

Good afternoon. Thank you to The Commutation Project and the Charles Hamilton Houston Institute for inviting me to participate in this important forum, and thank you to all of you for being here to join in the day's discussion.

My name is Gavi Wolfe. I am Legislative Counsel for the ACLU of Massachusetts. In that capacity, I spend some of my time advocating for the rights of prisoners and ex-prisoners, as well as for sensible criminal justice policy to ensure that as few people as possible enter the system to begin with. I've been asked to speak this afternoon about commutation, a subject I began to think about several years ago as a law student writing for the Boston College Third World Law Journal. I'm glad to be able to revisit the subject here today.

I'd like to use my time today to provide some historical context for the breakdown of the clemency process that we see today in the Commonwealth, and recommend some structural changes to improve the system. Most of all, I'd like to suggest some ways for us all to frame and think about the conversations to come in the rest of this afternoon's program.

Let me begin by being very honest with you about where I'm coming from. I believe the system is broken. Not underperforming. Not in a down turn. Not stalled out. Just plain broke. And I'll admit that I've come to this conclusion because I'm focused on outcomes. In Massachusetts, no one is being pardoned and no sentences are being commuted. Clemency in Massachusetts has ground to a halt. I initially wrote about the failure of commutation in Massachusetts during the Romney administration, but I'm sorry to say that six years later, not much has changed as far as commutation goes.

Commutation is one form of clemency – it's the power to remit some or all of the punishment allotted for a given offense. Clemency is supposed to function as a safety valve on the justice system as a whole. If it's never ever used, that must mean one of two things. Either we've achieved perfect justice in Massachusetts without clemency, or the system is broken. Even if I believed in the possibility of perfecting justice, I can assure you we haven't managed that feat anywhere in the United States, and certainly not in this state. So that can mean only one thing: the clemency system as it currently stands is not working. There is no safety valve.

But let's start with the obvious question. Is our criminal justice system under so much pressure that a safety valve is even needed?

Consider this:

- Between 1970 and 2005, the US prison population rose by 700 percent. We now have 5 percent of the world's population, but 25 percent of its prisoners.
- Then, on top of the overall gross disparity in incarceration rates compared with the rest of the world, we have to contend with staggering racial disparities in the treatment of our own population. Our nation's overflowing prisons are mostly

filled with poor, dispossessed people of color. Indeed, black Americans are imprisoned at nearly six times the rate of their white counterparts—and Latinos are locked up at nearly double the white rate. People of color are also likely to serve longer sentences.

- Finally, on top of the grave racial disparities, we also need to be mindful that our overflowing prison system is overflowing with people addicted to drugs, individuals with unaddressed mental health needs, and people locked up for administrative status offenses.

None of this has much to do with “justice.”  
So, does the system need a safety valve? Absolutely.

It’s not just that our prisons are buckling under the pressure. Our communities are being squeezed to the breaking point. And possibly the greatest strain is on our society’s ideals of fairness. For all of these reasons, the safety valve of clemency is sorely needed today – perhaps more than ever.

Assuming you agree with me on the basic premise that our criminal justice system and the people it affects – namely, *all* of us – are in dire need of relief, then we need to take a little closer look at clemency to examine its goals, its capacity to provide that relief, and its limitations.

What is clemency *supposed* to be able to do? What is its purpose?

Every executive who wields the pardon power is likely to have his or her own philosophy about it -- his or her own answer to the question of how clemency should operate. For our purposes today, I think it would be helpful to name some of the traditional philosophical approaches people have had to the question: What is clemency for?

Clemency has its roots in European monarchies, yet the power was also given to the President under the U.S. Constitution and to the Governor under most state constitutions. So, right off the bat, there is a tension between the history of the institution and its role in our modern American constitutional scheme of checks and balances.

Under a monarchy ruled by an all-powerful sovereign, clemency was a private act of grace from on high. Literally, clemency meant mercy. As an act of grace, it did not need to be justified. It was a good in and of itself. Clemency was moral because mercy was a virtue.

In contrast, Justice Holmes articulated a different role for clemency within our constitutional scheme. He described clemency as a determination that “the public welfare will be better served by inflicting less than what the judgment fixed.” According to this model, the pardon power serves a larger social utility.

Because clemency is fundamentally about remission of punishment – that is, retro-fitting the punishment of a particular individual – theorists tend to describe the goals of clemency in terms of the theory of punishment to which they subscribe.

The two major theories are fairly straightforward:

On one hand, retribution. If you're a retributivist, and you believe justice – that old platonic ideal – demands an exact measure of punishment for particular misconduct, then clemency is simply a straight-edged tool to level the measuring cup. In this case, a commutation is a way of reducing a sentence that is “too harsh” in an objective sense. It's a kind of executive audit to achieve a more perfect accounting on the balance sheet of justice.

On the other hand, redemption. If you take a redemptive approach, and you believe people deserve credit for their personal transformations while serving their sentence – well, then clemency becomes a tool to recalibrate the measure of punishment in light of individual rehabilitation. You might ask: has the prisoner improved himself in word and in deed? Has he achieved a higher moral attainment, as evidenced by expressions of remorse and public service? Is he now a different, better person than the one who committed the crime?

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I like all of this theory. It brings us back to essential first principles about justice and fair treatment, and it is worth listening to today's discussion through the filter of these theories of retribution and redemption, grace and the public welfare.

But to be honest, I feel that today, we don't have the luxury of spending too much time on theory because we're at a different, more basic and sad point in the discussion – not just what clemency should be about *in theory*, but how and whether clemency functions *in practice*, regardless of what theory you relate to. As I mentioned earlier, the system is broken in Massachusetts. Not a *single* pardon or commutation has been granted in the last 10 years, even though about 100 petitions are filed annually. Not *one* during former Governor Mitt Romney's entire term. And not one – not yet, at least, and we're six years in and counting – under Governor Deval Patrick. That's a full decade of inactivity. In computer speak, you might say the session has timed out and the system is offline.

And yet here we are at a time when Massachusetts teeters on the verge of adopting a rigid 3-strikes law that could result in a new wave of determinative sentences without any chance of parole. Restoring clemency seems all the more imperative.

So yes, think about theory today. But I hope that we will also focus on brass tacks – How does clemency work when it works? What gets in the way? And how can we make the process of deliberation and decision around clemency more productive?

Research on the *mechanics* of clemency shows interesting things about the structures and procedures various states have put in place to make decisions about pardons and commutations.

Attorney and scholar Margaret Colgate Love conducted perhaps the most comprehensive survey of clemency procedures by jurisdiction and examined each jurisdiction's pardon activity to see how well its procedure was working. According to Love's findings, few jurisdictions have a thriving pardon power. In fact, most states did not grant more than a token number of pardons each year in the decade from 1995 to 2005. Only 9 states issued what she called a “substantial” number of pardons each year and granted a substantial percentage of the applications filed. Other than in these states, she concluded, pardon does not seem to be reasonably attainable.

Massachusetts is not among the nine.

According to Love, the states with the most active pardon power share certain characteristics of administration:

1. A transparent process, regulated by law.
2. A public application and hearing process.
3. Written decisions with the reasoning spelled out.
4. An independent board that makes recommendations, to offer a degree of protection from politics.

Well, that's good news, right?! These are all characteristics of the clemency process in Massachusetts. The Commonwealth has a clear, well-regulated administrative process. And the Governor shares responsibility for making clemency decisions with an independent board, the Parole Board sitting as the Advisory Board of Pardons, which makes its recommendations in writing.

Actually, on second thought -- that's rather bad news. Because despite a hypothetically sound process, still no one is getting pardoned. While these characteristics may *correlate* to more frequent exercise of executive clemency, they clearly do not ensure it.

So, we have to look elsewhere for answers. Why should it be that in Massachusetts, although the system has some hallmarks of the most productive states, every time you shake the magic 8 ball of our clemency process, it settles on "my reply is no"?

One source of clues could be our Clemency Guidelines. Each Massachusetts Governor, at the start of his or her time in office, spells out in Executive Clemency Guidelines the principles he or she will use to make decisions about pardons and commutations.

It is fascinating, as an academic exercise, to do a close read of the guidelines since the Dukakis era and map the textual changes from administration to administration against the backdrop of the changing politics of the last 30 years. The changes are not necessarily dramatic from one administration to another – just a few words tweaked here or there – but over time they indicate some clear cultural shifts.

First, during this period, the language of the Guidelines shows a shift in the criteria for granting clemency – A shift away from a primary focus on rehabilitation – asking whether the prisoner has bettered himself – toward a new focus on predicting future conduct. Under Dukakis, a petitioner was required to demonstrate that he or she had, "*within his or her capacity*, made exceptional strides in self-development and improvement." Governor Weld added the criterion that the petitioner had to show that he or she "would be a law-abiding citizen." At first blush, this sounds like a satisfying, objective standard. In fact, however, it relies entirely on speculation and leaves the guesswork to the personal prejudices of the members of the Advisory Board. Finally, Governor Romney did away with the most individualized language in the guidelines, removing the reference to the petitioner's personal capacity.

A second significant trend shows a general devaluation of clemency over time. Dukakis described commutation as "an integral part of the correctional process." He embraced clemency

as a meaningful component of the criminal justice system and used strong language to encourage people in prison. “The *real possibility of future commutation relief*,” he wrote, “*is intended to serve as a strong motivation...for self-development and improvement....*” Dukakis also said that “persons who exhibit a substantial period of good citizenship subsequent to criminal conviction and who have a specific compelling need to clear their record *deserve* consideration for Pardon relief.”

Governors Weld and Romney did away with this language. Indeed, the Republican attitude toward clemency changed from urgency to indulgence. The Weld Guidelines made no mention of petitioners deserving consideration as a matter of right, but talked about clemency as an unusual privilege to be applied sparingly if at all. Weld referred to commutation as “an extraordinary remedy.” Romney marginalized the clemency power even further, excising the idea that commutation is integral to the correctional process and assuring the public that he would exercise his authority parsimoniously. Here’s his haughtiness in all its glory: “The Governor views the granting of executive clemency as an act of grace and not merely a remedy, which should be only awarded under the most rare and extraordinary circumstances.” Romney rejected any suggestion of constitutional obligation and reverted to a conception of clemency as handed down from on high.

For the record, I’ve recently taken a look to see what Governor Patrick did with all of this. Patrick appears to have edited out that last flamboyant phrase I quoted from Romney, but otherwise seems to hew fairly closely to the model he inherited.

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As I said, I find these textual changes fascinating. The language of the guidelines reflects not only the personalities and inclinations of each of the governors who issued them, but also a long arc of political history, from the pre-Willie Horton era through the 1990s Republican obsession with getting “tough on crime” and into the last number of years when that “tough on crime” position calcified as the only acceptable posture for any aspiring American politician.

At the end of the day, the textual changes from governor to governor probably don’t mean the difference between clemency petitions granted and clemency petitions denied, but the underlying attitudes may. Sadly, historical events keep the process at bottom *political*. No matter how insulated the system may be, the repercussions (real or imagined) of making the “wrong” decision seem to drive the process almost to the exclusion of other considerations – such as those ideals of retributive justice, redemption, public good, or even mercy.

Since the late eighties, Massachusetts has shivered in the long shadow of Willie Horton. Today, that shadow was been extended by Domenic Cinelli. [For those who aren’t familiar with the story, the short version is that in December 2010, Cinelli, who was out on parole, killed a Woburn police officer. Immediately, and ever since, critics of parole and commutation have clamored to further tighten the rules on who can get out of prison and under what circumstances. As a result, just last year Governor Patrick installed a completely new Parole Board, and the legislature has been threatening to make the parole process even more restrictive than it is already.]

**So.** We know, on a basic level, why we need clemency, what it is for, and some of the reasons why it's not working in Massachusetts.

I am, at my core, not an academic but an activist, so I'm drawn to ask – both rhetorically, and to all of you – what can we do about it? How can we pry open the safety valve?

As an initial matter, there *are* some concrete structural changes that I would recommend, both to buffer the clemency process as much as possible from political winds, and to hold the Governor more accountable for his or her decisions, particularly for clemency petitions denied. Of course, none of the recommendations is a magic bullet, but I think that implementing any of them would be an improvement on the current state of affairs.

- One way to reduce the direct impact of politics on the clemency process would be to not have the Governor write the clemency guidelines. It may be healthy to uncouple the guidelines from the Governor's personal preferences, anxieties and ambitions. To not have a single entity both define the criteria by which clemency should be granted and make the final determination regarding individual clemency petitions.
- Next, the Advisory Board of Pardons (aka the Parole Board) should be as diverse as possible. Existing law and the Board's own guidelines call for Board members to be drawn from a variety of professional fields, yet the newly installed board is nearly uniformly composed of people who have made careers in corrections and prosecutors' offices. The existing *recommendation* of diversity should be made a *requirement*.
- In addition, the Governor must be held accountable for his or her clemency decisions, and particular attention should be paid to denials. Today, denials are silent, and that silence enables governors to deny clemency without calling any critical attention to those decisions. Three simple structural changes will draw more attention to clemency petitions denied.
  - First, when a petition is recommended favorably by the Board, there should be a presumption in favor of clemency instead of against it. Today, if the governor fails to act on a favorable recommendation within a year, it is deemed to have been denied. But no petition that has received a favorable report from the Board should be allowed to perish because of the Governor's inaction. If the Governor doesn't act one way or another, the board's informed recommendation should stand.
  - Second, in cases where the Governor denies petitions that the Board recommended favorably, he should be required to issue an opinion explaining his reasons for the denial. The Governor should not exercise this authority without any accountability.
  - Third, while the Governor is currently required to report grants of clemency to the General Court on an annual basis, so too should he be

required to report denials. Denials of clemency ought not to be issued entirely under the radar.

So those are a few concrete suggestions for change, and I hope that we will have an opportunity to touch upon, discuss and debate some of them today, as well as hear suggestions from others.

But I will leave you with this – No amount of structural change is likely to fix the political reality that cowardice often trumps compassion.

To renew the exercise of the clemency power in Massachusetts and throughout the United States, policymakers must value clemency as vital to the American constitutional justice system. We must restore a sense of clemency as a moral and constitutional imperative. Because the fairness of our criminal justice system depends on it. Because we believe in second chances. Because compassion and mercy and personal transformation are good things in and of themselves. We need our Governors to exercise leadership in demonstrating fairness and compassion, not to shrink from it.

Thank you.