NOT JUST AN ACT OF MERCY: THE DEMISE OF POST-CONVICTION RELIEF AND A RIGHTFUL CLAIM TO CLEMENCY

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INTRODUCTION

During the twelve years of their marriage, Brenda Aris' husband blackened her eyes many times, cracked her ribs, and broke her jaw. Rick Aris threatened to kill Brenda and her parents if she ever called the police. Brenda left repeatedly, only to be stalked, dragged home, and beaten again. During the last year of his life, Rick beat Brenda on a daily basis. During the six weeks before his death, Rick kept Brenda padlocked in their bedroom. On the day of his death, he beat her throughout the day.[1] Just before passing out from using drugs and alcohol, Rick threatened that "he didn't think he was going to let [Brenda] live till morning."[2] Brenda believed him. When she was certain he was asleep, she shot him.[3] In her conversations with police following the shooting, Brenda said, "If he's dead, at least he won't kill me. It was self-defense."[4]

Brenda Aris was charged with second degree murder.[5] The California trial court ruled that Brenda was not entitled to present a claim of self-defense to the jury. Brenda was convicted and sentenced to fifteen years to life imprisonment.[6] The appellate court upheld the trial court's ruling on Brenda's self-defense claim, holding that, as a matter of law, self-defense "requires an honest belief that the killer is in *imminent* danger of death or

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1. Petitioner's Brief at 11, In the Matter of Brenda Denise Aris, Petition for Commutation of Sentence and Release, Before the California Board of Prison Terms (April 16, 1992) [hereinafter Petition for Commutation].

2. People v. Aris, 264 Cal. Rptr. 167, 171 (Cal. Ct. App. 1989).

3. Petition for Commutation, *supra* note 1, at 12.

4. *Id.* at 12-13 (citing Trial Tr., Vol I at 129).

5. *Aris*, 264 Cal. Rptr. at 171. A sentence enhancement was attached because a firearm was discharged in the commission of a felony. *Id. See* CAL. PENAL CODE §§ 189, 12022.5 (West 1995) (providing for sentence enhancement for crimes committed with a firearm).

6. *Aris*, 264 Cal. Rptr. at 171. The enhancement for use of a firearm was stayed. *Id.*

great bodily injury,"[7] and that, given this definition, no reasonable juror would find it possible to be in imminent fear of a sleeping man.[8]

After having served nearly five years of her sentence, Brenda petitioned California Governor Pete Wilson for clemency.[9] In her petition, Brenda claimed that she had not received a fair trial because a defense expert had not been allowed to testify that Brenda suffered from "battered

7. *Id.*

8. In the *Aris* case, the trial court instructed the jury on imperfect self-defense, but refused to instruct on perfect self-defense. People v. Humphrey, 13 Cal. 4th 1073 (Sup. Ct 1996). In upholding the trial court's refusal to so instruct the jury, the appellate court agreed that the reasonableness element required for perfect self-defense (along with the honest belief) could not be established by Brenda Aris because "the defendant presented no substantial evidence that a reasonable person under the same circumstances would have perceived imminent danger and a need to kill in self-defense." *Aris*, 264 Cal. Rptr. at 1192. Although expert testimony on Battered Woman's Syndrome was allowed to support the subjective, honest belief element of Brenda Aris' imperfect self-defense claim, neither the trial court nor the appellate court found such testimony relevant in establishing the objective, reasonableness element of a defendant's case. *Humphrey*, 13 Cal. 4th at 1085.

In a recent California Supreme Court decision, however, the court held that evidence of Battered Woman's Syndrome is relevant to both elements of perfect self-defense: "the reasonableness, as well as the subjective existence of defendant's belief in the need to defend. . . ." *Humphrey*, 13 Cal. 4th at 1088-1089. The court "disapprove[d] of People v. Aris . . . to the extent that . . . [the decision is] inconsistent with this conclusion." *Humphrey*, 13 Cal. 4th at 1089. The California Supreme Court found that expert testimony might enable a jury to find seemingly unreasonable behavior to be reasonable when viewed in the context of Battered Woman's Syndrome; for "as violence increases over time, and threats gain credibility, a battered person might become sensitized and . . . able reasonably to discern when danger is real and when it is not." *Humphrey*, 13 Cal. 4th at 1086. Thus, under *Humphrey*, it would be possible for a battered woman such as Brenda Aris to be in imminent fear of a sleeping man.

While *Humphrey* allows expert testimony on Battered Woman's Syndrome to be used in deciding the "reasonableness of [a defendant's] fear of death or serious injury," People v. Erickson, 57 Cal. App. 4th 1391, 1400, 67 Cal. Rptr. 2d 740, 745, a California Appeals Court has since determined that these experts cannot testify as to the actual state of mind of a defendant. *Id.* Citing *Aris*, the Court in *Erickson* found that, although syndrome testimony is admissible to "explain how a defendant's asserted subjective perception of a need to defend herself 'would reasonably follow from the defendant's experience as a battered woman,' an expert is not permitted to testify as to the expert's opinion that the defendant actually perceived that she was in danger and needed to defend herself." *Id.*

9. Petition for Commutation, *supra* note 1, at 2. In every state, the executive clemency power includes, either expressly or impliedly, the power to pardon and the power to grant conditional pardons, commutations, reprieves, and remissions of fines and forfeitures. 1 UNITED STATES DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 30-32 (1939) [hereinafter, SURVEY].

The term "pardon," although sometimes used interchangeably with "clemency," refers to a distinct form of clemency. A pardon is the most complete form of clemency; it is a purging of the offense. *In re* Ringnalda, 48 F.Supp. 975, 977 (D.D.C. 1943); *see Ex parte* Garland, 71 U.S. (4 Wall) 333, 380 (1867) (stating that a pardon "reaches both the punishment prescribed for the offense and the guilt of offender, and where pardon is full, it releases the punishment, and blots out of existence the guilt, so that in the eye of the law, the offender is as innocent as if he had never committed the offense").

woman's syndrome."[10] Rejecting Brenda's legal argument, Governor Wilson stated:

> [B]ecause clemency is not a continuation of the criminal justice process, I will not reconsider petitioner's renewed *legal claims* here. *Mercy* is not about a legal analysis of [battered woman's syndrome]. I am not in a position to retry criminal cases or to speculate as to what might have been if different evidence were before the jury. *Nor would it be appropriate for me to do so.*[11]

Governor Wilson was, however, sufficiently moved by Brenda's circumstances to commute her sentence of fifteen years to life imprisonment to twelve years to life.[12] He said, "I have considered and sympathized with the pain and terror petitioner must have suffered during the many episodes of violence she most certainly endured."[13]

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10. Petition for Commutation, *supra* note 1, at 13. "Battered woman's syndrome" was a term used several years ago to describe the effects of abuse on women. More recent research has led experts to prefer descriptive terms like "the effects of living with intimate violence." *See generally*, Phyllis Goldfarb, *Describing Without Circumscribing: Questioning the Conviction of Gender in the Discourse of Intimate Violence*, 64 GEO. WASH. L. REV. 582 (1996) (examining the construction of gender roles in the discourse of intimate violence).

In her clemency petition, Aris did not claim that she had been improperly denied an instruction on self-defense. Perhaps her counsel did not deem it wise to request that Governor Wilson flatly disregard the trial court's holding that Aris was not entitled to present a claim of self-defense to the jury. Rather, Aris attacked the appellate court ruling that the trial court's limitation of expert testimony was harmless error. Aris argued that, based on information gathered during post-trial juror interviews, the limitation of expert testimony could not have been harmless error. *Aris*, 215 Cal. Rptr. at 180-81. The appellate court had held that the trial court had in fact committed error in barring the expert's proffered testimony that Aris was a battered woman whose experience influenced her perception of danger at the time that she shot and killed her husband. However, the appellate court deemed that error harmless "because of the particular circumstances of this case." *Id.* at 181. This conclusion was based primarily on the fact that Rick Aris was asleep at the time of the shooting. Thus, the appellate court reasoned that it was "not reasonably probable that BWS [battered woman's syndrome] testimony [would have convinced] the jury that, nevertheless, the defendant honestly perceived an imminent danger resulting in a different verdict." *Id.*

11. Office of the Governor, State of California, Decision in the Matter of the Clemency Request of Brenda Aris 4 (May 27, 1993) (emphasis added) [hereinafter Clemency Request Decision]. In reviewing clemency petitions from battered women convicted of murder, the Governor will only ask, "Did the petitioner have the option to leave her abuser, or was the homicide realistically her only chance to escape?" Governor Pete Wilson, Press Release 93:392 "Wilson Announces Battered Women's Syndrome Clemency Decisions," May 28, 1993, [hereinafter Press Release 93:392]. *See* Cookie Ridolfi, *Governor Improperly Restricted Use of Pardoning Power*, ST. B. BULL., July 28, 1993, at 1 (asserting that Wilson's test places improper restrictions on the exercise of clemency, and pointing out that the governor cannot fairly answer his own test without consideration of the very issues he refuses to consider); Minouche Kandel, *Wilson Doesn't Get It - Governor Misses the Point About Battered Women*, S.F. DAILY J., June 17, 1993, at 4 (criticizing the governor's questioning whether the woman had the opportunity to leave her abuser since the question "assumes that leaving stops the violence").

12. Clemency Request Decision, *supra* note 11, at 5.

13. *Id.*

While acknowledging that "the California Constitution gives the Governor broad discretion to grant clemency *on any condition he deems proper,*"[14] Wilson has flatly refused to revisit legal claims in any case, reserving his grants of clemency for "rare and extraordinary cases"[15] or innocence.[16]

Governor Wilson's narrow interpretation of the executive clemency power is wrong. His position reflects two erroneous assumptions: first, that redressing a legal error in an individual case is strictly the province of the judiciary; and second, that courts are always willing and able to correct an injustice. This article argues that the United States Constitution and the California Constitution authorize the executive to intervene in a criminal case if intervention is necessary to achieve a just result - regardless of the source of that injustice. Further, this article argues that clemency review, guided by principles of justice as well as mercy, must be exercised more frequently when access to post-conviction relief is restricted by courts and legislatures.

Indeed, a careful analysis of the history, intended purpose, and nature of the pardoning power reveals that, even in cases where judicial doors remain open, the pardoning power may be exercised as the executive deems fit, regardless of existing legal standards. Governor Wilson's refusal to review claims of legal error leaves many who assert compelling claims with neither judicial nor executive relief. While this denial of justice may prove very costly for any defendant, it has special relevance for battered women, who are often denied fair treatment in the judicial process.

It is not disputed that the executive pardoning power provides Governor Wilson with broad discretion. It is the thesis of this article that restricting application of executive clemency to cases of innocence or to cases with mitigating factors that the executive finds personally compelling —or politically safeCamounts to an abuse of discretion. By categorically refusing to exercise clemency review for cases involving legal error, the executive is improperly redefining the pardoning power and rejecting his constitutional mandate.

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14. Press Release 93:392, *supra* note 11, at 5.

15. *Id.* Referring to Brenda Aris' case as well as to the cases of other battered women whose clemency petitions had been submitted to him, Governor Wilson said, "No one could listen to the litany of pain and abuse chronicled by these victims, knowing the appalling statistics which reveal the scope of this tragedy, and not be deeply moved. . . . I am committed to their cause." Clemency Request Decision, *supra* note 12, at 1-2. Governor Wilson then denied all but two women's petitions. One was Aris and the other was 78-year-old Frances Mary Caccavale, whose petition was granted solely because of her age and failing health. Richard Barbieri, *Battered Woman Makes Legal History a Second Time*, THE RECORDER, June 1, 1993, at 4.

16. Letter from Janice Rogers Brown, Governor Wilson's legal affairs secretary, to Convicted Women Against Abuse at Frontiera Prison (February 17, 1992).

The 1993 United States Supreme Court decision in *Herrera v. Collins*[17] has thrown these issues into sharp relief, confirming that the pardoning power has not outlived its usefulness. In *Herrera*, Justice Rehnquist, writing for the majority, denied habeas relief to death row inmate Leonel Herrera[18] in part because he was not "left without a forum;" he still could "file a request for executive clemency."[19] The Court emphasized that habeas corpus is not designed to guarantee error-free trials, and the real "'fail-safe' of the criminal justice system" is the executive pardon.[20]

This article articulates a theory of comprehensive and flexible clemency review supported by the *Herrera* Court's confirmation of this essential constitutional power: The executive has wide discretion to perform acts of *mercy*, and also has a constitutional obligation to use clemency as an instrument of *justice*. Part I presents the historical, judicial, and legislative development of the federal pardoning power and of California's pardoning power. Part II reviews the current state of habeas corpus law and, given the severe restrictions on habeas review, calls for an increase in the exercise of clemency review. Part III argues that the pardoning power, properly interpreted, (1) authorizes the executive to grant pardons for reasons of mercy that are justice-based; (2) authorizes the executive to consider claims of legal error that cannot be reached by the judiciary; and, (3) enables the executive to revisit an established legal standard if the standard's application is inconsistent with principles of justice.

I.
THE PARDON AS AN INSTRUMENT OF JUSTICE

The proposition that the executive has a constitutional duty to exercise the pardon as an instrument of justice stands in sharp contrast to the popular understanding of the pardon as an executive gift that may be granted or withheld in any case, for any reason. This "gift-giving theory of the pardon has descended, conceptual baggage intact, from the God-like powers of an absolute monarch."[21] Although the notion of the executive as an absolute monarch is inconsistent with American social theories, the notion of a pardon as an executive gift has persisted, giving rise to misconceptions regarding the intended purpose of the pardoning power in the United States.

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

18. For a more detailed description of *Herrera*, see *infra* notes 147-64 and accompanying text.

19. Herrera at 415.

20. *Id.*

21. KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY AND THE PUBLIC EXPERIENCE 11 (1989). Moore conducts a ground-breaking philosophical analysis of pardons, examining the role of the pardoning power during the reign of Hammurabi in the eighteenth century B.C. through modern times, to support her argument that there is no ethical basis for treating a pardon as an executive gift. Moore concludes that a pardon is a "*duty* of justice that follows from the principle that punishment should not exceed what is deserved." *Id.* at 12 (emphasis added).

This section shows that the framers of both the United States Constitution and the California Constitution intended that the executive use the pardoning power to redress injustices resulting from the improper, *as well as the proper,* application of the criminal law.

The thirteenth-century English case of Katherine Passeavant illustrates dramatically the unique and critical role of the pardon in an imperfect system of criminal justice. The defendant, just four years old at the time of her "crime," opened a door, accidently pushing a younger child into a vessel of hot water. The child later died. Katherine was arrested and imprisoned in the St. Albans jail, charged with criminal homicide. In 1249, English law did not provide for an infancy defense, and exceptions were not made for acts committed without criminal intent.[22] Guilty of murder under the law, four-year-old Katherine was sentenced to death. Katherine's father, anguished by his daughter's imprisonment and impending execution, but without recourse under the law, sought the only relief possible—a pardon.[23] Katherine's father begged the King for a pardon, which was granted.[24]

The value of the pardoning power in an arcane system of justice that does not provide exceptions for the acts of small children is undeniable. However, as criminal laws have become more sophisticated and flexible, and procedures more elaborate, the role of the pardon has become devalued by those who perceive our modern criminal justice system as quite capable of dispensing justice in any given case.[25] Furthermore, while the exercise of the pardoning power was once a sign of enormous political strength,[26] the granting of clemency is now likely to be perceived as very costly to the executive. The California political arena is no exception. Former California Governor Edmund (Pat) Brown admitted that political

22. NAOMI D. HURNARD, THE KING'S PARDON FOR HOMICIDE: BEFORE A.D. 1307, at viii (1969).

23. *Id.* In England, from medieval times through the mid-nineteenth century, pardons were frequently granted as legal solutions to problems arising from the law's failure to recognize self-defense, lack of intent, insanity, and age as factors relevant to a determination of guilt. SURVEY, supra note 9, at 39-40.

As late as 1748, William York, a 10-year-old who killed a 5- year-old and buried the child in a dunghill, was convicted, sentenced to death, and subsequently pardoned because of his tender years. SURVEY, supra note 9, at 41.

24. HURNARD *supra* note 22.

25. Moreover, lawyers and legal scholars have paid little attention to the pardon, perhaps because an act of pardon is virtually unreviewable by the courts. *See* MOORE, *supra* note 21, at 6-7 (stating that "[p]ardons were an important topic for most of the great Enlightenment philosophers. But until very recently, pardons have proceeded in relative philosophical obscurity in the nineteenth and twentieth centuries.").

26. MOORE, *supra* note 21, at 16-17. The ancient Romans were accustomed to pardons (and to public executions), which occurred on coronation days and local holidays. "The Romans evidently understood that the power to pardon is every bit as great a power as the power to punish, and they used the pardon often and skillfully for their political ends." *Id.*

pressure directly affected his clemency decisions.[27] Governor Wilson, too, was likely influenced by the ongoing media frenzy and public outcry in making his decision to deny commutation to death row prisoner Robert Alton Harris.[28] In denying clemency to the twenty-eight battered women convicted of crimes in California who have petitioned him, Governor Wilson likely understood that these cases pose significant political liability, despite instances of sympathetic media coverage.[29]

Proper interpretation of the history and purpose of the pardoning power, however, reveals that the power should persist, changing alongside developments in the law.[30] The exercise of the pardoning power should not be understood as an interference with justice, but rather as a signal that the public good has been served. A historical analysis of the pardoning power suggests that the devaluation of the pardoning power is mistaken, and the discomfort surrounding its exercise is misplaced.

A. The Federal Pardoning Power

1. The Constitutional Debate, 1787

The English pardoning power was a royal prerogative, viewed as the King's individual act of "forgiveness" for a crime against the Crown. The

27. EDMUND G. BROWN, PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW (1989). "Governors are so afraid of signing their own political death warrant that clemency is just not exercised at anywhere near the rate it was 20 years ago. The only governors commuting death sentences are lame duck governors who are on their way out." Amy Chance, *Brown Targeted Over Opposition to Death Penalty*, SACRAMENTO BEE, March 6, 1994, at A21 (quoting Gerald Uelmen, former dean of Santa Clara University Law School).

28. Robert Alton Harris was convicted in the deaths of two San Diego teenagers murdered in 1978. His case received national attention throughout 11 years of judicial appeals and petitions to Governor Wilson for clemency. Over 1,000 stories have been written about the case in major newspapers alone. Search of LEXIS, News Library, Major Papers File (June 3, 1996). Harris asked that his sentence be commuted from a sentence of death to life without the possibility of parole. The Governor denied clemency, and Harris was executed on April 21, 1992. *Murderer Dies in California Gas Chamber*, CHI.TRIB., Apr. 21, 1992, at 1.

29. Of the 34 petitions filed by the California Coalition for Battered Women in Prison [hereinafter CCBWP], nine have been denied by Governer Wilson and 23 remain undecided five years after filing. One petitioner has since been paroled and one has died. Nineteen other women petitioned Governor Wilson without assistance from CCBWP.

In 1990, at the close of his second term in office, former Ohio Governor, Richard Celeste, granted clemency to 68 people, 25 of whom were battered women convicted of killing or assaulting abusive partners. These acts generated a great deal of controversy and criticism regarding the exercise of executive clemency. One newspaper editorial criticized Celeste's "sad and sorry performance, an exercise of arrogance, if not outright contempt." *See* Daniel T. Kobil, *Do the Paperwork or Die: Clemency, Ohio Style?*, 52 OHIO ST. L.J. 655, 656-57 (1991) (quoting *Killers Spared*, COLUMBUS DISPATCH, Jan. 14, 1991, at A8).

30. Indeed, the centuries-old power of executive clemency has endured because of its very flexibility. The pardon represents the oldest type of release procedure, with records of its use dating back to the Code of Hammurabi in the eighteenth century B.C. MOORE, *supra* note 21, at 9. The power to pardon exists in every country of the world except China. Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 575 (1991) [hereinafter, Kobil, *Quality of Mercy*].

King delegated his pardoning power to a royal governor in the American colonies, who exercised the power in furtherance of royal interests, and often at the expense of the colonists' concerns.[31] By the time of the American Revolution, colonists had become suspicious of the executive, and some doubted the propriety of placing the power in the hands of governors unfettered.[32] In the new republic, a crime was not viewed as an offense against the king, but as an offense against the people. Thus, there was concern that vesting the power to pardon in the executive would violate the notion of a government "of the people, by the people, for the people."[33]

Nonetheless, the Framers, themselves steeped in the tradition of English law, were in substantial agreement about the need for an executive pardoning power and favored its adoption.[34] An executive pardon would provide a safety-net in situations where application of the criminal law would fail to reach a just result. Additionally, an executive pardon would allow the President to heal the country in times of civil unrest, thereby protecting national security.[35]

The early lawmakers understood that situations would undoubtedly arise that were more complex than a general set of rules could anticipate and handle justly. Alexander Hamilton argued in the *Federalist Papers* that good social policy and humanitarian concerns required the creation of an extraordinary remedy to deal fairly with exceptional cases:

> The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favour of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.[36]

Hamilton's defense of the power to pardon makes it clear that he viewed the pardoning power as more than a means by which mistakes made by judges or juries could be rectified. Indeed, Hamilton understood the pardoning power as a necessary tool for redressing injustices resulting from the *proper* application of the law.

James Iredell, a participant in the North Carolina Ratifying Convention in July 1788, echoed Hamilton's call for flexibility in curing the law's inherent inadequacies. He argued:

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31. SURVEY, *supra* note 9, at 88-89.

32. *Id.*

33. *Id.*

34. *See, e.g.,* Schick v. Reed, 419 U.S. 256, 260 (1974) (stating that the Framers were well acquainted with the history of clemency); Hoffa v. Saxbe, 378 F. Supp. 1221, 1231 (D.C. Cir. 1974) (stating that the Framers were very familiar with the English precedent for the pardoning power). *See also* Kobil, *Quality of Mercy, supra* note 30, at 589-92 (detailing the Framers' discussion of pardoning power at the Constitutional Convention).

35. *See generally* M. FARRAND, 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 (1911); *see also* THE FEDERALIST No. 74 (Alexander Hamilton) (explaining the importance of the power to pardon).

36. THE FEDERALIST No. 74 (Alexander Hamilton).

> It is the genius of the republican government that the laws should be rigidly executed, without the influence of favor or ill-will. . . . This strict and scrupulous observance of justice is proper in all governments. . . . But, though this general principle be unquestionable, surely there is no gentleman in the committee who is not aware that there ought to be exceptions to it; because there may be many instances where, though a man offends against the letter of the law, yet peculiar circumstances in his case may entitle him to mercy. It is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of great injustice.[37]

Thus, while Hamilton and Iredell believed that laws should be strictly applied, they deemed the exercise of the executive pardon as complementary to the rigid application of the law.

Proposals for an executive pardoning power, however, were met with objections concerning the inherent risk of abuse of discretion. Ultimately, the Framers resolved the tension by vesting the pardoning power in the President alone but prohibiting the exercise of the power in cases of impeachment by Congress. The Constitutional power to pardon is found in Article II: "The President. . .shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."[38]

The Founders concluded that the power to pardon was integral to their vision of the republic, and trusted the President to hold the power because "where could it be more properly vested, than in a man who had received such strong proofs of his possessing the highest confidence of the people?"[39]

The Framers recognized that any effort to define the limits of the pardoning power would destroy its effectiveness, for its exercise was intended to complement the operation of an evolving criminal justice system. Indeed, institutional competence varies with the adequacy of the written law and with the availability of relief through existing criminal procedures. As the ability of the system to dispense justice expands and contracts with changes in the law, so, too, does the need to exercise the executive pardon. For these reasons, the executive is entrusted and obligated to exercise the pardoning power to the extent that just results are not attainable within the criminal justice system.

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37. James Iredell, Address at the North Carolina Ratifying Convention (July 28, 1788) *in* 4 FOUNDERS CONSTITUTION 17-18 (P.Kurland & R. Lerner eds. 1987) [hereinafter Iredell Address].

38. U.S. CONST. art. II, § 2, cl. 1.

39. Iredell Address, *supra* note 37, at 17-18.

2. United States Supreme Court Jurisprudence

Though the executive power to pardon is affirmatively granted by the Constitution, the Supreme Court did not squarely address the substantive role of executive clemency until well into the twentieth century. Once it did, the Court articulated a clemency jurisprudence consistent with the Framers' intentions. Modern cases clearly establish that: (1) the pardoning power is part of the overall Constitutional scheme; (2) the executive has broad discretion to act for the public good so long as the act does not otherwise offend the Constitution; (3) the power to pardon does not pose a separation of powers problem, as the three branches were never intended to be completely separate and independent; (4) the role of the pardoning power is dependent on the institutional competence of the judiciary and the legislature; and, (5) exercise of the pardoning power is reserved for exceptional cases.

The Supreme Court's meandering path to these principles began with *United States v. Wilson*,[40] the first case to arise under the pardoning power. *Wilson* addressed the relatively narrow question of whether the court should take judicial notice of a pardon that the parties had not pled. In *Wilson*, the defendant, George Wilson, had been charged in eight separate indictments with robbing the United States mails, and had entered a plea of not guilty to all charges.[41] Following a trial on one of the cases, Wilson was convicted and sentenced to death. On the day he was sentenced, he withdrew his earlier pleas in each of the remaining cases and entered guilty pleas. Three weeks later, President Andrew Jackson pardoned Wilson on his first case, thus relieving him of the death sentence, but expressly stipulated that the pardon not extend to any of the other cases.[42]

At the time of his sentencing on the remaining charges, the court expressed concern that the pardon might apply to one of the cases for which he was about to be sentenced.[43] Wilson however, made no attempt to avail himself of the pardon, failing to argue that it was a bar to sentencing on the case before the court.[44] This presented the trial court with a dilemma. Because the court was aware of the presidential pardon but was unsure of the pardon's effect on Wilson's second related case, the court certified two questions to the United States Supreme Court: 1) Did the pardon bar further prosecution of any of Wilson's pending cases?; and 2) Even if the pardon did bar prosecution, could Wilson "derive any advantage from the pardon without bringing the same judicially before the court?"[45] Because

40. United States v. Wilson, 32 U.S. (7 Pet.) 150 (1833).

41. *Id.* at 151.

42. *Id.* at 153.

43. *Id.* at 154.

44. *Id.* at 150, 158-59. References to George Wilson's case do not explain why Wilson refused to avail himself of the pardon.

45. *Id.* at 158.

the Supreme Court found the record insufficient, it addressed only the second question.[46]

Justice Marshall, writing for the Court, ruled that Wilson could not benefit from a pardon without pleading it as a bar to the prosecution or presenting it to the court.[47] Marshall defined the pardoning power, as "a private, though official act" delivered to the pardonee, not to the court.[48] Marshall remarked that a judge, "sees only with judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially."[49] Thus, a pardon not communicated was not before the court and could not be acted upon.[50] Marshall then explained:

> A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him.[51]

This dicta has been understood to suggest that a pardon denotes a private contractual relationship between the executive and the subject of the pardon, effective only if accepted by the pardonee.[52]

Although *Wilson* held only that a prisoner must plead a pardon in order for it to receive consideration from a court, Marshall's dicta concerning the private contractual nature of the pardon long wreaked havoc with the Court's efforts to articulate a coherent clemency jurisprudence. The opinions in *Ex Parte Wells*[53] and *Burdick v. United States*[54] illustrate *Wilson*'s pernicious influence.

In *Wells*, the Court was asked to decide whether the pardoning power includes the power to grant conditional pardons. Because the prisoner in *Wells* had already accepted the pardon, conditions and all,[55] the Court simply could have applied Marshall's private contract approach to conclude

46. Justice Marshall concluded that, without an adequate record, it was impossible to determine whether the two indictments were for the same crime or even whether the defendant was the same man. *Id.* at 159. Marshall explained that President Jackson's pardon would excuse Wilson if the Court were sentencing him for the same crime for which he had been pardoned. In this case, however, he concluded that "it would be unnecessary to discuss or decide it." *Id.* at 160.

47. *Id.* at 163.

48. *Id.* at 160-61.

49. *Id.* at 161.

50. *Id.*

51. *Id.*

52. *See, e.g.*, Burdick v. United States, 236 U.S. 79 (1914) (holding that a pardon must be accepted by the pardonee in order to be effective). *See also* G. Sydney Buchanan, *The Nature of a Pardon Under the United States Constitution*, 39 OHIO ST. L.J. 36, 38 (1978) (discussing cases requiring a pardonee's acceptance for a valid pardon).

53. *Ex parte* Wells, 59 U.S. (18 How.) 307 (1855).

54. Burdick v. United States 236 U.S. 79 (1914).

55. *Wells*, 59 U.S. at 307-08.

that the prisoner was bound by his agreement. Indeed, the *Wells* court observed that:

> [T]he power to offer a condition, without ability to enforce its acceptance, when accepted by the convict, is the substitution, by himself, of a lesser punishment than the law has imposed upon him, and he cannot complain if the law executes the choice he has made.[56]

Interestingly, however, the *Wells* opinion did not end with a reiteration of Marshall's dicta in *Wilson*. Instead, the opinion emphasized that precedent for decisions concerning the pardoning power must come from the laws of England as they existed at the time of the adoption of the United States Constitution. Since the power to pardon in England included the power to impose conditions, the power to pardon in the United States included the same.[57] The Court observed further that:

> The King cannot, by any previous license, make an offence [sic] dispunishable which is *malum in se*, i.e. unlawful in itself, as being against the law of nature, or so far against the public good as to be indictable at common law. A grant of this kind would be against reason and the common good, and therefore void.[58]

The Court underscored this point with reference to the King's obligation to act for the benefit of all of his subjects —an obligation incurred upon his taking of an oath at his coronation, which includes a promise "that he will cause justice to be exercised with mercy."[59]

By both recognizing the importance of the pardoning power as a tool for advancing the public interest, and acknowledging the pardonee's prerogative to reject an executive order of pardon, the *Wells* Court sanctioned two competing ideas. The executive could appropriately grant a pardon for the public good, but the pardonee could lawfully thwart that purpose by refusing to accept. The Court would not resolve this tension for another three-quarters of a century. In the interim, the Court continued to apply the acceptance requirement first articulated in *Wilson*.

In *Burdick*, the Court expressly held that a pardon must be accepted in order to be effective.[60] A federal grand jury investigating a federal employee suspected of leaking classified information to the press called the defendant, George Burdick, editor of the *New York Tribune*, to testify. Despite the fact that Burdick asserted the Fifth Amendment and refused to answer any questions put to him, he was ordered to return and testify the

56. *Id.* at 315.
57. *Id.* at 311.
58. *Id.* at 312.
59. *Id.* at 311.
60. *Burdick*, 236 U.S. at 90-91.

next day.[61] On the second day, he was handed a pardon signed by President Woodrow Wilson, granting him a "full and unconditional pardon for all offenses against the United States which he . . . had committed or may have committed."[62] Despite that pardon, Burdick again refused to testify, stating that his answers might tend to incriminate him.[63]

The prosecutor argued that Burdick no longer had any Fifth Amendment basis for refusing to testify because, cloaked with the protection of the President's pardon, he no longer was subject to sanction for any self-incrimination.[64] The lower court accepted the government's argument, cited Burdick for contempt, fined him $500, and ordered him to testify or be jailed until he complied. The court concluded that Burdick's acceptance of the pardon was not required for it to be effective.[65]

Reversing the lower court, the Supreme Court reiterated the rule that a presidential pardon requires acceptance in order to be effective. Citing *Wilson* for both its reasoning and authority, the Court stated that an individual has a right "against the exercise of executive power not solicited by him nor accepted by him."[66] Thus, the *Burdick* Court expressly adopted the *Wilson* Court's conception of the pardon as a private contract.[67]

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61. *Id.* at 85.

62. *Id.* at 86.

63. *Id.*

64. *Id.* at 87.

65. Id. at 86-87.

66. *Id.* at 91.

67. The Court distinguished its decision in *Burdick* from its apparently inconsistent decision in Brown v. Walker, 161 U.S. 591 (1896). In *Brown*, the petitioner was subpoenaed by the Interstate Commerce Commission to appear before a federal grand jury investigating the rate practices of the Allegheny Valley Railway Company. A federal statute granted him immunity from prosecution for his testimony. Like Burdick, Brown refused to testify, citing protection under his Fifth Amendment right against self-incrimination. Brown was held in contempt, ordered to pay a fine, and jailed for contempt. On review, the Supreme Court ruled that Brown was required to testify, and held that a grant of legislative immunity could not be rejected by the person to whom it was tendered. *Id.* at 610.

In ruling that a grant of executive pardon requires acceptance in order to be effective, the *Burdick* Court distinguished a grant of legislative immunity, or a legislative pardon, from an executive pardon. The *Burdick* Court reasoned that it would be unfair to force an executive pardon upon an individual, for an executive pardon intimates guilt. Legislative immunity, however, is noncommittal, reasoned the *Burdick* Court. *Burdick*, 236 U.S. at 94. G. Sidney Buchanan has criticized the *Burdick* Court's reasoning as circular:

> The Court states that a pardon, unlike a grant of legislative immunity, "carries an imputation of guilt," and this is advanced as the reason for allowing the pardonee to refuse the immunity tendered by the pardon. A pardon, however, carries an imputation of guilt only if the validity of the pardon depends upon its acceptance by the pardonee. If the requirement of acceptance is removed, the imputation of guilt vanishes. It becomes circular, therefore, to use the imputation of guilt argument as a justification for the requirement of acceptance.

G. Sidney Buchanan, *The Nature of a Pardon Under the United States Constitution*, 39 OHIO ST. L. J. 36, 44 (1978).

Ten years later, in *Ex parte Grossman,*[68] the Court took the first significant step away from *Wilson.* Unlike the earlier cases, that had turned largely on procedural considerations, *Grossman* addressed the role of the pardoning power in the overall constitutional scheme. The case was unusual in that it involved a pardon for criminal contempt. Grossman had been charged with maintaining a nuisance by selling liquor in violation of the National Prohibition Act. He was arrested, tried, found guilty of criminal contempt, sentenced to one year in prison, and fined $1,000 for violation of a temporary restraining order. Following Grossman's sentencing, the President pardoned him, commuting his jail sentence on the condition that he pay the fine. Grossman accepted the pardon, paid the fine, and was released. Notwithstanding the pardon, the district court committed Grossman to the Chicago House of Correction to serve the sentence. Grossman petitioned the United States Supreme Court for a writ of habeas corpus.[69]

The question presented to the Court was whether the power to pardon extends to cases of contempt of court. The government argued that the pardon was ineffective because the President's power to pardon extends only to offenses against the United States.[70] Moreover, the government argued, extending the pardoning power to include contempt of court would violate separation of powers principles and detract from the independence of the judicial branch.[71]

Rejecting the government's first argument, the Supreme Court held that the pardoning power may be exercised not only in cases involving indictable crimes but also in cases involving criminal contempt of court. The Court recognized that, historically, there has been a recognition of the practical need to distinguish between a pardon for criminal contempt and a pardon for civil contempt.[72] Civil contempt is remedial and intended to benefit a private complainant, while criminal contempt is punitive; it advances the public interest by vindicating the authority of the court and by deterring other derelictions.[73] Noting that pardons have always been intended to allow the executive to address concerns about the public good, the Court concluded that pardoning criminal contempt was within the scope of the executive's pardoning power.[74]

The Court further recognized that the pardoning power is an integral part of the constitutional scheme. While legislative powers are vested in Congress, executive power in the President, and judicial power in the courts, nowhere does the Constitution expressly state that the three

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

69. *Id.*

70. *Id.* at 108. It was argued that the use of the word "offences" [sic] in Article 2 of the Constitution included only crimes and misdemeanors triable by jury. *Id.*

71. *Id.*

72. *Id.* at 111.

73. *Id.*

74. *Id.* at 109-12.

branches of government should be kept independent and separate.[75] To the contrary, various provisions of the constitution indicate that complete independence and separation is neither attained nor intended.[76] The Court rejected the government's second argument and concluded that exercise of the pardoning power for contempt was not a violation of separation of powers. Rather, this exercise of the executive pardoning power was an intended and acceptable check on the other branches of government, enabling the executive to act when necessary for the public interest. Grossman's petition was granted, and Grossman was released.

In *Grossman,* the Court withdrew from its earlier notion of the pardon as the executive's personal act of mercy and focused its attention on the role of the pardoning power within the Constitutional scheme:

> Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential . . . to vest some other authority than the court's power to ameliorate or avoid particular criminal judgments.[77]

The Court emphasized the importance of discretion in the exercise of the power, stating that "whoever is to make it useful must have full discretion to exercise it."[78] Such broad discretion is consistent with the Framers' understanding that the pardoning power should neither be fixed nor reduced to a remedial formula capable of mechanical application. Rather, the pardoning power was intended to remain fluid, adaptable to the ever-changing capacities of courts and legislatures to ensure the dispensation of justice.[79]

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75. *Id.* at 119.

76. *Id.* at 119-20. For example, through the veto power, the executive and one more than one-third of either House can defeat legislation; one-half of the House and two-thirds of the Senate may impeach and remove members of the judiciary; the President can reprieve or pardon all offenses after their commission, either before, during, or after trial without modification or regulation by Congress; one House of Congress can withhold all appropriations and stop government operations; and, the Senate can hold up presidential appointments which constitutionally require confirmation, thereby depriving the President of the agents necessary to ensure that laws are enforced. These restraints indicate that the independence of each branch is qualified. *Id.* at 120.

77. *Id.* at 120-122.

78. *Id.* at 121.

79. The *Grossman* Court emphasized that the Constitution is a living document, interpretation of which must necessarily evolve with time: "[T]he provisions of the Constitution are not mathematical formulas having their essence in their form. . . . Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth". *Id.* at 116 (citation omitted).

In 1927, in *Biddle v. Perovich*,[80] the Supreme Court formally abandoned the "private act of grace" definition of the pardoning power. The defendant, Vuco Perovich, had been convicted of first degree murder and was sentenced to be hanged. After the execution had been delayed several times, President Taft commuted Perovich's sentence to life imprisonment.[81] Perovich filed a petition for writ of habeas corpus in federal district court alleging that his incarceration was illegal. Perovich argued that because his removal from jail to the penitentiary was not authorized by the sentencing statute, his consent was required for the President's commutation to be valid.[82] The issue before the Supreme Court was whether the President had the authority to commute Perovich's sentence from death to life imprisonment without regard for the existing sentencing statute.

The Supreme Court upheld the commutation and, for the first time, decisively departed from the acceptance requirement that courts had previously imposed upon the exercise of the pardoning power.[83] Focusing on the place of the pardoning power in the overall Constitutional scheme, the Court stated, "[A] pardon . . . is not a private act of grace from an individual happening to possess power. It is part of the Constitutional scheme and when granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment was fixed."[84]

The Court recognized that the power of the President to act for the public good supersedes the wishes of the individual granted the pardon.[85] Analogizing the exercise of the pardoning power to the imposition of a sentence, the *Perovich* Court stated, "Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, [in the exercise of the pardoning power,] the public welfare, not his consent, determines what shall be done."[86]

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80. Biddle v. Perovich, 274 U.S. 480 (1927).

81. *Id.* at 485.

82. *Id.* Perovich asserted that although President Taft had technically executed a commutation, his act was not a commutation, but rather a pardon because it did not conform to the definition of a commutation. He argued that a commutation is a lessening of the same kind of punishment, not a substitution of one kind of punishment for another. Thus, Perovich argued that, unlike a commutation, which does not require delivery and acceptance, President Taft's order was in fact a pardon invalid without acceptance. *Id.*

The government contended that a "commutation," the easing of a punishment, does not refer only to a reduction in degree of the same kind of punishment, but also denotes the substitution of a milder punishment for a harsher one. Since a life sentence is a lesser punishment than death, the government argued that the President's action was a commutation requiring neither acceptance nor delivery. *Id.* at 485-87.

The Court concluded that there was in fact no distinction between the power to pardon and the power to commute a sentence, although they had previously been viewed as distinct and separate forms of clemency. *Id.* at 487.

83. *Id.* at 487.

84. *Id.* at 486.

85. *Id.* at 486-87.

86. *Id.* at 486.

Thus, the Supreme Court, without expressly overruling *Burdick*,[87] altered the theory of the pardoning power. The pardon was a private act of grace no longer, but an act for the public welfare.[88]

In *Schick v. Reed*,[89] the Supreme Court resolved that both public policy and humanitarian concerns outweigh an individual's claim of right to a pardon unencumbered by conditions. In 1954, Maurice Schick, a master sergeant in the army, was found guilty of killing an eight-year-old girl and was sentenced to death. In 1960, President Eisenhower commuted his sentence to life imprisonment on condition that he never become parole eligible.[90] In 1971, Schick filed suit alleging that the United States Board of Parole was obliged to consider him for parole, despite the conditional commutation. Schick argued that the condition attached to his pardon unfairly placed him in a position different from that of other prisoners who had been sentenced to life imprisonment. Had Schick received a life sentence at the time of his conviction, he, like others who received life sentences under the statute existing at that time, would have become eligible for parole. The District Court and the Court of Appeals unanimously rejected Schick's argument, reasoning that the President has the power to commute a sentence upon conditions that do not otherwise offend the Constitution.[91]

87. *Id.* at 487-88 ("We are of opinion that the reasoning of Burdick. . .is not to ne extended to the present case."). It is unclear whether the Court intended to limit or overrule *Burdick*. Some scholars believe *Perovich* to be a "total repudiation of the Marshall conception of a pardon as a private act of grace." Buchanan, *supra* note 67, at 47. *But see* Kobil, *Quality of Mercy*, *supra* note 30, at 595 (taking the view that Perovich merely limits the earlier holding that a presidential pardon could be refused).

Although the latter view would appear to be more sensible given Perovich's language, which specifically left open the possibility that Burdick's reasoning might control future cases, the former view is more consistent with the history and purpose of the pardoning power. Because of the ambiguity, courts occasionally make reference to the acceptance requirement of *Burdick*. *See, e.g.*, United States v. Noonan, 906 F.2d 952, 958 (3d Cir. 1990) (discussing the acceptance of a pardon as an admission of guilt); Lupo v. Zerbst, 92 F.2d 362, 365 (5th Cir. 1937) (finding that acceptance of a pardon includes acceptance of conditions of the pardon).

88. *See* Hoffa v. Saxbe, 378 F. Supp. 1221, 1231 (D.D.C. 1974) (explaining that the President, as the elected representative of the people, must always exercise the pardoning power in the public interest).

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

90. *Id.* at 258.

91. *Id.* at 266. Schick's case became more complicated when, pending appeal, the United States Supreme Court decided Furman v. Georgia, 408 U.S. 238 (1972), which held that Georgia's death penalty statute, as statutorily implemented, constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. As a result of *Furman*, all pending death cases were set aside, leaving prisoners previously on death row serving life sentences without any conditions. Schick argued that he was thus, after *Furman*, actually in a worse position than he would have been had he never received a pardon. The Court disagreed, noting that Schick was better off because his death sentence could have been carried out before *Furman* was decided. *Schick*, 419 U.S. at 259. Schick unsuccessfully argued that, even if the condition attached to his life sentence was valid when imposed, the decision in *Furman* retroactively voided the condition previously imposed by President Eisenhower. *Schick* 419 U.S. at 268 (Marshall, J., dissenting).

Interpreting English law as it existed at the time of the Constitutional Convention, and emphasizing that conditions were routinely imposed on those pardoned by English kings, the Supreme Court rejected Schick's claims. First, without expressly overruling *Wilson*, the Court dismissed the acceptance requirement implicit in *Wilson's* treatment of the pardon as a private contractual arrangement. The Court explained that a pardonee's accepting a pardon resulted from an historical anomaly. Kings commonly granted pardons on the condition that the pardonees be transported to other places, often to the American colonies. However, a prisoner could not be forced to leave without approval by an Act of Parliament, which was rarely authorized. In order to circumvent this rule, pardoned prisoners were asked to agree to banishment.[92] The *Schick* Court pointed out that since the English prisoner was really only agreeing that his life should be spared, consent was "a legal fiction at best."[93]

Next, the Court concluded that legislative authorization was no longer essential to the exercise of the pardoning power. Indeed, even after Parliament abolished banishment as a sentence, the King retained the power to annex this condition to a pardon.[94] Reviewing this English history, the Court concluded that the pardoning power was generally intended to be free from legislative control.[95]

Finally, the *Schick* Court analyzed the debates at the Constitutional Convention on the nature of the pardoning power. The Court noted that the draftsmen of Article II, Section 2, "spoke in terms of a 'prerogative' of the President, which ought not be 'fettered or embarrassed."[96] The Court observed that the debates indicate that the President was given the power to pardon in order to deal with individual cases, unencumbered by legislative or judicial control.[97] Indeed, the Court acknowledged, "[A]cts of clemency inherently call for discriminatory choices because no two cases are the same."[98] The Court concluded that, "considerations of public policy and humanitarian impulses support an interpretation of [the pardoning power] so as to permit the attachment of any condition which does not otherwise offend the Constitution."[99] Thus, in *Schick*, the Supreme Court again recognized the pardoning power as an instrument for acting upon the exceptional case where doing so would best serve the public interest.

Most recently, the Supreme Court again considered English history, the debates at the Constitutional Convention, and its own earlier decisions to reaffirm the pardoning power as indispensable to the fair administration

92. *Schick*, 419 U.S. at 261.
93. *Id.*
94. *Id.* at 262.
95. *Id.*
96. *Id.* at 263 (quoting The Federalist No. 74 (Alexander Hamilton)).
97. *Id.* at 265.
98. *Id.* at 268.
99. *Id.* at 266.

of justice. In holding that a petition for habeas corpus was not the proper forum for a death row prisoner bringing a claim of innocence eight years after conviction, the Court in *Herrera v. Collins* relied on the fact that the petitioner was not left without a forum for relief.[100] The Court directed the prisoner to the state's governor for consideration of clemency.[101]

B. California State Pardoning Power

1. The Constitutional Debate, 1849

Drawing on more than a half-century of experience under the federal system, drafters of California's first constitution created a state pardoning power very similar in form and in purpose to the federal pardoning power. Most significantly, both the California Constitution and United States Constitution vested the pardoning power in one person, the executive, and authorized that individual to exercise it largely without limitation. Nonetheless, the survival of California's pardoning power is remarkable given the strong opposition to it at the California Constitutional Convention of 1889. Its staying power reflects the nearly universal acceptance of its importance as a safety-net for the inevitable imperfections of a system of justice that flows from the dual workings of a legislature and judiciary.

California's first constitution was adopted in 1849 by a convention comprised largely of newly arrived immigrants who had come to California during the Gold Rush.[102] Most had traveled long distances at great hardship to try their fortune in a state with a population numbering only 50,000.[103] Over the following thirty years, the state's population grew dramatically, and the economic, social, and political climate changed significantly. Banks closed during the 1870s amid accusations of bad business practice and misuse of funds, mining stocks collapsed, and agriculture and manufacturing became the state's chief industries. Property became concentrated in the hands of a privileged few; and a slump in business resulted in widespread unemployment.[104] Political corruption became widespread.[105] Working class persons, increasingly dissatisfied with economic conditions and the political environment, began to form political parties, precipitating a demand for reform at the California Constitutional Convention of 1878.[106]

A general distrust of politicians, among other issues, prompted reconsideration of the pardoning power. At an early meeting of the California Constitutional Convention, members created thirty standing committees,

100. Herrera v. Collins, 506 U.S. 390 (1993).
101. *Id.* at 415-20.
102. CARL BRENT SWISHER, MOTIVATION AND POLITICAL TECHNIQUE IN THE CALIFORNIA CONSTITUTIONAL CONVENTION 1878-79 6 (1969).
103. *Id.*
104. *Id.* at 6, 9, 15-16.
105. *Id.* at 15.
106. *Id.* at 15-16.

including the Committee on Pardoning Power (CPP), a nine-member group formed to revise Article V, Section 13, of the state's original constitution.[107] Article V provided, in relevant part:

> The Governor shall have the power to grant reprieves and pardons after conviction, for all offenses, except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. Upon conviction for treason, he shall have the power to suspend the execution of the sentence until the case shall be reported to the Legislature at its next meeting, when the Legislature shall either pardon, direct the execution of the sentence, or grant a further reprieve. He shall communicate to the Legislature, at the beginning of every session, every case of reprieve or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the pardon or reprieve.[108]

The CCP debated several challenges to the pardoning power during the convention's subsequent meetings, including: 1) whether clemency should be abolished; 2) whether clemency power should be partially divested from the governor and allocated to other individuals or groups; 3) whether clemency should be available only to those who had committed certain offenses; 4) whether any restrictions should be placed upon the eligibility of a person seeking clemency; and finally, 5) what, if any, control the legislature should have over the grantor of clemency.

The strongest opposition to the pardoning power was expressed by those who believed that the power had been corrupted, benefiting wealthy and influential people at the expense of all others.[109] One delegate felt so strongly about what he perceived to be the corruption of the pardoning power that his resolution would have prohibited the granting of clemency to convicted prisoners even where newly discovered evidence suggested that their sentences were unjust.[110] Following proposals to abolish clemency outright[111] were numerous proposals to limit it to cases of insanity,[112]

107. 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA, 1878-79, at 77 (1880) [hereinafter CALIFORNIA CONSTITUTIONAL CONVENTION].

108. *Id.* at 7. Note that under Article V, Section 13, the governor lacked the power to commute sentences. Any person who was legally guilty and convicted could seek a full pardon, but not a sentence reduction. Under the present California Constitution, the governor does have the power to commute sentences. CA.CONST. art. V, § 8.

109. CALIFORNIA CONSTITUTIONAL CONVENTION, *supra* note 107, at 278 (remarks of Barry), 358 (remarks of Beerstecher), 368 (remarks of Smith).

110. *Id.* at 369 (remarks of Grace).

111. *Id.* at 368 (remarks of Smith).

112. *Id.* at 277 (remarks of Barnes).

to cases of factual innocence established by the discovery of new evidence[113] or perjured testimony,[114] or to cases where the governor found the sentence unjust.[115] The delegates adopted none of these proposals.

Some delegates expressed concern that the governor was particularly susceptible to personal and political pressure, and proposed that the pardoning power be shared with the Chief Justice of the Supreme Court, a trial judge, the Attorney General, the Board of Wardens, the Commission in Charge of State Prison, or the Legislature.[116] Other delegates argued that the more people holding the pardoning power, the greater the risk that pardons would become a commodity to be bought and sold,[117] or that the group would fail to take responsibility for the consequences of its clemency decisions.[118] The delegates concluded that dispersal of the pardoning power would result in a watered-down version of justice, and adopted no proposal to divest the governor of the pardoning power.[119] Ultimately, the sole restriction placed upon the pardoning power was the exclusion of twice-convicted felons from consideration for executive clemency.[120]

While those who opposed the pardoning power commonly characterized it as the governor's arbitrary extension of mercy to those legally and morally guilty of crimes, those who defended the pardoning power typically emphasized its role in protecting the innocent. Delegate McCallum, for example, argued:

> [W]hen men shall devise a perfect government, when there shall be no mistakes made in the administration of government, then there will be no need of pardons in any case, because there would be no suppositions that there could be any injustice done in any case. But we are all liable to err. Jurors are liable to commit errors; Judges are liable to commit errors; witnesses are liable to make mistakes and misstatements. All human testimony is fallible.[121]

Significantly, Delegate Terry explained how the pardoning power, viewed by some as a device of corruption and favoritism and by others as a shield for protecting victims of judicial error, could be used to produce just results in complex cases:

> [T]here may be mitigating circumstances which excuse the offense in the minds of a large majority of the right- thinking people

113. *Id.* at 279 (remarks of Blackmer).
114. *Id.* at 277 (remarks of Barnes).
115. *Id.* at 279 (remarks of Blackmer).
116. *Id.* at 257 (remarks of Tinnin), 274 (remarks of Campbell), 278 (remarks of Barry and Filcher).
117. *Id.* at 277 (remarks of Barnes).
118. *Id.* at 358 (remarks of Howard).
119. *Id.* at 277 (remarks of Barnes), 279 (remarks of Blackmer).
120. *Id.* at 1195.
121. *Id.* (remarks of McCallum).

> of the country. A man may commit murder under the influence of a knowledge of an outrage upon his wife or sister, and be technically guilty, to be sure, but in such cases why should not the Governor be allowed to pardon him?[122]

Terry demonstrated that the pardoning power's importance in the fair the administration of justice becomes quite clear in the context of those cases where the defendant is guilty as a matter of law, but where strict adherence to the letter of the law would produce unduly harsh results.

Despite contentious challenges to the retention of a broad pardoning power, few restrictions ultimately were placed on the pardoning power, and the majority of California delegates refused to divest the executive of clemency power. The California delegates declined to limit its application to certain types of cases, recognizing that decisions in numerous types of cases, including some situations impossible to anticipate, could result in injustice. They appear to have agreed with their federal counterparts that discretion, and the acceptance of responsibility for the exercise of that discretion, are indispensable parts of a system of justice.

The delegates' appreciation of the need for an executive power to remedy the inadequacies of a sophisticated, but imperfect criminal justice system defeated attempts to significantly restrict the pardoning power. The need for a broad pardoning power was perhaps best articulated by Delegate Howard:

> A power to pardon seems indeed indispensable under the most correct administration of the law by human tribunals, since otherwise men would sometimes fall a prey to the vindictiveness of accusers, the inaccuracy of testimony, and the fallibility of jurors and Courts. Besides, the law may be broken, and yet the offender placed in such circumstances that he will stand in a great measure, and perhaps wholly, excused in moral and general justice, though not in the strictness of the law.[123]

While the governor may certainly exercise his discretion and decline clemency in a particular case, any California governor who attempts to redefine or limit the clemency power is acting contrary to the intent and wisdom of the state constitution.

122. *Id.* at 357 (remarks of Terry).
123. *Id.* at 358 (remarks of Howard).

2. *The Pardoning Power in the California Courts*

California clemency cases established early on that the federal and state pardoning powers should be viewed as substantially identical,[124] despite their minor differences.[125] Accordingly, California courts have looked to the history of the federal pardoning power,[126] as well as to the extensive debates surrounding adoption of the California Constitution,[127] in interpreting the nature and purpose of California's pardoning power.

Like the federal courts, the California courts have consistently rejected efforts to limit the executive's authority to exercise the power.[128] The state courts have interpreted the pardon as an act of mercy.[129] They have also emphasized its function as a safety-net that permits finality in the courts and limits on appeals without compromising the dispensation of justice. In

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124. In People v. Bowen, 43 Cal. 439, 441-42 (1872), the court stated:
The power of the Executive of the State to pardon offenses other than the offense of treason or impeachable offenses, is conferred upon him by the [California] Constitution. . . . His power in that respect is of the same general nature as that conferred upon the President of the United States by the Federal Constitution.

125. While the President can pardon before and after conviction, *Burdick*, 236 U.S. at 86-87, the Governor of California can act only after conviction and sentencing. CA. CONST. Art. V, § 8. In addition, the presidential pardoning power is unrestrained by legislative control, while the California governor's pardoning power is subject to legislative regulations relating to the manner of applying for a pardon. CAL PENAL CODE § 4800 et. seq. (West 1982).

126. *See, e.g.*, Way v. Superior Court, 74 Cal. App.3d 165 (1977) (deciding that the Legislature had not unconstitutionally usurped the governor's commutation power when it repealed the Indeterminate Sentencing Law, replaced it with the Determinate Sentencing Law and gave the new law retroactive effect, which had the effect of shortening the sentences of some California prisoners). The court noted that, "of considerable importance to our decision is the history of, the principles affecting, and the right to exercise the power of [pardon]." *Id.* at 173-76 (referring extensively to the records of the debates at the California Constitutional Convention).

127. *See, e.g.*, Way v. Superior Court, 141 Cal. Rptr. 383, 389 (Cal. Ct. App. 1977) (referring extensively to the records of the debates at the California Constitutional Convention).

128. It is well-settled law in California that the powers of commutation and pardon are held to be the exclusive domain of the Governor. People v. Odle, 230 P.2d 345, 348 (Cal. 1951); People v. Enriquez, 219 Cal. Rptr. 325, 330 (Cal. Ct. App. 1986); People v. Warren, 224 Cal. Rptr. 746, 755 (Cal. Ct. App. 1986). Various claims that the governor's pardoning power is limited in scope have been rejected. *See, e.g., Ex parte* Kelly, 99 P. 368, 369 (Cal. 1908) (holding that the executive is not disallowed from annexing any reasonable condition to a pardon); *In re* Collie, 240 P. 2d 275, 276 (Cal. 1952) (stating that though the legislature is authorized to prescribe conditions of parole, the governor has the power to withhold parole as a condition of commutation: "A commutation is in the nature of a favor which may be withheld entirely or granted upon such reasonable conditions, restrictions and limitations as the governor may think proper."); Green v. Gordon, 246 P.2d 38, 39 (Cal. 1952) (holding that a court's power to sentence does not limit the governor's power to issue a commutation upon conditions).

129. *See, e.g., Way*, 141 Cal. Rptr. at 391 (concluding that true commutations are characterized by forgiveness toward past offenders); People v. Mabry, 455 P.2d 759, 776 (Cal. 1969) (Peters, J., dissenting) (stating that the exercise of clemency is an exercise of grace and compassion); Phyle v. Duffy, 208 P.2d 668, 677 (Cal. 1949) (Traynor, J., concurring) (noting that the granting of executive clemency is recognized as an act of mercy).

Ex Parte Lindley,[130] the court considered and rejected petitions for a writ of habeas corpus and a writ of error coram vobis by a petitioner found guilty and sentenced to death for the murder of a thirteen-year-old girl. Adopting a posture prescient of the United States Supreme Court's decision in *Herrera*, the concurrence noted that though "the record leaves me with grave doubt as to whether Lindley is guilty of the crime," such doubt was insufficient to sustain a writ of habeas corpus and "[t]he remedy in such cases is committed by our law exclusively to the governor of the state."[131]

In *In re Horowitz*[132] the court again found the pardoning power to be the exclusive remedy in cases of factual innocence where no judicial recourse is available. Denying Horowitz's request for a writ of habeas corpus, the court acknowledged that the "[p]etitioner undoubtedly has established that at the trial there were disputed issues of fact and grave conflicts in the evidence."[133] Nonetheless, the factual inconsistencies could not support a habeas writ. The court concluded, "If at the end of court procedures there is claimed to persist a miscarriage of justice, despite all the precautions of the law to the contrary, the ultimate remedy rests in an appeal to the governor."[134]

This recognition of the importance of the pardoning power to concerns of mercy and factual innocence has, unfortunately, led to the view adopted by some - Governor Wilson apparently among them - that these are the *only* legitimate functions of the pardoning power. But the history and development of both the state and federal pardoning powers reveal that these are not the only legitimate concerns. Indeed, at least two California cases emphasize that the pardoning power is intended to enable the governor to do justice when, for any reason, injustice has occurred.

In *People v. Superior Court of San Francisco*,[135] Ullah Mohammed, having lost all his appeals, filed a civil suit in the Superior Court wherein he asked the court to vacate his judgment of conviction for murder in the first degree, and to issue an injunction to stay the execution of his death sentence. Mohammed argued that he had not received a fair trial, as he was deprived, by fraud, of his opportunity to present a defense. When the Superior Court issued the injunction, the State brought a writ of prohibition in the California Supreme Court to prohibit the Superior Court from proceeding with the suit. The California Supreme Court issued the writ of prohibition, concluding that no court had the power to hear Mohammed's suit or to grant the relief requested by Mohammed. The court held that, in

130. *Ex Parte* Lindley, 177 P.2d 918 (Cal. 1947).
131. *Lindley*, 177 P.2d at 930 (Schauer, J., concurring)
132. *In re* Horowitz, 203 P.2d 513 (Cal. 1949).
133. *Id.* at 521.
134. *Id.*
135. People v. Superior Court of San Francisco, 213 P. 945 (Cal. 1923).

circumstances such as these, the remedy provided for by law is an application to the governor.[136] The court explained:

> The constitutional grant to the Governor of the right to pardon is to enable the state to do justice in those *cases where the ordinary procedure results in injustice in individual cases by reason of extrinsic fraud or for any other reason.* There is thus a procedure established for the purpose of doing justice in this type of cases [sic], and we must assume that, if, as claimed here, Ullah Mohammed did not have a fair trial, and for the reasons he alleges in his complaint has not been able to present his defense, an application to the Governor for pardon will be given due consideration, and, if the representations are there made on his behalf that have been made here, and are established to the satisfaction of the Governor, that he will extend to him such a degree of leniency as is proper under the circumstances.[137]

Thus, the California Supreme Court made it clear that executive clemency gives the governor the power to remedy injustice that has resulted *for any reason,* and that the pardoning power may be exercised in order to correct trial errors no longer reviewable by a court.

The California Supreme Court reiterated this principle in *People v. Reid.*[138] The defendant in *Reid* was convicted of murder in the first degree. His motion for a new trial was denied, and his conviction affirmed on appeal. Reid filed a petition for a writ of error coram nobis in the trial court, alleging that his conviction should be reversed because of juror misconduct.[139] In support of his application, the defendant referred to affidavits attached to a petition for commutation of sentence that he had already filed with the governor. The trial court denied the application, believing that it had no jurisdiction to grant it.[140]

On review of the trial court's denial, and after an extensive examination of the English and early American history of the writ of error coram nobis, the California Supreme Court concluded that the writ was not available to the defendant, and affirmed the denial of the petition.[141] The court noted that there was no law sustaining the application for a writ, and no other judicial remedy available.[142] The court concluded that the governor,

136. *Id.* at 945.
137. *Id.* (emphasis added).
138. People v. Reid, 232 P. 457 (Cal. 1924).
139. *Id.* at 459.
140. *Id.*
141. *Id.* at 462.
142. *Id.*

not the court, was empowered and qualified to investigate the facts surrounding the defendant's allegations, and that the remedy available to Reid —an executive pardon —rested with the governor.[143]

These cases emphasize the symbiotic nature of the relationship between the clemency power and judicial review. In order to promote finality in criminal cases, and to limit what might otherwise be an endless series of appeals, the California courts have recognized that they inevitably sacrifice justice in some cases. They have justified this sacrifice by pointing out that the system as a whole still provides a remedy — the executive pardon — particularly, though not exclusively, in cases in which the facts giving rise to the injustice may not be cognizable by the courts. Thus, the California courts have recognized, from the time of the Constitution forward, that the pardoning power is not merely an instrument of mercy to be utilized at the governor's discretion, but constitutes an integral part of our system of justice.

II.
RESTRICTIONS ON POST-CONVICTION RELIEF

While our criminal courts may strive to produce just results, they cannot possibly permit every criminal case to be endlessly relitigated. A judicial system needs a measure of finality. Criminal cases can generate new evidence, procedural challenges, and claims of legal error years after the conviction. Moreover, prisoners have powerful incentives to proceed with new appeals. Accordingly, our criminal justice system, even as it may seek to safeguard the rights of criminal defendants, must impose some limits on appeals.

Almost any limit placed on appeals, however, creates a risk of injustice. Given the current trend toward confining criminal litigation to the trial and appellate courts, adequate judicial remedies for addressing post-conviction claims have become fewer in number and more limited in scope. Governor Wilson's refusal to revisit legal issues on clemency review no doubt will exacerbate the harshness of judicially-created procedural hurdles to post-conviction relief.

The primary post-conviction means of challenging a criminal conviction is the writ of habeas corpus.[144] Habeas corpus challenges the constitutionality of a prisoner's custody and demands the prisoner's release.[145] The

143. *Id.*

144. *See generally* NATIONAL CENTER FOR STATE COURTS-STATE JUSTICE INSTITUTE, HABEAS CORPUS IN STATE AND FEDERAL COURTS 1 (1994) [hereinafter HABEAS CORPUS IN STATE AND FEDERAL COURTS] (discussing habeas corpus in the United States). There were over 10,000 habeas corpus petitions filed by state prisoners in 1991. *Id.* at 14 tbl.1.

145. *See generally* JAMES S.LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 13-18 (2d ed. 1994) [hereinafter LIEBMAN & HERTZ] (explaining that federal habeas corpus review is limited to claims of federal constitutional error). 28 U.S.C. § 2241(c)(3) (1996). State habeas relief provided by the California courts extends to

writ acts as a judicial safety-net for the criminal justice system, providing the state prisoner with her last chance for judicial review. In recent years, habeas corpus has become an increasingly narrow avenue for post-conviction relief.[146] Federal and state courts have begun to marginalize habeas as a means of remedying serious errors in the trial process because of concerns over federalism, comity, finality, and the scarcity of judicial resources.[147] This trend toward depriving prisoners of meaningful habeas review leaves clemency review as the only process by which errors may be remedied.

This section outlines the evolving relationship between clemency review and habeas corpus. It lays the foundation for my conclusion that comprehensive clemency review is an indispensable safety-net for the unjustly convicted.

A. Herrera v. Collins

Leonel Torres Herrera was found guilty of shooting and killing a police officer along a stretch of Texas highway, convicted of capital murder, and sentenced to death.[148] The evidence against him included the officer's dying declaration identifying Herrera as the killer, a police officer's eyewitness identification, blood evidence found on Herrera's jeans, and a written *mea culpa* found on Herrera when he was arrested.[149] Herrera's conviction was affirmed on appeal to the Texas Supreme Court.[150]

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constitutional error, jurisdictional error, and claims of newly discovered evidence. *In re* Clark, 5 Cal. 4th 750, 767 (Cal. 1993).

146. LIEBMAN & HERTZ, *supra* note 145, at v. ("The road to federal habeas corpus relief for state prisoners was already an obstacle course in 1988. . . . Today the road has become a narrower, more tortuous track among concealed stake-pits and anti-personnel mines calculated to daze cartographers and daunt a modern Gilgamesh"). *Id.*

147. *See, e.g.,* Coleman v. Thompson, 501 U.S. 722 (1991) (holding that the "independent and adequate state grounds" doctrine prohibits federal habeas review of federal constitutional claims waived under state procedural rules):

> In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism. Without the rule, a federal district court would be able to do in habeas what this court could not do on direct review: habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.

Id. at 730-31. If the federal court's habeas watchwords are "federalism" and "comity," the California court's anxiety about habeas is primarily focused on concerns over finality and the integrity of the appellate process. *See* In re Clark, 5 Cal. 4th 750 (Cal. 1993) (discussing California's judicially created procedural restrictions on state habeas review):

> Procedural rules have been established by our past decisions to govern petitions for writs of habeas corpus. Such rules are necessary both to deter use of the writ to unjustifiably delay implementation of the law, and to avoid the need to set aside final judgments of conviction when retrial would be difficult or impossible.

Id. at 764.

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

149. *Id.* at 394-95.

150. *Id.* at 395.

Herrera's first round of state and federal habeas petitions was unsuccessful.[151] Herrera then initiated a second state habeas petition alleging, for the first time, that he was factually innocent of the murder.[152] In his second petition, Herrara presented three affidavits indicating that his deceased brother, Raul Herrera, had killed the police officer.[153] Three of the affiants reported that Raul had admitted to the murder in their presence.[154] One of the affiants was a former state judge, who as a lawyer had represented Raul in an unrelated criminal matter.[155] The former state judge also alleged that Raul and the murdered officer had been involved in drug trafficking together.[156] Herrera added a fourth affiant on his second federal habeas petition. In this affidavit, Raul's son gave a first-hand account of how, as a nine year-old child, he had witnessed his father, not Leonel Herrera, kill the officer.[157]

The United States Supreme Court, in an opinion by Chief Justice Rehnquist, affirmed a federal court of appeals' denial of habeas relief. The Court held that Herrera's "actual innocence" claim, standing alone, was not cognizable by the federal courts on habeas review because such a claim did not present a constitutional issue.[158] "[F]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution," the majority wrote, "not to correct errors in fact."[159] Upon conviction, the Court reasoned, the presumption of innocence vanishes regardless of any newly-discovered exculpatory evidence, and the prisoner becomes "legally guilty."[160] A federal habeas court bases its analysis on a presumption of legal guilt, thus an assertion of "actual innocence" without an accompanying constitutional claim is insufficient to support the habeas petition.

Having rejected Herrera's habeas petition, Chief Justice Rehnquist asserted that for a prisoner with newly-discovered exculpatory evidence, executive clemency acts as "the 'fail-safe' in our criminal justice system."[161] Leonel Herrera, the majority assured, was not without a forum. Although the judicial system is "fallible," Rehnquist continued, "history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence."[162]

151. *Id.* at 396. At this stage, Herrera challenged the identification evidence as unreliable and improperly admitted. *Id.*

152. *Id.*

153. *Id.* at 396.

154. *Id.*

155. *Id.* at n.2.

156. *Id.*

157. *Id.* at 397.

158. *Id.* at 404.

159. *Id.* at 400.

160. *Id.* at 425.

161. *Id.* at 415.

162. *Id.*

The Court cited sixty-five cases in which it was later determined the defendant had been wrongfully convicted. Clemency, the Court stated, had provided relief in forty-seven of these cases.[163] The Court concluded that clemency was the proper mechanism for addressing claims of actual innocence in circumstances where judicial relief was unavailable.[164]

Insofar as *Herrera* emphasized the role of executive clemency in remedying injustices in certain types of cases, the decision was extremely important. *Herrera* reaffirmed the principle that it is an executive's obligation to exercise clemency review in those cases where courts or legislation restrict, or totally eliminate, a prisoner's access to post-conviction corrective review. The Court's stark reminder that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding"[165] makes clear that the exercise of clemency is sometimes the only mechanism capable of compensating for judicial system shortcomings.

Accordingly, the role of clemency depends on identifying the limitations of the system in which it operates. As legislatures and the courts cut back on the procedural protections that once permitted the justice system more leeway to do justice in individual cases, the need to reconsider the role of clemency in our own time is becoming particularly urgent. After *Herrera*, it is especially important for the executive branch to understand the ever more onerous barriers being placed by the judiciary and legislatures on prisoners seeking post-conviction relief. Only then will state governors fully appreciate the scope of their duty to provide comprehensive clemency review for the unjustly convicted.

B. Restrictions on Post-Conviction Relief

After a period of expansion, Supreme Court rulings since 1976 have steadily restricted the scope of habeas relief.[166] These restrictions have

163. *Id.* at 420 (*citing* E. BORCHARD, CONVICTING THE INNOCENT (1932)).

164. *Id.* The Court cited the fact that all thirty-six states with the death penalty also had statutorily authorized executive clemency. *Id.* at 414 n.14.

165. *Id.* at 400.

166. Stone v. Powell, 428 U.S. 465 (1976) (stating that habeas claims based on the Fourth Amendment cannot be relitigated because state court had provided full and fair opportunity to litigate); Wainwright v. Sykes, 433 U.S. 72 (1977) (requiring habeas applicants who procedurally defaulted on a claim in state court to show cause and prejudice); Teague v. Lane, 489 U.S. 288 (1989) (stating that newly articulated constitutional rules of criminal procedure are not applicable to cases which became final before the new rule was announced); McCleskey v. Zant, 499 U.S. 467 (1991) (requiring successive habeas petitions to show cause and prejudice to include a claim omitted from first petition); Brecht v. Abrahamson, 507 U.S. 619 (1993) (requiring prisoner to show constitutional error had a "substantial and injurious effect or influence in determining the jury's verdict," a more difficult standard than the former "harmless error" standard).

been severely criticized by practitioners and academic commentators,[167] but there is little indication that the trend will reverse itself. Restrictions on habeas relief became even more severe when Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[168] This section reviews the numerous practical and procedural restrictions on a prisoner who seeks relief through a habeas writ.

1. Practical Restrictions: A Petition from Behind Bars

A 1994 study reveals that the typical habeas petitioner is doing "hard time," with a median *minimum* sentence of twenty-four years.[169] Given the procedural hurdles to habeas relief, only prisoners sentenced to long terms have time to complete the steps necessary for filing a habeas petition.[170] Nearly all petitioners were represented by court-appointed counsel at trial.[171] States are not obligated under the Sixth Amendment to provide counsel to needy prisoners seeking post-conviction relief.[172] Most petitioners were not represented through the filing of their habeas petitions. Seventy-five percent of petitioners in state court and ninety-one percent in federal court represented themselves, frequently in handwritten scribblings.[173]

Ineffective assistance of counsel is the most common habeas claim in both state and federal courts.[174] Claims of due process violation, Eighth Amendment abridgment, trial court error, and prosecutorial misconduct

167. *See, e.g.*, Stephen B. Bright, *Does the Bill of Rights Apply Here Any More?*, CHAMPION, Nov. 20, 1996, at 25; Emmanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557 (1994) (arguing that the increasing emphasis by the Supreme Court on "actual innocence" and "innocence of death" in recent habeas law is a "trap for the unwary and a 'catch 22' for the wary."); Ronald J. Tabak & J. Mark Lane, *Judicial Activism and Legislative "Reform" of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals*, 55 ALB. L. REV. 1 (1991) (describing the ways in which judicial "reform" of habeas law has eliminated the writ of habeas corpus to many death row inmates).

168. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996).

169. HABEAS CORPUS IN STATE AND FEDERAL COURTS, *supra* note 144, at 35-38 (1994).

170. *Id.* at 35. The study reveals that, for death row inmates, a median time of 2,319 days passes between conviction and filing of federal habeas petitions, and 1,873 days elapses for state habeas petitions.

171. *Id.* at 36. The competency of trial counsel has become key as heightened restrictions on habeas corpus suggest that an accused's fate will be increasingly and finally decided at the trial level. For a thorough discussion of how restrictions on habeas corpus affect defendants who must rely on appointed trial counsel see Debra Cassens Moss, *Death, Habeas and Good Lawyers: Balancing Fairness and Finality*, 78 A.B.A. J. 82 (1992). *See also* Ellen Kreitzberg, *Death Without Justice*, 35 SANTA CLARA L.REV. 485 (1995).

172. Murray v. Giarratano, 492 U.S. 1 (1989) (concluding that no habeas counsel is required in a capital case); Pennsylvania v. Finley, 481 U.S. 551 (1987) (determining that no habeas counsel is required in a noncapital case).

173. HABEAS CORPUS IN STATE AND FEDERAL COURTS, *supra* note 144at 39.

174. *Id.* at 45. Between forty and fifty percent of habeas claims assert ineffective assistance of counsel. *Id.* at 46.

are also asserted frequently.[175] Nearly all petitions fail. The success rate for all state habeas petitions filed in the four states represented in the study was just under five percent;[176] for federal claims, the overall success rate was *less than one percent.*[177] In light of related studies that have examined the prevalence of constitutional error in the judicial process, these figures are remarkable. For example, in an amicus curiae brief, the NAACP Legal Defense and Education Fund stated that federal appellate courts have found constitutional error in seventy-three percent of death penalty cases.[178] Another recent study concluded that forty-three percent of state capital judgments reviewed on habeas corpus in the state and federal courts between 1976 and mid-1991 were determined, after final review, to be constitutionally flawed.[179] These studies confirm that the presence of constitutional error is not unusual, even in our most serious criminal proceedings. Nonetheless, habeas relief is rarely granted.

2. *Federal Procedural Restrictions on Habeas Corpus*

Beyond the practical difficulties of filing a habeas petition, procedural bars to habeas corpus review also prevent many prisoners from having the merits of their post-conviction claims heard by a habeas court. These restrictions have been made increasingly burdensome in recent years by both the Supreme Court and Congress.

Statute of Limitations. While prisoners used to have unlimited time to bring a federal constitutional challenge, as long as there was no prejudice to the respondent state,[180] the AEDPA has imposed a one-year statute of limitations on habeas petitions.[181] This statute of limitations has had the most immediate and most serious impact on prisoners seeking habeas relief. The one-year time limit runs from the date the judgment became final, either through exhaustion of direct appeals or expiration of the time for seeking direct review.[182] The average time it currently takes prisoners to

175. *Id.* at 45-60.

176. *Id.* at 62, tbl.7. It is important to note this figure is inflated by the 11 percent success rate of excessive bail claims under the Eighth Amendment, where the "relief" granted amounts to a lowering of bail. *Id.*

177. HABEAS CORPUS IN STATE AND FEDERAL COURTS, *supra* note 144, at 62, tbl.17.

178. Brief Amicus Curiae for the NAACP Legal Defense and Education Fund, Inc. at 27, Barefoot v. Estelle, 463 U.S. 880 (1987) (No. 82-6080).

179. Randal Samborn, *Habeas Corpus Statistics Reveal Caseload is Light*, NAT'L L.J., Oct. 17, 1994, at A19 (citing 1992 research findings by Professor James S. Liebman of the Columbia University School of Law).

180. RULES GOVERNING § 2254 CASES IN THE U.S. DISTRICT COURTS Rule 9(a).

181. 28 U.S.C. § 2244(d)(1) (1996) (as amended by AEDPA § 101, (1996)).

182. *Id.* § 2244(d)(1) also specifies three other dates which could start the clock ticking, including the date when the impediment (if any) to filing state post-conviction remedy was removed, the date when the Supreme Court articulates a new, retroactively applicable claim, and the date when the factual predicate of the claim became available. *Id.* The clock starts ticking on the *latest* of the dates.

file a federal habeas petition is far longer than 365 days.[183] Once the 365 days have lapsed, however, the prisoner is barred from filing a federal habeas corpus petition, no matter how meritorious her constitutional claims. The AEDPA provides for no exceptions.

Procedural Default. Prior to 1977, state prisoners could raise a constitutional issue in the federal habeas court as long as the petitioner's failure to raise it in state appellate court had not been deliberate.[184] *Wainwright v. Sykes*[185] replaced this generous "deliberate bypass" rule with a more restrictive test that required the applicant to show both "cause" for her failure to assert the claim and "actual prejudice" from the omission.[186] The cause and actual prejudice standard is a significant impediment to federal habeas relief. Most notably, attorney ignorance, inadvertence, or error that results in a procedural default does not constitute "cause."[187] Emphasizing the importance of promoting finality of criminal convictions and federalism concerns,[188] the Court has concluded that there was "no inequity in requiring [prisoners] to bear the risk of attorney error that results in a procedural default."[189]

Standard of Review. The standard used by the habeas court to review state court convictions has become more deferential, making it more difficult for petitioners. In an appellate case, federal constitutional error at trial is grounds for the reversal of a criminal conviction unless the appellate court finds that the error was "harmless beyond a reasonable doubt."[190] After the Court's 1993 ruling in *Brecht v. Abrahamson*,[191] however, the habeas standard became more deferential than the appellate standard. In habeas cases, the prosecution is relieved from establishing harmless error

183. Habeas Corpus in State and Federal Courts, *supra* note 144, at 86, tbl.22 The study determined that for death row inmates a median of 2,319 days passed between conviction and filing of federal habeas petitions and 1,873 days elapsed for state habeas petitions.

Pursuant to 28 U.S.C. § 2254, a state prisoner must generally "exhaust" all of his state appellate remedies before filing for federal habeas. 28 U.S.C. § 2254 (1996).

184. Fay v. Noia, 372 U.S. 391, 439 (1963).

185. Wainwright v. Sykes, 433 U.S. 72 (1977).

186. *Id.* at 87.

187. Murray v. Carrier, 477 U.S. 478, 486-87 (1986). The harsh consequences of this rule were highlighted in Coleman v. Thompson, 501 U.S. 722, 753 (1991), where defense counsel, unfamiliar with Virginia's 30-day filing period, filed the petitioner's appeal one day late. The Supreme Court held that "attorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting or failing to act, in furtherance of the litigation, and the petitioner must "bear the risk of attorney error." *Coleman*, 501 U.S. at 753.

188. *Carrier,* 477 U.S. at 487.

189. *Id.* at 478.

190. Chapman v. California, 386 U.S. 18, 24 (1967).

191. Brecht v. Abrahamson, 507 U.S. 619 (1993).

"beyond a reasonable doubt." To defeat a habeas claim, the prosecution need only show it was "highly probable" that the error was harmless.[192]

The AEDPA altered the standard of review in an even more dramatic way. Prior to the statute, habeas courts followed the traditional appellate standard of review and considered legal questions de novo. Under 28 U.S.C. §2254(d), as amended by AEDPA, a federal habeas court must now determine whether the state court decision was "contrary to, or involved an unreasonable application of clearly established Federal law."[193] The Seventh Circuit, sitting *en banc,* recently interpreted the new provision to mean that even if a federal judge determined that the state judge made a mistake about the federal constitutional rights of the prisoner, the federal judge must make an additional determination that the mistake was "unreasonable" before she can grant habeas relief.[194] It remains to be seen how deferential federal courts will be to state courts' determinations of federal Constitutional claims, but even the most narrow reading of the new section 2254(d) restricts the ability of prisoners to have a federal court make a *de novo* judgment on her Constitutional claims.[195]

Exhaustion. In the interest of federalism and comity, federal courts generally require that the habeas petitioner first exhaust her claims in state court. In 1982, the Supreme Court made this requirement more difficult for petitioners by ruling that if a petition contains any unexhausted claims, the *entire* petition (not just the unexhausted claims) must be denied and remanded to state court.[196] However, the federal court could reach the merits of the unexhausted constitutional claim if the federal judge determined that the state court had implicitly waived the exhaustion requirement by ignoring the exhaustion defect.[197]

The AEDPA amended 28 U.S.C. § 2254(b) to close this loophole: states must now explicitly waive the exhaustion requirement, and federal

192. *Id.* at 633. The Court reasoned that the threat to state sovereignty over criminal proceedings which the "extraordinary remedy" of habeas corpus poses justified the adoption of a more permissive standard. *Id.* For more in-depth analysis of the new *Brecht* standard, see James S. Liebman & Randy Hertz, Brecht v. Abrahamson, *Harmful Error in Habeas Corpus*, 84 J. CRIM L. & CRIM. 1109 (1994); John H. Blume & Stephen P. Garvey, *Harmless Error in Federal Habeas After* Brecht v. Abrahamson, 35 WM. & MARY L. REV. 163 (1993).

193. 28 U.S.C. § 2254(d)(1) (1996) (as amended by AEDPA (1996)).

194. Lindh v. Murphy, 96 F.3d 856, 876-77 (7th Cir. 1996) (en banc).

195. For a narrow reading of 28 U.S.C. § 2254(d), see Brief for Petitioner, Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996) (No. 96-6298) (arguing that § 2254(d) requires federal courts to defer to state courts only if the state court actually adjudicated the merits of the federal constitutional claim).

196. Rose v. Lundy, 455 U.S. 509 (1982).

197. Granberry v. Greer, 481 U.S. 129 (1987).

courts cannot decide that the state court had implicitly waived.[198] The statute makes an exception to this exhaustion requirement when the federal court wishes to *deny* the habeas petition.[199]

Successive Petitions. The restrictions on filing successive habeas petitions have also become increasingly hostile to the prisoner. Prior to 1991, the rule on successive petitions was that federal claims which had not been presented in previous petitions were allowed, as long as the omission was based on a good-faith assessment of available claims.[200] As an "abuse of the writ," a bad-faith omission could not be included in successive petitions. The Supreme Court issued a new rule in *McCleskey v. Zant*,[201] requiring the petitioner to show "cause" for her omission and "actual prejudice" from the omission. Even though the *McCleskey* "cause and actual prejudice" test made successive petitions extremely difficult, the AEDPA mandated an even stricter test.[202] Under the amended 28 U.S.C. § 2244(b), a petitioner must show *extreme* prejudice: the facts underlying the omitted claim must "be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty" of the offense.[203]

3. *State Restrictions on Habeas Corpus*

California state prisoners seeking *state* habeas relief based on alleged constitutional error also face formidable procedural bars. As with federal habeas petitions, California's appellate courts severely restrict multiple habeas petitions that raise "successive" or "abusive" claims.[204] California's judicially-created *Waltreus* Rule states that "in the absence of strong justification, any issue that was actually raised and rejected on appeal cannot be renewed in a petition for a writ of habeas corpus."[205] At the same time, another rule holds that an unjustified failure to present an issue on appeal will generally preclude its consideration in a post-conviction petition for a writ of habeas corpus.[206] Together, these rules prevent a prisoner from filing a state habeas claim if she raised that claim unsuccessfully on direct appellate review, or if she unjustifiably *failed* to raise that claim on direct

198. 28 U.S.C. § 2254(b)(3) (1996) (as amended by AEDPA (1996)).

199. 28 U.S.C. § 2254(b)(2) (1996) (as amended by AEDPA (1996)).

200. Sanders v. United States, 373 U.S. 1 (1963); 28 U.S.C. § 2244(b) (1990)

201. McCleskey v. Zant, 499 U.S. 467 (1991).

202. 28 U.S.C. § 2244(b) (1996) (as amended by AEDPA (1996)).

203. *Id.*

204. *See In re* Clark, 5 Cal. 4th 750 (Cal. 1993) (clarifying the exceptions to the general rule that California courts will not entertain delayed or repetitious claims on state habeas review).

205. *In re* Harris, 855 P.2d 391 (Cal. 1993).

206. *In re* Dixon, 41 Cal. 2d 756, 759 (Cal. 1953).

appellate review. The state supreme court has carved out only a very narrow (and quite vague) exception to these rules for claims premised on constitutional error.[207]

4. Restriction on Habeas Corpus: A Summary and Prospective

Clearly, habeas corpus is not a panacea for flawed criminal proceedings. Indeed, the Supreme Court emphasized in *Herrera* that habeas corpus is not designed to guarantee error-free trials; the real "fail-safe", according to the Court, is the executive pardon.[208] *Herrera's* characterization of the executive pardon as the criminal justice system's fail-safe, however, can only be realized if the executive is willing to revisit the substance of habeas claims denied under established judicial standards. Clemency review can offer no fail-safe protection if the executive is unwilling to exercise discretion beyond that exercised by the judiciary. The role of executive clemency as articulated in *Herrera* presupposes a governor's willingness to bring about a just resolution when the judicial system cannot. Governor Wilson's stated intent to use the pardon only as an act of grace or in cases of factual innocence flies in the face of *Herrera*, and leaves habeas corpus the exclusive post-conviction forum for challenging judicial error.

In the following section, I argue that the unavoidable flaws in our judicial system require that clemency review be comprehensive: the state executive must take into account not only considerations of mercy or factual innocence, but principles of justice as well. Under Governor Wilson's view, meritorious claims for post-conviction relief denied review by the courts cannot be addressed by the executive because the application of established procedural and substantive rules, including those relating to habeas corpus, is within the exclusive domain of the judiciary. Under the principles of comprehensive and flexible clemency review, however, the scope of review is essentially unlimited. The Governor has not only wide discretion to perform acts of mercy, but a constitutional obligation to use clemency as an instrument of justice as well.

III.
ANALYSIS

The exercise of clemency has been controversial. Unfortunately, the controversy has tended to focus on the nature of the particular case or the personalities involved rather than on the operation of the justice system itself. This emphasis is misguided. Without giving careful attention to the

207. *See In re* Harris, 5 Cal. 4th 831, 836 (Cal. 1993) ("We recognize the possibility that in *rare situations*, there may be some clear and fundamental constitutional violations striking at the heart of the trial process that should have been raised or were unsuccessfully raised on appeal") (emphasis added).

208. Herrera v. Collins, 506 U.S. 390,415 (1993).

capacity of the criminal justice system to render a fair result in a given case, the reach of clemency is inadequate. Pardoning power review must encompass the executive's honest evaluation of whether the justice system has dealt adequately with the case and whether the procedures for habeas corpus and other appellate review were satisfactory.

The executive was given the pardoning power to serve two general purposes: (1) to dispense mercy when the system is too harsh in an individual case and, (2) to mete out justice when the system proves itself incapable of reaching a just result.[209] When clemency is exercised for *mercy* reasons, it is to minimize the undue harshness of an otherwise effective and fair system of laws. When exercised for *justice* reasons, it is to make up for inadequacies or failures within that system of laws. Generally, these failures occur either because a procedural rule prevents the courts from reaching the merits of a "good" claim or because an established legal standard is insufficiently flexible to achieve justice in a particular situation.

In this final section, I review three scenarios that call upon the Governor to extend clemency. In the first scenario, clemency is exercised primarily for reasons of mercy. In these cases, clemency is used to temper harsh results in a retribution-based judicial system. In the second scenario, clemency is appropriate when a procedural bar prevents the judicial system from reaching the substance of a claim. In the third scenario, the executive exercises clemency because the appellate or habeas court's application of an established rule of law is inconsistent with principles of justice.

In the second and third scenarios, clemency is exercised in a manner that compensates for the judicial system's failure to deliver a just result. In these cases the executive must be willing to revisit procedural, evidentiary, and substantive legal issues on clemency review in order to comply with constitution-based directives to achieve justice.

To illustrate these different grounds for clemency, I focus on battered women whose claims of self-defense either were not presented at trial or were presented in ways that prevented their full consideration by the jury. The women were then convicted of killing their abusers. For the typical battered woman seeking clemency, the issues unique to her self-defense claims may not have been presented at all at trial, or likely were subject to procedural barriers that unfairly marginalized their significance. The prisoner may have exhausted her direct appeals without full consideration of the issues, and any efforts to raise them through habeas claims may be limited by procedural obstacles or onerous standards of review. This is often true even in circumstances where, were the trial held today, the claims might lead the finder of fact to a verdict of not guilty. Accordingly, at least some of these cases squarely test the role of clemency as a safety-

209. These purposes have been characterized as "justice enhancing" and "justice neutral." *See* Kobil, *Quality of Mercy*, *supra* note 30, at 579.

net for a functioning system of justice. These cases are particularly appropriate to illuminate the role of clemency, in part because incarcerated battered women have filed many highly publicized clemency petitions nationwide, with different responses by executives in different states.[210]

In addition, battered women's cases —in a manner not unlike the claims of young Katherine Passeavant —involve issues many states did not consider when they adopted statutes on homicide and self-defense. The judiciary, therefore, was not prepared to address the issue in any systematic fashion. The level of scholarly understanding and expertise in the area of battered women's criminal trials has grown and changed dramatically over a relatively short period.[211] This increased theoretical sophistication has paralleled popular attitudes about the fairness of the law's treatment of battered women, as the silence and stigma that have traditionally surrounded domestic violence slowly have given way to recognition of its pervasiveness across class lines.

A final reason for focusing on cases involving battered women is that they illustrate the way in which the principles of justice and mercy must *both* be considered in the decision to pardon. Clemency review must be comprehensive rather than merely based on mercy. While the plight of the battered woman seems tailor-made for a pure act of grace, these examples show that acts of executive mercy, uncoupled with justice-based factors, undermine both the integrity and constitutional purpose of executive clemency.

A. Scenario I: Discretionary Considerations of Clemency and the Quality of Mercy

Since taking office, Governor Wilson has granted clemency in three cases. In one case, the petition was brought posthumously on behalf of Jack Ryan, a man wrongly convicted 68 years earlier, and in two of the cases, the petitioners were battered women.[212] Governor Wilson granted

210. Since 1978, at least 102 battered women from 22 states have received clemency. In some cases, the petitioner's victimization as a battered woman was not the basis for the grant. *See* National Clearinghouse for the Defense of Battered Women, Battered Women Who Have Received Clemency: 1978-1996 (1996)(unpublished annotated bibliography) (on file with the National Clearinghouse of Battered Women). This annotated bibliography lists articles, cases and litigation materials relating to battered women.

211. *Id.* As of April 1996, the bibliography contained more than 2,000 listings, the overwhelming majority of which date from the 1980's and 1990's. *See, e.g.,* Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 (1991) (discussing the legal claim of self defense in cases of battered women who kill their abusers).

212. Dave Lesher, *Dead Man's Name Finally to Be Cleared*, L.A. TIMES, April 15, 1996, at A1.

clemency to Brenda Aris because he "sympathized with the pain and terror"[213] she suffered at the hands of her abuser. He granted clemency to 78 year-old Frances Caccavale because of her "advanced years and deteriorating medical condition."[214]

In both cases, the Governor's acts were motivated by his personal sympathy for these women, without concern for the application of the underlying law or the decision of the court that administered it. The use of clemency for reasons of mercy is not in serious debate, although, little attention has been given to what are proper considerations for a mercy based pardon.

The idea of a pardon for mercy may be misleading, for it suggests that it is proper for an executive to pardon someone simply out of pity. Justice Blackmun's dissent in *Herrera* highlighted the importance of comprehensive, rather than merely mercy-based, clemency review, "The vindication of rights guaranteed by the Constitution has never been made to turn on the unreviewable discretion of an executive official of administrative tribunal. . . .If the exercise of a legal right turns on 'an act of grace,' than we no longer live under a government of laws."[215] The history and development of the pardoning power in the United States and within the individual states make clear that there are standards that must be upheld in the exercise of pardons. When proper standards are overlooked, the integrity of the executive's act comes into question and public confidence is undermined. While compassion may have a proper role in the exercise of clemency, compassion alone is not enough to support a pardon.

Governor Wilson's pardon of Frances Caccavale on grounds of advancing age and failing health was presented as an act of mercy. Whether such a pardon is just, however, depends on the relative harshness of the punishment and the gravity of the offense in light of the circumstances. In weighing these considerations, it would be proper for the Governor to consider, for example, that a fifteen year prison sentence may be harsher on a prisoner not expected to survive the sentence, or on one whose physical condition would result in much greater suffering, than the identical sentence imposed on a younger prisoner in good health. It is also proper to consider the circumstances of the subject's crime. In Caccavale's case, Wilson's clemency review could have considered the acts of violence by the decedent over the four decades of their marriage and the probability that, but for her victimization as a battered woman, Caccavale would not have

213. Executive Decision, Hon. Pete Wilson, Governor of the State of California, In the Matter of the Clemency Request of Brenda Aris 5 (May 27, 1993) [hereinafter Executive Decision Aris].

214. Executive Decision, Hon. Pete Wilson, Governor of the State of California, In the Matter of the Clemency Request of Francis Mary Caccavale 5 (May 27, 1993). [hereinafter Executive Decision Caccavale].

215. Herrera v. Collins, 506 U.S. 390, 429-40 (1993) (J. Blackmun, dissenting) (citations omitted).

committed this crime. The Governor, unlike the courts, is in the unique position to consider these mitigating circumstances and is not bound by mandatory sentencing guidelines. Caccavale's pardon fits squarely within the tradition of pardons granted on grounds of mercy, not because she was a battered woman *per se* but because the justness of the result is proportionate to the gravity of the offense.

Governor Wilson's commutatuion of Brenda Aris' sentence was also grounded in mercy. Governor Wilson's sympathy for her "pain and terror . . . during the many episodes of violence"[216] may be a proper basis for a grant of clemency. His willingness to take into account the brutality she experienced at the hand of her victim involves an assessment of the justness of applying the mandatory penalty for second degree murder—fifteen years to life—to battering victims. The justness of Wilson's pardon therefore requires recognition of the special circumstances of battering cases. To the extent that a pardon rests on such grounds, similar review of the nature of any battering suffered should be extended on a routine basis to all prisoners in similar circumstances.

B. Scenario II: Mandatory Considerations of Clemency and the Demands of Justice

Clemency review should permit the governor to reach the merit of claims that courts cannot or will not address. This class of cases involves circumstances in which the judiciary has never ruled on the issue and cannot now act on the claim because the issue was subject to procedural default or some other procedural restriction of habeas review.[217] Clemency becomes extremely important in these cases where the criminal justice system has restricted its power to remedy injustices it has imposed. In fact, clemency review is mandatory where executive review corrects those defects in the criminal justice system that would render the system itself unjust.

Herrera combines these factors in their most compelling form. Herrera argued that new evidence demonstrated his innocence and that it would be a violation of due process to execute him. The Supreme Court held that it would not expand habeas jurisprudence to permit judicial consideration of new evidence, but that the result was neither unjust nor unconstitutional exactly because the governor could consider the new evidence on clemency review.[218] The Court's opinion suggests that if the pardoning power did not exist or if the executive *refused to exercise it*, the constitutionality and the justice of the existing restrictions on appellate and habeas review would be called into question.

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216. Executive Decision Aris 5.
217. *See supra* part III(B).
218. *Herrera*, 506 U.S. at 403-09.

Yet, this is exactly what happens under Governor Wilson's vision of limited clemency review: claims of judicial error subject to non-cognizability or procedural default bars go unaddressed. The case of Brenda Aris is again illustrative. The heart of Aris' case was her claim of self-defense, which was offered at trial, but limited because of the trial court's procedural rulings. She raised five claims of judicial error on direct appellate review and each was denied.

On clemency review, Governor Wilson granted a commutation but refused to revisit the appellate court's judicial determinations on any of the five claims of error. He then extended the commutation only as an act of mercy. Wilson's review of Aris' clemency petition in no way challenged the judicial determinations made by the court. It did not operate as a check or safety-net on judicial error. His grant of clemency was a purely subjective executive decision based on mercy alone. Governor Wilson's failure to exercise comprehensive clemency review was improper. The fail-safe role of clemency review cannot be fulfilled unless the governor is willing to entertain claims of judicial error denied appellate or habeas oversight.

At the trial of a battered woman raising a claim of self-defense against a charge that she murdered her abuser, the woman's experience with her batterer is crucial in determining whether she acted in self-defense. If evidence of battering is properly considered, the battered woman can reach the jury on the self-defense issue.[219] The self-defense claim, like the factual innocence claim presented in *Herrera*, is based on the notion that punishment under the circumstances is unjust because the defendant has committed no crime. If, after conviction, judicial review is barred because of non-cognizability or procedural default, the claimant cannot have the merits of her claim heard by the habeas courts. Unaddressed judicial error on a self-defense claim is no less compelling than an unaddressed factual innocence claim. In either case the executive should act to secure a just outcome by reviewing the actual merits of a claim that the courts, by law, cannot reach.

Such an executive review does not compromise judicial concerns of finality. Comprehensive clemency review, a purely executive act, does not threaten judicial finality; it is exercised in specific instances *because* judicial

219. In *Aris*, Battered Woman's Syndrome (BWS) was asserted as a basis for both a "perfect" self-defense claim (meaning that the defendant had a *reasonable* fear of imminent harm from the victim) and for an "imperfect" self-defense claim (meaning that the defendant had an *actual* and *honest* fear, reasonableness notwithstanding, of imminent harm from the victim). People v. Aris, 215 Cal. App. 3d 1178 (Cal. Ct. App. 1989).

The Court of Appeal in *Aris* upheld the trial court's decision not to instruct the jury on perfect self-defense because it found that no reasonable juror could conclude that a sleeping abuser poses an imminent threat to his partner. *Id.*, at 1192.

The court further held that while erroneous, it was harmless error for the trial court to have disallowed expert testimony on how BWS affected Brenda Aris' perception of danger because it was not "reasonably probable" that a jury could have found that Brenda honestly could have believed that her husband posed an imminent danger to her. *Id.* at 1199-1201. Governor Wilson's limited clemency review did not revisit BWS as a basis for either form of self-defense.

review is unavailable or impractical. Executive clemency places no additional burden on the courts. Nor are federalism concerns implicated because executive clemency is exercised by a state official.

Wilson's failure to revisit legal issues denied on post-conviction review is also improper because, by refusing to revisit the legal basis of a claim like Aris' self-defense claim, the Governor bypassed the opportunity to explore the ultimate justification for the executive pardon: the absence of actual guilt. A legal system that incarcerates innocent people is unjust. When exculpatory evidence is not presented or is presented poorly by incompetent defense counsel at the criminal trial, the prisoner only has one year after she exhausts her direct appeals to file a federal habeas petition. After the AEDPA's one year statute of limitations expires, the criminal justice system must rely heavily on executive review to free an innocent prisoner.

C. Scenario III: Discretionary Justice

In this final section, I analyze situations where courts may be constrained in their consideration of claims they can reach because of established legal rules, the principle of stare decisis, or judicial reluctance to revisit an issue that has already been decided. A factual or legal claim may be denied because it fails to meet an established legal standard, the application of which may be just in most contexts. In the exceptional case, however, the same claim can result in fundamental injustice. These cases are squarely within the traditional exercise of the clemency power, yet neither essential to the administration of justice, nor solely questions of mercy. These cases, like those in the previous section, involve the ultimate justice of the result. However, because they do not raise the same issues of institutional competence, the executive should act with greater caution. Aris' case and the cases of other battered women are again useful to illustrate three types of representative issues.

1. Evidentiary Rules that Preclude Consideration of Relevant Testimony

If the appellate court is precluded by law from considering evidence that is probative of the effect on jurors of trial court error, and if appellate consideration of that evidence might have led to a different conclusion about the integrity of the verdict, then the executive has a duty to consider the evidence in deciding whether to grant clemency. The executive may, of course, ultimately decide that no injustice was involved.

In Brenda Aris' clemency petition, she claimed that statements made by jurors during post-trial interviews, had they been considered, would have contradicted the appellate court's conclusion that the trial court's limitation of expert testimony was harmless.[220] Jurors' statements that the

220. "I was the juror in the case who argued that Brenda had battered-women syndrome [sic]. I felt, and vocalized to the jury, that we were not allowed to be told by psychologist Lenore Walker, author of *The Battered Woman*, that Brenda had [battered woman's

limitation on expert testimony had a significant impact on their verdict could have supported a finding of harmful error, but these statements could not be considered by the appellate court because the information was technically unavailable.[221] California Evidence Code 1150(a) limits the admission of evidence that may be considered in challenging the integrity of a jury verdict.[222] To protect the sanctity of the jury, a judge may not replay the deliberation process, because to do so would exceed the court's limited authority to invade the traditionally inviolate nature of the jury proceedings. Allowing an inquiry of that scope could open a Pandora's box of challenges to all criminal convictions.

While it is reasonable and perhaps necessary that the appellate courts' review of jury decisions be generally subject to such limitation, these restrictions can prevent meaningful review of the effect of trial error in circumstances such as in *Aris*, where evidence of the harmful effect was known. Strict application of California Evidence Code 1150(a) prevented the *Aris* appellate court from considering the statements of jurors that the verdict would have been different had the domestic violence expert been permitted to testify regarding her evaluation of the defendant.

In its ultimate impact, the court's inability to consider the juror statements in *Aris* is identical to the judicial refusal to consider new evidence in *Herrera.* In each case, procedural rules barred consideration of evidence relevant to the assessment of the accuracy of the guilty verdict. Like Herrera, Aris was not "left without a forum;" in theory, she had the full benefit of the age-old remedy of executive clemency. In reality though, when the Governor refused to consider the possibility of clemency on such grounds, there was no one left in the system to consider the compelling evidence that the trial court error was not "harmless" in the eyes of the jury.

Aris' assertion does not necessarily mandate a conclusion that the verdict in her case was wrong. The appellate court may have based its ruling of harmless error, not on prediction of juror sentiment, but on a conclusion that a reasonable jury, had it been able to consider the excluded expert testimony, should still have found that Aris did not meet the self-defense

syndrome]. The juror who wanted a 2nd degree conviction, told me I was wrong and argued we would have been told if she had. I discovered, after the trial, I was right. Judge Webster would not allow Ms. Walker to testify on the [sic] behalf of Brenda." Petition for Commutation, *supra* note 1, at 15-16. The expert would have testified that Brenda Aris suffered from "battered woman's syndrome and about how her experiences as a battered woman affected her state of mind at the time of the killing." *Aris*, 215 Cal. App. 3d at 1191.

221. *Aris*, 215 Cal.App.3d at 1200 n.6.

222. Under the California Evidence Code § 1150(a), evidence is limited to statements, conduct, conditions, or events open to sight, hearing, and the other senses that are likely to influence the verdict improperly. "No evidence is admissible to show the effect of such statement, conduct, condition or event upon a juror either in influencing him to assent to or dissent from the verdict." CAL. EVID. CODE § 1150(a) (West 1995).

requirement that the harm she feared was "imminent." The juror statements could be read to mean that Aris might have been *unjustifiably* acquitted but for the trial court error. Consideration of the evidence of the juror statements, even were it interpreted in the light most favorable to Aris, does not inescapably lead to the conclusion that the verdict was wrong or her sentence unjust.[223] The role of clemency in this context must involve determination of the larger question of whether the particular history of the case suggests an unjust result. In the context of that aspect of the clemency review, the jurors' statements should be considered together with the underlying issues of battered women's self-defense claims which are discussed below.

2. *Changing Mores, Understanding, and Information*

The determination of a just result varies not only with the evidence available to the trier of fact, but with the conceptual understanding of the nature of the offense and available defenses. When an English judge found four-year-old Katherine Passeavant guilty of murder, he did so in the context of a judicial system that did not yet recognize an infancy defense, and in a society that had yet to draw a legal distinction between the responsibilities of a child and an adult. In similar fashion, the defense claims of a battered woman require recognition of patterns of behavior and distinctive psychology that until recent years were largely unknown. The earliest study showing that a woman's perception may be influenced by the battering experience was published in 1979.[224] It was this study that laid the groundwork for the development of expert testimony.

In California, it was another ten years before the appellate court published *People v. Aris*.[225] Two years after *Aris*, the California legislature, with the support of Governor Wilson, adopted California Evidence Code § 1107, a section which specifically supports the propriety of admitting such testimony.[226] Of the thirty women represented by the California Coalition for Battered Women in Prison who petitioned Governor Wilson for clemency, twenty never had the benefit of expert testimony regarding what effect their experiences may have had on their perceptions at the time of the killing.[227] In those cases, there is no arguable claim of ineffective assistance of counsel because, at the time the cases were tried, there was no psychological data supporting such a claim.

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223. Harmful error found on appellate review results in reversal of conviction. A reversal is considered an order to a new trial unless the opinion states otherwise. *See, e.g.*, CAL. PENAL CODE § 1262 (West 1995).

224. LENORE E. WALKER, THE BATTERED WOMAN 61 (1979).

225. *Aris*, 215 Cal.App.3d 1178.

226. CAL EVID. CODE § 1107 (West 1995). The California legislature initially approved of the admissibility of expert witness testimony regarding battered woman's syndrome in 1991. *Id.*

227. Statistical information regarding petitions filed by CCBWP are on file with the author.

A battered woman whose case was tried before the psychological dynamics of battering relationships were understood is in the same position as a four-year-old in a judicial system that does not recognize an infancy defense. Neither the court nor the jury could consider what effect her battering experience may have had on her perception of danger. Moreover, to the extent that the system later recognized the relevance of a battered woman's experience, procedural rules bar courts from later consideration of the relevance of this evidence to her self-defense claim.[228] The only hope the criminal justice system holds out for this woman is executive clemency.

In Aris' case, the juror statements are compelling. Domestic violence and the effect it has on victims' experiences and perceptions are now better understood. To the extent that jurors in her case interpreted the trial court's limitation of expert testimony as a conclusion that Brenda was *not* a battered woman, they erred in a way that reflects not only their misunderstanding about the court's ruling, but unfamiliarity with the relatively new psychological dynamics of domestic violence. Although the appellate court did consider whether Aris was entitled to invoke self-defense in its conclusion that the trial court error was harmless, the Governor could have concluded that the combination of appellate court insensitivity and juror confusion was also a product of limited familiarity with battered women and their experiences.

Clemency based on considerations of evolving understanding does not necessarily raise the same institutional issues as *Herrera* because the judiciary in *Aris* was not barred from consideration of the issues. Nonetheless, to the extent that the executive concludes that a sentence is unjust and that the injustice resulted from changing standards or judicial confusion, clemency review is an appropriate response. Furthermore, if implementation of changing standards does result in radically inconsistent or arbitrary results, the issues might raise the types of institutional concerns that make clemency review mandatory.

3. *Executive, Legislative and Judicial Disagreement*

a. *The Governor v. The Courts*

Application of the pardoning power is not limited to purposes of mercy or to cases in which the appellate courts were otherwise constrained from reaching a just result. If an executive finds that the application of an established legal standard is inconsistent with principles of justice, the executive may exercise the pardoning power to correct the injustice. The executive may thus disagree with a judicial conclusion in an individual case and act on that difference, if the executive believes the result in the case was wrong.

228. *See supra* part III(C).

In some cases, very harsh results flow from judicial reluctance to expand existing legal standards. While it recognized that other jurisdictions have permitted expert testimony to address the ultimate question of a particular defendant's reasonableness in the exercise of defensive force, the court in *People v. Aris* refused to go that far itself.[229] Governor Wilson, however, had the power to disagree with the *Aris* court's judgment and to override it in that case. He could conclude, as have courts in other jurisdictions,[230] that expert testimony explaining the impact of a history of abuse can assist a jury's determination of the reasonableness of an abused woman's actions.[231] If the Governor disagrees with the Court of Appeal and concludes that Aris' actions were not criminal—or not criminal at the level of her affirmed conviction —he would be acting rightly within the scope of his power to grant clemency.

Such an act is improperly characterized as an act of executive conscience and a usurpation of the judicial process. The executive pardon is *always* an interference with judicial prerogative, and Governor Wilson's pardons of Aris and Caccavale are not exceptions. Though Wilson granted the pardons for the narrow reason that he took pity on the women, he overturned years of appellate decisions in granting them. Such an act is proper and is in keeping with the traditional purpose of clemency to correct injustice which was not remedied by the judicial process.

The executive is an extra-judicial actor who is not constrained by the evidentiary and procedural rules regulating the courts. While the executive may defer to the judicial system, he is not obliged to do so. Governor Wilson's liberal discretion under the pardoning power made him the only actor in a position to evaluate the juror statements in *Aris*. Clearly, his duty to

229. One of the key holdings of the Court of Appeal in *Aris* was its decision to uphold the trial court's refusal to instruct the jury on reasonable or "perfect" self-defense. The court found that there was not "substantial evidence" to support the defense and that no such instruction was required. The basis for this decision was the court's assumption that no "jury composed of reasonable men could have concluded that" a sleeping victim presents an imminent danger of great bodily harm." *Aris*, 215 Cal. App. 3d at 1192 (quoting People v. Flannel, 25 Cal. 3d 668, 684 (Cal. 1979)). In other words, the court concluded that it was factually impossible to satisfy the reasonableness requirement of perfect self-defense. Consistent with that conclusion, the court held that expert testimony on the reasonableness of Aris' conduct, the linchpin of "perfect" self-defense, was irrelevant. The court reasoned that Aris' subjective state of mind was not relevant to the reasonableness of her actions. *Aris*, 215 Cal. App. 3d at 1196-98.

230. *See Aris*, 215 Cal. App. 3d at 1198 n.5 (citing State v. Norman, 324 S.E. 2d 8, 11-12 (N.C. 1989) (finding defendant guilty of voluntary manslaughter based, in part, on testimony that defendant had BWS and it appeared "reasonably necessary" to her to kill her husband); State v. Stewart, 763 P.2d 572, 579 (Kan. 1988) ("BWS relevant to a determination of the reasonableness of the defendant's perception of danger"); State v. Leidholm, 334 N.W.2d 811 (N.D. 1983) (holding "BWS" testimony relevant to reasonableness of perception of imminent danger).

231. A defendant's prior experience with the victim of a homicide is admissible in any criminal case when a claim of self-defense is raised. *See, e.g., In re* Christian S., 13 Cal. Rptr. 2d 232 (Cal. 1992).

review the case does not carry a corresponding obligation to grant clemency. The pardoning power simply provides the opportunity to affect the outcome of a case if, after the review required by the constitution, the Governor concludes that the conviction was unjust. In *Aris*, Governor Wilson had the power to consider critical information which the Court of Appeal could not. The jurors' statements, at a minimum, undercut certainty that the trial court error was harmless. They demonstrated that, had the erroneously excluded expert testimony been admitted, at least two jurors would have concluded that Aris' fear was informed by her status as a battered woman who honestly feared her abuser. This would have been sufficient to find imperfect self-defense (on which jury instructions were given) and preclude a conviction of murder in the second degree.[232] The highest verdict likely would have been manslaughter.

b. The Governor v. The Legislature

A more profound separation of powers issue is raised by the question of whether the executive has the power to substitute his or her own judgment for that of the legislature. Does the constitution permit the Governor to grant clemency to all battered women tried without the benefit of expert testimony, regardless of the underlying circumstances? Could he take such action even where the legislature has already determined that such evidence is inadmissible? If the governor were personally opposed to the death penalty, could he simply refuse to execute all prisoners on that basis alone?

The short answer to all of these questions is "yes." There are no formal limitations on the pardoning power. The executive power to pardon plays an institutional role in determining policy as well as in dispensing justice and mercy.[233] The answer however, is not uncomplicated in its implications. Executive exercise of the pardoning power is most controversial where it directly contradicts legislative decision-making. The executive's power to grant clemency on such a basis should be exercised with caution, with the recognition that he is substituting his own preferences for those of the legislature on broad issues of public policy. While the constitutional provisions providing for clemency permit such a result,[234] the executive act can be equivalent to a veto or executive nullification. To the extent the

232. Governor Wilson's failure to reconsider the harmless error issue in *Aris* is particularly troubling given the fact that federal habeas courts use a less demanding harmless error standard than the "harmless beyond a reasonable doubt" standard used on direct review. *See supra* text accompanying notes 191-92. Habeas corpus, therefore, is hardly a safety-net for petitioners on harmless error issues.

233. A pardon granted to all war resistors or rebels engaged in an insurrection is an example of policy-setting pardoning not only permitted, but endorsed by the founding fathers. *See supra* Part I(B)(1).

234. *See supra* Parts III(B) and (C).

Governor acts on policy grounds, he should be especially prepared to defend the decision in the political arena.

CONCLUSION

Pardons are too often mischaracterized as acts of mere personal or political opinion. The reality is that the power to pardon serves a critical, constitutionally-required role within the criminal justice system. A restricted definition of the pardoning power exacerbates public misconceptions and undermines the integrity of this important constitutional allocation of power to the executive branch. In Brenda Aris' case, Governor Wilson's decision emphasized that clemency was extended as an act of mercy, an act properly within his discretion.[235] Pardons based on mercy may also be just. However, Governor Wilson's statement that mercy and factual innocence are the only justifications for which a pardon may be granted devalued the pardoning power and perpetuated public confusion about its constitutional purpose.

The Governor characterized his refusal to revisit legal issues as deference to the judicial process. He was wrong. His refusal is, in fact, a refutation of a system of criminal justice in which judicial actions are the major, but not the only, part. Although his stance may well be motivated by an understandable fear of political repercussion, such a concern does not justify his failure to fulfill a responsibility of his office. Public understanding of the true nature and role of the pardoning power should be promoted by governors who wish to insulate the executive office from the political fallout that has often surrounded the misunderstood exercise of that power.

By granting clemency to 78-year-old Frances Caccavale, reducing by three years the fifteen-to-life sentence of Brenda Aris, and posthumously pardoning Jack Ryan, Governor Wilson acknowledged that mercy and innocence were proper grounds for the exercise of clemency. These were narrowly defined —and almost risk-free from a political standpoint —acts of clemency. Ironically, while a grant of clemency to address an appellate failure may appear more politically dangerous, this use of the pardoning power has a more compelling justification than a discretionary act of mercy. In Aris' case, the Governor should have recognized and explained that, while the Court of Appeal acted properly in applying the harmless error standard, he was nonetheless compelled to reach an independent determination on the basis of information the court could not consider. Pardons under these circumstances, as when doors to habeas corpus relief are closed to prisoners, should be the subject of informed public discussion that can protect an executive from political backlash. As Justice Rehnquist made clear in the majority opinion in *Herrera*, the Governor is the only person in the position to rectify wrongs in these contexts.

235. Petition for Commutation, *supra* note 1, at 25-28.

Even a well-founded concern for his or her own political future does not justify narrowing an executive's role in the pardoning process. Governor Wilson's total refusal to consider the legal issues presented by Aris' petition was rooted in an incorrect view of his obligations. When clemency review is limited to considerations of mercy, the public image of a pardon as an arbitrary executive act, unrelated to justice, is reinforced. This is particularly disturbing when it marginalizes the petitioner's innocence. Wilson granted a commutation to Aris only because he took pity on her, without regard to the question of whether she was wrongly convicted. If her conviction was wrong, Aris owes no debt to society. Her continued incarceration and separation from her children and the severe social stigma of a murder conviction are a continuing injustice. This distinction has been disavowed by Governor Wilson's restricted definition of the pardoning power. Wilson's position is without constitutional or moral basis.

The Governor's duty to serve the ends of justice does not change based on the source of the injustice. The fact that a question has already been litigated does not make rectifying an injustice any less compelling. Trial error unremedied by appellate court review is perhaps most worthy of executive redress. Clemency in such situations responds to a institutional failure —it functions as a procedural safety-net.