

RUTGERS JOURNAL OF LAW & PUBLIC POLICY

EDITORIAL BOARD

Editor-in-Chief

SIMON SCHMITT-HALL

Executive Editors

ZACHARY CARR

KRISTINA INGERSOLL

Managing Articles Editors

MICHELLE MASON

SHAMNAZ ZAMAN

Managing Notes Editors

SALLY ABDULRAOUF

MARISSA TERWILLIGER

Submissions and Symposium Editors

ALLIE CAPECCI

PRIYA VAISHAMPAYAN

Managing Research Editor

OLGA ROMADIN

Managing Senior Editor

EMMA ROTH

Business and Marketing Editor

PAIGE KAERCHER

Managing Publications Editor

NADIA AL KHUNAIZI

Senior Staff Editors

FLORENCE HULBERT

MATT LAMORGESE

BYRON MITCHELL

RANDALL PETRONKO

YASLIN REYES

CLAUDIA SANCHEZ

AARON USCINOWICZ

3L Staff Editors

DIANA DIAZ

JIBRI DOUGLAS

RYAN FISHER

DEIDRA HOPKINS

SARAH KUSNIRAK

CHRISTINA RAMELLI

JUSTIN ZARAGOZA

2L Staff Editors

OLIVIA FARNESKI

NINA GLIKSHTERN

KRISTINA GOSHORN

CATRINA GUTESCU

TYLER HARTMAN

JOSEPH KELMON

DONISHA KENDRICK

ALEXIS MATTE

JESS MEYERS

LEIGH NASPO

BRENDALIZ POLANCO

MEGAN SHARP

THOMAS STIMSON

PATRICK WALSH

JESSICA WILLOX

PAYTON WILLIAMS

SHAHAB ALHADAD

ZACHARY BALL

TAYLOR BELLMAN

MIRANDA BOTTURA

PAMELA BREWSTER

PORSHA BRYANT

ALI CHAUDHRY

GREGORY DANCY

Faculty Advisor

ALEC WALEN

About the Rutgers Journal of Law & Public Policy

The *Rutgers Journal of Law and Public Policy* (ISSN 1934-3736) is published two times per year by students of the Rutgers School of Law – Camden, located at 217 North Fifth Street, Camden, NJ 08102.

The views expressed in the *Rutgers Journal of Law & Public Policy* are those of the authors and not necessarily of the *Rutgers Journal of Law & Public Policy* or the Rutgers School of Law – Camden.

Form: Citations conform to The Bluebook: A Uniform System of Citation (21st ed. 2021).

Please cite the Rutgers Journal of Law & Public Policy as 22 RUTGERS J.L. & PUB. POL'Y __ (2025).

Copyright: All articles copyright © 2025 by the *Rutgers Journal of Law & Public Policy*, except where otherwise expressly indicated. For all articles to which it holds copyright, the *Rutgers Journal of Law & Public Policy* permits copies to be made for classroom use, provided that (1) the author and the *Rutgers Journal of Law & Public Policy* are identified, (2) the proper notice of copyright is affixed to each copy, (3) each copy is distributed at or below cost, and (4) the *Rutgers Journal of Law & Public Policy* is notified of the use.

For reprint permission for purposes other than classroom use, please submit request as specified at <http://www.rutgerspolicyjournal.org/>.

Manuscripts: The *Rutgers Journal of Law & Public Policy* seeks to publish articles making original contributions in the field of public policy. The Journal accepts both articles and compelling essays for publication that are related to the expansive topic of public policy. Manuscripts must contain an abstract describing the article or essay which will be edited and used for publication on the website and in CD-ROM format. The Journal welcomes submissions from legal scholars, academics, policy makers, practitioners, lawyers, judges and social scientists.

Electronic submissions are encouraged. Submissions by email and attachment should be directed to submissions.rjlpp@gmail.com.

Paper or disk submissions should be directed to *Rutgers Journal of Law & Public Policy*, Rutgers University School of Law – Camden, 217 North Fifth Street, Camden, New Jersey 08102.

Subscriptions: Subscription requests should be mailed to *Rutgers Journal of Law & Public Policy*, Rutgers University School of Law – Camden, 217 North Fifth Street, Camden, New Jersey 08102, or emailed to info@rutgerspolicyjournal.org.

Internet Address: The *Rutgers Journal of Law & Public Policy* website is located at <http://www.rutgerspolicyjournal.org>.

RUTGERS
JOURNAL OF LAW & PUBLIC POLICY

VOLUME 22

SPRING 2025

ISSUE 2

CURRENT ISSUES
IN PUBLIC POLICY

© 2025 by Rutgers University School of Law – Camden
ISSN 1934-3736



THE PREROGATIVE OF MERCY: ASSISTING CLEMENCY CLIENTS IN MASSACHUSETTS

*Stevie Leahy*¹

¹ Associate Professor of Law at Suffolk University Law School in Boston, Massachusetts. Thank you to all my former students and research assistants who have worked on clemency projects with me starting in 2020. Thank you to the Women's Bar Foundation Clemency Project and Laura Burnett, William Allen, Patty DeJuneas, and Pauline Quirion for your guidance over the years. Thank you to my incarcerated clients for sharing your stories and trusting me with your petitions.

TABLE OF CONTENTS

I.	UNDERSTANDING FEDERAL AND STATE CLEMENCY PROCESSES AND THEIR CRITICISMS.....	4
A.	<i>The Federal Clemency Power: Statistics and Basics</i>	6
1.	Arguments Against Clemency: Weighing Mercy Against Other Strong Considerations.....	13
B.	<i>Overview of the Clemency Process in Massachusetts</i>	19
1.	The Healey Guidelines: A Shift Towards Opportunity for Mercy.....	24
II.	CLEMENCY AS A TOOL TO REMEDY SYSTEMIC INEQUITIES WITHIN MASSACHUSETTS.....	27
A.	<i>History of MCI Framingham</i>	28
B.	<i>Demographics and Conditions at MCI Framingham</i>	32
III.	PRACTICAL CHALLENGES TO CLEMENCY.....	34
A.	<i>Non-Use of Clemency Historically Equates to Lack of Public Awareness or Support</i>	35
B.	<i>The Complicated Massachusetts Clemency Process</i>	37
C.	<i>The Hurdle of the "Perfect" Petition</i>	39
IV.	CONCLUSION.....	40

Founding Father and Federalist Paper author Alexander Hamilton opined that “clemency was vital to temper the harshness of criminal codes because ‘without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.’”² Hamilton and his contemporaries understood the need for a justice system that balanced strict enforcement of the law with the ability to recognize individual circumstances and extend compassion where warranted. Without the ability to make exceptions for people who are guilty but nonetheless deserving of compassion, the justice system would appear excessively harsh, violent, and unkind. The justice system in the United States has certainly been categorized as all those things in the centuries since Hamilton; in light of mass incarceration, systemic inequities, and overly punitive sentencing policies, the current state of the system is seemingly grounded in an unyielding pursuit of punishment over fairness or any other penological goal. At the federal or state level, clemency is one small tool that could provide some merciful balance.

There are many arguments against clemency, for example, undermining the rule of law, the perception of unfairness, impact on victims, and the potential for abuse, among others. As an advocate serving incarcerated individuals with their clemency petitions, I have experienced the challenges and flaws present in our system and specifically when it comes to advancing a clemency petition within the Commonwealth of Massachusetts. Part I of this Article will provide an overview of clemency at the federal level, highlighting some of the ways that clemency has been pulled into the national spotlight during the

² MASS BAR ASS'N, *Report of the Mass. Bar Ass'n Clemency Task Force*, 1, 2 (2021) [hereinafter *Clemency Report*] (citing THE FEDERALIST NO. 74, at 446 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). The mission of the Task Force was “to examine the process for clemency in Massachusetts including commutation and pardons, and address problems related to the clemency process that result in denial of equal justice under the law and undermine the public trust and confidence in the clemency process and criminal legal system as a whole.” *Id.* at 1. The report goes on to identify “major areas for suggested reform after taking into account the feasibility, importance, and potential impact of possible changes to the clemency process.” *Id.*

most recent transfer of executive power. This section will also detail arguments against clemency, which are applicable at the federal and state level. Next, the Article will describe how this system works within Massachusetts specifically. Part II of this Article will explore clemency as a tool to remedy systemic inequities, something that can be “actively humanizing and forward looking.”³ Finally, Part III of this Article will detail some of the practical challenges an attorney or applicant may encounter working with an incarcerated individual petitioning for clemency.

I. UNDERSTANDING FEDERAL AND STATE CLEMENCY PROCESSES AND THEIR CRITICISMS

Grace and forgiveness are the foundations of clemency.⁴ Yet realistically within many jurisdictions, it fails to deliver on a philosophy that permits those who have committed crimes from being judged or assessed by anything other than that conviction, and critics would argue that would be appropriate. The underutilized vehicle of clemency provides state and federal executives the ability to forgive or reduce the sentences of those convicted of crimes in the United States.⁵ The use of this power

³ Preston Shipp, *From Punishment to Promise: The Power of Redemption*, ACLU (Aug. 4, 2020), <https://www.aclu.org/news/smart-justice/from-punishment-to-promise-the-power-of-redemption>.

⁴ See generally Paul J. Larkin, Jr., *Guiding Presidential Clemency Decision Making*, 18 GEO. J.L. & PUB. POL'Y 451, 471 (2020) (“[t]he Supreme Court, per Chief Justice John Marshall, described an award of clemency as ‘an act of grace,’ a description that the Court has reiterated in more recent times, and as a way to ‘temper’ justice with ‘mercy.’”). “Clemency scholars often point to Abraham Lincoln as the epitome of a generous, forgiving chief executive . . . Lincoln considered favorably factors such as an offender's youth, penitent disposition, record of good conduct, prior military service (including those wounded in battle).” *Id.* at 484, n.194 (citation omitted). There is likewise a movement in Massachusetts and several other states to more meaningfully consider characteristics such as youth in sentencing overall. See *Commonwealth v. Mattis*, 493 Mass. 216, 223 (2024).

⁵ See Alexandra Wood, Note, *Releasing the Steam: An Abolition Constitutionalist Approach to Revitalizing Clemency Proceedings*, 15 NE. U. L. REV. 201, 209 (2023) (“[C]lemency remains a largely unused power.”).

can be traced to at least as early as the 7th century and was first used in the United States by President George Washington in 1795 after the Whiskey Rebellion in western Pennsylvania.⁶ While it is rooted in the concept of grace,⁷ opponents see it as “making law meaningless” or mocking victims of crime.⁸ It can be used for the most mundane crimes or the most serious, including murder.⁹ Clemency, and in particular pardons (one of the forms of clemency), have come into the national spotlight in the last two presidential administrations—yet most individuals do not know much about the nuances of this power at the federal level, or the differences between federal and state use of this power.

⁶ Colleen Shogan, *The History of the Pardon Power*, THE WHITE HOUSE HIST. ASS'N, (Dec. 2, 2020), <https://www.whitehousehistory.org/the-history-of-the-pardon-power>. “In 1795, the leaders of the Pennsylvania Whiskey Rebellion were accused of tarring and feathering officials attempting to collect a new federal tax of sixty cents per gallon on whiskey. In referring to one of the leaders as being ‘a little short of an idiot,’ Washington noted that the government should show mercy.” Robert Nida & Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 OKLA. L. REV. 197, 207-08 (1999).

⁷ See *United States v. Wilson*, 32 U.S. 150, 160 (1833) (“A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.”); see also *In re Kennedy*, 135 Mass. 48, 53 (1883).

⁸ Austin Sarat & Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life*, 56 STAN. L. REV. 1307, 1308-09 (2004). “Bill Clinton explained his reluctance to grant clemency by saying: ‘The appeals process, although lengthy, provides many opportunities for the courts to review sentences and that’s where these decisions should be made.’” *Id.* at 1310. “Obama’s frequent use of commutations, particularly for prisoners convicted of drug-related crimes, prompted criticism from Republicans, who said it benefited ‘an entire class of offenders’ and infringed on the ‘lawmaking authority’ of the legislative branch.” John Gramlich, *Biden Granted More Acts of Clemency than Any Prior President*, PEW RESEARCH CTR. (Feb. 7, 2025), <https://www.pewresearch.org/short-reads/2025/02/07/biden-granted-more-acts-of-clemency-than-any-prior-president/>.

⁹ See Sarat & Hussain, *supra* note 8, at 1313 (“The power to pardon, of course, is not coterminous with ‘sparing life,’ as pardons are used for the most mundane of crimes.”).

A. The Federal Clemency Power: Statistics and Basics

At the federal level, clemency can take numerous forms, “including pardon, commutation of sentence, remission of fine or restitution, and reprieve.”¹⁰ Pardon is the forgiveness of the underlying offense¹¹ and commutation is a reduction in the original sentence (for example, converting a natural life sentence with no eligibility for parole into a lesser sentence that is eligible for parole).¹² Statistically, remission and reprieve are almost never granted at the federal level, with pardons being the most commonly granted type of application.¹³ The authority for this broad power is found in Article II, Section 2 of the Constitution—and was heavily modeled on the English

¹⁰ *Office of the Pardon Attorney*, U.S. DEP’T OF JUST.: OFF. OF THE PARDON ATT’Y (last visited Feb. 12, 2025),

¹¹ For example, President Trump’s pardons of the January 6 insurrectionists. Ali Swenson & Lindsay Whitehurst, *Experts Worry That Trump’s Jan. 6 Pardons Will Legitimize Political Violence, Embolden Extremists*, ASSOCIATED PRESS, Jan. 25, 2025, <https://apnews.com/article/trump-pardons-jan-6-extremists-capitol-riot-proud-boys-bdd25aa653ceb2a2db6fd3ef2f9bda6e>.

¹² Clemency refers to multiple forms of presidential mercy. The two most common forms are pardons, which forgive past crimes and restore civil rights, and commutations, which completely or partially reduce sentences for those in prison or on community supervision. Two less-common forms are remissions, which reduce financial penalties associated with convictions, and respites, which are temporary reprieves that are usually granted to inmates for medical reasons. See *Gramlich*, *supra* note 8.

¹³ See *Clemency Statistics*, U.S. DEP’T OF JUST.: OFF. OF THE PARDON ATT’Y, <https://www.justice.gov/pardon/clemency-statistics> (last visited Feb. 12, 2025). This office has statistics on clemency dating back more than a century, beginning with President McKinley in 1900. These numbers do not include “individual members of a class of persons granted pardons by proclamation, such as President Carter’s proclamation granting clemency to certain Vietnam era offenders, and persons granted clemency after action by President Ford’s Presidential Clemency Board because those petitions were not processed through the Office of the Pardon Attorney.” *Id.*; see also Colleen Shogan, *The History of the Pardon Power*, THE WHITE HOUSE HIST. ASS’N, <https://www.whitehousehistory.org/the-history-of-the-pardon-power> (last visited Feb. 12, 2025) (“A reprieve delays the imposition of a sentence or punishment.”).

monarchy ("The royal prerogative of mercy").¹⁴ The U.S. Supreme Court has interpreted this power broadly, and it is "not generally subject to congressional modification."¹⁵ The only check on any abuse of this power by a president is impeachment.¹⁶ There is no clear answer as to whether a self-pardon is lawful,¹⁷ although that concept is likely to be tested in the coming years.¹⁸

Clemency proceedings do not determine whether a party is guilty or innocent and are not part of the trial or adjudicatory process—"[t]hey are conducted by the executive branch, independent of direct appeal and collateral relief proceedings."¹⁹ Scholars disagree about the purposes of the pardon power, with some advocating that it should only be used as an act of mercy to promote justice, and others pushing for a

¹⁴ U.S. CONST. art II, s2 ("[A]nd he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."); see also Brandon Sample, *The History of the Presidential Power* (Dec. 30, 2018), <https://clemency.com/history-presidential-pardon>.

¹⁵ Shogan, *supra* note 6; see also Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 565 (2001) ("The federal courts have also been reluctant to impose restrictions on the pardon power, preferring to rely on the general proposition that 'clemency has not traditionally 'been the business of the courts.'").

¹⁶ Nida et al., *supra* note 6, at 199.

¹⁷ *Id.*; see also Paul J. Larkin, Jr., *The Legality of Presidential Self-Pardons*, 44 HARV. J. L. & PUB. POL'Y 763, 777 (2021) ("[W]e should consider ourselves fortunate that the issue has not arisen with the regularity necessary to generate a body of case law.").

¹⁸ See Nida et al., *supra* note 6, at 212. The authors argue that while a self-pardon "may be constitutional, ... no individual should have the ability to place themselves in judgment of their own actions in the public arena. This quagmire in the Constitution ought to be resolved preventatively." *Id.* at 221. "President Nixon considered such a move when he realized the devastating impact that the Watergate scandal would have on his presidency. The Bush administration also reviewed the self-pardon option during the Iran-Contra arms for hostages scandal." *Id.* at 212.

¹⁹ *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280 (1998) (Rehnquist, J.) (describing clemency as "simply a unilateral hope"). The "heart of executive clemency" is to grant it as a matter of grace, enabling "the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations." *Id.* at 273.

broad application.²⁰ Outside of academic discussions, the use of clemency also fluctuates based on societal and political factors (and even the calendar itself,²¹ as seen by President Biden in the end of his term in 2024).²² While there seems to be agreement that pardons should not be bought or sold, there is no agreement about “whether the pardon power should only be used to correct mistakes, for example, to free someone who had been wrongly convicted or, instead, might be used to achieve a variety of... goals.”²³ Disagreement about the scope and use of this power has existed since its creation under the U.S. Constitution.

Despite conflicting theories of application of this power, there are many modern-day examples of its use that demonstrate mercy for those guilty of crimes (or at least, what was defined as a crime at the time of conviction). One such example of how pardon has recently operated at a large scale at

²⁰ Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 BRANDEIS L. J. 85, 89 (2002); “[B]ecause the Eighth Amendment and clemency are each designed to help prevent prisoners from suffering more than is their due, the jurisprudence of the former might be helpful in figuring out what the latter requires.” *Id.* at 96. *But see infra* Section I.A.1 (noting that some legal scholarship argues that mercy should not be a consideration in clemency in light of the theories of retribution and punishment).

²¹ Larkin, *supra* note 17, at 764. “[O]utgoing Presidents, no longer accountable to the electorate and effectively immune from congressional oversight, are freed from any political restraint on their behavior. Some chief executives grant clemency to parties who would never have received it while the political guardrails channeling presidential conduct were still in effect.” *Id.*

²² Press Release, The White House, Fact Sheet: President Biden Commutes the Sentences of 37 Individuals on Death Row, (Dec. 23, 2024), <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/12/23/fact-sheet-president-biden-commutes-the-sentences-of-37-individuals-on-death-row/>. “President Biden is also the first President ever to issue categorical pardons to individuals convicted of simple use and possession of marijuana, and to former LGBTQI+ service members convicted of private conduct because of their sexual orientation.” *Id.*

²³ Strasser, *supra* note 20, at 86 (“Commentators disagree about the purposes of the pardon power, both descriptively and normatively.”).

the federal level is with non-violent drug offenses: consider Katrina Polk, a 54-year-old Washington, D.C. resident who pled guilty to a nonviolent drug offense at age eighteen.²⁴ In April of 2024, President Biden pardoned eleven individuals and commuted [reduced] the sentences of five individuals who were convicted of non-violent drug offenses, including Polk.²⁵ The Press Release associated with those grants of clemency highlighted the underlying policy behind this action:

Many of these individuals received disproportionately longer sentences than they would have under current law, policy, and practice. The pardon recipients have demonstrated their commitment to improving their lives and positively transforming their communities. The commutation recipients have shown that they are deserving of forgiveness and the chance at building a brighter future for themselves beyond prison walls.²⁶

As of February 2025, President Biden had granted over 4200 pardons or commutations, with the vast majority near the end

²⁴ Kathryn Watson, *Biden Grants Clemency to 16 Nonviolent Drug Offenders*, CBS NEWS (Apr. 24, 2024), <https://www.cbsnews.com/news/biden-pardons-clemency-nonviolent-drug-offenders/>.

²⁵ *Id.* Under the Biden Administration, there was a late push with a plan to reduce unnecessary incarcerations: "The United States has less than 5% of the world's population but a fifth of its prisoners." Paul Grant, *Biden Pardons 11 People, Commutes Sentences of Five Others, Says White House*, REUTERS (Apr. 24, 2024, 12:24 PM), <https://www.reuters.com/world/us/biden-pardons-11-people-commutes-sentences-five-others-says-white-house-2024-04-24/?utm> (noting that the plan supports the goal of rehabilitation of those convicted of crimes, as opposed to retribution or punishment).

²⁶ Press Release, The White House, Statement from President Joe Biden on Clemency Actions, (Apr, 24, 2024), <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/04/24/statement-from-president-joe-biden-on-clemency-actions-2/?utm>; see also Grant, *supra* note 25. Note that this use of clemency was both a pardon (forgiveness of the original offense) and a commutation (reduction of the original sentence. Polk went on to get her PhD in public policy and administration. Watson, *supra* note 24.

of his term in 2025.²⁷ Notably, this group also included his own son, who was facing a possible prison sentence for federal felony gun and tax convictions.²⁸ Consistent with past trends, this number drastically increased in February 2025, with nearly 1600 petitions granted.²⁹

In recent years, clemency has become part of the regular news cycle under the Trump Administration, with some arguing a “supercharged” abuse of the pardon power, transforming the tool from one intended to serve public interest into “a tool for self-dealing.”³⁰ However, this is not without similarity by past presidents—many scholars have suggested the President Jefferson also used the power to free his political allies, rather than as an act of mercy.³¹ The original constitutional Framers did not include a restrictions on self-pardons and vested the President with the exclusive right to pardon anyone.”³² The

²⁷ *Clemency Statistics*, *supra* note 13. This is significantly more than under the 2016-2020 Trump Administration (238) and double that than under the 2012-2016 Obama Administration (1927). *Id.* President Obama has granted the most clemency petitions of any president since the Nixon Administration. *Id.*

²⁸ Zeke Miller et al., *Biden Pardons His Son Hunter Despite Previous Pledges Not To*, ASSOCIATED PRESS, <https://apnews.com/article/biden-son-hunter-charges-pardon-pledge-24f3007c2d2f467fa48e21bbc7262525> (Dec. 2, 2024, 7:49 AM).

²⁹ *Clemency Statistics*, *supra* note 13.

³⁰ Justin Florence & Grant Tudor, *The Presidential Pardon Power Explained*, PROTECT DEMOCRACY (Mar. 18, 2024), <https://protectdemocracy.org/work/the-presidential-pardon-power-explained/>.

³¹ See Nida et al., *supra* note 6. “The pardon power went largely unchallenged at a time when the Supreme Court was without a true understanding of its own role until the nation’s fourth Chief Justice, John Marshall, defined the Court’s role as the interpreter of the Constitution in 1803.” *Id.* at 208. This category of presidents that have also been labeled as using the pardon power for political purposes also includes former President Bush. *Id.* at 215.

³² *Id.* at 205; see also Albert W. Alschuler, *Limiting the Pardon Power*, 63 ARIZ. L. REV. 545, 545 (2021):

In granting this power, the Framers deliberately cast structural safeguards aside. Nevertheless, the presidency of

Supreme Court has noted that any limit to this power “must be found in the Constitution itself.”³³ An unsettled question about clemency that may soon be answered during the next presidential administration (potentially by a court that is thought to heavily favor President Trump)³⁴ is whether he has

Donald Trump prompted a search for limits. This Article examines: (1) whether a president may pardon crimes that have not yet happened (or announce his intention to do so); (2) whether he may pardon himself; (3) whether he may use pardons to obstruct justice or commit other crimes; (4) whether criminal statutes should be construed not to apply to the president when they arguably limit the pardon power; (5) whether the Take Care Clause limits the pardon power; (6) whether pardons can deprive victims of due process; (7) whether pardons ever violate the separation of powers by limiting the authority of courts; (8) whether the exception to the pardon power for impeachment cases does more than prevent the president from blocking the impeachment of federal officeholders; (9) whether pardons must specifically identify the crimes pardoned; and (10) whether pardons are invalid when issued as the result of fraud, bribery, or other unlawful conduct.

Id. at 607 (concluding that two of Trump’s pardons that appear to justify both criminal prosecution and judicial declarations that the pardons are invalid).

³³ Alschuler, *supra* note 32, at 606; see also Peter Brandon Bayer, *The Due Process Bona Fides of Executive Self-Pardons and Blanket Pardons*, 9 FAULKNER L. REV. 95, 159 (2017) (arguing that “there is nothing direct in the Constitution forbidding self-pardons, and much emanating from the executive discretion associated with clemency to justify self-pardoning as within the realm of clemency”). “[T]he Framers assumed that any President would exercise his authority, in the words of Alexander Hamilton, with ‘circumspection,’ ‘scrupulousness,’ and ‘caution.’” Larkin, *supra* note 4, at 496.

³⁴ See, e.g., Ankush Khardori, *The Supreme Court Gave Trump a Stunning Gift — and Rewrote the Constitution*, Politico (July 2, 2024, 5:00 AM) (noting that a recent decision by SCOTUS gives President Trump immunity from prosecution for conduct involving discussions with Justice Department officials). The ACLU has characterized this decision as the six Republican-appointed justices “abandoning” the Constitution and paving the way to create new constitutional protections for the president, “while turning away the claims of the powerless.” David Cole, *Supreme Court Term Ends with Win*

the authority to pardon himself. President Trump has already publicly stated that he believes he the legal authority to pardon himself to end a Justice Department investigation.³⁵ This is in conflict with many scholars' opinions that, just like the Justice Department, a president cannot pardon himself.³⁶ Yet, there is also support for President Trump's position.³⁷ The 2024-28 presidential administration is likely to provide answers to many of the questions that have risen with respect to the application of clemency throughout its history.

There has been some advocacy to pass legislation at the federal level to increase the use of clemency—and to make it more transparent to address concerns of bias and abuse. For example, The FIX Clemency Act supported by Massachusetts Congresswoman Ayana Pressly.³⁸ This legislation would create “an independent U.S. Clemency Board” comprised of nine individuals appointed by the President, including a person who is formerly incarcerated.³⁹ The Board would review applications for a pardon, commutation, or other relief from collateral consequences of convictions and then the recommendations from the Board will be given directly to the President and included in an annual report to Congress.⁴⁰ Yet, it is unclear whether such legislation would have sufficient support at the

for Trump, First Amendment Rights, ACLU (July 10, 2024), <https://www.aclu.org/news/civil-liberties/supreme-court-term-ends-with-win-for-trump-first-amendment-rights>.

³⁵ Larkin, *supra* note 17, at 773.

³⁶ *Id.*

³⁷ *Id.*; see also Jonathan Turley, *Yes, Donald Trump Can Pardon Himself, But it Would be a Disastrous Idea*, USA TODAY (June 4, 2018, 6:12 P.M.), <https://www.usatoday.com/story/opinion/2018/06/04/donald-trump-self-pardon-constitutional-impeachment-column/667751002/>. “Whether a president can grant himself a pardon is a question that has long fascinated academics. It has never been answered since, thankfully, no president had had the reason or the temerity for such a self-dealing abuse of power.” *Id.*

³⁸ See *The Fix Clemency Act*, CONGRESSWOMAN AYANNA PRESSLEY, <https://pressley.house.gov/the-fix-clemency-act/> (last visited Jan. 10, 2025).

³⁹ *Id.*

⁴⁰ *Id.*; see also H.R.6234, 117TH Cong. (2021).

federal level when there is republican control of all three branches of government.⁴¹

1. Arguments Against Clemency: Weighing Mercy Against Other Strong Considerations

There are numerous arguments against clemency, often focusing on concerns about fairness, justice, and public safety. Within legal scholarship, academics disagree about whether mercy is even an appropriate consideration in clemency,⁴² but at least in Massachusetts this consideration is explicitly written into the executive clemency guidelines.⁴³ This section will focus on three of the major criticisms: (1) clemency is unfair to victims and their families; (2) clemency undermines the rule of law and settled convictions; and (3) clemency has tremendous potential for abuse.⁴⁴ While all of these are significant considerations that should be balanced in any clemency process, this Article takes the position should not defeat the right to use the process of this constitutionally enshrined power. However, that does not extend to the concept that all grants of clemency would be appropriate; just that the process should be available to incarcerated

⁴¹ See Olivia Beavers et al., *GOP Holds Onto House Majority — Clinching the Trifecta*, POLITICO (Nov. 13, 2024, 11:04 PM), <https://www.politico.com/news/2024/11/13/republicans-win-house-control-00187509>.

⁴² Larkin, *supra* note 4, at 485 (highlighting arguments that debate whether mercy is consistent with justice in light of the sentencing justifications of incapacitation and retribution).

⁴³ See *infra* Section I.B.

⁴⁴ IAN O'DONNELL, FOR AND AGAINST CLEMENCY, JUSTICE, MERCY, AND CAPRICE: CLEMENCY AND THE DEATH PENALTY IN IRELAND 54, 62-69, 82 (2017); see generally Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 26 (2015) ("When the Framers spoke of the pardon power, they noted that it was necessary because prevailing criminal law might be too severe."); Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J. L. & PUB. POL'Y 833, 878 (2016) ("Presidents now must consider not only the effect that clemency may have on the immediate victims of a crime and their families, but also the political fallout from angering the victims' rights movement.").

individuals and that process should transparently weigh all relevant considerations in arriving at a decision.

Addressing the first criticism, it is undeniable that clemency in many, if not most cases will cause emotional distress to victims and co-victims (or secondary victims, such as family).⁴⁵ Victims and their families consider pardon or commutation as undermining their suffering and the justice they believe was served through the offender's punishment.⁴⁶ In many clemency processes, the impact of the release of an individual who has done harm to victim or their families is a necessary part of the clemency process. For example, in Pennsylvania, the survivors of homicide victims are entitled to

⁴⁵ Victims' relatives are often called "co-victims" or secondary victims. John D. Bessler, *Torture and Trauma: Why the Death Penalty Is Wrong and Should Be Strictly Prohibited by American and International Law*, 58 WASHBURN L. J. 1, 11 (2019). For example, many law enforcement members and their families were outraged over the Jan. 6 pardons. See, e.g., Luke Broadwater, *A Betrayal, a Mockery: Police Express Outrage Over Trump's Jan. 6 Pardons*, N.Y. TIMES (Jan. 21, 2025), <https://www.nytimes.com/2025/01/21/us/politics/jan-6-pardons-police.html>. One victim was noted as saying the pardon was a miscarriage of justice and an insult to those who risked their lives defending democracy. *Id.* Another example is the 17-year sentence of former judge Michael Conahan that was commuted by President Biden. Maya Yang, *Victims of Kids for Cash Judge Outraged By Biden Clemency*, GUARDIAN (Dec. 14, 2024, 2:10 PM), <https://www.theguardian.com/us-news/2024/dec/14/kids-for-cash-judge-biden-pardon?utm>. Conahan was sentenced for accepting millions of dollars in illegal payments in exchange for sending more than 2,300 children to private juvenile detention centers. One victim's mother was quoted as saying:

Conahan's actions destroyed families, including mine, and my son's death is a tragic reminder of the consequences of his abuse of power.... This pardon feels like an injustice for all of us who still suffer. Right now I am processing and doing the best I can to cope with the pain that this has brought back.

Id. This particular commutation was interwoven with the impact of the release to house arrest of many non-violent, incarcerated individuals during the COVID-19 pandemic and jail overcrowding issues.

⁴⁶ See Yang, *supra* note 45.

participate in the commutation process in various forms, such as submitting a letter or appearing at the hearing.⁴⁷ And while that opportunity is essential, it can be excruciatingly painful for the victims that have to relive these circumstances as part of their involvement in the process.⁴⁸ The inclusion of this perspective for consideration, while forcing renewed trauma on victims, is a “moral cacophony,” both necessary and paradoxical.⁴⁹ The voices of victims must be heard and respected,⁵⁰ and this, in my view, is the most challenging argument against the exercise of clemency.

In the face of this primary criticism of the use of clemency, it is important to highlight that not all victims or families are opposed to the release of those convicted of crimes against them or their family members. For example, in the petition for William Allen in Massachusetts, the family members of his victim testified in his support at his hearing.⁵¹ Mr. Allen

⁴⁷ Regina Austin, “*Second Looks, Second Chances*”: Collaborating with *Lifers Inc. on A Video About Commutation of LWOP Sentences*, 22 U. PA. J. L. & Soc. CHANGE 71, 86 (2019).

⁴⁸ Robert C. Ross, *Clemency Petitions from an Executive Branch Perspective*, 67 BOSTON BAR. J. (Special Edition 2023: Community Justice Reimagined) (Aug. 31, 2023), <https://bostonbar.org/journal/clemency-petitions-from-an-executive-branch-perspective/> (“[the] crime had a specific (and often immeasurable) impact on the victim”); see also Negar Katirai, *Retraumatized in Court*, 62 ARIZ. L. REV. 81, 88 (2020) (“[R]etraumatization refers to additional traumatization during a survivor’s interactions with professionals and processes in the justice system”).

⁴⁹ Anthony V. Alfieri, *Mercy Lawyers*, 82 N.C. L. REV. 1297, 1314 (2004) (describing how difficult it is “to hear of guilt pronounced by offender voices of contrition and remorse” and to consider forgiveness for an offender). But see Austin, *supra* note 47, at 86 (noting that there is lack of data of what victims really want from the justice system and society has created a narrative that victims want vengeance for closure).

⁵⁰ But see Austin, *supra* note 47, at 86 (highlighting the argument that there should be a limitation on the consideration of the feelings of victims’ survivors in commutation).

⁵¹ *Have Mercy: Public Support Tips the Scales Toward Justice*, McDERMOTT WILL & EMERY, <https://www.mwe.com/legal-case-studies/have-mercy-public-support-tips-the-scales-toward-justice/> (last visited Jan. 16, 2025) [hereinafter *Have Mercy*]. Mr. Allen’s circumstances were quite unique, perhaps the “perfect” candidate for clemency:

was later granted a commutation of his original life without parole sentence, successfully applied for parole, and is currently out of prison.⁵² Similarly, in the petition of Quintin Jones in Texas, the victim's sister was strongly in favor of clemency for the convicted Jones.⁵³ This did not persuade the deciding body;

There is no question that under then-applicable felony murder law, William Allen was guilty of first-degree murder, even though he did not directly cause the death of the victim. He participated in a robbery with a co-defendant, during which crime he drove the car and kept hostages at knifepoint in an apartment bathroom while the co-defendant encountered the victim and killed him in the living room. While the co-defendant received a second-degree sentence because of a plea bargain, Mr. Allen refused to plead and received a first-degree sentence. The family of the victim of his crime, notably, supported his commutation.

Ross, *supra*, note 48; see also Northeastern Univ. Sch. of Law, *A Conversation with William Allen, Correcting a Fundamental Unfairness Through the Clemency Process*, YOUTUBE (Nov. 29, 2022), <https://www.youtube.com/watch?v=6MLZPOyMhoM>.

⁵² Deborah Becker, *William Allen Released From Prison After Life Sentence Commuted*, WBUR (May 12, 2022), <https://www.wbur.org/news/2022/05/12/william-allen-released-from-prison-after-life-sentence-commuted> (noting that Allen's release marked the first time in a quarter century that a first-degree murder sentence was commuted in Massachusetts).

⁵³ *Quintin Jones is on Death Row for Killing his Great-Aunt. The Victim's Sister is Pleading for Clemency*, CBS NEWS (May 14, 2021 9:02 AM), <https://www.cbsnews.com/news/quintin-jones-death-row-great-aunt-sister-clemency/>. Jones accepted responsibility for killing his aunt for drug money, and he was sentenced to death—while on death row, the victim's sister wanted to prevent his sentence from being carried out:

"I love him very much," she told CBS News' Omar Villafranca. [She] said she and Bryant were extremely close. She does not believe Jones should die. "I think the governor should spare him, because he has changed and he's a different person than he used to be," she said. Writer Suleika Jaouad wrote a recent opinion article advocating for Jones' clemency because she believes he has transformed his life. "He had an unimaginably difficult childhood of abuse and

Jones was executed on May 19, 2021.⁵⁴ The victim impact and the reaction of the victim and the community should be at the forefront of any consideration of clemency, and it is a layered and complicated issue for those seeking this remedy. In reality, most clemency applications will face significant resistance from victims and families, thus exposing the “multiple complexities” of clemency practice and victims’ rights.⁵⁵

Second, critics argue that clemency can weaken the authority of the legal system by overriding judicial decisions and established sentences, potentially leading to a perception of favoritism or inconsistency.⁵⁶ When executive power is used to alter or erase penalties handed down by the courts following a conviction, it can undermine the legitimacy of judicial processes and erode public trust in the justice system.⁵⁷ This is especially

violence and addiction and neglect, but as he said to me, his childhood did not excuse what he did,” she said.

Id.

⁵⁴ Jolie McCullough, *Texas Executed Quintin Jones for Murdering his Great Aunt. Supporters Questioned if Race Played a Factor in his Clemency Rejection*, TEX. TRIB. (May 19, 2021), <https://www.texastribune.org/2021/05/19/texas-execution-quintin-jones/> (arguing that because a white man in a similar situation was spared, the parole board’s rejection was racially motivated in light of the support for clemency from the victim’s family).

⁵⁵ See Mary Margaret Giannini, *Measured Mercy: Managing the Intersection of Executive Pardon Power and Victims’ Rights with Procedural Justice Principles*, 13 OHIO ST. J. CRIM. L. 89, 126 (2015)

⁵⁶ Andrew Novak, *Transparency and Comparative Executive Clemency: Global Lessons for Pardon Reform in the United States*, 49 U. MICH. J. L. REFORM 817, 838 (2016) (“Transparency in the clemency process can prevent arbitrariness, discrimination, and political favoritism by allowing media and public scrutiny and allowing applicants to challenge deficiencies.”); see also Phillip John Strach, *Ohio Adult Parole Authority v. Woodard: Breathing New “Life” into an Old Fourteenth Amendment Controversy*, 77 N.C. L. REV. 891, 922 (1999) (“clemency operates only as an outlet for mercy, which the executive may use on behalf of society when society (through the executive) deems it necessary to override the judicially imposed sentence”).

⁵⁷ But see Elizabeth Rapaport, *Straight Is the Gate: Capital Clemency in the United States from Gregg to Atkins*, 33 N.M. L. REV. 349, 352, 256 (2003) (noting that the clemency power has also been used to “restore” trust in a

true if clemency appears arbitrary, driven by political motives, or disproportionately favors individuals with influence, wealth, or connections. Such perceptions can create a sense that the law does not apply equally to all, fostering resentment among the public and diminishing the system's credibility. Furthermore, critics worry that frequent or poorly justified acts of clemency may discourage confidence in judicial decisions, sending a message that court rulings can easily be overturned based on subjective or external considerations rather than the rule of law.⁵⁸ However, this criticism only carries weight in the case of those who are legitimately guilty of their crimes.⁵⁹ Furthermore, this criticism is weakened when a system of clemency also takes into consideration broader systemic inequities or unfairness.⁶⁰

Third, and related to the above, there is significant potential for abuse.⁶¹ The clemency process can be vulnerable to misuse, with decisions potentially influenced by corruption, political pressure, or personal relationships rather than fairness or justice.⁶² Clemency might create the impression of unequal treatment, especially if it appears to favor the wealthy, politically

system in the case of miscarriages of justice or correction of the malfeasance and misfeasance of other actors in the criminal justice system).

⁵⁸ See generally Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239, 308 (2003) (noting that critiques advanced against the use of clemency include nonpolitical factors, which result in the inconsistent application of clemency). This undermining of the rule of law through clemency is now happening against a backdrop of a more wide scale erosion of the rule of law nationally. William R. Bay, *The ABA Supports the Rule of Law*, ABA (Feb. 10, 2025), <https://www.americanbar.org/news/abanews/aba-news-archives/2025/02/aba-supports-the-rule-of-law/>.

⁵⁹ See Rapaport, *supra* note 57, at 356.

⁶⁰ See *infra* Section II.

⁶¹ See *infra* Section I.B.

⁶² This has been demonstrated by both Republican and Democrat executives throughout the years. Editorial, *The Bipartisan Abuse of the Pardon*, LAS VEGAS REV. J. (Jan. 25, 2025, 9:00 PM), <https://www.reviewjournal.com/opinion/editorials/editorial-the-bipartisan-abuse-of-the-pardon-3270413/>. See generally Alyson Dinsmore, *Clemency in Capital Cases: The Need to Ensure Meaningful Review*, 49 UCLA L. REV. 1825, 1845-46 (2002) (noting that studies establish that even more than two decades ago, clemency was being abused).

connected, or high-profile individuals over ordinary citizens. At the federal level, and in many state processes, the clemency process has “no fixed criteria” and are left to the “vast unguided discretion of the executive.”⁶³ Despite these concerns, supporters of clemency argue that it plays a crucial role in correcting injustices, addressing overly harsh sentences, and recognizing individual circumstances that legal processes may overlook. This Article suggests that the overhaul to the system in Massachusetts and the new 2024 Clemency Guidelines will serve as a more transparent model for clemency at the state and federal level that may alleviate some of these criticisms.

B. Overview of the Clemency Process in Massachusetts

Clemency varies at the state level.⁶⁴ Consistent with federal law, there are different forms of clemency in Massachusetts—pardons and commutations. Pardons are forgiveness for the convicted individual's underlying offense and would eliminate the record of the crime.⁶⁵ Commutations do

⁶³ “More likely, clemency and pardon grants can damage the system's moral credibility because they are commonly seen as one more example of an offender escaping the punishment he or she deserves by getting early release without evidence of remorse or atonement.” Paul H. Robinson & Muhammad Sarahne, *The Opposite of Punishment: Imagining A Path to Public Redemption*, 73 RUTGERS U. L. REV. 1, 23, 25 (2020).

⁶⁴ “Clemency procedures vary from state to state. In 15 states, the governor has full and sole authority to grant clemency: Alabama, Arkansas, California, Colorado, Kentucky, Mississippi, New Jersey, New Mexico (although it has abolished the death penalty, two inmates remain on death row), North Carolina, Oregon, South Carolina, South Dakota, Virginia, Washington, and Wyoming. In seven states—Arizona, Delaware, Florida, Louisiana, Oklahoma, Pennsylvania, and Texas—the governor must have the recommendation of clemency from a board or advisory group. In Georgia, Nebraska, Nevada, and Utah, a board or advisory group has the sole discretion to grant clemency.” *Clemency and Pardons*, ACLU: SMART JUSTICE, <https://www.aclu.org/issues/smart-justice/parole-and-release/clemency-and-pardons> (last visited Feb. 12, 2025).

⁶⁵ *Pardons and Commutations*, MASS. GOV, <https://www.mass.gov/info-details/pardons-and-commutations> (last visited Jan. 10, 2025); *Executive*

not forgive underlying offenses but reduce the period of incarceration for the convicted individual.⁶⁶ The Governor's power of clemency derives from the Massachusetts Declaration of Rights, the state constitution:

The power of pardoning offences, except such as persons may be convicted of before the senate by an impeachment of the house, shall be in the governor, by and with the advice of council, provided, that if the offence is a felony the general court shall have power to prescribe the terms and conditions upon which a pardon may be granted; but no charter of pardon, granted by the governor, with advice of the council before conviction, shall avail the party pleading the same, notwithstanding any general or particular expressions contained therein, descriptive of the offence or offences intended to be pardoned.⁶⁷

While once more widely used, clemency in the Commonwealth dropped significant in the early 1980s, "likely a function of a broader shift toward more retributive penal practices that began in the 1970s."⁶⁸ Unfortunately, and inequitably, clemency

Clemency Process, MASS. GOV <https://www.mass.gov/info-details/executive-clemency-process> (last visited Jan. 10, 2025).

⁶⁶ *Pardons and Commutations*, *supra* note 65; *Executive Clemency Process*, *supra* note 65; *see also* Ross, *supra* note 48 ("A pardon offers forgiveness for the underlying offense, whereas a commutation is the substitution of a lighter sentence for a more severe sentence and, unlike a pardon, does not "do away with the conviction.").

⁶⁷ MASS. CONST. pt. 2, ch. II, § 1, art. VIII, *amended by* MASS. CONST. amend. LXXIII. The Declaration of Rights has its roots in the 1780 Constitution of the Commonwealth of Massachusetts, drafted by John Adams. This is "the world's oldest functioning written constitution. It served as a model for the United States Constitution, which was written in 1787 and became effective in 1789." *John Adams and the Massachusetts Constitution*, MASS. GOV, <https://www.mass.gov/guides/john-adams-the-massachusetts-constitution> (last visited Jan. 10, 2025).

⁶⁸ BEN NOTTERMAN, WILLIE HORTON'S SHADOW: CLEMENCY IN MASSACHUSETTS (NYU L. Sch. Ctr. on Admin. of State Crim. L. State Clemency Proj. ed. 2019), https://www.law.nyu.edu/sites/default/files/CACL%20Clemency%20MA_Accessible.pdf. Willie Horton was an incarcerated individual in

has been a rare occurrence in Massachusetts in prior decades until the most recent administration.⁶⁹ It is an intersection of intricate legal procedures with a heavily political process, neither of which have historically had significant transparency.⁷⁰

The clemency process in Massachusetts is [overly] complicated. It starts with the incarcerated petitioner (with or without counsel) filing a petition with the Advisory Board of Pardons, a body that also handles parole petitions.⁷¹ After “review and investigation,” if the Board determines that the petition warrants a hearing, a public hearing will be held.⁷² They determine which petitions are worthy for a hearing by relying on Clemency Guidelines that are specific to the governor in office.⁷³ The hearings are an opportunity for the Board to hear directly from the incarcerated individual, but also other stakeholders, including victims and secondary victims.⁷⁴ Following the hearing, the Board will submit its recommendation to the Governor. The Board is supposed to include its reasoning for the recommendation, making specific reference to the Guidelines.⁷⁵ Upon receipt of a favorable

Massachusetts sentenced to life without parole. *Id.* at 6. In June 1986, Horton did not return from a weekend furlough and later assaulted a man before repeatedly raping the man’s fiancé. *Id.* Then-Governor Dukakis “endured a crucible of public rage in the media,” and a shadow of fear and reluctance has hung over the clemency power since that time. *Id.* “The tendency to reflexively overhaul a criminal justice policy after a single violent crime, regardless of the policy’s overall success, became known as the ‘Willie Horton effect.’” *Id.*

⁶⁹ *Pardons and Commutations*, *supra* note 65; *Executive Clemency Process*, *supra* note 65.

⁷⁰ *See Pardons and Commutations*, *supra* note 65; *Executive Clemency Process*, *supra* note 65; *Clemency Report*, *supra* note 2, at 2 (“The guidelines that apply to clemency in Massachusetts similarly characterize clemency ‘an integral part of the correctional process.’”).

⁷¹ *Executive Clemency Process*, *supra* note 65.

⁷² *Id.* This is supposed to be done within ten weeks of the petition being filed. OFF. OF THE GOVERNOR, COMMONWEALTH OF MASS., EXECUTIVE CLEMENCY GUIDELINES (2023) [hereinafter HEALEY GUIDELINES].

⁷³ *Executive Clemency Process*, *supra* note 65.

⁷⁴ *Id.*

⁷⁵ *Id.* This is supposed to be done within 6 months of the hearing. HEALEY GUIDELINES, *supra* note 72.

recommendation from the Board, the Office of the Governor will evaluate the petition.⁷⁶

The Governor has the prerogative to return a petition to the Board for further action.⁷⁷ If the Governor takes no action within 90 days following a recommended denial from the Board, the petition is considered denied.⁷⁸ Whenever the Board recommends that the Governor grant a petition and the Governor does not take any action with respect to the recommendation within one year, the Board and the petitioner are supposed to presume that the Governor disagrees with that recommendation and clemency is again denied.⁷⁹ Per the Massachusetts Constitution, a grant of clemency also requires the “advice and consent” of another body called the Governor’s Council.⁸⁰ No decision by the Governor to grant clemency is given effect unless it is approved by this Council.⁸¹ And, despite attempts to force past governors to increase the use of clemency in Massachusetts, the judiciary has been clear that no court can compel a governor to act when it comes to clemency.⁸²

Most individuals who vote in Massachusetts are not even aware of the roles or composition of either board that is involved in clemency processes. The Advisory Board of Pardons is basically the Parole Board by another name that reviews applications for clemency and provides recommendations to the Governor.⁸³ Its role is to evaluate cases, conduct hearings, and offer expert advice to guide the Governor’s decision-making in

⁷⁶ *Executive Clemency Process*, *supra* note 65.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Executive Clemency Process*, *supra* note 65; MASS. CONST. pt. 2, ch. II, § 1, art. VIII, amended by MASS. CONST. amend. LXXIII.

⁸¹ *See id.*

⁸² *See Foster v. Comm'r of Corr.*, 146 N.E.3d 408, 411-12, (Mass. 2020) (citing *Dist. Att’y for the Suffolk Dist. v. Watson*, 411 N.E.2d 1274 (Mass. 1980) (holding that the “judicial branch cannot control executive clemency”)).

⁸³ NOTTERMAN, *supra* note 68.

matters of clemency.⁸⁴ This is intended to provide transparency and ensure that all voices are considered in the decision-making process.⁸⁵ The Advisory Board of Pardons is composed of the same members as the Parole Board, which means it includes individuals with expertise in corrections, law, psychology, and social work. This works to ensure that clemency decisions are informed by a broad understanding of justice, rehabilitation, and public safety.⁸⁶ The board currently consists of seven members appointed by the Governor, each serving a five-year term.⁸⁷ Members are often chosen for their expertise in criminal justice, corrections, psychology, or social work. The Advisory Board of Pardons is a constitutionally established body that plays a key role in the state's executive branch.⁸⁸

The second group that needs to give its stamp of approval to a clemency application is the Governor's Council. This body is unique to Massachusetts and has its roots in the colonial era.⁸⁹ As noted, the council reviews recommendations for clemency after they have been forwarded by the Advisory Board of Pardons. The Governor's Council consists of eight elected members who serve two-year terms (unlike the Parole Board,

⁸⁴ *Executive Clemency*, MASS.GOV, <https://www.mass.gov/executive-clemency> (last visited Jan. 30, 2025).

⁸⁵ See HEALEY GUIDELINES, *supra* note 72.

⁸⁶ *But see* NOTTERMAN, *supra* note 68 (noting that previously, the Board consisted primarily of law enforcement).

⁸⁷ *Board Member Profiles*, MASS.GOV, <https://www.mass.gov/info-details/board-member-profiles> (last visited Feb. 12, 2025). For example, currently on the Board is Sarah B. Coughlin, a licensed clinical social worker, an alcohol and drug counselor, and a certified recovery coach supervisor. She was confirmed to the Board in September 2023. *Id.* The board also includes attorneys, former probations officers, a social worker, and a psychologist. *Id.*

⁸⁸ *Governor's Power to Pardon*, MASS.GOV, <https://www.mass.gov/news/governors-power-to-pardon> (last visited Feb. 12, 2025).

⁸⁹ See Nicci Kadilak, *Massachusetts Governor's Council: What You Need to Know*, BURLINGTON BUZZ (July 29, 2024), <https://www.burlington.buzz/civic-engagement/massachusetts-governors-council-what-you-need-to-know/>.

whose members are appointed).⁹⁰ Each member represents a specific district within the state.⁹¹ The role and operation of both boards are essential to the clemency process within the Commonwealth, yet most Massachusetts voters do not have a strong understanding of who they are or what they do when it comes to clemency. However, there has been a push in recent years (bolstered by some high-profile grants of clemency) to increase visibility to this space.⁹²

1. The Healey Guidelines: A Shift Towards Opportunity for Mercy

As noted, each Massachusetts governor has the authority to issue their own version of clemency guidelines. On October 31, 2023, Governor Maura Healey issued her clemency guidelines.⁹³ These are markedly different than those used by any other administration in Massachusetts history, explicitly outlining the ways in which Governor Healey will use executive clemency to address unfairness and systemic bias.⁹⁴ For the first time, the Guidelines will take into consideration factors like “the

⁹⁰ *Governor’s Council*, MASS.GOV, <https://www.mass.gov/orgs/governors-council> (last visited Jan. 29, 2025).

⁹¹ *Id.*

⁹² See, e.g., *Clemency Report*, *supra* note 2; *Have Mercy*, *supra* note 51; see also *Clemency Initiative*, GREATER BOS. LEGAL SERVS., <https://www.gbls.org/clemency-initiative> (last visited Feb. 12, 2025); Naila Awan & Katie Rose Quandt, *Executive Inaction: States and the Federal Government Fail to Use Commutations as a Release Mechanism*, PRISON POL’Y INITIATIVE (Apr. 2022), <https://www.prisonpolicy.org/reports/commutations.html> (noting increased advocacy around the use of clemency in Massachusetts).

⁹³ Press Release, Governor Maura Healey, Governor Healey Issues New Clemency Guidelines to Center Fairness and Equity in Criminal Justice System, (Oct. 31, 2023) <https://www.mass.gov/news/governor-healey-issues-new-clemency-guidelines-to-center-fairness-and-equity-in-criminal-justice-system> [hereinafter Healey Guidelines PR]; see also HEALEY GUIDELINES, *supra* note 72.

⁹⁴ HEALEY GUIDELINES, *supra* note 72 (“With all these factors in mind, the Governor intends to use clemency to make our Commonwealth more compassionate and more just.”).

petitioner's age at the time of the offense, health, post-offense behavior, race, ethnicity, gender and sexual identity, as well as whether they are a survivor of sexual assault, domestic violence or human trafficking."⁹⁵

In evaluating a petitions for clemency, Governor Healey's Guidelines focus primarily on three factors: (1) the Governor views executive clemency as a means of addressing unfairness in the criminal justice system; (2) the Governor will use executive clemency to ensure accountability with compassion; and (3) the character and behavior, particularly post-offense behavior, of the petitioner will be considered in evaluating all clemency applications.⁹⁶ As noted, these areas of focus represent a significant shift from those used by former Governor Charlie Baker.⁹⁷ The key differences between the two sets of guidelines are as follows:

- For the first time, the guidelines explicitly state that clemency will be used to address systemic biases and unfairness in the criminal justice system. While acknowledging the importance of clemency, the Baker Guidelines did not explicitly focus on systemic biases or the specific personal circumstances of petitioners.
- The new guidelines do not specify a minimum time served before a petitioner serving a life sentence can be considered for clemency, allowing for more

⁹⁵ Healey Guidelines PR, *supra* note 93; *see also* Larkin, *supra* note 4, at 484, n.194 (noting that these individualized assessments trace back at least to President Lincoln).

⁹⁶ HEALEY GUIDELINES, *supra* note 72; *see* Austin Sarat, *Massachusetts Governor Offers a New Way of Thinking About Crime, Justice, and Clemency*, VERDICT (Nov. 2, 2023), <https://verdict.justia.com/2023/11/02/massachusetts-governor-offers-a-new-way-of-thinking-about-crime-justice-and-clemency> (reporting that one commentator noted the guidelines "offer a model that may transform the understanding of executive clemency across the country and, at the same time, return it to what it once was in the United States.").

⁹⁷ As one Governor reflected on the political challenges that face governors in granting clemency, he noted: "There's no political credit." Hanna Liebman Dershowitz & Rachel Van Etten, *Reflections on the Rewriting the Sentence II Summit on Alternatives to Incarceration*, 36 FED. SENT'G REP. 114, 125, (2024).

individualized assessments. In contrast, the Baker Guidelines specified that the governor was unlikely to consider commuting a life sentence for first-degree murder until the petitioner had served at least fifteen years.

- Finally, the Healey Guidelines aim to make clemency more accessible by considering a broader range of factors and focusing on rehabilitation, personal growth, and reintegration into society.⁹⁸ The Baker Guidelines were more restrictive, emphasizing the seriousness of offenses and setting higher thresholds for consideration.

Wasting no time, and shortly into her term, Governor Healey granted significantly more pardons in her first year in office than the prior governor.⁹⁹ These Guidelines represent a more progressive and inclusive approach, focusing on rectifying systemic injustices and considering the individual circumstances of petitioners, whereas Governor Baker's guidelines were more conservative and stringent in their criteria.¹⁰⁰ Clemency has the potential at both the federal and state level to balance the branches of government,¹⁰¹ as well as

⁹⁸ The factor of "age" also has overlap with another space that Massachusetts is pioneering, namely the recognition of the most updated neuroscience research into brain development. Nik DeCosta-Klipa, *3 Things to Know About Gov. Maura Healey's New Guidelines for Pardons*, WBUR (Nov. 1, 2023), <https://www.wbur.org/news/2023/11/01/massachusetts-maura-healey-clemency-pardons-guidelines-newsletter>.

⁹⁹ *Id.* ("Healey has recommended more pardons (13) in her first year in office than any Massachusetts governor since Michael Dukakis").

¹⁰⁰ Healey Guidelines PR, *supra* note 93. Lieutenant Governor Driscoll was quoted as saying: "Executive clemency has the power to not only make a positive difference in the lives of individual petitioners, but also to make our state fairer and more equitable.... The Governor has said from day one that our administration is going to apply an equity lens to everything we do, and we are seeing the results – an administration-wide equity assessment, new and diverse councils and commissions, eleven pardons and now these updated guidelines."

¹⁰¹ Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 17 (2015) ("It is clear that the Framers intended the pardon power not only to be a vehicle

to redress long standing inequities that have plagued incarceration.¹⁰² By explicitly calling out “mercy” in the new Guidelines,¹⁰³ they offer a potential model at the state and federal level to revisit the original purpose of this executive power that has been absent.

II. CLEMENCY AS A TOOL TO REMEDY SYSTEMIC INEQUITIES WITHIN MASSACHUSETTS

Healey’s Guidelines acknowledge that systemic biases—such as racial, socioeconomic, and gender disparities—have historically influenced the outcomes of criminal justice processes.¹⁰⁴ Under those guidelines, clemency is framed in a way that Hamilton likely would have supported: as a mechanism to address inequities and ensure that individuals

for the ancient value of mercy but also to play a role in the balance between the branches of government.”).

¹⁰² Ashley Nellis, *Mass Incarceration Trends*, THE SENT’G PROJECT (May 21, 2024), <https://www.sentencingproject.org/reports/mass-incarceration-trends/>. Nellis describes the trends in incarceration rates since the 1970s, as well as pointing out significant disparities for people of color:

People of color remain massively overrepresented in prisons, accounting for nearly 7 in 10 people in prison. Systemic causes range from a history of racial and ethnic subordination to ongoing police tactics that unfairly ensnare people of color into the system, and also include charging and sentencing practices that create stiffer punishments for people of color.

Id.

¹⁰³ See HEALEY GUIDELINES, *supra* note 72 (“By issuing clemency, a governor can do what is right rather than what is merely expedient – correcting legal errors, righting systemic wrongs, addressing historical injustices, exercising compassion, showing mercy, promoting equity, and fighting racism.”).

¹⁰⁴ These biases also extend to the clemency process itself. See, e.g., Michael Heise, *The Death of Death Row Clemency and the Evolving Politics of Unequal Grace*, 66 ALA. L. REV. 949, 949 (2015) (“[W]hat little clemency activity that persists continues to distribute unevenly across gender, racial and ethnic groups, geography, governors’ political affiliation, and over time.”).

disproportionately affected by systemic injustice are afforded opportunities for relief.¹⁰⁵ Racial disparities in Massachusetts prisons and jails are more severe than in many other states.¹⁰⁶ The Massachusetts prison population is growing increasingly older and more costly to incarcerate.¹⁰⁷

This is particularly true when the focus is solely on those incarcerated at MCI Framingham.¹⁰⁸ Clemency seems like a particularly useful tool for this much smaller segment of prisoners; while some have argued that clemency is ineffective since it has such a small impact on prison populations, MCI Framingham has such a small population to start with that it would be an impact that was felt more significantly. In addition, there are particular attributes of the facility and the prisoners that would make them more likely to fit within the scope of Governor Healey's aims for clemency. When it is "the final check separating life and death," attention to principles that center systemic inequalities throughout our system should be prioritized.¹⁰⁹

A. History of MCI Framingham

Massachusetts has a lower rate of female incarceration compared to other states.¹¹⁰ The state's only facility for incarcerated women is the Massachusetts Correctional Institution – Framingham (MCI-Framingham), a medium

¹⁰⁵ See HEALEY GUIDELINES, *supra* note 72.

¹⁰⁶ *Clemency Report*, *supra* note 2, at 4 ("Among those sentenced to incarceration, Black and Latinx people sentenced to incarceration receive longer sentences than their White counterparts. Other disparities occur in charging decisions, jury trials, and plea bargaining.") (citation omitted).

¹⁰⁷ *Buckman v. Comm'r of Corr.*, 138 N.E.3d 996, 1002 (Mass. 2020).

¹⁰⁸ This population includes individuals who were assigned female at birth and trans women, both of whom are housed at MCI Framingham. See, e.g., *Kosilek v. Misi*, 630 F. Supp. 3d 328, 331 (D. Mass. 2022).

¹⁰⁹ Heise, *supra* note 58, at 308–09.

¹¹⁰ *Highest and Lowest Female State Imprisonment Rates (per 100,000 U.S. Female Residents)*, THE SENT'G PROJECT, (July 7, 2024) <https://www.sentencingproject.org/fact-sheet/incarcerated-women-and-girls/>.

security prison that houses women serving sentences, awaiting trial, or civilly committed.¹¹¹ Currently, less than 200 (although this number is likely closer to 175) individuals are housed at this facility.¹¹² Originally called the Sherborn Reformatory for Women, MCI Framingham was built in 1877 to house women convicted of minor offenses,¹¹³ such as drunkenness and vagrancy (which were often linked to poverty and social inequity). The institution's focus was initially on rehabilitation rather than punishment.¹¹⁴ As incarceration rates rose in the

¹¹¹ *MCI Framingham*, MASS.GOV, <https://www.mass.gov/locations/mci-framingham> (last visited Feb. 12, 2025).

¹¹² *Women's Incarceration Conditions and Reentry Project*, PRISONER'S LEGAL SERVS. OF MASS., <https://plsma.org/womens-project/> (last visited Feb. 12, 2025). Also reporting respondents in the report have experienced or witnessed sexual misconduct by staff. Some experienced physical violence by staff, and others have been threatened with physical violence by staff. Transgender women incarcerated in men's prisons reported sexual misconduct from both correctional staff and incarcerated men. The Massachusetts Department of Correction ("DOC") reports that 70% of women in its custody have an open mental health case. See Michael Goldstein, *A Renewed Vision of Justice at Framingham: Uniting a Prison's Past and Future*, CRIMSON (Nov. 18, 2021), <https://www.thecrimson.com/article/2021/11/18/framingham-retrospection/> ("As of July 26, 2021, the prison is only at 30 percent capacity, making it the least occupied medium-security prison in Massachusetts. And, in 2019, only 4.1 percent of the women in prison in the U.S. were incarcerated for violent crimes, while the majority of women in prison — 59.2 percent — were incarcerated for drug-related crimes.").

¹¹³ MASS. DEP'T OF CORR. MCI FRAMINGHAM, VOLUNTEER ORIENTATION HANDBOOK (2025), https://www.bc.edu/content/dam/bc1/schools/mcas/arts%20council/PDF/PAO_orientationhandbook.pdf; Shelby Grebbin, *Inside the Fight to Document the Horrors at America's Oldest Women's Prison*, DIGBOSTON (Dec. 17, 2020), <https://diggoston.com/inside-the-fight-to-document-the-horrors-at-americas-oldest-womens-prison/>. "[T]his is the oldest all-women's prison still in operation in the U.S. At its inception, prison reformers saw Sherborn as an opportunity to implement a more gendered mode of punishment rather than relegating women to isolated corners of male-dominated institutions." Grebbin, *supra*.

¹¹⁴ Goldstein, *supra* note 112 ("[T]he Reformatory faced its downfall when the state began worrying about... progressive treatment of crime that prioritized humanity over the strict hand of the law.").

20th century, the reformatory expanded to accommodate women convicted of more serious crimes.¹¹⁵ It transitioned from a reformatory model to a state prison,¹¹⁶ though rehabilitation programs persisted. Like many prisons at the time, MCI Framingham reflected broader social inequalities, with incarcerated women of color often facing harsher treatment and fewer opportunities for rehabilitation (and arguably, this is still true today).

The 1960s and 1970s saw growing attention to the treatment of incarcerated women.¹¹⁷ By the 1980s, the prison system in Massachusetts and across the U.S. became more punitive, with an emphasis on longer sentences and stricter conditions.¹¹⁸ MCI Framingham became known for consistent over capacity, exacerbating issues like inadequate healthcare and programming.¹¹⁹ While the overcrowding issue has resolved due to decreasing incarceration rates, many issues still exist. The prison population at MCI Framingham reflects systemic inequities, with a disproportionate number of incarcerated

¹¹⁵ Grebbin, *supra* note 113.

¹¹⁶ *Id.*

¹¹⁷ See, e.g., LINDA K. HOLT, MASS. DEP'T OF CORR. WOMEN COMMITTED TO THE MASSACHUSETTS DEPARTMENT OF CORRECTION, 1970 TO 1980 (1981), <https://www.mass.gov/doc/237commitspdf/download> (noting that societal changes have fostered an increase in attention and research pertaining to incarcerated women).

¹¹⁸ DORIS LAYTON MCKENZIE, SENTENCING AND CORRECTIONS IN THE 21ST CENTURY: SETTING THE STAGE FOR THE FUTURE 1 (2001), <https://www.ojp.gov/sites/g/files/xyckuh241/files/archives/ncjrs/189106-2.pdf> ("The strong emphasis on rehabilitation that existed for the first seven decades of the 20th century gave way in the 1970s to a focus on fairness and justice, by which sentences reflected "just deserts" rather than a utilitarian motive. Sentencing practices later moved toward a crime-control model that emphasized incarceration as a way to reduce crime in the community; this crime-control model became increasingly popular during the 1980s and 1990s.").

¹¹⁹ Alison Kuznitz, *Inmates Say \$50 Million for New Mass. Prison Would be Better Spent on Rehabilitation*, MASSLIVE (June 28, 2023, 5:55 AM), <https://www.masslive.com/politics/2023/06/inmates-say-50-million-for-new-mass-prison-would-be-better-spent-on-rehabilitation.html>.

women being low-income and women of color.¹²⁰ Many are survivors of trauma, domestic violence, and substance use disorders. MCI Framingham's history underscores the evolving challenges and injustices of the criminal justice system, particularly as they relate to women. Its legacy serves as a case study in the broader struggle to balance accountability, rehabilitation, and equity and which theory of sentencing should control in the Commonwealth.¹²¹

The Massachusetts Department of Correction is actively pursuing the construction of a new women's prison, with experts estimating a cost of \$50 million to Massachusetts taxpayers.¹²² There has been significant pushback from a variety of groups, including the incarcerated women themselves, as well as members of the Massachusetts legislature.¹²³ After a prior jail and prison construction moratorium was vetoed by Governor Baker, there is momentum to get a similar 5-year ban in front of Governor Maura Healey, who is thought to be more likely to support it.¹²⁴ One potential solution would be to increase the use of clemency at MCI Framingham where constitutional under the

¹²⁰ Susan Sered, *Unwarranted Restrictions, Gratuitous Harm—Women and Prison Security Classification in Massachusetts*, SCHOLARS STRATEGY NETWORK (Aug. 26, 2024), <https://scholars.org/contribution/unwarranted-restrictions-gratuitous-harm-women>.

¹²¹ Joseph R. Nolan & Laurie J. Sartorio, *Theories of Punishment*, in 32 MASS. PRAC., CRIMINAL LAW § 7 (3d ed. 2024) ("There are several schools, teaching a variety of theories regarding the object of punishment") (including public safety, retribution, reformation, and deterrence).

¹²² Sered, *supra* note 120. ("In the wake of the Legislature's 2024 failure to vote on the Prison Construction Moratorium Bill—which passed last year but was vetoed by then Governor Baker—it is more crucial than ever to look closely at DOC policies and practices that impact the continued incarceration of women"); *see also* An Act Establishing a Jail and Prison Construction Moratorium, S. 1979, 193rd Sess. (Mass. 2023-2024), <https://malegislature.gov/Bills/193/S1979>.

¹²³ Kuznitz, *supra* note 119.

¹²⁴ *Id.* ("Melissa Cordle, who's been incarcerated for the last 38 years, told lawmakers that constructing a new prison would only transfer and perpetuate the issues at MCI-Framingham. Cordle, 73, advocated for alternatives like relief for elderly inmates who pose a low threat to society").

Guidelines to reduce its population and potentially create solutions for a smaller population of incarcerated individuals.

B. Demographics and Conditions at MCI Framingham

As of July 2024, Framingham had an operational capacity of 469, and reported that it had 214 individuals housed there.¹²⁵ This includes people with life without parole ("LWOP") sentences, as well as individuals waiting in a pretrial stage (21% of the 214) or individuals who are under civil commitment (6% of the 214).¹²⁶ Of the 214, 64% are white, 20% are black, and 9% are Hispanic.¹²⁷ Fifty women are serving a LWOP sentence.¹²⁸ Of particular relevance when it comes to the Guidelines:

Incarcerated women are overwhelmingly survivors of violence and trauma. The vast majority of women in MCI-Framingham are mothers separated from their children. There are 7 women in their 70s and 10 women in their 60s in Framingham. Women are suffering from a range of significant illnesses and receiving inadequate healthcare.... Women express a need for mental health care and treatment that cannot happen inside prison.¹²⁹

The conditions at Framingham have been well documented by groups like Families as Justice for Healing and Prisoners Legal Services.¹³⁰ For example:

¹²⁵ *July 2024 MA DOC Institutional Fact Card*, MASS.GOV, <https://www.mass.gov/doc/institutional-fact-cards-july-2024/download> (last visited Jan. 19, 2025).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Families as Justice for Healing, *Pass the Jail and Prison Construction Moratorium*, PRISONERS' LEGAL SERVS. OF MASS., <https://plsma.org/wp-content/uploads/2023/03/Moratorium-Bill-Info-Sheet.pdf> (last visited Feb. 12, 2025).

¹³⁰ See, e.g., Sarah Nawab, *The Way Home: The Urgency of Decarcerating Women and Girls in Massachusetts*, PRISONERS' LEGAL SERVS. OF MASS. (Oct. 30,

The overwhelming majority of women interviewed and surveyed for the report stated that they had either experienced or witnessed sexual misconduct or harassment by correctional or other staff. Women also reported experiencing physical violence, threats of violence, and verbal bullying from staff. Women incarcerated throughout the Commonwealth reported pervasive retaliation for reporting staff sexual misconduct, and several women reported that they had experienced physical and sexual violence prior to incarceration as well, indicating that incarceration is compounding existing trauma. Women reported experiences and conditions in Massachusetts prisons and jails that have exacerbated mental illness and reported that mental health care is woefully inadequate to virtually nonexistent.¹³¹

In the report detailing these conditions, Attorney Nawab and Prisoner's Legal Services push for the increased use of "existing but underutilized" options for decarceration, including clemency.

2024), https://plsma.org/wp-content/uploads/2024/10/The-Way-Home-The-Urgency-of-Decarcerating-Women-in-Massachusetts-2024_10_30-FINAL.pdf. From a terminology standpoint, Nawab highlights why it can be important to use specific terms when working in this space: "Terms such as 'inmate,' 'offender,' 'convict,' and 'criminal' are harmful and dehumanizing because they reduce people in prisons and jails to their incarcerated status, and this dehumanization normalizes harm toward people trapped in carceral systems." *Id.* at 1. In working within MCI Framingham and on clemency petitions, I have taken my lead on language choices based on the way that the individuals housed there refer to themselves.

¹³¹ Nawab, *supra* note 130, at 2. PLS and Nawab point out that "[w]ith the increased attention given to the use of clemency, as seen in the updated Executive Clemency Guidelines, the time is ripe to grant clemency to women incarcerated in Massachusetts." *Id.* at 15.

III. PRACTICAL CHALLENGES TO CLEMENCY

My work with clemency began in 2020 in directing law-student research on the clemency process under the Baker Guidelines.¹³² This work was a very small piece of support for the Report and Recommendations from the Women's Bar Foundation to provide recommendations to update the Guidelines and the overall process for clemency in Massachusetts.¹³³ For the following two years, I continued to lead student projects related to clemency and oversaw research assistants in various projects related to this topic. Upon the launch of the Women's Bar Foundation Clemency Project,¹³⁴ I volunteered as a pro bono attorney to take on a clemency petition for an incarcerated individual within MCI Framingham. Fortunately, a petition under the Healey Guidelines has a higher likelihood of being granted than under any of the prior guidelines from the past decades (the executive branch has long been impacted by "the Shadow of Willie Horton"¹³⁵ and the risk

¹³² See *supra* Section I.B.1.

¹³³ *Clemency Report*, *supra* note 2.

¹³⁴ See generally *Women's Prison and Re-Entry Project*, WOMEN'S BAR FOUND., <https://wbawbf.org/wbf/pro-bono-projects/womens-prison-and-re-entry-project> (last visited Feb. 12, 2025).

The Clemency Pro Bono Project is an expansion of the Women's Bar Foundation's Women's Prison and Re-Entry Project. The Clemency Project was created because clemency, whether in form of a pardon after release from incarceration or commutation of a sentence, has become rare in Massachusetts. The project matches elder women who have served more than ten years of their sentence with attorneys who help them complete their Petition for Commutation and represent them in their hearing.

Id.

¹³⁵ NOTTERMAN, *supra* note 68. As one author notes, every jurisdiction has their own "Willie Horton." Austin, *supra* note 47, at 87 (noting the biggest obstacle to clemency is the possibility that a released individual will recidivate, which undermines the process and poses a threat to the future of any politician who approved the release). Governor Healey has taken steps

of unpopular political decisions). This work is replete with difficulties, however this section will touch upon three: (1) lack of public support for clemency petitions, as compounded by victim opposition; (2) the complexity of the process, which is not always transparent, and (3) the hurdle of the “perfect” petition.

A. Non-Use of Clemency Historically Equates to Lack of Public Awareness or Support

Governor Healey does not have an easy task in building public support for an increased use of clemency—at both the federal and state level, a “cycle of disfavor and disuse is difficult to break without concerted action.”¹³⁶ The prior administration granted just three commutation petitions, and it is not a term that the public is familiar with or understands.¹³⁷ While the use of clemency was much more robust prior to 1971, it has been in steep decline since.¹³⁸ The lack of clemency in the past decades at both the federal and state level affirmatively signals that clemency is unimportant.¹³⁹ However, Healey has embraced the

already in the first year of her Guidelines that demonstrate she is less likely to be deterred from granting clemency than past governors, assuming that petitions are able to survive the Advisory Board and Governor’s Council.

¹³⁶ See Barkow & Osler, *supra* note 44, at 14.

¹³⁷ See Lucie Gulino, *Clemency in Massachusetts and its Potential for Revitalization*, MASS. LAWYERS BLOG (Jan. 27, 2023), <https://www.bostonlawyerblog.com/clemency-in-massachusetts-and-its-potential-for-revitalization/> (“Massachusetts has a fraught history with clemency and has strongly disfavored this post-conviction remedy for decades.”).

¹³⁸ *Id.*

¹³⁹ Barkow & Osler, *supra* note 44, at 13. “The pardon attorney, embedded among prosecutors, protects the work of those prosecutors above all else. The president, in turn, fails to use the pardon power. Clemency falls out of the public eye, and the failure to use the pardon power only affirms the continuing negativity of the pardon attorney.” *Id.* at 14. Governor Baker granted three commutations, all of which were incredibly strong petitions: “Despite differing evaluations of whether each petitioner ‘did it,’ these three men shared a thorough acceptance of responsibility for their actions, remarkable determination, and extremely compelling stories of how they

idea of revitalizing clemency, with an early move in 2024 to pardon all people convicted of simple marijuana possession in Massachusetts.¹⁴⁰

Governor Healey's proactive use of clemency has garnered significant public attention and support.¹⁴¹ By issuing new Guidelines aimed at centering fairness and equity in the criminal justice system, Healey has been commended by various legal and civil rights organizations—for example, the Massachusetts Bar Association praised her openness to input from reform-minded professionals, noting that the Guidelines reflect a more fair and equitable approach to the clemency process.¹⁴² The ACLU of Massachusetts also expressed gratitude, emphasizing that pardons and commutations are vital tools for addressing historic wrongs and systemic failures.¹⁴³

While this seems to represent a collective appreciation for her commitment to justice reform and equity, none of Healey's clemency grants have yet commuted the sentence of someone convicted of LWOP. There are petitioners in the

had remade their lives in prison. These are the reasons why Governor Baker commuted their prison sentences." Ross, *supra* note 48.

¹⁴⁰ Walter Wuthman, *Healey Announces Sweeping Pardons for Simple Possession of Cannabis*, WBUR (Mar. 13, 2024), <https://www.wbur.org/news/2024/03/13/massachusetts-governor-pardon-marijuana-possession> ("In a move she described as "nation-leading" in scope and ambition, Gov. Maura Healey on Wednesday unveiled plans to pardon all people convicted of simple marijuana possession in Massachusetts"). Healey's plan was later approved.

¹⁴¹ See, e.g., Sam Doran, *Parole Board Sends More Petitions to Governor's Desk*, WWLP (Oct. 9, 2024, 7:26AM), <https://www.wwlp.com/news/state-politics/parole-board-sends-more-petitions-to-governors-desk/>. An attorney involved in one of the few commutations granted during the Baker Administration is quoted as saying: "the number [of petitions] that have made it to the desk are encouraging" and "Gov. Healey has recommended more pardons than any governor in modern history, and she is absolutely to be commended for that." *Id.*; see also *Massachusetts Governor Adds to Number of Individuals Eyed for Pardons*, ASSOCIATED PRESS (May 24, 2024, 3:07PM) (noting approval of Healey's blanket pardon to those convicted of misdemeanor marijuana charges going back decades — an estimated tens of thousands of individuals, or more).

¹⁴² Healey Guidelines PR, *supra* note 93.

¹⁴³ *Id.*

process of applying for this exact relief currently, and the public reaction (and victim opposition) to granting a petition like that as of yet remains unknown.¹⁴⁴ Victim opposition to clemency petitions will be the most significant hurdle going forward, and as noted previously, is an immensely significant consideration that should be carefully and thoughtfully approached.

B. The Complicated Massachusetts Clemency Process

A second hurdle is how complicated it is for a low income, incarcerated individual with no legal training to file for pardon or commutation. As described, the process for filing a clemency petition in Massachusetts is incredibly complicated, more so than many other states.¹⁴⁵ As one practitioner noted, "Obtaining clemency is a rare occurrence – combining legal and political processes with little guidance. The journey from petition to pardon involves uncertainty for petitioners and their attorneys alike."¹⁴⁶ Determining which U.S. state has granted the most clemency petitions is challenging due to variations in record-keeping and the diverse nature of clemency processes across states. However, some states are recognized for their more frequent and regular use of clemency: for example, contrast Massachusetts with the neighboring Connecticut.¹⁴⁷

¹⁴⁴ "People can change. People are capable of rehabilitation and transformation, and those folks who've managed to undergo that process themselves really can add a lot of value to our communities and a lot of potential is being wasted continuing the incarceration of those folks ... for the rest of their lives. So, there's a lot of need for clemency." Liebman Dershowitz & Van Etten, *supra* note 97, at 125.

¹⁴⁵ See generally *Clemency Procedures by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/policy/clemency/clemency-by-state> (last visited Jan. 24, 2025).

¹⁴⁶ William G. Cosmas, Jr., *From Here to Clemency: Navigating the Massachusetts Pardon Process*, 59 BOS. BAR. J. 2 (2015), <https://bostonbar.org/journal/from-here-to-clemency-navigating-the-massachusetts-pardon-process/>. In 2014, Cosmas represented a successful petitioner for clemency in Massachusetts. *Id.*

¹⁴⁷ *Executive Pardon: A National Survey*, COLLATERAL CONSEQUENCES RESOURCE CTR. (Feb. 28, 2022), <https://ccresourcecenter.org/2022/02/28/executive-pardon-a-national-survey/>.

Connecticut is described as frequently granted clemency with a regular process; at the other end of the spectrum (currently) is Massachusetts, described as “rare” in granting clemency.¹⁴⁸ While Governor Healey’s Guidelines make it more likely that clemency will be granted, the process will inevitably be slow and confusing. This is a barrier for pro se applicants and attorneys interested in taking a case pro bono.

Relatedly to the complexities of the process, prior to the WBF Clemency Project there were little consolidated resources or training for attorneys interested in taking a case in this space with no prior background in clemency. Many people who are incarcerated and are eligible to apply do not have a legal background, or the financial ability to hire an attorney. There is not necessarily a market for a newer attorney to make a full-time practice just doing clemency, or pathways from any of the Boston law schools to get attorneys knowledgeable and aware of this space. Luckily, the WBF Clemency Project is slowly changing this difficulty in the process—and as more petitions are granted, and more attorneys volunteer their time and build knowledge, more resources will be available despite the lack of transparency or complexity of the process.¹⁴⁹

Finally, there is not always clarity on why a petition was granted a hearing or recommended for commutation or pardon, which can make it very hard to use that kind of “precedent” as persuasive in future cases. And a past decision being categorized as only persuasive, not binding, is an important distinction—“unlike a court, neither the Governor nor the Governor’s Council is ‘bound’ to treat seemingly like cases alike.”¹⁵⁰ Perhaps under the new Guidelines when the first LWOP commutation petition is filed, there will be a turning point to try and see what type of application is the best “precedent” for a woman from MCI

¹⁴⁸ *Id.* (noting that in at least 18 states, the practice of pardoning has continued to thrive over the years as an integral part of the justice system even when it has been severely curtailed in others).

¹⁴⁹ See *Women’s Prison and Re-Entry Project*, *supra* note 134.

¹⁵⁰ Ross, *supra* note 48.

Framingham serving a natural life sentence.¹⁵¹ Clemency's "life and death consequence" should require that its application in Massachusetts "be clear, evenhanded, and transparent."¹⁵²

C. The Hurdle of the "Perfect" Petition

A final challenge from a non-exhaustive list of difficulties in the process in Massachusetts is the idea of a perfect petition. While there are numerous obstacles to securing a commutation, the need for an exceptionally compelling petition stands out as a high bar. National or state level studies of clemency are scant and unhelpful.¹⁵³ There is no clear, consistent framework outlining precisely what makes a petition successful, leaving applicants and their advocates navigating a complex and often opaque process. But what we know from the two petitions that commuted the sentences of two men serving LWOP here in the Commonwealth is that they had incredibly strong petitions under any set of guidelines.

For example, William Allen. He was originally convicted of LWOP under a felony murder statute that no longer exists in the Commonwealth.¹⁵⁴ So, if tried today, he would not have received the sentence that he did that prevented any possibility of release. He was a model prisoner with participation in endless programs and no disciplinary record.¹⁵⁵ He had the support not only of the secondary victims, but also of the prosecutor and Judge who were originally involved in his LWOP sentence.¹⁵⁶ Mr. Allen, while certainly deserving of the chance for mercy through

¹⁵¹ Political factors can and do create variation in the application and approval of clemency and they deserve attention. "These political factors include a governor's background, age, education, political party, religion, election, and whether he or she is legally trained. Turning to structural factors, conventional wisdom suggests that administrative boards rather than governors are better positioned to buck public opinion and, therefore, more likely to grant clemency petitions." Heise, *supra* note 58, at 261.

¹⁵² *Id.* at 310.

¹⁵³ *See id.*

¹⁵⁴ *Have Mercy*, *supra* note 51.

¹⁵⁵ *See id.*

¹⁵⁶ *Id.*

clemency, had an application that most other petitioners will not. The two petitions granted by Baker demonstrated overwhelming evidence of rehabilitation, unwavering community support, and other factors (changes in law) that made them nearly unimpeachable. This raises concerns about equity and accessibility—if only the most exceptional cases receive favorable outcomes, what does that mean for the vast majority of incarcerated individuals seeking clemency? The current system appears to demand not just a meritorious case but an almost unattainable level of perfection, making clemency an option for only a select few rather than a meaningful avenue for justice and redemption.

IV. CONCLUSION

The revitalization of clemency under Governor Healey is a significant shift in Massachusetts policy, particularly in its explicit recognition of systemic inequities and emphasis on mercy. This centralization of the concept of mercy aligns with the original purpose behind this executive power. While the new Guidelines create unprecedented opportunities for relief, particularly for those incarcerated at MCI Framingham who may have compelling cases under the broader consideration factors, significant hurdles remain in the practical implementation of clemency. The historical lack of public support, complexity of the process, and the apparent requirement for near-perfect petitions will continue to present substantial challenges. Moving forward, the success of clemency as a tool for justice in Massachusetts will depend on sustained commitment to transparency, public education, and the development of clearer frameworks for evaluation of petitions.