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Empty Protection and Meaningless Review—The Need to Reform California's Stagnant Capital Clemency System

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**EMPTY PROTECTION AND MEANINGLESS
REVIEW—THE NEED TO REFORM
CALIFORNIA’S STAGNANT
CAPITAL CLEMENCY SYSTEM**

*Brittney Cunningham**

This Note examines California’s stagnant capital clemency system and its ability to properly function as a fail safe against miscarriages of justice. Finding that the state’s clemency system lacks transparency, appears arbitrary, and is strained by political pressure, this Note argues that California’s system of wide discretion fails to provide a meaningful review of clemency petitions. To restore clemency’s fail-safe function, this Note urges California to create a clemency board and provide procedural guidelines for the board to follow when addressing petitions. This Note asserts that by enacting these reforms, California will invigorate its stagnant clemency system and ensure that clemency petitions are meaningfully reviewed.

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TABLE OF CONTENTS

I. INTRODUCTION	S267
II. AN OVERVIEW OF CAPITAL CLEMENCY	S269
A. The History of Clemency.....	S269
B. Modern Clemency and the Tension Between Clemency's Merciful and Fail-Safe Functions	S270
III. CAPITAL CLEMENCY IN CALIFORNIA	S272
A. California's Clemency Procedures	S273
B. Issuing Commutations Was Not Always Rare.....	S276
IV. A CRITIQUE OF CALIFORNIA'S EXISTING CLEMENCY SYSTEM	S277
A. California's Current Clemency System Lacks Transparency	S278
B. Clemency Decisions Appear Arbitrary	S279
C. Governors' Decisions Are Influenced by Political Pressure	S281
V. CALIFORNIA NEEDS A CLEMENCY PROCESS THAT ALLOWS FOR MEANINGFUL, RELIABLE REVIEW	S283
VI. RECOMMENDATION	S285
A. A Board Should Decide Clemency.....	S285
B. Procedural Guidelines Should Be Enacted	S287
VII. WHY THE TIME IS RIGHT TO EFFECT CHANGE—CAPITAL CLEMENCY'S INEXTRICABLE TIES TO THE DEATH PENALTY DEBATE	S289
VIII. CONCLUSION.....	S292

I. INTRODUCTION

One of the historical aims of clemency is to protect against miscarriages of justice.¹ In fact, in *Herrera v. Collins*,² the Supreme Court relied on clemency as a “fail safe” in the criminal justice system when it denied review of a death row inmate’s newly discovered evidence of actual innocence.³ In rationalizing its decision, the Court explained that the state clemency system would prevent an innocent man’s execution.⁴ By placing its confidence in clemency, the Court recognized the process as a “critical component in the death penalty system”⁵ while reaffirming its utility in preventing injustice.⁶

Unfortunately, the Court failed to recognize that many states, including the state in which Herrera would seek clemency,⁷ grant their governors unfettered clemency powers. In these states, investigation is discretionary, and there is no guarantee that the governor will review a petitioner’s exculpatory evidence.⁸ This discretionary clemency power, unregulated and largely unreviewable, is at odds with the idea that clemency prevents injustice and undermines the *Herrera* Court’s assumption that clemency petitioners will receive meaningful review of their petitions.⁹

California is among the states that place clemency power solely in the hands of the governor, who is checked only by the election process.¹⁰ This system is largely “standardless in procedure, discretionary in exercise, and unreviewable in result.”¹¹ Indeed, in

1. *Herrera v. Collins*, 506 U.S. 390, 411–12 (1993).

2. 506 U.S. 390 (1993).

3. *See id.* at 411, 415.

4. *See id.* at 411; Alyson Dinsmore, Comment, *Clemency in Capital Cases: The Need to Ensure Meaningful Review*, 49 UCLA L. REV. 1825, 1827 (2002).

5. Dinsmore, *supra* note 4, at 1827.

6. *See id.*

7. Herrera would seek clemency in Texas, one of the states that employs executive clemency.

8. *See* Dinsmore, *supra* note 4, at 1827 (“[G]overnors are free to do whatever they choose at clemency, restrained only by potential political consequences.”).

9. *See id.*

10. *See* Jonathan Harris & Lothlórien Redmond, *Executive Clemency: The Lethal Absence of Hope*, 3 CRIM. L. BRIEF 2, 8–9 (2007); Dinsmore, *supra* note 4, at 1827.

11. Dinsmore, *supra* note 4, at 1827 (quoting Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 225, 257 (1990–1991)).

exercising clemency powers, the governor decides whether to hold hearings, meet with counsel, or consider certain evidence.¹² Rather than function as a “reliable fail-safe in the death penalty system,” this form of clemency seems little more than a meaningless ritual.¹³ Under California’s current system, the clemency process lacks transparency, appears arbitrary, and is outcome-determinative due to the political pressure on governors to deny clemency petitions. These problems indicate that the current “system of wide discretion[,] unchecked by procedural standards[,] may not be able to properly serve its role”¹⁴ as a fail safe for miscarriages of justice.

The protection clemency offers is especially necessary given the status of California’s capital punishment system. California has the largest death row in the country, with over 700 inmates awaiting execution.¹⁵ As the increasing death row population turns to clemency for post-conviction relief, the procedures used for determining whether to grant clemency petitions should fall under closer scrutiny.¹⁶

This Note calls for a restoration of clemency’s fail-safe function by urging California to create a clemency board and require it to follow procedural guidelines when addressing clemency petitions. By doing so, the state will ensure that petitioners receive the full protections of the clemency process and receive a meaningful review of their petitions.

Part II provides an overview of capital clemency, including its historical and modern functions. Part III describes California’s clemency process and history in preparation for an analysis of the system. Part IV critiques California’s clemency system, identifying problems that hinder clemency’s meaningful participation in the justice system. Part V identifies why California needs a better clemency process, and Part VI recommends changes to improve the system. Part VII asserts that now is the right time to effect such changes, and Part VIII concludes.

12. *See infra* Part III.A.

13. Dinsmore, *supra* note 4, at 1839.

14. *Id.*

15. *See id.*

16. Daniel Lim, *State Due Process Guarantees for Meaningful Death Penalty Clemency Proceedings*, 28 COLUM. J.L. & SOC. PROBS. 47, 47, 66 (1994).

II. AN OVERVIEW OF CAPITAL CLEMENCY

Clemency is a general term that encompasses an executive decision to issue a pardon, a reprieve, or a commutation.¹⁷ A pardon essentially “forgives” a crime by absolving an individual’s conviction and punishment.¹⁸ A reprieve, on the other hand, delays the execution of sentence for a short amount of time,¹⁹ but does not eliminate or reduce the sentence. A commutation substitutes an individual’s punishment with a lesser sentence.²⁰ Though clemency technically encompasses each function, the term is most commonly associated with commutations in capital cases where an inmate’s sentence is reduced from death to life imprisonment.²¹ For the purposes of this Note, clemency is examined in this context—when the executive commutes the sentence of an individual sentenced to death.

A. The History of Clemency

Clemency is a practice deeply rooted in human tradition. It originated in the caveman era and remained an important function in Biblical and Roman society.²² The English heavily relied on clemency and vested kings, as omniscient decision-makers, with broad discretion to grant clemency.²³ Scholars of the era observed, “[T]he King may extend his mercy of what terms he pleases, and consequently may annex to his pardon any condition he thinks fit.”²⁴ After acquiring the American colonies, the King of England delegated clemency powers to the colonies’ governors,²⁵ thereby exporting this clemency model to the United States.

After the American colonies gained independence from England, citizens were hesitant to grant broad, unrestricted powers to a single executive.²⁶ With this wariness in mind, many states issued

17. Joanna M. Huang, Note, *Correcting Mandatory Injustice: Judicial Recommendation of Clemency*, 60 DUKE L.J. 131, 142 (2010).

18. *Id.*

19. *Id.*

20. *Id.*

21. See Harris & Redmond, *supra* note 10, at 2.

22. See *id.* at 3.

23. See *id.*; Dinsmore, *supra* note 4, at 1830.

24. WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 547 (6th ed. 1824).

25. See Harris & Redmond, *supra* note 10, at 3.

26. *Id.*

clemency powers to the state legislature or to the legislature and the governor combined.²⁷ At the federal level, however, the Framers eventually placed clemency powers with the President.²⁸ After the Constitution was adopted, executive clemency gained popularity, and most states, which were free to create their own clemency systems, mirrored their provisions after the federal model.²⁹ Accordingly, clemency has largely rested in the hands of state governors.³⁰

Though clemency has primarily remained an executive function since its establishment in the United States, its procedures and uses have undergone various changes. When examining modern clemency procedures, it is important to investigate this ongoing evolution and note the ways in which clemency should continue to evolve.

*B. Modern Clemency and the Tension Between
Clemency's Merciful and Fail-Safe Functions*

Today, in several states, clemency powers continue to rest with the governor.³¹ However, since individual states are free to implement their own clemency systems, different models have emerged over time. There are four models of clemency procedures: (1) the governor has sole discretion to decide clemency; (2) the governor has sole clemency discretion, but may receive a non-binding recommendation from a board or advisory group; (3) the governor must have a recommendation from a board or advisory group to grant clemency; and (4) a board or advisory group has the power to determine clemency.³² Of the states that implement the death penalty, twenty-one confer clemency authority to the governor, acting with or without the advice of a clemency board,³³ and eleven states confer clemency authority to a board or require the board's

27. *Id.*

28. See Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and Rightful Claim to Clemency*, 24 N.Y.U. REV. L. & SOC. CHANGE 43, 51.

29. See Daniel Kobil, *The Evolving Role of Clemency in Death Penalty Cases*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 673, 675 (James R. Acker et al. eds., 2d ed. 2003)

30. *Id.* at 4.

31. *Id.*

32. See *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Jan. 23, 2011) (listing types of clemency models in "Clemency Process by State" chart).

33. See *id.* Four of the fourteen states that delegate sole clemency discretion to the governor, New Jersey, New York, and New Mexico, as well as Illinois, which used an advisory clemency board, have now banned the death penalty. *Id.*

consent for the governor to grant clemency.³⁴ California is unique, as it is the only state that requires a majority of the state's supreme court to support a governor's decision to grant clemency to a twice-convicted felon.³⁵

Though clemency is part of the judicial system in the sense that it is a defendant's last chance to challenge or plead his case, clemency is an executive function that largely remains outside the realm of the judicial branch.³⁶ As such, the judicial branch plays a minimal role in the clemency process and provides little review of clemency procedures or decisions.³⁷ In *Ohio Adult Parole Authority v. Woodard*,³⁸ the Supreme Court acknowledged that minimal due process protection exists for clemency petitioners convicted of capital crimes.³⁹ Since this opinion, however, clemency petitioners' due process rights have been interpreted very narrowly.⁴⁰ Thus, modern-day clemency is controlled by the executive branch, which is essentially checked only by the election process.⁴¹

34. *See id.*

35. *Id.*

36. Mary-Beth Moylan & Linda E. Carter, *Clemency in California Capital Cases*, 14 BERKELEY J. OF CRIM. L. 37, 40 (2009).

37. *Id.*

38. 523 U.S. 272 (1998).

39. *See id.* at 276. In *Woodard*, a death row inmate claimed Ohio's clemency procedures violated his Fourteenth Amendment due process rights. *Id.* at 277. In a plurality opinion, four justices concluded that inmates are not afforded due process rights in clemency proceedings, citing clemency as an extrajudicial act of grace. *See id.* at 275, 285. However, a four-justice concurring opinion found that "some minimal procedural safeguards apply in clemency proceedings" because a death row inmate maintains an interest in his life. *Id.* at 288–89 (O'Connor, J., concurring). In a concurring and dissenting opinion, Justice Stevens supported a due process finding, stating that "these proceedings are not entirely exempt from judicial review", *id.* at 290, and that "it is abundantly clear that respondent possesses a life interest protected by the Due Process Clause." *Id.* at 292 (Stevens, J., concurring in part and dissenting in part). Justice Stevens maintained that "only the most basic elements of fair procedure are required," *id.*, and concluded that "procedures infected by bribery, personal or political animosity, or the deliberate fabrication of false evidence" violate due process. *Id.* at 290–91. This agreement between the concurring plurality and Justice Stevens appears to pave the way for minimal due process protection in clemency proceedings, at least when the petitioner has been sentenced to death.

40. For example, in *Bacon v. Lee*, 549 S.E.2d 840 (N.C. 2001), the Supreme Court of North Carolina found no due process violation when the governor deciding clemency was the Attorney General at the time the inmate had been sentenced to death. *Id.* at 849–50. The court stated that "minimal due process applicable to state clemency procedures includes the right of an inmate seeking clemency to have his or her request reviewed by an executive possessing the level of impartiality normally required of a judge presiding over an adjudicatory proceeding." *Id.* at 849.

41. *See* Linda E. Carter, *Lessons from Avena: The Inadequacy of Clemency and Judicial Proceedings for Violations of the Vienna Convention on Consular Relations*, 15 DUKE J. COMP. & INT'L L. 259, 267 (2005) ("[T]he only oversight of clemency rest[s] with voters who elect the

Though petitioners are only entitled to a minimal due process right in clemency cases, that right places clemency at a unique intersection between the judicial and executive branches.⁴² This intersection has led to competing views of clemency: some claim clemency is an unregulated executive function, not bound by procedural processes,⁴³ while others claim clemency should have procedural guidelines similar to judicial hearings.⁴⁴ These views essentially align with clemency's twin functions. First, clemency allows the executive to show mercy by considering factors the judicial system did not contemplate.⁴⁵ Second, clemency acts as a fail safe for correcting errors or injustices that have occurred in the judicial system.⁴⁶ Those who support broad executive powers rely on clemency's merciful origins and claim flexibility is needed so that executives may consider factors outside the judicial process.⁴⁷ Those who support procedural clemency guidelines cite case law that recognizes clemency's fail-safe function and argue that "[c]lemency's role as a procedural safeguard is in tension with the lack of procedural requirements imposed upon it."⁴⁸ As the courts have recognized both functions of clemency,⁴⁹ this debate is ongoing.⁵⁰ However, it is important to remember these functions when evaluating the systems by which the power is carried out.

III. CAPITAL CLEMENCY IN CALIFORNIA

California's clemency system stems from the state's original 1849 constitution, which granted the governor clemency powers.⁵¹ Since that time, though the constitutional provisions governing

governors.").

42. See Moylan & Carter, *supra* note 36, at 40 (describing clemency's "unusual placement").

43. Harris & Redmond, *supra* note 10, at 11.

44. See Dinsmore, *supra* note 4, at 1828.

45. Moylan & Carter, *supra* note 36, at 42.

46. *Id.*; see *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

47. See Moylan & Carter, *supra* note 36, at 97.

48. See Dinsmore, *supra* note 4, at 1828.

49. Adam M. Gershowitz, *The Diffusion of Responsibility in Capital Clemency*, 17 J.L. & POL. 669, 710 (2001) (describing Justice Marshall and Justice Rehnquist's belief that clemency is an act of executive mercy and the *Herrera* Court's reliance on clemency as the "fail safe" of the criminal justice system).

50. While these functions are prevalent when examining modern clemency systems, the debate concerning clemency's *primary* function is outside the scope of this Note.

51. CAL. CONST. art. V, § 13 (1849); Moylan & Carter, *supra* note 36, at 43.

clemency have changed, the practice remains at the mercy of the governor's unfettered discretion.⁵² At one time, governors used their clemency powers regularly and granted petitions fairly often.⁵³ Today, however, clemency is little more than a ritual or tradition, an atrophied process that pales in comparison to clemency's previously active role in California's criminal justice system.

A. California's Clemency Procedures

California's constitution restricts gubernatorial clemency powers very little. In 1879, the California constitution's clemency provision was amended so that a majority of the California Supreme Court had to approve clemency before the governor could grant the petition of a twice-convicted felon.⁵⁴ Amendments made to the provision in 1966 required the governor to report grants of clemency to the legislature.⁵⁵ Aside from the constitution, the governor's broad discretion is subject only to "application procedures" enacted by the legislature. Presumably, these procedures merely refer to the submission of an inmate's clemency petition.⁵⁶ Accordingly, "application procedures" are more akin to minimal due process rights afforded all clemency petitioners, rather than substantive procedural rights such as the right to a hearing.⁵⁷

Interestingly, the governor's powers are more limited in cases involving two-time felons. The California Constitution requires judicial approval for a governor to grant clemency to a two-time felon.⁵⁸ In these cases, the governor files a public application with the California Supreme Court and transmits case documents to the court.⁵⁹ Regardless of the outcome, the chief justice informs the governor in writing of the court's decision, which is made a public record.⁶⁰

In typical clemency cases, however, there are few, if any,

52. *See infra* Part III.A.

53. *See infra* Part III.B.

54. Moylan & Carter, *supra* note 36, at 43–44.

55. *Id.* at 44.

56. *Id.*

57. *See id.*

58. CAL. CONST. art. V, § 8.

59. Internal Operating Practices and Procedures of the California Supreme Court, 45 (revised Jan. 1, 2007).

60. *Id.*

mandated procedures and no public transparency. All codified procedures refer to applying for a petition, while the methods used to decide clemency are largely unregulated.⁶¹ As such, the governor alone makes clemency decisions, as he or she sees fit.⁶² Given the lack of codified procedures and public transparency, it seems necessary to analyze this system through the lens of personal experience. Indeed, many clemency scholars have relied on their own or others' experiences when conducting studies.⁶³ While this experience helps one gain a general understanding of the clemency process, it is important to remember that procedures ultimately differ for each governor and often for each petition addressed by a single governor during his or her term.

The bulk of the clemency process begins when the execution date is set.⁶⁴ At that point, the governor's legal affairs secretary sets due dates for the clemency application and any opposition.⁶⁵ The petition advances justifications for granting clemency, which often include evidence of both innocence and wrongful conviction, as well as evidence of mental disability, rehabilitation, and other mitigating factors.⁶⁶ The governor may ask the Board of Parole Hearings (BPH) to conduct a background investigation of the petitioner at any time after receiving the petition.⁶⁷ Once all judicial processes are final, the

61. See Moylan & Carter, *supra* note 36, at 44 (stating that the governor's broad discretion is subject only to "application procedures" that most likely refer to the submission of an inmate's clemency petition; *id.* at 54 (stating that executive clemency procedures are not heavily regulated).

62. Not all governors were comfortable making these decisions. Reflecting on the clemency decisions he made, Governor Edmund Brown stated,

[T]he longer I live, the larger loom those fifty-nine decisions about justice and mercy that I had to make as governor. They didn't make me feel godlike then: far from it; I felt just the opposite. It was an awesome, ultimate power over the lives of others that no person or government should have, or crave. And looking back over their names and files now, despite the horrible crimes and the catalogue of human weaknesses they comprise, I realize that each decision took something out of me that nothing—not family or work or hope for the future—has ever been able to replace.

EDMUND G. BROWN WITH DICK ADLER, PUBLIC JUSTICE PRIVATE MERCY—A GOVERNOR'S EDUCATION ON DEATH ROW 163 (1989).

63. Moylan & Carter, *supra* note 36, at 54 (describing interviews with individuals from several administrations that were involved in clemency decisions); see Harris & Redmond, *supra* note 10, at 11 n.103 (drawing on the authors' personal experience as clemency counsel for Stanley Williams).

64. See Moylan & Carter, *supra* note 36, at 55.

65. Harris & Redmond, *supra* note 10, at 9.

66. *Id.*

67. See Harris & Redmond, *supra* note 10, at 9.

BPH collects information from witnesses, the petitioner's family, the victim's family, and correctional staff.⁶⁸

The petitioner may request a hearing in front of the BPH, but has no right to be heard.⁶⁹ Whether a hearing occurs is at the governor's discretion.⁷⁰ If the governor grants a hearing, BPH Commissioners review the petitioner's application and issue a recommendation.⁷¹ Hearings are typically public matters, while the Commissioners' recommendation is usually confidential.⁷² This too is subject to the governor's wishes, as he or she may require a private hearing.⁷³ The governor may also set time limits and other restrictions on the hearing, including whether the petitioner may be present.⁷⁴

Following the hearing, if one is held, the governor decides whether to take the BPH's recommendation and whether to make the recommendation public.⁷⁵ If it is kept private, the petitioner, like everyone else, remains ignorant of the BPH's recommendation.⁷⁶ Instead of, or in addition to a BPH hearing, the governor may initiate his or her own hearing with the district attorney and the petitioner's counsel.⁷⁷

Regardless of the process used, the governor retains complete discretion at every step of the clemency decision. The governor may accept or reject information as he or she sees fit and is not required to explain the reasoning or procedures used in reaching the decision.⁷⁸ Grants of clemency are reported to the legislature and become public

68. *Id.*

69. *Id.*

70. *Id.* at 8–9 (“Ultimately, whether to grant clemency is an entirely discretionary decision of the California governor, and he or she has broad discretion whether to hold any sort of clemency hearing and may consider or ignore any of the information presented to him.”).

71. *Clemency Policy: California*, CRIMINAL JUSTICE POLICY FOUNDATION, <http://www.cjpf.org/clemency/California.html> (last updated Jan. 24, 2007). Commissioners, who are separate from the BPH investigators, are appointed by the governor and confirmed by the senate. CAL. PENAL CODE § 5075(b) (West 2000 & Supp. 2008). Commissioners may serve multiple terms and may only be removed for cause. Moylan & Carter, *supra* note 36, at 57.

72. Harris & Redmond, *supra* note 10, at 9–10.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *See id.*; see CAL. CONST. art. V, § 8.

records.⁷⁹ However, clemency denials are merely announced to the petitioner and the public in a written statement and, since the California Constitution does not require it, are not reported to the legislature.⁸⁰ Therefore, clemency denials are difficult to acquire.⁸¹

B. Issuing Commutations Was Not Always Rare

Governors used their clemency power to varying degrees in the first half of the twentieth century. For example, while Henry Gage granted clemency to only one prisoner during his 1899 to 1902 term, William Stephens commuted thirteen prisoners between 1918 and 1922.⁸² Edmund Brown, one of the last governors to commute a death sentence, granted clemency to twenty prisoners from 1959 to 1966.⁸³

While governors granted clemency at different rates, doing so was a routine practice. From 1899 to 1967, each governor granted at least one clemency petition during his term.⁸⁴ This changed in 1972, however, with a series of cases that halted the death penalty until 1977.⁸⁵ In *People v. Anderson*,⁸⁶ the California Supreme Court overturned the state's use of the death penalty, ruling that the practice violated the constitutional ban against cruel and unusual punishment.⁸⁷ A few months later, the U.S. Supreme Court decided *Furman v. Georgia*,⁸⁸ which held that the death penalty in Georgia and Texas was unconstitutional due to its "arbitrary and capricious" application.⁸⁹ This ruling effectively halted the death penalty systems in all fifty states, commuting the sentences of 107 death row inmates

79. *Id.* at 9–10.

80. *See* Moylan & Carter, *supra* note 36, at 58.

81. *Id.*

82. *Id.* at 45–46.

83. CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA 156 (Gerald Uelman ed., 2008) [hereinafter FINAL REPORT], available at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf>.

84. *See* Moylan & Carter, *supra* note 36, at 45–46.

85. *See e.g.*, *History of Capital Punishment*, CAL. DEP'T OF CORRECTIONS & FACILITATION, http://www.cdcr.ca.gov/Capital_Punishment/history_of_capital_punishment.html (last visited Jan. 15, 2011).

86. 493 P.2d 880 (Cal. 1972).

87. *Id.* at 899.

88. 408 U.S. 238 (1972).

89. *Id.* at 239–40.

in California, including Charles Manson and Sirhan Sirhan.⁹⁰ Later that year, the U.S. Supreme Court held that the death penalty itself was not unconstitutional so long as it was not applied arbitrarily.⁹¹ After this decision, many states rewrote their death penalty statutes in order to satisfy this standard.⁹² California, one of these states, passed a new death penalty statute in 1977 and has retained the sentence ever since.⁹³

Since the *Furman* decision, clemency grants have drastically declined. No commutation has been issued since the death penalty was reinstated in California in 1977,⁹⁴ though thirteen men have been executed.⁹⁵ In fact, Governor Ronald Reagan issued the last grant of clemency forty-four years ago.⁹⁶

IV. A CRITIQUE OF CALIFORNIA'S EXISTING CLEMENCY SYSTEM

In light of clemency's stagnation, California must examine and rework the existing system. Recognizing the need for reform, the American Bar Association (ABA), has undertaken projects to identify problems with and remedies for the clemency process nationwide. The first project, the ABA Justice Kennedy Commission (the Kennedy Commission), was created in response to Justice Kennedy's appeal for an examination of the penal system at the ABA's annual meeting in 2003.⁹⁷ Specifically, Kennedy challenged the ABA to examine mandatory sentencing, racial discrimination, prison conditions, recidivism, and the state and federal pardoning processes.⁹⁸ The Kennedy Commission examined clemency generally, rather than targeting capital cases, but emphasized clemency as an important equitable remedy, noting its recent

90. BROWN WITH ADLER, *supra* note 62.

91. See Moylan & Carter, *supra* note 36, at 48; *History of Capital Punishment*, *supra* note 85.

92. Moylan & Carter, *supra* note 36, at 48.

93. *Id.*

94. See e.g., *Clemency*, *supra* note 32 (chart of clemencies granted since 1976 revealing that California is not listed as granting any).

95. *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976>, (last visited Jan. 15, 2011).

96. FINAL REPORT, *supra* note 83 at 156.

97. AM. BAR ASS'N, <http://www.abanet.org/leadership/initiative/initiative4.html> (last visited Jan. 18, 2011).

98. *Id.*

atrophy.⁹⁹ The second ABA project, the Death Penalty Moratorium Project (the “Moratorium Project”), specifically examined clemency in capital cases.¹⁰⁰ In 2007, after evaluating the clemency processes of eight sample states,¹⁰¹ the Moratorium Project published its “Key Findings,” which emphasized clemency’s importance and made recommendations to improve its use and functionality.¹⁰² Interestingly, both projects identified problems that are inescapably apparent in California’s clemency system.

A. California’s Current Clemency System Lacks Transparency

As California’s clemency system currently operates, the decisionmaking process is shrouded in ambiguity and inconsistency. As described above, no mandated procedures exist for deciding clemency—the governor dictates the methods used in reaching decisions as he or she sees fit. If the governor allows for a BPH or personal hearing, that hearing need not be conducted in public. Like the majority of the clemency process, the decision to hold a public hearing is discretionary.¹⁰³ Furthermore, clemency denials require no written decisions—the governor must only file grants of clemency with the state legislature.¹⁰⁴ Therefore, since no governor has granted clemency in the last forty-four years,¹⁰⁵ the procedures used in deciding clemency largely remain a mystery to the public. In practice, some governors make written statements concerning clemency denials, but these statements are difficult to locate since there is no requirement that they be recorded.¹⁰⁶

This system has led to a lack of transparency in California’s clemency system. The Moratorium Project identified this problem as a theme in many jurisdictions, observing that “[m]ost states do not

99. AM. BAR ASS’N JUSTICE KENNEDY COMM’N, *Reports with Recommendations to the A.B.A. House of Delegates*, 71 (2004), available at <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf>.

100. See ABA Death Penalty Moratorium Project, *Key Findings*, AM. BAR ASS’N, http://www.americanbar.org/content/dam/aba/migrated/keyfindings_2.authcheckdam.pdf (last visited Mar. 23, 2011).

101. Alabama, Arizona, Florida, Georgia, Indiana, Ohio, Pennsylvania, and Tennessee.

102. See generally ABA Death Penalty Moratorium Project, *supra* note 100 (assessing the fairness and accuracy of eight state death penalty systems).

103. *Id.*

104. See CAL. CONST. art. V, § 8.

105. FINAL REPORT, *supra* note 83, at 156.

106. Moylan & Carter, *supra* note 36, at 65–66.

require the decision-maker to explain the reasons why clemency was or was not granted.”¹⁰⁷ The Moratorium Project recommended ending this opacity and advocated for more transparency in the clemency process.¹⁰⁸

B. Clemency Decisions Appear Arbitrary

Perceived arbitrariness goes hand in hand with a lack of transparency. Because the investigative measures used, the scope of information gathered, and the ability for a petitioner to be heard are determined solely by the governor’s wishes, clemency decisions may appear arbitrary or predetermined. As such, the governor’s “discretion is so broad that it allows, and in fact condones, results that are entirely independent of the merits of the case.”¹⁰⁹ Furthermore, the procedures for determining clemency vary for each petition addressed within an administration, in addition to the variations between gubernatorial administrations.¹¹⁰ For example, Governor Edmund Brown looked for “extraordinary reasons” to grant clemency, outside guilt or legal issues.¹¹¹ Alternatively, at least in one case, Governor Schwarzenegger considered judicial mistakes a key factor in deciding clemency.¹¹² In turn, however, Governor Schwarzenegger appeared inconsistent in this requirement—although he stated he would deny Stanley Williams’ petition unless a mistake had occurred in the judicial system, he made no such requirement for previous petitioners.¹¹³ These types of inconsistencies indicate an arbitrary decision-making process that fails to ensure a principled clemency decision.

107. ABA Death Penalty Moratorium Project, *supra* note 100, at 4.

108. *See id.* The Moratorium Project recommended implementing procedural and substantive standards for the clemency system, as well as public hearings, thus providing for more transparency. These recommendations will be discussed in the following section. *Infra* Part VI.B.

109. Dinsmore, *supra* note 4, at 1844.

110. Moylan & Carter, *supra* note 36, at 58, 63 (recognizing that “each California gubernatorial administration has the flexibility to adopt its own process for review” and that “the current administration has implemented a case-by-case approach to the holding of hearings”).

111. BROWN WITH ADLER, *supra* note 62, at 10. Governor Brown stated that the governor’s clemency powers “had little to do with guilt or innocence, or even with the finer points of law. The first was for a jury and the original judge to decide; the second was the job of the appellate courts.” *Id.*

112. *See Clemency News and Developments: 2005*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency-news-and-developments-2005> (last visited Jan. 19, 2011).

113. *See id.*

In 2008, the California Commission on the Fair Administration of Justice flagged this inconsistent clemency process as a topic for investigation.¹¹⁴ The commission set forth focus questions highlighting these problems:

- Are clemency procedures used by California governors consistent from one administration to the next?
- Are they consistent with the procedures utilized by other states?
- Are they adequate to assure a fair opportunity to be heard by all interested parties, and to assure a principled decision on the merits?¹¹⁵

As the commission suggested, clemency's ability to ensure a meaningful and just review is undermined by the procedural inconsistencies of the current process.¹¹⁶

Perhaps the most compelling example of this problem—albeit a noncapital example—is the case of Esteban Nuñez, the son of a political ally whose sixteen-year sentence Governor Schwarzenegger commuted.¹¹⁷ Nuñez's case was strikingly similar to that of another inmate, Sieu Ngo: both were involved in a group brawl that ended in death, though they did not deliver the fatal blow; both were nineteen years old when the crime occurred; and both fled hundreds of miles after participating in the crime.¹¹⁸ However, Schwarzenegger overturned the parole board's decision to grant Ngo parole, citing Ngo's "irresponsible" flight from the scene of the crime as his reason for denying parole.¹¹⁹ Ngo had served sixteen years when Schwarzenegger denied his parole; Nuñez had served just seven months when Schwarzenegger commuted his sentence.¹²⁰ As Nuñez's case highlights, California's discretionary clemency system allows for results that do not reflect a fair reasoning on the merits of a case.

114. *Focus Questions for Hearings on the Fair Administration of the Death Penalty in California*, CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE (Feb. 18, 2008), <http://ccfaj.org/documents/press/Press22.pdf>.

115. *Id.*

116. *See id.*

117. Jack Dolan, *Nunez Clemency Is a Departure for Schwarzenegger: The Case Stands in Stark Contrast to How He Treated Dozens of Similar Offenders*, L.A. TIMES, Jan. 16, 2011, at A1.

118. *Id.*

119. *Id.*

120. *Id.*

C. Governors' Decisions Are Influenced by Political Pressure

The Kennedy Commission explicitly recognized the impact of political pressure on governors deciding clemency petitions.¹²¹ In its report to the ABA House of Delegates, the commission stated, “[T]he vitality of the pardon power in a particular state jurisdiction varies depending upon the extent to which its decision-maker is insulated from politics.”¹²² Thus, placing the clemency power with a single individual, especially one who is popularly elected and politically aligned, undermines clemency’s ability to freely function.¹²³ If the governor fears that granting a clemency petition will lead to political backlash, he or she may deny the petition.¹²⁴

This fear is realistic and ever present. In fact, former Governor Edmund Brown admitted denying a petition because he feared a farm workers’ minimum-wage bill would be jeopardized if he granted clemency.¹²⁵ The governor was set to hear Richard Lindsey’s clemency petition the same week the legislature decided the minimum-wage bill.¹²⁶ Ironically, the swing vote needed to pass the bill belonged to a pro-death penalty legislator from the county in which the victim was murdered.¹²⁷ In describing the situation, Governor Brown reflected, “[I]f I spared this man’s life, I would most certainly be dooming an important farm labor minimum-wage bill that we had worked hard to promote.”¹²⁸ “Should I risk, did I even have the *right* to risk, destroying any of that because of one demented criminal?”¹²⁹ “The scales tipped” in favor of the bill, and the governor denied clemency, a decision that troubled him for years to come.¹³⁰

Similarly, governors may feel pressure to deny clemency petitions to avoid appearing “soft on crime.”¹³¹ A now-cautionary

121. See AM. BAR ASSOC. JUSTICE KENNEDY COMM’N, *supra* note 99 at 70.

122. *Id.*

123. See *id.*

124. See *id.*

125. BROWN WITH ADLER, *supra* note 62, at 72.

126. *Id.* at 75.

127. *Id.*

128. *Id.* at 72.

129. *Id.* at 84.

130. *Id.*

131. See *Death Row Clemency Is Much Rarer These Days*, ABC NEWS (Dec. 11, 2005), <http://abcnews.go.com/WNT/LegalCenter/story?id=1395809>.

tale, Michael Dukakis's presidential bid was "killed," in part,¹³² after he granted a furlough to Willie Horton, who then committed assault, robbery, and rape.¹³³ This concern has grown in recent years with the emergence and support of the retributive theory of justice.¹³⁴ Today, clemency is viewed by some as a political liability. Scholars acknowledge that "[c]lemency can be seen, when it's exercised by a governor, as a sign of weakness or not being tough on one of the country's great social issues."¹³⁵ Some governors, afraid of these political repercussions, wait until their terms are all but completed to grant clemency.¹³⁶ As a practical matter, however, it appears more common for governors to deny clemency petitions than to wait until the end of their terms to commute sentences. Instead, "the political reality is that there are few criticisms of officials who say 'no' to a clemency request, and there is considerable risk of political backlash if an offender released by action of the executive commits another crime."¹³⁷

In addition to this general pressure, California governors deciding clemency are indirectly pressured by the California Constitution. For the governor to *grant* clemency to a two-time felon,

132. Dukakis also lost the presidential election due to his position on the death penalty. Abby Livingston, *Obama's Non-Dukakis Answer*, FIRST READ FROM NBC NEWS (Jun. 25, 2008, 10:07 PM), http://firstread.msnbc.msn.com/_news/2008/06/25/4433621-obamas-non-dukakis-answer (describing Dukakis's statements about the death penalty as the "beginning of the end of his campaign").

133. See AM. BAR ASS'N JUSTICE KENNEDY COMM'N, *supra* note 99, at 69; Mark Balzer, *Shades of 1988*, POLITICS (Dec. 5, 2009, 8:57 AM), http://www.pocatelloshops.com/new_blogs/politics/?p=5490. Governor Brown also faced political backlash for granting clemency, which almost cost him re-election. He stated,

[B]ecause of my high percentage of commutations, I became known as an outspoken foe of capital punishment. It wasn't an image I consciously tried to create; in fact, the evidence is strong that it seriously damaged my political future. Richard Nixon made it such a major issue during the 1962 gubernatorial campaign that at one point I was sure I'd lose and seriously considered dropping out.

BROWN WITH ADLER, *supra* note 62, at xiii.

134. Harris & Redmond, *supra* note 10, at 7 (citing retributive theory of justice as a factor in clemency's decline).

135. See *Death Row Clemency Is Much Rarer These Days*, *supra* note 131.

136. Former Illinois Governor George Ryan granted the largest blanket clemency in history when he commuted the sentences of 167 death row inmates as one of his last acts in office. See *Illinois Governor's Blanket Pardon Spares Lives of 167 Condemned Inmates*, FOX NEWS (Jan. 11 2003), <http://www.foxnews.com/story/0,2933,75170,00.html> (stating that Governor Ryan granted 167 clemency petitions two days before the end of his gubernatorial term).

137. AM. BAR ASS'N JUSTICE KENNEDY COMM'N, *supra* note 99, at 69.

the majority of the California Supreme Court must concur.¹³⁸ However, no similar requirement exists for a Governor to *deny* clemency to a two-time felon.¹³⁹ Thus, the legislature was more concerned with harnessing the governor's power to grant clemency than his or her ability to deny it.¹⁴⁰ This further pressures California governors to deny clemency.¹⁴¹

V. CALIFORNIA NEEDS A CLEMENCY PROCESS THAT ALLOWS FOR MEANINGFUL, RELIABLE REVIEW

The number of individuals sentenced to death has steadily increased over the past forty years.¹⁴² California has the largest death row in the country, with over 700 inmates awaiting execution.¹⁴³ As the death sentences increase, so does the potential for wrongful convictions.¹⁴⁴ The Anti-Terrorism and Effective Death Penalty Act of 1996¹⁴⁵ augments this problem. The statute restricts inmates' habeas corpus review by imposing a one-year statute of limitations and requiring a deferential standard of review for assessing inmates' claims.¹⁴⁶ As a result, inmates bringing constitutional challenges against their sentences are severely limited in their ability to find relief through habeas corpus avenues. Therefore, clemency may be some inmates' only chance for post-conviction relief.

Interestingly, as death sentences have increased, clemency

138. CAL CONST. art. V, § 8.

139. *See id.*

140. Moylan & Carter, *supra* note 36, at 96.

141. Governor Edmund Brown faced this pressure when deciding clemency for Caryl Chessman. Governor Brown considered granting clemency, but a grant required affirmation by the California Supreme Court because Chessman had two prior felonies. BROWN WITH ADLER, *supra* note 62, at 35. After speaking with one of the justices, Brown learned that the court would not affirm clemency if he granted the petition. *Id.* Therefore, granting clemency was not worth the "extremely dangerous" political backlash Brown expected because the supreme court would strike down the decision anyway. *Id.* at 34.

142. Death Row Inmates by State and Size of Death Row by Year, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year> (last visited Jan. 23, 2011) (showing an increase in death row populations per year, until 2001).

143. *See id.*

144. Lim, *supra* note 16, at 67.

145. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at 28 U.S.C. §§ 2244, 2253-2255, 2261-2266 (2006)).

146. 28 U.S.C. § 2254(e)(1) (2006) ("[A] determination of a factual issue made by a State court shall be presumed to be correct."); *id.* § 2244(d)(1) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus . . .").

grants have steadily declined.¹⁴⁷ A California governor has not granted clemency since 1967,¹⁴⁸ yet death row inmates continue to seek clemency. As the increasing death row population turns to clemency for post-conviction relief, the procedures used for determining whether to grant clemency petitions should fall under closer scrutiny.¹⁴⁹ However, many scholars have questioned clemency's ability to function in a meaningful way.¹⁵⁰ When speaking to the House of Representatives, Douglas A. Berman, a law professor at Ohio State University, stated, "Unfortunately, in modern times, the 'fail safe' of executive clemency has been failing to effectively serve the ends of justice that the Framers emphasized."¹⁵¹ The days of clemency as a regularly used function have passed—in order to remain a relevant and meaningful instrument, California's clemency process must evolve and follow the example of other states that have implemented more structured systems.¹⁵²

147. Gershowitz, *supra* note 49, at 670–71 (2001) ("Given the Court's hands-off approach and the more frequent use of capital punishment, executive clemency takes on even greater importance. In short, clemency truly does have the potential to be the fail safe of the criminal justice system. Unfortunately, however, that potential has not been realized. In fact, the use of executive clemency has dramatically declined in the past few decades.").

148. FINAL REPORT, *supra* note 83, at 156.

149. Lim, *supra* note 16, at 47, 66.

150. See Gershowitz, *supra* note 49, at 700–01.

151. *Presidential Clemency Power: Testimony before the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Douglas A. Berman, Professor of Law, Ohio State University).

152. See *supra* Part II.B. There is also a possible conflict between the California Penal Code and the state constitution. The constitution bestows broad discretionary powers on the governor and only requires approval from the majority of the supreme court to grant clemency to a two-time felon. The Penal Code, however, requires that the governor transmit certain clemency petitions to the BHP. Moylan & Carter, *supra* note 36, at 56 n.99; see FINAL REPORT, *supra* note 83, at 156–57. This Note advocates solving this apparent discrepancy when enacting constitutional amendments to California's clemency provisions.

VI. RECOMMENDATION

As Justice Kennedy has stated, “[T]he clemency power can correct injustices that the ordinary criminal process seems unable or unwilling to consider.”¹⁵³ To restore this purpose of clemency, California must implement procedural guidelines for approaching clemency petitions and create a board to decide petitions’ outcomes. Enacting a clemency board and standard clemency procedures will help correct the rampant problems in California’s current system, including the political pressure on the governor, the lack of transparency in decisionmaking, and the apparent arbitrariness or unfairness of decisions. By making these changes, California will create a dependable, fair clemency system that meaningfully and efficiently protects against injustice.

A. A Board Should Decide Clemency

A decisionmaking board is necessary to alleviate the political pressures that presently cramp California’s clemency system. The Moratorium Project recognized the political pressure weighing on decisionmakers and recommended insulating clemency decisions from such pressure as much as possible.¹⁵⁴ Appointing a board to make clemency decisions instead of placing the responsibility with a single popularly elected individual will promote the political insulation the Moratorium Project recommended. Even scholars who support discretionary executive power recognize that placing clemency decisions with a board would remove the significant political pressure that the governor currently faces.¹⁵⁵

There are several ways to select a clemency board—some scholars have suggested that boards include the sentencing judge¹⁵⁶ or

153. *Dretke v. Haley*, 541 U.S. 386, 399 (2004) (Kennedy, J., dissenting).

154. Moylan & Carter, *supra* note 36, at 90.

155. *Id.* at 96 (“There is nothing, in place in California, however, that attempts to remove some of the political pressure on an elected official, such as by putting a determinative decision into the hands of an independent board.”). Even though clemency has traditionally rested with a single executive, several states have broken tradition and created clemency boards. *See Clemency*, *supra* note 32. Furthermore, early American citizens, distrustful of arbitrary or biased rulings, were hesitant to grant broad, unrestricted powers to a single executive. *See Harris & Redmond*, *supra* note 10, at 3. In its current form, California’s dysfunctional clemency system appears to warrant this distrust.

156. *See generally* Huang, *supra* note 17, at 131 (suggesting a judge to sit on a board deciding federal clemency).

the governor. Others would allow the governor to appoint clemency board members.¹⁵⁷ However, the key goal when selecting the clemency board is to ensure its members are not “political appointments” who are subjected to political pressures.¹⁵⁸ With this in mind, Victoria Palacios, a former member of a parole board, has suggested that the governor select members for an appointments board that, in turn, would choose the clemency board members.¹⁵⁹

At the most basic level, using a clemency board will make clemency decisions appear less arbitrary and more objective. Using a more structured approach and placing decisions in the hands of multiple individuals will make the decision appear less subject to whim or personal bias. Furthermore, a board may revitalize California’s stagnant clemency process. The Kennedy Commission found that

pardons tend to be granted more regularly and generously in the five states where the pardon power is exercised by an independent board with no involvement by the governor, than it is in the twenty-two states where the governor exercises the power subject to no procedural constraints.¹⁶⁰

Though the Commission reviewed the clemency system broadly, this finding may translate to capital cases as well—of the six states that use a board to decide clemency,¹⁶¹ three states grant clemencies fairly regularly.¹⁶²

157. This approach is problematic because board members appointed by the governor are politically aligned and are therefore subject to political pressure. For a clemency board to ensure a fair, meaningful review, the decisionmaker(s) must be insulated from this pressure.

158. Victoria J. Palacios, *Faith in the Fantasy: The Supreme Court’s Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311, 352–53 (1996).

159. *Id.* at 371.

160. AM. BAR ASS’N JUSTICE KENNEDY COMM’N, *supra* note 99, at 70. This statistic is based on the entire clemency system, not solely capital cases.

161. Connecticut, Georgia, Idaho, Nebraska, Nevada, and Utah. Clemency, *supra* note 32; *see* State by State Database, DEATH PENALTY INFORMATION CTR., http://www.deathpenaltyinfo.org/state_by_state (last visited Mar. 23, 2011) (select Idaho, Nebraska, and Nevada from drop-down options to view state clemency models).

162. Since 1976, Georgia has granted seven clemencies and executed fifty-one people; Nevada has granted one clemency and executed twelve people; and Idaho has granted one clemency and executed one person. State by State Database, *supra* note 161.

B. Procedural Guidelines Should Be Enacted

Some scholars maintain that clemency is an executive function and should therefore remain discretionary and largely unregulated.¹⁶³ However, California's current clemency system undermines this proposition. In California, the clemency system is not strictly an executive function—the California Supreme Court must confirm the governor's decision to grant clemency to a twice-convicted felon.¹⁶⁴ Furthermore, clemency's stagnancy suggests that it may no longer protect against miscarriages of justice.¹⁶⁵ With the emergence of the retributive theory of justice, the number of death row sentences continues to increase, while meaningful clemency review seems to decrease.¹⁶⁶ In light of the changes in capital punishment,¹⁶⁷ the justifications for the “unfettered discretion of the executive have lost their potency.”¹⁶⁸ Thus, more procedural standards should be enacted to ensure clemency still functions as a fail safe for injustice.¹⁶⁹

Many scholars and the ABA support implementing standard clemency procedures.¹⁷⁰ The ABA Moratorium Project made eleven recommendations to bolster state clemency processes, including substantive standards, public hearings, and individual meetings with the decisionmaker.¹⁷¹ Though some petitions may have received this

163. See generally Harris & Redmond, *supra* note 10, at 10 (discussing California's state clemency process); Moylan & Carter, *supra* note 36, at 96–97 (discussing clemency in California capital cases).

164. CAL. CONST. art V, § 8.

165. See Dinsmore, *supra* note 4, at 1838.

166. See generally Dinsmore, *supra* note 4 (discussing the need to ensure meaningful review in California capital cases).

167. The criminal justice system used to impose harsh mandatory sentencing, in which punishments were not closely tailored to crimes. *Id.* at 1833–34. Under this system, unregulated, broad clemency powers allowed executives to tailor sentences and ensure individual consideration. *Id.* However, since then, sentencing has become more flexible with the subdivision of murder into degrees and the U.S. Supreme Court's requirement that the states redraft precise penal codes. *Id.* Therefore, considering the evolution of capital punishment, unregulated, discretionary clemency powers are no longer necessary. *Id.*

168. *Id.* at 1834.

169. *Id.*

170. See generally, e.g., AM. BAR ASS'N. JUSTICE KENNEDY COMM'N, *supra* note 99, at 70 (examining the fairness, wisdom, and efficacy of criminal punishment throughout the United States); Dinsmore *supra* note 4 (discussing the need to ensure meaningful review in California capital cases); ABA Death Penalty Moratorium Project, *supra* note 100 (assessing the fairness and accuracy of eight state death penalty systems).

171. Moylan & Carter, *supra* note 36, at 90.

treatment, these procedures are not required or regularly followed in California.¹⁷² Recognizing this inconsistency in states like California, the ABA Kennedy Commission stated:

Jurisdictions should also make clear the standards that govern applications for commutation and pardon; specify the procedures that an individual must follow in order to qualify for a grant of clemency; and ensure that clemency procedures are reasonably accessible to all persons.¹⁷³

This Note supports the recommendations of the Moratorium Project and Kennedy Commission and advocates the creation of basic procedural standards for the proposed clemency board to follow in deciding petitions.¹⁷⁴

Because California has enacted statutory provisions related to the appointment of counsel and resources,¹⁷⁵ this Note focuses on what procedures should take place once the decisionmaker becomes involved in the petition. First, to ensure a complete and consistent review, the legislature should clearly articulate the types of information the board should consider, such as records of mental health, economic disparity, and any doubt of guilt. In this way, the clemency board may ensure its review is as thorough as possible and petitioners will know the types of factors the board will consider. These factors may serve as guidelines that guarantee the decisionmaker considers basic important information when deciding clemency but will allow for further investigation should the board so choose.¹⁷⁶ In this way, these substantive standards promote transparency and consistency, yet allow the board to consider exigent circumstances and exercise mercy.¹⁷⁷

Second, after an appropriate investigation has taken place,¹⁷⁸ the

172. *Id.* at 92 (listing clemency procedures that are not regularly followed in California).

173. AM. BAR ASS'N JUSTICE KENNEDY COMM'N, *supra* note 99, at 74.

174. If a clemency board is not created, these suggested procedures apply equally to the governor.

175. Moylan & Carter, *supra* note 36, at 91–92.

176. Dinsmore, *supra* note 4, at 1855 (explaining that substantive procedures can function as guiding principles rather than constraints).

177. *Id.* at 1855–56.

178. The BPH may continue to conduct clemency investigations for the decisionmaker. These investigations will differ in their mandatory character and inclusion of the aforementioned minimally required areas of research.

board should hold a public hearing.¹⁷⁹ Requiring this type of hearing provides both the petitioner and opposing counsel an opportunity to be heard and present any important information to the decisionmaker. Additionally, holding a *public* hearing will open the clemency process to the community, thereby providing further transparency in the clemency process and ensuring interested parties are able to attend.

Finally, similar to Georgia, a state that delegates clemency powers to a board,¹⁸⁰ California should require the board to submit written reports of clemency denials to the legislature. Reporting these denials to the legislature will create a public record of clemency denials, not just grants, thereby “creat[ing] a more complete database for future governors, legislators, researchers, and the general public.”¹⁸¹ This type of public access will allow for more transparency in the clemency system and create a historical record for future decision-makers to refer to.¹⁸²

VII. WHY THE TIME IS RIGHT TO EFFECT CHANGE—CAPITAL CLEMENCY’S INEXTRICABLE TIES TO THE DEATH PENALTY DEBATE

The time to effect change is now. Given the political climate surrounding the death penalty¹⁸³ and the growing budget crisis,¹⁸⁴

179. Under California’s current system, even if the BHP holds a public hearing, it does not take place before the governor. Moylan & Carter, *supra* note 36, at 92.

180. See GA. CODE ANN. §42–9-43(a) (1997). Georgia requires its clemency board to submit written reports of its activities to the governor, the attorney general, and all the members of the general assembly each year.

181. Moylan & Carter, *supra* note 36, at 97.

182. *Id.* at 99–100.

183. Public and political outcry over California’s death penalty has come from several different corners, regardless of title or political affiliation. Judge Arthur L. Alarcón of the U.S. Court of Appeals for the Ninth Circuit, a former district attorney and clemency secretary, deemed California’s death penalty system “defunct.” Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature’s Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. (SPECIAL ISSUE) S42, S46 (2011). The American Law Institute, which originally drafted the death penalty structure, does not support the current system it created, yet refuses to rework it. In 2009, police considered the death penalty the least effective method of preventing crime. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last updated Aug. 11, 2011).

184. See generally Alarcón & Mitchell, *supra* note 181 (examining California’s capital punishment system and the costs of administering the death penalty). In the midst of a hefty budget deficit, California spends millions annually on funding the death penalty.

The costs of expensive death penalty trials are the tip of the iceberg; the exorbitant bills to the taxpayers begin to stack up in earnest after a death sentence is imposed. At that

California is poised to reform its criminal justice system, particularly in the capital arena. Part of this reform must be revitalizing the capital clemency system. The clemency process is inextricably tied to the death penalty, as it is a death row inmate's final option for avoiding execution by a faltering criminal system. In their recent critique of California's death penalty system, Judge Arthur L. Alarcón of the U.S. Court of Appeals for the Ninth Circuit, a former clemency secretary to the governor, and Paula M. Mitchell, an adjunct law professor, expressed their dissatisfaction with California's failure to implement the recommendations of the California Commission on the Fair Administration of Justice.¹⁸⁵ This commission conducted a study of California's criminal justice system—capital punishment in particular—and recommended significant changes to the system.¹⁸⁶ As noted above, these recommendations included amendments to the clemency system that would promote further transparency and fair reviews.¹⁸⁷ Judge Alarcón and Paula Mitchell highlighted the legislature's failure to enact these recommendations in 2008—specifically those providing the timely appointment of counsel and review for condemned inmates—and called for voter action in favor of capital reform.¹⁸⁸ In response to Judge Alarcón and Paula Mitchell's report, Senator Levi Hancock introduced Senate Bill 490, which seeks to abolish California's death penalty.¹⁸⁹ The bill, which has passed through the Public Safety Committee, must survive the Appropriations Committee, the Assembly and Senate floor, and the governor's

point, California taxpayers foot the \$186 million annual bill for housing, healthcare, and the provision of legal representation for condemned inmates, many of whom are dying of natural causes.

Id. at S46.

185. *Id.* at S47–48.

186. FINAL REPORT, *supra* note 83, at 10–21.

187. These clemency recommendations are not entirely on point with the viewpoint of this Note, as the commission supports maintaining broad executive clemency powers. However, the commission does recommend creating public records of clemency denials and conducting a meeting between the governor and both parties to the petition, among other recommendations. *Id.* at 156–57.

188. Alarcón & Mitchell, *supra* note 181, at S47, n.7.

189. Courtney Minick, *California Voters May Get Chance to Weigh In on Death Penalty*, JUSTIA LAW, TECH. & LEGAL MARKETING BLOG (July 18, 2011), <http://onward.justia.com/2011/07/18/california-voters-may-get-chance-to-weigh-in-on-death-penalty/>.

scrutiny before it is placed on California's 2012 voters' ballot.¹⁹⁰

Considering the tumultuous debates surrounding the death penalty and the legislature's past failure to enact reform, it is natural to question whether California's legislature will have the courage to act upon the recommendations of this Note—it is fair to assume that the political pressure to deny clemency petitions equally applies to the legislature and the amendments it enacts, especially those related to the death penalty. However, the legislature should not be fearful of creating both a clemency board and procedural standards for it to follow, as doing so is favorable to both proponents and opponents of the death penalty. In this way, clemency reform sidesteps the political ramifications of enacting death penalty reform.

Death penalty opponents will support enacting a these clemency amendments because they provide a meaningful review of an inmate's case and, in turn, further protect against executing innocent people. Also, consistently requiring the decisionmaker to consider socioeconomic, mental health, and family history information when deciding clemency may alleviate unfortunate sentencing biases¹⁹¹ in the judicial system.

Death penalty proponents should also support the recommended clemency approach. Providing a meaningful review of an inmate's case ensures that retribution is exacted on the correct individual. This makes the argument for the death penalty stronger—if additional steps are taken to guarantee innocent people are not executed, a key argument against the death penalty is effectively eliminated. Furthermore, the proposed clemency approach is consistent with victim and family rights. Requiring a public hearing before the clemency board gives the victim's family, in addition to the petitioner, a greater chance to be heard. This is important, for in some cases, victims' family members do not support execution and instead favor granting clemency.¹⁹²

Therefore, because enacting a clemency board and procedural requirements to govern it is favorable to both sides of the death penalty debate, the legislature should embrace the recommendations of this Note. Though clemency bills have been unsuccessful in the

190. *Id.*

191. FINAL REPORT, *supra* note 83 at 169–71 (discussing racial and socioeconomic sentencing disparities).

192. Moylan & Carter, *supra* note 36, at 76.

past,¹⁹³ given the current dissatisfaction with California's capital punishment system and the repeated calls for legislative action, the time is right to effect change in our clemency system. In fact, by enacting the recommended clemency amendments, the legislature may be able to appease, albeit temporarily, members of the public who are dissatisfied with the legislature's failure to act on issues raised by the death penalty debate.¹⁹⁴

VIII. CONCLUSION

California must end the lack of transparency, apparent arbitrariness, and political pressure that render its clemency system an empty, meaningless ritual. For California's clemency system to properly safeguard against miscarriages of justice, the state must create a board to decide clemency petitions and provide procedural standards for the board to follow. True, making these changes will take time and cost money, but "society should be willing to pay the price" to ensure sentences are rightfully determined.¹⁹⁵ By adopting a clemency board and procedural standards, the state will reinstate clemency's fail-safe function, ensure that petitions receive a meaningful review, and restore clemency to its rightful active position in the criminal justice system.

193. Senate Bill 119, proposed in 2006, called for mandatory hearing before the BPH, the appointment of competent counsel, and other related fiscal and timing requirements. Alarcón & Mitchell, *supra* note 181, at S200.

194. Judge Alarcón and Paula Mitchell refer to the legislature's failure to address the state's deteriorating death penalty system as a "multi-billion-dollar fraud." *Id.* at S46.

195. Dinsmore, *supra* note 4, at 1858 (stating that clemency is the last stage to catch errors of the judicial system and increasing clemency costs is worth ensuring that innocent people are not executed).