidelines, by codifying standards which would direct judges’ sentencing decisions in most but not all cases, could reduce sentencing disparities and maintain sentencing flexibility, while promoting the development of principled sentencing law and policy.”).

⁴⁶⁰ Several credible studies have found that the guidelines system has reduced sentencing disparities. See e.g., Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 ST. LOUIS U. L. J. 425, 443 (2000) (“[G]uidelines systems in a number of states have succeeded in improving sentencing policy and practice reducing bias and disparity in sentencing....”); see also James M. Anderson, Jeffrey R. Kling & Kate Stith, *Measuring Interjudge Disparity: Before and After the Federal Sentencing Guidelines*, 42 J. OF LAW AND ECON. 271, 303 (1999) (concluding “the [Sentencing] Guidelines (and

sentencing outcomes is the “guided discretion” approach. Under the sentencing guidelines system, judges’ discretion in considering the sentencing factors are guided by the codified sentencing standards, especially in terms of the severity of the offense and the offender’s criminal history,⁴⁶¹ and so similar cases are more likely to be treated similarly. Thus the “guided discretion” approach is better than the “unguided discretion” approach in achieving the sentencing goal of consistency.

Meanwhile, the “guided discretion” approach’s ability in achieving the sentencing goal of individualization remains attainable. Under the Sentencing Guidelines system, judges can fashion a sentence by considering the specific aspects of an individual case, --- the nature and circumstances of the offense and the offender’s criminal history and characteristics --- because these factors can be incorporated into the standardized Sentencing Guidelines.⁴⁶² Thus, different cases can be treated differently depending on the severity of the offense and the characteristics and criminal history of the offender. In other words, under the Guidelines system, judges still make individualized sentencing decisions by considering the factors relevant to the individual cases, as long as the factors are within the standardized factors prescribed by the Guidelines. That is a process far different from the “unguided discretion” approach employed in pre-Guideline era, under which judges could consider any factors they wished.⁴⁶³

It must be conceded that the Federal Sentencing Guidelines system has shortcomings in implementing a sentencing system that is both consistent and individualized. Most importantly, the Guidelines did not effectively codify the multitude of factors relevant to a well-tailored sentencing decision. For example, before *Booker*, under the mandatory Guidelines, individualized factors such as the defendant's family responsibilities, aberrant behavior, community ties, and diminished capacity could not be used to mitigate a punishment.⁴⁶⁴ However, this deficit does not prove that the “guided discretion” approach is incapable of meeting the sentencing goal of individualization. It simply shows that the Sentencing Guidelines *as written* are not comprehensive enough to allow sentencing judges, in certain cases, to consider individual circumstances that might well be necessary to assure sentencing that is sufficiently individualized. The problem is not in the Guidelines system itself, but rather in the choices made by legislators and the

concomitant statutory minimum sentences) have been successful in reducing interjudge nominal sentencing disparity”).

⁴⁶¹ As required by the SRA, in determining the “particular sentence to be imposed,” judges shall consider “the nature and circumstances of the offense and the history and characteristics of the defendant,” “the need for the sentence imposed” to satisfy the purposes of sentencing, the “kinds of sentences available” by statute, the kinds and range of sentences set forth in the “guidelines,” “any pertinent policy statement,” and the “need to avoid unwarranted sentence disparities” among similarly situated defendants. *See* 18 U.S.C. §3553(a)(1)-(6).

⁴⁶² In his dissent to the remedial decision in *Booker*, Justice Scalia reasoned that “logic compels the conclusion that the sentencing judge, after considering the recited factors (including the Guidelines), has full discretion, as full as what he possessed before the Act was passed, to sentence anywhere within the statutory range.” This assertion has truly indicated that Sentencing Guidelines, --- a “guided discretion” approach, --- by allowing judges consider the “recited factors” within the Guidelines, do not deny the sentencing goal of individualization. *See Booker*, 543 U.S. at 251 (Scalia, J., dissenting).

⁴⁶³ *See Williams*, 337 U.S. 241 (1949) (noting that judges are unconstrained in both the sentencing factors to consider and the mode of proof for establishing those factors).

⁴⁶⁴ *See* Sandra D. Jordan, *Have We Come Full Circle? Judicial Sentencing Discretion Revived In Booker And Fanfan*, 33 PEPP. L. REV. 615, 646 (2006); Myrna Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905 (1993) (noting that Federal Guidelines did not take account of facts such as that mothers often have sole or primary responsibility for care of children, nor that they may have become involved in criminal activity because of social or cultural pressures).

Sentencing Commission to limit the consideration of factors that might be important to an individualized sentence.

In conclusion, of the two sentencing approaches, the “guided discretion” approach is better able to satisfy the sentencing goals of individualization and consistency; it is a better system for ensuring that sentencing justice is delivered via a fair sentencing procedure in each individual case.

3. Guided Discretion: An Approach that Better Guarantees Proportionality

Besides ensuring consistency while yet allowing appropriate individualization, an optimal sentencing approach must also be able to deliver sentences that are proportionate to the individual offender’s crime. In the following analysis, I will argue that while there is no sentencing system that can produce a perfect outcome, a system based on “guided discretion” is most likely to reach sentences that are proportional to the individual offense.

(a) Limitations in Codifying the Full Range of Sentencing Factors.

It is true that under a “guided discretion” approach there will be a difficulty in establishing standards that encompass the full range of appropriate sentencing factors for every individual case. And theoretically, the “unguided discretion” approach could be able to cover a full range of sentencing factors, because that approach allows judges to consider every factor relevant to an individual case. However, the “unguided discretion” approach encounters the same infirmities in having sentencing judges apply the “full range” of sentencing factors. Such finiteness is caused by the limited personal knowledge of the individual judge, instead of the legislature, in considering what constitutes standardized appropriate sentencing factors. Since every single judge has a different personal understanding of what constitutes appropriate sentencing factors, it is impossible to expect that every sentencing judge is knowledgeable enough to apply, in every individual case, the supposed ideal full range of sentencing factors. In an “unguided discretion” approach, different judges will apply different personalized standardized sentencing factors, and thus unfair and disparate sentences will be produced in the cases where the sentencing judge did not consider the sentencing factors beyond his personal knowledge and predilection.

(b) Errors in Presetting the Appropriate Sentencing Range.

A significant problem in promoting proportionality in any sentencing system is how to determine the appropriate sentencing range or guideline. A prime example is the Sentencing Guidelines for drug offenses. As Congress prescribed high drug sentences and the Sentencing Commission established correspondingly harsh guidelines, both defendants and judges argued that the guideline sentences for many drug crimes were disproportionate to the crime.⁴⁶⁵ One might argue that this experience shows a deficiency in a system

⁴⁶⁵ Frank O. Bowman, *Fear Of Law: Thoughts On Fear Of Judging And The State Of The Federal Sentencing Guidelines*, 44 ST. LOUIS U. L. J. 299, 338 (2000) [hereinafter Bowman, *Fear of Law*] (“[T]he honest application of the guidelines in drug cases tends to produce sentences so high that most judges in most cases do not consider a sentence higher than the bottom of the range to be a tenable option”.); see also Frank O. Bowman, III, *Playing “21” With Narcotics Enforcement: A Response to Professor Carrington*, 52 WASH. & LEE L. REV. 937, 980-81 (1995) (noting that drug sentences are often longer than can be rationally justified to achieve deterrence); Marvin E. Frankel, *Sentencing Guidelines: A Need for Creative Collaboration*, 101 YALE L. J. 2043, 2047 (1992) (“[T]he Commission produced guidelines that actually increase the overall severity [of federal sentences], taking particular aim at so-called white-collar offenders whom the Commission found (perhaps correctly) to have been treated with undue solicitude.”); Daniel Richman, *Cooperating Clients*, 56 OHIO STATE L.J. 69 (1995) (citing federal statistics showing a significant increase – after adoption of the Guidelines --- in both incarceration and the length of offense, and an increase in mean prison terms for drug offenses from 27 months to 67 months); *Bonin v. Calderon*, 59 F.3d 815 (9th Cir. 1995) (Kozinski, J., concurring) (criticizing the fact that the Guidelines often provide harsher sentences for small-time drug offenders than for murderers and rapists).

of guided discretion in effectuating proportionality. But again the problem of disproportionality is not in the system of guided discretion but rather in the substantive decisions made by the legislature.

It is noteworthy that the “unguided discretion” approach has the same problem of ineffectiveness in regulating or eliminating unduly harsh sentencing. It could be argued that in the “unguided discretion” approach, judges, without restriction on how to evaluate sentencing factors, could definitely enter a sentence that falls into their comfort zone. But because different judges have different perceptions of fair sentencing when evaluating the weights of sentencing factors, it is hard to say that the sentences entered by individual judges within their own comfort zone upon their personal perception are all fair and proportionate sentences. As revealed in the history of the indeterminate sentencing era, without any instruction on exercising discretion in how to evaluate the weights of particular sentencing factors, judges entered either lenient or harsh sentences that were disproportionate to the crime one way or another.⁴⁶⁶

In sum, any flaw in the “guided discretion” approach in obtaining proportionate sentencing stems from the imperfections of the legislature, whereas the flaw in the “unguided discretion” approach stems from the limited perception and individual predilections of the individual sentencing judge.

(c) Potentiality of Producing Fair Sentencing Outcomes

It is true that, as discussed above, the “guided discretion” sentencing approach carries deficiencies in presetting a perfect standardized sentencing regime with full range of sentencing factors and appropriate sentencing ranges. But the “guided discretion” approach is able to make adjustment within the mechanisms of the law towards the perfect regime. As noted by Professor Bowman, “Any system that aims to constrain human behavior within a web of rules will be subject to continuing adjustment ...”.⁴⁶⁷ The development of Federal Sentencing Guidelines has demonstrated how the “guided discretion” sentencing scheme can continually make adjustment towards the perfection of the sentencing law. It is well known that, because of the inadequately crafted sentencing factors and inappropriately calculated sentencing ranges, Sentencing Guidelines were widely criticized and upset district judges, who were forced to enter unnecessary “harsh” or “unjust” sentences.⁴⁶⁸ But, *Booker* and the Fair Sentencing Act of 2010 (FSA) have significantly modified the Guidelines system to better promote fair sentencing results. And the dynamic process of legislative input and Guideline amendment is available for further developments and fixes. The same cannot be said of a system of unguided discretion, which is the epitome of a disorganized approach to sentencing.

(1) Booker, A Common Law Approach To Modify The Guidelines Regime

At first glance, *Booker* may seem to pave the way for a discretionary sentencing regime, one that would allow the judges freely to impose a sentence inside or outside the Guidelines range. But such assessment is merely an illusion. *Booker* not only has not terminated the “guided discretion” approach employed in the Guidelines regime, but it also has fostered a common law approach of sentencing lawmaking and thereby will significantly contribute to the evolution of proportionate sentencing under the Guidelines regime.⁴⁶⁹ In this section, I will analyze how that common law approach promoted by *Booker* is

⁴⁶⁶ See Louis F. Oberdorfer, *Mandatory Sentencing: One Judge’s Perspective--2002*, 40 AM. CRIM. L. REV. 11, 14 (2003) (“In the early 1970s, public outrage about increasing violent crime was growing; Congress and state legislatures were listening. From one segment of public opinion came complaints that some judges were too lenient From another segment came complaints that sentences were too long”).

⁴⁶⁷ See Bowman, *Fear of Law*, *supra* note 465, at 357.

⁴⁶⁸ See, e.g., Rhonda McMillion, *Second Effort: ABA Supports Push to Restore Judicial Discretion in Sentencing*, 90 A.B.A. 62 (2004).

⁴⁶⁹ A suggestion for the need for a common law approach in the development of the federal sentencing guidelines can be found in Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence That Undermines the Federal Sentencing Guidelines*, *see supra* note 459.

an approach will improve the “guided discretion” sentencing regime and assure that it is a better system than that of “unguided discretion” in assuring proportionate sentencing.

i) Judicial Development of Common Law In Advancing the Guidelines Regime

The notion of a judicially-directed “common law of sentencing” was raised when the sentencing reformers drafted the sentencing guidelines model.⁴⁷⁰ Recognizing that the guidelines could not fully take into account all relevant sentencing factors in advance, reformers intentionally retained judicial discretion to depart from the Guidelines in the guidelines model.⁴⁷¹ Reformers believed that, by requiring the judges to articulate the reasons for departure from the guidelines and instituting appellate review of the sentencing decisions,⁴⁷² a “common law of sentencing”,⁴⁷³ as Professor Freed noted, would be formulated through the following process: 1) trial judges’ reasoned statements for departing from the guidelines; 2) appellate judges’ assessments of the reasons for departure; 3) a common law of justified departures from the Guidelines; and 4) amendment of the guidelines to codify the common law developments.⁴⁷⁴ Reformers believed that the collaboration of the commission designing sentencing guidelines and the courts developing a “common law of sentencing” would eventually lead to a system of fair and proportionate sentencing for each individual.⁴⁷⁵

⁴⁷⁰ See, e.g., Berman, *A Common Law*, *supra* note 420, at 96 (describing how the reformers designed a sentencing guidelines model that incorporated the mechanisms to promote a judicially-directed “common law of sentencing”).

⁴⁷¹ See Freed, *supra* note 431, at 1694 (noting that, when Congress passed the SRA, it “envisioned an interactive guidelines process involving federal judges . . .” Judges “would be authorized to individualize sentences and depart from the guidelines when a case did not fit the guidelines structure, or when Commission guidance failed to take adequate account of circumstances a court found compelling.”).

⁴⁷² PIERCE O’DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM 59-60, 94-95 (1977) (asserting that requiring the specific reasons for departures and instituting the appellate review for these departures provides “an ideally suited institutional mechanism to upgrade--through the gradual development of case law--the rationale and rationality of sentencing.”).

⁴⁷³ See LESLIE T. WILKINS ET AL., SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION xvii (1978) (discussing that the departures would provide “an informational feedback loop,” and “inject a continuous element of self-improvement and regeneration into the guidelines”); see also Robert Sweet et al., *Towards a Common Law of Sentencing: Developing Judicial Precedent in Cyberspace*, 65 *FORDHAM L. REV.* 927, 939-40 (1996) (urging the creation of a common law of sentencing founded on the work of sentencing judges through “written, published sentencing opinions”).

⁴⁷⁴ Professor Freed has provided a clear and concise explanation of how judicial departure decisions would advance the federal sentencing guidelines:

[Judges] would be authorized to individualize sentences and depart from the guidelines when a case did not fit the guidelines structure, or when Commission guidance failed to take adequate account of circumstances a court found compelling. Their statements of reasons would lay the foundation for appellate review. By reviewing large numbers of cases, courts of appeals would gain a sense of trial court sentencing practice and the parameters of agreement and disagreement with the guidelines. The appellate courts would define common law principles to resolve conflicts. . . . The Commission would watch this process closely. It would modify or “fine-tune” its guidelines as individual cases illuminated problems.

See Freed, *supra* note 431, at 1694.

⁴⁷⁵ See Berman, *A Common Law*, *supra* note 420, at 96 (“[A] central virtue of the guidelines model promoted by reformers was its sound institutional structure for addressing lawlessness in sentencing. . . .

Although the ideal judicial development of a common law of sentencing, which had been adopted by SRA in 1984,⁴⁷⁶ was disrupted by Congress's passage of mandatory sentencing laws and the Sentencing Commission's restrictive treatment of judges' departure from guidelines,⁴⁷⁷ the *Booker* decision, which restored judges' discretion to depart from the Guidelines, has reopened the possibility of a common law of sentencing that can lead to a flexible and fair system of sentencing while providing appropriate limitation on judicial discretion.⁴⁷⁸ By authorizing limited judicial discretion to depart from the Guidelines, *Booker* has placed the judges in the sentencing lawmaking process, specifically in the following two aspects: 1) supplementing the sentencing factors that the Guidelines had "not adequately taken into consideration",⁴⁷⁹ and 2) modifying the harsh or lenient sentencing ranges provided by certain Guidelines.

In short, judicial development of a common law of sentencing would continuously modify the Guidelines to address the inadequacy or absence of certain sentencing factors and the harshness of others⁴⁸⁰ --- meaning that the "guided discretion" sentencing approach will gradually approach (even though it may not attain) the goal of proportionate sentencing in every case.

From that point, to best take advantage of institutional competencies, the particulars of sentencing law would evolve through the collaborative efforts of an expert commission (providing a system-wide perspective) and an experienced judiciary (providing a case-specific perspective.); see also Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 283-85 (1977) (arguing that the sentencing guidelines model "would allow the sentencing commission to have a long-term formative and unifying effect on criminal sentences and yet preserve flexibility and provide an incentive for the essential process of judicial development of common law of sentencing").

⁴⁷⁶ Becker, *supra* note 429, at 10, 11 (stressing that Congress "intended that departures play a critical role in the ongoing process begun by the SRA" by providing "the Sentencing Commission with the feedback it needs to refine the guidelines over time").

⁴⁷⁷ See, e.g., Berman, *A Common Law*, *supra* note 420, at 99-102 (describing how the judicial role in the sentencing lawmaking process was disrupted by Congress and the Sentencing Commission).

⁴⁷⁸ See Nancy Gertner, *Supporting Advisory Guidelines*, 3 HARV. L. & POL'Y REV. 261, 279 (2009) ("Efforts to develop a common law of sentencing at both levels will be mutually reinforcing. As lower courts begin to apply alternative sentencing frameworks to individual cases, post-*Booker* appellate review will begin to have more content. In turn, meaningful appellate review will help guide lower courts to make future sentencing decisions.").

⁴⁷⁹ See Freed, *supra* note 431, at 1699 (noting that the purpose of the departure provision of Section 3553(b) is to authorize the courts to enter departure sentences on the condition that "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described").

⁴⁸⁰ "Family ties and responsibilities" would be an example that indicates *Booker's* contribution to the evolution of the Guidelines in covering the adequate range of sentencing factors. Family ties and responsibilities, under USSG § 5H1.6, used to be a "discouraged factor" in the pre-*Booker* era. But post-*Booker*, family ties and responsibilities in certain cases may be considered as offender characteristics under § 3553. See THE OFFICE OF GENERAL COUNSEL OF U.S. SENTENCING COMMISSION, DEPARTURE AND VARIANCE PRIMER 32-33 (June 2013).

"Crack cocaine" would be another example that indicates *Booker's* contribution to the evolution of the Guidelines in modifying harsh sentencing. In the drug guideline, the Commission created the 100-to-1 quantity ratio throughout the drug table. In *Kimbrough v. United States*, 552 U.S. 85 (2007), the Supreme Court held it is not "an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve §3553(a)'s purposes, even in a mine-run case."

ii) Guided Discretionary Judicial Departures

This is not to say that *Booker* has returned us to the chaotic days of indeterminate sentencing. Judicial discretion post-*Booker* is not unconstrained but is rather a framed (guided) departure which is designed to create a common law of sentencing and according amendment of guidelines, rather than a series of patchwork and individualized decisions that was the hallmark of “unguided discretion.”⁴⁸¹ The Supreme Court imposed a “reasonableness” standard in *Booker* that appropriately establishes a system of “guided discretion” that differs in degree and not in kind from the pre-*Booker* procedure under the Guidelines.

Under the *Booker* “reasonableness” standard, a sentencing judge must “consider” the Guidelines as a “starting point” before “tailoring” them with the § 3553(a) factors.⁴⁸² Thus, judges’ discretion is still guided by the preset listed factors.

One could argue that the factors listed in Section 3553(a)⁴⁸³ are mostly generalized principles, and thus Section 3553(a) has left sentencing judges plenty of free space to exercise unwarranted discretion. But, in fact, the “reasonableness” standard has made the discretionary departure a guided departure. Framed by the “reasonableness” standard, the reasonable application of the § 3553(a) factors is required to bear a reasonable similarity to the Guidelines, which implies similar categorized sentencing factors listed in §3553(a) should be weighed alike to the Guidelines factors. Take “family ties” as an example: when sentencing judges applying §3553(a) consider “family ties”, --- a post-*Booker* judicially developed sentencing factor under §3553(a),⁴⁸⁴ --- as a mitigating sentencing factor, the judges’ sentencing consideration is framed under the “reasonableness” standard in two dimensions: first, the “family ties” suffices to be a sentencing factor, for it is categorically similar to the Guidelines presetting factors in terms of the offender’s character; second, the weight of the “family ties” should be reasonably relevant to the weight of the like factors set in the Guidelines --- thus it cannot be given undue or outsized weight in reducing a sentence, in the absence of any other relevant factors. .

In sum, the judicial discretionary departures, as required by *Booker*’s “reasonableness” standard, are guided by the Guidelines (starting point of sentencing consideration) and Section 3553(a) (reasonable adjustment of sentencing consideration). As these guided judicial departures develop a common law of sentencing and consequent amendment of the guidelines, the “guided discretion” sentencing scheme will gradually approach the substantive sentencing goal of delivering fair sentencing results.

⁴⁸¹ Both judges and scholars agree that *Booker* did not bring judicial discretion back to the pre-Guidelines era of absolute discretion. *See* United States v. Jaber, 362 F. Supp. 2d 365, 370 (D. Mass. 2005) (courts should not view *Booker* as a return to the “‘free at last’ regime, or a return to pre-1984 indeterminate sentencing.”); *see also* Jordan, *supra* note 464, at 644 (“Courts that take the position that the Guidelines have been tossed aside in favor of a completely discretionary sentencing scheme are equally misguided”).

⁴⁸² *See* United States v. Biheiri, 356 F. Supp. 2d 589, 594 n.6 (E.D. Va. 2005) (Guidelines should be a “useful starting point in fashioning a just and appropriate sentence.”); United States v. Terrell, 445 F.3d 1261, 1264 (10th Cir. 2006) (“The Guidelines continue to be the ‘starting point’ for district courts and for this court’s reasonableness review on appeal.”).

⁴⁸³ Section 3553(a) factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; ... (3) the kinds of sentence available; ... (5) the Guidelines and policy statements issued by the Sentencing Commission, including the advisory guidelines range; (6) the need to avoid unwarranted sentencing disparity; and (7) the need to provide restitution where applicable.

⁴⁸⁴ Dan Markel, Jennifer M. Collins & Ethan J. Lieb, *Criminal Justice And The Challenge Of Family Ties*, 2007 U. ILL. L. REV. 1147, 1174 (2007) (In a post-*Booker* world, “[c]onsideration of family responsibilities’ may now be viewed as part of a defendant’s ‘history and characteristics,’ and judges can assess those traits as reasons to mitigate the length of sentences.”).

b) FSA, A Statutory Law Approach To Modify The Guidelines Regime

Besides the common law approach, the “guided discretion” sentencing regime is also open to adjustment via legislation. Legislatures retain the power to set punishment proportionate to crimes. When policy changes in response to evolving understanding of justice and social circumstances, the legislature retains the power to modify the punishment, and thereby the Sentencing Guidelines would subsequently reflect the statutory changes towards a more refined “guided discretion” sentencing scheme. The passage of the Fair Sentencing Act of 2010 demonstrates that the sentencing guidelines regime is able to evolve towards a refined regime via legislative act.

Congress, in 1986, enacted the Anti-Drug Abuse Act, which set forth the quantity thresholds that produced the 100:1 powder-to-crack cocaine ratio.⁴⁸⁵ A defendant involved with five hundred grams of powder cocaine would receive a five-year mandatory minimum sentence, whereas possession of five grams of crack cocaine implicated the same minimum term.⁴⁸⁶ In response to the Anti-Drug Abuse statute, the Sentencing Commission set offense levels to reflect the mandatory minimums set forth in the statute.⁴⁸⁷ Over the following decades, the drug guidelines were attacked as disproportionate, especially towards the offenders involved in crack cases, most of whom were African-American.⁴⁸⁸ Congress responded with the passage of the Fair Sentencing Act in 2010, which increased the threshold amounts of crack cocaine that trigger the mandatory minimums, from five grams to twenty-eight grams.⁴⁸⁹ Shortly after the passage of the FSA, the Sentencing Commission promulgated an emergency amendment to the Guidelines, which made the Guidelines reflect the statutory changes.⁴⁹⁰ Thus, after the passage of the FSA, the drug sentencing guidelines will lead to drug sentences that are more close to fair sentencing results. This example shows that a Guidelines system can be flexible enough to remedy disproportionate results.

(d) Conclusion

The “guided discretion” sentencing scheme has been proved, not only by practical experience but also by theoretical analysis, to be preferable to the “unguided discretion” sentencing scheme in achieving fair sentencing goals on all count. The “guided discretion” sentencing scheme would function in a consistent manner in which similar cases would be treated alike. Sentencing judges would enter individualized sentences by considering the character and record of the individual offender and the circumstances of the particular offense, which are preset in the standardized guidelines. The “guided discretion” sentencing scheme, by taking into account established sentencing guidelines and sentencing factors, and by continually making adjustment, would more likely guarantee that the sentence is proportionately to the crime.

⁴⁸⁵ Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2 to 3207-3 (1986) (codified as amended at 21 U.S.C. § 841 (2006)).

⁴⁸⁶ Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002(1)(B), 100 Stat. 3207, 3207-3 (1986).

⁴⁸⁷ *Dorsey v. United States*, 132 S. Ct. 2321, 2327 (2012).

⁴⁸⁸ See Kyle Graham, *Sorry Seems To Be The Hardest Word: The Fair Sentencing Act Of 2010, Crack, And Methamphetamine*, 45 U. RICH. L. REV. 765, 766, ft. 7 (2013).

⁴⁸⁹ Fair Sentencing Act, Pub. L. No. 111-220, § 2, 124 Stat. 2372 (2010).

⁴⁹⁰ Fair Sentencing Act, Pub. L. No. 111-220, § 8, 124 Stat. 2372 (2010); Notice of a Temporary, Emergency Amendment to Sentencing Guidelines and Commentary, 75 FED. REG. 66, 188 (Oct. 27, 2010).

D. The Need for a “Guided Discretion” Scheme in Commuting LWOP Sentences

While the clemency power cannot be constrained as a matter of law, the question remains whether that power should be constrained as a matter of policy. The experience with sentencing systems based on guided and unguided discretion is rich with lessons for executive decisions on clemency. After all, the decision to commute the sentence of a LWOP inmate is not different in kind from the decision whether to sentence a defendant to life without parole in the first place. It is just made at a different time. Learning from the success of the implementation of the “guided discretion” sentencing scheme in the judicial sentencing system, it is certainly worth arguing that the executive clemency power to commute LWOP sentences should be instituted in a “guided discretion” scheme. In this section, I will conduct a comparative analysis of the judicial sentencing power and the executive clemency power, and argue that the exercise of the executive discretionary clemency power to commute LWOP sentences should be framed in a “guided discretion” scheme.⁴⁹¹

The executive branch and the judicial branch perform different functions under the regime of the separation of powers. However, when the executive exercises the clemency power to commute LWOP sentences, the executive performs the same function as the judicial branch in terms of determining appropriate sentences for the offenders, as follows:

The same feature of discretionary power. The executive clemency power to commute LWOP sentences and the judicial sentencing power are both the discretionary power authorized to one person, who must make decisions under the law. The executives are authorized by the Constitution to make decisions whether to commute sentences for LWOP inmates. The judges are authorized by sentencing law to make decisions imposing punishment against offenders.

The same functional area of criminal justice. Both the exercise of executive clemency power to commute LWOP sentences and the judicial sentencing power is to decide sentencing issues. The executives are empowered to decide whether to reduce or commute the LWOP sentences for an individual offender. The judges are empowered to decide the length of the sentence to be imposed on an individual offender.

The same goal of sentencing justice. Both the exercise of the power to commute LWOP sentences and the judicial sentencing power are implemented with the goal of seeking justice. The exercise of executive clemency power, by commuting or reducing punishment of a LWOP inmate, provides the individual offender the last resort for relief for the purpose of effectuating justice at the back end. The exercise of the judicial sentencing power, by imposing the appropriate punishment to offenders, seeks sentencing justice in each individual case at the front end.

The same pursuit of sentencing consistency, individualization, and proportionality. The judicial delivery of sentencing justice is accomplished when (1) the imposed sentence is tailored to the individual offender’s character and record and the circumstances of the particular offense; (2) similar cases are treated alike; and (3) the sentence is proportionate to the crime. The use of the clemency power to commute LWOP sentences should satisfy the same three goals: (1) the elimination or reduction of the sentence should be tailored around the individual applicant’s circumstances, such as innocence, mitigating factors, etc.; (2) applicants that apply for clemency with similar reasons should be treated alike --- a selective grant of clemency under the executive’s personal whim not only violates the principle of the rule of law, but also violates principles of procedural justice; and (3) the elimination or reduction of the LWOP sentence should be appropriate in light of the crime committed --- if the executive commutes or reduces a LWOP sentences without the constraint of proportionality, it would violate not only the goal of sentencing justice for the

⁴⁹¹ While this article focuses particularly on commuting LWOP sentences, the analogy from “guided discretion” sentencing schemes may be applicable more broadly to other clemency decisions such as a pardon. The analogy is not perfect, however, because the decision to commute a sentence deals with exactly the same issue as the sentencing determination, i.e., the length of a sentence.

sentence originally imposed, but also the principle of separation of power by interrupting the exercise of judicial and legislative power.

Because the executive clemency power to commute LWOP sentences shares the same traits as the judicial sentencing power in delivering sentencing justice, there should be the same conditions in its exercise --- if not as a matter of law, then as a matter of policy. Because the “guided discretion” scheme is the most advanced scheme of exercising the judicial power in delivering sentencing justice, the clemency power to commute LWOP sentences should be instituted subject to a “guided discretion” scheme as well.

It should be clarified that instituting the clemency power in the “guided discretion” scheme does not mean the “guided discretion” scheme should be equipped with the exactly the same standardized sentencing guidelines prescribed for guiding the exercise of judicial discretion in sentencing. The “guided discretion” scheme is a principle, which simply requires that the exercise of power should be structured or framed by reasonable rules. Accordingly, the clemency power should be subject to “guided discretion” scheme, but certainly not by the same sentencing guidelines prescribed for the exercise of the judicial sentencing power.

In conclusion, when the executive exercises the clemency power to commute LWOP sentences, the clemency power should be framed by a “guided discretion” scheme, which should be designed with unique guidelines rules sufficient to facilitate the exercise of clemency power to commute LWOP sentences in the pursuit of sentencing justice. The next section proposes a set of guidelines for this important task.

It must be clarified that I am not arguing that guidelines can be legally imposed to restrain the executive’s clemency decisions. Rather, the point is that such guidelines *should* be imposed as a matter of policy --- otherwise the carefully constructed system of controlled discretion at the front end of the sentencing decision could be irrationally undermined by uncontrolled discretion at the back end.

IV. Guidelines for Commuting LWOP Sentences

The previous discussion has demonstrated the inconsistent exercise of the clemency power in commuting LWOP sentences, and also the need to establish a system of guided discretion to regulate commutation that would be exercised arbitrarily. In this section, I propose a set of substantive and procedural standards that would guide the executive in making rational and reasonable commutation decisions for LWOP inmates.

The substantive standards are derived from the discussion above on when commutation decisions would be consistent with the legislative determination that LWOP sentencing is justified --- and on the assumption that it is simply bad policy to have sentencing determinations on the front end undermined at the back end.

The procedural standards are based on the principle that it is important (even though not constitutionally required) that commutation decisions are fairly and consistently made --- in order to avoid a signal to the public that they are nothing more than arbitrary political decisions. As Maryland's then-Governor Robert Ehrlich stated: "By establishing a clearly defined process for Executive Clemency requests" the Executive will bring "a high-level of integrity to the process"--- thereby assuring that public that the Executive is acting "in an objective manner, and bas[ing] my decision fully and fairly on the merits of each individual case."⁴⁹² If the process appears fair and open, then the public will be more likely to accept the substantive result of any clemency decision --- and that can only work to the favor of the Executive, by shielding her from allegations that a grant of clemency is nothing more than a payoff or an act of political expediency.⁴⁹³

What follows is a set of model standards (with explanatory notes) for commutation of LWOP sentences.

1. Grounds for Commutation

1.1 Excessive Punishment

The Executive may commute a LWOP sentence upon a finding that the sentence is now determined to be excessive in proportion to the crime for which the applicant was convicted. That finding can be made on one of three grounds.

(a) the standards under which the petitioner was sentenced have been subsequently adjusted downward, but the new adjustments have not given retroactive effect, so the petitioner cannot be given relief in the courts;

(b) the petitioner was sentenced erroneously to life without parole, but the error in sentencing cannot be corrected by the courts; or

(c) the petitioner presents newly discovered evidence of mitigating sentencing factors, but the discovery was made after the expiration of the time period for filing a motion to reduce the sentence.

⁴⁹² *Governor Ehrlich Clarifies Executive Clemency Process*, <http://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/001000/001015/unrestricted/20051987e.html>

⁴⁹³ Both the substantive and procedural rules set forth below might well be applicable to other forms of clemency decisions (such as pardons) and to other kinds of punishment (such as the death penalty and sentences for a term of years) --- but this dissertation focuses on commutation of LWOP sentences and accordingly the standards are tailored to that decision.

Note:

Section 1.1: Commutation of a life without parole sentence may be justified if the punishment can, at the time of the commutation decision, be found to be excessive. In this narrow instance, the commutation power supports sentencing justice without undermining the policies of finality, certainty, and proportionality that the legislature found compelling in establishing the sentence of life without parole. Although judicial proceedings are usually available to remedy sentencing injustice, there still exist possibilities of sentences that can be found erroneous or unduly harsh at the time of the commutation decision, as to which the judicial system does not provide an effective remedy. In such a limited situation, commutation can properly fill the role of a fail-safe device to restore sentencing justice.

Subdivision (a): An example of commuting a sentence based on subsequent reductions occurred at the federal level, under which a LWOP sentence could at one time be imposed on certain low-level drug offenses. Congress provided for lesser sentences in the Fair Sentencing Act of 2010 (FSA). But the LWOP inmates who were sentenced before the passage of FSA were not eligible for sentencing reduction relief,⁴⁹⁴ because Congress did not make the FSA retroactive.⁴⁹⁵ In such cases, in which the pre-FSA LWOP inmates could not seek reduction of their sentences under the FSA, commutation would be the significant gateway leading to sentencing justice.⁴⁹⁶

Such use of commutation is limited to the situation in which two conditions must be satisfied: (1) current law has provided less harsh sentences and (2) current law has no retroactive effect. If there is no current law providing less harsh sentences, there will be no legitimate foundation for the Executive in providing LWOP inmates relief for excessive punishment. Such a decision would amount to nothing more than disagreement with the legislature about the validity of the LWOP sentence --- and that disagreement should be vetted directly, rather than by using a particular individual as part of a political contest and undermining sentencing objectives at the back end. Similarly, if the ameliorating sentencing changes have been made retroactive, then the proper avenue for relief is in the court system, not the Executive.

Subdivision (b): Judicial errors in sentencing could result in an erroneous application of a LWOP sentence. One possibility is when a sentencing court applies an interpretation that is overturned by a Supreme Court decision in a different case, but that decision is not retroactively applicable.⁴⁹⁷ In such

⁴⁹⁴ All of the federal circuit courts, relying on the “general savings statute” have refused to grant relief to defendants who are sentenced prior to the passage of the Fair Sentencing Act.

See Jeff Lazarus, *Making The Fair Sentencing Act Retroactive: Just Think Of The Savings . . . Clause*, 61 CLEV. ST. L. REV. 713, 719 (2013). The savings statute, 1 U.S.C. § 109, provides:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

⁴⁹⁵ The Fair Sentencing Act did not explicitly state whether it could apply retroactively to those imposed with harsh sentences under the old drug sentencing law. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

⁴⁹⁶ Such use of commutation has been corroborated by President Obama’s recent issuance of commutation to the LWOP inmates who would have been sentenced to a shorter time under the FSA. See *supra* note 155-57 and accompanying text.

⁴⁹⁷ For example, in *Wofford v. Scott*, the court held that, under 28 U.S.C. §2255(e), “the only sentencing claims that may conceivably be covered by the savings clause are those based upon a retroactively applicable Supreme Court decision overturning circuit precedent”. *Wofford v. Scott*, 177 F.3d 1236, 1245

circumstances, commutation should function to provide relief for erroneously sentenced LWOP inmates. However, where the sentencing error can be corrected through judicial relief, exercise of the commutation power is unnecessary and intrusive.

Subdivision (c): Under federal and state practice, new trial motions based on newly discovered evidence are valid only if the motions are filed before the expiration of the statutory time limitation. The Supreme Court, in *Herrera v. Collins*, 506 U.S. 390 (1993), observed that there is no judicial relief for a habeas petitioner’s claim of innocence based on new evidence discovered after the expiration of the time limit for filing new trial motions,⁴⁹⁸ and suggested that clemency could provide a remedy for the claim of innocence based on new evidence discovered too late to support a new trial motion.⁴⁹⁹ Although *Herrera* is a case in which the petitioner claimed innocence, the same problem could arise with a petitioner claiming that a LWOP sentence must be reduced due to newly discovered evidence of mitigating factors. In such a situation, commutation should provide the fail-safe remedy for those LWOP inmates, who are subject to excessive punishment that cannot be corrected in the court system.

The newly discovered evidence should satisfy the requirement of “due diligence”: it must have been unknown and not reasonably discoverable at the time of sentencing.⁵⁰⁰ The policy of applying the “due diligence” principle is to encourage the petitioner to make adequate efforts in proving his claim during the judicial proceeding and to discourage the petitioner from strategically making use of the clemency proceeding --- which the petitioner might think maintains a looser scheme for making sentencing findings. That is, the “due diligence” standard must be applied to assure that the petitioner is not seeking to evade judicial review through the clemency process.

1.2 Battered Woman Syndrome

The Executive may commute a sentence of life without parole upon a finding that:

- a) the petitioner suffered Battered Woman Syndrome at the time of the crime, as established by reliable expert evidence;
- b) the Battered Woman Syndrome would be recognized as a ground for mitigating a sentence if the petitioner were tried at the present time; and
- c) the petitioner has already served sufficient time for the crime in light of the mental condition under which the petitioner committed the crime.

Note:

Under this rule a sentence of life without parole may be commuted as to a petitioner claiming that she had a valid claim of battered woman syndrome (BWS) that would mitigate the punishment if the case were tried at the time of the commutation decision. Before the mid-1970s, battered women who killed their

(11th Cir.1999); *see also, e.g.,* *United States v. Gilbert*, 640 F.3d 1293 (11th Cir. 2011) (error in sentencing could not be adjudicated because the claim would have been made in a successive habeas petition).

⁴⁹⁸ *Herrera*, 506 U.S. at 409.

⁴⁹⁹ *Herrera*, 506 U.S. at 417 (noting clemency is the traditional “fail safe” remedy “for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion.”).

⁵⁰⁰ *See* John A. Glenn, *What Constitutes "Newly Discovered Evidence" Within Meaning of Rule 33 of Federal Rules of Criminal Procedure Relating to Motions for New Trial*, 44 A. L. R. FED. 13, 21, § 2[a] (1979) (noting that a particular matter constituting “newly discovered evidence” must satisfy the “due diligence” principle).

abusers usually either pled guilty or claimed insanity, temporary insanity, or diminished capacity. In the late 1970s, BWS evidence began to be used by courts in some states as evidence in support of a self-defense claim.⁵⁰¹ But even where such evidence was theoretically recognized, it was often rejected for lack of relevancy,⁵⁰² or inability to aid the jury⁵⁰³ or some other exclusionary principle.⁵⁰⁴ Moreover, even allowing BWS evidence did not all guarantee that juries would be convinced that it was sufficient to establish the defense of self-defense.

Under this Rule, commutation, instead of pardon, is available to LWOP inmates, whose claim of self-defense based on the BWS evidence failed at trial, but who would have been eligible for a reduction in sentence, either due to sentencing leniency or a finding of guilt on a lesser included offense.⁵⁰⁵ The remedial policy is based on the premise that the Executive exercising the commutation power should refrain from intruding into the substantive law's determination of guilt and justification, but could provide a remedy to alleviate harsh sentences in light of new thinking about domestic abuse and the plight of battered women.

BWS, is an increasingly accepted theory to explain why a woman killed her abusive husband, but it has not been entirely accepted by the legislatures or courts as a ground for acquitting the battered woman under traditional self-defense law. Although every jurisdiction has accepted expert testimony on BWS to support claims of self-defense,⁵⁰⁶ battered women's claims of self-defense based on the BWS evidence mostly fail in the non-confrontational situation, in which the battered woman killed the abuser at the time when she was not under direct attack. In these cases, judges or juries usually refuse to find that the battered woman's killing is consistent with the requirement of traditional self-defense law of reasonable belief of

⁵⁰¹ See Elizabeth M. Schneider & Susan B. Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 WOMEN'S RTS. L. REP. 149, 159 (1978); see also Jeffrey B. Murdoch, *Is Imminence Really Necessity? Reconciling Traditional Self-Defense Doctrine With The Battered Woman Syndrome*, 20 N. ILL. U. L. REV. 191, 191 (2000).

⁵⁰² See, e.g., *People v. Aris*, 264 Cal. Rptr. 167 (Cal. Ct. App. 1989) (the court upheld the exclusion of testimony in a case in which a battered woman shot her sleeping husband. The trial court ruled that battered woman syndrome is not relevant to the issues of imminence of harm and reasonableness of response to deadly force.)

⁵⁰³ See, e.g., *Buhrle v. State*, 627 P.2d 1374, 1377 (Wyo. 1981) (holding that, because the defendant could not demonstrate that a reasonable expert opinion could be rendered, testimony would not aid the jury).

⁵⁰⁴ Prior to 1991, in Maryland, a battered woman who killed the abuser was unable to present the BWS evidence at trial. Trial judges refused to hear testimony about domestic violence and battered spouse syndrome on the ground that evidence of the battered woman's state of mind was irrelevant if the woman was the first aggressor. See, e.g., *Friend v. State*, No. 88-483 (Md. Ct. Spec. App. filed Dec. 12, 1988) (affirming the defendant's conviction of murder in the second degree for the shooting death of her husband. The court agreed that evidence on the syndrome was properly excluded because once evidence proves aggressor status, the honesty and the reasonableness of the defendant's belief that her actions were necessary to defend herself are utterly immaterial). Maryland has rewritten the law and admitted the evidence of the battered woman syndrome "notwithstanding evidence that the defendant was the first aggressor, used excessive force, or failed to retreat at the time of the alleged offense." Md. Code Ann., Cts. & Jud. Proc. § 10-91(b) (Supp. 1992).

⁵⁰⁵ See Charles P. Ewing, *Psychological Self-Defense: A Proposed Justification for Battered Women Who Kill*, 14 LAW & HUM. BEHAV. 579, 580 (1990) (noting that although most battered women who kill their abusers plead self-defense, they are frequently convicted of murder or manslaughter).

⁵⁰⁶ Lauren Champaign, *Criminal Law Chapter: Battered Woman Syndrome*, 11 GEO. J. GENDER & L. 59, 59-60 (2010).

imminent harm.⁵⁰⁷ Although scholars advocate for the expanding interpretation of traditional self-defense law to accommodate the self-defense claims of battered women in the non-confrontational cases,⁵⁰⁸ courts and legislatures generally have not yet accepted the solution of expanding the interpretation of self-defense law to accommodate battered women. But until the legislature codifies a justification for a battered woman's killing of her abuser, it is inappropriate for Executives --- by pardoning LWOP inmates with BWS who are denied the claim of self-defense at trial --- to use the back door of clemency to establish a substantive defense of self-defense. Any general application of the substantive law of self-defense should be made by legislatures and courts to the victims as a class, rather than to individual claimants by way of random grants of pardon.

However, an executive's *commutation* of the sentence of a battered woman who was sentenced to LWOP --- and who has already served a sufficient amount of prison time in light of the crime and her mental condition --- constitutes an appropriate use of the commutation power. If BWS had been properly recognized at the time of the crime, the defendant may well have qualified for a lesser sentence due to impaired mental state;⁵⁰⁹ or the judge at sentencing could have considered the BWS evidence as a mitigating factor that would have reduced the sentence.⁵¹⁰ A defendant who was denied those opportunities is a proper candidate for commutation based on changes in societal attitude toward criminal sentencing --- similar to defendants who were sentenced under drug laws that were thought appropriate at the time but found to be harsh due to changing circumstances. See Rule 1.1.

Importantly, a petitioner is not eligible for relief under this rule if the syndrome evidence that was either presented or barred at trial was insufficient to establish the petitioner as a battered woman.⁵¹¹

1.3 Substantial Assistance to Authorities

Upon petition of the government stating that an inmate serving life without parole has provided substantial assistance in the investigation or prosecution of another person who has committed a serious offense, the Executive may commute the inmate's sentence of life without parole. The commutation decision will be determined for reasons that that may include, but are not limited to, consideration of the following:

⁵⁰⁷ See *North Carolina v. Norman*, 324 N.C. 253 (1989) (reversing the appellate court requiring a self-defense instruction when there were non-confrontational circumstances).

⁵⁰⁸ See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 59 (1991) (suggesting that a better judicial understanding of the "separation assault" phenomenon could help to have the battered woman's non-confrontational killing satisfy the self-defense law's requirement of the reasonable belief of imminent harm.); see also Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 372, 402 (1993) (suggesting the traditional self-defense standard should be expanded to accommodate the battered woman's non-confrontational killing situations.)

⁵⁰⁹ See *Schneider & Jordan*, *supra* note 501; see also Elizabeth M. Schneider, *Equal Rights to Trial For Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 636 (1980).

⁵¹⁰ See, e.g., *United States v. Whitetail* 956 F.2d 857, 864 (8th Cir. 1992) (the court ruled that a federal court could consider testimony on the syndrome as a mitigating factor at sentencing despite the jury's verdict that such testimony had not warranted a finding of self-defense).

⁵¹¹ See, e.g., *Pruitt v. State*, 296 S.E.2d 795, 797 (Ga. Ct. App. 1982) (upholding the lower court's exclusion of expert testimony during a bench trial because there was no evidence that the defendant was a battered woman).

a) the significance and usefulness of the petitioner's assistance, taking into consideration the government's evaluation of the assistance rendered;

b) the truthfulness, completeness, and reliability of any information or testimony provided by the inmate;

c) the nature and extent of the inmate's assistance;

d) any injury suffered, or any danger or risk of injury to the inmate or his family resulting from his assistance;

e) the timeliness of the inmate's assistance;

f) a comparison of the seriousness of the crime for which the inmate is serving a life without parole sentence and the seriousness of the crimes that are prosecuted as a result of the inmate's substantial assistance; and

g) the amount of time that the petitioner has already served on the LWOP sentence.

Note:

In order to prosecute crime, it is often, indeed usually, necessary to establish incentives to cooperate on the part of those who participated in or otherwise know about the crime. In extreme cases --- e.g., a murder of prison personnel by an inmate --- it may be necessary to provide incentives to prisoners to cooperate. That may even include LWOP inmates in cases where the crime is of the highest priority and cannot otherwise be prosecuted. Of course, cooperation is usually incentivized by reduction in sentences of those cooperating. As to LWOP inmates, if there is no possibility of reducing the sentences, it is unlikely that there would be sufficient incentives to get the inmate to cooperate --- especially given the risk of reprisal for cooperators in prison.

The rule adapts Sentencing Guideline 5K.1 to the situation of cooperation of LWOP inmates. The Executive should give careful consideration to the trade-off being made. The rule specifically states that the Executive should weigh the seriousness of the inmate's crime with the seriousness of the crimes the prosecution of which the inmate is providing assistance. That comparison factor is not included in Guideline 5K.1 but it is surely of the utmost importance in deciding whether to commute the sentence of LWOP, as such commutation at the very least raises questions of safety to society and undermining the finality and certainty of the LWOP sentence. Moreover, given the fact that the award of commutation for a LWOP inmate is a grave and costly act, the Executive should determine that the assistance provided is truly significant, and also that the inmate has served a substantial time on the offense for which he was convicted.

1.4 Terminal Illness

The Executive may commute a sentence of life without parole if:

a) the petitioner suffers from a terminal illness and is faced with an imminent death;

b) the petitioner has family or other responsible persons willing and capable to assume the responsibility for the petitioner's care; and

c) the finding of terminal illness is made by two physicians appointed by the Executive, who both conclude that the petitioner's illness will result in death within twelve months from the date of the physician's report.

Note:

The policy of commuting the sentence of a LWOP inmate based on the ground of terminal illness is to promote the value of benefiting the state welfare. The release of dying LWOP inmates promotes state welfare by relieving the correction department's fiscal pressure in prison health care cost, without any risk of public safety caused by the releasee's reoffending. Additionally, the early release of terminally ill LWOP inmates would promote the integrity of the state by expressing human sympathy to these dying inmates.

The rule assures that claims of medical release are justified by findings of qualified medical experts.

2. Prohibited Grounds for Commutation

2.1 Rehabilitation

A life without parole sentence may not be commuted on the ground of the inmate's rehabilitation.

Note:

The legislature, in instituting a sentence of life without parole, has made the determination that the inmate should never be released on the ground of rehabilitation. A life without parole sentence is completely inconsistent with any consideration of rehabilitation, because LWOP by definition "forswears altogether the rehabilitative ideal."⁵¹² Whether one agrees with that policy or not, it is clear that legislatures opting for a LWOP penalty have embraced principles of finality, certainty, and just deserts --- and have rejected the rehabilitative ideal. It makes no sense for a sentencing system to be based on finality and certainty at the front end, only to have the Executive undermine that policy at the back end. Any change to the policy should come through an Executive's work with the legislature, so that changes if any can be made on a class basis, rather than through individual determinations that reject legislative policy to the benefit of certain convicts and not others. Accordingly, the Executive should not use the clemency power to commute a LWOP inmate's sentence on the ground of rehabilitation.

Commuting LWOP inmates on the grounds of rehabilitation will not only undermine the legislative objective, but it will also have a negative effect on defendants in capital punishment jurisdictions where life without parole is an alternative to a death sentence. If there is a possibility that a LWOP sentence can be commuted, then there is a possibility that the prosecutor can convince the jury in a capital case that a LWOP sentence will not be a perfect alternative that would control the defendant's future dangerousness .

There is surely a concern about how to control the behavior of LWOP inmates who have no incentive to behave or improve if deprived of the rehabilitation reward of sentence reduction. But sentence reduction is not the only possible incentive for good behavior. Prison systems can provide other incentives such as prison privileges that, while certainly not as strong as sentence reduction, can be used to encourage good behavior --- while not undermining the legislative determination that animates LWOP sentencing.

2.2 Meritorious Services

A life without parole sentence may not be commuted on the ground of the inmate's meritorious services while incarcerated.

Note:

Meritorious services refer to good works in prison, such as providing medical care assistance, providing assistance in preventing other inmates' unruly behavior, etc. These services are the demonstration of the inmates' efforts towards rehabilitation. For the reasons expressed in the note to Rule

⁵¹² *Graham*, 560 U.S. at 82.

2.1, these meritorious services are deserving of reward --- but not in the form of commuting a LWOP sentence.

2.3 Prison Overcrowding

A life without parole sentence may not be commuted on the ground of prison overcrowding.

Note:

There is concern that the accelerating population of LWOP inmates contributes to the problem of prison overcrowding. It is true that providing early release to certain prisoners would be a solution to alleviating prison overcrowding, but it is difficult to conclude that commuting LWOP inmates would be a justified solution to the problem of overcrowding.⁵¹³ Indeed the question of releasing LWOP inmates to alleviate overcrowding seems to be theoretical. Assuming that prisoners are going to be released due to overcrowding, it stands to reason that LWOP inmates will be the last to go --- not only because they are presumably the most serious criminals, but also because there are thousands of better examples for release, including defendants serving lengthy sentences on mandatory minimums and for minor drug offenses. Moreover, LWOP inmates constitute a relatively small (but admittedly growing) fraction of the entire prison population.⁵¹⁴ If a class of inmates is going to be released and have a strong effect on alleviating overcrowding, the sheer numbers of drug defendants make them better candidates.⁵¹⁵

More importantly, the whole idea of LWOP sentencing is grounded in the premise that certain crimes are so grave that they must be treated with finality and serious and certain punishment. It goes without saying that LWOP inmates are not expected by the legislature and public to be freed back into society due to a lack of prison facilities. If commutation is used to alleviate prison overcrowding by setting early release to a certain number of inmates, it is better to release the non-LWOP inmates who are supposed to be released back to society someday, than it is to undermine the policy of LWOP sentences. If the problem is allocation of resources --- a policy problem --- then it should be addressed by the legislature directly rather than by the Executive's individualized determination that a certain LWOP inmate should be released.

3. Written Reasons

The Executive, in deciding whether to commute the sentence of a LWOP inmate, should state the specific reason for the decision to grant or deny the petition.

⁵¹³ Prison overcrowding is a complex problem, for which there might be many causes, including 1) failure of the legislature to fund prison expansion; 2) expansion of criminal laws, such as drug laws; 3) legislatures enact harsh sentencing laws with longer imprisonment; and etc. Such a complex problem is unlikely to be solved by setting free LWOP inmates by commutation.

⁵¹⁴ Commuting LWOP inmates, a group of 3.1% of the total inmates population (as calculated in Section I, see Table 2 and Table 3 in Section I and accompanying analysis) has less effect in relieving prison overcrowding than would commuting non-LWOP inmates --- and it would seem perverse to release the most serious criminals in any case.

⁵¹⁵ As noted by the Chair of United States Sentencing Commission, Chief United States District Judge, Patti B. Saris, "Drug offenders make up about a third of the offenders sentenced federally every year and a majority of the prisoners serving in the federal Bureau of Prisons, so they are in many ways the key to the size and nature of the federal prison population." See Honorable Patti B. Saris, *A Generational Shift For Federal Drug Sentences*, 52 AM. CRIM. L. REV. 1, 1 (2015) (internal citation omitted). According to the data collected by Federal Bureau of Prison, by the end of 2014, drug offense inmates in federal prison went up to 96,544, 48.7% of the federal prison population. *Inmate Statistics*, FEDERAL BUREAU OF PRISON http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (last updated Dec. 27, 2014).

Note:

A statement of written reasons derives from the requirement of the guided discretion clemency scheme. The exercise of the commutation power in a rational way will not be accomplished without requiring the commutation reasons to be clearly stated and published for public review.

4. Procedures for Considering Commutation Petitions

(a) A petition for commutation may be filed any time after the petitioner exhausts all judicial remedies.

(b) The Executive should appoint a special master to investigate and determine whether the petitioner has stated grounds for relief under Rule 1.

(1) Appointment.

A special master must not have a relationship to the petitioner, attorneys, any interested government official, or the Executive that would require disqualification of a judge, unless the interested parties, with the Executive's approval, consent to the appointment after the master discloses any potential grounds for disqualification.

(2) Special Master's Authority.

A special master shall:

(A) when conducting any evidentiary hearing, exercise the power to compel, take, and record evidence;

(B) regulate all proceedings;

(C) take all appropriate measures to perform the assigned duties fairly and efficiently;

(D) make any necessary finding of fact; and

(E) determine an appropriate sentence reduction, if any, after reviewing similar cases and consulting with relevant sentencing guidelines.

(3) Special Master's Orders.

A special master who issues an order must file it and promptly serve a copy on the petitioner and any interested government official. The order must also be submitted to the Executive's office, together with an explanation of reasons for the order and a transcript of any proceedings.

(c) The Executive, after reviewing the special master's order, should grant or deny commutation in accordance with the order, unless the Executive determines that the special master has abused discretion. If the Executive rejects the special master's order, any grant or denial of relief should be accompanied by an explanation of reasons.

Note:

Subdivision (a): Most jurisdictions require a petitioner to serve a certain percentage of his/her sentence or serve a certain amount of time in prison before being able to seek commutation. Such a waiting period makes sense when the petitioner files a commutation petition on the ground of rehabilitation, because the petitioner's rehabilitation achievement could not be proved up to the Executive without a substantial period of good behavior during incarceration. However, rehabilitation is not a ground for

LWOP inmates filing a commutation petition. See Rule 2.1. Accordingly, it is unnecessary to require a waiting period for LWOP inmates filing a commutation petition for the permissible grounds set forth in Rule 1. It is true that if the petitioner's ground is substantial assistance, the Executive will of necessity take into account the amount of time that the prisoner has served under Rule 1.3 --- but that is a flexible inquiry and no independent time limitation is necessary or advisable. The same is true for commutation based on Battered Woman Syndrome --- the amount of time the inmate has served is relevant but that will be a flexible enquiry. See Rule 1.2.

The rule retains an important condition --- that commutation is not available unless the petitioner has exhausted all forms of judicial relief. Commutation should not be used as an evasion of judicial review. It is a fail-safe for when judicial review is unavailable.

Subdivision (b): The facts and issues pertinent to a commutation decision should be decided by an independent person with expertise in factfinding and interpreting and applying the law. It is not appropriate to vest the power to the Executive to command the trial court to open a new trial. In accordance to the separation of power principle --- which requires that each branch maintain the independence of exercising its core function --- the Executive branch does not maintain the power to order a trial court to retry a case. It is also not appropriate to appoint a political official or administrative board to make the commutation determination, because of the risk that the decision will be on political grounds rather than on fact and reason. The best solution for evaluating the claim to commutation is to submit the matter to a special master to conduct any necessary evidentiary hearing and to make the necessary findings and recommendations.

Subdivision (b) (1): The rule tracks the procedural requirements for appointing special masters that are found in Rule 53 of the Federal Rules of Civil Procedure. A special master exercises the power to make a finding as a court would do. However, the special master's finding does not constitute a judicial finding. The special master is appointed by the Executive to assist the Executive in making a clemency decision. In that sense, the special master's finding constitutes a part of the Executive decision and should not be subject to judicial review. Instead, the special master's finding is subject to the review of the Executive.

The Executive must carefully review the special master's order because the Executive is responsible for the master's decision, and the Executive may be legitimately concerned about the "potential reaction of the news media, political allies and adversaries, special interest groups" and crime victims based on the Executive's commutation decision.⁵¹⁶ It is conceivable that the Executive is more likely to stray from a reasoned review of a special master's order during the Executive's last term of office, because at that point there is little political constraint on the commutation decision. However, such lack of constraint on the Executive power occurs in every field in which it is exercised during the Executive's last term of office. The requirement that the Executive must provide written explanations for why she believes the special master abused discretion is intended to limit the risk that the Executive will grant or deny commutation as a result of outside influence or for completely personal reasons, especially when political constraints are mild.

Subdivision (b) (2): The evidence rules should apply in the hearing on Battered Woman Syndrome. The issue to be decided, which is about the potential justification of the petitioner's wrongful conduct, warrants a rigid application of the rules of evidence --- which would assure the petitioner's guilt or innocence is reasonably and fairly determined. Thus the rules should be no looser than the evidence rules applied in the judicial proceeding. The policy of applying rigid evidence rules is to prevent the petitioner from strategically making use of the clemency procedure to seek a better chance of acquittal or sentence reduction in a clemency proceeding employing more flexible rules.

The evidence rules should not rigidly apply in the hearing of excessive punishment or substantial assistance to authorities. The Federal Rules of Evidence do not apply in sentencing proceedings.⁵¹⁷ Because

⁵¹⁶ See Breslin & Howley, *supra* note 206, at 232.

⁵¹⁷ See FED. R. EVID. § 1101.

the issues to be decided regarding substantial assistance or excessive punishment are about sentencing factors, the commutation proceeding on sentencing issues is essentially a sentencing proceeding at the back end. As with sentencing proceedings, while the Federal Rules of Evidence do not apply, the special master should be regulated by basic principles of relevance and reliability.⁵¹⁸

The special master should make the decision of commutation consistent with the relevant sentencing ranges and guidelines, and in light of other similarly situated petitioners, in order to satisfy the sentencing goal of individualization, consistency and proportionality. The sentence reduction could be to time served (e.g., from LWOP to time served) or to a shorter period of time (e.g., from LWOP to 20 years, or from LWOP to life with parole).

Subdivision (b) (3): The special master's order should be filed with the Executive's office and subject to public review. A system of commutation based on guided discretion cannot be achieved if no record is kept for public review. Public review assures that the Executive's decision has not been subject to inappropriate outside influence or bare politics.

Subdivision (c): It is true that the Executive's power to commute a sentence is essentially unconstrained by law. But while the Executive has the unconstrained power to commute or not to commute, these procedural requirements are based in the policy that a system of guided discretion is necessary not only to assure fair results, but also to protect the Executive from charges of improper influence, personal whim, or bare politics. Therefore the Executive should adhere to the order of the unbiased special master, unless the Executive can provide stated reasons for concluding that the special master has abused discretion. A system of guided discretion is based on the principle that the Executive will not grant or deny commutation without any specific reason or for a reason that is not prescribed in the commutation guidelines.

⁵¹⁸ See, e.g., *United States v. Kikumura*, 918 F.2d 1084 (3d Cir. 1990) (hearsay rule does not apply at sentencing proceeding but hearsay cannot be considered if it is clearly untrustworthy).

V. CONCLUSION

This article proposes a system of guided discretion, with detailed procedural guidelines, to control the Executive's decision on whether to commute the sentence of a prisoner sentenced to life without parole. The constraints of guided discretion cannot be found in the state or federal constitutions. But they can be found in the need to provide some standards for an Executive decision that could otherwise be seen as one based on rank politics, improper outside influence, or perhaps even worse as an attempt to undermine legislative and judicial determinations.

The sentence of life without parole, for good or ill, is one based on finality, certainty, and a legislative determination that the sentence is proportionate to the crime and that rehabilitation is irrelevant. There are certainly valid arguments against LWOP as a sentencing policy. It is probably fair to state that LWOP was little more than a knee-jerk reaction to the War on Drugs, the death penalty, and the War on Crime, and that it should at some point be reconsidered. But any reconsideration should come through the processes of legislative and judicial action that will apply across the board. It should not come by way of individualized commutation decisions. For that reason, this article contends that rehabilitation should not be considered as a ground for commuting LWOP sentences.

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