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THE CONTROVERSY OF CLEMENCY AND INNOCENCE IN AMERICA

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INTRODUCTION

Clemency has been embedded in the American criminal justice system since America was founded. [1] Justified under a mixture of retributive, redemptive, and utilitarian principles, [2] "clemency" covers "a variety of mechanisms an executive can use to remit the consequences of a crime," [3] including pardons, commutations of ***56** sentence, reprieves, and the remission of fines and forfeitures. [4] Through these mechanisms, executives and/or administrative bodies can accomplish such diverse goals as restore civil rights, acknowledge mitigating circumstances, correct egregious sentences, prevent deportations, and support political agendas. [5] They can also correct the wrongful conviction of innocents.

In the 1993 case of *Herrera v. Collins*, the United States Supreme Court (USSC) placed extreme confidence in the clemency function to remedy wrongful convictions. [6] In ruling that Herrera's claim of actual innocence (absent some other procedural violation in his case) was not a ground for federal habeas relief, the USSC held that: (1) clemency is the "fail safe" of the criminal justice system; [7] (2) state clemency processes are the proper mechanism for assessing innocence claims; [8] and (3) clemency is the historic remedy for preventing miscarriages of justice where the judicial process has been exhausted. [9]

The Supreme Court decided *Herrera* just as the American Innocence Movement was gaining momentum. The year before, in 1992, Barry C. Scheck and Peter J. Neufeld formed The Innocence Project "to assist prisoners who could be proven innocent through DNA testing." [10] By the end of 1993, one hundred and thirty-five people had been exonerated, [11] including fourteen whose innocence had been conclusively proven by post-conviction DNA evidence. [12] ***57** Since then, however, a number of disturbing cases--such as those of Cameron Todd Willingham [13] and Troy Anthony Davis [14] -- have steadily highlighted the inadequacy of clemency in providing relief to innocent inmates. In spite of presenting significant evidence of innocence, Willingham and Davis were refused clemency by governors in Texas and Georgia, respectively, and were executed soon thereafter. [15] Concerns about clemency's ability to provide relief to innocent inmates have been exacerbated by the USSC's decision in *Ohio Adult Parole Authority v. Woodard*. [16] In *Woodard*, the USSC afforded only "minimal" due process protections to defendants in clemency proceedings and held--in spite of the holding in *Herrera* that clemency is the "fail safe" of the criminal justice system-- that clemency proceedings are not "an integral part of the . . . system for finally adjudicating guilt or innocence of a defendant." [17]

This article considers to what extent clemency is fit to handle innocence claims, particularly from the perspective of innocents who are incarcerated and seeking post-conviction relief. Part I traces the ***58** history of clemency and demonstrates how it has never served a significant legal function or been truly "innocentric" in nature, but rather was an exercise of political power inherently unfavorable to innocents. Part II reviews current clemency frameworks across America and explores the obstacles innocents face when applying for relief, including a lack of transparency, imbalanced administrative board compositions, and

barriers to meaningful review, including high eligibility thresholds and unfavorable application procedures. Part III evaluates the effectiveness of *Woodard*'s minimal due process standard for protecting against unfair clemency procedures by reviewing a cohort of cases in which state clemency procedures were challenged on the basis of unfairness. The cases discussed in Part III demonstrate that courts are applying *Woodard* narrowly, and are generally reluctant to interfere in state clemency processes--an approach unfavorable to innocents seeking relief through clemency. Part IV concludes that clemency, to a large extent, is a hostile environment for innocence claims, given the few historical or contemporary frameworks dedicated to evaluating innocence claims, obstacles to meaningful review, antipathetic executive attitudes, minimal constitutional protection, and courts' reluctance to interfere with state procedures.

I. THE HISTORICAL DEVELOPMENT OF CLEMENCY: A POWER FOR POLITICAL EXPEDIENCE

This section highlights major landmarks in the evolution of the clemency power from the theological foundation of mercy to clemency practices in early America to the eventual thrusting of the clemency power into the criminal justice system as a mechanism for identifying wrongful convictions during the "era of innocence." This examination of the development of clemency exposes it as a political power, neither designed nor routinely used to remedy wrongful convictions.

A. God, Ancient Egypt, and Ancient Rome

While American executive clemency is rooted in common law tradition, the concept of "mercy" can be traced well beyond the common law era. Unlike the modern clemency power, which is vested in state officials, the historical foundation of mercy was divine. ***59** For example, the ancient Egyptian slaves of *Deir El-Medina* believed that blindness was a punishment, which could be withdrawn by the merciful goddess *Meretseger* in return for the offender repenting his sins. [18] The first documented human-vested clemency power was in early Greek democracies, where the power was vested in the supreme democratic legislature, *Ecclesia*. [19] With the fall of democracy in the Roman Empire, however, clemency was removed from the people and vested solely in the Emperor, [20] beginning its journey to the executive clemency power we have today.

This shift in investiture from the legislature to the Emperor was important for two particular reasons. First, as Ancient Rome lost its democratic character and moved toward an autocratic rule, the potential for tyranny increased. [21] As such, several authors have suggested that the public exercise of mercy was politically essential in order to offset the newfound "awesome abilities of the state to inflict harm" [22] and to embed a divine quality in rulers. [23] In fact, Julius Caesar was known for his repeated acts of mercy toward defeated opponents, [24] with the modern term "clemency" derived from "Clementia," the goddess of forgiveness and mercy, deified as a celebrated virtue of Julius Caesar. [25] Second, the exercise of mercy through clemency came to symbolize the absolute power with which the Emperor ruled. [26] In particular, the act of pardoning placed the grantor in a position of ruling over the grantee, forcing a defeated ***60** opponent, for example, into a lasting position of weakness. [27] As such, while the possession of the divine quality of mercy was important to the general population, the exercise of clemency was deeply resented within the political class. [28] Considering this, few of Caesar's contemporaries viewed the act of clemency as one of mercy; rather, clemency was largely regarded as a "manifestation of tyrannical power" [29] or, at least, as a political tool that "once . . . [it] ceased to convey the advantage to Caesar, he would drop." [30] It appears, therefore, that the Roman clemency power was concerned primarily with political expediency, not considerations of mercy, and certainly was not used to ensure justice. Furthermore, in that era, the act of clemency was not designed with the intention of ensuring justice. Instead, arguably, the power inherent in Roman "clemency" was derived specifically from the act of granting grace to an individual who did not deserve or warrant such--an individual the law had every right to punish, but who was, nevertheless, treated more leniently by their ruler. As such, mercy could be considered antithetical to justice. [31]

Over time, even as the clemency power moved away from the Emperor and into the hands of judges, it continued to fulfill a primarily political purpose. [32]

61** ***B. Clemency and the Common Law

Although pardons were recorded prior to the Norman conquest of England, [33] it was not until after 1066 and the Battle of Hastings that the King's pardon power was codified in the Code of William the Conqueror. [34] Like in Ancient Rome, exercise of the King's pardon power was rarely related to considerations of mercy or justice and was primarily concerned with political and/or economic expediency. For example, by the time of Henry I, codified laws explicitly allowed the exchange of pardons for money, [35] and Edward I granted pardons in exchange for military service. [36]

Unlike the Ancient Roman pardon power, however, English monarchs shared the right to be merciful with Roman Catholic clergymen, who exercised a divine mercy. [37] Although several monarchs struggled with this sharing of power, it was only following Henry VIII's split from the Catholic Church that the English Parliament passed an act granting the King "sole power and ***62** auctoritie," which vested the clemency power solely in the monarch. [38] The power to grant clemency remained solely the preserve of the monarch for over two centuries, confirming his or her absolute sovereignty. [39]

Ultimately, a lack of oversight or legal recourse in relation to grants of clemency played a central role in the fall of this autocratic regime. In 1678, King Charles II's use of the pardon power to thwart the intentions of the democratically elected parliament led to a constitutional crisis. [40] Subsequently, the pardon power was gradually withdrawn from the monarch and granted to a combination of the government and parliament, where it remains today. [41] As such, history shows, regardless of where the clemency power has been vested from the time of ancient Rome to Enlightenment England, one thing has remained constant: its primary function has been to further or consolidate a position of power.

This trend continued when clemency "arrived" in America.

C. Clemency in America

This subsection considers the development of the clemency power in America at the state and federal levels. Although this article concentrates on state clemency proceedings, an exploration of the ***63** development of the federal clemency power is useful in illustrating the largely political focus of the clemency power in America. Moreover, the state and federal powers have taken a similar evolutionary journey.

1. Early American Clemency

With the expansion of the British Colonial Empire, clemency was often utilized to curry favor with the local, indigenous American population. [42] As such, the monarch--who remained, at that time, the sole individual vested with the clemency power--customarily bestowed on colonial governors the power to grant clemency on his behalf. [43] By 1776, therefore, the concept of clemency was familiar to the American political system and to the Founding Fathers. Clemency was understood to be "one of the great advantages of the monarchy;" [44] therefore, it was considered as greatly beneficial in buttressing the monarchial power the Founding Fathers were trying to replace.

Following the American Revolution, there was a concerted attempt among the states to move away from a central executive power. [45] Consequently, when drafting their constitutions, the majority of states (eight out of thirteen) moved away from a system of clemency vested solely in the executive. [46] Instead, states vested the clemency power in either the legislature or a

combination of the legislature and the executive.[47] Thereafter, when the federal government began codifying the scope of its powers, the two major plans--the New Jersey Plan and the Virginia Plan--failed to address the issue of clemency at all.[48]

***64** When clemency was finally considered at the federal level, little contemplation was given to the prospect of following the states' practice of limiting the executive clemency power or of placing the clemency power in the legislature, either solely or jointly with the executive.[49] Instead, it was Alexander Hamilton's approach--which almost exactly mirrored the British model as laid out in the Act of Settlement of 1701--that was adopted.[50] With Article II of the United States Constitution stating that "[The President] shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."[51]

Founding Father Alexander Hamilton argued that adopting an executive-based clemency power would position clemency as a defense against *overbearing* law,[52] much in the same vein as the founding spirit of the new Republic.[53] Specifically, Hamilton noted that the ability to exercise clemency would ensure that citizens are treated fairly, as a rigid system of justice "would wear a countenance too sanguinary and cruel."[54] During the early years of the American clemency power, "justice-enhancing" arguments, such as those proffered by Hamilton, were popularly cited at both the state and the federal levels as support for vesting an unrestricted power so centrally.[55]

Much like the clemency power in Ancient Rome and England, however, the true rationale behind such an uninhibited prerogative was, in practice, primarily justice-neutral and premised on political expediency.[56] In light of the weakness of the new Republic, the ability to exercise leniency for certain crimes was crucial; Hamilton ***65** suggested that clemency could prove essential to holding the Confederation together during "seasons of insurrection."[57] As such, the early federal clemency power was most frequently used to mitigate the effects of punishing popular rebellions, most notably during the Pennsylvanian Whiskey Rebellion.[58] Similarly, Thomas Jefferson utilized the clemency power to pardon individuals whom the Federalists had convicted and sentenced under the Alien Sedition Act in the years prior to their defeat in the election of 1800.[59]

The largely political nature of the early clemency power is laid bare when examining the range of crimes pardoned by the first four Presidents. Of Washington's thirty-one pardons, fifteen related to treason and six to violations of unpopular taxation.[60] Of Adams's twenty-five pardons, seventeen related to either insurrection or trade violations.[61] Between them, Jefferson and Madison pardoned thirty-five individuals for desertion and forty-five for violations of revenue laws.[62] These pardons demonstrate that clemency was a powerful political tool in the early years of the fledgling Republic, which used to soften the fall-out from unpopular increases in federal taxation and the centralization of power.[63]

As the executive-based federal clemency power was effectively utilized to hold the early Republic together, the "post-independence Republican faith in legislative bodies soon waned."[64] Consequentially, as state constitutions were ratified, changes were made so as to move away from vesting the clemency power jointly in the legislature and the executive and toward the federal approach, ***66** which vested the clemency power solely in the executive. Of the first thirty-five state constitutions ratified, twenty-six placed the clemency power in the hands of the Governor alone.[65]

During this time, the clemency power--both the federal clemency power and the power vested in state governors--was rarely, if ever, used to correct wrongful convictions that occurred against a non-political backdrop.[66] Seemingly, the strength of early American clemency was its exercise contrary to justice: relieving law-breakers from their punishment while reinforcing that the law was effective.[67]

Almost fifty years passed before the USSC considered the scope of the federal pardon power. In the 1833 case of *United States v. Wilson*, the USSC considered whether President Jackson's pardon of a death sentence was valid against a robber who "did not wish . . . to avail himself, in order to avoid [[the] sentence . . . ." [68] The case required the Justices to consider from where the seemingly unfettered pardon power derived. [69] Due to scant legal discussion amongst American courts, Chief Justice John Marshall sought guidance from English law and found that the presidential pardon was "an act of grace, proceeding from the power entrusted with the execution of laws," that should be interpreted widely and, to the extent possible, unregulated by law. [70] As such, the USSC refused to compel Wilson to accept the pardon and held that the presidential pardon was not valid as against an unwilling recipient. [71]

The breadth of the presidential pardon power was underscored in *Ex Parte Garland*, where the USSC found the power to be "unlimited . . . . [A]nd may be exercised at any time . . . . This power ***67** of the President is not subject to legislative control. Congress can neither limit the effect of [the President's] pardon, nor exclude from its exercise any class of offenders." [72] Furthermore, the USSC stated that the legislative inability to regulate the presidential pardon was a direct result of "the benign prerogative of mercy reposed in [the President,] . . . [which] cannot be fettered by any legislative restrictions." [73] Notably, although the USSC addressed legislative interferences with clemency, judicial regulation was almost wholly ignored. [74] As such, the question emerged whether such an uninhibited power could exist within a legal system without being subject to judicial review.

2. The 20th Century Clemency Power

At the turn of the 20th Century, the clemency power began to interact more directly with the American criminal justice system. This subsection will consider how this interaction occurred: first through clemency's utility to rehabilitative forms of justice, and thereafter with its opposition to punitive justice. Finally, this section will consider how the USSC thrust clemency into the forefront of the "era of innocence."

a. Clemency and Rehabilitative Justice

The emergence of new forms of psychiatry and criminology at the start of the 20th Century meant that, for the first time, mercy was no longer merely a political tool, but was actually a way of satisfying criminal justice policy. In addition to traditional punitive measures, a strong emphasis was placed on rehabilitation. [75] This trend "unapologetically reject[ed] an act--and desert--based conception of justice . . . and wholeheartedly embrace[d] leniency rooted in compassion." [76] Compassionate justice aimed at character reformation ***68** became a central focus, [77] and the ability to grant pardons to rehabilitated individuals began to be used as a tool in the administration of criminal justice. [78] At the state level, clemency recommendations and decisions moved into the hands of official administrative boards. Additionally, many states, along with the federal government, enacted indeterminate sentencing periods with wide ranging potential sentences, depending upon various factors. [79] There was a culture change toward individualized, less punitive justice. [80]

b. The Demise of Rehabilitative Justice and the Rise of "Tough on Crime" Agendas

In the 1970s, shortly after the clemency power moved into the mechanics of the criminal justice system, the rationale for its criminal justice-related use eroded with the perceived failure of rehabilitative punishment. [81] Coupled with an increasingly powerful voice of "victim advocacy," [82] several widely reported incidents of "urban ***69** disorder" in the wake of the 1965 Los Angeles Riots led to the replacement of rehabilitative theories of crime and punishment with populist "tough on crime" initiatives. [83] This "tough on crime" approach culminated in the devastating effect of George H. W. Bush's now infamous "Willie Horton" advertising campaign during the 1988 presidential election, which almost single-handedly changed

the outcome of the presidential race.[84] Even today, political candidates viewed as "soft on crime" are, in many places, considered unelectable.[85]

As part of this return to punitive justice, legislatures across America began enacting strict mandatory sentencing guidelines for a large range of crimes.[86] Against this backdrop, the general consensus was that the excessive use of clemency, a traditionally executive act, had the potential to blur the separation of powers. Specifically, it was felt that the exercise of clemency pitted this residual executive power against the will of a democratically elected legislature, which had enacted mandatory sentences.[87] For the first time, the use of clemency actively weakened the position of the executive.

At the state level, several governors found their exercise of clemency being successfully used against them in subsequent election campaigns.[88] To this day, even within typically liberal-aligned states, the use of clemency is considered a political minefield. For example, although New York Governor Andrew Cuomo had been an outspoken proponent of clemency prior to being elected, it took him over three ***70** years to grant his first and, to date, only pardon.[89] At the federal level, the appearance of executive overreach into the courts and legislature was even more damaging in light of the "small government"[90] framework emphasized by successive presidents since Nixon's "New Federalism."[91] Raymond Theim, the Deputy Pardon Attorney to three Republican presidents, including Reagan and George H. W. Bush, summed up the feeling toward the use of clemency when he was in office:

> The feeling is that we should do as little as possible to grant relief. . . . It's a dangerous trend for the executive to override the function of the Courts and the parole system too much, both from the point of view of the balance of power and of possible corruption. . . . Clemency is bestowed as an act of grace and not as a matter of right.[92]

***71** Evidencing the implementation of this view, restrictions on clemency applications were employed during both the Reagan and Bush Senior Administrations. For example, the Reagan Administration tightened the rules surrounding applications for clemency.[93] As a result of these restrictions, the number of clemency applications fell dramatically during both of Reagan's terms in the White House--a trend that has continued.[94] Moreover, grants of clemency dropped from approximately eighteen percent under President Nixon to just four percent under President George H. W. Bush.[95] Most recently, President Obama has been criticized for his unwillingness to utilize the presidential pardon.[96]

As such, although it was a trend towards merciful punishment that originally transformed the clemency power from a political tool to a familiar feature of the criminal justice system, this concept of mercy has become the weakest point of the clemency power within the modern justice framework. Considering this, it is unfortunate that the USSC decided to thrust clemency into the heart of the criminal justice system at a time when the exercise of clemency had become such a politically unfavorable act.[97]

3. Clemency's Introduction to the Era of Innocence

In the 1993 case of *Herrera v. Collins*, the USSC placed great confidence in the clemency function by labeling it the "fail safe" of the criminal justice system.[98]

Herrera had been convicted of capital murder and sentenced to death in January 1982.[99] The evidence against him included two ***72** eyewitnesses, circumstantial evidence, and a handwritten letter in which Herrera impliedly admitted his guilt.[100] In subsequent proceedings, Herrera claimed his deceased brother had committed the murders.[101] Herrera's actual innocence claim was supported by: affidavits from Herrera's cell-mate, school friend, and brother's attorney, all of who claimed that Herrera's

brother had confessed to having committed the murders; [102] and an affidavit from Herrera's nephew, who claimed to have witnessed his father carrying out the murders. [103] Despite this evidence, the USSC held that Herrera's claim of actual innocence (absent some other procedural violation in his case) was not a ground for federal habeas relief. [104] Rather, the Court reasoned: (1) clemency was the "fail safe" of the criminal justice system; [105] (2) state clemency processes are the proper mechanism for assessing innocence claims; [106] and (3) clemency had been the historic remedy for preventing miscarriages of justice where the judicial process had been exhausted. [107]

Therefore, clemency is the final check on whether the entire legal system has failed. This section, however, challenges the USSC's account of clemency historically playing a key role in correcting wrongful convictions. Rather, political expediency appears to be the traditional, primary function of clemency. [108] Considering this, Part II explores the extent to which current state clemency frameworks cater to the "innocence role" afforded clemency.

*73 II. A REVIEW OF STATE CLEMENCY FRAMEWORKS

The application of the clemency power differs from state to state. Thirteen states give the Governor the sole power to preside over clemency decisions. [109] In five states, an administrative board solely determines clemency decisions. [110] In other states, the Governor and an administrative board share the clemency power. [111] Most states have established administrative boards that can make non-binding clemency recommendations to the Governor. [112] In eight states, these recommendations are mandatory procedure, and the Board must provide the Governor with a recommendation before he or she can act. [113] This non-uniformity is largely due to a lack of "statutory or administrative standards governing use of the power." [114] Thus, as one commentator explains, "each governor has different ideas about the function of executive clemency and . . . the rate of granting clemency varies dramatically . . . from state to state." [115]

In addition to highlighting the differences in the design of clemency frameworks, [116] a review of state clemency procedures reveals a number of obstacles that may hinder innocents' abilities to successfully navigate the clemency process. These obstacles fall into three broad categories: (1) transparency issues; (2) imbalanced administrative board compositions; and (3) barriers to meaningful review. Although many of these issues apply to guilty inmates seeking clemency, they are exacerbated in the cases of innocent inmates attempting to utilize clemency to seek relief.

*74 *A. Transparency Issues*

A review of state clemency frameworks reveals a number of transparency issues unfavorable to innocents. These issues include a lack of published reasoning for clemency decisions, selective transparency, and expansive confidentiality rules. Each issue will be considered in turn.

1. Lack of Published Reasoning

There is general lack of reasoning provided by executives and administrative bodies determining clemency applications. For example, Indiana and Nevada do not require the Governor to justify any clemency decision by providing his or her rationale. [117] Similarly, in Idaho, the Commission of Pardons and Paroles publishes a list of clemency decisions on its website, but does not embellish it with detailed reasons. [118] The same is true in Oklahoma, [119] Utah, [120] and Texas. [121] In New Jersey, the Governor must provide the state legislature with a written report about the clemency applications he ***75** grants, but there is no equivalent requirement for those he denies. [122] The procedure is the same in New York [123] and Oregon. [124] Notwithstanding this requirement, reports from the Oregon Governor include only a minimal offering of reasons for his grants of clemency. [125]

The procedures in Utah facially appear to provide for greater transparency because state rules dictate that the Board of Pardons and Paroles' decisions--made following public hearings--be public documents; the Board "may publish its decisions on its website or other forum or in other forms, at its discretion and convenience." [126] These decisions and any accompanying reasons are not substantive, however, and the appearance of transparency fades in application. [127]

In states where the clemency power is shared between an administrative board and the Governor, the executive can ignore board recommendations; this is the case even in states that require administrative boards to provide the reasons behind clemency decisions or that make clemency decisions public documents. In Washington, for example, hearings before the Clemency and Pardons Board are public--as are the deliberations of the Board members. [128] As part of this process, each Board member must vote and explain the rationale behind his or her decision. [129] However, as is the case with ***76** most administrative board recommendations, rationales provided may be ignored by the Washington Governor. [130] Arizona has a similar facility for its Board of Executive Clemency. Although the Board does not necessarily have to provide extensive reasons in its public hearings, it may provide a lengthy letter of recommendation to the Governor. [131] Again, however, the Board's recommendations are not binding. [132] Notably, there are numerous states, including Arizona, Delaware, Florida, Idaho, Louisiana, Oklahoma, Pennsylvania, and Texas, that employ a system whereby the board must give a recommendation before the Governor can act--regardless of whether he or she acts in accordance with the recommendation. [133] To date, however, it appears that no state has established *binding* administrative board recommendations. [134]

2. Selective Transparency

As evidenced above, where there is transparency, it is sometimes selective and unfavorable to applicants. Similar to clemency procedures in New Jersey, New York, and Oregon, which only provide some level of transparency to clemency grants (but not to ***77** clemency denials), Louisiana and South Carolina also apply selective transparency rules unfavorable to clemency applicants. [135]

In Louisiana, all letters submitted in favor of a clemency applicant are subject to public inspection, whereas letters from victims and victims' representatives are not. [136] In effect, an innocent inmate in Louisiana is unable to challenge the rationale advanced in the letter of an alleged victim opposing his or her clemency application. Letters and statements in support of, or in opposition to, clemency may vary, but they can be significant. Generally, an inmate's family and friends may write to demonstrate that the inmate has a support network outside of prison; counselors may submit a letter to provide details about an inmate's temperament or work and education programs the inmate has completed while in prison. Victims may make statements about the long-term impacts of the crime for which the applicant was convicted. Sentencing judges may also write because they feel the mandatory sentence they were legally bound to impose was too harsh and deserves correction. In the context of innocence claims, jurors at the clemency applicant's trial may write to say that, in light of new evidence, they would not vote for a guilty verdict; eyewitnesses or "snitches" may recant their trial testimony; and experts may submit statements to support clemency applications. As such, Louisiana's selective procedures may disadvantage an innocent inmate by preventing him or her from challenging--or, at least, fully challenging-- arguments presented against his or her clemency application. By contrast, the State will be advantaged by full access to all materials in support of and in opposition to the inmate's application.

In South Carolina, the Board of Pardons and Paroles, which makes decisions in non-capital cases, is mandated to publish accountability reports; however, these reports are merely business or core values reports, [137] which add very little to the substantive transparency of decision-making in the state clemency process. As ***78** aforementioned, other states, such as Idaho, [138] Oklahoma, [139] Utah, [140] and Texas, [141] provide statistics or other brief information about clemency decisions, but, again, nothing substantive. Although these examples give the appearance of transparency, they are, in reality, quite shallow when it comes to shedding light on the rationale behind clemency decisions.

3. Lack of Records and Expansive Confidentiality Rules

A general lack of record-keeping and the expansive confidentiality rules governing clemency proceedings also result in a lack of transparency. For example: New Mexico has no particular record keeping processes in place; [142] the Mississippi Constitution does not expressly require that records on decision-making processes be kept; [143] in Vermont, the Parole Board holds public hearings, but board member deliberations are not recorded; [144] and in Ohio, Clemency Reports--which cover the particulars of an applicant's case, but are only sometimes completed by Parole Board Parole Officers--are confidential. [145] Texas also has an expansive confidentiality regime, where six categories of information are considered confidential in the event an inmate seeks clemency: Department of Public Safety records; ***79** criminal history information; execution summaries and prison records; recommendations from trial officials; letters from victims and supporters; letters from inmate and supporters; and general correspondence from the public. [146]

The rationale for confidentiality is legitimate: to protect the privacy of applicants and victims and to encourage "frank and open decision-making" by shielding the deliberative processes of decision-makers from overbearing scrutiny. [147] However, confidentiality rules may avert public scrutiny of exculpatory issues and thereby prevent innocents from being identified or hinder their ability to challenge the case against them. For example, in 2010, a journalist in Texas wanted to examine documents related to the clemency application of death-row inmate Hank Skinner after it came to light that there was DNA evidence in his case that, if tested, could possibly exonerate him. [148] The Texas Board of Pardons and Parole rejected the journalist's request for "correspondence, documents and reports" related to the Skinner case because nearly all such information was deemed to be confidential. [149]

Transparency is an important factor in clemency proceedings because it interlinks with a bundle of other important, justice-related concepts. According to Leona D. Jochnowitz:
[T]he question of public access to state . . . clemency petitions is emblematic of important issues regarding the fairness, standards, effectiveness, flexibility and diversity of the various clemency ***80** procedures. It also is related to the question of who controls, monitors and historically preserves the records depicting the unbridled discretion associated with the clemency process. [150]

Additionally, transparency can reveal injustice. This is why Kathleen Dean Moore argues that clemency decisions should be made on a "basis of reason," which is then made public. [151] Moore asserts that public scrutiny allows for an assessment of whether a clemency decision is "principled, reasonable and fair." [152] "Sunshine is thus an antiseptic." [153]

Veiled decision-making, selective transparency, and expansive confidentiality regimes expose the clemency process to potential abuse. As previously noted, many states shield clemency decisions and, more importantly, the reasoning underpinning those decisions from the full light of day. A number of states--such as Arizona, [154] Maryland, [155] Utah, [156] Nebraska, [157] and Washington [158] --do, however, conduct clemency hearings in a public setting, providing significant transparency for credible innocence claims to be aired and identified. [159]

Finally, the rationale behind confidentiality rules can conflict with "transparency needs," especially with regard to protecting recommendations to deny clemency and victim statements. [160] As a result of these transparency issues, it is possible that the rejection of clemency applications based on credible innocence claims may never ***81** be identified, let alone corrected, and clemency is therefore hindered in its role as a "tool of corrective justice." [161]

B. Imbalanced Administrative Board Compositions

Administrative boards play a significant role in the vast majority of state clemency proceedings; therefore, the composition of these boards is crucial to the assessment of innocence claims.

In order to encourage balanced, collaborative dialogues about how the risk of wrongful convictions can be reduced, American innocence commissions have brought together representatives from across the criminal justice system, including prosecutors, defense attorneys, victims' rights advocates, politicians, scientists, and academics.[162] This collaboration brings "usually autonomous actors . . . together to encourage change."[163] Rachel Barkow argues that such diversity is equally important when it comes to administrative boards involved in clemency processes, because diverse administrative boards can add expediency, political cover, and legitimacy to a grant of clemency.[164] Barkow asserts that clemency boards should "not be mere arms of law enforcement interests, for that could skew them . . . against issuing any grants at all."[165] Instead, clemency boards should be "careful to mix law enforcement interests with those of defense lawyers and former offenders so that each side can learn from the other and increase the likelihood that sound conclusions will be reached and less subject to political attack."[166] In the context of innocence, ***82** a diverse board may also mean that innocence claims will glean a more balanced review.

Administrative boards in some states do reflect a degree of diversity. For example, the Kentucky Board brings together members from legal, investigative, teaching, medicine, corrections, and social work backgrounds.[167] Ohio's Board is comprised of members with varying experience in victims' rights, rehabilitation and corrections, and law.[168] The Pennsylvania Board integrates members with experience in offender mentoring, specialized courts, corrections, law enforcement, parole, medical technology, science, and law, including criminal defense.[169] South Carolina's Board includes individuals with backgrounds in religious practice, administration, parole, probation, social work, nursing, pharmaceuticals, management, realty, automotive brokering, personal training, teaching, and military service.[170] The Board in South Carolina is, however, nearly devoid of members aligned with the criminal defense community and, instead, consists mostly of individuals aligned with state prosecutorial services or organizations.[171]

Other administrative boards are more overtly state aligned. For instance, the Nebraska Board of Pardons is comprised of the Governor, the Secretary of State, and the Attorney General.[172] Colorado requires that its Board include the Executive Director of the Department of Corrections, the Executive Director of the Department of Public Safety, and at least one person who is a crime victim (or suitable representative) in its membership;[173] there is no requirement ***83** that the Board include any defense-orientated members.[174] In Nevada, the Board of Pardons is comprised of the Governor, the Attorney General, and the seven Nevada State Supreme Court Justices,[175] the majority of whom have backgrounds in complex civil law; in fact, only three of the Justices have any experience in criminal law,[176] and, of those, only one has a background, albeit a minimal one, in criminal defense--having spent one year working with the Public Defender's Office.[177] The Utah Board of Pardons and Parole has eight members, of whom seven have backgrounds in state organizations, including: the District Attorney's Office, the Department of Corrections, the Office of Legislative Research and General Counsel, Homeland Defense and Security, and the Attorney General's Office.[178]

The inclusion of board members from state aligned organizations, however, is not wholly unfavorable. As Barkow states, it is important to "include groups most likely to oppose such [clemency] grants"[179] because involving such representatives "is a critical means of muting any subsequent criticism"[180] of a decision to grant clemency. The issue, then, is the extent to which state aligned representatives eclipse those from the criminal defense and inmate communities. Unfortunately, a survey of recent state clemency boards reveals a distinct lack of diversity in board composition. Clemency boards ***84** devoid of representation by individuals (such as lawyers, academics, and scientists) with a working knowledge of post-conviction review, state evidence and innocence rules, and the causes of wrongful convictions are problematic for a balanced assessment of innocence claims.

C. Barriers to Meaningful Review

As clemency has been saddled with the responsibility of serving as the final adjudicator of innocence claims, one scholar argues "[t]o serve properly . . . as a safeguard, it is essential that the clemency power be checked, so as to require, at the very least, that all applications for clemency are meaningfully reviewed." [181] There are numerous potential barriers to the meaningful review of clemency applications, particularly for innocents, including: (1) high thresholds for eligibility and relief and antipathetic attitudes; (2) obstacles to the evaluation of claims; and (3) a lack of specific innocence procedures.

1. High Thresholds and Antipathetic State Attitudes Toward Granting Clemency

High thresholds operate to restrict or foreclose the opportunities for an inmate's clemency application to be heard. State clemency frameworks generally employ two particularly high thresholds: eligibility requirements and requirements for relief. Additionally, evidence indicates that decision-makers are generally hostile toward granting clemency. This subsection considers these thresholds and attitudes.

a. Eligibility Thresholds

Numerous states employ high eligibility thresholds for clemency. Some states, for example, require a payment to access the clemency system. In Pennsylvania, an inmate must pay $8 for a clemency ***85** application form. [182] Other states employ a more typical, robust eligibility threshold. Among them, Indiana requires inmates to serve a third of their sentence before applying for clemency; [183] Connecticut requires inmates to serve four years if their original sentence exceeds eight years and half of the original sentence if the original sentence is less than eight years; [184] and Colorado requires inmates to serve one third or ten years of their sentence, whichever is less. [185] In Georgia, state law does not dictate a minimum number of years be served before applying for clemency; rather, there is a general requirement that an inmate serve at least one-third of his or her sentence. [186] Requirements like these are patently problematic for innocents because they eliminate a mechanism for relief for substantial amounts of time, often without special consideration of credible innocence claims.

Other states employ strict disqualification criteria. In Indiana, for example, any inmate whose institutional record reflects one major violation or two or more minor violations in the last year is precluded from applying for clemency. [187] Comparably, Virginia requires that an applicant not have pleaded guilty to be eligible to apply for clemency; [188] this prerequisite is particularly troublesome given that ***86** research shows numerous DNA exonerees originally pleaded guilty to a crime they did not commit. [189]

b. Relief Thresholds

Some states employ high thresholds for clemency relief. Applicants in Connecticut, for example, must "describe and submit evidence of specific extraordinary circumstances or specific exemplary conduct supporting the request for clemency;" [190] however, what constitutes "extraordinary circumstances" is not defined. In Wisconsin, applicants must show that the need for clemency is "significant and documented." [191] Washington also requires "extraordinary circumstances" to grant clemency. [192] The list of factors considered by the Washington Board when determining if an application is sufficiently "extraordinary" to warrant relief does not expressly include innocence or dubious guilt. [193] In contrast, the factors considered by the Board of Pardons in South Dakota do expressly include (1) substantial evidence indicating one's sentence was a miscarriage of justice and (2) proven innocence by clear and convincing evidence. [194] The Montana Board of Pardons and Paroles also considers whether an inmate petitioning for clemency can ***87** "satisfactorily prove innocence of a crime" for which he or she is serving or has served a sentence. [195]

High relief thresholds are a hallmark of the American post-conviction relief arena.[196] This is likely because employing high relief thresholds is a means of ensuring finality, which is one of the American criminal justice system's greatest obsessions.[197] Given the clemency system's relationship with the criminal justice system, it is unsurprising to find the application of rules that largely preserve trial verdicts, thus supporting the system's general allegiance to finality. Accordingly, clemency boards and executives avoid unraveling jury verdicts,[198] despite their responsibility to do so when a case warrants such action, *i.e.*, in cases involving credible innocence claims.[199]

c. Antipathetic State Attitudes

As well as employing high eligibility and relief thresholds, numerous states underscore that a grant of clemency, especially one grounded in innocence, is rare. Moreover, some states give the impression they are unwelcoming of such applications. For example, the Georgia Board of Pardons and Paroles states in its annual report that a grant of clemency based on "complete innocence" is "most rare,"[200] and highlights that only two such pardons have been granted since 1943.[201] In Virginia, it is emphasized that an "absolute pardon," which is a pardon based on the belief that a petitioner is innocent and ***88** was unjustly convicted, is "rarely granted."[202] The general information section of Wisconsin's application for clemency advises that "[e]xecutive clemency is an extraordinary measure and is rarely granted."[203] The point is bolded and underlined.[204]

Collectively, these thresholds and projected antipathetic attitudes are unfavorable to innocent inmates because they tightly restrict the timeframe in which an inmate can apply for clemency, set a high bar for relief, and discourage inmates from applying. Requiring an innocent inmate to serve a third of his or her sentence before applying for clemency, for example, hardly comports with notions of justice. Additionally, many innocent inmates lack the "clear and convincing" evidence of innocence or "extraordinary circumstances" required for relief. One way to satisfy this "clear and convincing" standard is by presenting DNA evidence; however, only between 5% and 10% of criminal cases involve DNA evidence,[205] and, even when such evidence exists, inmates often face issues gaining access to and testing it.[206] Innocence cases often confront a hodgepodge of other problems, such as false confessions, erroneous eyewitness identifications, jailhouse snitches, State misconduct, ineffective lawyering, and unreliable forensic evidence.[207] Such obstacles are exacerbated by clemency procedures and attitudes unfavorable to innocent inmates.

2. Obstacles to the Evaluation of Claims

There are numerous junctures of the review process of clemency applications that are potentially unfavorable to innocents. First, many states' clemency application forms are designed without a focus on innocence, failing to include specific questions about innocence or the ***89** potential causes of a wrongful conviction.[208] This is not true in all states, however. Some states' applications include a space where applicants *can* provide their version of events. For example, the Illinois application asks applicants to "provide [[their] own version of the factual circumstances of the offense(s)."[209] Additionally, some states, like Illinois and Arizona, allow applicants to file supplementary documentation to support their applications.[210]

Second, the investigation of claims raised in clemency applications can be troublesome. Some states, including Oklahoma and Nebraska, indicate that clemency claims are investigated without clarifying the form or the extent of the investigations.[211] Missouri provides slightly more information, stating that the Board may investigate information ranging from criminal history and medical needs to statements from relevant lawyers, judges, and victims.[212] The issue of investigation of claims links with the transparency concerns identified above; a lack of information regarding the depth to ***90** which clemency applications and innocence claims are investigated may allow abuse of process.[213]

Third, although numerous states offer hearings to expand upon the claims set out in clemency applications, sometimes this mechanism is underutilized or is inadequate to facilitate innocence claims. In Washington and Nebraska, hearings are only provided after a preliminary decision is made that the application has merit; [214] however, the meaning of "merit" is unclear. Even if a hearing is granted in Nebraska, "[i]t is not . . . the purpose of the hearing to retry the case or determine guilt or innocence." [215] Similarly, in Washington, "the hearing is not a forum to retry the conviction." [216] In Ohio, hearings are discretionary. [217] Pennsylvania [218] and Utah [219] have typical hearing time requirements of fifteen and twenty minutes, respectively. By contrast, other states, like Georgia [220] and Arizona, [221] permit hearings to span many hours.

***91** During the clemency application review process, applicants are faced with obstacles potentially unfavorable to innocents. These obstacles, such as restricted clemency application forms, undefined investigations, and limited hearings, reduce the likelihood that innocence claims will be effectively examined and evaluated by administrative boards and executives.

3. Lack of Specific Innocence Procedures

As noted, clemency was not originally developed to assess innocence claims; [222] rather, an innocence role was thrust upon it by the USSC in *Herrera*. This sub-section considers the extent to which states have remodeled (or, indeed, failed to remodel) their clemency frameworks to account for its innocence role.

a. Innocence and Extraordinary Circumstances Procedures

Numerous states employ special clemency procedures for extraordinary circumstances, which aim to streamline the application process. However, such procedures often fail to cater to innocence claims by routinely omitting actual innocence from the list of extraordinary circumstances considered. In West Virginia, for example, "an inmate, parolee, or probationer must have contributed extraordinary service to his penal institution, exhibited extraordinary motivation toward his rehabilitation, or . . . suffer[ed] an extreme[,] life-threatening medical condition that has been certified by prison medical staff in order to be eligible to apply for a pardon." [223] Arizona's special procedures only cover applicants in "imminent danger of death," in a permanent vegetative state, or pending execution. [224] The Utah Board of Pardons may, in exceptional circumstances, adjust its prior decisions through a special-attention review or hearing; [225] in Utah, exceptional circumstances include illness requiring extensive medical attention, exceptional performance ***92** or progress in prison, exceptional family circumstances, a verified opportunity for employment, or information that was not previously considered by the Board. [226] Although this list is not exhaustive and, arguably, "information not previously considered by the Board" could include evidence of innocence, innocence is not specifically highlighted. [227] States' failure to identify innocence as an extraordinary circumstance is just one example of how states have failed to remodel their clemency frameworks to account for clemency's post-*Herrera* innocence role.

b. General References to Innocence

There are states, however, that do reference innocence as part of their clemency processes. For instance, New York considers pardons when no other adequate administrative or legal remedy is available and when there is "overwhelming and convincing proof of innocence not available at the time of conviction." [228] Pardons are available in Georgia in two specific instances, one of which is "complete innocence;" [229] the administrative board in Georgia "ha[s] the authority to pardon any person convicted of a crime who is subsequently determined to be innocent of said crime." [230] In Alabama, persons under sentence who have not yet completed three years of successful parole may apply for a pardon based on innocence, but this process requires approval from the sentencing court or prosecuting District Attorney. [231] In Louisiana, applicants with a life sentence may bypass the fifteen-year service rule and apply for clemency when they have ***93** sufficient evidence to show they would not have been found guilty if the new evidence had been introduced at trial. [232]

c. Innocence Specific Procedures

Some states have carved out specific clemency procedures that focus on innocence claims. In Montana, for example, pardons may be granted for applicants who "satisfactorily prove innocence of a crime for which the individual has served time" [233] or who "submit[] newly discovered evidence showing complete justification or non-guilt on the part of the individual." [234] Additionally, applicants in Montana who prove "by overwhelming evidence that the individual is innocent of a crime for which the individual was convicted" can be recommended for commutation. [235] In North Carolina, a "pardon of innocence" is granted either when an individual has been convicted and the criminal charges are subsequently dismissed or when the individual has been erroneously convicted, imprisoned, and later found innocent. [236] Tennessee utilizes a clemency "exoneration" procedure, [237] through which the Governor gives serious deliberation to applications that demonstrate, by clear and convincing evidence, "after consideration of the facts, circumstances and any newly discovered evidence [[that] the Petitioner did not commit the crime for ***94** which the Petitioner was convicted." [238] Clark McMillan and James Green were both exonerated by Tennessee Governor Phil Bredesen through this procedure. In McMillan's case, DNA evidence proved he was innocent of a rape and robbery for which he had spent twenty-two years in prison. [239] Green was pardoned, after serving two years for the abduction and groping of a child, after the victim recanted her testimony and the District Attorney dropped the charges. [240] Texas also specifically allows for pardons based on innocence, which exonerate the applicant and erase his or her conviction(s). [241] "In order to consider a pardon for innocence, the Texas Board of Pardons and Paroles requires either evidence of actual innocence from at least two trial officials; or the findings of fact and conclusions of law from the district judge in a state habeas action indicating actual innocence." [242]

Alyson Dinsmore argues that clemency, in its current form, "is an inadequate means of protecting against wrongful executions," labeling it a "meaningless ritual." [243] While it is apparent that innocent inmates face a plethora of obstacles during their quest for relief via clemency, it is also evident that some states have taken a measure of positive action. Still, states have not yet adopted a consistent approach to building clemency frameworks that satisfy their responsibilities under *Herrera* --to be the "fail safe" of the criminal justice system and the final identifier of wrongful convictions--in a meaningful way.

Whether the result of legal mandates or the preference of individual executives, innocence-specific procedures generally arise only after the legal system has relieved a defendant. Consequently, ***95** the extent to which clemency practices and decisions can be judicially reviewed is crucial.

III. AMERICAN COURTS' RESPONSES TO DUE PROCESS CHALLENGES TO CLEMENCY FRAMEWORKS

Five years after *Herrera*, [244] the USSC considered whether clemency was an "integral" part of Ohio's system for adjudicating guilt or innocence and, therefore, deserving of due process protection. [245] Rejecting the Petitioner's claims--and seemingly sidelining its decision in *Herrera*--the USSC determined that clemency proceedings "are not part of the trial or even of the adjudicatory process." [246] The Court explained that clemency proceedings "do not determine the guilt or innocence of the defendant, and are not intended primarily to enhance the reliability of the trial process." [247] In so holding, the USSC affirmed that clemency decisions were not the "business of the courts." [248]

The Court split, however, with regard to whether procedural due process rights attach to clemency proceedings. [249] Chief Justice Rehnquist, joined by Justices Kennedy, Scalia, and Thomas, concluded that the Due Process Clause provides no constitutional safeguards as to clemency procedures. [250] Justice O'Connor, however, joined by Justices Breyer, Ginsburg, and Souter, concluded that, because a death row prisoner retains some life interest before execution, "some *minimal* procedural safeguards apply to clemency proceedings," even if the power to grant clemency is solely entrusted to the executive. [251] Justice

O'Connor reasoned that judicial intervention might be "warranted in the face of a scheme whereby the 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 ***96** clemency process." [252] Justice Stevens concurred, arguing that it would be wrong for clemency processes "infected by bribery, personal or political animosity, or the deliberate fabrication of false evidence" to be constitutionally acceptable. [253] Subsequently, the vast majority of courts have interpreted *Woodard* to mean that minimal due process protections extend beyond clemency applications arising out of death penalty cases and attach to all clemency proceedings. There is no agreement, however, on what exactly constitutes "minimal" due process in the context of clemency proceedings. Since *Woodard*, defendants have made a variety of due process challenges in relation to state clemency frameworks. These have included: (A) innocence related challenges; (B) challenges related to the provision of assistance for preparing clemency applications; (C) challenges to state clemency procedures; and (D) challenges related to the role or conduct of state officials. This section provides a brief overview of courts' responses to such claims.

A. Innocence Related Challenges

Some inmates have challenged clemency proceedings by way of arguments related to their claim of innocence. In *Corliss v. Pennsylvania Board of Pardons & Parole*, Corliss challenged the Board's decision to deny him parole, alleging that, in light of exculpatory DNA evidence, the denial violated his Eighth and Fourteenth Amendment rights. [254] The court rejected his claim, stating ***97** that Corliss presented no basis for his conclusion that DNA evidence proved his innocence; [255] the fact that the trial court properly rejected the DNA evidence as inconclusive illustrated that Corliss's claim lacked merit. [256] However, deference to trial court findings concerning exculpatory evidence can be problematic. As one commentator states:

> Exaggerating the weaknesses of a prisoner's exculpatory evidence not only undermines the integrity of the judicial process, but it may also make it more difficult for the prisoner to obtain clemency. Once a court declares that the . . . standard [for review] has not been met, a governor fearful of controversy may find it irresistibly tempting to take cover behind the court's declaration and say that he or she, like the court, finds the prisoner's exculpatory evidence unconvincing. It certainly would not be the first time that a governor presented with a difficult clemency petition has sought shelter behind a court's refusal to grant the prisoner's request for relief. [257]

In 2008, the court in *McKithen v. Brown* engaged in possibly the most protracted discussion of any court regarding innocence claims and clemency proceedings. [258] McKithen, who had been convicted of the attempted murder of his wife, petitioned the court for access to DNA testing of a knife that might exonerate him. [259] One question the court considered was whether McKithen's liberty interest in meaningful access to existing executive clemency mechanisms encompassed access to the knife introduced as evidence against him at trial. [260] Judge John Gleeson of the United States District Court, referring to *Herrera*'s description of clemency as a "fail safe," held:

[There is] strong support for my conclusion that the right of meaningful access to existing clemency mechanisms entails the right to certain evidence of innocence. Though clemency ***98** proceedings are not exclusively or even primarily "error-correction" proceedings, and often turn not on a revisitation of the facts underlying a conviction, but on an analysis of a defendant's contrition and personality, they nevertheless have one significant, even if discretionary, error-correcting function: they are the last resort for the wrongfully convicted. [261]

Judge Gleeson concluded that the criminal justice system continues to "grapple with the questions of which avenues of relief remain open to those advancing claims that they are wrongfully convicted." [262] He noted that while some states offer statutory

mechanisms to set aside convictions based on newly discovered evidence, it was unclear whether there was a constitutional right to do so. [263] Therefore, Judge Gleeson reasoned:

> The remaining resort for the innocent convicted is to avail themselves of the opportunity to petition for clemency in whatever form the state has authorized. States may debate the value of expanding or contracting any of these avenues; in light of the tremendous probative power of DNA evidence, it may be wise to strike a different balance between accuracy and finality in cases where it is available. [264]

In spite of Judge Gleeson's detailed assessment, the Second Circuit Court of Appeals overruled the decision in 2010. [265] Although acknowledging that the district court paid "careful attention to precedent" and employed a "quality of . . . reasoning, which proved to be intricate and, in many ways, persuasive," the circuit court found ***99** McKithen had no residual due process liberty interest in meaningful access to state clemency mechanisms. [266] In so holding, the circuit court relied heavily on the USSC's 2009 decision in *District Attorney's Office v. Osborne*, 557 U.S. 52 (2009), [267] which raised similar issues. There, the USSC found that a prisoner had no liberty interest with respect to "any procedures available to vindicate an interest in state clemency," explaining that clemency is "inherently discretionary and subject to the whim, or grace, of the decision-maker; it is, in other words, a form of relief to which a prisoner has no right." [268] As such, the circuit court in *McKithen* explained:

> Because there is no liberty interest in receiving clemency, the *Osborne* Court rejected the existence of any subsidiary liberty interest regarding the adequacy of state procedures capable of granting that relief. Thus, the District Court's holding that a prisoner has a liberty interest in meaningful access to state clemency mechanisms does not survive *Osborne*. [269]

These cases demonstrate that the relationship between clemency and innocence has crept into legal challenges. The district court's decision in *McKithen*, and to some extent the circuit court's acknowledgement of its persuasiveness despite overruling it, demonstrates a glimmer of understanding that the courts *should* (albeit that they cannot or will not) intervene where clemency or legal frameworks do not facilitate access to unimpeachable evidence of innocence, such as DNA evidence. However, *Corliss*, the circuit court's decision in *McKithen*, and the USSC's decision in *Osborne* ***100** undermine this point and further the legal system's general allegiance to finality over accuracy [270] by encouraging clemency boards to defer to trial court determinations and foreclosing the notion that defendants have a liberty interest in meaningful access to clemency. Moreover, these decisions demonstrate the general resistance to claims concerning access to exculpatory evidence.

Although the following cases do not relate specifically to innocence claims, they further demonstrate how narrowly *Woodard*'s minimal due process standard is applied and illustrate courts' unwillingness to interfere in state clemency proceedings. This lack of judicial oversight allows for even the most suspect clemency proceedings to pass constitutional muster and potentially shields the inadequate examination of innocence claims in state clemency proceedings.

B. Challenges Related to the Provision of Assistance for Preparing Clemency Applications

Some inmates have argued that minimal due process requires they be provided with a certain level of assistance when preparing clemency applications. For example, in the 2006 case *Lewis v. State of Alaska*, Lewis argued that due process required the State provide her with an examination by a private doctor whose report she could use to support her application for clemency. [271] The Alaska Supreme Court assumed that Lewis had a "significant interest" in the ability to generate information to support her clemency application and that the State's denial could have the effect of denying her access to "potentially important relief." [272] However, because Lewis had not "demonstrated any real-world value of gaining access to a private doctor," the court found there was no denial of due process and rejected Lewis's claims. [273] The court stated, "Lewis did not attempt to rely on any

readily available information to make out a showing ***101** suggesting that she has a medical condition that might justify clemency" or might qualify as an "exceptional circumstance." [274]

In *Baze v. Parker*, Baze, a death row inmate, challenged the Kentucky Department's denial of his unfettered access to prison personnel. Baze had sought a court order permitting him to interview prison staff whom he thought could support his application for clemency. [275] Regarding the propriety of such an order, Baze argued that federal courts have the power to order third-party compliance with clemency related investigations. [276] The Sixth Circuit found that "[s]uch a broad oversight power is in tension with the longstanding principle that we do not sit as super appeals courts over state commutation proceedings." [277] In response to Baze's argument that meaningful access to clemency included a right to call upon federal courts to supervise the mechanics of state proceedings, the court bluntly stated, "we cannot infer a Congressional intent to interfere with state proceedings to such a remarkable extent." [278]

Courts' unwillingness to compel states to actively facilitate the preparation of clemency applications emphasizes the uninhibited nature of the clemency power. Moreover, courts appear generally unwilling to interfere with state clemency procedures, whether or not the clemency application is based on a claim of innocence. Although *Lewis* and *Baze* are not innocence cases, presumably, courts would similarly approach claims advanced by innocent inmates in cases where states have refused to assist innocents in gathering evidence typically utilized to challenge a conviction, such as lay witness or expert testimony and forensic evidence. Of course, courts could retreat from the current precedent and expand the district court's approach in *McKithen* beyond unimpeachable DNA evidence. However, as attractive as such a change in direction would be, it is unlikely; this is because *McKithen*'s holding was, in effect, very narrow, given that only five to ten percent of cases involve DNA evidence. [279]

***102** *C. Challenges to State Clemency Procedures*

Another argument inmates have advanced is that state clemency procedures are not in compliance with *Woodard*'s minimal due process standard. In *Faulder v. Texas Board of Pardons & Paroles*, Faulder claimed the Texas Board of Pardons and Paroles violated due process by providing inadequate notice of issues it would consider for clemency, acting in secrecy, refusing to hold hearings, giving no reasons for its decisions, and failing to keep records of its actions. [280] The Fifth Circuit labeled Faulder's latter claims regarding transparency "meritless." Interpreting narrowly Justice O'Connor's view in *Woodard* regarding when judicial intervention is warranted, the court explained that *Woodard*'s "low threshold of judicial reviewability is based on the facts that pardon and commutation decisions are not traditionally the business of courts and that they are subject to the ultimate discretion of the executive power." [281] The court found that Texas clemency procedures did not exhibit the "extreme" nature of a coin toss or arbitrary denial of access to the clemency process, and thus satisfied *Woodard*'s minimal due process standard. [282] In conclusion, the court noted, "[p]rocedural due process is an inherently flexible concept. And *Woodard* emphasizes that extra flexibility is required when, as here, the criminal process has reached an end and a highly individualized and merciful decision like executive clemency is at issue." [283]

Texas's clemency procedures have been highlighted as suspect numerous times since *Faulder*. [284] Accordingly, Professor Daniel Kobil considers it regrettable that courts have held "the deeply flawed Texas clemency process satisfies the *Woodard* standard." [285]

Similarly, in *Fugate v. Board of Pardons & Paroles*, the Superior Court of Georgia denied an emergency motion for injunctive relief after Fugate argued his due process rights were violated by the State ***103** Board's refusal to disclose the information that would be relied on during its clemency decision and its reliance on untrustworthy and inaccurate information. [286] The court rejected Fugate's claim and, interpreting *Woodard*, held that judicial intervention is only warranted when a decision-maker relied on "admittedly false information." [287]

In *Sepulvado v. Louisiana Board of Pardons & Parole*, Sepulvado argued that the State denied him minimal due process because Louisiana's clemency procedures did not guarantee a clemency hearing. [288] Rejecting this claim, the court found there are no specific requirements that clemency proceedings must follow in order to achieve due process compliance. [289] Louisiana permitted all inmates to apply for clemency and to provide a variety of detail, including the reason for clemency, at the initial application stage, which the court held did not fall below the *Woodard* standard. [290] Therefore, it was irrelevant that, unless a hearing was granted, an inmate could not provide any further information. [291] The court highlighted, however, that Louisiana procedure included an exception to this bar on additional evidence, which allowed certain inmates to introduce evidence demonstrating actual innocence. [292] Relying on its earlier decision in *Faulder*, the Fifth Circuit Court of Appeals concluded, "Sepulvado had full access to the clemency process, and the Board considered his application before denying him a clemency hearing. Under the highly deferential *Faulder* standard of review, Sepulvado does *not* state a due-process-denial claim for which relief can be granted." [293]

Again, in *Gilreath v. State Board of Pardons & Paroles*, a Florida clemency process was found not to breach the "minimal" *Woodard* standard, despite the fact that one of the Board members who voted ***104** against clemency was absent from an earlier meeting where people spoke in favor of clemency. [294] The constitutionality of the process was upheld because, prior to voting, the Board member at issue saw a written file and reviewed a summary of the oral presentations. [295]

In the 2013 case *Mann v. Palmer*, Mann, who was scheduled to be executed on March 1, 2013, [296] argued that he was denied due process when Florida procedure permitted the Governor, before signing the death warrant, to consider an updated clemency investigation without giving Mann an opportunity to be heard and represented by counsel in those proceedings. [297] The majority of the Eleventh Circuit Court of Appeals found this procedure did not violate due process, as the State had conducted a full clemency hearing--which included notice and the opportunity to participate and have the representation of counsel--in 1985. [298] Judge Martin dissented in part, finding the due process issue in Mann's case unusual because the 1985 clemency proceeding, although relating to the same underlying conviction, addressed a different sentence of death. [299] Notwithstanding the full clemency investigation in 1985, Mann claimed he never had a clemency proceeding on the now pertinent death sentence imposed in 1990 after he was resentenced by a newly empanelled jury. Mann further claimed that neither he nor his counsel had been advised that the Governor had conducted an updated clemency investigation and additional clemency proceedings and that he was denied access to records of those proceedings. Judge Martin, troubled by Mann's claims and wary of the *Herrera* decision, stated:

> I understand Mr. Mann to be arguing that he has arbitrarily been denied any access to Florida's clemency process for the specific sentence of death set to be carried out this week. As I mentioned, this argument gives me pause. That is because the Supreme Court ***105** has acknowledged that clemency proceedings have an important role to play in the administration of the death penalty. [300]

Unprepared to label Mann's claim futile, Judge Martin concluded that "Mr. Mann will certainly suffer irreparable injury if his execution is carried out, I would proceed with caution." [301]

These cases demonstrate that courts are applying *Woodard*'s due process protection very narrowly, underscoring, again, the expansive and legally unchecked nature of the clemency power. Although courts mention the "fail safe" function of clemency, this characteristic, as well as any reference to innocence, is left unexpanded. Courts appear to be more concerned about mere access to clemency procedures than the substance of these frameworks. As Kobil observes, "*Woodard* is viewed [by the courts] as requiring states to provide very little in the way of process." [302]

D. Challenges Related to the Role or Conduct of State Officials

Inmates have also argued that the role or conduct of state officials involved in the clemency process violated the *Woodard* due process standard. For instance, inmates have challenged state clemency boards with members under investigation for impropriety while considering clemency applications. In *Gilreath*, an inmate claimed his due process rights were violated when two members of the state clemency board were under investigation by the State Attorney General's Office at the time his clemency application was denied; the investigations, Gilreath argued, gave rise to an appearance of impropriety because the board members might have voted to deny clemency in order to curry favor with the Attorney General. [303] The Eleventh Circuit Court of Appeals rejected Gilreath's claim, noting there was no evidence that: the Attorney General regularly advocated ***106** for or against clemency; anyone familiar with the State's clemency procedure would believe the Attorney General's Office was an advocate in the clemency proceeding; or indicated the result desired by the Attorney General for Gilreath's clemency proceeding. Moreover, the court concluded that the mere "appearance" of impropriety would not violate due process. [304]

The 2001 case of *Parker v. State Board of Pardons & Paroles* is a more extreme example. [305] There, Parker not only claimed that the investigation of two active board members--including the Chairman--for criminal wrongdoing violated due process, [306] but further asserted that relief was warranted in light of the Board Chairman's statement that "[n]o one on death row [will] ever get clemency as long as [I am] Chairman of the Board," coupled with the Chairman's unique control over the voting process. [307] The Eleventh Circuit rejected both claims, relying on *Gilreath*'s holding that an appearance of impropriety does not violate due process, and applying *Woodard*'s low threshold for due process compliance. The court reasoned that, assuming the Chairman's statement was actually made, the three-year time lapse between the statement and Parker's clemency proceedings was a "long enough period to allow [the Chairman] to reevaluate his position so that he could now fairly review Parker's clemency application." [308] The court additionally noted the Chairman's testimony indicated that he "now has an open mind and listens to all of the clemency cases that come before him prior to voting on them." [309] As such, the court affirmed the district court's denial of Parker's requested relief. [310]

***107** Other inmates have challenged the Governor's role or conduct in clemency proceedings. In *Duvall v. Keating*, for example, the Governor of Oklahoma had made a statement similar to the statement at issue in *Parker*, namely that he would not grant clemency for murderers. [311] The court rejected Duvall's due process claim because, since Duvall was never recommended for clemency by the Oklahoma clemency board, the Governor did not engage in the clemency proceeding. [312]

The issue in *Bacon v. Lee* was whether *Woodard*'s minimal due process protection included an inmate's right to have his or her clemency request reviewed by an executive possessing the level of impartiality required of a judge presiding over an adjudicatory proceeding. [313] The court ruled that it did not, stating:

> We do not believe *Woodard* intended to repudiate entirely the cardinal principle that clemency decisions are normally not a matter to be litigated in courts of law. . . . Instead, we conclude . . . that state clemency procedures generally comport with due process when a prisoner is afforded notice and the opportunity to participate in clemency procedures, and the clemency decision, though substantively a discretionary one, is not reached by means of a procedure such as a coin toss. [314]

In the 2013 case of *Schad v. Brewer*, a death-row inmate argued that the Governor's Office placed undue influence on members of the ***108** Arizona Board of Executive Clemency to vote against clemency, particularly when voting on clemency for high profile inmates, in violation of due process. [315] A number of previous Board members provided evidence that suggested they were not reappointed because the Governor was "unhappy" with their votes in certain cases. [316] The court rejected Schad's claims, holding that "even if [the previous Board members'] impressions were accurate, this does not demonstrate that the

current Board members are incapable of objectivity or are biased." [317] That said, the court's approach did differ slightly from that taken in *Bacon*. The *Shad* court seemed prepared to assume that "minimal due process applicable to clemency proceedings pursuant to *Woodard* includes access to an impartial decision maker." [318]

Cases challenging the role or conduct of state officials during the clemency process further demonstrate how courts are applying *Woodard* narrowly and, seemingly, are willing to overlook the biases of decision-makers. Notably, courts are reluctant to demand the same objectivity of individuals making clemency decisions as is demanded of court officials--even where applications are based on innocence claims--notwithstanding that these individuals are charged with a role equivalent to that of adjudicating guilt and innocence.

Overall, with respect to due process and related doctrine, some courts acknowledge clemency's "innocence" role, following *Herrera*; however, most courts continue to underscore that clemency is not "the business of the courts," and are, as a result, antipathetic to inmates' claims. As noted by Kobil, "[t]hus far, virtually every challenge to state clemency procedures based on *Woodard* has been summarily rejected by lower courts, despite allegations of serious irregularities." [319] As the cases discussed above demonstrate, most courts are applying *Woodard*'s due process protections narrowly and are focusing on mere access to clemency proceedings rather than the substance of clemency frameworks. For instance, proceedings tainted ***109** by the appearance of impropriety, partiality, and bias, as well as those lacking in transparency and/or infrastructures for supporting inmates' development of their clemency applications have each failed to trigger judicial intervention. Presently, therefore, the sanguine view of clemency, as adopted by the USSC in *Herrera*, does not seem "to comport with the practical realities of the clemency process," [320] an actuality that has been "frankly acknowledged by lower courts." [321]

CONCLUSION

Clemency is an integral part of the American criminal justice system. However, like those before them, American executives primarily utilize the clemency power for political expedience rather than to remedy wrongful convictions. To that extent, the USSC's decision in *Herrera* catapulted clemency into a role it had never truly served. The Innocence Movement is now in full stride--with more than fourteen hundred exonerations listed on the National Registry of Exonerations, over three hundred and twenty of which have been proven conclusively by post-conviction DNA evidence. [322] Consequently, the extent to which clemency is fit to fulfill its "innocence" role is now critical. This article urges that there are serious deficiencies in the operation of clemency systems across America, particularly from the viewpoint of innocents. In addition to the lack of historical precedent for remedying innocence claims, current state clemency frameworks showcase a myriad of obstacles to the meaningful assessment of innocence claims, such a lack of transparency, imbalanced administrative board compositions, and barriers to meaningful review, such as high eligibility thresholds and unfavorable application procedures. These obstacles are exacerbated by the minimal constitutional protection afforded to clemency ***110** applicants under *Woodard*--a standard which courts have routinely applied narrowly, focusing on mere access to clemency procedures rather than the substance of state frameworks. Moreover, courts demonstrate clear reluctance to interfere with even the most troublesome clemency practices.

Fortunately, there is some acknowledgement of clemency's innocence role under *Herrera* by states and courts, as evidenced by innocence-focused procedures in states like Montana, North Carolina, Tennessee, and Texas and by a few cautious acknowledgements in judicial decisions. Still, more must be done. While it is beyond the scope of this article to make detailed recommendations, several suggestions include: (1) developing innocence-focused clemency procedures and innocence-based clemency applications in each state; (2) encouraging clemency boards to conduct more transparent and expansive reviews of innocence applications and to reject trial court findings in appropriate cases; and (3) applying a broader interpretation of *Woodard*'s due process requirements. [323]

Clemency is a hostile environment for innocents. Given the USSC's decision in *Herrera* and the ever-increasing tally of exonerations, action must be taken to ensure clemency applications--especially those based on innocence claims-- are fairly and effectively reviewed.

Footnotes

a1 (Barrister), Senior Lecturer in Law, Centre for American Legal Studies, Birmingham City University. I would like to thank Dr. Jon Yorke for his valuable review of this article, Alice Christian for her helpful research, and the scholars at the 2014 U.S. Academy of Criminal Justice Sciences conference and Durham University PGR conference on Decision-Making and Criminal Justice: National and International Trends, for allowing me to share earlier drafts. Thanks, also, to Daniel for being an excellent co-author.

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1 Daniel T. Kobil, *How to Grant Clemency in Unforgiving Times*, 31 CAP. U. L. REV. 219, 232 (2003) [hereinafter Kobil, *Unforgiving Times*] (“Clemency has been an integral part of the American legal system since our country's founding.”).

2 *See* Dretke v. Haley, 541 U.S. 386, 399-400 (2004) (Kennedy, J., dissenting) (stressing the importance of applying both retributive and redemptive principles in executive clemency).

3 Molly Clayton, Note, *Forgiving the Unforgivable: Reinvigorating the Use of Executive Clemency in Capital Cases*, 54 B.C. L. REV. 751, 754 (2013).

4 Kathleen (Cookie) Ridolfi & Seth Gordon, *Gubernatorial Clemency Powers: Justice or Mercy*, 24 CRIM. JUST. 26, 28 (Fall 2009), *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_ newsletter/crimjust_cjmag_24_3_ridolfi.authcheckdam.pdf.

5 *Id.* (citing grounds for which clemency has been granted).

6 *See generally* Herrera v. Collins, 506 U.S. 390 (1993).

7 *Id.* at 415.

8 *Id.* at 417.

9 *Id.* at 412.

10 *Mission Statement*, INNOCENCE PROJECT, http://www.innocenceproject. org/ about/Mission-Statement.php (last visited May 13, 2014).

11 *Browse the National Registry of Exonerations*, THE NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited May 10, 2014).

12 *See id.* (indicating exonerations based on DNA with a letter “Y” in the “DNA” column); *see also Know the Cases*, INNOCENCE PROJECT, http:// www.innocenceproject.org/know/Browse-Profiles.php (last visited May 26, 2014) (listing fourteen exonerations from 1989 through 1992, all of which were attributed to DNA evidence).

13 *See generally* David Grann,*Trial by Fire: Did Texas Execute an Innocent Man?*,NEW YORKER, Sept. 7, 2009, *available at* http:// www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann (discussing Willingham's conviction, clemency denial, and execution).

14 *See* STATE BD. OF PARDONS & PAROLES, STATEMENT REGARDING DAVIS CLEMENCY DECISION (Sept. 20, 2011), *available at* http:// multimedia.savannahnow.com/media/pdfs/DavisDecisionStatement.pdf (Georgia Board of Pardons and Parole's statement regarding its decision to deny clemency for Troy Davis). *See generally* Kathy Lohr, *Georgia is Poised to Execute Davis, 22 Years Later*, NPR (Sept. 21, 2011, 12:01 AM), http:// www.npr.org/2011/09/21/140629240/georgia-is-poised-to-execute-davis-22-years-later (discussing the debate surrounding the denial of clemency for Davis and his scheduled execution); Ed Pilkington, *Troy Davis Execution: Georgia Pardons Board Denies Plea for Clemency*, GUARDIAN (Sept. 20, 2011), http:// www.theguardian.com/

world/2011/sep/20/troy-davis-execution-pardon-denied (noting the evidentiary issues which have arisen since Davis's conviction and the public doubt regarding his guilt). Davis was executed on September 21, 2011. *See id.*

15 Grann, *supra* note 13.

16 Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1997).

17 *Id.* at 285 (citing Evitts v. Lucey, 469 U.S. 387, 393 (1985) (quoting Griffinv.Illinois, 351 U.S. 12, 18 (1956))).

18 BARBARA S. LESKO, THE GREAT GODDESSES OF EGYPT 76 (1999).

19 II ROBERT J. BONNER & GERTRUDE SMITH, THE ADMINISTRATION OF JUSTICE FROM HOMER TO ARISTOTLE 253-56 (1938).

20 MELISSA BARDEN DOWLING, CLEMENCY AND CRUELTY IN THE ROMAN WORLD 13-21 (2005).

21 *Id.* at 13-21.

22 *Id.* at 9.

23 *Id.* at 12.

24 Marcus Tullius Cicero, *Epistulae ad Atticum [Letters to Atticus]* (Latin) 14.22 (L.C. Purser ed., 1965) [hereinafter *Letters to Atticus*], *available* at http://perseus.uchicago.edu/perseus-cgi/citequery3.pl? dbname=PerseusLatinTexts&getid=1&query=Cic. %20Att.%2014.22 (last visited May 18, 2014).

25 DOWLING, *supra* note 20, at 19.

26 SUSANNA BRAUND, SENECA: DE CLEMENTIA 32 (2009) ("[C]lementia is an imperial virtue; when clementia is shown towards fellow-Romans it is testimony of absolutepower.").

27 *See, e.g.*, *Letters to Atticus*, *supra* note 24, at 9.7C, *available at* http://perseus.uchicago.edu/perseus-cgi/citequery3.pl? dbname=PerseusLatinTexts&getid=1&query=Cic.%20Att.%209.7C (Caesar suggested the granting of mercy was necessary for continued victory, stating "we fortify ourselves with mercy and generosity"); *see also* David Konstan, *Clemency as a Virtue*, 100 CLASSICAL PHILOSOPHY 337, 337 (2005).

28 *See Letters to Atticus*, *supra* note 24, at 10.4, *available at* http:// perseus.uchicago.edu/perseus-cgi/citequery3.pl? dbname=PerseusLatinTexts& query=Cic.%20Att.%2010.4&getid=1; *see also* Konstan, *supra* note 27.

29 Konstan, *supra* note 27.

30 DOWLING, *supra* note 20, at 23.

31 See, for example, AUSTIN SARAT, MERCY ON TRIAL: WHAT IT TAKES TO STOP AN EXECUTION 69-75 (2005),for a detailed discussion of the relationship between mercy and justice, and, in particular, justice as a legal concept.

32 See, for example, Pontius Pilate's decision not to grant Jesus clemency after a popular vote. *Matthew* 27:15-24.

33 *See* William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 477 (1977), *available at* http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2444&context=wmlr (discussing the early English Kings' versions of clemency).

34 LEGES HENRI PRIMI [LAWS OF HENRY I] (Latin) § 11(16a), at 115 (L. J. Downer ed. & trans., Oxford Univ. Press 1971) (Eng.).

35 *Id.* § 79(2) at 247.

36 Duker, *supra* note 33, at 478; Stanley Grupp, *Some Historical Aspects of the Pardon in England*, 7 AM. J. LEGAL HIST. 51, 58 (1963).

37 *See* Duker, *supra* note 33, at 487 n.60 (citing An Acte Recontynuyng of Ctayne Libties and Francheses Heretofore Taken Frome the Crowne [An Act for Continuing Certain Liberties of the Crown] (Eng.), 27 Hen. 8, c. 24, § 1 (1535) [hereinafter An Act for Continuing Certain Liberties of the Crown]) (alteration in original). See generally K. J. KESSELRING, MERCY AND AUTHORITY IN THE TUDOR STATE 46 (2003), for an examination of the development of the doctrine of the "benefit of the cloth," which was "based on an ancient custom designed to reserve churchmen for punishment for the church courts in an age when few save clerics could enjoyed literacy, the male convict who demonstrated his ability to read was handed over for the much lighter sanctions of the ecclesiastical jurisdiction." *See also* Lesley Skousen, Redefining Benefit of Clergy During the English Reformation: Royal Prerogative, Mercy, and the State (2008) (unpublished M.A. thesis, University of Wisconsin), *available at* http:// minds.wisconsin.edu/handle/1793/65455.

38 An Act for Continuing Certain Liberties of the Crown, *supra* note 37 (*quoted in* Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 586 n.95 (1991) [[hereinafter Kobil, *The Quality of Mercy*] (describing Parliament's grant to the King of "the [w]hole and sole power andauctoritie [authority]" to pardon (alteration in original))).

39 *See* Kobil, *The Quality of Mercy*, *supra* note 38, at 586 *(*referencing E. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEASE OF THE CROWN, AND CRIMINAL CAUSES 233 (London, E. & R. Brooke 1797)).

40 *Id.* at 576; *see also* Duker, *supra* note 33, at 487; Brian C. Kalt, *Pardon Me: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 783-84 (1997).

41 S*ee* Noel Cox, *The Gradual Curtailment of the Royal Prerogative*, 25 DENNING L.J. 1, 2 (2012). Within the British Constitutional Monarchy, the Government, although made up of members of the parliament, acts as *de facto* executive on behalf of the monarch; the parliament in general acts as the highest legislative authority, checking and debating the work of the Government. *See Parliament and Government,* UK PARLIAMENT, http:// www.parliament.uk/about/how/role/parliament-government/ (last visited Dec. 6, 2010).

42 Kobil, *The Quality of Mercy*, *supra* note 38, at 589.

43 *See* Duker, *supra* note 33, at 487.

44 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765-1769, at 314 (Chi. Univ. Press 1979) (1769), *available at* http://press-pubs.uchicago.edu/founders/documents/ a2_2_ 1s17.html.

45 CHRISTEN JENSEN, THE PARDONING POWER IN THE AMERICAN STATES 10 (Chi. Univ. Press. 1922), *available at* http:// books.google.com (search "Christen Jensen"; then follow "The Pardoning Power in the American States" hyperlink).

46 *Id.*

47 *Id.*

48 *See* THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 20-23, 243-45 (Max Farrand ed., 1911) (discussing the Virginia Plan and the New Jersey Plan).

49 *See* Duker, *supra* note 33, at 504.

50 *Id.* at 501.

51 U.S. CONST. art. II, § 2, cl. 1.

52 ALEXANDER HAMILTON, JAMES MADISON, & JOHN JAY, THE FEDERALIST PAPERS 377 (Garry Wills ed., Bantam 1982) (1787-1788) [hereinafter THE FEDERALIST].

53 *See* Duker, *supra* note 33, at 504 ("The greatest of American liberties has been the concept of 'checks and balances.' The framers provided for such checks and limitations on all other powers set forth in the Constitution because they recognized the 'encroaching nature' of power.").

54 THE FEDERALIST, *supra* note 52, at 377.

55 Kobil, *The Quality of Mercy*, *supra* note 38, at 579, 591.

56 *See* Duker, *supra* note 33, at 528-34.

57 *Id.* at 505.

58 *See* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS § 10, at 173 (James D. Richardson ed., 1897) (Presidential Proclamation of July 10, 1795).

59 Duker, *supra* note 33, at 530.

60 P.S. Ruckman, Jr., Policy as an Indicator of "Original Understanding": Executive Clemency in the Early Republic (1789-1817), at 18, *available at* http://www.rvc.cc.il.us/faclink/pruckman/pardoncharts/Paper7.pdf (last visited Nov. 16, 2014).

61 *Id.*

62 *Id.*

63 *Id.*

64 Kobil, *The Quality of Mercy*, *supra* note 38, at 605 (quoting KERMIT HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 104 (1989)).

65 JENSEN, *supra* note 45, at 10.

66 *See* Ruckman, *supra* note 60, at 2 ("Clemency decision have, furthermore, been intimately connected with (if not the central feature of) some of the most salient political events in our nation's history including: the Whiskey Rebellion, Fries Rebellion, the Alien-Sedition Acts, the presidential election of 1801, the War Between the States and Reconstruction....").

67 SARAT, *supra* note 31, at 72.

68 United States v. Wilson, 32 U.S. 150, 155 (1833).

69 *Id.* at 161.

70 *Id.* at 160.

71 *Id.* The holding in *Wilson* was overturned in *Biddle v. Petrowich*, 274 U.S. 480, 487 (1927), where the Supreme Court held that the presidential pardon could be enforced upon an unwilling recipient.

72 *Ex parte* Garland, 71 U.S. 333, 380 (1866).

73 *Id.*

74 SARAT, *supra* note 31, at 80.

75 *See* DORIS LAYTON MACKENZIE, SENTENCING AND CORRECTIONS IN THE 21ST CENTURY: SETTING THE STAGE FOR THE FUTURE 6 (2001), *available at* https:// www.ncjrs.gov/pdffiles1/nij/189106-2.pdf.

76 SARAT, *supra* note 31, at 95.

77 *Id.*

78 *See* Gavriel B. Wolfe, Note, *I Beg Your Pardon: A Call for Renewal of Executive Clemency and Accountability in Massachusetts*, 27 B.C. THIRD WORLD L.J. 417, 423-24 (2007).

79 MACKENZIE, *supra* note 75, at 6.

80 Francis A. Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L. & CRIMINOLOGY 226 (1959).

81 Adam Lamparello, Note, *Reaching Across Legal Boundaries: How Mediation can Help the Criminal Law in Adjudicating "Crimes of Addiction,"* 16 OHIO ST. J. ON DISP. RESOL. 335, 341-42 (2001). *See generally* Katherine Beckett & Theodore Sassoon,

Conservative Agendas and Campaigns, the Rise of the Modern "Tough on Crime" Movement, in DEFENDING JUSTICE 43-68 (Palak Shah ed., Political Research Assocs. 2005), *available at* http:// www.publiceye.org/defendingjustice/pdfs/chapters/toughcrime.pdf (discussing the "tough on crime" movement policies and their effect).

82 *See, e.g.*, Judith Greene, *Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments Leading to the Passage of the 1994 Crime Act, in* SENTENCING AND SOCIETY: INTERNATIONAL PERSPECTIVES ((Cyrus Tata & Neil Hutton eds., Ashgate Publ'g Ltd. 2002), *available at* http:// www.justicestrategies.org/sites/default/files/Judy/GettingToughOnCrime.pdf (providing a detailed discussion of the violent offender incarceration and truth in sentencing incentive grants, states' incorporation of victim advocacy initiatives, and the "tough on crime" agenda).

83 Beckett & Sassoon, *supra* note 81.

84 DAVID C. ANDERSON, CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE 5 (1995).

85 Beckett & Sassoon, *supra* note 81.

86 LISA M. SEGHETTI & ALISON M. SMITH, CONG. RESEARCH SERV., RL32766, FEDERAL SENTENCING GUIDELINES: BACKGROUND, LEGAL ANALYSIS, AND POLICY OPTIONS 12 (2007), *available at* http://www.fas.org/sgp/crs/misc/RL32766.pdf.

87 *See* Kobil, *The Quality of Mercy*, *supra* note 38, at 603 (discussing the "dangerous trend" of executive overreach through the use of clemency).

88 *See* SARAT, *supra* note 31, at 66-68.

89 The Editorial Bd., Editorial, *Governor Cuomo's Stingy Pardons*, N.Y. TIMES (Jan. 3, 2014), http://www.nytimes.com/2014/01/04/opinion/governor-cuomos-stingy-pardons.html.

90 Small government refers to the concept that the Government has only those powers delegated to it by the people, and, thus, its interference should be limited; this concept may be problematic for exercise of executive clemency. *See* Kobil, *The Quality of Mercy*, *supra* note 38, at 603 ("The rarity of granting clemency on grounds of innocence is due at least in part to a controversial philosophy about clemency's proper role.").

91 Brent Cebul, Op-Ed., *Government, Big or Small*, L.A. TIMES (Jan. 23, 2012), http://articles.latimes.com/2012/jan/23/opinion/la-oe-cebul-smaller-govt-20120123. State officials are similarly reluctant to exercise clemency while considering future campaigns for federal office. For example, in 1992, just months before running against George H. W. Bush in the presidential race, Clinton refused to grant clemency to a seriously brain-damaged death row inmate. *See Killer Executed After Clinton Denies Clemency*, N.Y. TIMES (May 8, 1992), http://www.nytimes.com/1992/05/08/us/killer-executed-after-clinton-denies-clemency.html. Many academics have suggested Bush's successful "Willie Horton Campaign" played a significant role in Clinton's decision to deny clemency. *See* James Acker & Charles Lanier, *May God-or the Governor-Have Mercy: Executive Clemency and Executions in Modern Death Penalty Systems*, 36 CRIM. L. BULL. 200, 200-01 (2000), *available at* http:// www.deathpenaltyinfo.org/documents/Acker Clemency.pdf (last visited May 20, 2014); *see also* Beckett & Sassoon, *supra* note 81 ("Clinton... touted his record on capital punishment. (Perhaps to make the point, Clinton returned to Arkansas in the midst of the 1992 campaign to oversee the execution of a convicted killer with an IQ in the 70s.)").

92 Kobil, *The Quality of Mercy*, *supra* note 38, at 603.

93 Charles S. Clark, *Reagan Parsimonious in Use of Pardon Power*, 42 CONG. Q. 2878, 2878 (1984).

94 *See Clemency Statistics*, U.S. DEPARTMENT OF JUST., http:// www.justice.gov/pardon/statistics.htm (last updated Sept. 2014).

95 *See id. (*percentages calculated based on total number of petitions granted as compared to the total number of petitions denied by the President or closed without presidential action).

96 Arthur Delaney, *Obama Presidential Pardons: The Elusiveness of Executive Clemency*, HUFFINGTON POST *(*June 3, 2011, 2:52 PM), http:// www.huffingtonpost.com/2011/06/03/obama-presidential-pardons_n_870431.html.

97 *See* Herrera v. Collins, 506 U.S. 390 (1993).

98 *See id.* at 415.

99 *Id.* at 393.

100 *Id.* at 394.

101 *See id.* at 396.

102 *Id.* at 395-97.

103 *Id.* at 397.

104 *Id.* at 405.

105 *Id.* at 415.

106 *See id.* at 417 ("History shows that the traditional remedy for claims of innocence based on new evidence... has been executive clemency.").

107 *Id.* at 412 n.13. Despite the USSC's decision in *Herrera*, the Texas Board of Pardons and Paroles maintained it was beyond its function to review bare innocence claims and rejected Herrera's clemency application. Nicholas Berg, Note, *Turning a Blind Eye to Innocence: The Legacy of* Herrera v. Collins, 42 AM. CRIM. L. REV. 121, 145 (2005). Herrera was executed on May 12, 1993. *Id.* His last words were: "I am innocent, innocent, innocent.... I am an innocent man, and something very wrong is taking place tonight." *Id.* at 154.

108 *See supra* notes 21-39, 55-64 and accompanying text.

109 *See Clemency*, DEATH PENALTY INFORMATION CENTER, http:// www.deathpenaltyinfo.org/clemency (last visited May 20, 2014) [hereinafter *Clemency*, DEATH PENALTY INFORMATION CENTER].

110 *Id.*

111 Kobil, *The Quality of Mercy*, *supra* note 38, at 604-05.

112 *Id.*

113 *Id.*

114 *Id.* at 605.

115 *Id.* at 605-06.

116 *Id.*

117 *See* IND. CONST. art. V, § 17 (containing no explicit requirement that the governor provide reasons for his or her decisions); NEV. CONST. art. V, § 13 (containing no explicit requirement that the governor provide reasons for his or her decisions).

118 *See Decisions*, IDAHO COMMISSION OF PARDONS & PAROLE, http:// parole.idaho.gov/decisions.html (last visited Nov. 16, 2014) (publishing decisions without supporting reasons).

119 *See Dockets and Results*, OKLA. PARDON & PAROLE BOARD, http:// www.ok.gov/ppb/Dockets_and_Results/index.html (last visited Nov. 16, 2014) (publishing pardon docket and results, which omit rationales behind decisions).

120 *See, e.g.*, *Hearing Results of the Board of Pardons from Friday, Oct 10, 2014 to Monday, Nov 10, 2014*, STATE OF UTAH BOARD OF PARDONS & PAROLE, http://bop.utah.gov/images/pdf/results.pdf (last visited Dec. 6, 2014) (results, without justification, of the Board of Pardons and Paroles for the state of Utah).

121 *See, e.g.*, Press Release, *Gov. Perry Grants Clemency to Fourteen*, OFFICE OF THE GOVERNOR RICK PERRY (Dec. 21, 2012), http:// governor.state.tx.us/news/press-release/18001/. The case of Cameron Todd Willingham highlights the troubling nature of this

Texas provision in the innocence context. *See generally* Grann,*supra* note 13 (discussing the Texas Board of Pardons and Paroles's denial of Willingham's clemency petition without explanation or record of deliberations).

122 N.J. STAT. ANN. § 2A:167-3.1 (West, Westlaw through L.2014, c. 75 and J.R. No. 3).

123 N.Y. CONST. art. IV, § 4 ("The governor shall annually communicate to the legislature each case of reprieve, commutation or pardon granted.").

124 OR. CONST. art. V, § 14 ("He shall have power to remit fines, and forfeitures, under such regulations as may be prescribed by law; and shall report to the Legislative Assembly at its next meeting each case of reprieve, commutation, or pardon granted, and the reasons for granting the same.").

125 *See, e.g.*, Theodore R. Kulongoski, *Clemency Report to Legislature*, OR. STATE LIBRARY (Jan. 10, 2011), http://library.state.or.us/repository/2011/ 201102251522015/2011.pdf.

126 UTAH ADMIN. CODE r. 671-305 (West, Westlaw through Nov. 1, 2014).

127 For example, clemency decisions and accompanying reasons do not appear on the hearing results website for the State of Utah Board of Pardons and Parole. *See Hearings Results*, STATE OF UTAH BOARD OF PARDONS & PAROLE, http://bop.utah.gov/hearings-top-public-menu.html (follow "Hearings" dropdown menu; then follow "Results" hyperlink) (last visited Oct. 7, 2014).

128 *See Washington State Clemency & Pardons Board Policies*, STATE OF WASH. OFFICE OF THE GOVERNOR 4-5 (Dec. 7, 2012), http:// www.governor.wa.gov/office/clemency/documents/policies.pdf.

129 *Id.*

130 *Id. (*"After the Board has reached a decision, the Chairperson announces it and closes the Board's record on the Petition. The recommendation is submitted to the Governor who is not bound to follow the Board's recommendation or take any action on the Petition.").

131 *See, e.g.*, Letter from Arizona Board of Executive Clemency to the Honorable Janice K. Brewer, Governor of the State of Arizona (Aug. 25, 2009) (on file with author) (Arizona Board of Executive Clemency's letter of recommendation for a commutation of sentence for William Macumber).

132 *See* ARIZ. REV. STAT. ANN. § 31-402(A) (2001) (West) ("[T]he board of executive clemency shall have exclusive power to pass upon and recommend reprieves, commutations, paroles and pardons. No reprieve, commutation or pardon may be granted by the governor unless it has first been recommended by the board.").

133 *See Clemency*, DEATH PENALTY INFORMATION CENTER, *supra* note 109.

134 *But see* Joseph N. Rupcich, Comment, *Abusing a Limitless Power: Executive Clemency in Illinois*, 28 S. ILL. U. L.J. 131, 151 (2003) ("Alternatively, some states have given a board or advisory group power to make a binding recommendation to the governor for his exercise of clemency.").

135 *See* LA. CONST. art. IV, § 5(E)(1); S.C. CODE ANN. § 24-21-920 (West, Westlaw through 2014 Reg. Sess.).

136 LA REV. STAT. ANN. § 15:573.1(B), (E) (West, Westlaw through 2014 Reg. Sess.).

137 *See Facts and Figures*, S.C. DEPARTMENT OF PROBATION, PAROLE & PARDON SERVICES, http://www.dppps.sc.gov/Facts&Figures.html (last visited Sept. 26, 2014).

138 *See* IDAHO CONST. art. IV, § 7.

139 *See* OKLA. CONST. art. VI, § 10.

140 *See* UTAH CODE ANN. § 77-27-9(1)(a), (c) (West, Westlaw through 2014 Gen. Sess.).

141 *See Annual Statistical Report Fiscal Year 2013*, TEX. BOARD OF PARDONS & PAROLES 26, http://www.tdcj.state.tx.us/bpp/publications/BPP%20StatisticalReport%C20FY%2#014.pdf (last visited Nov. 16, 2014) (Executive Clemency section includes

statistics without justifications); *Texas Board of Pardons and Paroles Publications Page*, TEX. BOARD OF PARDONS & PAROLES, http:// www.tdcj.state.tx.us/bpp/publications/publications.html (last updated Sept. 4, 2014) (Board publications limited to annual statistical reports).

142 *See* N.M. STAT. ANN. § 31-21-17 (West, Westlaw through 2nd Reg. Sess. Of the 51st Legislature (2014), effective May 21, 2014).

143 MISS. CONST. art. V, § 124.

144 *See The Vermont Parole Board Manual*, VT. DEPARTMENT OF CORR., http://doc.vermont.gov/about/parole-board/the-vermont-parole-board-manual-revised-january-17-2014-1, at 19, 36, (last revised Jan. 17, 2014).

145 OHIO REV. CODE ANN. § 2967.07 (West, Westlaw through Files 1 to 144 and Statewide Issue 1 of the 120th GA (2013-2014)).

146 *See* Brandi Grissom, *Pardons Documents Kept Secret*, TEX. TRIBUNE (Feb. 9, 2010), http://www.texastribune.org/2010/02/09/pardons-documents-kept-secret/.

147 Leona D. Jochnowitz, *Public Access to State Clemency Petitions*, 44 No. 2 CRIM. L. BULL. 2, 2 (Mar.-Apr. 2008); *see also, e.g.*, Grissom, *supra* note 146 (a 2001 open records ruling issued by then-Attorney General John Cornyn noted "the confidentiality protects not only the prisoner's privacy but also 'the deliberations of the board by encouraging frank and open discussion in its decision-making process"').

148 *See* Grissom, *supra* note 146.

149 *Id.* In 2012, the prosecutor agreed to the requested DNA testing. *See* Eli Okun, *Ruling Goes Against Death Row Inmate Skinner*, TEX. TRIBUNE (July 15, 2014), http://www.texastribune.org/2014/07/16/judge-rules-dna-evidence-doesnt-exonerate-skinner/. In 2014, however, a judge determined that the newly tested DNA evidence would not have changed the jury's decision in Skinner's case. *See id.*

150 *Id.*

151 Kathleen Dean Moore, Symposium, *Pardon for Good and Sufficient Reasons*, 27 U. RICH. L. REV. 281, 281 (1993).

152 *Id.*

153 Jochnowitz, *supra* note 147.

154 ARI. REV. STAT. ANN. § 31-402 A-D (2014) (West).

155 MD. CONST. art. II, § 20.

156 UTAH CODE ANN., § 77-27-9(1)(a), (c) (West, Westlaw through 2014 Gen. Sess.).

157 NEB. REV. STAT. § 83-1,126 (West, Westlaw through 2013 Reg. Sess.).

158 WASH. CONST. art. III, § 11.

159 The meaningfulness of these hearings is discussed *infra* Part II.C.

160 *Id.*

161 Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 572. However, Hoffstadt notes that increased transparency implicates public policy. *Id.* at 596-609 ("In addition to the constitutional questions, the public policy ramifications of making the executive clemency process more 'transparent'--that is, open to the public, subject to mandatory procedures, and governed by fixed, substantive standards--must be examined.").

162 Sarah Lucy Cooper, *Innocence Commissions in America: Ten Years After*, *in* CONTROVERSIES IN INNOCENCE CASES IN AMERICA 198, 201 (Sarah Lucy Cooper ed., 2014).

163 *Id.* at 215.

164 *See*Rachel E. Barkow,*The Politics of Forgiveness: Reconceptualizing Clemency*, 21FED. SENT. REP.153, 155-56 (2009), *available at* http:// www.law.nyu.edu/sites/default/files/ECM_PRO_062016.pdf.

165 *Id.* at 156.

166 *Id.*

167 KY. REV. STAT. ANN. § 439.320(1) (West, Westlaw through 2014 legislation).

168 OHIO REV. CODE ANN. § 5149.10 (West, Westlaw through Files 1 to 140 and Statewide Issue of the 120th GA (20132014)).

169 PENN. CONST. art. IV, § 9(b).

170 S.C. CODE ANN. § 24-21-10(b) (West, Westlaw through 2013 Reg. Sess.); *About PPP*, STATE OF S.C. DEPARTMENT OF PROBATION, PAROLE & PARDON SERVICES, http://www.dppps.sc.gov/stateboard.html (last visited May 3, 2014) [[hereinafter STATE OF S.C. DEPARTMENT OF PROBATION, PAROLE & PARDON SERVICES].

171 *See* STATE OF S.C. DEPARTMENT OF PROBATION, PAROLE & PARDON SERVICES, *supra* note 170.

172 NEB. REV. STAT. § 83-1,126 (West, Westlaw through 2013 Reg. Sess.).

173 Ga. Exec. Order No. B 2012 003 (Oct. 19, 2012), http:// www.colorado.gov [hereinafter Ga. Exec. Order No. B 2012 003] (search "clemency;" then follow "Clemency Advisory Board, Executive" hyperlink); *see also* Ga. Exec. Order No. B 008 07 (Aug. 2007), http://www.colorado.gov [[hereinafter Ga. Exec. Order No. B 008 07] (search "clemency;" then follow "b 008 07 executive order the executive clemency advisory board" hyperlink).

174 *See* Ga. Exec. Order No. B 2012 003, *supra* note 173; Ga. Exec Order No. B 008 07, *supra* note 173.

175 NEV. CONST. art. V, § 13.

176 *See The Supreme Court of Nevada Justices*, SUPREME CRT. OF NEV., http://supreme.nvcourts.gov/Supreme/Court_Information/The_Supreme_Court_of_ Nevada&uscore;Justices/ (last visited Oct. 10, 2014). The three justices with experience in criminal law are Justice Michael A. Cherry, Justice Nancy M. Saitta and Justice Ron D. Parraguirre. *Id. (*follow "Justice Michael A. Cherry," "Justice Nancy M. Saitta," and "Justice Ron D. Parraguirre" hyperlinks).

177 *See id.* (follow "Justice Michael A. Cherry" hyperlink).

178 *Board Members*, STATE OF UTAH BOARD OF PARDONS & PAROLES, http:// www.bop.utah.gov/board-top-public-menu/members.html (last visited April 26, 2014).

179 Barkow, *supra* note 164, at 155.

180 *Id.*

181 Alyson Dinsmore, *Clemency in Capital Cases: The Need to Ensure Meaningful Review*, 49 UCLA L. REV. 1825, 1857 (2002).

182 *How to Obtain an Application for Clemency*, PA BOARD OF PARDONS, http://www.bop.state.pa.us/portal/server.pt/community/how_to_request_an_ application/14411 (last visited Oct. 10, 2014).

183 *Petition for Clemency*, IN.GOV, http:// www.in.gov/idoc/files/petition_for_clemency_form.pdf (last visited Oct 1, 2014).

184 *Information and Instructions for New Clemency Form*, CONN. BOARD OF PARDONS & PAROLES (Feb. 24, 2014, 2:34:57 PM), http:// www.ct.gov/bopp/cwp/view.asp?A=4331&Q=508208 [hereinafter CONN. BOARD OF PARDONS & PAROLES].

185 *See, e.g.*, *Colorado*, CRIM. JUSTICE FOUND. (June 30, 2014), http:// www.cjpf.org/clemency-co.

186 *See, e.g.*, *Frequently Asked Questions*, STATE BOARD OF PARDONS & PAROLES, http://pap.georgia.gov/frequently-asked-questions-0 (last visited May 26, 2014).

187 220 IND. ADMIN. CODE 1.1-4-1(i) (West, Westlaw through amendments received through the Ind. Weekly Collection, dated Dec. 3, 2014).

188 *See Absolute Pardons and Writ of Actual Innocence*, VIRGINIA.GOV, https://commonwealth.virginia.gov/judicial-system/pardons/absolute-pardons/ (last visited Oct. 10, 2014) [hereinafter VA., *Absolute Pardons*].

189 For an analysis of the frequency of guilty pleas, see Rebecca Stephens, *Disparities in Postconviction Remedies for Those who Plead Guilty and Those Convicted at Trial: A Survey of State Statutes and Recommendations for Reform*, 103(1) J. OF CRIM. L. & CRIMINOLOGY 309 (2013), *available at* http:// scholarlycommons.law.northwestern.edu/jclc/vol103/iss1/7/.

190 CONN. BOARD OF PARDONS & PAROLES, *supra* note 184.

191 *Application for Executive Clemency*, STATE OF WIS. OFFICE OF THE GOVERNOR Part III.6, http:// www.recordgone.com/public/templates/default/pdf/Wisconsin-Pardon-Application.pdf (last visited May 23, 2014) [hereafter WIS., *Application*].

192 WASH. REV. CODE § 9.94A.885 (West, Westlaw through 2014 Legislation and Initiative Measures 594 (2015 c 1) and 1351 (2015 c 2); *see also Washington State Clemency & Pardons Board Policies*, STATE OF WASH. OFFICE OF THE GOVERNOR Part II.B (Dec. 7, 2012), http:// www.governor.wa.gov/office/clemency/documents/policies.pdf [hereinafter *Wash. Pardons Board Policies*].

193 *See Wash. Pardons Board Policies*, *supra* note 192, at Part II.B.

194 S.D. ADMIN R. 17:60:05:12 (West, Westlaw through rule published in S.D. register dated Nov. 24, 2014).

195 MONT. ADMIN. R. 20.25.901A(5) (West, Westlaw through Issue 12 of the 2014 Mont. Admin. Register, dated June 30, 2014).

196 *See generally* Kathleen Callahan, *In Limbo: In re Davis and the Future of* Herrera *Innocence Claims in Federal Habeas Proceedings*, 53 ARIZ. L. REV. 629 (2011) (discussing practical concerns that "make it difficult, if not practically impossible, for wrongfully convicted prisoners to obtain" clemency).

197 *See id.* at 655.

198 *See, e.g.*, Ridolfi & Gordon, *supra* note 4, at 1(providing the example of former California Governor Pete Wilson, in the case of Brenda Aris, who stated that he "[was] not in a position to retry criminal cases or to speculate as to what might have been if different evidence were before the jury").

199 *See* discussion *infra* Part III.

200 *Annual Report 2006*, GA. STATE BOARD OF PARDONS & PAROLES 31, http://pap.georgia.gov/sites/pap.georgia.gov/files/Annual&uscore; Reports/06Annual_Report.pdf (last visited May 16, 2014).

201 *Id.*

202 VA., *Absolute Pardons*, *supra* note 188.

203 WIS., *Application*, *supra* note 191, at Part I.3 (emphasis omitted).

204 *Id.*

205 *Non-DNA Exonerations*, INNOCENCE PROJECT, http:// www.innocenceproject.org/know/non-dna-exonerations.php (last visited Oct. 10, 2014) [hereinafter INNOCENCE PROJECT, *Non-DNA Exonerations*].

206 *Access to DNA Testing*, INNOCENCE PROJECT, http:// www.innocenceproject.org/fix/DNA-Testing-Access.php (last visited Oct. 10, 2014).

207 *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, http:// www.innocenceproject.org/understand/ (last visited Oct. 10, 2014).

208 For example, South Dakota and Arkansas utilize clemency applications that do not ask about innocence. *See Application for Executive Clemency*, S.D. BOARD OF PARDONS & PAROLES, http:// doc.sd.gov/documents/forms/clemency/E2100V1-

ExecutivePardonApplicationJan2013.pdf (last visited Oct. 10, 2014); Arkansas Pardon Application *Instructions*, ARK. PAROLE BOARD, http:// paroleboard.arkansas.gov/Clemency/Documents/Applications/PardonApplication070214.pdf (last visited Oct. 10, 2014).

209 *See Executive Clemency Relief*, STATE OF ILL., https:// www2.illinois.gov/prb/documents/sample%20petition%204.13.14.pdf (last visited Oct. 10, 2014) [hereafter ILL., *Executive Clemency*]. Michigan also provides applicants with an opportunity to describe the event. *See Application for Pardon or Commutation*, STATE OF MICH. DEPARTMENT OF CORR., http:// www.michigan.gov/documents/corrections/application&uscore;for_pardon_or_ commutation_-_current_prisoner_331014_7.pdf (last revised July 2011).

210 ILL., *Executive Clemency*, *supra* note 209; *Pardon Application*, ARIZ. BOARD OF EXECUTIVE CLEMENCY, https://boec.az.gov/sites/default/files/documents/ files/Completed%20Pardon%C20Application%20fillable_0.pdf (last revised Oct. 29, 2013).

211 *See Pardon Process*, OKLA. PARDON & PAROLE BOARD, http:// www.ok.gov/ppb/Pardon_Process/Pardon_Process/index.html (last visited Oct. 10, 2014); *see also Pardon Application Guidelines*, STATE OF NEB. BOARD OF PARDONS § 003.02, http://www.pardons.state.ne.us/app_guidelines.html [hereinafter NEB., *Pardon Application Guidelines*] (last revised July 1, 1994).

212 *Executive Clemency*, MO. DEPARTMENT OF CORR., http:// doc.mo.gov/PP/Executive_Clemency.php (last visited May 30, 2014).

213 For example, such a lack of information may result in a failure (or poor attempt) to investigate or other misconduct, which may go undiscovered due to the lack of transparency. Accordingly, an inmate could be severely disadvantaged, yet never know of such faulty investigation or misconduct in the handling of his or her application.

214 *Wash. Pardons Board Policies*, *supra* note 192, at Part III.A; NEB., *Pardon Application Guidelines*, *supra* note 211, at § 003.01.

215 *See* State Clemency Policy for the State of *Nevada*, CRIM. JUSTICE POLICY FOUND., http://www.cjpf.org/clemency-ne (last updated June 23, 2014).

216 *Wash. Pardons Board Policies*, *supra* note 192, at Part III.A.

217 *Clemency Procedures: Non-Death Penalty Cases*, STATE OF OHIO DEPARTMENT OF REHABILITATION & CORR. (June 6, 2014), http:// www.drc.ohio.gov/web/drc_policies/documents/105-PBD-05.pdf.

218 *Clemency Process*, PA. BOARD OF PARDONS, http:// www.bop.state.pa.us/portal/server.pt/community/process/19509 (last visited May 18, 2014) (“No more than 15 minutes is allowed for each applicant's presentation.”).

219 *State Clemency Policy for the State of Utah*, CRIM. JUSTICE POLICY FOUND., http://www.cjpf.org/clemency-ut *(*last updated July 30, 2014).

220 For example, the hearing for Troy Anthony Davies, prior to his execution, lasted one day. Rhonda Cook & Bill Rankin, *Parole Board Denies Clemency for Troy Davis*, AJC.COM (Sept. 20, 2011), http:// www.ajc.com/news/news/local/parole-board-denies-clemency-for-troy-davis/nQLyy/ #__federated=1.

221 For example, Bill Macumber's two clemency hearings lasted numerous hours. *See* BARRY SIEGEL, MANIFEST INJUSTICE: THE TRUE STORY OF A CONVICTED MURDERER AND THE LAWYERS WHO FOUGHT FOR HIS FREEDOM ch. 19, 25 (2014).

222 *See* discussion *supra* Part I.

223 *Executive Clemency Guidelines*, W. VA. PAROLE BOARD, http:// www.paroleboard.wv.gov/executiveclemency/Pages/guidelines.aspx (last visited May 18, 2014).

224 ARIZ. REV. STAT. ANN. § 31-403(D)(1) (2001) (West).

225 UTAH ADMIN. CODE r. 671-311 (West, Westlaw through Aug. 1, 2014).

226 *Id.*

227 *See id.*

228 *Executive Clemency*, N.Y. STATE DIVISION OF PAROLE, https:// www.parole.ny.gov/clemency.html (last visited May 18, 2014).

229 GA. CODE ANN. § 42-9-39(d) (West, Westlaw through Acts 343 to 669 of the 2014 Reg. Sess.); *see also FY 2008 Annual Report*, STATE OF GA. STATE BOARD OF PARDONS & PAROLES 20 (2008), http:// pap.georgia.gov/sites/pap.georgia.gov/filesAnnual_Reports/08_Annual_Report.pdf.

230 GA. CODE ANN. § 42-9-39(d) (West, Westlaw through Acts 343 to 669 of the 2014 Reg. Sess.).

231 ALA. CODE §15-22-36(c) (West, Westlaw through Act 2014-457 of the 2014 Reg. Sess.).

232 LA. REV. STAT. ANN. § 15:572 (West, Westlaw through 2014 Reg. Sess.).

233 MONT. ADMIN. R. 20.25.901A(1)(a) (West, Westlaw through Issue 12 of the 2014 Mont. Admin. Register, dated June 30, 2014).

234 *Id.* at R. 20.25.901A(1)(b).

235 *Id.* at R. 20.25.901A(2)(a).

236 *See* North Carolina *Glossary of Terms*, OFFICE OF EXEC. CLEMENCY, http://www.doc.state.nc.us/clemency/glossary.htm (last visited Oct. 13, 2014); N.C. GEN. STAT. ANN. § 15A-149 (West, Westlaw through 2014 Reg. Sess. of the Gen. Assemb.). The case of the Wilmington Ten showcases this facility. *See* Steve Almasy, *North Carolina Governor Pardons "Wilmington 10"* (Jan 1, 2013), CNN.COM, http://edition.cnn.com/2012/12/31/justice/north-carolina-wilmington-10/; Joy-Ann Reid, *North Carolina Governor Pardons "Wilmington 10,"* THE GRIO (Dec. 31, 2012 3:22 PM), http://thegrio.com/2012/12/31/north-carolina-governor-pardons-wilmington-ten/2/.

237 TENN. CODE ANN. § 40-27-109 (West, Westlaw through 2014 Second Reg. Sess.).

238 *Application for Exoneration*, STATE OF TENN. BOARD OF PAROLE 1, http://www.tn.gov/bop/Docs/BP%200247%C20Exoneration%20Application.pdf (last revised Oct. 2013).

239 *See* Case Profile of *Clark McMillan*, INNOCENCE PROJECT, http:// www.innocenceproject.org/Content/Clark_McMillan.php (last visited May 16, 2014).

240 *James Green*, THE NAT'L REGISTRY OF EXONERATIONS (Before June 2012), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3258.

241 *What is a Pardon Based on Innocence?*, TEX. BOARD OF PARDONS & PAROLES, http://www.tdcj.state.tx.us/bpp/exec_clem/Pardon_for_Innocence.html (last updated April 1, 2013).

242 *Pardon for Innocence*, TEX. DEPARTMENT OF CRIM. JUSTICE 2, https:// www.tdcj.state.tx.us/bpp/forms/PFIÄpp.pdf (last revised Jan. 11, 2010).

243 Dinsmore, *supra* note 181, at 1825.

244 Herrera v. Collins, 506 U.S. 390 (1993).

245 Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1997).

246 *Id.* at 284 (plurality opinion).

247 *Id*. (plurality opinion).

248 *Id.* (plurality opinion) (quoting Conn. Bd. of Pardons v. Dumschat,452 U.S. 458, 464 (1981)).

249 *See generally id.* (plurality opinion).

250 *Id.* at 285 (plurality opinion).

251 *Id.* at 289 (O'Connor, J., concurring).

252 *Id. (*O'Connor, J., concurring).

253 *Id.* at 290 (O'Connor, J., concurring). Although recognizing that a death row prisoner "maintains a residual life interest, e.g., in not being summarily executed by prison guards," Chief Justice Rehnquist stated that a death row prisoner cannot use this interest to mount a procedural due process challenge to a clemency determination. Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 281 (1997) (plurality opinion). In addition, Chief Justice Rehnquist found that a death row prisoner has "no substantive expectation of clemency" because, under Ohio law, clemency lies within the discretion of the executive. *Id.* at 283 (plurality opinion). Further, Chief Justice Rehnquist rejected the argument that*Evitts v. Lucey*,469 U.S. 387 (1985), creates a "second strand" of procedural due process protection encompassing clemency proceedings because they are not "an integral part of the ... system for finally adjudicating the guilt or innocence of a defendant." *Woodard*, 523 U.S. at 283-85(plurality opinion) (quoting *Evitts*,469 U.S. at 393).

254 Corliss v. Pennsylvania Bd. of Probation & Parole, No. 4:CV-0501817, 2006 WL 2927270, at *1 (M.D. Pa. Oct. 11, 2006).

255 *Id.* at *5.

256 *Id.*

257 Todd E. Pettys, *Killing Roger Coleman Habeas, Finality, and the Innocence Gap*, 48 WM. & MARY L. REV. 2313, 2361 (2007).

258 Mckithen v. Brown, 565 F. Supp. 2d 440 (E.D. N.Y. 2008), *rev'd*, 626 F.3d 143 (2d Cir. 2010).

259 *Id.* at 443.

260 *Id.* at 453.

261 *Id.* at 471.

262 *Id.* at 493.

263 *Id.*

264 *Id.* at 495.

265 McKithen v. Brown, 626 F.3d 143 (2d Cir. 2010). The Second Circuit Court of Appeals relied largely on the USSC's decision in *District Attorney's Office v. Osborne*, 557 U.S. 52 (2009), which was delivered after the District Court considered *McKithen*. *McKithen*, 626 F.3d at 145. In that case, the USSC held that Osborne (who raised similar issues to McKithen) was not entitled to DNA evidence in post-conviction proceedings as a matter of either substantive or procedural due process. *Id.* at 151. The Second Circuit essentially applied that decision to the district court's ruling that McKithen was entitled to conduct post-conviction DNA testing as a matter of procedural due process. *Id.* at 152-54.

266 *Id.*

267 *Osborne* was decided after the district court's decision and whilst the case was pending before the Second Circuit. *See id*. at 145, 152-54.

268 *Osborne*, 557 U.S. at 68; *McKithen*, 626 F.3d at 151 ("The*Osborne* Court concluded that a prisoner has no liberty interest with respect to "any procedures available to vindicate an interest in state clemency" because clemency isinherently discretionary and subject to whim, or grace, of the decisionmaker; it is, in other words, a form of relief to which a prisoner has no right.").

269 *McKithen*, 626 F.3d at 152; *see Osborne*, 557 U.S. at 68 *(*regarding McKithen's due process claim concerning access to DNA evidence, although there is no constitutionally cognizable residual liberty interest in obtaining clemency and no subsidiary interest in the adequacy of state clemency mechanisms, the *Osborne* Court recognized that a prisoner may retain a state-created "liberty interest in demonstrating his innocence with new evidence under state law").

270 *See* Carrie Sperling, *When Finality and Innocence Collide*, *in* CONTROVERSIES IN INNOCENCE CASES IN AMERICA 141 (Sarah Cooper ed., 2014) (noting finality has been a compelling goal in the American criminal justice system).

271 Lewis v. State, 139 P.3d 1266, 1269 (Alaska 2006).

272 *Id.* at 1270.

273 *Id.*

274 *Id.*

275 Baze v. Parker, 632 F.3d 338, 340 (6th Cir. 2011).

276 *Id.* at 342.

277 *Id.*

278 *Id.* at 343.

279 *See* INNOCENCE PROJECT, *Non-DNA Exonerations*, *supra* note 205.

280 Faulder v. Tex. Bd. of Pardons & Paroles, 178 F.3d 343, 344 (5th Cir. 1999).

281 *Id.*

282 *Id.*

283 *Id.* at 343.

284 For instance, in the aforementioned cases of Hank Skinner and Cameron Todd Willingham. *See* Okun, *supra* note 149; Grann, *supra* note 13.

285 Kobil, *Unforgiving Times*, *supra*note 1, at 237.

286 Fugate v. Bd. of Pardons & Paroles, No. 2002CV56978, 2002 WL 34185124, at *1, *2 (Ga. Super. Aug. 14, 2002).

287 *Id.* at *2 (discussing Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 289 (1997)).

288 Sepulvado v. La. Bd. of Pardons & Parole, 171 F. App'x. 470, 472 (5th Cir. 2006).

289 *Id.*

290 *Id.*

291 *Id.*

292 *Id.*

293 *Id.* at 473.

294 Gilreath v. State Bd. of Pardons & Paroles, 273 F.3d 932, 934 (11th Cir. 2001).

295 *Id.* at 934.

296 Mann v. Palmer, 713 F.3d 1306, 1306 (11th Cir. 2013).

297 *Id.* at 1316.

298 *Id.* at 1317-18 (quoting Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 290 (1997)).

299 *Id.* at 1318 (Martin, J., dissenting).

300 *Id.* at 1318-19 (Martin, J., dissenting) (citing Herrera v. Collins, 506 U.S. 390, 411-12 (1993) (recognizing that “[c]lemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted”) (internal citation and footnote omitted)).

301 *Id.* at 1319 (Martin, J., dissenting).

302 Kobil, *Unforgiving Times*, *supra* note 1, at 237.

303 Gilreath v. State Bd. of Pardons & Paroles, 273 F.3d 932, 934 (11th Cir. 2001).

304 *Id.*

305 Parker v. State Bd. of Pardons & Paroles, 275 F.3d 1032 (11th Cir. 2001).

306 *Id.* at 1034.

307 *Id.*

308 *Id.* at 1037.

309 *Id.*

310 *Id.* Circuit Judge Barkett was troubled by this reasoning to a certain extent. In his special concurrence, Judge Barkett stated:
The district court's conclusion in this case is based on its acceptance of Chairman Ray's testimony that "I have an open mind and I listen to every one of them." Because I cannot say that the Court's acceptance of this testimony was clear error, I concur in the majority's decision. However, I am deeply troubled by the unusual nature of the court's conclusion. On the one hand, the district court assumed, for purposes of decision, that Chairman Ray made the statement that "No one on death row [will] ever get clemency as long as [I am] Chairman of the Board." But it did not so find as a fact. At the same time, the court found that Ray, who denied ever making the statement, was credible when he said that he could now entertain clemency petitions from death row inmates with an open mind. As it stands, the court has effectively assumed that Ray lied when he said he never made the initial statement, but was sincere when he said he could be neutral. It is troubling that the district court did not explore the question of Ray's openness in light of questions involving his assumed original bias.
Id. at 1037 (Barkett, J., concurring).

311 Duvall v. Keating, 162 F.3d 1058, 1060 (D. Ariz. 1998).

312 *Id.* at 1061.

313 Bacon v. Lee, 549 S.E.2d 840 (N.C. 2001).

314 *Id.* at 850.

315 Schad v. Brewer, No. CV-13-01962-PHX-ROS, 2013 WL 5524547, at *1-*2 (D. Ariz. Oct. 4, 2013).

316 *Id.* at *3, *9.

317 *Id.* at *9.

318 *Id.* at *8.

319 Kobil, *Unforgiving Times*, *supra* note 1, at 235-36.

320 *Id.* at 233.

321 *Id.*

322 *See Browse the National Registry of Exonerations*, THE NAT'L REGISTRY OF EXONERATIONS, https:// www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited Oct. 1, 2014) (select "DNA" drop down menu; then follow "Y" hyperlink). For the total number of DNA exonerations to date, see *The Innocence Project*, INNOCENCE PROJECT, http://www.innocenceproject.org/ (last visited Nov. 16, 2011).

323 *See generally* Kobil, *Unforgiving Times*, *supra* note 1 (providing suggestions for reform in a capital case context).

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