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The Use of Executive Clemency in Ohio: A Historical Assessment

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Abstract: Under the Ohio Constitution, the Governor has the authority to make decisions about executive clemency. This paper is a historical review of the nature of executive clemency, and the frequency of its use in the twentieth century. The use of clemency is put into historical perspective and factors associated with changes in its use are examined.

Holcomb, J.E. (2004). "Executive clemency in Ohio: A historical assessment." Ohio Corrections Research Compendium (Volume 2), 225-235. Columbus, OH: Ohio Department of Rehabilitation and Correction.

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Under the Ohio Constitution, the Governor has the authority to make decisions about executive clemency. This paper is a historical review of the nature of executive clemency, and the frequency of its use in the twentieth century. The use of clemency is put into historical perspective and factors associated with changes in its use are examined.

The word “clemency” may be applied to a variety of related but dissimilar actions. Clemency is generally thought of as an action generated by kindness, mercy, leniency or forgiveness that mitigates or suspends a sanction, usually a criminal penalty (Black, 1991: 173). However, the overly general use of the term often leads to confusion and ignores of the various types of clemency available (e.g. see Hurnard, 1969; Moore, 1989). As this study focuses on Ohio, it is most appropriate to use terminology that is consistent with the Ohio Constitution (Ohio Constitution art. III §11). Though the Ohio constitution does not define the various forms of clemency, they are generally consistent with those found in other states (see National Governor’s Association, 1986). The Ohio constitution recognizes three types of clemency actions: pardons, reprieves, and commutations¹. Pardons, though often

considered synonymous with clemency, are in fact a specific type of clemency. Pardons generally have the most far-reaching consequences for a convicted person². Pardons may be full or conditional, and are usually interpreted as eliminating legal responsibility (i.e. the punishment) of the offender following conviction (Kobil, 1991: 660-661). A commutation is a reduction of the original punishment to a less severe one. Such punishments are often commuted either to time served, thereby releasing the inmate from incarceration, to a shorter sentence to make the prisoner eligible for early release such as parole, or used to reduce a death sentence to some form of life imprisonment (see Kobil, 1991: 61). Reprieves are the most limited type of clemency and represent a temporary withholding of punishment. Reprieves usually postpone imposition of a sentence for a specific period of time in order for appeals or relevant matters to be resolved (Moore, 1989:5; Kobil, 1991: 661). A fourth type of clemency, amnesty, is usually awarded to specific groups of individuals or types of offenders (Moore, 1989: 5). An example of amnesty is the use of post-war clemency to preclude prosecution for those who violated military draft laws during wartime (see Saliterman, 1985). Usually granted by Presidents and monarchs, the use of amnesty in individual state procedures is extremely rare. In fact, the Ohio Constitution does not mention the use of amnesty and the present research found no evidence of an Ohio governor attempting to grant amnesty, therefore the use of amnesty is not addressed in this work (but see Moore, 1989; Saliterman, 1985). To avoid confusion, the term clemency is used in a general sense and more specific terminology is

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 the governor’s reasons therefor. (found in Katz and Giannelli, 1999)

¹ Article III, § 11 of the Ohio Constitution reads:

The governor shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such condition as the governor may think proper; subject, however, to such regulations, as to the manner of applying for commutations and pardons, as may be prescribed by law. Upon conviction for treason, the governor 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. The governor shall communicate to the General Assembly, at every regular session, each case of reprieve,

² In Ohio, pardons can be granted only *after* conviction (OH Const. art. III § 11).

used when addressing particular types of clemency.

The current study is a historical review of the nature of executive clemency and the frequency of its use in Ohio during the 20th century. The primary goal is to put the use of executive clemency in historical perspective and examine the factors associated with changes in its use. Under Ohio law, the governor has the sole discretion to make decisions about clemency, provided that regulations concerning the application process established by law are followed (OH Constitution art. III § 11). This power remained unchanged during the entire 20th century in Ohio. Any changes in the use of clemency, therefore, will be associated with political, social, and legal factors and not in legal changes in a governor's authority to use that discretionary power³.

METHODOLOGY

Research on the use of executive clemency focuses primarily on clemency in capital cases (Abramowitz and Paget, 1964; Bedau, 1990; Burnett, 2002; Wolfgang, Kelly, and Nolde, 1962). The present study, however, is interested in examining the use of all types of executive clemency in Ohio. A detailed examination of the use of clemency in capital cases, though obviously an important issue, is beyond the scope of the present work (see Bedau, 1990; Burnett, 2002; Kobil, 1993; Myers, 1997; Palacios, 1996; Radelet and Zmesbik, 1993; also Holcomb, 2000). The current study is a descriptive analysis of official Ohio records on the use of executive clemency and is primarily interested in examining the frequency of granting executive clemency and changing patterns in the use of executive clemency in Ohio. Identifying the political and social context associated with such changes may provide insight into the factors and circumstances that influence the use of executive clemency.

³ Following the controversial granting of clemencies by outgoing Governor Celeste in 1991, Ohio citizens modified the Ohio Constitution to require the governor to consider only clemency for only those individuals who had actually applied for clemency. This change became effective in 1995 but did not alter the governor's sole discretion in clemency decisions (see *Wilkerson v. Mauer et al.*, 1994). This change was primarily symbolic and only affected the last few years of the study, therefore, its impact on the present findings is negligible (see Holcomb, 2000, 28-33).

Clemency data sources.

The data represent a complete enumeration of all clemency actions granted in Ohio between 1900 through 2002. The primary source of data on the number and types of clemency actions was the "Biennial Report of Ohio Pardons, Commutations, and Reprieves" submitted to the Ohio General Assembly as part of the official record of each session. This report is entered into the official record of the session and is published along with the session proceedings in the official publication of the Ohio Senate, the *Journal of the Senate of the State of Ohio* (hereafter *Ohio Senate Journal*), usually as an appendix to the session report.

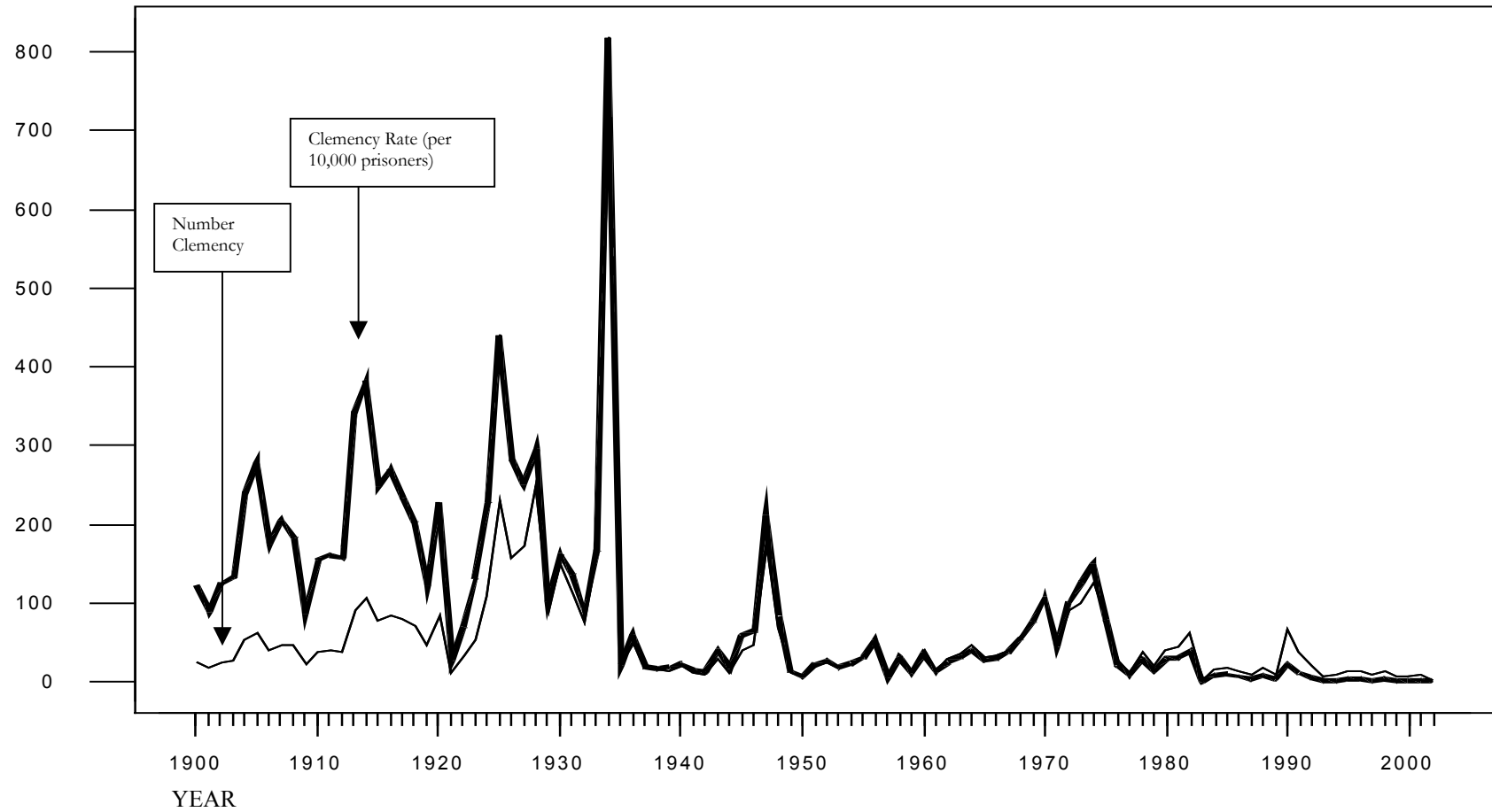
Types of clemency

Data were collected on the numbers of pardons, commutations, and reprieves granted every year between 1900 and 2002. Commutations were further divided into one of three categories based on the type of sentence that was commuted: death sentences, life sentences, and non-life sentences. Non-life sentence commutations were defined as those granted to offenders convicted of a crime that resulted in neither a life or death sentence.

Gubernatorial terms of office in Ohio typically begin the second week of January in the new year following their election in November. Because the data were recorded on a yearly basis, if an outgoing governor granted clemency during the new year, it would be impossible to distinguish those clemency actions from any granted by the newly elected governor during their first year in office. The result would be the combining of clemency actions from two separate governors. Therefore, clemency actions granted by an outgoing (i.e. lame duck) governor during the first year of a newly elected governor are "lagged". In effect, such actions are coded as having been granted in the previous year during the final full calendar year of the outgoing governor's term in office⁴. Since the research is interested in changing patterns in the use of clemency, this procedure will not substantively alter the findings.

⁴ Either method, using actual calendar dates or lagging the described actions, present validity problems. Using actual calendar dates, the data would not clearly reflect differences in the use of clemency power by different governors. The lagging procedure results in a slight shifting of clemency actions for some years to a previous calendar year.

Figure 1: Total Clemency Granted in Ohio, 1900-2002



The use of rates

A unique aspect of the present study is the examination of rates of clemency actions over time rather than merely the raw numbers. This allows the researcher to gauge changes in the use of clemency in relation to a particular population base. Rates for the clemency variables were calculated based on the year-end count of the Ohio prison population (per 10,000 inmates) during a particular year. While pardons and non-life commutations have been granted to those who were not within prison system at the time they were granted clemency (in particular, the World War II non-life commutations), a significant percentage of all clemency actions were granted to prisoners while they were incarcerated. Both the resident population and the number of incarcerated persons in Ohio have increased dramatically during the previous century, indicating that considering clemency relative to some base population should reflect these changes. The use of a rate based upon the prison population seems a reasonable, though not perfect, method to compare changes in the use of clemency over time⁵.

ANALYSIS AND DISCUSSION

Frequency of executive clemency in Ohio

Table 1 presents a descriptive summary of the total frequency of the use of executive clemency in Ohio between 1900 and 2002. These figures represent the aggregated total number of each type of clemency granted by Ohio governors during the time frame for the present study. The absence of similar studies examining all types of clemency in a single jurisdiction makes it difficult to compare the frequency of clemency in Ohio to other jurisdictions. Table 1 suggests, however, that the use of executive clemency is not a historical anomaly in Ohio. Combined, there were relatively equal numbers of pardons (**2634**) and commutations of sentences (**2815**) granted by Ohio governors in the 20th century. Among commutations, there were nearly equal numbers of commutations of life sentences and those for sentences other than life or death.

⁵ Perhaps a better measure would be to compare changes in the percentage of clemency applications that are granted (see Ruckman, 1995). Unfortunately, data on the number of applications submitted per year does not exist for the vast majority of period under study.

Table 1: Executive Clemency in Ohio, 1900-2002

Type of Clemency	Frequency
Total Clemency Granted	5701
<i>Total granted in lame term</i>	667
Pardons	2677
Commutations (all types)	2824
<i>Life sentence commutations</i>	1392
<i>Other sentence commutations</i>	1364
<i>Death sentence commutations</i>	68
<i>Lame term death commutations</i>	16
Death Sentence Reprieves	200
Other Reprieves	1

Death sentence commutations were the least common type of clemency and commutation granted. As expected, clemency in death penalty cases made up a small percentage (4.6%) of the total clemencies granted. The rarity of death sentences compared to other types of dispositions ensures that the available pool of possible clemency applicants will consist primarily of non-death sentence cases. Reprieves of death sentences (**196**) were granted almost three times more often the commutations of death sentences (**66**). Finally, Table 1 indicates that outgoing Ohio governors have used executive clemency during their lame duck period in office. When considered in relation to the total number of clemency actions granted, however, there does not appear to be a pattern of granting clemency excessively during this period. The percentage of death sentence commutations that were granted during the lame duck period is considerably higher (24.4%) than the percentage of other types of clemency (12%) granted during this period.

Changing use of executive clemency

The graphs in the following Figures represent the plotting of data reported in Table 1 on a per year basis. Again, any clemencies that were granted after December 31 of a governor's last full year in office and before the new governor took office were recorded as having been granted in the previous year to properly identify those as being awarded by the outgoing governor.

Clemency rates and frequencies in Ohio, 1900-2002

Figure 1 presents the combined totals for all types of clemency actions for each year of the current study⁶. Figure 1 provides support for the consideration of clemency rates rather than raw numbers. If the analysis had been limited to raw number of clemency actions, the observable pattern of decreasing clemency usage relative to the prison population would have been missed. Notwithstanding notable exceptions such as 1921, it appears that the clemency rate in the early part of the century was considerably higher than contemporary practices. It also appears that since 1981, the clemency rate dropped to its lowest level and for the longest period of time in the 20th century. As this figure is a summation of the frequency and distribution of the primary variables of interest, several comments seem appropriate at this point. Figure 1 indicates that there has been considerable variation in the use of executive clemency throughout the 20th century in Ohio. There were several years in which the use of clemency increased dramatically. A common trend appears to have been that years immediately following those with higher rates and frequencies of clemency (e.g. 1921, 1929, 1935, 1948, and 1975) saw a significant decrease in the use of clemency. An examination of Ohio's election history, however, indicates that such variation is not simply a function of election year cycles.

Life sentence commutations in Ohio, 1900-2002

There have been several changes in Ohio law regarding the parole eligibility of prisoners sentenced to life imprisonment (see Bridge and Mosure, 1961; Holcomb, 2000; Joint Legislative Committee, 1926). Generally, it can be stated that during the 20th century, Ohio prisoners sentenced to life imprisonment for first degree murder (with mercy) were ineligible for parole consideration. Therefore, life prisoners who were deemed worthy of parole release or who had served extensive prison sentences required a commutation of their sentence before they could be considered for parole⁷. With the

passage of Ohio's Commutations of Sentences Law (OH Gen. Code 2201-1, 1945), Ohio governors were given discretion to determine the parole eligibility of life prisoners and had an important influence on the level of overcrowding in Ohio's prisons (e.g. see Messinger et. al, 1985).

The extent to which this law was responsible for the serious prison overcrowding that began in the 1970s is unclear. However, it is unlikely a mere coincidence that the use of commutations of sentences increased during periods of prison overcrowding in Ohio such as the late 1920s and mid 1970s (see also Martin, 1983; Messinger et al., 1985). The sharp decrease in the use of life sentence commutations following 1982 is probably the result of several factors. Perhaps most importantly were the increasing criticism of the use of discretion to reduce offenders' sentences (Clear, 1994) and the increasingly punitive orientation towards crime and punishment (see Holcomb, 2000).

Commutations of sentences other than life or death, 1900-2002

Figure 3 displays the data for commutations of sentences other than life or death. Together with the use of pardons (see Figure 5), these represent unique situations for executive clemency in Ohio. It has already been noted that Ohio governors had a legal justification for involving themselves in clemency cases with life sentences. The use of clemency in the cases presented in Figure 3 represent situations in which Ohio governors likely had the most political discretion. Non-life sentence cases likely represent the best example of "unfettered" gubernatorial discretion to intervening in the punishment of offenders. Figure 3 suggests that governors were much more likely to use executive clemency in these cases prior to 1950. However, brief periods of very small rates prior to 1950 and periods of higher rates after 1950 are found as well. Four periods in particular appear to have had higher than normal commutation rates: James Cox's terms as governor (1913-1915, 1917-1921), the use of clemency to mitigate harsh sentencing practices of the late 1920s (especially under the

⁶ The only exception is the single reprieve of a non-death that was excluded because it would have required the creation of a distinct category with only one case.

⁷ The current study does not present information on the length of prison sentences served by those "lifers" who received a commutation of their sentence.

However, during the data collection process it was not uncommon to come across cases where prisoners had served 40 years of a life sentence before having their sentence commuted, usually to second degree murder, in order to become eligible for parole consideration.

Figure 2: Commutations for Life Sentences in Ohio, 1900-2002

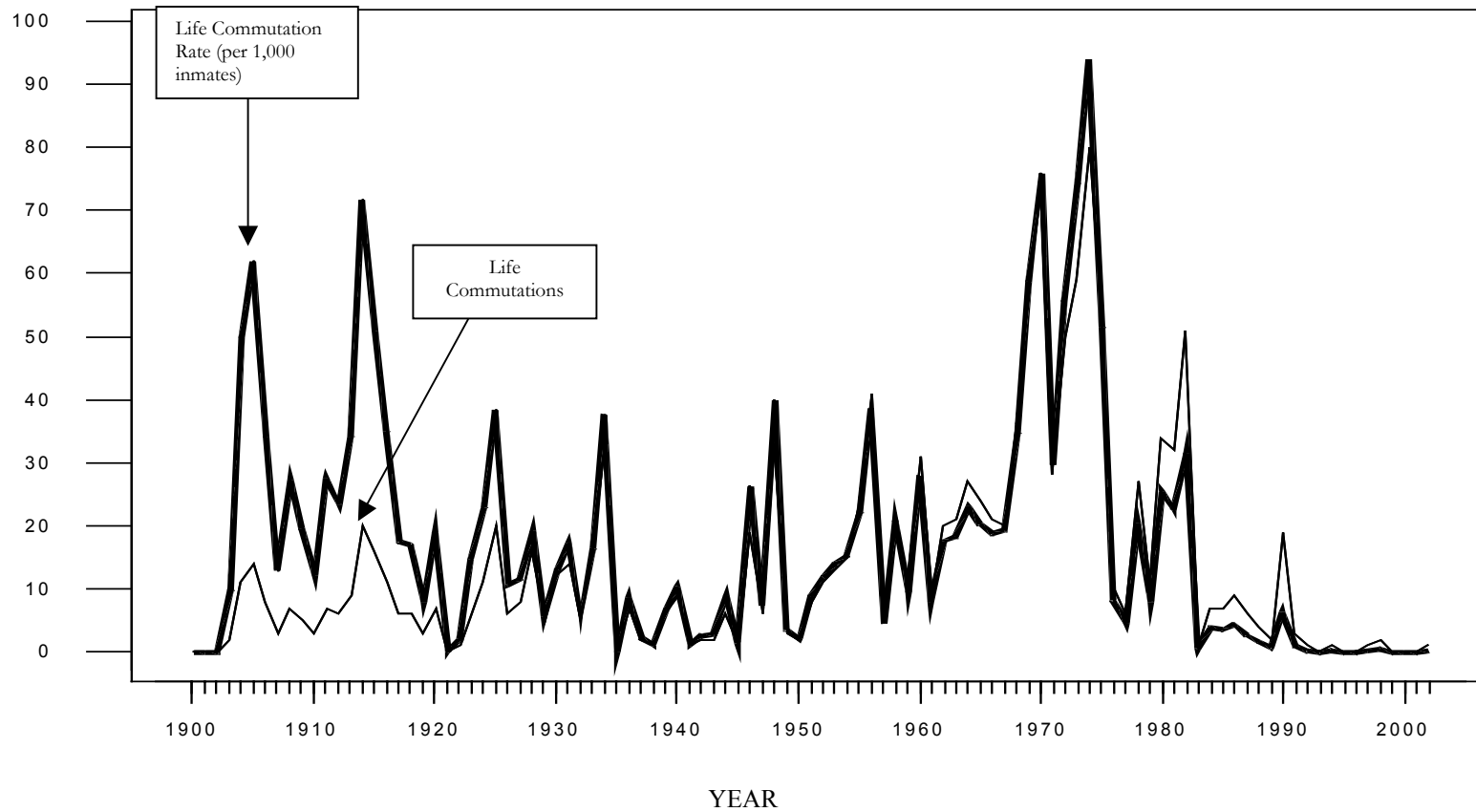


Figure 3: Commutations for Sentences other than Life or Death in Ohio, 1900-2002

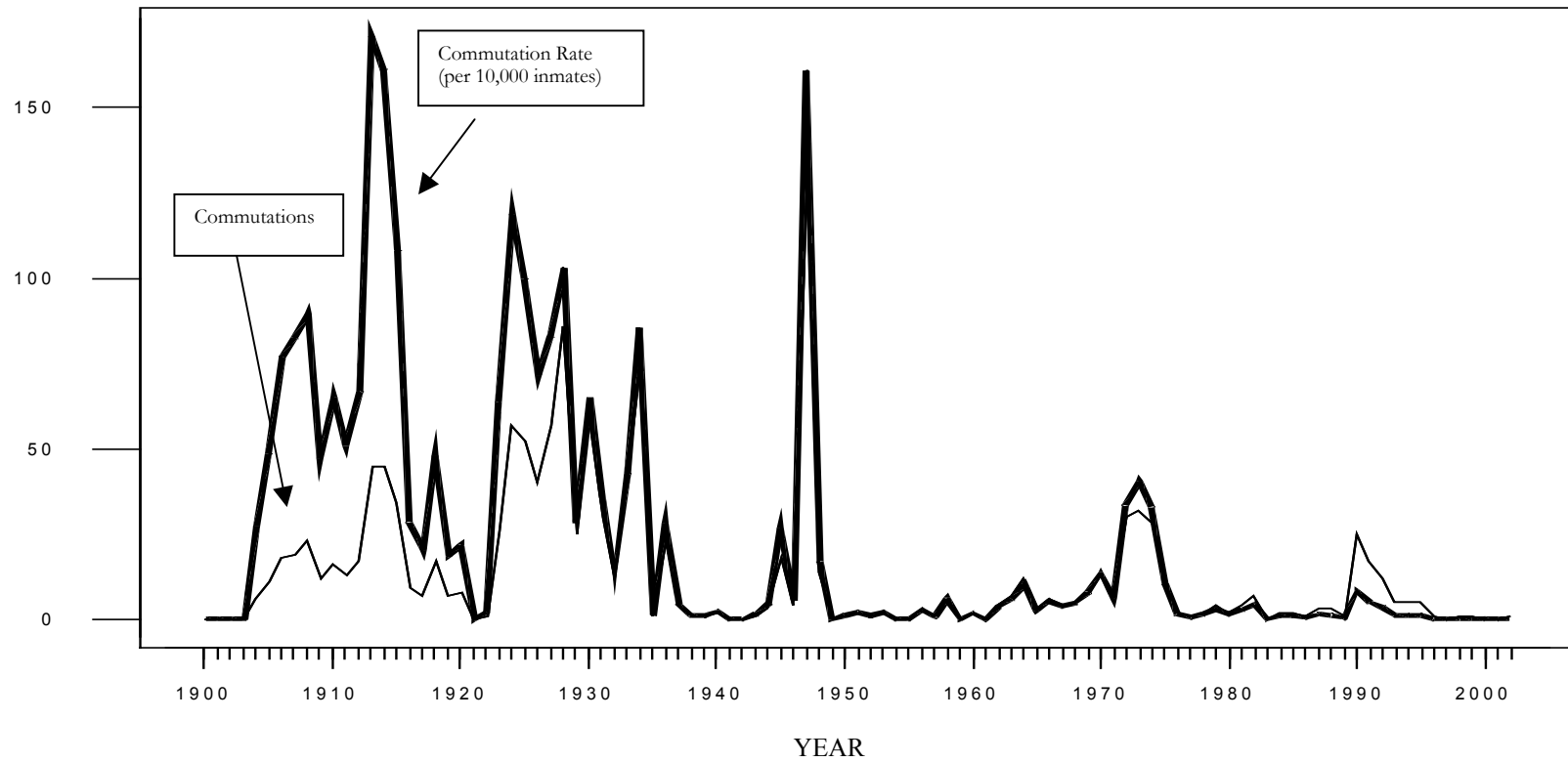
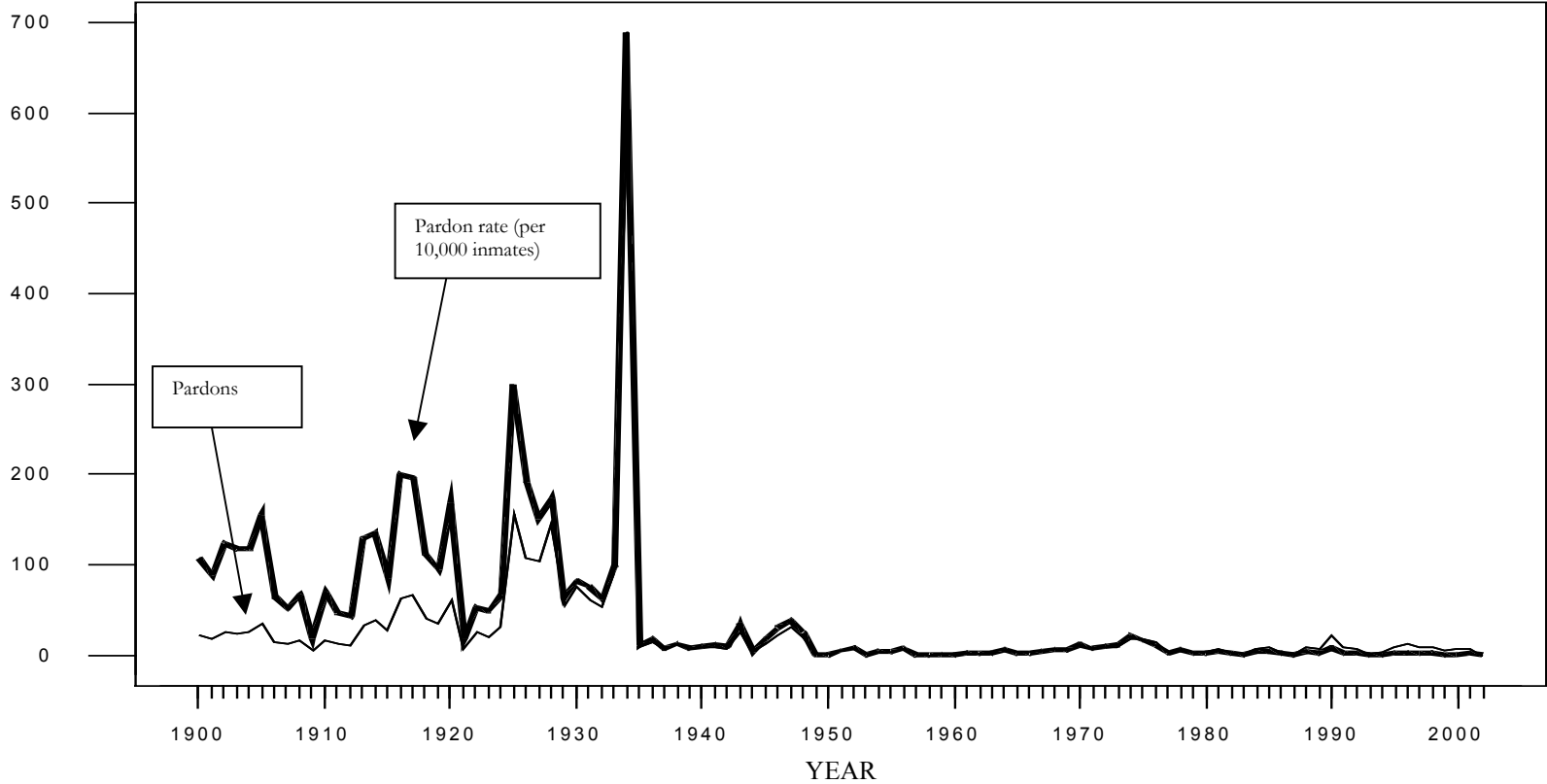


Figure 4: Pardons Granted in Ohio, 1900-2002



Norwood Law⁸), the commutation of sentences for Ohio prisoners released to serve in World War II⁹, and the commutation of sentences in the early 1970s that was likely the result of significant prison overcrowding (see Holcomb, 2000).

The use of pardons in Ohio, 1900-2002

As Figure 4 indicates, pardons were granted at a considerably higher rate earlier in this century compared with contemporary practices. In fact, for much of the second half of the 20th century, the granting of pardons in Ohio was an extremely rare occurrence¹⁰ compared to previous periods, though it should be noted that due to the extremely high number of pardons granted in 1934, the graph may be visually deceiving. The large range of values represented on the Y-axis means that even a considerable increase in the use of pardons appears visually insignificant. Interestingly, the high number of pardons in 1925 and 1934 were for similar reasons: to mitigate the severity and consequences of punishment for liquor law violations¹¹. The issue of prohibiting the manufacture, trafficking, and/or consumption of alcohol played a major role in early 20th century Ohio politics (see Aumann and Walker, 1956; Walker, 1948; Cox, 1946). As indicated in Figure 4, there was a tremendous increase in the

pardon rate in 1934, increasing from 90 pardons in 1933 to 603 in 1934. The vast majority (595 of 603) of the pardons granted in 1934 were executed on May 7, 1934 for liquor law violations following the repeal of prohibition.

Executive clemency in Ohio

It is difficult to compare the results of this study with that of previous research. Prior studies have typically looked at jurisdictions for a shorter period of time than the present work. The literature on clemency also concentrates on the use of executive clemency in death penalty cases (e.g., Johnson, 1957; Wolfgang et al, 1961; Bedau, 1990; Radelet and Zmesbik, 1993).

Different Ohio governors have varied in their interest or willingness to intervene in the punishment of convicted persons. Furthermore, the same governors have used clemency at different rates within their own term in office and these changes cannot be attributed simply to election year politics. It appears that external factors, in addition to a governor's personal beliefs, impact their willingness to use clemency. There have been several periods in Ohio's history when the governor's personal beliefs and political ideologies clearly influenced the clemency rate and other periods when social circumstances, such as war and Prohibition, created unique circumstances that a governor believed had warranted the use of their authority to grant clemency. It thus appears that an important consideration is the *interaction* between factors such as a governor's personal philosophy, external forces, legal circumstances, and the merits of an individual cases that appear to influence the use of clemency in a given case and patterns of clemency use in general.

Another important finding of the present study was the number and types of relationships that existed between the criminal law and executive clemency. Examples such as the Norwood Law and Prohibition indicate that clemency is often used when a law has unintended consequences or is implemented in a manner for which the correctional system is not prepared. In those situations, clemency served to address concerns of social justice or practical considerations about system capacity. Such circumstances reflect the use of clemency to provide some flexibility towards the application of the law. For example, commentaries on the Norwood Law (e.g. Ohio Board of Clemency, 1927) suggested that judges were occasionally using their new authority to apply the law in a manner not anticipated by the legislature or prison

⁸ OH Gen. Code § 2166 (1921), repealed 1931. See Holcomb (2000) for a more detailed discussion on the history and motivation of the Norwood Law.

⁹ According to the Commission report (1945), those parolees serving with the armed services had their supervision suspended until after their service was completed.

¹⁰ It should be noted that due to the extreme rate in 1934, the graph may be visually deceiving. Unlike some of the previous graphs, the index scale for the Y-axis (pardon rate) is quite condensed. The result is that even a slight upturn on the graph may indicate a considerable increase in the use of pardons, even though it does not look visually impressive. The tremendous increase in 1934 makes most of the other increases seem relatively insignificant.

¹¹ 1917 and 1918 were also years of relatively high pardon rates. Justifications for pardons in those years were a combination of several factors. Similar to the 1947 World War II commutations described earlier, several World War I veterans were granted pardons after returning home after the War. Almost all other pardons had various conditions attached to them. Popular conditions included refraining from alcohol and among immigrant law violators, the clemency was conditional upon the offender leaving the United States to return to their country of origin.

administrators. Official reports indicate that clemency was used to during this period to reduce the severity of some punishments and create a larger pool of eligible prisoners for parole release consideration (see Ohio Board of Clemency, 1927 and 1929).

Findings also suggest that although the use of various types of executive clemency has fluctuated during Ohio's history, it certainly has not been an unusual occurrence. The present study, however, did not find evidence that Ohio governors have used clemency excessively. A particularly interesting finding was that a number of Ohio governors, even those who supported capital punishment, have used executive clemency in death penalty cases. This indicates that executive clemency has not been used exclusively by more liberal minded governors. However, the dramatic reduction in the use of executive clemency, particularly since the 1980s, is perhaps one of the more noteworthy findings. Given the dramatic increases in convicted offender populations (of which the prison population only measures a fraction) during the past 20 years, the virtual elimination of the use of executive clemency is striking. There are several possible explanations for this change, but perhaps the most likely has been the increasing politicization of criminal justice policy (see Garvey, 1991; Palacios, 1996; Beckett, 1997). Increased emphasis on "get tough" policies in the war on crime and drugs has resulted in significant changes in the use of correctional discretion, especially actions that can be criticized as "lenient" or rehabilitative-oriented. Scholarly and first hand accounts of governors' (e.g. Anaya, 1993; Brown, 1989) decision making clearly demonstrate that granting clemency in today's political climate is a risky endeavor and one that many governors are simply not willing to take.

REFERENCES

- Abramowitz, E. and Paget, D. (1964). Executive clemency in capital cases. *New York University Law Review*, 39, 136-192.
- Anaya, T. (1993). Statement on capital punishment. *University of Richmond Law Review*, 27, 177-184.
- Aumann, F.R. and Walker, H. (1956). *The government and administration of Ohio*. New York: Thomas Y. Crowell Company.
- Beckett, K. (1997). *Making crime pay: Law and order in contemporary politics*. New York: Oxford University Press.
- Bedau, H.A. (1990). The decline of executive clemency in capital cases. *New York University Review of Law and Social Change*, 28, 255-272.
- Black, H.C. (1991). *Black's Law Dictionary* (6th ed.). St. Paul: WEST Publishing.
- Bridge, F.M. and Mosure, J. (1961). *Capital punishment*. Staff research report No. 46. Columbus, OH: Ohio Legislative Service Commission.
- Brown, E.G. with Adler, D. (1989). *Public justice, private mercy: A governor's education on death row*. New York: Weidenfeld and Nicolson.
- Champion, D.J. (1996). *Probation, parole and community corrections*. Upper Saddle River, NJ: Prentice Hall.
- Clear, T.R. and Cole, G.F. (1990). *American Corrections*. Pacific Groves, CA: Brooks/Cole Publishing.
- Clear, T.R. (1994). *Harm in American penology: Offenders, victims and their communities*. Albany: State University of New York.
- Cox, J.M. (1946). *Journey through my years*. New York: Simon and Schuster.
- Garvey, S.P. (1991). Politicizing who dies. *Yale Law Journal*, 101, 187-209. Retrieved February 27, 1999 from LEXIS-NEXIS on-line database (101 Yale L.J. 187).
- Holcomb, J.E. (2000). The use of executive clemency in Ohio (Doctoral dissertation, Florida State University, 2000). Dissertation Abstracts International.
- Hurnard, N.D. (1969). *The king's pardon for homicide before a.d. 1307*. London: Oxford University Press.
- Johnson, E. (1957). Selective factors in capital punishment. *Social Forces*, 36, 165-169.
- Kobil, D.T. (1993). Due process in death penalty commutations: Life, liberty, and the pursuit of clemency. *University of Richmond law review*, 27, 201-226.
- Kobil, D.T. (1991). The quality of mercy strained: Wrestling the pardoning power from the king. *Texas Law Review*, 69, 569-641. Retrieved from LEXIS-NEXIS on-line database on February 21, 1999 (69 Tex. L. Rev. 569).
- Joint Legislative Committee on Prisons and Reformatories (1926). *The penal problem in Ohio*. Columbus: Author.
- Martin, S.E. (1983). Commutations of prison sentences: Practice, promise, and limitation. *Crime and Delinquency*, 29, 593-613.
- Messenger, S., Berecochea, J.E., Rauma, D., and Berk, R.A. (1985). The foundations of parole in California. *Law and Society Review*, 19, 69-106.
- Moore, K.D. (1989). *Pardons: Justice, mercy, and the public interest*. New York: Oxford University Press.
- Myers, L. (1997). An appeal for clemency: The case of Harold Lamont Otey. In H.A. Bedau (Ed.), *The death penalty in America: Current controversies* (pp. 361-383). New York: Oxford University Press.

- National Governor's Association. (1988). *Guide to executive clemency among the American states*. Washington, D.C.: National Institute of Corrections.
- Ohio Board of Clemency (various). *Annual Report*. Columbus: Author
- Palacios, V.J. (1996). Faith in fantasy: The Supreme Court's reliance in commutation to ensure justice in death penalty cases. *Vanderbilt Law Review*, 49, 311-372.
- Radelet, M.L. and Zsembik, B.A. (1993). Executive clemency in post-*Furman* capital cases. *University of Richmond Law Review*, 27, 289-314.
- Saliterman, R.A. (1985). Reflections on the presidential clemency power. *Oklahoma Law Review*, 38, 257-265.
- Walker, H. (1948). *Constructive government in Ohio: The story of the administration of Governor Myers T. Cooper, 1929-1930*. Columbus, OH: Ohio History Press.
- Wolfgang, M.E., Kelly, A. and Nolde, H.C. (1962). Comparisons of the executed and the commuted among admissions to death row. *Journal of Criminal Law, Criminology, and Police Science*, 53, 310-311.

ACKNOWLEDGEMENTS

The author would like to thank Todd Clear, Michael J. Lynch, Alex Goberman, and members of the College of Health and Human Services Research Group for their helpful insights and comments in the preparation of this manuscript. An additional special thanks to Steve Van Dine from the Department of Rehabilitation and Correction. The opinions and conclusions expressed herein are solely those of the author. Please direct all correspondence to the author at 233 Health Center, Bowling Green State University, Bowling Green OH, 43403; jholcom@bgnet.bgsu.edu.