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Do the Paperwork or Die: Clemency, Ohio Style?

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*God forbid the king should use any more such mercy to any of my friends,
and God bless all my posterity from such pardons.*

—Sir Thomas More¹

*The last temptation is the greatest treason:
To do the right deed for the wrong reason.*

—T. S. Eliot²

I. INTRODUCTION

Upon his conviction for high treason for denying the supremacy of King Henry VIII, Sir Thomas More was sentenced to be drawn on a hurdle through London, after which he was to be hanged until he was “half dead,” and then cut down alive to have “his privy parts cut off, his belly ripped, his bowels burnt, his four quarters set up over four gates of the city, and his head upon London-Bridge.”³ By the pardon of the King, More’s sentence was changed to simple beheading, prompting Sir Thomas “merrily” to importune the heavens that his friends and progeny be spared from similar acts of mercy.

Today, the state of Ohio accomplishes capital punishment by electrocution rather than drawing and quartering, but the clemency power⁴ remains largely

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¹ T. HOWELL, *Trial of Sir Thomas More*, in STATE TRIALS 385, 394 (1535).

² T. S. ELIOT, MURDER IN THE CATHEDRAL 44 (Centenary ed. 1988).

³ See HOWELL, *supra* note 1, at 394.

⁴ Pardon, commutation, and reprieve are the three varieties of clemency specifically recognized, but not defined, in the Ohio Constitution. OHIO CONST. art. III, § 11.

unchanged from More's day, a vestige of the royal pardoning prerogative.⁵ So, perhaps it is not surprising that for some of the prisoners on Death Row, recent grants of executive clemency have turned out to be a decidedly mixed blessing—a blessing that they may one day wish they had been spared.

At the close of his second term, former Ohio Governor Richard Celeste granted clemency to sixty-eight individuals.⁶ Many of the cases were controversial, with Celeste being alternately praised and vilified for reducing the punishments of, among others, twenty-five battered women who had killed or assaulted their purported abusers,⁷ eight condemned murderers,⁸ a famous country-western singer,⁹ and an embezzler of hundreds of thousands of dollars.¹⁰ Unfortunately for eleven of those clemency recipients, including seven of the prisoners on Death Row, Celeste intentionally deviated from normal procedures and did not file applications for clemency with the Ohio Adult Parole Authority [hereinafter "the APA"] prior to remitting punishment. This irregularity has become the basis for an unprecedented legal challenge by the Ohio attorney general to invalidate the governor's acts of clemency and reinstate the prisoners' original punishment.¹¹ Thus, these would-be commutees remain suspended, limbo-like,

⁵ See generally C. JENSEN, *THE PARDONING POWER IN THE AMERICAN STATES* 1-15 (1922) (describing the transplantation from England of the royal clemency power into the executive branch of most state governments).

⁶ Mahoney, *List of Celeste Pardons, Commutations Grows to 68*, *Cleveland Plain Dealer*, Feb. 16, 1991, at 1A, col. 2.

⁷ Johnson, *25 Women Granted State's Clemency*, *Columbus Dispatch*, Dec. 22, 1990, at 1A, col. 1.

⁸ *At End of Term, Ohio's Governor Commutes Death Sentences for 8*, *N.Y. Times*, Jan. 12, 1991, at A12, col. a1.

⁹ *Celeste Orders Paycheck Freed*, *Columbus Dispatch*, Jan. 11, 1991, at 5B, col. 1 (reporting the commutation of what Celeste termed the "unbelievably harsh" sentence of singer Johnny Paycheck, who was serving seven-to-nine-and-one-half years for the 1985 shooting of a bar patron).

¹⁰ Larkin, *Ex-Con Awaits Answer to the \$164 Question*, *Cleveland Plain Dealer*, Mar. 3, 1991, at B1, col. 1 (reporting on the release of Eric Solowitch, who stole \$432,000).

¹¹ *N.Y. Times*, Jan. 30, 1991, at 16A, col. 3 (describing Attorney General Lee Fisher's filing of a law suit in Franklin County Common Pleas Court challenging the commutations issued by Celeste to 11 prisoners).

The eleventh-hour acts of clemency have also prompted legislative efforts to limit the clemency power, including a proposed constitutional amendment that would restrict the governor's power to commute sentences in the last 90 days of his term. Miller, *Legislation Would Limit Governor's Commutation Power*, *Cleveland Plain Dealer*, Mar. 5, 1991, at 3B, col. 1.

wondering whether the governor's failure to process the paperwork will lead ultimately to their execution.

In addition to its effect in human terms on the recipients of the governor's mercy, the spate of last-minute pardons and commutations issued by Celeste raises intriguing legal questions about the responsible use of clemency and its role in our system of justice. In the view of some, Celeste properly carried out the duties of his office by exercising mercy in deserving cases.¹² Indeed, Celeste may well have been in the vanguard of a national movement toward commuting the sentences of abused women. Following Celeste's lead, Governor Schaefer of Maryland granted clemency to eight women convicted of killing or assaulting men who had battered them, and efforts to seek clemency for women in similar circumstances are now under way throughout the country.¹³

Nevertheless, outrage over Celeste's remissions of punishment predominated and has led to the crisis in the clemency power on which this article will focus. Newspaper editorials criticized Celeste's "sad and sorry performance, an exercise of arrogance, if not outright contempt" for the citizens of Ohio.¹⁴ Prosecutors found his decisions "outrageous," while one

¹² See, Underwood, *97 Left on Ohio's Death Row*, Cleveland Plain Dealer, Jan. 20, 1991, at 3C, col. 1 (supporting Celeste's commutation of the death sentences of eight Ohio prisoners).

¹³ Lewin, *More States Study Clemency for Women Who Killed Abusers*, N.Y. Times, Feb. 21, 1991, at A19, col. 1 (reporting that similar clemency initiatives are being pursued in Arizona, New York, Texas, and Washington).

¹⁴ *Killers Spared*, Columbus Dispatch, Jan. 14, 1991, at 8A, col. 1. The editors of the Columbus Dispatch excoriated Celeste:

Celeste, in effect, is thumbing his nose at the majority, who support capital punishment for heinous crimes. As an avowed opponent of capital punishment, the departing governor has abused flagrantly the authority of his public office in order to impose his private vision of justice. It is a sad and sorry performance, an exercise of arrogance, if not outright contempt.

Id.

A Cleveland Plain Dealer editorial likewise criticized the manner in which Celeste wielded the clemency power, particularly his ignoring the unfavorable recommendation of the Ohio Parole Board in 10 of the 25 cases involving women claiming to suffer from "battered woman syndrome." *O, My Darling Clemency*, Cleveland Plain Dealer, Dec. 22, 1990, at 8B, col. 1.

legislator said that the governor had "set himself above" the other branches of government and had "callously ignored" the families of crime victims.¹⁵

This tide of public dissatisfaction with the clemency power gave rise to efforts on several fronts to curb the governor's authority to remit punishments. Celeste's successor, George Voinovich, heeded the hue and cry and sought to have the death penalty commutations invalidated. A staunch supporter of capital punishment, Voinovich directed his staff and the newly elected attorney general to find some means to "potentially stop the commutations" granted by Celeste to condemned prisoners.¹⁶ Attorney General Lee Fisher, along with several other public officials, promptly instituted law suits¹⁷ designed to establish that the governor can never grant clemency without application having first been made to the APA, a body charged by statute with investigating clemency applications.¹⁸ Not to be outdone, several state senators proposed an amendment to the Ohio Constitution that would clip the wings of "lame duck" governors by preventing them from commuting any death sentence during the 90-day period prior to the expiration of their final term of office.¹⁹ Another

¹⁵ Lane, *Celeste Commutes Eight Death Sentences*, Cleveland Plain Dealer, Jan. 11, 1991, at 1A, col. 1 (quoting former prosecutor Michael J. Corrigan and state senator Eugene Watts).

¹⁶ Johnson, *Voinovich Wants Clemencies Undone*, Columbus Dispatch, Jan. 19, 1991, at B1, col. 1 (quoting Curt Steiner, communications director for the governor).

¹⁷ *Ney v. Governor of Ohio*, 58 Ohio St. 3d 602, 567 N.E.2d 986 (1991) (filed by Hamilton County Prosecutor Arthur Ney); *Wilson v. Maurer*, No. 91-CVH01763 (C. P. Franklin County, Ohio filed Jan. 29, 1991) (filed by Attorney General Lee Fisher). See also Underwood, *Fisher Asks Court to Void Pardons of 7 on Death Row*, Cleveland Plain Dealer, Jan. 30, 1991, at 1B, col. 5 (reporting Attorney General Lee Fisher's attempt to invalidate 11 of the commutations granted by Celeste); *Senator Asks for Repeal of Death Row Clemencies*, Cleveland Plain Dealer, Jan. 26, 1991, at 4B, col. 3 (reporting the intention of state senator Richard Finan and Hamilton County Prosecutor Arthur Ney to file an action in the Ohio Supreme Court blocking the commutations).

¹⁸ OHIO REV. CODE ANN. § 2967.07 (Anderson 1987) (requiring that applications for clemency be made to the Adult Parole Authority, which must conduct a thorough investigation into whether clemency should be granted and make a non-binding recommendation to the governor).

¹⁹ S.J. Res. 1, 119th Ohio Gen. Ass., Reg. Sess. (1991) [hereinafter Ohio Senate Res. 1]. The joint resolution proposes that the following language be inserted into Article III, § 11 of the Ohio Constitution, following the first sentence:

However, in the case of a convict who has been sentenced to death, the Governor shall not have the power to grant a commutation during the ninety-day period prior to the expiration of a term of his office for which he is prohibited from seeking or for which he has failed to seek re-election, or from the time he fails to win re-election until the

legislator introduced a bill that would require the governor, at least three days prior to commuting a death sentence, to give notice of the pending commutation to the prosecuting attorney, the common pleas judge in the county in which the indictment was found, and a member of the immediate family of the victim.²⁰

Each of these efforts to limit the clemency power of the governor is fraught with problems that threaten to undermine the proper role of clemency in our system of justice. Because clemency is an arcane, misunderstood, yet politically-explosive power of the executive, it is hardly surprising that these hurried efforts to "fix" it are flawed in one way or another. The perception, however, that there is something wrong with how the clemency power has been wielded by our governors is, I believe, an accurate one.

In this article I will examine recent uses of the clemency power and efforts to curb that power in light of the constitutional and statutory provisions which vest that power in the office of the governor. First, I will look at the evolution of the clemency provisions of the Ohio Constitution and at the statutory provisions that have been enacted with respect to clemency. These provisions, as well as the manner in which they have been implemented by various governors and by the APA, will then be discussed relative to the various attempts to limit the power of clemency currently being considered. Finally, I will consider several possible approaches that could be used to refine the clemency power, while still retaining its status as a meaningful check on the excesses of the judiciary and the legislature.

II. CLEMENCY PRACTICE AND PROCEDURE IN OHIO

Because a certain imprecision in terminology exists in much of the literature and in many of the cases dealing with the clemency power, a short exposition of the terms I will be using throughout this article is necessary. Although the term "clemency" is sometimes used as a synonym for all manifestations of mercy, I will use it to denote leniency or mercy *in the exercise of authority or power*. Thus, "clemency" refers to the forms of leniency extended by various branches of government, most often the

expiration of his term of office.

²⁰ H.B. 212, 119th Ohio Gen. Ass., Reg. Sess. (1991).

executive,²¹ to remit the punishment of those who have either broken the laws, or who are suspected of having done so.

Pardon, commutation, and reprieve are the three varieties of clemency specifically recognized, but not defined, in the Ohio Constitution.²² An early decision of the Ohio Supreme Court construed the terms "pardon" and "reprieve," as used in the constitution, as having the same meaning and effect as were given to those terms under the laws of England, from which our constitutional provisions have been "borrowed and adopted."²³

It is not uncommon for courts and commentators to use "pardon" as a synonym for "clemency" when referring to the general power to remit punishment.²⁴ The term "pardon," however, more accurately is used, as it is in the Ohio Constitution, to designate that discrete type of clemency which provides the most sweeping remission of the consequences that normally attend violation of the law.²⁵ A pardon wipes out both the punishment and

²¹ The Ohio Supreme Court has held that the legislature also may grant some forms of clemency, since the grant in the Ohio Constitution "of the pardoning power to the Governor is not a limitation on the General Assembly's power to pardon." *State v. Morris*, 55 Ohio St. 2d 101, 108-09, 378 N.E.2d 708, 713 (1978) (upholding the power of the Ohio General Assembly to create new sentencing guidelines under which previously convicted criminals could apply for reductions in sentences). *See generally* 3 U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 102-22 (1939) [hereinafter SURVEY] (discussing theoretical justifications for the legislature's power to grant clemency).

²² OHIO CONST. art. III, § 11.

²³ *Sterling v. Drake*, 29 Ohio St. 457, 460 (1876).

²⁴ *See, e.g., Morris*, 55 Ohio St. 2d at 105, 378 N.E.2d at 713 (characterizing the power to reduce penalties and grant amnesties as being within "the power to pardon").

²⁵ Indeed, some of the confusion in terminology may be traceable to the fact that the United States Constitution, unlike the Ohio Constitution, mentions "pardons and reprieves," but not commutations. U.S. CONST. art. II, § 2 ("The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in cases of Impeachment"). The president's power to commute sentences has been held to derive from the express constitutional power to "grant Reprieves and Pardons," *Schick v. Reed*, 419 U.S. 256, 260 (1974), thus making the granting of commutations truly part of the "pardoning power." The drafters of the 1851 Ohio Constitution were more precise in their terminology and specifically distinguished pardons, commutations, and reprieves. OHIO CONST. art. III, § 11 ("[The governor] shall have power, after conviction, to grant reprieves, commutations, and pardons"). Nevertheless, the longstanding use of the term "pardoning power" to refer to the *federal* authority to grant pardons, commutations, and reprieves could explain why a number of state courts, including some in Ohio, have sometimes used the term "pardon" to include all varieties of clemency. *See, e.g., Licavoli v. State*, 20 Ohio Op. 562, 568, 34 N.E.2d 450, 456 (Ct. App. 1935) (referring to the executive's constitutional power to grant reprieves, commutations, and pardons as

the guilt of the offender, effectively resulting in "a reversal of judgement, a verdict of acquittal."²⁶ Pardons may be absolute or conditional and may be granted only after conviction.²⁷

Commutation is a more limited form of clemency than pardon. It merely means that a lesser penalty has been substituted for the original punishment, regardless of whether the offender consents to the mitigation of punishment.²⁸ Commutations are typically granted to shorten the offender's sentence to time already served or to make him immediately eligible for parole.²⁹

The third form of clemency mentioned in the Ohio Constitution is reprieve, the most limited type of executive mercy. A reprieve temporarily suspends execution of a sentence and may be granted without the consent of the offender.³⁰ A reprieve postpones execution of the sentence for a specified time period. Usually it is used to give the offender an opportunity to complete pending appeals or other pleas for relief from the sentence.

Parole is not discussed in this article because it is not a form of clemency.³¹ Rather, it is an "established variation on imprisonment of convicted criminals" characterized by the conditional extension of certain freedoms.³² The United States Supreme Court has explicitly distinguished parole from "an *ad hoc* exercise of clemency."³³

the "pardoning power"); *Guy v. Utecht*, 216 Minn. 255, 260, 12 N.W.2d 753, 756 (1943) (relying on federal constitutional caselaw for the proposition that the power to commute sentences is part of the pardoning power); *In re Court of Pardons*, 97 N.J. Eq. 555, 560-61, 129 A. 624, 626-27 (N.J. Ct. Pardons 1925) (relying on federal constitutional caselaw to conclude that the power to pardon includes the power to commute or remit sentences).

²⁶ *Knapp v. Thomas*, 39 Ohio St. 377, 381 (1883); *see also State ex rel. Attorney-General v. Peters*, 43 Ohio St. 629, 650, 4 N.E. 81, 87 (1885).

²⁷ OHIO CONST. art. III, § 11.

²⁸ *See In re Victor*, 31 Ohio St. 206, 207 (1877).

²⁹ *See R. GOLDFARB & L. SINGER, AFTER CONVICTION* 344 (1973).

³⁰ *See Sterling v. Drake*, 29 Ohio St. 457, 464 (1876) (a reprieve "does not annul the sentence, but merely delays or keeps back the execution of it, for the time specified").

³¹ *See State ex rel. McKee v. Cooper*, 40 Ohio St. 2d 65, 68, 320 N.E.2d 286, 289 (1974) (parole "is not a full release, nor is it a form of leniency").

³² *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972).

³³ *Id.*

A. *The Evolution of the Clemency Power in the Ohio Constitution*

The power to remit punishment is vested in the governor by the Ohio Constitution. The Northwest Ordinance, which governed the territory that was to become Ohio, did not contain any provision for executive clemency.³⁴ Ohio's original constitution, drafted and adopted in 1802 when Ohio became a state, however, allocated the clemency power to the executive using language that was very similar to that contained in the federal Constitution.³⁵ Former article II of the 1802 Ohio Constitution provided that the governor "shall have the power to grant reprieves and pardons, after conviction, except in cases of impeachment."³⁶

Although there is no indication why the framers of the original Ohio Constitution vested a power of clemency in the executive, it seems likely that the power was given to the governor for reasons similar to those that led to the vesting of the federal clemency power in the president.³⁷ Proponents of the presidential clemency power had argued that it would serve two distinct purposes. First, the executive clemency power acted as a check on the legislative and judicial branches by permitting the president to rectify injustices that might result from inflexible adherence to the law.³⁸ Second,

³⁴ AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE RIVER OHIO, (July 13, 1787), *reprinted in* OHIO CONSTITUTION HANDBOOK 621 (T. Swisher ed. 1990).

³⁵ U.S. CONST. art. II, § 2. The United States Constitution provides that the President "shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." *Id.*

³⁶ OHIO CONST. OF 1802, art. II, § 5, *reprinted in* OHIO CONSTITUTION HANDBOOK, *supra* note 34, at 613.

³⁷ *See generally* Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 501-06 (1977) (recounting the drafting of the federal clemency provision); Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 589-92 (1991) (discussing the various rationales advanced in support of the federal clemency power).

³⁸ *See* THE FEDERALIST No. 74, at 447-49 (A. Hamilton) (C. Rossiter ed. 1961) (arguing that the "benign prerogative of pardoning" should be as little fettered as possible so that exceptions in favor of "unfortunate guilt" could be made).

See also Address by James Iredell, North Carolina Ratifying Convention (July 28, 1788) [hereinafter Iredell Address], *reprinted in* 4 THE FOUNDERS' CONSTITUTION 17-18 (P. Kurland & R. Lerner ed. 1987). Mr. Iredell, in defending the presidential clemency power, argued:

[T]here 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

the clemency power was vested in the executive to permit him to pursue ends beneficial to the state, such as the quelling of rebellions,³⁹ the procurement of testimony from accomplices of criminals,⁴⁰ and the protection of spies.⁴¹ Presumably, many of the drafters of the Ohio Constitution of 1802 were familiar with the arguments advanced during the federal constitutional debate of fifteen years earlier and heeded them in allocating the clemency power to the governor. Ohioans, however, were not long content with a constitution that mirrored the federal clemency provision.

When a new Ohio Constitution was adopted in 1851, the provision concerning clemency was expanded into its current form:

He shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as he may think proper; subject, however, to such regulations, as to the manner of applying for pardons, as may be prescribed by law. Upon conviction for treason, he may suspend the execution of the sentence, and report the case to the general assembly, at its next meeting, when the general assembly shall either pardon, commute the sentence, direct its execution, or grant a further reprieve. He shall communicate to the general assembly, at every regular session, each case of reprieve, commutation, or pardon granted, stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon, or reprieve, with his reasons therefor.⁴²

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 very great injustice. For this reason, such a power ought to exist somewhere; and 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?

Id.

³⁹ THE FEDERALIST NO. 74, *supra* note 38, at 449.

⁴⁰ Iredell Address, *supra* note 38, at 18.

⁴¹ *Id.*

⁴² OHIO CONST. art. III, § 11. This section is virtually identical to clemency provisions that had been added to the constitutions of the states of New York, Wisconsin, and Michigan during the five years prior to the drafting of the Ohio Constitution. *See* 5 F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2660 (1909) (Constitution of New York, 1846); 7 *id.* at 4084 (Constitution of Wisconsin, 1848); 4 *id.* at 1952 (Constitution of Michigan, 1850). The California Constitution of 1849 also contained language very similar to that found in the Ohio Constitution, except that California did not grant the governor the power to grant commutation until it enacted the California

This revision both broadened and constricted various aspects of the governor's power. It made clear that the clemency power extends not merely to pardons and reprieves, but to commutations as well. The revision also explicitly authorized the governor to attach to a grant of clemency any conditions that he⁴³ thought proper.⁴⁴

The new section, however, placed some constraints on the governor as well and created a role for the legislature in the clemency process. Treason was added to the category of cases excepted from the executive's prerogative of clemency, with the power to grant mercy in such cases being vested in the General Assembly. Article III, section 11, also provided that the executive's power to remit punishment was "subject . . . to such regulations, as to the manner of applying for pardons, as may be prescribed by law."⁴⁵ Finally, the new clemency provision contained a disclosure requirement, forcing the executive to provide the General Assembly with the names of the clemency recipients, their sentence and crime, as well as the reasons for granting clemency.

Relatively little constitutional history exists to indicate the precise intentions of the drafters with respect to each of these provisions. The only reported discussion of article III, section 11, by its drafters is found in the *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio*.⁴⁶ During that exchange, the drafters of the constitution focused most of their attentions on the disclosure requirement contained in the last sentence of the section.

Delegate McCormick moved to delete the provision requiring the governor to report to the General Assembly all acts of clemency. Speaking in support of the McCormick motion, Delegate Larwill asserted that:

Constitution of 1879. 1 *id.* at 398, 430 (Constitutions of California, 1849, 1879).

⁴³ Throughout this Article, I will use masculine pronouns to refer to people in a generic sense or in hypothetical situations. Since no gender-neutral pronoun that I find satisfactory has yet found its way into common, or legal, usage, I have decided that it is less distracting to alternate between masculine and feminine pronouns from article to article rather than from sentence to sentence within a particular piece.

⁴⁴ By contrast, the ability of the president to attach any condition he desires to a grant of clemency was not established unequivocally until 1974, when the United States Supreme Court held that the executive can attach any condition that "does not otherwise offend the Constitution." *Schick v. Reed*, 419 U.S. 256, 266 (1974).

⁴⁵ OHIO CONST. art. III, § 11.

⁴⁶ 1 J.V. SMITH, REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 306-07 (1851) [hereinafter OHIO DEBATES]. The complete discussion by the delegates of the clemency power contained in the OHIO DEBATES is reproduced in the Appendix accompanying this article. That discussion occurred in Columbus, Ohio, on June 5, 1850.

[T]he information communicated would not be of any great amount ultimately. The Governor would no doubt have good reasons for exercising the pardoning power, and [Mr. Larwill] supposed would at all times be willing to communicate to the Legislature his reasons for so doing, when it was desired.⁴⁷

The majority of the delegates evidently did not share Mr. Larwill's confidence in the governor, however, and the argument favoring some accountability in the exercise of the clemency power carried the day. Delegate Riddle, in the only reported explanation of why the disclosure requirement was added, noted that its purpose was to prevent clemency abuses by the governor:

The committee inserted [the disclosure] clause into the report for the purpose, that the legislature at its annual or biennial sessions might know what the Governor had done during the vacation in the exercise of the pardoning power. It was known that the exercise of that power was much complained of. They all knew in what manner petitions were got up—it was an easy matter to get them up, as every one knew—it was but too easy to excite the sympathies of men in behalf of the convicted criminal. Gentlemen of the committee were aware from their own experience that they had often put their names to papers soliciting reprieves and pardons on the representation of persons, in whom they had confidence. They knew also that persons in the same manner might influence the governor; and they further knew that on the strength of that influence brought to bear on him, by the names of persons standing high in society he often exercised that power in instances in which the public could not see any propriety. The power, no doubt, had been abused, but when they looked into the entire matter they would find that no blame could be attached to the Governor. He knew that in the county he in part represented, many persons had *been convicted*, at a great expense, of counterfeiting and grand larceny; well, a few weeks passed by and then they found those counterfeiters and burglars walking about the streets of the city. When they inquired into the matter, it was found that they were pardoned, and probably they found that the jury who convicted them, through sympathy for their families, respectable lawyers, and sometimes the judges of the Bench, had put their names to petitions for their pardon. This section would prevent parties from putting their names to such documents indiscriminately. These were the reasons which induced the committee unanimously to report the section as it stood.⁴⁸

⁴⁷ *Id.* at 307.

⁴⁸ *Id.* at 306–07.

The majority of the convention then rejected McCormick's motion and retained the requirement that the governor communicate to the General Assembly all uses of the clemency power.⁴⁹

It is also helpful in understanding the Ohio clemency provision to compare it with the analogous provision adopted by Indiana in the same year.⁵⁰ The Indiana Constitution was reviewed by the Ohio convention delegates while they were drafting the Ohio charter⁵¹ and contained a clemency provision that resembled article III, section 11, of the Ohio Constitution.⁵² The many similarities in the language of the two provisions and the virtual simultaneity of their adoption makes it reasonable to assume that the Ohio delegates were conscious of the points at which their proposed constitution diverged from that of their Hoosier counterparts. Specifically, article III, section 11, of the

⁴⁹ *Id.* at 307.

⁵⁰ The Ohio and Indiana constitutional conventions were held at virtually the same time in 1850 to 1851. The Ohio convention began on May 6, 1850, in Columbus and concluded in Cincinnati on March 10, 1851. I. PATTERSON, *THE CONSTITUTIONS OF OHIO* 100 (1912). The Indiana constitutional convention began on October 7, 1850, and ended on February 10, 1851, in Indianapolis. *JOURNAL OF THE CONVENTION OF THE PEOPLE OF THE STATE OF INDIANA*, reprinted in *CONVENTION JOURNAL 1850* (Fort Wayne 1936).

⁵¹ OHIO DEBATES, *supra* note 46, v.2 at 81.

⁵² Article V, section 17, of the 1851 Indiana Constitution contained language similar to that ultimately adopted in Ohio:

He shall have the power to grant reprieves, commutations, and pardons, after conviction, for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law. Upon conviction for treason, he shall have power to suspend the execution of the sentence until the case shall be reported to the General Assembly at its next meeting, when the General Assembly shall either grant a pardon, commute the sentence, direct the execution of the sentence, or grant a further reprieve. He shall have power to remit fines and forfeitures, under such regulations as may be prescribed by law, and shall report to the General Assembly at its next meeting, each case of reprieve, commutation or pardon granted, and also the names of all persons in whose favor remission of fines and forfeitures shall have been made, and the several amounts remitted: *Provided, however*, that the General Assembly may, by law, constitute a council, to be composed of officers of State, without whose advice and consent the Governor shall not have power to grant pardons, in any case, except such as may, by law, be left to his sole power.

2 F. THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA* 1082 (1909) (Constitution of Indiana, 1851). See also OHIO CONST. art. III, § 11 (1851), quoted *supra* text accompanying note 42.

Ohio Constitution omitted a provision found in the Indiana Constitution that allowed the legislature to create a council that could veto gubernatorial clemency decisions.⁵³ The Indiana Constitution, unlike Ohio's, also granted the executive the power to remit fines and forfeitures.⁵⁴ Finally, the Indiana Constitution made the power to remit fines and forfeitures subject to "such regulations as may be prescribed by law,"⁵⁵ while the Ohio Constitution made the governor's clemency power subject to legislative regulation only "as to the manner of applying for pardons."⁵⁶ All in all, the Ohio constitutional provision governing the clemency power accorded substantially greater power to the executive, relative to the legislature, than did the provision adopted contemporaneously in Indiana.

Still, the revised version of the clemency power included in the 1851 Ohio Constitution was at least partly aimed at assuring that the legislature would have some role in monitoring the exercise of the executive clemency power.⁵⁷ The Ohio Supreme Court has noted that the thrust of the reporting requirement was to permit the legislature to apply "moral pressure on the Governor to cautiously exercise his power to pardon," though this "does *not* imply that the General Assembly may interfere with the discretion of the Governor in granting pardons."⁵⁸

It is this legislative role, particularly as to the manner of applying for pardons, that has been the primary focus of several attempts to limit the governor's clemency power, which was mentioned earlier. Thus, in order to understand the scope of the clemency power, and also clarify this recondite procedure, it is necessary to examine the statutes and regulations that pertain to the clemency power.

⁵³ The relevant language in Article V, section 17, of the 1851 Indiana Constitution provided "[t]hat the General Assembly, may, by law, constitute a council to be composed of officers of State, without whose advice and consent the Governor shall not have power to grant pardons, in any case, except such as may, by law, be left to his sole power." 2 F. THORPE, *supra* note 52, at 1082 (Constitution of Indiana, 1851).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ OHIO CONST. art. III, § 11 (1851).

⁵⁷ One commentator notes with regard to article III, section 11, of the 1851 constitution that its "effect was to continue the governor's full power of executive clemency but require him to account publicly for his use of the power." OHIO CONSTITUTION HANDBOOK, *supra* note 34, at xxiv.

⁵⁸ *State v. Morris*, 55 Ohio St. 2d 101, 111, 378 N.E.2d 708, 714 (1978) (upholding the power of the Ohio General Assembly to create new sentencing guidelines under which previously convicted criminals could apply for reductions in sentences).

B. Ohio Statutory Provisions Governing Clemency

Chapter 2967 of the Ohio Revised Code⁵⁹ [hereinafter "Chapter 2967"], which prescribes the procedures to be followed when applying for clemency, begins by purporting to define the three types of clemency recognized under the Ohio Constitution: pardon,⁶⁰ commutation,⁶¹ and reprieve.⁶² These statutory definitions cannot, however, affect the clemency power of the governor; the clemency terms used in the Ohio Constitution are to be defined by reference to English common law and cannot be altered by statute.⁶³ Thus, the statutory definitions do not affect the scope of the governor's clemency power.⁶⁴

⁵⁹ OHIO REV. CODE ANN. Ch. 2967 (Anderson 1987 and Supp. 1990).

⁶⁰ OHIO REV. CODE ANN. § 2967.01(B) (Anderson 1987) states:

"Pardon" means the remission of penalty by the governor in accordance with the power vested in him by the constitution. Pardons may be granted after conviction and may be absolute and entire, or partial, and may be granted upon conditions precedent or subsequent.

⁶¹ OHIO REV. CODE ANN. § 2967.01(C) (Anderson 1987) states:

"Commutation" or "commutation of sentence" means the substitution by the governor of a lesser for a greater punishment. A sentence may be commuted without the consent of the convict, except when granted upon the acceptance and performance by the convict of conditions precedent. After commutation, the commuted sentence shall be the only one in existence. The commutation may be stated in terms of commuting from a named crime to a lesser included crime, in terms of commuting from a minimum and maximum sentence in months and years to a minimum and maximum sentence in months and years, or in terms of commuting from one definite sentence in months and years to a lesser definite sentence in months and years.

⁶² OHIO REV. CODE ANN. § 2967.01(D) (Anderson 1987), states: "Reprieve" means the temporary suspension by the governor of the execution of a sentence. A reprieve may be granted without the consent of and against the will of the convict."

⁶³ The Ohio Supreme Court has stated that since the Ohio Constitution does not define the terms "pardon" and "reprieve," the court will give them the "construction or effect" that was given to them under the laws of England from which they were adopted. *Sterling v. Drake*, 29 Ohio St. 457, 460 (1876). See also 1 Op. Ohio Att'y Gen. 257 (1940) (stating that in light of the constitutional grant of the clemency power to the governor, the legislature cannot abridge the power in any way).

In similar fashion, the clemency power vested in the president by article II, section 2, of the United States Constitution has been interpreted as being commensurate with that of the English Crown. *Ex parte Wells*, 59 U.S. (18 How.) 307, 310-15 (1855).

⁶⁴ Statutory language purporting to prescribe the scope of the clemency power, such as the provision in OHIO REV. CODE ANN. § 2967.01(B) (Anderson 1987), which states that pardons "may be absolute and entire, or partial," is mere surplusage.

The APA is charged with the statutory duty of administering all provisions regarding clemency that are set forth in Chapter 2967.⁶⁵ Applications for pardon, commutation, or reprieve are to be made in writing to the APA.⁶⁶ The APA has prepared directions on how to apply for clemency and an application form that are available on request.⁶⁷ Although a time limit on applying or reapplying for clemency is not mentioned in Chapter 2967 or the administrative regulations,⁶⁸ the APA has informally adopted a rule requiring applicants to wait two years between applications for clemency.⁶⁹

Once an application for clemency is filed, or whenever the governor directs, the APA is required to investigate the propriety of remitting punishment and make a written report to the governor.⁷⁰ A hearing may be scheduled on the application at the discretion of the Ohio Parole Board.⁷¹

⁶⁵ OHIO REV. CODE ANN. § 2967.02 (Anderson 1987). The APA has delegated to the Ohio Parole Board, which operates under the APA's supervision, the statutory responsibilities of processing clemency applications and making recommendations to the governor. *See* OHIO ADMIN. CODE § 5120:1-1-15 (1990). Throughout this Article, however, I will refer to the APA as the administrative agency that processes, investigates, and makes recommendations on clemency applications, since the APA is the body statutorily charged with implementing all clemency provisions.

⁶⁶ OHIO REV. CODE ANN. § 2967.07 (Anderson 1987).

⁶⁷ The form elicits basic biographical information about the applicant such as his name, alias, address, birthdate, and employer. In addition, an applicant must specify whether he is requesting a pardon, commutation, or reprieve, as well as reasons why clemency is appropriate. According to the directions supplied by the APA:

If a PARDON is requested, reason(s) must be given as to why the applicant's conviction should be set aside. If a COMMUTATION is requested, reason(s) must be given as to why the prisoner's sentence should be shortened. If a REPRIEVE is sought, reason(s) must be given as to why the sentence should not be carried out.

DIRECTIONS AS TO: "HOW TO APPLY FOR CLEMENCY," Form created by Ohio Adult Parole Authority (Revised May, 1990).

Finally, an applicant must supply relevant information about his criminal record, including the crime for which he is serving time, court case number, county of sentencing, sentence, and prior criminal convictions. Prisoners must indicate their institution of confinement, date of admission, serial number, parole date, and final release date. *Id.*

⁶⁸ OHIO ADMIN. CODE § 5120:1-1-15 (1990) (specifying APA procedures governing applications for pardon, reprieve, and commutation).

⁶⁹ Letter from Ohio Parole Board Chairman Raymond E. Capots to author (July 27, 1989) (copy on file with the *Ohio State Law Journal*).

⁷⁰ OHIO REV. CODE ANN. § 2967.07 (Anderson 1987).

⁷¹ OHIO ADMIN. CODE § 5120:1-1-15(B) (1990).

Chapter 2967, however, requires that, at least three weeks before the APA recommends any pardon or commutation, notice of the pendency of the clemency application must be "sent to the prosecuting attorney and the judge of the court of common pleas of the county in which the indictment against the convict was found."⁷² In addition, if the applicant was convicted of certain enumerated crimes, the APA must send a similar notice to the victim of the crime, or to a representative member of the victim's family, three weeks before recommending a pardon or commutation.⁷³ In the case of an application for clemency by an individual sentenced to death, the governor may modify the pardon and commutation notification requirements if there is not sufficient time to comply with them before the applicant is to be executed,⁷⁴ or may grant a reprieve without notices or application.⁷⁵

Once the APA has completed its investigation, given the requisite statutory notices, and considered any statement given by the victim or his family, the APA issues a report and recommendation to the governor.⁷⁶ The report must contain a brief statement of facts, a recommendation for or against clemency, the grounds for the recommendation, and the records or minutes relating to the case.⁷⁷

As is the case in most states, no meaningful statutory or administrative standards exist in Ohio to determine when a clemency application should be granted.⁷⁸ The only guidance given to the APA is that it may recommend

⁷² OHIO REV. CODE ANN. § 2967.12(A) (Anderson Supp. 1990).

⁷³ *Id.* at § 2967.12(B).

⁷⁴ *Id.* at § 2967.12(D).

⁷⁵ *Id.* at § 2967.08 (Anderson 1987).

⁷⁶ *Id.* at § 2967.03 (Anderson Supp. 1990).

⁷⁷ *Id.* at § 2967.07 (Anderson 1987).

⁷⁸ See generally NAT'L GOVERNORS' ASS'N CENTER FOR POLICY RESEARCH, GUIDE TO EXECUTIVE CLEMENCY AMONG THE AMERICAN STATES (1988) [hereinafter GUIDE TO STATE CLEMENCY]. The GUIDE TO STATE CLEMENCY, which contains the results of a 1987 survey of clemency procedures throughout the United States, indicates that very few states have promulgated statutory or administrative standards governing the use of the power. See, e.g., COLO. REV. STAT. § 16-17-102 (1986) (the governor may give weight to a petitioner's "[g]ood character previous to conviction, good conduct during confinement in the correctional facility, the statements of the sentencing judge and the district attorneys . . . and any other material concerning the merits of the application" when making the determination of whether a pardon should be granted); MINN. STAT. § 638.02 (1990) (the Board of Pardons has the discretion to grant a pardon if a petitioner has "been convicted of no criminal acts other than the act upon which such conviction was founded and is of good character and reputation"); WASH. REV. CODE ANN. § 9.94A.150(4) (1988 & Supp. 1990) (the governor, upon recommendation from the clemency and pardons board, may grant a pardon "for reasons of serious health

clemency if it reasonably concludes that, "if the convict is granted a pardon, commutation, or reprieve, . . . such action would further the interests of justice and be consistent with the welfare and security of society."⁷⁹

In view of the Ohio Constitution's vesting of the clemency power solely in the governor, the APA's recommendation is purely advisory and may be ignored.⁸⁰ Typically, Ohio's governors have had recourse to little more than their personal moral standards, political beliefs, or considerations of expediency, resulting in a puzzling patchwork of clemency practices.⁸¹ An examination of the manner in which the clemency power has been used, particularly the array of pardons and commutations issued by Governor Celeste at the close of his term, highlights problems inherent in the clemency power and offers some basis for suggesting ways in which the institution of clemency ought to be reformed.

III. WIELDING THE CLEMENCY POWER: ABUSES OF DISCRETION OR DISCREET CONFUSION?

The most detailed and thoughtful account of an Ohio governor's use of the clemency power is found in former Governor Michael V. DiSalle's book, *The Power of Life or Death*.⁸² DiSalle's impassioned narrative offers a rare glimpse into the thought processes and reasoning that prompt a governor to

problems, senility, advanced age, extraordinary meritorious acts, or other extraordinary circumstances"). Missouri requires by statute that the governor be informed of any inmate suffering from an incurable disease or life-endangering condition, though the decision whether to commute the prisoner's sentence is left entirely to the executive's discretion. MO. REV. STAT. § 217.250 (1986).

⁷⁹ OHIO REV. CODE ANN. § 2967.03 (Anderson Supp. 1990).

⁸⁰ See, e.g., Brown & Winston, *Clemency for Christmas*, Cleveland Plain Dealer, Dec. 22, 1990, at 1A, col. 1 (recounting former-Governor Celeste's decision to disregard unfavorable recommendations by the APA in 10 of 25 cases in which clemency was granted to purported victims of "battered-woman syndrome"). But see BIENNIAL REPORTS OF THE OHIO PARDON AND PAROLE COMMISSION OF PARDONS, COMMUTATIONS AND REPRIEVES [hereinafter BIENNIAL CLEMENCY REPORTS] (Report of Clemency applications granted by Governor James Rhodes between January 1, 1969, and December 31, 1970, showing that he followed the recommendation of the APA in virtually all instances), reprinted in 134 OHIO SENATE JOURNAL 2558-78.

⁸¹ Ohio's governors are not alone in their inconsistency, since clemency practices tend to vary radically from state to state and administration to administration within specific jurisdictions. See generally Kobil, *supra* note 37, at 606-07.

⁸² M. DISALLE, *THE POWER OF LIFE OR DEATH* (1965). DiSalle served as Governor of Ohio from 1959 through 1962.

grant or deny clemency, especially in capital cases.⁸³ Unlike most Ohio governors, who rarely make known their reasons for granting clemency,⁸⁴ DiSalle bared his soul in his book and candidly acknowledged the complex amalgam of legal, moral, and political factors that went into each clemency decision:

I have never known a governor so blasé or so heartlessly devoted to the rule of eye for an eye that he did not go into a long executive session with his conscience when faced with a decision involving clemency. There are always conflicting factors: the laws of the state vs. a personal reluctance to say yes to killing a man; the demand for equal justice vs. unequal verdicts of the several juries sitting in separate trials of principals in the same crime; the objective facts vs. the apparent prejudice of superannuated judges or overambitious prosecutors; a twenty-year record of co-operation, self-discipline, and development of a social attitude vs. a vindictive, emotional communal refusal to accept a returned prisoner.

The problem of getting at the truth is difficult enough. But when all the elements in the decision have been examined and weighed, the executive still faces the pressures of practical politics. These pressures can be resisted . . . but they cannot be ignored. . . . Ignoring an application for parole or commutation is bound to escape criticism. Releasing a convicted murderer, even after twenty years of honorable behavior and apparent rehabilitation, is just as certain to arouse political hornets.⁸⁵

DiSalle agonized over whether or not to grant clemency in particular cases,⁸⁶ opting for a principled approach to clemency, often at substantial political cost to himself.⁸⁷ He tended to use the power in what I have

⁸³ A similarly candid account of the uses of the executive clemency power outside of Ohio is found in former California Governor Pat Brown's book, E. BROWN & D. ADLER, *PUBLIC JUSTICE, PRIVATE MERCY* (1989).

⁸⁴ This evidently accounts for the fact that, in recent years, Ohio's governors have ignored a constitutional requirement that they transmit to the General Assembly their reasons for granting clemency. *See infra* notes 91-92 and accompanying text.

⁸⁵ M. DISALLE, *supra* note 82, at 175-76.

⁸⁶ *Id.* at 5 ("No one who has never watched the hands of a clock marking the last minutes of a condemned man's existence, knowing that he alone has the temporary Godlike power to stop the clock, can realize the agony of deciding an appeal for executive clemency.").

⁸⁷ *Id.* at 204, recounting the following conversation with the Statehouse press corps who criticized DiSalle for commuting six death sentences and thereby losing the 1962 election to James Rhodes:

"You left yourself wide open when you could have ducked. . . ."

elsewhere characterized as a justice-enhancing fashion.⁸⁸ In other words, DiSalle saw clemency as a means of ensuring that the offender received the punishment that he deserved and attempted to make this delicate determination by taking into consideration factors other than the offender's conviction in a substantially error-free proceeding.

In capital cases, he frequently traveled to the prison in which the condemned prisoner was incarcerated for a personal interview in order to determine for himself whether death was deserved. Unlike governors today, who for the most part rely on the summary of each case prepared by their legal staff or the APA, DiSalle personally reviewed the entire transcript in many cases. He also interviewed key witnesses before making clemency decisions. His penchant for making certain that justice was done prompted him to use some unorthodox methods, and he once commuted the death sentence of a woman convicted of murder when post-conviction statements she made while under the influence of sodium amytal, commonly known as "truth serum," convinced DiSalle that she was probably innocent.⁸⁹

In cases where guilt was in doubt, DiSalle felt justified in utilizing the clemency power to ensure that justice was done. He used his authority to remit punishment where there was some question of culpability owing to the diminished mental capacity of the offender.⁹⁰ Like a number of his predecessors, DiSalle also commuted sentences when carrying out the prescribed punishment would work an injustice in comparison to the punishment meted out to other principals in the crime.⁹¹

....

[By commuting the death sentences,] you practically begged my editor to clobber you. He called you a bleeding heart and a fuzzy-thinking do-gooder, and you got licked."

"So you saved the lives of six nonentities," said the other man. "And who cares? If you'd kept your mouth shut, the world would be no poorer, and you'd be around for another four years to fight for the underdog."

⁸⁸ Kobil, *supra* note 37, at 579-83 (describing "justice-enhancing" uses of the clemency power as those which ensure that a person receives the punishment that "is due her," taking into account such factors as blameworthiness and the fairness of the punishment).

⁸⁹ M. DiSALLE, *supra* note 82, at 28-47 (discussing the case of Edythe Klumpp, who evidently confessed to murder in order to protect her lover from prosecution for the killing of his estranged wife).

⁹⁰ *Id.* at 59-64 (recounting DiSalle's commutation of murderer Lewis Niday's death sentence to life imprisonment because of Niday's mental deficiency).

⁹¹ *Id.* at 52-59 (describing DiSalle's commutation of the death sentence of Frank Poindexter, in view of the fact that the real instigator of the crime had been sentenced to life imprisonment). DiSalle also noted that former governors White, Davey, O'Neil, Lausche, and Herbert had commuted sentences where more culpable participants had received relatively lenient sentences, so that it could not be said that "Ohio had failed in

In those cases in which DiSalle could not find any principled justification for granting clemency, however, he allowed even the death sentence to stand, notwithstanding his unbridled constitutional authority to grant clemency and his personal opposition to capital punishment:

During my term as governor, I came to dread the days leading to an execution. In those four years, six men died in the electric chair. Despite my opposition to the death penalty as a futile barbaric relic, my oath of office required me to execute the laws of the state, some of which call for capital punishment. True, my power of clemency was limited only by the exclusion of treason and impeachment cases, but for the six who died I could find no extenuating circumstances, no unequal justice, no questionable legal procedure, no reasonable doubt, to justify my reversing the sentence of the courts.⁹²

Owing to a paucity of data about reasons for exercising the clemency power, it is difficult to ascertain whether the governors who succeeded DiSalle were similarly possessed of an overarching clemency philosophy. Although the Ohio Constitution states that the governor must report his reasons for each grant of clemency to the General Assembly,⁹³ Governors Rhodes, Gilligan, and Celeste failed to comply with this requirement. A review of the reports made by these governors to the General Assembly over the past twenty-five years reveals that while they identified the instances in which clemency was granted, none communicated any "reasons therefor," in violation of the mandate of article III, section 11.⁹⁴

Whatever their reasons, none of these executives were shy about using the clemency power to mitigate sentences.⁹⁵ During his first term, from 1963 through 1966, James Rhodes between January 1, 1969, and December 31, 1970, commuted 120 sentences.⁹⁶ From 1967 through 1970 he commuted

comparative justice." *Id.* at 56-58.

⁹² *Id.* at 5.

⁹³ See OHIO CONST. art. III, § 11 (requiring the governor to communicate to the General Assembly each clemency application granted, "stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon, or reprieve, with his reasons therefor").

⁹⁴ See BIENNIAL CLEMENCY REPORTS, *supra* note 80 (for period from January 14, 1963, through December 31, 1988).

⁹⁵ *Id.* See also, Williams, *Celeste Did Not Break New Ground in Commuting Several Death Sentences*, Columbus Daily Reporter, Jan. 14, 1991, at 1A, col. 3. This article contains statistics compiled by the Ohio Public Defender's Office from Ohio Pardon and Parole Commission reports.

⁹⁶ Williams, *supra* note 95.

the sentences of 208 prisoners, and of the 144 commutations issued in 1969 and 1970, 122 were given to murderers.⁹⁷ Governor Gilligan commuted the sentences of 252 individuals from the beginning of 1971 through 1974, though none of these were death sentences.⁹⁸ When James Rhodes returned to office for another eight years, his commutation rate began to taper off slightly, with 100 commutations being granted between 1975 and 1978, and 89 being granted during his final term of office, 1979 through 1982.⁹⁹

Nineteen-eighty-three ushered in the administration of Richard Celeste and, with it, a considerable decline in the number of commutations. Celeste commuted only twenty-nine sentences during his first term from 1983 through 1986.¹⁰⁰ Following his landslide reelection in 1986, however, even this stinginess with commutations did not keep Celeste from blundering seriously with the clemency power in a manner which foreshadowed the controversy that would enshroud his last days in office.

On July 20, 1987, Governor Celeste followed the unanimous recommendation of the APA and commuted the life sentence of Robert L. Steele, a former municipal judge from the Cleveland area who had been convicted ten years earlier of arranging to have his wife murdered.¹⁰¹ As often happens after a grant of clemency to a violent offender,¹⁰² much criticism was directed at Celeste's decision by law enforcement officials and even Steele's children, who referred to their father as "a sick animal" and a "liar."¹⁰³ This controversy would probably have soon been forgotten and Steele released on parole if *The Cleveland Plain Dealer* had not initiated a public records lawsuit¹⁰⁴ and obtained documents that revealed Celeste had

⁹⁷ *Id.*

⁹⁸ *Id.* Early in Gilligan's term, capital punishment, as it was then administered, was declared unconstitutional by the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Celeste Commutes Life Term of Ex-Euclid Municipal Judge*, *Cleveland Plain Dealer*, July 30, 1987, at 1A, col. 5.

¹⁰² M. DISALLE, *supra* note 82, at 176 (noting that releasing a convicted murderer through clemency inevitably engenders criticism).

¹⁰³ *Steele's Son Joins Attack on Reduction of Sentence*, *Cleveland Plain Dealer*, July 31, 1987, at 1A, col. 1. ("In a telephone interview last night, Brett Steele, now 23, called his father 'a sick animal' and said his family was 'mortified that after not even 10 years they would think of letting a convicted murderer go free.'").

¹⁰⁴ *Cleveland Plain Dealer v. Richard Celeste*, No. 87-1475 (Ohio Supreme Ct.) (dismissed on application of *Cleveland Plain Dealer* on Sept. 23, 1987).

taken extraordinary steps to influence the APA to make a favorable clemency recommendation for Steele.¹⁰⁵

The records obtained by the newspaper revealed that after the APA had unanimously recommended in 1985 that Steele be denied clemency, Celeste's legal staff had written a letter "under this [sic] direction of Governor Celeste" asking the APA to reconsider its clemency recommendation.¹⁰⁶ Although Celeste attempted to characterize the request for reconsideration as a routine action by his staff, corrections officials acknowledged that the governor's office rarely made such requests.¹⁰⁷ The *Plain Dealer* also revealed that Celeste had been petitioned by his father, a friend of the Steele family, to release Steele,¹⁰⁸ and that Celeste had relied on a purported job offer to Steele from a defunct charity in requesting reconsideration by the APA.¹⁰⁹

These embarrassing revelations and the resulting public furor prompted the governor to reverse his position on Steele's release. At Celeste's request, the Ohio attorney general's office researched whether the commutation, once granted, could be revoked, and determined that it could not.¹¹⁰ It was clear to everyone, however, that the governor's office now did not want Steele released,¹¹¹ and for the second time in three months, the members of the

¹⁰⁵ Sharkey & Webb, *Celeste Sought Review for Steele*, *Cleveland Plain Dealer*, Sept. 12, 1987, at 1A, col. 1 (reporting that Governor Celeste's office petitioned for the release of former Municipal Court Judge Steele).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (quoting Robert Prosser, spokesman for the Department of Rehabilitation and Correction, and an unnamed state corrections official who could not recall such a request ever coming from the governor's office).

¹⁰⁸ *Id.*

¹⁰⁹ *Discredited Charity Led Celeste To Push for Steele Parole*, *Cleveland Plain Dealer*, Sept. 13, 1987, at 1A, col. 5 (relating that Celeste's office had asked the parole board to reconsider its recommendation against clemency purportedly because of the efforts on Steele's behalf of the Robert F. Kennedy Scholarship Fund, Inc., whose corporate charter had been revoked in 1985).

¹¹⁰ *Parole Board Meets Today on Steele's Request*, *Cleveland Plain Dealer*, Sept. 22, 1987, at 1B, col. 1.

¹¹¹ *Id.* (quoting an undisclosed source close to the parole board as saying that "the governor's office does not want any further embarrassment in this case, and the parole board knows it.").

parole board¹¹² changed their minds, unanimously, and denied parole to Steele.¹¹³

The Steele fiasco prompted Celeste temporarily to curtail his use of the clemency power and during the fifteen months following the *Plain Dealer* exposé, Celeste commuted only five sentences.¹¹⁴ In fact, Celeste was criticized in 1988 for *denying* clemency to Larry Brown,¹¹⁵ a minor property offender who had served nearly eight years of a twenty-two to fifty-five year sentence for using a stolen credit card to obtain \$164.08 worth of goods.¹¹⁶

In the month before leaving office on January 14, 1991, however, Celeste went on a clemency binge and granted sixty-eight pardons and commutations¹¹⁷—more than he had granted during any two year period in

¹¹² The Ohio Parole Board is the arm of the APA charged with making recommendations on clemency and decisions on parole. OHIO ADMIN. CODE § 5120:1-1-15 (1990).

¹¹³ *Board Denies Steele Parole*, *Cleveland Plain Dealer*, Sept. 23, 1987, at 1A, col. 5.

¹¹⁴ BIENNIAL CLEMENCY REPORTS, *supra* note 80 (January 10, 1987, through December 31, 1988).

¹¹⁵ I represented Mr. Brown in two requests for clemency. Celeste's successor, George Voinovich, finally decided to commute Mr. Brown's sentence on March 25, 1991. *Governor Ok's Clemency in Credit-Card Case*, *Cleveland Plain Dealer*, Mar. 26, 1991, at 1A, col. 5.

¹¹⁶ *E.g.*, Yant, *\$164 Question Is Why Man is Still in Prison*, *Columbus Dispatch*, May 7, 1989, at 1C, col. 5 (suggesting that Celeste did not commute Brown's sentence because of the criticism he had received in the Steele case); *Gov. Celeste Owes Ohioans Explanation*, *Canton Repository*, May 11, 1988, at A4, col. 1 (editorial) (attributing Celeste's refusal to commute Larry Brown's sentence to the small-time thief's lack of political clout).

¹¹⁷ *See Mahoney, supra* note 6.

Included in this number are several commutations that are difficult to account for in light of Celeste's previous clemency record. For example, Celeste commuted the sentence of country singer Johnny Paycheck who had served nearly two years of a seven to nine and one-half year sentence for shooting a man in a bar. *See Paycheck, supra* note 9. Celeste said that he commuted the sentence because it was "unbelievably harsh," a factor that had failed to move Celeste earlier in the far more compelling case of Larry Brown discussed above.

Celeste also commuted the sentence of Eric S. Solowitch, who was convicted of theft in a \$432,000 mortgage refinancing scam. *See Mahoney, supra* note 6. Celeste ignored an unfavorable recommendation by the parole board and reports that Solowitch's victims had been blackmailed by conditional promises of restitution into supporting the clemency application. *Id.*

his administration.¹¹⁸ Reportedly at the urging of his wife, Celeste commuted the sentences of twenty-five purportedly battered women who had either killed or assaulted their abusers and who had been convicted before Ohio law was changed to permit the introduction of evidence of battering in support of a claim of self defense.¹¹⁹ This decision generated both praise and criticism. Critics contended that Celeste had granted clemency to women who were not actually battered and asserted that his decision gave women license to kill.¹²⁰ Women's rights activists contended that Celeste's decision showed that the battering of women would no longer be tolerated in Ohio.¹²¹

This controversy over the battered women commutations illustrates the politically volatile nature of the clemency power and the delicacy of the judgments that are required of governors in deciding whether clemency should be granted. On the one hand, Celeste's decision to commute the sentences of these women is defensible in terms of the justice-enhancing function of clemency exemplified in Governor DiSalle's clemency practices.

¹¹⁸ BIENNIAL CLEMENCY REPORTS, *supra* note 80 (January 10, 1983, through December 31, 1988).

¹¹⁹ See Johnson, *supra* notes 7 & 16. William Schaefer, the governor of Maryland, followed Celeste's lead and commuted the prison sentences of eight women convicted of killing or assaulting men who had purportedly abused them. See Lewin, *supra* note 13. Schaefer's decision, however, has also exposed him to substantial criticism. See *The Gov Blunders Again*, The Wash. Times, Mar. 20, 1991, at G2, Col. 1 (editorial); Schneider, *Battered Women Defense Bill Nears Passage in Maryland*, The Wash. Post, Mar. 22, 1991, at C3, Col. 1; *Schaefer Batters Justice*, The Wash. Times, Feb. 25, 1991, at E2, Col. 1 (editorial).

¹²⁰ *E.g.*, Doulin & Riepenhoff, *Clemency Decision Stirs Controversy*, Columbus Dispatch, Dec. 23, 1990, at 1A, col. 1 (quoting prosecutors criticizing Celeste's decision). The *Cleveland Plain Dealer* succinctly captured the flavor of the criticism aimed at Celeste in a political cartoon that depicts a schoolboy reciting a variation on a familiar rhyme:

Lizzie Borden took an axe,
An' gave her mother forty whacks.
When she saw what she had done,
She gave her father forty one,
Not to worry, she was blest . . .
Her hide was saved by Dick Celeste.

In a corner of the cartoon, a diminutive commentator remarks, "Be still my bleeding heart." *Cleveland Plain Dealer*, Jan. 13, 1991, at 2E, col. 3 (cartoon).

¹²¹ Doulin & Riepenhoff, *supra* note 120 (quoting the president of a statewide coalition for battered women).

The commutations can be justified retributively both because of the diminished psychological culpability of the offenders and as a means of rectifying disparities in punishment. Many of the commutees may well have been acquitted had they been able to present a battered-woman syndrome defense.¹²²

Such justifications presume, however, that each of the commutees actually were battered. Investigation by the press into the cases of the twenty-five women given clemency suggested that Celeste may not have been correct in concluding that all of them had been physically abused.¹²³ Moreover, in commuting the sentences of ten of the women, Celeste disregarded the recommendation of the APA that clemency be denied, including several unanimous recommendations.¹²⁴ To the extent that Celeste and his staff failed to investigate fully the cases in which clemency was granted,¹²⁵ some of the criticism leveled at him appears warranted. The controversy surrounding the battered-women commutations, however, pales into insignificance when compared to the veritable fire-storm that greeted Celeste's commutation of eight death sentences four days before leaving office.

On January 10, 1991, Celeste commuted the death sentences of eight convicted killers, including two men who had murdered police officers and

¹²² *Id.* (quoting Capital University law professor Max Kravitz).

¹²³ *Claims of Pphysical Abuse Didn't Hold Up in Trials of Some Women*, Columbus Dispatch, Jan. 27, 1991, at 5F, col. 1 (containing excerpts from court testimony and police interviews indicating that some of the women granted clemency may not have been abused); Yocum, *Women's Clemency Angers Prosecutors*, Columbus Dispatch, Jan. 27, 1991, at 5F, col. 1 (reporting that some of the women granted clemency had not claimed to have been battered until the battered-women syndrome was recognized as a viable defense in Ohio).

¹²⁴ See Brown & Winston, *supra* note 80.

¹²⁵ It appears that in the waning days of his administration, Celeste lacked the legal staff needed to evaluate fully all of the requested commutations. I was informed by a former advisor to Celeste that at the end of Celeste's term, the office of legal counsel was severely understaffed. Thus, in order to process all of the clemency applications before leaving office, Celeste was forced to "borrow" from other governmental departments attorneys who had never before had any experience in clemency matters, and solicit their recommendations in pending cases.

In similar fashion, the decision of Maryland Governor William D. Schaefer to commute the sentences of eight battered women has also been criticized for having been made without an adequate investigation. See *Criticism of Clemency May Affect Efforts to Help Battered Women*, N.Y. Times, Apr. 2, 1991, at A8, col. 1.

all four women on Death Row.¹²⁶ Although Celeste, who opposes the death penalty, had been asked to commute the sentences of all 105 condemned prisoners, he refrained because he thought it might create a backlash against efforts to abolish the death penalty.¹²⁷ Instead, he said that he selected the eight prisoners based on criteria that included the crimes committed, the fairness of sentences, the mental capacities of the offenders, and the length of time served. He also hinted that the grants of clemency were at least in part intended to redress a perceived racial imbalance on Death Row.¹²⁸

The public outcry against these commutations was deafening.¹²⁹ Politicians, prosecutors, and newspapers lambasted Celeste, and this criticism intensified when it came to light that in some of the cases he had granted clemency without application having been made to the APA or investigation having been conducted by the APA.¹³⁰ For reasons that have never been adequately explained, neither Celeste nor attorneys for eleven clemency recipients, including seven of the eight death penalty commutees, had caused clemency applications to be filed with the APA prior to the issuance of the commutations.¹³¹

¹²⁶ See Lane, *supra* note 15. Six of the eight sentences were commuted to life without parole, while the sentences of two of the women on Death Row were commuted to life in prison. *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* Six of the eight prisoners whose sentences were commuted are black, including all four women who were on Death Row. In announcing the commutations, Celeste said that a disproportionate number of blacks receive the death sentence in Ohio and called on the governor, legislature, and Ohio Supreme Court to review a "pattern of racial composition" among condemned prisoners. *Id.*

¹²⁹ See *supra* notes 14–15 and accompanying text (describing the scathing criticism that Celeste received for commuting the capital sentences).

¹³⁰ See, e.g., Henderson, *Not To Be Pardoned*, Cleveland Plain Dealer, Jan. 28, 1991, at 1B, col. 5 (characterizing Celeste's death penalty commutations as an aberration of justice and contrary to sound public policy); Yant, *Celeste May Have Hurt Future Good of Clemency*, Columbus Dispatch, Feb. 3, 1991, at 1F, col. 5 (arguing that the "bitter reaction" to Celeste's commutations could make other governors hesitant to use the clemency power in deserving cases).

¹³¹ Celeste stated in an interview with me that he did not know why clemency applications had not been filed with the APA in those eleven cases. Telephone interview with Richard Celeste (April 1, 1991). Based on certain internal documents I have obtained, however, it would appear that the decision not to process at least one of the clemency appeals through the APA was consciously made by persons in the governor's office, and perhaps by Celeste himself.

More than a year before the controversial grants of clemency, an attorney working in the office of Napoleon Bell, counsel to the Governor, researched the question of

The new governor, George Voinovich, requested that his staff and the new attorney general, Lee Fisher, find a means of undoing the death penalty commutations.¹³² Fisher, a liberal Cleveland Democrat like Celeste who had formerly opposed capital punishment, unexpectedly sided with the Republican Voinovich and attempted to have eleven grants of clemency set aside, including seven of the eight commutations of the death penalty. At Fisher's direction, the attorney general's office filed a declaratory judgment action in the Franklin County Common Pleas Court claiming that the commutations were invalid because of the failure to file applications for clemency with the APA.¹³³

Ohio political insiders described Fisher's decision to attack the commutations as "smart" in light of Celeste's lingering unpopularity and the fact that at the time the suit was filed, a challenge to Fisher's own recent election as attorney general was pending in the Republican-dominated Ohio

whether the governor could issue a "blanket" commutation to all persons on Death Row. Attorney Steve Vamos concluded that the governor would have to grant such clemency "only one inmate at a time, and only after the adult parole authority investigated the cases, and gave notice to the proper prosecuting attorney and judges." Memorandum of Steve Vamos to Napoleon Bell, "RE: Commutation of All Death Row Inmates" (June 22, 1989).

This advice, however, was not followed at least with regard to John Salim, whose unconditional pardon by Celeste is now being challenged because it was issued before the APA had a reasonable time to process his clemency application. *See infra*, notes 150-55 and accompanying text. On December 17, 1990, Celeste asked his counsel, Carl Anderson, for his thoughts on a request by United States Representative Mary Rose Oakar that Celeste pardon Salim. Anderson responded that while it appeared that an injustice had been done, the "paperwork" could not be processed by the APA in time for Celeste's consideration. Handwritten note of Carl Anderson to Governor Celeste (copy on file with the *Ohio State Law Journal*). Subsequently, legal associate Betsey Krieger informed Celeste that "Carl's advise [sic] was to tell Representative Oakar that the clemency process would be initiated by our office but that the application would not be reviewed by this administration due to the time constraints. . . . *Please advise if you wish to bypass the Parole Board on this clemency as we are doing for the Bellinger and Delieo cases so that we can process the appropriate paperwork.*" Memorandum of Betsy Krieger to Governor Celeste, "RE: Clemency Cases on Moore, Salim, and Bellinger," (January 9, 1991) (emphasis supplied) (copy on file with the *Ohio State Law Journal*). On the same memorandum, written in what appears to be Governor Celeste's hand are the words, "let's bypass APA and pardon Salim. seems a gross miscarriage of justice." *Id.*

¹³² *See Johnson, supra* note 16 (reporting that Voinovich, a supporter of capital punishment, disagreed with Celeste's eleventh-hour commutations).

¹³³ *Wilson v. Maurer*, No. 91-CVH01763 (C. P. Franklin Co., filed Feb. 1, 1991). *See also Johnson, Celeste's Commutations Challenged*, Columbus Dispatch, Jan. 30, 1991, at 1A, col. 4.

Supreme Court.¹³⁴ Fisher, on the other hand, focused on what he said was the illegality of Celeste's actions, a contention that will be examined more fully below. Regardless of his motives, however, this challenge to the executive clemency power, coupled with pending legislative efforts to limit the executive clemency prerogative,¹³⁵ threatens to work substantial changes in an executive power that has existed in its current form since 1851.

That such changes would be proposed is predictable in light of the arbitrary manner in which the clemency power seems to have been exercised in recent years. Celeste sometimes gave the appearance of being careless in his use of the clemency power during his tenure as governor. By attempting to squeeze into his last month in office the most controversial uses of the clemency power, Celeste probably avoided some of the political repercussions that would have attended utilizing the power earlier in his term. Yet, in the process, the governor may have issued some ill-considered pardons and commutations and certainly undermined public confidence in clemency as a principled check on the legislature and judiciary.

Notwithstanding these problems, it is unlikely that the proposed reforms or pending challenges, if successful, will constitute an improvement on our present system. In order to evaluate these efforts to curb the clemency power, it is necessary to examine them in light of the constitutional and statutory provisions described above.

IV. THE PROPER SCOPE OF THE CLEMENCY POWER IN OHIO: IF IT IS BROKEN, HOW SHOULD WE FIX IT?

In assessing the appropriateness of various proposals to limit the executive's authority to grant clemency, it is necessary to consider both the recent challenges to the clemency power and the problems they are meant to address. The proposed changes in the clemency power generally may be broken down into two categories: those relating to the subject matter of the act of clemency and those relating to the procedure for granting clemency.

¹³⁴ See Johnson, *Fisher Starts with "Smart" Decisions*, Columbus Dispatch, Feb. 1, 1991, at 9A, col. 1. One Republican official is reported to have remarked that the decision shows that Fisher is "going to be on A-plus good behavior as long as this election [which was decided by only 1,234 votes out of 3.3 million cast] is in doubt." *Id.* (quoting "a top GOP official."); see also Underwood, *Fisher Displays Political Agility*, Cleveland Plain Dealer, Feb. 3, 1991, at 3C, col. 5 (praising Fisher's political sense in challenging Celeste's commutations).

¹³⁵ Ohio Senate Res. 1, *supra* note 19; H.B. 212, *supra* note 20.

A. Limits on the Subject Matter of the Clemency Power: The Proposed Constitutional Amendment

Much of the criticism of Celeste's actions appears to stem from Celeste's commutation of the death sentences of eight murderers in the face of overwhelming public sentiment supporting capital punishment.¹³⁶ Indeed, one newspaper editorial called Celeste's death penalty commutations "a rupture of Ohio's system of justice,"¹³⁷ and it is this sense of public outrage over Celeste's remission of the death sentences that seems to have prompted Senate Joint Resolution One [hereinafter the "Resolution"].¹³⁸

The Resolution purports to remove death sentences from the ambit of a lame-duck governor's clemency power during his last ninety days in office. It attempts to do this by adding the following language at the end of the first sentence of the current provision:

However, in the case of a convict who has been sentenced to death, the Governor shall not have the power to grant a commutation during the ninety-day period prior to the expiration of a term of his office for which he is prohibited from seeking or for which he has failed to seek re-election, or from the time he fails to win re-election until the expiration of his term of office.¹³⁹

At first glance, the Resolution seems designed to ensure that decisions to remit punishment for serious crimes are made in a considered fashion.¹⁴⁰

¹³⁶ See Oreskes, *The Political Stampede on Execution*, N.Y. Times, Apr. 4, 1990, at A16, col. 1 (reporting that public support for the death penalty remains at 72%, close to the record highs reached at the end of the 1988 presidential campaign). In view of this popular support for capital punishment, one political analyst has noted that "[y]ou cannot be against the death penalty and survive a campaign for major office" in some states. *Id.* at A16, col. 2. Predictably, the rate of clemency granted in cases involving the death penalty has dropped significantly since the United States Supreme Court reinstated the death penalty in *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion). Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389, 393-94 (1989).

¹³⁷ See *Killers Spared*, *supra* note 14.

¹³⁸ Ohio Senate Res. 1, *supra* note 19.

¹³⁹ *Id.*

¹⁴⁰ Indeed, this appears to be the considered opinion of John W. Shoemaker, Chief of the Adult Parole Authority. Shoemaker recently testified in support of Ohio Senate Res. 1 and asserted that clemency is a "powerful legal tool" that should not be used "impetuously or otherwise injudiciously." Johnson, *Parole Authority Chief Supports Limiting Clemency*, Columbus Dispatch, Mar. 14, 1991, at 3C, col. 1. While I agree

Closer scrutiny, however, reveals that the Resolution is an ill-conceived measure that does not directly encourage more considered use of the clemency power and may preclude an outgoing governor from granting clemency in meritorious cases.

First, it should be noted that death penalty cases are precisely the sort of cases in which the governor's discretion to remit punishment is most needed. As former Governor DiSalle remarked, "the death penalty is so horribly final[; o]nce it has been carried out, mistakes cannot be corrected, and what human does not make mistakes?"¹⁴¹ DiSalle's observation is not mere idle speculation. More often than we would like to admit, erroneous convictions have led to the execution of innocent individuals.¹⁴² In view of the political pressure placed on public officials to support the death penalty,¹⁴³ it seems unwise to remove the power to correct the most egregious injustices extant in our legal system from the hands of those who would be most likely to use it, namely outgoing governors. Moreover, as the discussion of gubernatorial clemency practices set forth above indicates, the commutation of murderers in Ohio has, if anything, declined over the last ten years,¹⁴⁴ and thus the perceived need for such a limitation on the clemency power is illusory.

with both of Mr. Shoemaker's premises, for the reasons set forth below, I do not believe that Ohio Senate Res. 1 will in any way ensure that the power will be exercised responsibly.

¹⁴¹ M. DISALLE, *supra* note 82, at 5-6; *see also*, BROWN, *supra* note 83, at xi-xii, 159-60 (recounting that the finality of the death penalty and the inevitability of human error have led to irrevocable mistakes being made in executing prisoners); Note, *supra* note 136, at 389-91 (arguing that the finality of capital punishment and the political pressures that tend to encourage executions necessitate a revival of mercy by governors).

¹⁴² *See* Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 23-24 (1987) (revealing at least 350 individuals who were erroneously convicted in cases in which the death penalty was or could have been imposed); *see also* E. BORCHARD, *CONVICTING THE INNOCENT* (1932) (reporting a study of 65 documented cases in which innocent men and women were convicted of various crimes); M. YANT, *PRESUMED GUILTY* (1991) (describing numerous cases in which people who were later demonstrated to be innocent were wrongly convicted).

¹⁴³ *See*, Kaplan & Cohn, *Pardon Me, Governor Wilder*, NEWSWEEK, Mar. 4, 1991, at 56 (speculating that commutation recipient Joseph Giarratano was fortunate his request for clemency came after Virginia Governor L. Douglas Wilder had allowed two other executions to be carried out since Wilder was then "insulated from charges that he is lenient on crime"); Oreskes, *supra* note 136 (describing the pressure placed on politicians to support capital punishment).

¹⁴⁴ *See supra* notes 95-100 and accompanying text (comparing the number of commutations granted by Governors Rhodes and Gilligan to the number granted by Governor Celeste during his two terms).

If the Resolution is aimed at guaranteeing that the governor's clemency power will be exercised in a more considered fashion, it fails in this regard also. The Resolution does not identify any standards which might ensure that clemency is granted for justice-enhancing reasons, as opposed to idiosyncratic or venal ones. By moving the deadline for the issuance of death penalty commutations up ninety days, the Resolution merely would prompt the spate of commutations that occasionally issues from a departing governor's office to begin three months earlier, with no attendant improvement in the decision-making process.¹⁴⁵ The sponsors of the Resolution could more effectively encourage responsible clemency decisions if they passed a resolution requiring the governor to comply in a meaningful fashion with the existing constitutional requirement that he provide the General Assembly with a statement of the reasons for granting clemency in each case.¹⁴⁶

Finally, even if the Resolution had some sound purposes to recommend it, it is drafted in such a way as to be virtually meaningless. The Resolution prevents only the issuance of a "commutation" by the outgoing governor to a condemned prisoner. A governor intent on reducing the punishment of such an individual still could grant a complete or conditional pardon, or a reprieve for a lengthy period that would effectively ensure that the prisoner could not be executed.

Thus, the Resolution amounts to little more than a public repudiation of the Celeste commutations, a hurried response that does not ensure that the clemency power will be exercised in a more principled fashion. If its

¹⁴⁵ The only possible advantage to amending the constitution in this fashion is that perhaps it might result in death penalty clemency decisions being made before key members of the outgoing governor's legal staff have taken other positions. If, however, that is the Resolution's goal, it seems to further it at best indirectly, and only in a handful of cases: those involving the death penalty. Moreover, the three-month time period is insufficiently long to ensure that key members of the legal staff will not have already left the administration for other positions.

Senator Gary Suhadolnik, a sponsor of the Resolution, has argued that the 90-day cut off for death penalty commutations would force the governor to act in October, before the November election of his successor, thereby dissuading him from using the power. See Miller, *Legislation Would Limit Governor's Commutation Power*, Cleveland Plain Dealer, Mar. 5, 1991, at 3B, col. 1 (describing the testimony of Senator Suhadolnik before the Senate Judiciary Committee). This argument, however, is based on unprovable and perhaps unfounded assumptions about the conduct of outgoing governors. When I asked former Ohio Governor Richard Celeste whether the proposed amendment, if it had been in effect last year, would have prevented the issuance of the death penalty commutations, Celeste emphatically said that it would not have. Telephone interview with Richard Celeste (Apr. 1, 1991).

¹⁴⁶ OHIO CONST. art. III, § 11.

sponsors are ever successful in having the Resolution placed on the ballot, it seems unlikely that even lingering resentment over the Celeste commutations would blind voters to the proposed amendment's underlying fatuity. In contrast, the efforts to limit the clemency power that focus on its procedural aspects get closer to the heart of the matter, though unfortunately they too fall short.

B. Procedural Limits on the Clemency Power: The Fisher Legal Challenge and the Proposed Victim Notification Law.

1. The Fisher Law Suit

On January 29, 1991, the Ohio Attorney General, Lee Fisher, sought to have an Ohio court, for the first time in history, declare a grant of executive clemency invalid.¹⁴⁷ The complaint for declaratory judgment was filed in the Franklin County Court of Common Pleas on behalf of George W. Wilson, the Director of the Department of Rehabilitation and Correction, and the Chief of the Ohio APA, John W. Shoemaker.¹⁴⁸ The defendants named

¹⁴⁷ The lawsuit initiated by the Attorney General runs contrary to Ohio case law which holds that the judiciary may not invalidate grants of executive clemency. In *Knapp v. Thomas*, 39 Ohio St. 377 (1883), Ohio's highest court granted a writ of habeas corpus to a prisoner who was reconfined on his original sentence after he had been granted a pardon by the governor. The prison warden, who had been informed by the governor that the pardon was null and void because it had been procured by "falsehood and fraud," opposed the writ by arguing that the pardon was void. *Id.* at 378. The court, however, relied on separation of powers principles to conclude that it had no power to declare the pardon invalid, any more than the governor could overrule a decision by the judiciary or repeal a law. *Id.* at 391-94. According to the court, "any attempt of the courts to interfere with the governor in the exercise of the pardoning power, would be manifest usurpation of authority." *Id.* at 391.

The United States Supreme Court, however, has intimated, at least in dicta, that judicial review of the presidential clemency power may in some instances be proper. *See Kobil, supra* note 37, at 616-20 (discussing federal case law suggesting that the judiciary may refuse to give effect to acts of presidential clemency). For a fascinating comparative discussion of judicial review of grants of executive clemency under Israeli, American, and English law, *see Barzilai v. Government of Israel*, H.C.J. 428/86, 40(3) P.D. 505; 6 S.J. 1 (1986) (holding valid Israeli presidential pardons granted prior to conviction to several internal security officials who had been indicted for wrongdoing in connection with the killing of Arab terrorists). The official English translation of this opinion is reported at 6 Selected Judgments of the Supreme Court of Israel 1 (1986).

¹⁴⁸ *Wilson v. Maurer*, No. 91-CVH01763 (C.P. Franklin County, Ohio filed Jan. 29, 1991).

in the action were eleven recipients of clemency from Governor Celeste, including seven of the eight death penalty commutees.¹⁴⁹

In the complaint, Fisher¹⁵⁰ asserted that these eleven grants of clemency (consisting of nine commutations and two unconditional pardons),¹⁵¹ are null and void because of Celeste's failure to comply "with the procedural prerequisites of R.C. Chapter 2967, and Article III, Section 11, of the Constitution of the State of Ohio."¹⁵² The complaint alleged that, in seven of the cases, no application was made to the APA before clemency was granted, although attorneys for these seven defendants did apply directly to the governor for clemency.¹⁵³ The Attorney General contended that, in the other four cases, the APA received the applications for clemency, but was not given reasonable time to complete its investigation and issue a recommendation to the governor.¹⁵⁴

¹⁴⁹ The eleven defendants named in the suit and their original sentences are: Donald Maurer, sentenced to death; Leonard Jenkins, sentenced to death; Willie Jester, sentenced to death; Lee Seiber, sentenced to death; Debra Brown, sentenced to death; Rosalie Grant, sentenced to death; Elizabeth Green, sentenced to death; Saram Bellinger, sentenced to an indefinite term of 5 to 25 years; Ralph DeLeo, sentenced to an indefinite term of 15 years to life imprisonment; Freddie Moore, whose sentence was suspended; and John Salim, sentenced to an indefinite term of 3 to 15 years. *See* Complaint, at paras. 4-14, *Wilson v. Maurer*, No. 91-CVH01763 (C.P. Franklin County, Ohio filed Jan. 29, 1991) [hereinafter "Complaint"].

¹⁵⁰ Although several of Fisher's assistants actually signed the pleadings, I will refer to the arguments made and positions asserted as "Fisher's" because the Ohio Attorney General personally decided that the suit ought to be filed and has taken responsibility for the suit in numerous statements to the press. *See, e.g.*, *Commutations Invalid*, Fisher Says, Press Release of Lee Fisher (Jan. 29, 1991) (copy on file with the *Ohio State Law Journal*); Letter from Lee Fisher to Richard Celeste (Jan. 29, 1991) (copy on file with the *Ohio State Law Journal*).

¹⁵¹ The death sentences of Mauer, Jenkins, Jester, Seiber, Brown, and Green, who were all convicted of aggravated murder, were commuted to life imprisonment with no parole eligibility. Grant's sentence of death for aggravated murder was commuted to life imprisonment. Bellinger's 5 to 25 year sentence for aggravated robbery with a gun was commuted to time served. DeLeo, sentenced from 15 years to life for murder, received a commutation to time served. Salim, convicted of felonious assault with a gun and violence and sentenced to imprisonment for 3 to 15 years, was granted a full and unconditional pardon. Moore, who received a suspended sentence after being convicted of operating a gambling house, received a full and unconditional pardon. *See* Complaint, *supra* note 149, at Exhibits A-K.

¹⁵² *Id.* at para. 22.

¹⁵³ *Id.* at para. 20.

¹⁵⁴ *Id.* at paras. 20-21.

Thus, the Fisher law suit alleges that Celeste's failure to process the paperwork and permit the APA sufficient time to review these clemency requests rendered the grants of clemency invalid. The Attorney General's challenge, if successful, would radically alter previous conceptions of the executive clemency power in several ways. First, the Attorney General would interpret the governor's clemency power as being subject to legislative regulations as to the manner of applying not only for pardons, but commutations and reprieves as well. In addition, the Attorney General's challenge rests on an assumption that the legislature can prescribe the use of the clemency power by the governor, and that the legislature can achieve this end implicitly, without expressly stating that it wishes to limit the power. Finally, Fisher's assertion that some of the acts of clemency are void because they were issued without sufficient time being given to the APA to process the applications would make the executive clemency power subject to implied administrative limitations. While some of the changes in the clemency power urged by the Attorney General may be desirable from a public policy standpoint, none of them are supported by the language of the Ohio Constitution, court decisions, or the Ohio Revised Code.

The Ohio Constitution creates, as well as provides the only limits on, the power of executive clemency.¹⁵⁵ In addition to excepting cases involving treason and impeachment from the executive clemency power, article III, section 11, provides that the power shall be "subject, however, to such regulations, as to the manner of applying for *pardons*, as may be prescribed by law."¹⁵⁶ Fisher has contended that the word "pardon," as used in this passage, also means "commutations" and presumably "reprieves" as well.¹⁵⁷ Hence, according to Fisher, since the commutations issued by Celeste were issued in violation of statutory provisions that require applications for commutation to be filed with the APA, they are void.¹⁵⁸

¹⁵⁵ See *Knapp v. Thomas*, 39 Ohio St. 377, 392 (1883) ("the only limitations [on the governor's clemency power] . . . are found in the constitution . . ."); see also *supra* notes 34-57 and accompanying text for a discussion of the history of article III, section 11, of the Ohio Constitution.

¹⁵⁶ OHIO CONST. art. III, § 11 (emphasis supplied).

¹⁵⁷ See Plaintiff's Memorandum Contra Motion to Dismiss, at pp. 35-42, *Wilson v. Maurer*, No. 91-CVH01763 (C.P. Franklin Co., Ohio) [hereinafter *Fisher Memorandum Contra*].

¹⁵⁸ Although the complaint does not specify that the commutations violate a specific provision of the Code, presumably the argument is based on OHIO REV. CODE ANN. § 2967.07 (Anderson 1987), discussed more fully *infra* notes 170-74 and accompanying text. See also Underwood, *supra* note 17 ("Specifically, Fisher says Celeste failed to heed Ohio law that first requires an application for commutation through the Adult Parole

This argument is the product of a common misapprehension about clemency terminology which assumes that the term “pardon” refers to all aspects of the clemency power.¹⁵⁹ The drafters of the Ohio Constitution, however, were more precise in their usage: the same sentence in which the language in question is found earlier refers to “reprieves, commutations, and pardons” as three distinct types of clemency.¹⁶⁰ Fisher’s argument supposes that the drafters of the constitution used the word “pardons” in the first half of the sentence to refer to a component of the clemency power that was distinct from commutations, and then suddenly switched to using the word “pardons” *within the same sentence* to refer to all types of clemency, including commutations. This reading is simply implausible, particularly in light of the fact that the drafters added the word “commutations” to the 1851 constitution in order to give the governor the power to commute sentences, even though he had possessed the power to grant “pardons” under the 1802 constitution.¹⁶¹ It also runs counter to basic principles of statutory construction: a term whose meaning is clear in one portion of a document retains this meaning notwithstanding other uses of the term within the same document that may seem obscure.¹⁶²

The most probable explanation for why the drafters would have subjected the governor’s power to grant pardons to some legislative regulation and not placed those same limits on commutations is that pardons have long been viewed as a much greater boon to the recipient. Under English common law, which defines the constitutional terms relating to the clemency power,¹⁶³ the effect of a pardon “is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon.”¹⁶⁴ This sweeping definition of a pardon as wiping out all consequences of a crime, including guilt, has been adopted by the Ohio

Authority followed by an investigation by the parole board.”).

¹⁵⁹ See *supra* notes 21–33 and accompanying text.

¹⁶⁰ OHIO CONST. art. III, § 11 (“He shall have power, after conviction, to grant reprieves, commutations, and pardons . . .”).

¹⁶¹ See *supra* notes 42–44 and accompanying text. In addition, it should also be noted that the Indiana Constitution of 1851, which was drafted at the same time as the Ohio Constitution and was available to the Ohio drafters, referred to pardons as a discrete type of clemency and subjected the granting of pardons, and not other forms of clemency, to special legislative limitations. See *supra* notes 50–55 and accompanying text.

¹⁶² See *State ex rel. Bohan v. Industrial Comm’n*, 146 Ohio St. 618, 67 N.E.2d 536, para. one of syllabus (1946).

¹⁶³ *Sterling v. Drake*, 29 Ohio St. 457, 460 (1876).

¹⁶⁴ 4 W. BLACKSTONE, COMMENTARIES *402.

Supreme Court.¹⁶⁵ Thus, the drafters of the Ohio Constitution may well have wished to regulate pardons because they represent an absolute remission of punishment, and even blot out guilt for the crime.

Although the constitution and its history contradict the Fisher contention that the nine challenged commutations are subject to limitations as to the manner of applying for them, two of the grants of clemency at issue *are* actually pardons. Thus, it is necessary to consider whether an executive pardon could be issued without application having first been made to the APA. Both the relevant Ohio statutes and the decisions of Ohio courts suggest that the pardons challenged by Fisher did not violate Ohio law.

The Ohio Supreme Court has never directly addressed whether the legislature can, through regulation of the application procedure, preclude the governor from issuing a pardon. The cases that have discussed this issue, however, all suggest that such legislative limitations would be inconsistent with the broad scope of the clemency power. The Ohio Supreme Court has noted that because the clemency power was intended to further merciful and beneficent purposes, "no construction should be put upon this constitutional provision that will prevent him from freely using" it for the purposes intended.¹⁶⁶ The Ohio Supreme Court, in dictum, has also stated that the General Assembly may only legislate "in aid of the [clemency] power," and if it wished to invalidate a pardon obtained by fraud, it could only do so "with the concurrence of the executive."¹⁶⁷ Moreover, in *State v. Schiller*,¹⁶⁸ the court considered whether a statute preventing anyone convicted of first degree murder from being recommended for a pardon by the board of pardons, except upon proof of innocence,¹⁶⁹ limited the governor's clemency power. The court held that this statute "in no wise

¹⁶⁵ See *Knapp v. Thomas*, 39 Ohio St. 377, 381 (1883); see also *State ex rel. Attorney-General v. Peters*, 43 Ohio St. 629, 650, 4 N.E. 81, 87 (1885); *Ex parte Lockhart*, 12 Ohio Dec. Reprint 515, 516 (Super. Ct. Cincinnati 1855).

¹⁶⁶ *Sterling*, 29 Ohio St. at 465 (discussing the power to grant reprieves).

¹⁶⁷ *Knapp*, 39 Ohio St. at 392. The court went on to state that the only power that the legislature might have with respect to executive clemency is limited to such provisions which "aid the governor in avoiding a pardon for some atrocious fraud." *Id.* at 393.

¹⁶⁸ 70 Ohio St. 1, 70 N.E. 505 (1904).

¹⁶⁹ 3 THE ANNOTATED REVISED STATUTES OF THE STATE OF OHIO § 6808 (C. Bates 4th ed. 1903). This section provided in part that "no person convicted of murder in the first degree shall be recommended for pardon by the board of pardons, or for parole by the board of managers of the penitentiary, except upon proof of innocence established beyond a reasonable doubt." *Id.*

affected or abridged” what the court referred to as the governor’s “full power to pardon.”¹⁷⁰

In addition, one lower appellate court has rejected the argument advanced by Fisher, although not within the context of an attempt to invalidate a pardon. In *Licavoli v. State*,¹⁷¹ the Court of Appeals for Lucas County considered whether a trial court had correctly charged the jury when it instructed that despite a statute prohibiting a recommendation for pardon except on proof of innocence, “*the Governor could pardon if so disposed at any time.*”¹⁷² The court persuasively reasoned that the jury had been properly instructed:

It is claimed that the language, “subject, however to such regulations, as to the manner of applying for pardons, as may be prescribed by law”, authorizes the legislature to limit the power conferred upon the Governor by regulating procedure. We do not so construe that language. If so construed, it would or could nullify the power of the Governor. It must be assumed that the Governor, as well as every other public officer, charged with the duty of deciding, will act judiciously. Section 11 of Art. III of the Constitution, by requiring the Governor to report his reasons to the General Assembly, is a recognition to hear and reach honest conclusion, at least, before granting a pardon. Granting a pardon without doing so would be just ground for impeachment. The power of the legislature to regulate the manner of applying for pardons is limited to such regulations as will assist the Governor in the discharge of his duty to act judiciously. Such regulations would not limit the proper exercise of the pardoning power *at any time.*¹⁷³

Even if, however, the legislature were somehow held to possess the power to limit the executive clemency power with respect to the manner of applying for pardons, the legislature has not expressly chosen to do so. The Fisher lawsuit assumes that Ohio law *requires* that an application for clemency be filed with the APA as a prerequisite to the governor issuing any form of clemency.¹⁷⁴ The Attorney General relies primarily on Section 2967.07 of the Ohio Revised Code, which provides:

All applications for pardon, commutation of sentence, or reprieve shall be made in writing to the adult parole authority. Upon the filing of such application, or when directed by the governor in any case, a thorough

¹⁷⁰ *Schiller*, 70 Ohio St. at 9–10, 70 N.E. at 508.

¹⁷¹ 20 Ohio Op. 562, 34 N.E.2d 450 (1935).

¹⁷² *Id.* at 568, 34 N.E.2d at 456.

¹⁷³ *Id.* at 569, 34 N.E.2d at 457.

¹⁷⁴ See Complaint, *supra* note 149, at paras. 20–22.

investigation into the propriety of granting a pardon, commutation, or reprieve shall be made by the authority, which shall report in writing to the governor a brief statement of the facts in the case, together with the recommendation of the authority for or against the granting of a pardon, commutation, or reprieve, the grounds therefor and the records or minutes relating to the case.¹⁷⁵

Yet this reliance is misplaced because the statute itself appears to assume that two avenues exist for a clemency request to be considered by the APA: *either* an application may be filed with the APA (presumably by the prospective clemency recipient), thereby triggering an APA investigation, or the governor "*in any case*" may direct the APA to conduct an investigation. If the drafters of Section 2967.07 had considered the governor to be bound by the requirement of filing an application, the clause "or when directed by the governor in any case" would be entirely unnecessary.¹⁷⁶ Implicit in this statutory scheme is recognition of the governor's preeminence when it comes to the granting of clemency;¹⁷⁷ like the courts, the legislature evidently presumed that it can assist the governor in the exercise of the power, but may not establish prerequisites that would limit its exercise.

If the General Assembly does desire to limit the executive's pardoning power by imposing procedural prerequisites to the executive's use of the power, it should be expressly stated in the statute. Such an extraordinary limitation on a power delegated to the executive by the constitution should not, as Fisher contends, be read into the statute by implication. Other state

¹⁷⁵ OHIO REV. CODE ANN. § 2967.07 (Anderson 1987).

¹⁷⁶ Fisher, in support of his reading of the statute, has also pointed to OHIO REV. CODE ANN. § 2967.08 (Anderson 1987), which provides that a governor "may grant a reprieve for a definite period of time to a person under sentence of death, with or without notices or application." Fisher Memorandum Contra, *supra* note 157, at 44. By negative inference, Fisher argues that in all other cases the governor cannot grant clemency without application first having been made to the APA.

Putting aside the problems that attend inferring a limitation on an express constitutional power from an ambiguous statutory provision, such a reading of the statute cannot be reconciled with Section 2967.07 or the cases discussed above. Instead, Section 2967.08 appears to be one of many instances in which Chapter 2967 has redundantly codified truisms about the clemency power that are clear either from the constitution or from the decisions of the Ohio Supreme Court. *See, e.g.*, OHIO REV. CODE ANN. § 2967.01(B) (Anderson 1987) (repeats OHIO CONST. art. III, § 11's grant to the governor of the power to grant pardons "after conviction, . . . upon conditions precedent or subsequent").

¹⁷⁷ *See also* OHIO REV. CODE ANN. § 2967.03 (Anderson Supp. 1990) (noting that the APA may exercise its functions and duties in clemency cases "upon direction of the governor or upon its own initiative").

legislatures that have sought to limit the executive's clemency power by requiring initial application to an administrative body similar to the APA have expressed these limitations in no uncertain terms.¹⁷⁸ No less should be required of the General Assembly.

Finally, Fisher seeks to establish in the lawsuit that the governor is also subject to implied administrative conditions when exercising the clemency power. Specifically, Fisher contends that the governor cannot grant clemency before the APA has had a "reasonable time . . . to have completed an investigation, given any required notice, and made a recommendation" to the governor.¹⁷⁹ This implied prerequisite to the exercise of the clemency power seems to have had its genesis in Section 2967.12 of the Revised Code, which states that, at least three weeks prior to recommending clemency, the APA must notify the judge, prosecutor, and in some instances, the victim, of the pendency of clemency.¹⁸⁰ As with the other provisions relied on by Fisher, however, Section 2967.12 does not expressly predicate the governor's use of the clemency power on compliance with this notification provision.¹⁸¹ Fisher's contention that the governor must wait "a reasonable time" for the APA to act before he is authorized to issue a pardon or commutation would effectively render the governor a secondary actor in the clemency process, contrary to article III, section 11, of the Ohio Constitution, which vests this power in the governor. The "reasonable time" requirement advocated by Fisher would also inject an unacceptable element of uncertainty into the clemency process: outgoing governors could never know when it was too late to grant clemency,¹⁸² and in the case of each pardon or commutation issued before the APA had issued a recommendation,

¹⁷⁸ E.g., ARIZ. REV. STAT. ANN. § 31-402 (A) (West Supp. 1990) ("No reprieve, commutation or pardon may be granted by the governor unless it has first been recommended by the [Board of Pardons and Paroles].").

¹⁷⁹ See Complaint, *supra* note 149, at para. 21.

¹⁸⁰ OHIO REV. CODE ANN. § 2967.12 (Anderson Supp. 1990).

¹⁸¹ Although the statute does contain a subsection authorizing the governor to modify the APA's notification requirements if there is insufficient time to comply with them prior to execution of a death sentence, this provision is applicable in "case[s] of an application for" clemency. OHIO REV. CODE ANN. § 2967.12(D) (Anderson Supp. 1990). Thus, this modification of notice requirements is only relevant where applications for clemency have been made, rather than where the governor has himself decided to grant clemency.

¹⁸² For example, Governor Celeste indicated to me that at the end of his term, the APA was having great difficulty processing the more than 100 requests for clemency in the battered woman syndrome cases, despite his office initiating its request that the cases be considered as early as August of 1990. Telephone interview with Richard Celeste (Apr. 1, 1991).

the question of "reasonableness" would have to be litigated. It seems highly unlikely that either the drafters of the Ohio Constitution, or the members of the General Assembly who enacted Chapter 2967, intended such a result.

In sum, the arguments advanced by Attorney General Fisher in support of the lawsuit are refuted by the language of article III, section 11, of the Ohio Constitution, by the decisions of Ohio courts, and by the statutory provisions pertaining to clemency. While some of the procedures that Fisher advocates, such as the requirement that the APA be given an opportunity to conduct a thorough investigation whenever clemency is granted, are probably desirable from a public policy standpoint, there is no support for them under existing Ohio law. If this case is ultimately decided on the merits,¹⁸³ this unprecedented effort to invalidate Celeste's grants of executive clemency should be thwarted.

2. *The Victim Notification Law*

Recently, Representative Suzanne M. Bergansky introduced House Bill 212¹⁸⁴ [the "Bill"], which requires that at least three days before commuting a death sentence, "the Governor shall give notice of the pending commutation to the prosecuting attorney and the judge of the court of common pleas in which the indictment was found and to a member of the immediate family of the victim of the offense for which the convict received the death sentence." According to Representative Bergansky, the Bill was drafted in response to the complaint of the widow of a Cleveland police officer who was killed by one of the prisoners commuted by Celeste. Bergansky quoted the officer's widow, Tracy Johnson, as saying:

[While watching television] I learned that Gov. Celeste had commuted my husband's killer's death sentence. This absolutely unexpected news was devastating. The law should require prior notice so families are not so emotionally beaten up by such a punch of bad news.¹⁸⁵

¹⁸³ The Ohio Public Defender's Office, on behalf of all named defendants, has filed a motion to dismiss Fisher's lawsuit on a number of intriguing procedural and substantive grounds. Motion to Dismiss of Ohio Public Defender, *Wilson v. Maurer*, No. 91-CVH01763 (C.P. Franklin County, Ohio filed Mar. 6, 1991) (arguing, among other things, that the Fisher lawsuit violates separation of powers principles and violates prohibitions against cruel and unusual punishment). The motion was overruled, however, on September 26, 1991. Journal Entry, *sub nom.* Ohio Dep't of Rehabilitation and Correction v. Maurer, No. 91-CVH01763 (C.P. Franklin County, Ohio).

¹⁸⁴ H.B. 212, *supra* note 20.

¹⁸⁵ See Miller, *supra* note 145 (Statement of Tracy Johnson, quoted by Representative Bergansky).

Notwithstanding the obvious good intentions behind the Bill, there is absolutely no constitutional authority for the legislature to enact such a law. Unlike the Fisher lawsuit,¹⁸⁶ which is at least ostensibly based on the constitutional provision making the governor's clemency power subject to regulation "as to the manner of applying for pardons," the Bill attempts to regulate the governor's *granting* of commutations, a limitation on the governor's power not found in the constitution.¹⁸⁷ Thus, the Bill should not be enacted since it would certainly be declared unconstitutional if it were ever challenged.¹⁸⁸

V. OVERHAULING THE EXECUTIVE CLEMENCY POWER:
MOVING BEYOND RELIANCE ON THE KINDNESS OF STRANGERS

As the discussion set forth above indicates, the proposed attempts to "fix" the clemency power currently being pursued are fraught with problems. I believe that any attempts to revise the clemency power must recognize that the clemency power is an integral part of our system of justice, not a sort of "wild-card" that should be taken out of the governor's deck because many people believe it was used frivolously by Governor Celeste. Executive clemency is a powerful, but necessary, check on the legislative and judicial branches that permits the governor to correct miscarriages of justice that would otherwise be without a remedy. The very flexibility, however, that

¹⁸⁶ The introduction of the Bill by Representative Bergansky demonstrates at least implicit recognition that two avenues exist for obtaining clemency, contrary to Attorney General Fisher's argument that application to the APA and subsequent investigation are mandatory prerequisites for clemency. *See supra* notes 175-77 and accompanying text. Since the APA is already required to provide the notices described in Bergansky's Bill, *see OHIO REV. CODE ANN. § 2967.12* (Anderson Supp. 1990) (at least three weeks notice required), the notices Bergansky would require of the governor would only be needed in those cases in which clemency was granted without application having been made to the APA.

¹⁸⁷ *See, Knapp v. Thomas*, 39 Ohio St. 377, 392 (1883) (stating that the only limitations on the executive clemency power are "found in the constitution"); 1 Op. Ohio Att'y. Gen. 257, 259 (1940) (advising that the legislature is without power to diminish or enlarge the clemency power of the governor).

¹⁸⁸ The Bill is not only constitutionally infirm; it also fails to achieve even the limited purpose of shielding the families of victims from unexpected news of clemency since it omits both pardons and reprieves from its coverage.

allows executive clemency to operate as a meaningful check on the other branches also makes its abuse a very real possibility.¹⁸⁹

Thus, any attempts to refine the clemency power should focus on encouraging judicious use of the clemency power by the executive, without constraining the use of the power to such an extent that it loses its effectiveness as a limit on judicial and legislative actions. Also, account should be taken of political realities that have led to a substantial atrophy in the clemency power both at the federal level and at the state level.¹⁹⁰

I believe that one improvement that could readily be made in Ohio clemency procedures is compliance by the governor with the accountability clause of the Ohio Constitution.¹⁹¹ Governors for the past twenty-five years have failed to provide any reasons to the legislature for their grants of clemency, in contravention of the disclosure requirement of article III, section 11.¹⁹² By failing to insist on compliance with this constitutional requirement, the legislature has allowed Ohio governors to avoid justifying the grounds for each act of clemency, thereby encouraging arbitrary use of the clemency power. If a governor is forced to provide reasons for each of his clemency decisions, he would at least have to consider such things as consistency and what constitutes sound reasons for remitting punishment. In addition, I believe that the accountability provision was intended to promote confidence in the clemency power as an integral part of our system of justice. Unexplained uses of the clemency power undermine this end and contribute to a perception by the public, and perhaps the executive as well, that the clemency power is some sort of inscrutable prerogative to be dispensed at the whim of the governor. If the General Assembly wished to revive this dormant provision in the Ohio Constitution, it could do so by conveying a

¹⁸⁹ Although Ohio has thus far avoided the most blatant abuses of the clemency power, other states have not been so fortunate. *See* SURVEY, *supra* note 21, at 150-53 (describing the impeachment and removal from office of Oklahoma Governor J.C. Walton for selling hundreds of pardons); *see also* P. MAAS, MARIE: A TRUE STORY (1983) (describing the scandal that embroiled the administration of Tennessee Governor Ray Blanton involving the widespread sale of pardons and commutations); Blackmore, *Tennessee's Clemency-Selling Scheme: Could Blanton Not Have Known?*, 5 CORRECTIONS MAGAZINE, June 1979, 55 (describing the circumstances and aftermath of Governor Blanton's eleventh-hour grants of clemency and his slightly premature ousting from office).

¹⁹⁰ *See* Kobil, *supra* note 37, at 602-10 (noting the statistical and anecdotal indications that use of the clemency power is declining at both the state and federal levels); Note, *supra* note 136, at 393-94.

¹⁹¹ OHIO CONST. art. III, § 11 ("He shall communicate to the General Assembly . . . [each case of clemency granted] . . . with his reasons therefor.").

¹⁹² *See supra* notes 93-94 and accompanying text.

joint resolution to the governor requesting disclosure pursuant to article III, section 11. Should this request not be heeded, an action in mandamus could be brought to force the governor to fulfill his constitutional duty to provide reasons for using the clemency power.

As I have argued elsewhere, however, the most significant improvement that could be made in the clemency process would be the promulgation of standards to assist the executive in the principled exercise of the clemency power.¹⁹³ Inasmuch as retributive concerns substantially underlie our system of justice, I believe that standards which focus on whether the offender deserves the punishment imposed would be helpful in assessing whether clemency is appropriate, although rehabilitative principles may also be deemed relevant.¹⁹⁴ The most obvious circumstance in which retributive standards dictate the remission of punishment would be a case where there was substantial doubt about guilt. Other such factors that would support clemency include diminished mental capacity, disproportionate punishment, and punishment that is related to factors other than what is deserved for the particular crime.¹⁹⁵

In Ohio, these or analogous standards could be promulgated either by the legislature, to the extent that it is constitutionally permitted to participate in the clemency process,¹⁹⁶ or by the executive. In light of the vast discretion given to the executive in exercising the clemency power, the only way of ensuring that these principles are given consideration would be to amend the constitution, at least to make the governor's power "subject to *and limited by* such regulations as to the manner of applying for *reprieves, commutations, and pardons* as may be prescribed by law." Then, a constitutional basis would exist for the legislature to enact statutes which unambiguously state that the governor cannot grant any form of clemency until after an application has been made to the APA, and a recommendation by that body has been made to the governor. Such a requirement would ensure that a responsible body with the requisite expertise considered and investigated each clemency application. The APA should in turn be required by statute, or at least its own administrative rules, to consider and make recommendations based on clearly defined standards for evaluating clemency applications.

¹⁹³ See Kobil, *supra* note 37, at 624-33.

¹⁹⁴ *Id.* at 579-83, 624-33.

¹⁹⁵ *Id.* at 624-33 (describing various factors based on retributive concerns that would justify granting clemency).

¹⁹⁶ *Supra* note 21.

The ultimate authority to decide whether to grant clemency, however, would remain with the governor, permitting some political accountability in the exercise of the power, and providing a check on the judicial and legislative branches by the governor. I would also advocate the inclusion of some sort of sunset provision in the constitution, similar to that found in the Alabama Constitution,¹⁹⁷ to ensure that the governor's clemency power was not rendered indefinite. Such a provision could provide that if the APA, or any other body charged with the task of advising the governor on clemency, failed to act on an application within a specified time, the governor could then grant or deny clemency based on his own assessment of the application. Thus, the governor's clemency power could not be rendered nugatory because of an administrative "bottle-neck" or through the actions of an intransigent administrator who happened to oppose the governor's clemency practices.

In practice, many of these same ends could be achieved without a constitutional amendment. The legislature or the APA could promulgate standards to be employed by the APA in processing clemency applications, or the governor could himself develop and utilize such principles in deciding whether to grant clemency.¹⁹⁸ Regardless of who implemented principled clemency standards, the upshot would be an improvement in the quality of clemency decisions since the APA considers and makes a recommendation to the governor in the vast majority of cases. The only drawback to such an

¹⁹⁷ ALA. CONST. art. V, § 124, which in part provides:

The attorney-general, secretary of state, and state auditor shall constitute a board of pardons, who shall meet on the call of the governor, and before whom shall be laid all recommendations or petitions, for pardon, commutation, or parole, in cases of felony; and the board shall hear them in open session, and give their opinion thereon in writing to the governor, *after which or on the failure of the board to advise for more than sixty days, the governor may grant or refuse the commutation, parole, or pardon, as to him seems best for the public interest.*

(emphasis supplied).

¹⁹⁸ It is also possible that, at least with regard to pardons, the legislature could attempt to pass a statute prohibiting any pardon from being granted unless application had first been made to the APA. The APA could then at least evaluate all pardon applications under the more principled approach I have outlined, even if its recommendation did not have binding effect. However, in light of several Ohio decisions indicating that the governor's power to pardon can only be "assisted" by legislative regulations and not limited, *see supra* notes 166-73 and accompanying text, it is problematic whether the legislature could establish a prerequisite to the granting of pardons, even through regulations pertaining "to the manner of applying for pardons." *See* OHIO CONST. art. III, § 11.

approach is that the use of more consistent and principled clemency standards would be impossible to mandate, owing to the breadth of the constitutional grant of authority to the governor.

VI. CONCLUSION

The Lucas County Court of Appeals observed in *Licavoli v. State*, that “[i]t must be assumed that the Governor, . . . will act judiciously” in exercising the clemency power.¹⁹⁹ In Ohio, however, that assumption has not always been well founded. Our experience has perhaps been more analogous to that of Kasper Gutman, the rotund, erudite foil to Humphrey Bogart’s Sam Spade in the *Maltese Falcon*.²⁰⁰ Upon meeting Gutman for the first time, Spade remarks that he likes to talk, prompting Gutman to wax eloquent on the virtues of plain speaking:

Better and better! I distrust a closed-mouthed man. He generally picks the wrong time to talk and says the wrong thing. Talking is something you can’t do judiciously unless you keep in practice. Now then, we’ll talk if you like. I’ll tell you right out, I’m a man who likes talking to a man who likes to talk.²⁰¹

I believe that the clemency power, like talking, cannot be used judiciously by governors who do not “keep in practice.” Despite the politically explosive nature of the clemency power, it is an integral part of our system of justice, and hence governors should exercise the power in a fair and principled manner throughout their tenure in office. Yet owing to the potential repercussions for granting clemency, the temptation has been, and will continue to be, for governors to use the power infrequently, and in all likelihood, injudiciously. For if clemency decisions are viewed merely as rare exercises of executive discretion, it seems likely that they will be made in an arbitrary fashion, without consistent standards ever being developed to guide the governor or his advisors.²⁰²

¹⁹⁹ 20 Ohio Op. 563, 568, 34 N.E.2d 450, 457 (1935). The court observed that the only remedy for the governor’s failure to employ the clemency power in a responsible fashion would be impeachment. *Id.*

²⁰⁰ *The Maltese Falcon* (United Artists 1941). Gutman was of course played by the inimitable Sydney Greenstreet.

²⁰¹ *Id.*

²⁰² Indeed, one attorney I spoke with who made recommendations to Governor Celeste on clemency cases told me that in order to lend consistency to his recommendations, he was compelled to devise his own personal standards for whether clemency was deserved

The present wording of the Ohio Constitution makes it impossible for the legislature or the judiciary to force governors to employ principled standards in using the clemency power. Moreover, the various attempts to limit the clemency power that have been proposed, ranging from attempts to amend the constitution, to revise Ohio statutes pertaining to clemency, or to challenge the decisions directly in court, do not offer sound or legally defensible alternatives to the present system. The problem with the power is the arbitrariness of clemency decisions, an arbitrariness that stems from fundamental misconceptions about the role and nature of clemency. Although this problem could be addressed by amendment of the constitution, coupled with thoughtful revision of the statutory provisions pertaining to clemency, in my view the most likely avenue of reform lies in the voluntary development of principled clemency standards by the executive himself, or by the APA.

The development of such standards obviously would not end controversies over uses of the clemency power. In view of the tremendous public support for capital punishment, Governor Celeste would no doubt have been soundly criticized for commuting a death sentence no matter how he went about it. If, however, he had been steadily evaluating these sentences in a principled, consistent fashion throughout his two terms in office, the impression given to the public would not have been that of a governor finally daring to use the power for personal philosophical reasons at a time when he no longer was politically accountable. Certainly, he would have at least been able to make sure that the APA was given an opportunity to evaluate the proposed grants of clemency in all cases. Thus, the challenge to the commutations on the ground that proper application had not been made to the APA would have been avoided, and the potential commutees would not now be balanced between life and death, wondering whether the failure to do the paperwork will ultimately prove fatal to them.

in particular cases. As I have argued above, this is an unacceptably arbitrary approach to what is an integral part of our system of justice. The development of such standards should not be done by each attorney who happens to advise the governor on a particular case, but by the governor early in his term, or by the APA.

APPENDIX

REPORT OF THE DEBATES AND PROCEEDINGS
OF THE CONVENTION FOR THE REVISION OF
THE CONSTITUTION OF THE STATE OF OHIO
(J.V. SMITH, REPORTER 1851)

Section 11 (recited above) giving to the Governor the reprieving power, &c., was then read.

Mr. HAWKINS moved to amend by striking out all after the word "treason" in the second line.

The motion was not agreed to.

On motion of Mr. LIDEY, the word "annually," in the ninth line, was struck out.

Mr. BROWN, of Carroll, moved to insert after the word "all," in the second line, the words, "crimes and," which was agreed to.

Mr. ARCHBOLD moved to amend by inserting after the word "shall" in the ninth line, the words "at every regular session of the General Assembly."

The motion was agreed to.

Mr. STILWELL moved to strike out the word "legislature," wherever it occurred in the section, and to insert the words "General Assembly."

The motion, however, was withdrawn after some cursory observations from different members.

On motion of Mr. HITCHCOCK of Geauga, the word "under" was inserted after the word "and" in the 3d line.

Mr. HUMPHREVILLE moved to add the following at the end of the section "and his reason therefor."

Mr. McCORMICK moved to amend by striking out all after the word "reprieve" in the 9th line.

The question being on the motion of the gentleman from Medina (Mr. HUMPHREVILLE) it was put and carried.

The question then recurring was on striking out all after the word "reprieve" in the 9th line.

Mr. RIDDLE desired to say a few words, and if might be, give a reason why the section should stand as it was. The committee inserted that clause into the report for the purpose, that the legislature at its annual or biennial sessions might know what the Governor had done during the vacation in the exercise of the pardoning power. It was known that the exercise of that power was much complained of. They all knew in what manner petitions were got up—it was an easy matter to get them up as every one knew—it was but too easy to excite the

sympathies of men in behalf of the convicted criminal. Gentlemen of the committee were aware from their own experience that they had often put their names to papers soliciting reprieves and pardons on the representation of persons, in whom they had confidence. They knew also that persons in the same manner might influence the governor; and they further knew that on the strength of that influence brought to bear on him by the names of persons standing high in society he often exercised that power in instances in which the public could not see any propriety. The power, no doubt, had been abused, but when they looked into the entire matter they would find that no blame could be attached to the Governor. He knew that in the county he in part represented, many persons had been convicted, at a great expense, of counterfeiting and grand larceny; well, a few weeks passed by and they found those counterfeiters and burglars walking about the streets of their city. When they inquired into the matter, it was found that they were pardoned, and probably they found that the jury who convicted them, through sympathy for their families, respectable lawyers, and sometimes the judges of the Bench, had put their names to petitions for their pardon. This section would prevent parties from putting their names to such documents indiscriminately. These were the reasons which induced the committee unanimously to report the section as it stood.

Mr. HAWKINS moved to amend the amendment, by striking out the word "he" in the 11th line, and inserting the words "such persons."

The amendment was agreed to.

Mr. McCORMICK thought that the committee had failed in effecting what they desired. The section required nothing to be communicated to the Legislature except the names of the persons pardoned. If men had interfered improperly in getting reprieves for criminals, there was nothing in that section as it now stood, which required the naming of the persons who interfered to obtain it, and even with the addenda of the gentleman from Medina [Mr. HUMPHREVILLE] that requisition was not yet made upon the governor for it, but required the communication of his reasons—the reasons that operated on his mind. The only object to be gained by this section, was the ascertainment of the number of prisoners pardoned, but the Warden of the Penitentiary had that information always in his possession.

Mr. HAWKINS proposed an amendment, as follows, to come in at the end of the section—"and the cases of all persons who may have by petition or otherwise applied for such reprieve, pardon or commutation."

Mr. STANTON expressed himself opposed to the amendment of the gentleman from Morgan. He supposed that the latter part of the section was intended for the purpose of making the Governor accountable to the people for the exercise of the pardoning power, and to inform them whom he had pardoned. He considered that the reasons which influenced the Governor were all that could reasonably be required.

Mr. LARWILL would support the motion of the gentleman from Adams, (Mr. McCORMICK). He thought that the information communicated, would not be of any great amount ultimately. The Governor would no doubt have good reasons for exercising the pardoning power, and he supposed would at all times be willing to communicate to the Legislature his reasons for so doing, when it was desired.

The motion of the gentleman from Morgan, (Mr. HAWKINS) was not sustained.

The question then turned on the amendment presented by Mr. McCORMICK, which was disagreed to.

Mr. STANBERY wished to learn from some member of the committee who made the report, what was the necessity of the provision in relation to "treason."

Mr. RIDDLE in reply, said he hoped such an offence of treason, would never occur in Ohio; but still it might occur, and in view of the contingency, this provision had been reported. The committee when inserting the word "treason" in the section, had not supposed that the definition of it would be left to the legislature: they had expected that the term would be defined in the constitution we were about to frame. He was aware that a similar provision existed in some of the constitutions. Treason against the State consisted to levying war against it, or adhering to its enemies or giving them aid or comfort. They never had been called upon, and he hoped we never would be while we existed as a member of this great confederacy, to impeach any one of its citizens for levying war against the State—or adhering to its enemies, &c. &c. [sic] Yet, we know that a distinguished individual had been indicted and convicted of treason, and if the section did not harm, why strike it out? The definition of the term, he considered properly belonged to, and would no doubt be defined by another committee, and if it were not defined, why, then he would go with the gentlemen, and have the definition given in this place.

Mr. ROBERTSON thought that the provision should be retained and the offence defined. The fact that the constitution of the United States provided a remedy for the crime of treason, was no reason why we should not have a remedy under our State government, for the same

offence. Such was the case in many instances. Counterfeiting the coin of the United States was made punishable by the laws of the United States and also by the laws of this State; there was a concurrent jurisdiction. In treason, above all things, he thought the State should retain the power of punishing those guilty of that crime, because the State was immediately interested, and in the absence of such a provision might suffer materially.

The question being on the amendment of the gentleman from Franklin, [Mr. STANBERY,] it was put and lost.

On motion of Mr. OTIS, the word "thereto," was substituted for the words "to the Legislature," in the ninth line.