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ARTICLE

**THE STUDY OF MERCY:  
WHAT POLITICAL SCIENTISTS KNOW  
(AND DON'T KNOW) ABOUT THE  
PARDON POWER**

P.S. RUCKMAN JR.\*

INTRODUCTION

The pages of journals associated with the profession of political science (or at least the most prestigious among them) are a far cry from the pages of *The New York Times*, *The Washington Post*, or *The Wall Street Journal*. Nor do they look much like the pages of leading magazines of opinion, such as *National Review* or *The New Republic*. An informed reader would generally not hunt down the November 2001 issue of the *American Political Science Review* in order to read what political scientists had to say about the terrorist attacks of September 11. Likewise, one would never guess that Gerald Ford had pardoned Richard Nixon by reading the November 1974 issue of *The Journal of Politics*. To this day, no major journal in political science has said a word about Bill Clinton's pardon of fugitive millionaire Marc Rich.

The leading journals of the discipline feature a somewhat homogenous fare: multi-authored, highly sophisticated statistical analyses of aggregate data, usually aimed at supporting or contradicting some major premise in a huge body of literature, or professing to have found a different way to look at (or solve) an old theoretical, conceptual, or methodological problem. Occasionally, these exercises are adorned with debates about purely methodological matters or interrupted by exotic exercises in "formal theory," or someone's fresh, new outlook on Thomas Hobbes or Machiavelli.

Political scientists who have taken their research and writing skills to the study of state and federal clemency have often observed that the pardon

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power has received little scholarly attention (in both relative and absolute terms). This article shows, however, that political scientists have given the pardon power a fair amount of attention, certainly as much as many more “mainstream” topics of research in the discipline. The perception of scarcity emanates from the form and, to some extent, the quality of what has been written. For all of our analysis and commentary, the lines of communication between past and present writers have not been clear, and the amount of systematic, cumulative knowledge that has been generated is surprisingly small.

In the pages that follow, I provide a brief discussion of the historical development of political science and the sub-field known as “presidential studies.” This discussion offers readers the context necessary to understand both the manner in which political scientists have examined the pardon power and the place that this literature has in the discipline overall.

I then review the literature as it has developed in what I see as four distinct time periods. In each instance, I do my best to inform readers of the most distinct characteristics of each piece and share what I expect each author would consider the most important observations and conclusions. For the most part, the review is chronological. This approach further emphasizes the importance of contextual developments in the discipline of political science.

After summarizing what political scientists know (and don’t know) about clemency, I conclude with a normative assessment of the literature and the exercise of clemency at the state and federal level. In doing so, I believe I provide readers with significant insight as to what they can expect the future work of political scientists will entail.

## I. THE DISCIPLINE OF POLITICAL SCIENCE AND PRESIDENTIAL STUDIES

While Western political philosophy traces its roots to the idealism of Socrates and Plato, the descriptive and essentially more empirical slant of Aristotle’s work often earns him the title of “first political scientist.”<sup>1</sup> Similarly, the value-free pragmatism of Machiavelli prompts many to label him as “the first political scientist,” or, at least, the founder of “modern political science”<sup>2</sup> (the self-proclamations of Thomas Hobbes notwithstanding).<sup>3</sup>

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1. ANDREW HACKER, *POLITICAL THEORY: PHILOSOPHY, IDEOLOGY, SCIENCE* 71 (1961); John C. Wahlke, *Pre-Behavioralism in Political Science*, 73 *AM. POL. SCI. REV.* 9, 27 n.7 (1979); but see IRWIN L. MORRIS, *THE AMERICAN PRESIDENCY: AN ANALYTICAL APPROACH* 45 (2010) (arguing that although it is possible to assert that Aristotle was the first political scientist, no community of true political scientists existed until the late seventeenth century).

2. GEORGE CATLIN, *THE STORY OF POLITICAL PHILOSOPHERS* 195 (1939); STEPHEN L. WASBY, *POLITICAL SCIENCE: THE DISCIPLINE AND ITS DIMENSIONS, AN INTRODUCTION* 204 (1970).

3. Hobbes’ *Leviathan* is especially critical of Aristotle, and “other heathen philosophers,” who defined “good and evil” on the basis of their own “appetite” and based their moral philosophy on their own “passions.” Hobbes asked rhetorically, “What science is there at this day ac-

Fortunately, the lineage of what is known in the academy as the discipline of political science is more certain. The discipline first emerged in the 1880s and '90s when the German model of research-centered education was copied by American universities.<sup>4</sup> John W. Burgess, a Civil War veteran who studied in Göttingen, Leipzig and Berlin, eventually incorporated this model at Columbia University.<sup>5</sup> In addition to creating the nation's "first school of political science," Burgess founded the discipline's first journal, *Political Science Quarterly*, in 1886.<sup>6</sup> Burgess believed there were "fundamental laws governing the growth and behavior of political institutions[,] and . . . meticulous comparative historical analysis would reveal what they were."<sup>7</sup>

The discipline's character became even more distinct with the emergence of the approach championed by Charles E. Merriam in the 1920s. Merriam, who studied at Columbia before attending the University of Berlin, was the first political scientist hired at the University of Chicago. His vision of the discipline emphasized data collection and statistical analysis, with less emphasis on theoretical (or more qualitative) approaches and greater interest in cross-pollination with other disciplines (psychology in particular).<sup>8</sup>

Merriam's crusade for quantitative analysis may have been a "short-term failure," but "the battle he lost in the 1920s was won by his students after World War II."<sup>9</sup> Eventually, the movement in Merriam's direction would be labeled as "behavioralism"<sup>10</sup> and its triumph is well reflected in the pages of the "top" journals of the discipline today.<sup>11</sup> To be sure, purely historical or legal analyses, normative analyses, descriptive studies, and case studies still have their place. That place, however, is simply not in the "best," most prestigious journals of the discipline.

On the other hand, the quantitative revolution did not spread evenly across sub-fields in the discipline, much less across every specific area of study within those sub-fields. While "congressional studies" developed im-

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quired by their readings and disputings?" THOMAS HOBBS, *LEVIATHAN* 686, 697 (Penguin Books 1986) (1651).

4. See Donald M. Freeman, *The Making of a Discipline, in* POLITICAL SCIENCE: LOOKING TO THE FUTURE, VOLUME ONE: THE THEORY AND PRACTICE OF POLITICAL SCIENCE 17 (William Crotty ed., 1991).

5. ALBERT SOMIT & JOSEPH TANENHAUS, *THE DEVELOPMENT OF POLITICAL SCIENCE: FROM BURGESS TO BEHAVIORALISM* 16–17 (1967).

6. *Id.* at 36; WASBY, *supra* note 2, at 205.

7. SOMIT & TANENHAUS, *supra* note 5, at 28.

8. See Freeman, *supra* note 4, at 21.

9. *Id.* at 20.

10. *Id.* at 25–26.

11. The *American Political Science Review* (American Political Science Association) founded in 1906, the *Journal of Politics* (Southern Political Science Association) founded in 1939, and the *Midwest Journal of Political Science* (Midwest Political Science Association, later renamed the *American Journal of Political Science*) founded in 1957.

pressive empirical analyses of congressional decision making (voting) and elections, and the field known as “judicial politics” showcased sophisticated mathematical approaches to judicial decision making, “presidential studies” seemed, more often than not, resistant to quantification and stuck in the past. To no small degree, this was attributable to hurdles peculiar to the institution of the presidency.<sup>12</sup>

In the late 1970s, Hugh Heclo observed that “scholars gave only passing attention to the presidency” during the nineteenth century.<sup>13</sup> Things began to change at the turn of the century, and then “more quickly after 1930, [when presidential studies] emerged as a specialized area for research and interpretation.”<sup>14</sup> In his discussion of “deficiencies and correctives” in the literature, Heclo wrote:

[C]onsidering the amount of such writing in relation to the base of original empirical research behind it, the field is as shallow as it is luxuriant. To a great extent, presidential studies have coasted on the reputations of a few rightfully respected classics [and] on secondary literature and anecdotes produced by former participants.<sup>15</sup>

By the 1980s, scholars were less kind, declaring outright that presidential research had “too often fail[ed] to meet the standards of contemporary political science.”<sup>16</sup> George C. Edwards III described “progress in understanding the presidency [as] very slow” and suggested one of the “most striking” things about presidential research was the “low regard with which it ha[d] been held by the discipline.”<sup>17</sup> Furthermore, he argued readers *should* be “skeptical of conclusions reached” by more “traditional methods” of scholars who simply “explain” and “describe.”<sup>18</sup> He encouraged political scientists to

move beyond the description of the institution and its occupants and attempt to explain the behavior we observe. In addition, we must seek to reach generalizations rather than being satisfied with discrete, ad hoc analyses. To explain we must examine relationships, and to generalize we must look at these relationships under

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12. For example, the “Small N” problem—on any given day, there is only one president (as opposed to 535 members of Congress and almost 800 federal judges); presidencies (44 in total) are spread over a considerable period of time; the presidency has undergone considerable change since 1789, much more so than the legislative branch or the judiciary.

13. HUGH HECLO, *STUDYING THE PRESIDENCY: A REPORT TO THE FORD FOUNDATION* 8 (1977).

14. *Id.*

15. *Id.* at 30.

16. George C. Edwards III, *The Quantitative Study of the Presidency*, 11 *PRESIDENTIAL STUD.* Q. 146 (1981).

17. George C. Edwards III, *Quantitative Analysis, in STUDYING THE PRESIDENCY* 99 (George C. Edwards III & Stephen J. Wayne eds., 1983).

18. *Id.* at 101.

many circumstances. Quantitative analysis can be an extremely useful tool in these endeavors.<sup>19</sup>

In the introduction to *The Elusive Executive*,<sup>20</sup> Gary King and Lyn Ragsdale continued to insist that presidential “scholars must move from anecdotal observation to systematic description.”<sup>21</sup> In their minds, presidential literature featured too much “reminiscences” and too little “data systematically acquired and analyzed.”<sup>22</sup>

In the section to follow, I review the literature of political science as it relates to the pardon power. More specifically, I review the qualitative and quantitative research generated by political scientists in professional journals, books, and monographs. In addition, I discuss research and commentary by non-political scientists published in journals of the discipline.<sup>23</sup>

## II. A REVIEW OF CLEMENCY LITERATURE

### A. *The Literature: Pre-1941*

Perhaps fittingly, this review begins with the work of the individual who was the first official “political scientist” in the United States, an individual who also happened to have been imprisoned twice and was the recipient of a pardon (albeit from the King of Prussia): Francis Lieber.<sup>24</sup> In 1853, Lieber’s *On Civil Liberty and Self-Government* appeared, featuring a “paper on the abuse of the pardoning power” as a second appendix.<sup>25</sup>

Lieber’s paper first asserted clemency was a “virtue [that belonged] to the legislator, and not to the executor of the laws[,] a virtue which ought to shine in the code, and not in private judgment.”<sup>26</sup> It is thus the legislator who should be “tender, indulgent, and humane.”<sup>27</sup> On the other hand, the “strict and formal application of the law [can operate] against essential jus-

19. *Id.*

20. GARY KING & LYN RAGSDALE, *THE ELUSIVE EXECUTIVE* (1988).

21. *Id.* at 2.

22. *Id.*

23. I also decided to omit studies of multivariate models of public opinion or voting where Gerald Ford’s pardon of Richard Nixon was inserted as one of many independent variables. See MORRIS P. FIORINA, *RETROSPECTIVE VOTING IN AMERICAN ELECTIONS* (1981); Eric M. Uslaner & M. Margaret Conway, *The Responsible Congressional Electorate: Watergate, the Economy, and Vote Choice in 1974*, 79 AM. POL. SCI. REV. 788 (1985).

24. AMERICAN POLITICAL SCIENTISTS: A DICTIONARY 236 (Glen H. Utter & Charles Lockhart eds., 2002). See also Charles R. Mack, *Francis Lieber and the Arts*, in FRANCIS LIEBER AND THE CULTURE OF THE MIND 143 (Charles R. Mack & Henry H. Lesesne eds., 2005) (noting that Lieber was pardoned by the King of Prussia).

25. FRANCIS LIEBER, *ON CIVIL LIBERTY AND SELF-GOVERNMENT* 144 (1853).

26. *Id.* at 148 (quoting CESARE BONESANA BECCARIA, *AN ESSAY ON CRIMES AND PUNISHMENTS* (1807) (Tr. from Italian)).

27. *Id.*

tice.”<sup>28</sup> There was therefore need for a “conciliatory power to protect ourselves against [the] tyranny of the law.”<sup>29</sup>

After enumerating nine “disastrous consequences” of “arbitrary use of the pardoning power,”<sup>30</sup> Lieber aimed to convince readers that those consequences had “shown themselves” to “an alarming degree” in the United States and, “in many parts of the country,” were “on the increase.”<sup>31</sup> The “proof of this evil state of things” could be found in legislative committee hearings, the newspapers, “recent occurrences in [a] prominent state,” statistics (such as they existed), grand jury proceedings, and official reports and documents.<sup>32</sup>

Unfortunately, the hailstorm of evidence began with the announcement of the “appalling fact” that a governor of a “large state” had been “openly and widely accused of having taken money for . . . pardons” (a “fact” which, Lieber confessed, could not actually be verified).<sup>33</sup> This less-than-spectacular beginning was followed with a presentation of aggregate statistics from the State of Massachusetts across four decades. The data indicated 460 prisoners (out of almost four thousand) were pardoned before their term of imprisonment had expired and had served, on average, 65% of their original sentence.<sup>34</sup> In a smaller span of time, Lieber found those originally sentenced to life in prison served, on average, a little over seven years.<sup>35</sup> Armed with aggregate data (and similar data from eleven additional states and four federal prisons), and the unstated premise that the figures were clearly unacceptable and/or without justification, Lieber felt confident to report that there was plenty of “abuse” of the pardoning power.<sup>36</sup>

The paper, however, assured readers that the “object” was “not to propose any political measure” to remedy these abuses.<sup>37</sup> No, the subject would be treated in a “scientific” manner “irrespective of what [could] or [might] be done.”<sup>38</sup> That being said, Lieber held that the pardon power “ought to exist,”<sup>39</sup> but admitted that he was averse to transferring the power to the legislature, the judiciary, or any other “political body” that existed for “other purposes.”<sup>40</sup>

Instead, he believed careful investigations, resistance to importunity, and public confidence could be obtained by the creation of a “Board of

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28. *Id.* at 149.

29. *Id.*

30. *Id.* at 150–52.

31. LIEBER, *supra* note 25, at 153.

32. *Id.* at 152–53.

33. *Id.* at 154.

34. *Id.* at 155.

35. *Id.* at 156.

36. *Id.* at 158.

37. LIEBER, *supra* note 25, at 158.

38. *Id.*

39. *Id.*

40. *Id.* at 161 n.15.

Pardon,” with members (some of whom would be judges) appointed by the legislature.<sup>41</sup> Lieber also suggested that pardons should only be issued by the governor when they are recommended by the board,<sup>42</sup> and that the desire to grant clemency be advertised with the reasons for clemency published as well.<sup>43</sup> If such boards were established, “a series of fair principles and rules” would, “in a short time,” be “settled by practice, and the pardon [power] would be far less exposed to arbitrary action.”<sup>44</sup>

Fourteen years later, Francis Lieber was no less enthusiastic about the topic. When he wrote on proposed amendments to the New York constitution, the *first* order of business was pardons (followed by discussion of such minor concerns as judicial independence, suffrage, representation in Congress, federalism, municipal government, and education).<sup>45</sup> Without delay, Lieber informed his readers there was “no inherent reason why the pardoning power should belong to the executive”<sup>46</sup> and that there were “many and urgent reasons why it should either be taken from the executive, or at least should be greatly modified.”<sup>47</sup> The power was “inconsistent” with policy and the administration of justice, encouraged crime, effaced “the moral character of the community,” and was “illogical and mischievous.”<sup>48</sup>

He then argued that there was “[n]o better way of moderating the pardoning power” than by establishing a board of pardon, to work “in conjunction with the executive power.”<sup>49</sup> Lieber’s view of such boards had changed little over the years, though he added a requirement of senatorial confirmation and an insistence on lengthy terms.<sup>50</sup>

In 1910, James D. Barnett, Professor of Political Science at the University of Oregon published “The Grounds of Pardons in the Courts” in the *Yale Law Journal*.<sup>51</sup> Barnett observed that while the “motives” and “discretion” behind the pardon power were “not subject to judicial inquiry,” courts had nevertheless “often” taken the time to “discuss the grounds upon which pardons [had been] based.”<sup>52</sup> There followed six-and-a-half pages of commentary composed of quotations from decisions of the U.S. Supreme Court,

41. *Id.* at 164.

42. *Id.* at 165. Lieber also suggested that governors be forced to grant clemency if a board recommends such a second time.

43. LIEBER, *supra* note 25, at 165.

44. *Id.* at 166.

45. FRANCIS LIEBER, *Reflections on the Changes Which May Seem Necessary in the Present Constitution of the State of New York*, in THE MISCELLANEOUS WRITINGS OF FRANCIS LIEBER, VOLUME TWO: CONTRIBUTIONS TO POLITICAL SCIENCE 181, 185 (1883).

46. *Id.*

47. *Id.* at 186.

48. *Id.* at 187.

49. *Id.* at 189.

50. *Id.*

51. James D. Barnett, *The Grounds of Pardons in the Courts*, 20 YALE L.J. 131 (1910).

52. *Id.* at 131.



a variety of lower federal courts, state courts, and an opinion of the U.S. Attorney General.

After describing a pardon as “an act of grace” and a “work of mercy,”<sup>53</sup> Barnett catalogued judicial notice of pardons on the basis of actual innocence, justifiable homicide, as a reward for accomplices who turned State’s evidence, or a means of generally resolving some deficiency in criminal law.<sup>54</sup> Barnett also noted justifications for pardons related to the “merit” of the individual recipients (such as “reformation” and “expiation of the offense”), grounds which he considered “absolutely incompatible with the strict doctrine of grace.”<sup>55</sup>

Progressive politics were responsible for the appearance of no less than four articles related to clemency in the *Annals of the American Academy of Political and Social Science* (henceforth “*The Annals*”) in 1913 and 1914. Theodore Roosevelt argued the “new penology” was based on “justice to both the prisoner and to society” and that the pardon power was “one of the most objectionable points” in our criminal justice system.<sup>56</sup> He supported the point by reference to a *New York Times*’ article in which a majority of twenty governors complained about having precious little time for clemency decision making and “advocated” the creation of a “board of pardons” in their respective states.<sup>57</sup> Roosevelt agreed, so long as governors served as members of such boards and the remaining members were appointed, “non-political” persons of “high integrity and sound judgment,” equipped with their own “secretary and office staff.”<sup>58</sup>

Herbert S. Hadley, the Governor of Missouri, followed Roosevelt’s commentary with his own argument that chief executives “be relieved from the burden and responsibility of dealing with” pardon applications.<sup>59</sup> Hadley complained:

[Governors are] peculiarly subject to and liable to unwarranted and malicious attacks by sensational and unscrupulous newspapers for granting executive clemency to those convicted of crime. And it is easy, by a failure to publish the facts upon which clemency in each case was based, to mislead and to prejudice the public mind against a proper policy of executive clemency.<sup>60</sup>

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53. *Id.*

54. *Id.* at 133–34.

55. *Id.* at 135.

56. Theodore Roosevelt, *The New Penology*, 46 ANNALS AM. ACAD. POL. & SOC. SCI. 4, 4 (1913).

57. See *Governors Discuss the Granting of Pardons*, N.Y. TIMES, Jan. 19, 1913, at SM11 (detailing numerous interviews with various governors in regards to the pardoning power).

58. Roosevelt, *supra* note 56, at 4–5.

59. Herbert S. Hadley, *New Theory as to Punishment of Crime*, 46 ANNALS AM. ACAD. POL. & SOC. SCI. 40, 43 (1913).

60. *Id.*

On the other hand, if pardons were administered by a board of pardons and paroles, decisions “would assume something of the form of a judgment of a court” and “better and more complete investigation[s]” would be possible.<sup>61</sup> Hadley guessed such boards would largely be insulated from “unwarranted attacks and misrepresentations.”<sup>62</sup>

By 1914, William W. Smithers, of the Philadelphia Bar, asserted it was “generally conceded” that “some advisory board should hear applications and make recommendations” to the governor for the sake of “regularity, publicity and careful consideration.”<sup>63</sup> Smithers also agreed with Hadley’s notion that the pardon power “invite[d] or at least afford[ed] ready opportunity for the most unreasonable invective, calumny and innuendo.”<sup>64</sup> However, Smithers blamed this circumstance on the broad scope of the power, “the impossibility of review and, especially . . . the superficial knowledge of the subject among laymen and the meager special study given it by even the bench and the bar.”<sup>65</sup>

Even more than Roosevelt and Hadley, Smithers defended the pardon power and highlighted its importance in the attempt to “emerge from the cloud of antiquity” in order to discard everything about the criminal justice system that was “old, cruel, useless and futile.”<sup>66</sup> He noted that while the administration of clemency could never be perfect, it was “significant that it ha[d] never been overlooked in any scheme of government since the dawn of history.”<sup>67</sup> The executive’s “oath to ‘take care that the laws be faithfully executed’ include[d] the declaration that he will maintain the constitution which confers upon him the pardoning power,”<sup>68</sup> and under state and federal constitutions in America, it was the “moral duty” of executives to “afford relief if a rational interpretation of all the data mark[ed] the case as entitled to remedy by the higher justice.”<sup>69</sup> Smithers argued that withholding a pardon in a “proper case” would be no more acceptable than refusing to “call out the militia when the preservation of public peace demands it.”<sup>70</sup>

Smithers insisted “[t]here [had been] a general acceptance of the theories of criminology and penology which [had] evolved . . . and proven . . . consistent with the moral and intellectual advancement manifested in all other phases of community life.”<sup>71</sup> As a result, the “fallacy of the traditional

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61. *Id.*

62. *Id.*

63. William W. Smithers, *The Use of the Pardoning Power*, 52 ANNALS AM. ACAD. POL. & SOC. SCI. 61, 63 (1914).

64. *Id.* at 61.

65. *Id.*

66. *Id.* at 66.

67. *Id.* at 61–62.

68. *Id.* at 63.

69. Smithers, *supra* note 63, at 62.

70. *Id.* at 62–63.

71. *Id.* at 64.

vindictive punishment of criminals” was recognized, as well as the “futile” nature of attempts to “diminish crime by statutes fixing a definite penalty for a specified offense.”<sup>72</sup> Smithers encouraged executives not to “shrink from exercising the pardon power.”<sup>73</sup> Indeed, he wrote, if there is any “abuse” at all it was in the “failure of executives to act,” because prisons were packed with individuals incarcerated “years ago” under a system of “rigid impersonal and mechanical criminal laws” and “many inmates . . . could and ought to be free.”<sup>74</sup> He argued that executives should do more than respond more agreeably to clemency applications.<sup>75</sup> Smithers emphasized that they were not “bound to wait until an application for pardon” was filed.<sup>76</sup> The governor had a “constitutional duty . . . to exercise his power rationally in all exceptional cases.”<sup>77</sup>

Samuel Scoville, Jr.’s blistering 1914 commentary, “The Evolution of Our Criminal Procedure,”<sup>78</sup> suggested the acceptance of the Progressive view of pardons was far from universal. From Scoville’s standpoint, the Progressive view amounted to mere dust raised on the path through an “age of unreason,” a passing “nonsense age,” on the way to the dawn of “common sense.”<sup>79</sup>

By Scoville’s telling, “[o]ur forebears were grim and hasty folk” with an “exaggerated regard for property and a contempt for human life.”<sup>80</sup> As a result, both criminal law and procedure were “harsh” and punishments were “bloody” and “barbarous.”<sup>81</sup> Then at some point, judges “began to insist upon the observance of every technicality,” which had the effect of making convictions very difficult to obtain.<sup>82</sup> Scoville then provided (and bemoaned) a list of judicially imposed changes (and associated horror stories) that, in his view, made any conviction a “wonder.”<sup>83</sup> Precedents and principles were given “the force of actual statutes.”<sup>84</sup> Direct evidence was preferred over circumstantial evidence.<sup>85</sup> The burden was placed on the prosecution to prove “entirely every detail of its case.”<sup>86</sup> Criminal defendants were presumed innocent.<sup>87</sup> Convicted criminals were “practically”

72. *Id.*

73. *Id.* at 65.

74. *Id.*

75. Smithers, *supra* note 63, at 65.

76. *Id.* at 62.

77. *Id.*

78. Samuel Scoville, Jr., *The Evolution of Our Criminal Procedure*, 52 ANNALS AM. ACAD. POL. & SOC. SCI. 93, 93 (1914).

79. *Id.* at 93, 98–99.

80. *Id.* at 93.

81. *Id.* at 93–94.

82. *Id.* at 94.

83. *Id.* at 94, 97.

84. Scoville, *supra* note 78, at 94.

85. *Id.* at 95.

86. *Id.*

87. *Id.* at 95.

given “an unlimited right of appeal.”<sup>88</sup> Worst of all, “technicalities which were devised to save innocent men” were used “only to shield guilty ones.”<sup>89</sup>

Outside of the courtroom, exhibit one in Scoville’s nightmare was gubernatorial abuse of the pardon power.<sup>90</sup> He noted that in Pennsylvania, “practically no prisoners” served out their sentence because they were “always pardoned or paroled.”<sup>91</sup> In South Carolina, the governor had pardoned 721 convicts (100 just before Thanksgiving).<sup>92</sup> In Tennessee, 956 criminals had been pardoned “and 152 of them were murderers.”<sup>93</sup> The prime example, in a style that might impress even Michael Dukakis, read:

Eight years ago in one of our central cities, a man committed murder and was sentenced to be hung. Such a flood of sentimental appeals poured down upon the governor that his sentence was commuted. Six years later he was pardoned. Six months after his pardon, this criminal murdered a man who had befriended him, his friend’s wife and three children in order that he might rob his house of \$200.<sup>94</sup>

Scoville was, however, comforted that a court of appeals in Oklahoma had refused to set aside an indictment so “the guilty [could] be convicted and taught that it [was] exceedingly serious and dangerous to violate the laws.”<sup>95</sup> He was also pleased that the Supreme Court of Wisconsin refused to let a criminal defendant “juggle” with his “constitutional rights.”<sup>96</sup> Even better, a judge in New York “took charge” of a trial, chose a jury quickly, and refused to allow “delays, evasions and petty technicalities.”<sup>97</sup> The U.S. Supreme Court had also ruled that reversals on the basis of technical error would only be granted when errors are serious enough to have affected the merits of the case,<sup>98</sup> a position that had been supported by the American Bar Association for six years.<sup>99</sup>

88. *Id.* at 98.

89. *Id.* at 96. (Scoville’s list of “technicality” horror stories was impressive. Among other things, he noted convictions overturned because the name of a county was omitted from an indictment, the name of a county *was* mentioned then referred to as “said county,” the letter “l” was omitted from the word “malice,” the letter “a” was omitted from the word “breast,” an indictment abbreviated “West” in West Virginia, the word “the” was omitted in another indictment and a last name was misspelled).

90. *See* Scoville, *supra* note 78, at 98 (lamenting the liberal use of pardoning power).

91. *Id.* at 98.

92. *Id.*

93. *Id.*

94. *Id.* at 99.

95. *Id.*

96. Scoville, *supra* note 78, at 99.

97. *Id.* at 100.

98. *See* *Holt v. United States*, 218 U.S. 245, 245 (1910) (dismissing minor, technical errors that had no bearing on the outcome of the case).

99. Scoville, *supra* note 78, at 100.

President Warren Harding, Secretary of Commerce Herbert Hoover, and William Howard Taft (Chief Justice of the U.S. Supreme Court and former president) all attended the semi-annual meeting of the Academy of Political Science at the Hotel Astor in May 1921. There they heard Frederick A. Cleveland's paper on the "reorganization" of the federal government.<sup>100</sup> Along the way, Cleveland "questioned whether the 'pardons' process should be [housed] in the 'prosecuting' department."<sup>101</sup> In his mind, prosecution should be "kept out," or placed "very far in the background," when it came to assessing pardon applications.<sup>102</sup> Instead, this "public function" should be "transferred" to some "group" that had, as a primary purpose, an "outworking of the problem of social reconstruction."<sup>103</sup> Taft referred to Cleveland's presentation as "interesting."<sup>104</sup>

The following year, Christen Jensen published *The Pardoning Power in the American States*.<sup>105</sup> His approach to the topic was very different from that of the authors discussed to this point, but not simply because the format was that of a book. Jensen had decided to take a brief break from his teaching duties at Brigham Young University in order to complete a doctoral dissertation at the University of Chicago. His work reflected Chicago's emphasis on original research and cross-pollination of disciplines.

The end-product was clearly less normative and prescriptive, and more descriptive and analytic, than the literature discussed thus far.<sup>106</sup> Instead of focusing on what states should (or should not) do, Jensen made it his primary task to simply describe, as exhaustively and accurately as possible, what each and every state (and former colony) *had* done and *was* doing.<sup>107</sup> In chapter I,<sup>108</sup> he employed historical and legal analysis in a discussion of the pardon power in the American colonies. In chapter VII,<sup>109</sup> he discussed controversial matters related to the effect of pardons, the scope of the pardon power, the timing and validity of pardons, and complications that sur-

100. Frederick A. Cleveland, *The Reorganization of the Federal Government: An Alternative Proposal*, PROCEEDINGS OF THE ACAD. OF POL. SCI. IN THE CITY OF NEW YORK, July 1921, at 31, 31.

101. *Id.* at 40.

102. *Id.*

103. *Id.* at 40; *see id.* at 45 (more specifically, Cleveland suggested the creation of a Bureau of Parole, Probation and Pardons that would be housed under the Assistant Secretary for Public Welfare).

104. William Howard Taft, *Financial Retrenchment and Governmental Reorganization*, PROCEEDINGS OF THE ACAD. OF POL. SCI. IN THE CITY OF NEW YORK, July 1921, at 90, 90.

105. CHRISTEN JENSEN, *THE PARDONING POWER IN THE AMERICAN STATES* (1922).

106. *See generally id.* (providing a historical perspective on the pardoning power in the states).

107. *Id.*

108. *Id.* at 1–8 (discussing pardoning powers in chapter I: Introductory: The Pardoning Power in the American Colonies).

109. *Id.* at 110–30 (reviewing controversial matters of pardons in chapter VII: Some Legal Aspects of the Pardon Power).

rounded conditions attached to pardons. Among those credited with having assisted Jensen was Charles E. Merriam.<sup>110</sup>

On pages 11 to 15, Jensen outlined the manner in which the organization of the pardon power had developed in each state via constitutional and, in many instances, statutory change. The result was the discovery of no less than twelve “forms” for administering the pardon power.<sup>111</sup> This remarkable degree of diversity hardly faded, even when Jensen focused on a topic as narrow and specific as administering boards.<sup>112</sup> In some states, such boards handled issues related to pardon *and* parole.<sup>113</sup> Most states found it prudent to require the presence of the attorney general on the board,<sup>114</sup> while others required the governor, lieutenant governor, secretary of state, state auditor, chief justice of the state’s supreme court, commissioner of agriculture, or some combination of those officers.<sup>115</sup>

With respect to limitations on pardon authorities, Jensen found much less diversity. While some state constitutions spelled out regulations, the more common method of regulating the pardon power was through statutory legislation, which allowed pardon authorities to “formulate and adopt rules and regulations.”<sup>116</sup> Some states did not allow pardon before conviction.<sup>117</sup> Some did not allow pardon in cases of treason, or impeachment,<sup>118</sup> or both.<sup>119</sup> With respect to rules and procedures of pardon authorities (especially those related to the time, place, and public notice of hearings), Jensen found “no uniformity.”<sup>120</sup> Indeed, his very brief summarizations of state notice of hearing requirements took up the better part of five pages.<sup>121</sup>

Criticisms of the pardon power are spread throughout Jensen’s book but, collected together, amounted to not much more than two (of more than 140) pages. Additionally, one would be hard pressed to get a sense of which criticisms or calls for reform Jensen considered more noteworthy or legitimate than the others. The style was clearly that of a social scientist attempt-

110. *Id.* at v.

111. JENSEN, *supra* note 105, at 15–16 (various options for administering the pardon power include: (1) the governor alone, (2) the governor and senate, (3) the governor and executive council, (4) advisory board to the governor and executive council, (5) governor and advisory pardon board, (6) governor and temporary advisory board, (7) governor and board of pardons, (8) a board with gubernatorial consent, (9) a board ruling via majority vote, (10) a board via unanimous vote, (11) the governor and a pardon attorney, and (12) two pardon authorities with divided responsibility).

112. *Id.* at 16.

113. *Id.*

114. *Id.* at 17.

115. *Id.* at 16–17. Jensen summarized the personnel of state boards at 19–21.

116. *Id.* at 29–30.

117. JENSEN, *supra* note 105, at 30–31.

118. *Id.* at 32. (Sixteen states).

119. *Id.* (Twenty-seven states).

120. *Id.* at 33–34.

121. *Id.* at 38–42.

ing to maintain objectivity while systematically presenting vast amounts of information.

If Charles Merriam had had his way, every article on state and federal pardons from that point forward would have had the style and quality of his student, Christen Jensen. The literature of pardons, however, like the field of presidential studies in general, resisted the tendency toward empirical analysis.

Harold W. Stoke's 1927 "A Review of the Pardoning Power"<sup>122</sup> was clearly influenced by Jensen's style, but the quality of the analysis was another issue. Stoke penned a "hasty," one-and-a-half page "sketch" of the development of the pardon power and noted there was "wide diversity among the states" in the methods provided for "administering [that] power."<sup>123</sup> Stoke made the point by presenting fifteen seemingly random, un-sourced, points of state pardon trivia: thirty-seven states required the consent of the governor; in six states the governor was a member of a board which voted on pardons; in Rhode Island, the governor had to obtain the consent of the Senate; in Maine, an executive council and an advisory board had to provide consent, etc.<sup>124</sup>

Stoke then raised a more serious concern: the "alarm manifest in the press and on the public platform" regarding America's crime wave and the "uneasy feeling" of the "general public" that condemned criminals were released too "soon," "[reappearing] to prey upon an indulgent society."<sup>125</sup> More specifically, Stoke asked, if pardons were "on the increase," had "clemency been granted too freely and [had] governors been too lenient?"<sup>126</sup> Stoke claimed he had investigated the matter and discovered the answer in "cold figures" gathered from "a few representative states."<sup>127</sup>

In fact, Stoke discussed pardon activity in only six states (IL, IN, KY, OH, MO, and TN).<sup>128</sup> In some instances, he provided figures on pardons by administration (OH, MO), without specifying the length of time covered.<sup>129</sup> In other instances, he provided data from a single year (KY), a two-year period (IL), a period of ten years (IN) or no specified period at all (TN).<sup>130</sup> Regardless, Stoke asserted his "facts" showed pardons were "becoming rarer."<sup>131</sup> As a result,

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122. Harold W. Stoke, *Review of the Pardoning Power*, 16 KY. L.J. 34, 34 (1927).

123. *Id.* at 34–35.

124. *Id.* at 35–36. An examination of Stoke's figures suggests he was not relying on Jensen's work.

125. *Id.* at 36–37.

126. *Id.* at 37.

127. *Id.*

128. Stoke, *supra* note 122, at 37.

129. *Id.*

130. *Id.*

131. *Id.*

[t]he person who carries to a study of this sort the preconceived notion that he will be able to blame the presence of criminals in society upon wholesale release by our Governors will be disappointed by the virtue and restraint exhibited by our Chief executives. . . . [S]anity and conscience have characterized the use of this power in nearly all cases . . . the use of the pardoning power has been cautious and conservative.<sup>132</sup>

Therefore, Stoke asked, “who or what” was “responsible” for his generation’s “deluge of lawlessness?”<sup>133</sup> Once again, he claimed, “the facts [spoke] for themselves” in anecdotal evidence.<sup>134</sup> In Kentucky, a prisoner sentenced to life in prison was actually eligible for parole at the end of eight years.<sup>135</sup> In New York, eligibility was achieved in ten.<sup>136</sup> In Illinois, only six years of imprisonment were required.<sup>137</sup> As a result, while governors had granted very few pardons in six states (Stoke inexplicably removed the State of Tennessee from the representative anecdotal pool in this part of the “investigation” and replaced it with the State of New York), the parole system had “silently, continuously . . . poured its masses of criminals upon us to murder and pillage.”<sup>138</sup> Parole was, thus, the “leak through which the dregs of a prison population [were] filtering back into society.”<sup>139</sup> The parole system made pardons “unnecessary by accomplishing the same results without the attendant publicity and responsibility.”<sup>140</sup>

Although it constitutes a slight deviation from the general chronology of this discussion, it seems appropriate here to compare Stoke’s discussion with that of Clair Wilcox, who appeared in *The Annals* in 1931.<sup>141</sup> Wilcox calmly observed that the “doors” out of prison were “many” and, in a “majority of cases,” sentences were “reduced from the full term.”<sup>142</sup> In 1927, no less than 44,000 prisoners were “released” from state and federal prisons and reformatories.<sup>143</sup> Forty-nine percent were paroled.<sup>144</sup> Forty-two percent

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132. *Id.* at 37–38. Stoke granted there were some “notable exceptions” to his analysis, such as Governor Walton in Oklahoma and Miriam A. Ferguson, former governor of Texas who granted clemency more than three thousand times in only two years in office. Stoke also mentioned “discontent” and “dissatisfaction” in Michigan and in Colorado.

133. *Id.* at 38.

134. Stoke, *supra* note 122, at 39.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 40.

139. *Id.* Stoke justified this language somewhat with the unreferenced claim that “almost uniformly twenty percent of those released on parole violate[d] them within the year or half-year period” and a statement by the chairman of the Illinois Board of Paroles that “as high as forty percent of those released on parole [were] known to violate them.” *Id.*

140. Stoke, *supra* note 122, at 42.

141. Clair Wilcox, *The Open Door*, 157 ANNALS AM. ACAD. POL. & SOC. SCI. 102, 102 (1931).

142. *Id.*

143. *Id.* at 103–04.

144. *Id.* at 104.



were released because their sentences had expired.<sup>145</sup> Six percent were released after payment of a fine, in order to be deported, or to be delivered to some other institution.<sup>146</sup> A mere three percent were pardoned.<sup>147</sup>

Without a similar presentation of data, Wilcox asserted the pardon power was “subject to serious abuse” and had “frequently been abused by governors who have yielded to political pressure.”<sup>148</sup> He added that the pardon power placed an “unfairly heavy burden” on governors who did not “have the time” to “properly” consider applications—which is why some states had created agencies and boards to advise and assist with the process.<sup>149</sup> Wilcox insisted the clemency power was necessary, but believed “with the continuous development of adequate systems of parole, there should be diminishing number of occasions for its use.”<sup>150</sup>

Arguably, Wilcox was just as critical of parole as Stoke,<sup>151</sup> but Wilcox’s criticisms were provided more as a list of points of reform as opposed to grist for the horror story mill. When all was said and done he saw the need for the establishment of “effective machinery for parole administration” and held that there was “firm ground for the belief that parole [would] become an increasingly effective instrument of penal treatment.”<sup>152</sup>

Edward G. Griffin’s 1928 appearance in *The Annals* introduced another approach to the topic of pardons which would become quite popular: the case study approach.<sup>153</sup> While it is difficult to know from reading Griffin’s piece whether the ideals of the Progressives or the law-and-order approach of Scoville had won the battle, he did note the pardon power of governors was “constantly subject to severe criticism from many sources.”<sup>154</sup>

145. *Id.*

146. *Id.*

147. Wilcox, *supra* note 141, at 104.

148. *Id.*

149. *Id.*

150. *Id.*

151. Among other things, Wilcox wrote:

In general, parole selection is still an unscientific, rule-of-thumb procedure . . . . Methods of supervision are similarly inadequate . . . . Printed rules are announced but are not enforced. Written reports are required but there is nobody to check on the accuracy of the replies . . . . Other states have pressed sheriffs, constables, detectives, and police officers into service. These men are generally not qualified to advise and assist the prisoner in regaining his place in society, and, since unpaid, are inclined to neglect the work . . . . Little if any training is provided or required. The parole officers are almost always underpaid and overloaded with work.

*Id.* at 108–09.

152. *Id.* at 112.

153. Edward G. Griffin, *Executive Clemency*, 136 ANNALS AM. ACAD. POL. & SOC. SCI. 142, 142 (1928). In the case study approach, the researcher purposely focuses on a small number of examples (cases) and attempts to gain expertise with respect to each of them. The hope is that, by digging deeply into each example, the researcher will gain insights into larger processes and, as a result, be able to generalize outward.

154. *Id.*

Indeed, Griffin, counsel to the governor of New York, was prompted to write his piece in response to a report issued by the Baumes Committee in New York State.<sup>155</sup> The report complained of trends in generosity of clemency grants in recent decades and suspected the causes were “relaxing of rigid scrutiny” in consideration of the merits of clemency applications and “freer rein to sentimentalism” toward the “criminal classes.”<sup>156</sup> The report also complained that the governor’s “leniency to criminals” had encouraged crime.<sup>157</sup> But, Griffin warned that critics should have known better than to “generalize about executive clemency, or to draw inferences from insufficient facts as to the way it operates.”<sup>158</sup> Griffin found such “facts” in a statement by the governor to the New York legislature,<sup>159</sup> which documented that a “large percentage” of pardons granted annually had been “issued under entirely justifiable circumstances” because they simply restored the right to vote.<sup>160</sup> A second class of pardons, which constituted a large portion of annual grants, were pardons given to former prisoners who were aliens seeking to complete citizenship papers and become American citizens.<sup>161</sup> Griffin maintained that it would have been “unreasonable for the governor to refuse a pardon under such circumstances.”<sup>162</sup> As a result, typical New York pardon recipients were *not* being sprung from prison. They had already served their time (if any such service was required) and taken care of associated fines and penalties. After “some time,” in exchange for “evidence” of “earning an honest living,” their right to vote was restored or their path to citizenship was cleared.<sup>163</sup>

With respect to commutations of sentence, Griffin was no less hesitant. He argued there are actually “many” reasons why such grants were “necessary.”<sup>164</sup> Among the “most justifiable” were commutations recommended by district attorneys and situations where support for clemency may have been exchanged for “information [about others] involved in a crime.”<sup>165</sup> Said Griffin:

It is an invariable rule not to commute the sentence unless both the judge and the district attorney before whom the man was tried agree in writing. This places the responsibility for the pardon

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155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 145.

159. “Statement of the Pardons Commutations and Reprieves Granted by the Governor for the Year 1926,” State of New York Legislative Document (1927) No 73.

160. Griffin, *supra* note 153, at 143.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

upon the parties who know most about the offense, as well as upon those who must decide the immediate request.<sup>166</sup>

Given these facts, Griffin suspected the underlying anxieties of the Baumes Committee were actually the byproduct of ten respites (delays) that were granted to murderers.<sup>167</sup> The public might generally be “horrified at any leniency” toward a person convicted of such a serious crime and might reasonably call out for “speedy administration of justice.”<sup>168</sup> However, Griffin noted that “once the accused is dead there [was] no opportunity to correct mistakes.”<sup>169</sup> In addition, he explained that respites were only granted “after the written request of the district attorney who tried the case.”<sup>170</sup> As if all of that could fail to take the wind out of the sails of the Baumes Committee, nine of the ten persons to whom respites were granted were “eventually” electrocuted.<sup>171</sup> The tenth decided to provide valuable testimony that was utilized in the prosecution of others convicted of the same crime.<sup>172</sup>

Griffin concluded:

There are justifiable reasons for the exercise of executive clemency. . . . It is equally wrong from a legal as well as a moral sense to refuse to grant a pardon under circumstances where the facts indicate the opposite course should be followed. A governor must make the correct decision in each case. He should have the courage to do what he thinks is right under all the facts of the case. If he does not do so he should not be governor.<sup>173</sup>

The rebuttal to the Baumes Committee was narrow and specific, not to mention dated, but its current relevance suggests it is not time bound. It should also be noted that, while the piece featured no statistical analysis, or even tables of data, the analysis is both systematic and data driven.

The so-called Ferguson Case (1917) resulted in the appearance of three articles in two journals that are, today, considered among the most prestigious in the discipline, the *American Political Science Review* (hereafter the *APSR*) and *Political Research Quarterly* (hereafter *PRQ*).<sup>174</sup> The facts of the incident were as follows: On July 23, 1917, the speaker of the Texas

166. Griffin, *supra* note 153, at 143.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 144.

171. *Id.*

172. Griffin, *supra* note 153, at 144.

173. *Id.* at 145.

174. Frank M. Stewart, *Impeachment in Texas*, 24 AM. POL. SCI. REV. 652 (1930); Frank M. Stewart, *Legislative Pardon for Impeachment in Texas*, 25 AM. POL. SCI. REV. 365 (1931) [hereinafter Stewart, *Legislative Pardon*]; Cortez A.M. Ewing, *The Impeachment of James E. Ferguson*, 48 POL. SCI. Q. 184 (1933). A fourth article was written before clemency became a feature of the Ferguson Case. James Edward, *The Impeachment of Governor Ferguson*, 12 AM. POL. SCI. REV. 111 (1918).

House of Representatives issued a call for the House to meet in special session to consider impeachment of Governor James E. Ferguson.<sup>175</sup> The governor promptly labeled the call “unconstitutional.”<sup>176</sup>

Ferguson then decided to call for his own special session, and scheduled it to meet at the same time as the Speaker’s.<sup>177</sup> The House met under the Speaker’s call, investigated thirteen counts via thirty-nine witnesses and six hundred pages of testimony.<sup>178</sup> It recommended the impeachment of Ferguson by a vote of 82 to 51.<sup>179</sup> The Senate suspended Ferguson from office, but the formal trial was postponed because the special session was about to end.<sup>180</sup>

The newly installed governor, William P. Hobby, issued his own call for a special session in order to “facilitate a fair and impartial trial of the articles of impeachment” against Ferguson.<sup>181</sup> The result was the reading of twenty-one articles, the testimony of thirty-two witnesses, and five days of hellfire and brimstone from the impeached governor himself (who also gave his own closing arguments in a two-hour speech).<sup>182</sup> The specially assembled impeachment court convicted Ferguson on ten of the twenty-one articles and disqualified him from office.<sup>183</sup> The majority report was adopted by a vote of twenty-five to three.<sup>184</sup>

Eight years later, Miriam A. Ferguson, wife of the impeached governor, became governor and passed the *Amnesty Act* of 1925, aimed at absolving all persons previously impeached by the legislature.<sup>185</sup> The impeached husband then claimed that the amnesty terminated the Texas legislature’s removal of his eligibility for office and took steps to have his name placed, once again, on the Democratic ticket as candidate for governor.<sup>186</sup> In 1930, however, the Texas Supreme Court unanimously ruled the amnesty unconstitutional.<sup>187</sup>

The analyses of the Ferguson Case by Frank M. Stewart<sup>188</sup> and Cortez A.M. Ewing<sup>189</sup> followed the case-study approach of Griffin. Stewart’s coverage of the case, in the *APSR*, was more general with an emphasis on legal

175. Ewing, *supra* note 174, at 195.

176. *Id.*

177. *Id.* at 197.

178. *Id.* at 198.

179. *Id.* at 198–99.

180. *Id.* at 199.

181. Ewing, *supra* note 174, at 199.

182. *Id.* at 199, 202.

183. *Id.* at 205.

184. *Id.* at 207.

185. Stewart, *Legislative Pardon*, *supra* note 174, at 365 (1931); 1925 *Tex. Gen. Laws* 454, 455.

186. Stewart, *Legislative Pardon*, *supra* note 174, at 365 (1931).

187. *Ferguson v. Wilcox*, 28 S.W.2d 526, 536 (Tex. 1930).

188. Stewart, *Impeachment in Texas*, *supra* note 174, at 652; Stewart, *Legislative Pardon*, *supra* note 174, at 365.

189. Ewing, *supra* note 174, at 184.

issues raised by the episode and resulting decisions of the courts. His 1931 discussion of Ferguson was primarily a brief, journalist-style report on the Texas Supreme Court's 1930 ruling. Ewing's coverage featured analysis of voting data in the Texas Senate, and was more historical, biographical, and meticulous in detail.<sup>190</sup>

The last article that appeared in this time period was written by Everett S. Brown and published in the *APSR*.<sup>191</sup> Brown's discussion—while focusing on the restoration of civil and political rights by presidential pardon—was very much in the style of the *APSR* pieces by Frank Stewart discussed above. With considerable assistance from U.S. Pardon Attorney Daniel M. Lyons, Brown informed readers that, even if the president of the United States granted a pardon, restoring the rights of an individual, he/she might still suffer consequences of conviction via state law.<sup>192</sup> Our federal system created the possible need for additional acts of clemency from individual states.

While a piece of this style would never grace the pages of the *APSR* today, Brown was very much in acceptable form by saying little or nothing critical of the circumstance that he described. Thus, he offered no suggestion for reform, or even the possibility of the need for such.

#### B. Willard H. Humbert's Masterpiece

Willard Harrison Humbert earned his doctoral degree at Johns Hopkins University. It was also the place where he was first encouraged to study presidential pardons, and the result of his efforts was a *tour de force*, the likes of which has yet to be replicated.

Humbert's *The Pardoning Power of the President* (1941)<sup>193</sup> attempted to provide "a systematic account of the theory and the application of the pardoning power."<sup>194</sup> The preface noted that, after discussion of history, semantics, legal and procedural aspects, "facts" would be presented that related "to the actual exercise by the President of his pardoning power."<sup>195</sup> The facts presented in chapter 6 (entitled "Administrative Aspects") were actually data meticulously gathered from a record book kept by the U.S. Attorney General or his assistant from 1860–1884<sup>196</sup> and data from the *Annual Report* of the Attorney General, from 1884–1936.<sup>197</sup>

190. *Id.* at 204.

191. Everett S. Brown, *The Restoration of Civil and Political Rights by Presidential Pardon*, 34 AM. POL. SCI. REV. 295 (1940).

192. *Id.* at 295–96.

193. W.H. HUMBERT, *THE PARDONING POWER OF THE PRESIDENT* (1941).

194. *Id.* at 6.

195. *Id.*

196. *Id.* at 95. The "record book" actually extended back to 1854, but Humbert found the first six years of records not to be accurate.

197. *Id.* The data were gathered by calendar years from 1860–1884, and for fiscal years from 1885–1936.

Humbert's presentation hardly reached the level of mathematical sophistication that would be required in the top journals of political science today. Additionally, his free-flowing style of discussion and analysis of the seventy-six years of data would certainly be dismissed for lack of some guiding theory. Nonetheless, Professor Humbert's exercise in barefoot empiricism was a major event in the pardon literature, and it provided a wealth of information and insight. Indeed, one could reasonably argue that *The Pardoning Power* remains the standard.

It is not my purpose here to review every presentation of data by Professor Humbert. I would, however, like to mention the presentations that say the most about the exercise of the pardon power and those that are most relevant to current issues.

In Table 1 of *The Pardoning Power*, "Applications for Clemency and the Disposition Made of Them,"<sup>198</sup> Humbert identified eight different forms of clemency.<sup>199</sup> In Figure 1 of this article, I have collapsed these categories to present aggregate data on pardons and commutations of sentence from Humbert's data and more recent data from the Office of the Pardon Attorney (OPA), Department of Justice, from 1937–2012.<sup>200</sup> Data to the left of the vertical line in Figure 1 are from Humbert, while data to the right of that line are from the OPA.

First, it is quite obvious that commutations of sentence, a very rare occurrence in more recent decades, were actually quite common for the better part of five decades (1890–1940). In addition, Humbert suggested the apparent dominance of pardons from 1860–1884 may have been the result of "a failure to name properly in every case the form of clemency granted."<sup>201</sup> That is to say, commutations of sentence were probably more common than the left side of the chart indicates.

Humbert also identified a second point of interest in these data. He noted that, beginning with 1895, "the President disclosed consistently and impressively" an "inclination toward" the granting of "pardons to restore civil rights" (the most common form of clemency today).<sup>202</sup> In the first three decades of Humbert's data, less than ten percent of the annual acts of clemency involved the mere restoration of rights.<sup>203</sup> By 1905, the percent-

198. *Id.* at 96–99.

199. HUMBERT, *supra* note 193, at 100. The eight types of clemency defined by Humbert are: 1) full pardon, 2) conditional pardon, 3) pardon to terminate sentence and restore civil rights, 4) pardon to restore civil rights, 5) commutation, 6) conditional commutation, 7) reprieves, and remission of fines, and 8) forfeitures and costs.

200. OFFICE OF THE PARDON ATT'Y, U.S. DEPT. OF JUST., CLEMENCY STATISTICS, <http://www.justice.gov/pardon/statistics.htm> (last visited Aug. 23, 2012).

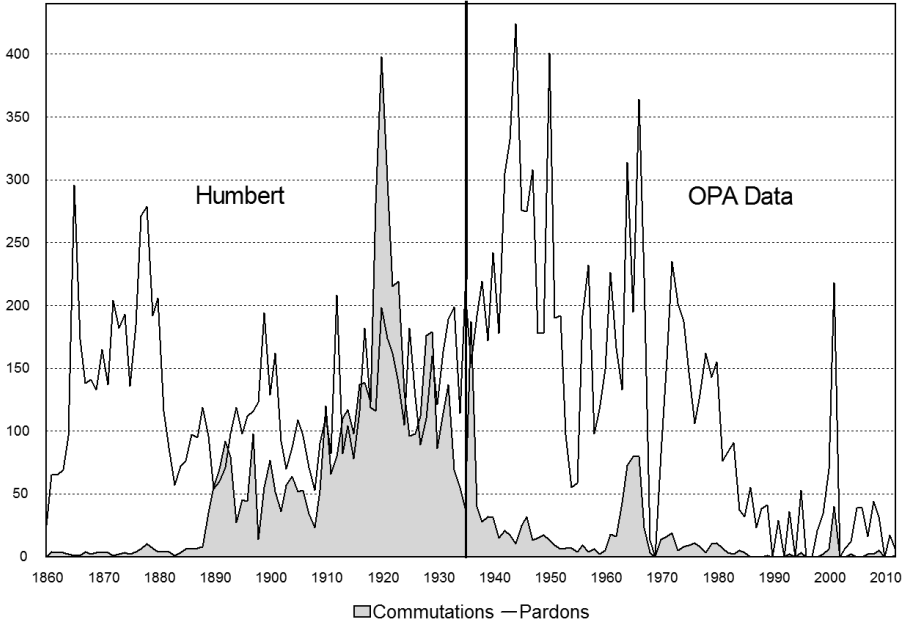
201. HUMBERT, *supra* note 193, at 100.

202. *Id.* at 101.

203. *Id.*

age had crossed the 50% mark.<sup>204</sup> In 1935, 66% of annual acts were pardons to restore rights.<sup>205</sup>

FIGURE 1: PARDONS V. COMMUTATIONS OF SENTENCE, 1860–2012



SOURCE : 1860-1936: W.H. Humbert, *The Pardoning Power of the President* (1941), 1937-2012: Office of the Pardon Attorney (OPA), Department of Justice.

When looking at Figure 1, it is also worth remembering that while Humbert’s data extended to 1936, his book was published in 1941, so it is most certain that he was aware of the nosedive in commutations of sentence from 1937 to 1940. As a result, Humbert observed that, after the opening of the twentieth century, presidents “largely departed from the most beneficial forms of clemency” and gravitated to forms which did not “disturb as drastically the original sentence of the courts.”<sup>206</sup>

In Chart III of his book,<sup>207</sup> Humbert presented data on the total number of pardon applications in comparison to grants and denials. Once again, the data had a modern day feel to them in that a large and increasing gap appears between the total number of applications and the number of decisions (grants or denials). Humbert observed:

If the inability of the President to consider every request for clemency was not apparent in the early days of the government, it became evident with the increase in clemency cases [from

204. *Id.*

205. *Id.*

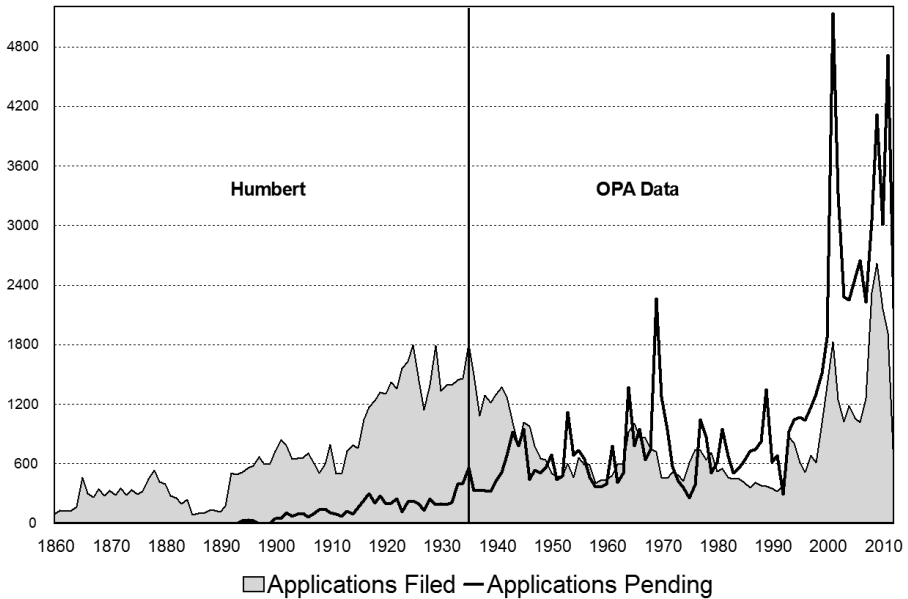
206. *Id.* at 102.

207. HUMBERT, *supra* note 193, at 105.

1910–1936] . . . . As a consequence, acts of clemency increased in number but the growth did not keep pace with the increase of requests for executive clemency.<sup>208</sup>

In Figure 2, I have updated Humbert’s data on clemency applications and cases left pending.<sup>209</sup> First, it is somewhat surprising that, while recent years have featured record numbers of applications, the number of applications was also generally high toward the end of Humbert’s data. As a result, the more noticeable trend is the fairly recent growth in the number of cases left unaddressed. Once again, however, it is worth remembering that Humbert went to press in 1941, so he was probably also aware of the somewhat radical increase in pending applications to that point. The comparable circumstances at the back end of both Humbert’s data and the most recent data from the OPA suggest Humbert’s analysis and suggestions could be relevant and useful today.

FIGURE 2: APPLICATIONS FILED, APPLICATIONS PENDING: 1860–2012



SOURCE: 1860-1936: W.H. Humbert, *The Pardoning Power of the President* (1941, pp. 96-8), 1937-2012, Office of the Pardon Attorney (OPA), Department of Justice.

Reasonably enough, Humbert guessed the increase in clemency applications was at least partially correlated with increases in the general population and the growth of the average prison population.<sup>210</sup> It turned out that

208. *Id.* at 107–09.

209. In Humbert’s data, cases were described as pending at the end of the fiscal year. In data provided by the Office of the Pardon Attorney (OPA), they are described as cases pending at the beginning of the fiscal year.

210. HUMBERT, *supra* note 193, at 109.



his analysis of population data<sup>211</sup> revealed a steady increase across time, followed by a “sharp decline . . . in the rate of expansion,” followed by “a more rapid increase” ending in 1930.<sup>212</sup> Data on average daily prison population (from 1896 to 1936) were more informative.<sup>213</sup> At the front end of the data (1896), the figure stood at 301.<sup>214</sup> At the back end (1936), it stood at 14,042.<sup>215</sup> As a result, the rate of growth in the average daily prison population was “comparatively much more rapid” and reached “far greater heights” than the population growth rate of the nation.<sup>216</sup>

Humbert suggested that the “enormous expansion” in the federal prison population was “attributable to a number of factors.”<sup>217</sup> He argued that the “most influential factor” was

the increase in national legislation as exemplified in the expansion of the criminal code. Because of the relatively simple conditions of social and economic life in the early days, and because of the absence of a paternal attitude in the national government, the early legislative product was neither of such magnitude nor of such nature that large numbers of people came under the influence of the national law. However, with the emergence of a more intricate life, with correlative assumption of wider powers by the national government, congressional legislative output during recent years became large and perhaps more restrictive of the freedom of the individual.<sup>218</sup>

A director of the Bureau of Prisons more specifically identified the Dyer Automobile Act, the Narcotics Act, the liquor legislation, and the Mann White Slave Act as having “tremendously increased” federal crime problems.<sup>219</sup>

In Humbert’s view, there were two significant questions: “Why has the decrease in the number of acts of clemency been so marked when compared with the growth in average daily prison population?” and “What explains increases and decreases in grants?”<sup>220</sup>

In Figure 3, I have updated Humbert’s data on both grants and denials. What must jump out at scholars today is the fact that it is hard to argue there was anything like an absolute decline in clemency grants in Humbert’s day. The steady decline in pardons and commutations, as well as the

211. *Id.* at 110–11, Table III.

212. *Id.* at 110.

213. *Id.* at 111–12, Table IV.

214. *Id.* at 111.

215. *Id.* at 112.

216. HUMBERT, *supra* note 193, at 113.

217. *Id.*

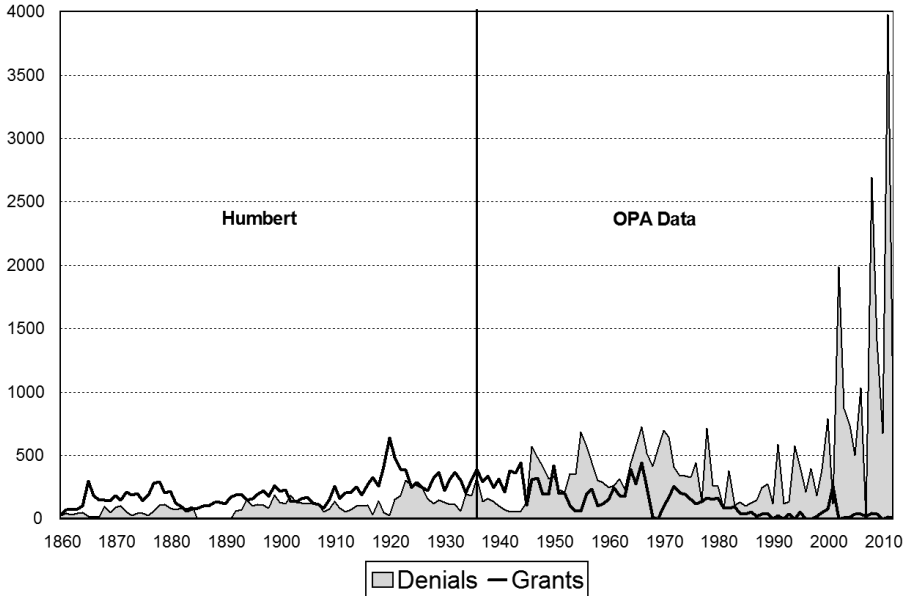
218. *Id.*

219. *Id.*

220. *Id.* at 115.

increase in clemency denials that continues to this day, began *after* Humbert went to press.

FIGURE 3: OUTCOMES OF APPLICATIONS FOR CLEMENCY: 1860–2012



SOURCE: 1860-1936: W.H. Humbert, *The Pardoning Power of the President* (1941, pp. 96-8), 1937-2012, Office of the Pardon Attorney (OPA), Department of Justice.

Humbert argued that decreases in clemency grants may have been attributable to a higher proportion of federal prisoners who were guilty of serious offenses and/or were “second offenders.”<sup>221</sup> He also suggested another explanation might be that the “proportions of prisoners of advanced age and in ill health had become smaller in recent years.”<sup>222</sup> The emergence of good-time laws, parole, and probation may have also “eliminated the need and the propriety of clemency in some instances.”<sup>223</sup> Even considering all of this, Humbert argued “the most effective influence” in “checking growth” in acts of clemency had been “the determination of the officials, who administered the pardoning power, to aid in the proper enforcement of the law and to avoid any flagrant misuse of the power of executive clemency.”<sup>224</sup>

Humbert noted, for example, that in several instances the U.S. pardon attorney had explained high numbers of adverse clemency recommendations from officials as the result of a desire to see “more rigid enforcement

221. *Id.*

222. HUMBERT, *supra* note 193, at 117.

223. *Id.*

224. *Id.* at 120.

of the laws.”<sup>225</sup> This mindset was again evident when a former attorney general spoke to the American Bar Association and berated President Hoover for appearing too sympathetic with claims of “misery” and human suffering in clemency applications.<sup>226</sup>

With respect to increases and decreases in clemency grants, Humbert was less certain, if not somewhat confused. He first argued that clemency “should be used only in extraordinary circumstances occurring irregularly and persisting for varying lengths of time.”<sup>227</sup> Since pardons should be used “irregularly,” the proper use of clemency powers should “show neither a uniform rise nor a gradual decrease.”<sup>228</sup> Humbert again pointed to the impact of good-time laws, parole, and probation to account for some of the variation in increases and decreases of clemency grants,<sup>229</sup> but he also recognized the impact of new rules and regulations,<sup>230</sup> war influences,<sup>231</sup> and the “periodic shifting of administrative personnel.”<sup>232</sup>

For all of the mania surrounding “empirical tests” and “multivariate modeling” in political science seventy years after the fact, political scientists have made little or no effort to apply the rigor of modern methodology to many of the relationships explored and discussed by Humbert.

*The Pardoning Power of the President* concluded with a summary of major points as well as a discussion regarding potential reforms.<sup>233</sup> The reforms are perhaps best understood and appreciated in light of the trends Humbert observed in the data: (1) More significant forms of clemency—especially commutations of sentence—were decreasing. (2) Pardons to restore civil rights were increasing. (3) While there was variation in clemency grants from year to year, in recent years there was a noticeable decline in its exercise. (4) As clemency grants decreased, clemency applications increased, resulting in increases in unaddressed applications.

Humbert noted that reformers had called for “greater circumspection” in pardoning, as opposed to modifications of the pardoning process or restricting the president.<sup>234</sup> Once again, the writing was extraordinary:

Recommendations on applications for clemency of United States Judges and Attorneys should not be relied upon to as great an extent in the future as in the past in deciding what should be done with applications for clemency. [Because] of the nature of the information which a judge receives on a case, because of the danger

225. *Id.* at 121.

226. *Id.*

227. *Id.*

228. HUMBERT, *supra* note 193, at 105.

229. *Id.* at 122–23.

230. *Id.* at 121.

231. *Id.* at 122–23.

232. *Id.* at 123.

233. *Id.* at 134–42.

234. HUMBERT, *supra* note 193, at 139.

of partiality which the experiences of a judge in criminal cases engender, and because of insufficient time to collect facts relevant to a decision in clemency cases, the United States Judge's recommendations should be critically examined. The judges imposed the sentence and they are loathe to admit any error in the original sentence. Secondly, if developments following the imposition of the sentence show the desirability of a pardon, the judges may not be in a position to appreciate the subsequent factors demanding clemency. . . .

This last objection applies with equal force to the practice of relying upon the recommendations of the United States Attorneys. The United States Attorneys who frequently reach their offices because of political preferment, are often fired with a zeal to make a record by numerous convictions in order to secure further promotion. Their ardor may bring about a great number of convictions, some of which were unwarranted. But will these men be willing, afterwards, to recommend clemency in the cases in which over-zealousness brought about a wrongful conviction or too severe a sentence?<sup>235</sup>

Humbert presented a second line of recommendations aimed at "better results" in the use of the pardoning power.<sup>236</sup> Such results could be obtained by "impartial studies of detailed data on each applicant for clemency, including the data submitted by the United States Attorneys and Judges."<sup>237</sup> Were "accurate, impartial, and scientific" information of this kind available, more reasonable decisions could be made by the executive branch without the assistance of others and "greater uniformity of treatment" would be promoted.<sup>238</sup> Humbert also argued that "better results" would "probably" be produced by the creation of a "small board," equipped with a staff to conduct "impartial studies."<sup>239</sup>

Perhaps some measure of the sweeping scope, impact, and authority of Humbert's work can be seen in the fact that, for the next three and a half decades, a mere two articles on clemency appeared in the journals of social science. Neither of the articles was particularly impressive and only one was written by a political scientist.

The first, appearing in the *APSR*,<sup>240</sup> addressed the false impression that one loses citizenship if convicted of a crime. In doing so, readers were reminded of the central point in Brown's *APSR* piece nine years earlier (that federal and state rights are not synonymous), and that Congress had determined that a person may lose citizenship only upon conviction of desertion

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235. *Id.* at 139–40.

236. *Id.* at 140.

237. *Id.*

238. *Id.* at 141.

239. *Id.* at 140.

240. James A. Gathings, *Loss of Citizenship and Civil Rights for Conviction of Crime*, 43 AM. POL. SCI. REV. 1228 (1949).

and treason.<sup>241</sup> The second article, appearing in *The Annals* (and written by a lawyer),<sup>242</sup> argued convincingly enough that, as long as capital punishment continued, pardons would clearly “remain an important element in the administration of criminal justice.”<sup>243</sup>

One wonders how much further the pardon power may have been neglected by political scientists had Gerald R. Ford not said these fateful words on September 8, 1974:

Now, therefore, I, Gerald R. Ford, President of the United States, pursuant to the pardon power conferred upon me by *Article II, Section 2*, of the *Constitution*, have granted and by these presents do grant a full, free, and absolute pardon unto Richard Nixon for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from July (January) 20, 1969 through August 9, 1974.<sup>244</sup>

### C. *The Post-Nixon Pardon Era*

When the media create lists of “famous” or “most controversial” pardons, it is a telling exercise. From source to source, the lists generally look the same: George Steinbrenner, Patricia Hearst, G. Gordon Liddy, Iran-Contra defendants, Jimmy Carter’s post-Vietnam amnesty, Jimmy Hoffa, Tokyo Rose, Marc Rich, and Scooter Libby. Those with a little more time on their hands might add Eugene Debs, Confederates after the Civil War, Mormons who practiced polygamy in the 1800s, or the Whiskey Rebels.

However, one can also generally expect that Gerald Ford’s pardon of Richard Nixon will be confidently labeled as the “most controversial” pardon granted in American history. Generally, most of the “controversial” pardons listed will be pardons granted *after* Nixon’s, suggesting it was some sort of game changer, or that its magnitude has, for whatever reason, blinded us considerably to noteworthy controversies previous to 1974.<sup>245</sup>

The 1970s certainly saw an increase in political science scholarship related to the pardon power, but that increase amounted to a mere handful of articles appearing in less-than-prestigious settings. When all was said and done, there was actually very little attention given to Ford’s pardon of Rich-

241. *Id.* at 1230–31.

242. Austin W. Scott, Jr., *The Pardoning Power*, 284 ANNALS AM. ACAD. POL. & SOC. SCI. 95 (1952).

243. *Id.* at 95. At least honorary mention must be given to the publication of a young lawyer who served as Pardon Counsel to the Governor of Wisconsin and went on to enjoy a prolific career as a political scientist. See David Adamany, *Executive Clemency in Wisconsin*, Wis. B. Bull. Oct. 1963 at 54, 54.

244. Proclamation 4311, Granting Pardon to Richard Nixon, 2 PUB. PAPERS 103 (Sept. 8, 1974).

245. It is my own contention that every generation of Americans has experienced its own unbelievable, unforgettable, end-all pardon controversy—if not three or four. But, the fact of the matter is, we *do* forget, *quickly* and *deeply*. I am thus very comfortable in arguing there have been pardon controversies quite comparable to Nixon’s.

ard Nixon! That is to say, the popular candidate for most “controversial” pardon of all time was all but completely invisible to the pages of the top journals of political science.

The explanations for this circumstance are worth exploring, because they relate to factors that are still at play today. By the 1970s, the top journals (*American Political Science Review*, *American Journal of Political Science*, and the *Journal of Politics*) were almost wholly given over to empirical testing of hypotheses via statistical analysis of aggregate data. The journalistic, reporting style of Stewart and legal discussions of Barnett and Brown were little tolerated. Clearly data driven case studies appeared now and then, but nothing on the more casual order of Griffin and Ewing. The overtly normative/prescriptive analyses of Hadley, Scoville, Smithers, Stoke, and Wilcox were simply no longer welcomed.<sup>246</sup>

This meant any scholar interested in doing a case study of the Nixon pardon would have to look elsewhere for publication. The unique nature of the pardon<sup>247</sup> left little room for the building of a data set of comparative pardons. To make matters worse, any person who mustered up the courage to write on the topic discovered (in their review of the literature), that nothing had been published on pardons in twenty-two years! The less-than-optimistic author might just imagine a journal’s blind referee scribbling: “And with good reason. Pardons are not important.”

In 1976, historian David R. Colburn went to *Political Science Quarterly* to publish his biographical sketch of Governor Alfred E. Smith.<sup>248</sup> Smith’s views on penal reform emphasized “the return of prisoners to society as meaningful contributors,”<sup>249</sup> and he considered the use of pardon boards to be the “modern, humane, scientific way to deal with the criminal offender.”<sup>250</sup> During his eight years in office Smith commuted several hundred sentences, but few recipients returned to prison.<sup>251</sup> Nonetheless, Republicans tried to embarrass Smith politically by asserting that his generosity with clemency was contributing to a “crime wave” in New York.<sup>252</sup> However, Smith defended both his policies and his individual decisions in such a deft manner that the *New York Times* wrote, “[t]he man who assails him without adequate information is in for a very troublous time.”<sup>253</sup>

246. An exception being made perhaps for debates about issues related to methodology.

247. Nixon was a former president. He did not apply for the pardon. He was never tried and convicted of any criminal offense. The pardon covers crimes he “may have” committed.

248. David R. Colburn, *Governor Alfred E. Smith and Penal Reform*, 91 POL. SCI. Q. 315 (1976).

249. *Id.* at 315.

250. *Id.* at 325 (quoting Alfred E. Smith, *Complete Text of the Annual Message of Governor Smith to the Legislature*, N.Y. TIMES, Dec. 17, 1920, at 24).

251. *Id.*

252. *Id.* at 326.

253. *A Stinging Rebuke*, N.Y. TIMES, Apr. 7, 1926, at 22.

In 1977, William D. Pederson published an article in *Presidential Studies Quarterly*, a journal which seemed to then become the unofficial home for scholarly analysis of federal executive clemency.<sup>254</sup> His article, entitled “Amnesty and Presidential Behavior: A ‘Barberian’ Test,” was mathematically simplistic—even by the standards of that day—but it constituted the first empirical test of a clemency-related hypothesis in an aggregate data set.<sup>255</sup> Pederson employed Gary M. Maranell’s questionnaire study of 600 American historians to devise a typology of presidents compatible with the typology presented in James David Barber’s *The Presidential Character: Predicting Performance in the White House*.<sup>256</sup> Pederson then correlated these character types with forty “formal amnesties granted by means of proclamation or executive order.”<sup>257</sup>

Pederson concluded presidential amnesty was a “tradition that depend[ed] on presidential character.”<sup>258</sup> The results showed ninety percent of the amnesties were granted by “active-presidents” and a majority (fifty-five percent) was granted by “active-positive” presidents.<sup>259</sup> Looking further, Pederson found “active-positive” presidents have shown “more willingness to use their clemency power in broader ways.”<sup>260</sup>

A second aberration from our general chronology is appropriate here, as Pederson’s analysis was essentially retested by P.S. Ruckman, Jr., in 1995.<sup>261</sup> Using a data set of 19,899 individual acts of clemency, Ruckman found “active” presidents accounted for a full 73% of the population of grants, from 1900 to 1993.<sup>262</sup> In addition, “active-positive” presidents accounted for a plurality of such grants.<sup>263</sup> Ruckman also found the percentage of clemency actions that were grants (as opposed to denials) was sensitive to both the “active” and “positive” components of Barber’s typology, as was willingness to use clemency in a variety of ways.<sup>264</sup> Ruckman concluded that the data provided further evidence that presidential character

254. No less than nine such articles appeared in *Presidential Studies Quarterly* from 1977 to 2008.

255. William D. Pederson, *Amnesty and Presidential Behavior: A “Barberian” Test*, 7 *PRESIDENTIAL STUD.* Q. 175 (1977).

256. *Id.* at 176; JAMES DAVID BARBER, *THE PRESIDENTIAL CHARACTER: PREDICTING PERFORMANCE IN THE WHITE HOUSE* 11–14 (1993). Barber’s typology was constructed along two dimensions: world view (positive or negative) and activity level (active or passive). The four character types were thus: active-positive, active-negative, passive-positive, and passive-negative.

257. Pederson, *supra* note 255, at 177.

258. *Id.* at 179.

259. *Id.* Table 2.

260. *Id.* at 180.

261. P.S. Ruckman, Jr., *Presidential Character and Executive Clemency: A Reexamination*, 76 *SOC. SCI. Q.* 213 (1995).

262. *Id.* at 218–19.

263. *Id.* at 218, Table 1 (41.7%).

264. *Id.* Data included pardons, commutations of sentence, remissions of fines and forfeiture, and respites.

was a “critical factor” in the clemency process,<sup>265</sup> but emphasized more “rigorous” tests of rival clemency hypotheses were both desirable and possible.<sup>266</sup> More specifically, he called for “multivariate time-series models of executive clemency policy.”<sup>267</sup>

Two years later, John M. Orman and Dorothy Rudoni penned an essay that basically made the point that the underlying dimensions of the pardon power are far from unique. They are, instead, perfectly consistent with the president’s broad discretionary powers in criminal justice policy.<sup>268</sup> The United States Constitution sets the stage for this broad discretion by declaring that the president “shall take Care that the Laws be faithfully executed.”<sup>269</sup> Orman and Rudoni explained that “[t]he Department of Justice is the President’s primary instrument for law enforcement . . . [and the] Criminal Division of the Justice Department . . . has responsibility for all federal prosecutions.”<sup>270</sup> However, the decisions by federal officials to prosecute, or not prosecute, were “in a sense less subject to popularly based political review than such decisions [at] the local level.”<sup>271</sup> The authors argued “disproportionate partisan influence” and “selective deployment of executive power” were serious concerns<sup>272</sup> but noted judicial review of prosecutorial decision making was “almost totally absent.”<sup>273</sup>

Of course, presidents also have broad discretion with respect to the individuals they appoint—including their direction, supervision, and removal, as well as how they will be handled when there are “episodes” which might hurt the president politically.<sup>274</sup> Finally, presidents have discretion with respect to symbolic leadership, the rhetoric they employ, the messages they send, and the degree to which words and actions appear to be correlated.<sup>275</sup> Orman and Rudoni offered some suggestions for reigning in this vast network of discretion, but none were related to the specific use of the pardon power.<sup>276</sup>

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265. *Id.* at 220.

266. *Id.* at 220–21.

267. Ruckman, *supra* note 261, at 221.

268. John M. Orman & Dorothy Rudoni, *Exercise of the President’s Discretionary Power in Criminal Justice Policy*, 9 *PRESIDENTIAL STUD. Q.* 415, 416–17 (1979).

269. U.S. CONST. art. II, § 3.

270. Orman & Rudoni, *supra* note 268, at 417.

271. *Id.* at 418.

272. *Id.* at 421–22.

273. *Id.* at 418 (quoting Kenneth Culp Davis, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 209 (1969)).

274. *Id.*

275. *Id.* at 423–25.

276. The perspective of the authors was somewhat at odds with that of Austin Sarat, who viewed clemency powers as “breaching the boundary between the rule of law and monarchical privilege” and generally existing in the “barely chartable borderland” of the law. See Austin Sarat, *At the Boundaries of Law: Executive Clemency, Sovereign Prerogative, and the Dilemma of American Legality*, 57 *AM. Q.* 611, 615, 618 (2005). In *Mercy On Trial: What it Means to Stop an Execution*, Sarat described clemency as “outside of, or beyond, the law and thus a threat to a



Christopher Joyner wrote a brief essay on the history, scope, and legal implications of the pardon power for *Federal Probation* in 1979.<sup>277</sup> However, it was David Shichor and Donald R. Ranish who brought clemency back to the pages of *Presidential Studies Quarterly*, in 1980, with a discussion of Jimmy Carter's Vietnam Amnesty.<sup>278</sup> On his first day in office, Carter provided a "full, complete and unconditional pardon" for Vietnam-era draft resisters.<sup>279</sup> The amnesty, however, left the fate of deserters to the Pentagon and military courts.<sup>280</sup>

Shichor and Ranish explored the "social effects and consequences" of the decision<sup>281</sup> and observed that the draft resistance movement "from its outset" was comprised "mainly of white middle-class students, or ex-students."<sup>282</sup> In contrast, the authors noted that it had been "demonstrated" that military deserters "in large part had lower-class social backgrounds"<sup>283</sup> and that there was a "high level of congruence" between "minority group membership and lower-class status."<sup>284</sup> They added:

Young adults from lower-class backgrounds and minorities were the first to be drafted, since most of them did not have the legal grounds to be deferred, they lacked the knowledge of the law to arrange for a deferment, and also did not have the financial means to flee the country like many of the draft dodgers did.<sup>285</sup>

Anticipation of controversial pardons related to the Iran-Contra affair probably prompted Mark J. Rozell's 1989 useful "bibliographic essay" on the pardon power<sup>286</sup> and David Gray Adler's very fine essay in Thomas Cronin's *Inventing the Presidency*.<sup>287</sup> After discussing the pardon process, the origins of the pardon power, pardon in the United States, and limitations on the power, Adler concluded that the power had, "on the whole," been "judiciously administered, and so the country has been well served."<sup>288</sup>

society dedicated to the rule of law." AUSTIN SARAT, *MERCY ON TRIAL: WHAT IT MEANS TO STOP AN EXECUTION* 69 (2005).

277. Christopher Joyner, *Rethinking the President's Power of Executive Pardon*, 43 *FED. PROBATION*, 1979 at 16. Despite the intriguing nature of the title, the article is really more of a summary and very basic introduction to the topic of pardons.

278. David Shichor & Donald R. Ranish, *President Carter's Vietnam Amnesty: An Analysis of a Public Policy Decision*, 10 *PRESIDENTIAL STUD. Q.* 443 (1980).

279. Proclamation No. 4833, 42 *Fed. Reg.* 4391 (Jan. 21, 1977) (executive order relating to proclamation of pardon titled: Granting Pardon for Violations of the Selective Service Act, August 4, 1964 to March 28, 1973).

280. Shichor & Ranish, *supra* note 278, at 445.

281. *Id.*

282. *Id.* at 447.

283. MICHAEL USEEM, *CONSCRIPTION, PROTEST AND SOCIAL CONFLICT* 145 (1973).

284. *Id.*

285. Shichor & Ranish, *supra* note 278, at 447.

286. Mark J. Rozell, *The Presidential Pardon Power: A Bibliographic Essay*, 5 *J. L. & POL.* 459 (1989).

287. DAVID GRAY ADLER, *The President's Pardon Power*, in *INVENTING THE AMERICAN PRESIDENCY* 209 (Thomas Cronin ed., 1989).

288. *Id.* at 230.

However, he suggested that pre-conviction pardons “ought to be discouraged as a matter of public policy,”<sup>289</sup> and the “possibility” of future sheltering of “high ranking officials” was reason enough to “rethink the constitutional structure governing the pardon power.”<sup>290</sup>

Adler found “merit,” for example, in Walter Mondale’s 1974 proposal to allow two-thirds of Congress to “disapprove of [a] pardon within 180 days of issuance.”<sup>291</sup> In his view, the nation had “nothing to lose by such a constitutional amendment, and it would have much to gain.”<sup>292</sup>

Christopher E. Smith and Scott P. Johnson’s article in *The Wayne Law Review*,<sup>293</sup> agreed that “the appropriate scope” of the pardon power deserved “examination and reassessment” in light of the possibility that a president “could halt criminal proceedings in order to suppress information about his own misdeeds.”<sup>294</sup> After calling attention to the shortcomings of independent counsel proceedings, civil liability, the news media, checks and balances, and the electorate as a means of protection from such abuse, Smith and Johnson suggested that the “most desirable” protection would be to disallow pardons before trial.<sup>295</sup> An “alternative approach” would be a “requirement that the President specify charges when issuing a pardon” so that “unspecified charges would remain fair targets for prosecution.”<sup>296</sup> In their view, even though these limitations “would not harm the greater purposes of the pardon power,”<sup>297</sup> it would be entirely too difficult to “generate sufficient political momentum” for a constitutional amendment.<sup>298</sup> Instead, such changes would probably have to come through interpretation (or, re-interpretation) of the Constitution by the federal courts.<sup>299</sup>

Amazingly, this author’s review uncovered a single article on Gerald Ford’s pardon of Richard Nixon. A full twenty years after the fact, Mark J. Rozell focused on the constitutionality of President Ford’s decision.<sup>300</sup> More specifically, Rozell reviewed arguments related to the timing of the pardon (previous to conviction), the Constitution’s impeachment exception, the vagueness of Ford’s proclamation, and supposed violations of special

289. *Id.* at 229.

290. *Id.* at 230.

291. S.J. Res. 240, 93rd Cong. (1974); *see also* Walter Mondale, *Harnessing the President’s Pardon Power*, A.B.A. J., Jan. 1975, at 108–10.

292. ADLER, *supra* note 287, at 230.

293. Christopher E. Smith & Scott P. Johnson, *Presidential Pardons and Accountability in the Executive Branch*, 35 WAYNE L. REV. 1113, 1115 (1989).

294. *Id.*

295. *Id.* at 1124.

296. *Id.* at 1125.

297. *Id.* at 1125–26.

298. *Id.* at 1128.

299. Christopher E. Smith & Scott P. Johnson, *Presidential Pardons and Accountability in the Executive Branch*, 35 WAYNE L. REV. 1113, 1128 (1989).

300. Mark J. Rozell, *President Ford’s Pardon of Richard M. Nixon: Constitutional and Political Considerations*, 24 PRESIDENTIAL STUD. Q. 121 (1994).

prosecutor regulations<sup>301</sup> and concluded “the weight of evidence [was] in favor of the pardon . . . as constitutionally proper.”<sup>302</sup> As for amending the Constitution in reaction to Ford’s pardon, Rozell considered it “doubtful that any constitutional or statutory remedy . . . [was] necessary, proper, or desirable.”<sup>303</sup> In his view, the separation of powers provided “all of the necessary checks against potential abuses of the pardoning power.”<sup>304</sup> Rozell observed:

[L]imiting the president’s pardoning power with any additional legislative check would defeat the purpose of the framers having given the president large discretionary authority to pardon in the first place. The pardon is primarily an act of mercy and must therefore be left in the hands of one person and not in the hands of a large deliberative assembly where many representatives will be influenced by temporary partisan passions. Only one person—the president—should be responsible for weighing the needs of justice and the national interest against the partisan passions of the day, and make the final determination as to the proper course of action.<sup>305</sup>

In 1997, P.S. Ruckman, Jr. revisited aggregate data on clemency with an aim, once again, toward encouraging “multivariate statistical analyses.”<sup>306</sup> With some reliance on Humbert and anecdotal data, Ruckman identified three broad categories of formal, public explanations for clemency decisions. Explanations which were *legal* or *technical* in nature, focused on concerns about innocence, consideration of mitigating factors, the desire for proportionate punishment, etc.<sup>307</sup> Decisions based on *humanitarian compassion* or *mercy* tended to receive more critical attention.<sup>308</sup> Deathbed pardons fell under this category, as did so-called “Christmas pardons.”<sup>309</sup> A final category of pardon explanations focused on judgments regarding *reform* or *rehabilitation* of the recipient.<sup>310</sup> Ruckman argued all of these explanations could be the byproduct of the social background characteristics of presidents, presidential character, public opinion, the social status of the prisoner, and changes in the rules administering pardons as well as war.<sup>311</sup>

Turning to the data, he found seventeen administrations (from William McKinley to George H.W. Bush) averaged almost 200 acts of clemency per

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301. *Id.* at 123–25.

302. *Id.* at 126.

303. *Id.* at 133.

304. *Id.*

305. *Id.* at 134.

306. P.S. Ruckman, Jr., *Executive Clemency in the United States: Origins, Development, and Analysis (1900–1993)*, 27 PRESIDENTIAL STUD. Q. 251, 251 (1997).

307. *Id.* at 257.

308. *Id.*

309. *Id.* at 257–58.

310. *Id.* at 258.

311. *Id.* at 258–60.

year<sup>312</sup>—something most Americans would not know, and probably would not guess, and a fact that also dispelled the notion that the typical act of clemency was “controversial” or required the expenditure of some great political capital. Ruckman found Democratic presidents had a higher average for grants than Republicans,<sup>313</sup> and, more tellingly, that Democrats were more likely to have a higher average positive grant rate (when calculating percentages both from the total number of applications or the total number of applications that resulted in some decision).<sup>314</sup> A second notable feature of the data was the very sorry record of the Reagan and Bush administrations.<sup>315</sup>

Ruckman finally introduced data that he judged appropriate for multivariate analysis: the percentage of requests granted per fiscal year.<sup>316</sup> These data revealed a long-term, downward trend, which originated much earlier in time than the Reagan and Bush administrations.<sup>317</sup> The downward trend may have been the result of “Republican dominance in the White House,” the “law and order” campaigns of Richard Nixon, and/or the advent of the retributive justice model.<sup>318</sup> While the occurrence of war did not have an obvious impact on the data, Ruckman found that the percentage of positive clemency actions tended to increase throughout the term of an administration, peaking in the last fiscal year.<sup>319</sup> In sum, the piece presented a solid basis upon which future multivariate analyses could be conducted.

Also conscious of the lack of sophisticated mathematical study of pardon power, Mark Morris wrote an essay on the “Overlooked Relevance of the Pardon Power.”<sup>320</sup> Examining data on pardons and commutations of sentence, from 1900 to 1996, Morris concluded “Democrats ha[d] used the [pardon] power with greater frequency than Republicans.”<sup>321</sup> In his view, however, the noticeable pattern of decline began in the administration of Lyndon Johnson.<sup>322</sup> Regardless, Morris saw the apparent decline as an appropriate topic of research, as well as the social background characteristics of pardon recipients and the kinds of crimes addressed in clemency warrants.<sup>323</sup> He also suggested further exploration of the “normative” question

312. Ruckman, *supra* note 306, at 261.

313. *Id.*

314. *Id.* at 263, Table 2.

315. *Id.* Reagan and Bush left, on average sixty-six and sixty-one percent of clemency applications pending. On average, only thirteen and five percent of their actions were positive (resulting in a grant).

316. *Id.* at 264.

317. *Id.*

318. Ruckman, *supra* note 306, at 264–65.

319. *Id.* at 265.

320. Mark Morris, *The Overlooked Relevance of the Pardon Power*, in *PRESIDENTIAL FRONTIERS: UNDEREXPLORED ISSUES IN WHITE HOUSE POLITICS* 79 (Ryan J. Barilleaux, ed., 1998).

321. *Id.* at 90.

322. *Id.*

323. *Id.* at 90–92.

of potential restraints on the president's power<sup>324</sup> and the role that the media play in the use (or non-use) of clemency.<sup>325</sup> Morris later co-authored an article on the pardon power with Jody C. Baumgartner<sup>326</sup> that utilized the case study method to compare and contrast the pardon power in the United States and in Russia.

To Morris's credit, his review of the literature spotted one of the earliest multivariate models of executive clemency.<sup>327</sup> The author, P.S. Ruckman, Jr. had, by that point, used Microfilm Set T967 (National Archives) to create a data set of every individual act of clemency, from 1789 to 1883.<sup>328</sup> In 1999, a portion of these data was first featured in a *Presidential Studies Quarterly* article on Abraham Lincoln's use of the pardon power.<sup>329</sup> The examination of more than 300 individual clemency warrants found Lincoln pardoned the largest number of individuals in the fourth year of his first term,<sup>330</sup> and about one-third of his clemency warrants were issued to offenders in "border states."<sup>331</sup> The most common explanations for granting clemency referenced good behavior after the offense, a sense of repentance, a life of good behavior before the offense, and the youth of the offender.<sup>332</sup> Finally, Lincoln's clemency warrants featured unprecedented influence by public opinion, resulting in a somewhat democratic twist to the use of a seemingly imperial power.<sup>333</sup>

324. *Id.* at 92.

325. *Id.* at 94–95.

326. Jody C. Baumgartner & Mark H. Morris, *Presidential Power Unbound: A Comparative Look at Presidential Pardon Power*, 29 POL. & POL'Y 209 (2001).

327. P.S. Ruckman, Jr., *Federal Executive Clemency in the United States, 1934–94: An Empirical Analysis*, (Nov. 6–9, 1996) (paper presented at the annual meeting of the Southern Political Science Association, Atlanta, Georgia).

328. P.S. Ruckman, Jr., *Executive Clemency 1789–1993, A Preliminary Report*, (Nov. 1995) (paper presented at the annual meeting of the Southern Political Science Association, Tampa, Florida).

329. P.S. Ruckman, Jr. & David Kincaid, *Inside Lincoln's Clemency Decision Making*, 29 PRESIDENTIAL STUD. Q. 84, 90–95 (1999).

330. *Id.* at 90.

331. *Id.* at 91.

332. *Id.* at 93.

333. *Id.* at 94–95.

Fifty 'respectable citizens' from the territory of Nebraska, for example, supported the warrant of James Corrigan (convicted of manslaughter). 'Many hundred respectable citizens at large' joined the senators, representatives and state legislators from Minnesota, as well as the governor, in supporting the warrant of Luther Preston (convicted of stealing from the mails). The warrant of John H. Murphy (convicted of manslaughter) mentions jurors, aldermen, city councilmen, the register, the collector, and 'nearly one thousand citizens of the District of Columbia.' Joseph S. Hewins (convicted of mail robbery) received support from a postmaster, the president of a railroad company, a sheriff, a collector, many 'well-known persons' of 'undoubted veracity,' and 'over eleven-hundred' citizens and acquaintances in Massachusetts. The warrant of Daniel Loudersmith (convicted of forging applications for pensions) was supported by a 'large majority' of the members of the Pennsylvania state legislature and 'several thousand citizens.'

*Id.* at 94.

In 1999, Scott P. Johnson and Christopher E. Smith passionately announced the clear “need” to restrict the pardon power (because of its “flawed and potentially self-serving component”), and fearlessly predicted that it was “only a matter of time” before it was used in a manner that would “jeopardize a President’s place in history.”<sup>334</sup> Had the focus of their article been slightly broader, they might have been the James David Barber of our generation.<sup>335</sup> But, as it turned out, Johnson and Smith were not so much concerned about the kinds of pardon abuse that were just around the corner (at the end of the Clinton administration). Instead, they were concerned about the use of pardons “to conceal criminal behavior or inappropriate conduct from the public.”<sup>336</sup>

Along the way, they made a contextual observation surprisingly missing from almost all discussions of clemency reform:

The modern presidency is far different than the vision of the executive possessed by those who wrote the Constitution. The framers ‘assumed that the president would be a political eunuch, with the duty of only assuring that laws passed by Congress, which is where the political action would occur, be faithfully executed.’ Over the course of two hundred years, the presidency has been transformed into a powerful office—one which initiates policies and exerts substantial control over foreign affairs and other matters . . . . In light of the expansive power of presidents, serious questions emerge concerning how people in a democracy will maintain accountability over a powerful official who has many people working on his or her behalf, both in the executive branch of government and in the President’s political party.<sup>337</sup>

Johnson and Smith recognized “several mechanisms hypothetically available” to prevent presidents from “exceeding . . . constitutional powers or committing harmful misdeeds” (independent counsel proceedings, civil liability, the news media, checks and balances, etc.).<sup>338</sup> They insisted, however, that pardons should be withheld until after conviction.<sup>339</sup> In addition, they argued the presidents should have to “specify charges” when issuing pardons.<sup>340</sup> These restrictions would leave the “greater purposes of the par-

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334. Scott P. Johnson & Christopher E. Smith, *White House Scandals and the Presidential Pardon Power: Persistent Risks and Prospects for Reform*, 33 *NEW ENG. L. REV.* 907, 928, 929 (1999).

335. It was Barber, a political scientist, who famously predicted, in the pages of the Sept. 12, 1969, issue of *Time* magazine, that Richard Nixon—if elected—might “commit himself irrevocably to some disastrous course of action.” Such behavior, said Barber, stemmed from “a very strong drive for personal power—especially independent power.” James Barber, *The President’s Analyst*, *TIME*, Sept. 12, 1969, at 62.

336. Johnson & Smith, *supra* note 334, at 929.

337. *Id.* at 912–13.

338. *Id.* at 913.

339. *Id.* at 923.

340. *Id.* at 925.

don power . . . intact.”<sup>341</sup> Perhaps most radically, the article called on the United States Supreme Court to apply “pragmatic considerations” and adjust (limit) the president’s power.<sup>342</sup>

#### D. *The Post-Clinton Era*

As Bill Clinton stepped into the office of the presidency, the number of applications for federal executive clemency jumped to their highest level in almost thirty years.<sup>343</sup> It was thus more than a little ironic that the first Democratic administration in some time quickly established a record of stinginess when it came to the pardoning power.<sup>344</sup> The irony thickened further when the president, who was criticized by some for using the power so *infrequently*,<sup>345</sup> drew additional (and even *sharper*) criticism by becoming a wellspring of mercy at the end of his second term.<sup>346</sup> On January 20, with only a few hours left in his presidency, Clinton granted 140 pardons and 36 commutations of sentence.<sup>347</sup>

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341. *Id.* at 926. Johnson and Smith noted the Founders’ concern about insurrections and rebellions would be hardly affected by such restrictions, in part, because, after two hundred plus years, the government had become “more stable.” In addition, pardons could still be used for public welfare purposes and for securing testimony.

342. Johnson & Smith, *supra* note 334, at 927.

343. OFFICE OF THE PARDON ATT’Y, U.S. DEPT. OF JUST., *supra* note 200. There were 698 applications for clemency in fiscal year 1993 (up from 379 in fiscal year 1992 and 318 in 1991) and 808 in fiscal year 1994. The 1994 figure was the highest since 1967, when there were 863 applications for clemency.

344. Clinton’s first pardons were granted 672 days into the administration—a record for delay. No previous president had waited more than 300 days. See P.S. Ruckman, Jr., *Obama: Nearing 900 Day Mark*, PARDON POWER BLOG (July 5, 2011), <http://www.pardonpower.com/2011/07/obama-nearing-900-day-mark.html>.

345. See, e.g., Peter Baker, *Wielding the Ultimate Instrument of Legal Forgiveness*, WASH. POST, Oct. 4, 1996, at A21; Margaret Love, *A Place for Pardons*, WASH. POST, Dec. 21, 1998, at A29; Kathleen Dean Moore, *Mr. President, Misusing This Power Is Unpardonable*, WASH. POST, Jan. 14, 2001, at B2; Russell Max Simon, *Presidential Pardons Get Greater Scrutiny: In the Scandal-Tinged Atmosphere of Washington, the End-of-Term Rite Seems Increasingly Tainted by Politics*, CHRISTIAN SCI. MONITOR, Dec. 22, 2000; Richard Willing, *Presidential Pardons a Rarer Event*, USA TODAY, Dec. 17, 1998, at 18A.

346. See, e.g., Peter Grier, *Clinton’s Suspect Pardons ‘Pardongate’ Sours Ex-President’s Legacy, His Wife’s Image, and Public View of Politics*, CHRISTIAN SCI. MONITOR, Feb. 23, 2001; Jonathan Peterson & Lisa Getter, *Clinton Pardons Raise Questions of Timing, Motive*, LOS ANGELES TIMES, Jan. 28, 2001, at A1; Michael Powell, *Pardons With Precedent; Marc Rich Drama is Latest in a Long Line of Last Acts*, WASH. POST, Feb. 26, 2001, at C.1; Dave Saltonstall, *Bill’s Very Bumpy Road from White House: Pardons, Softgate Has Pals Muttering ‘Tacky,’ ‘Sordid’*, N.Y. DAILY NEWS, Feb. 11, 2001, at 6; Richard A. Serrano & Stephen Braun, *47 Pardons Skirted Review, Papers Show*, LOS ANGELES TIMES, Feb. 8, 2001, at A1; Peter Slevin & George Lardner, Jr., *Rush of Pardons Unusual in Scope, Lack of Scrutiny; Back-Door Lobbying Had Large Role in Clinton’s Decisions, Observers Say*, WASH. POST, Mar. 10, 2001, at A.3.

347. OFFICE OF THE PARDON ATT’Y, U.S. DEPT. OF JUST., *PARDONS GRANTED BY PRESIDENT WILLIAM J. CLINTON (1993–2001)*, [http://www.justice.gov/pardon/clintonpardon\\_grants.htm](http://www.justice.gov/pardon/clintonpardon_grants.htm); OFFICE OF THE PARDON ATT’Y, U.S. DEPT. OF JUST., *COMMUTATIONS, REMISSIONS, AND REPRIEVES GRANTED BY PRESIDENT WILLIAM J. CLINTON (1993–2001)*, [http://www.justice.gov/pardon/clinton\\_comm.htm](http://www.justice.gov/pardon/clinton_comm.htm).

These infamous “last-minute” pardons were, in part, notable because they generated unprecedented interest in information about *historical* trends in the use of the pardoning power. Previously, when presidents granted the occasional “controversial” pardon, the tendency of commentators and administration officials was to focus on the particular case and compare it with a previous case, or small list of selected cases. Supporters of the administration would find examples of similar decisions and critics emphasized idiosyncrasies to dramatize the argument that the president’s pardon was “unprecedented,” “unheard of,” “a first,” etc.

However, Clinton’s “last minute” pardons clearly sparked broader, sophisticated interests. The *New York Times* investigated patterns in clemency applications across several years<sup>348</sup> and reporters for the *Los Angeles Times* wondered if “other presidents [had] pardoned as many individuals whose applications were not first reviewed by the Justice Department.”<sup>349</sup> The *New York Daily News* also wondered about the number of times previous presidents had “bypassed traditional channels” to grant pardons.<sup>350</sup> *USA Today* was curious about the Department of Justice’s role in the clemency process and what limits there were to the president’s use of the pardoning power<sup>351</sup> while reporters from the *Washington Post* and *Christian Science Monitor* questioned whether “last-minute” pardons were “the norm.”<sup>352</sup> For the first time, calls for empirical analysis of the pardon power were coming from outside the discipline of political science.

While the dust of the Clinton pardons hovered in the air, Sam Morison, an attorney-advisor in the OPA recommended that the individual clemency warrants on Microfilm Set T967 be combined with individual warrants signed afterward in a single, searchable database.<sup>353</sup> Most importantly, the database would include those warrants signed from 1932 to 2001.<sup>354</sup> Data Management International scanned all of the documents and created a system index to make the database searchable.<sup>355</sup> As a result, for the first time since the 1930s, researchers can examine individual clemency war-

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348. Kurt Eichenwald & Michael Moss, *Rising Numbers Sought Pardons in Last 2 Years*, N.Y. TIMES, Jan. 29, 2001, at A.1.

349. Peterson & Getter, *supra* note 346, at A1; Serrano & Braun, *supra* note 346, at A1.

350. Saltonstall, *supra* note 346, at 6.

351. Judy Keen, *Process Intended to Keep ‘Tranquility’*, USA TODAY, Mar. 1, 2001, at A.6.

352. Grier, *supra* note 346; Powell, *supra* note 346, at C.1.

353. E-mail from Sam Morison, (Nov. 17, 2011, 19:31) (on file with author).

354. E-mail from Ronald L. Rodgers, OFFICE OF THE PARDON ATT’Y, U.S. DEPT. OF JUST., (Nov. 17, 2011, 01:23) (on file with author) (response to Freedom of Information Request No. 2012-012).

355. *Id.* Unfortunately, the warrants featured in the CD set do not line up perfectly with aggregate data reported by the OPA. In 2012, the author also discovered that almost 150 pardons granted by Martin Van Buren were missing from the CDs. The OPA pledged the database would be “fixed.” E-mail from Brenda McElroy, OFFICE OF THE PARDON ATT’Y, U.S. DEPT. OF JUST., (July 18, 2012, 07:42) (on file with author).



rants, a significant improvement over aggregate data arranged by fiscal year (offered in the *Annual Report* of the Attorney General).

Whatever the desire may have been for empirical analysis of the pardon power, Louis Fisher heaped more than a little scorn on President Clinton's use of the pardon power in the pages of *Presidential Studies Quarterly*.<sup>356</sup> With particular attention on the FALN pardons and "Marc Rich et al.," Fisher persuasively argued Clinton's decision-making "did lasting damage" to his presidency and evidenced "a lack of professionalism, discipline, and judgment."<sup>357</sup>

Michael Genovese and Kristine Almquist's attempt to "evaluate Clinton's exercise of the pardon authority" was another story.<sup>358</sup> Although they held Clinton's pardons "generally rivaled" the Nixon pardon and the Iran-Contra pardons, Genovese and Almquist insisted Clinton was "by no means alone in issuing questionable pardons"<sup>359</sup> and certainly "not the first."<sup>360</sup> They even argued Clinton's infamous "eleventh-hour pardons" were something of a "presidential custom."<sup>361</sup>

Genovese and Almquist sought to explain "the outcry against Clinton"<sup>362</sup> ("perhaps . . . much ado about nothing").<sup>363</sup> Genovese and Almquist concluded "ethical questions" may have generated "moral outrage" toward the pardon, for example, of fugitive millionaire (and Clinton donor) Marc Rich. But they appeared equally convinced that the controversy was the result of Republicans who "overreacted," "pounced even before the facts were in,"<sup>364</sup> and never seemed to "tire" of trying to "punish" or "destroy" Clinton.<sup>365</sup> Genovese and Almquist appeared almost baffled that many were even more "skeptical" when Clinton "defended" his pardons in a *New York Times* editorial.<sup>366</sup>

356. Louis Fisher, "The Law:" *When Presidential Power Backfires: Clinton's Use of Clemency*, 32 *PRESIDENTIAL STUD. Q.* 586, 586 (2002).

357. *Id.* at 598.

358. Michael Genovese & Kristine Almquist, *The Pardon Power Under Clinton: Tested but Intact*, in *THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY* 75, 85 (David Gray Adler & Michael A. Genovese, eds., 2002).

359. *Id.* at 83, 85.

360. *Id.* at 87.

361. *Id.* at 84.

362. *Id.* at 86.

363. *Id.* at 85.

364. Genovese & Almquist, *supra* note 358, at 85.

365. *Id.* at 86.

366. *Id.* Clinton's *Times* editorial was a train wreck along so many dimensions. It attempted to contextualize the pardon of Marc Rich and Pincus Green by referencing other "extremely controversial" uses of the clemency power. Notably, none of the examples involved individuals who were exceptionally wealthy or suspected of having close financial ties to the president or a first lady. Nor did any of the examples feature a major financial contributor to the president's party, or a fugitive from justice. Clinton compared aggregate statistics on his use of the pardoning power with presidents before him, without mentioning that more than sixty-five percent of his pardons were granted in the last year, and final six weeks, of his last term. Nor did Clinton mention the fact that he may have also allowed more pardon applicants to bypass the Department of Justice

Almost as an afterthought, Genovese and Almquist wrote that “serious” discussions of clemency reform begin with Walter Mondale’s 1974 proposal to allow Congress to vote to disapprove pardons.<sup>367</sup> They agreed with Adler that Mondale’s proposal “could go far in affording the nation meaningful protection” against pardon abuses by deterring presidents “from granting pardons under suspicious circumstances.”<sup>368</sup>

Beau Breslin and lawyer John J.P. Howley published what they called an “unapologetically normative” discussion of the “political nature of the clemency process” in 2002.<sup>369</sup> In something of a twist, Breslin and Howley expressed concerns with attempts to “mitigate the impact of politics” on the clemency decision making process, particularly in cases involving the death penalty.<sup>370</sup> As they saw it, the judicial process brought with it “a level of rigidity,” and “formal procedures and standards tend[ed] to shield the decision-maker from personal responsibility and accountability.”<sup>371</sup> The clemency process, on the other hand, “should be more personal and more human.”<sup>372</sup> Although certainly a “component” of our legal system, it bore “no significant relation to the judicial process,” and any attempt to make it so would do more harm than good.<sup>373</sup>

In 2003, John Dinan updated Christen Jensen’s survey of the pardon power in the states in a provocative manner.<sup>374</sup> Dinan reviewed the remaining records of more than 230 state constitutional conventions and “examine[d] the distinctive conceptions of the pardon power that had prevailed at the state level.”<sup>375</sup> His ultimate goal, however, was to get a sense of

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than any president before him. Clinton observed other companies that were indicted for similar offenses were sued civilly, not criminally and that two “highly regarded” tax experts agreed Rich and Green had no unreported income or tax liability related to the transactions that were scrutinized even though they had paid a large amount of fines. In fact, there were about fifty criminal cases brought against crude oil resellers in the late 1980s and, consequently, over a dozen defendants served some time in prison. And the tax experts (Bernard Wolfman and Martin Ginsburg) were paid almost \$100,000 by Rich to conduct their analysis. All of their findings rested upon the somewhat risky assumption that the materials provided to them by Rich’s attorney were an accurate and complete representation of the government’s case. Clinton argued the case for pardon had been “reviewed and advocated” by “three distinguished Republican attorneys.” As for the attorneys; Leonard Garment said the column was “absolutely false.” He had “nothing” to do with the pardons. William Bradford Reynolds said he “never, never, never had any discussions about a pardon” and a White House spokesman said the third lawyer, Lewis Libby, was “in no way, shape, or form involved with the pardon.” All along the way, Clinton’s explanations were laced with language like “I understood that . . .” and “I was informed that . . .”

367. *Id.*

368. *Id.* at 86–87.

369. Beau Breslin & John J.P. Howley, *Defending the Politics of Clemency*, 81 OR. L. REV. 231, 232 (2002).

370. *Id.* at 233.

371. *Id.*

372. *Id.* at 234.

373. *Id.* at 239.

374. John Dinan, *The Pardon Power and the American State Constitutional Tradition*, 35 POLITY 389 (2003).

375. *Id.* at 392.

whether or not these varied approaches shed some insight as to what considerations might then be “applicable to the federal system.”<sup>376</sup> There followed an interesting discussion of the manner in which state conventions debated who should wield the pardon power and under what restrictions, if any.<sup>377</sup> Dinan found a majority of states chose to “deviate” from the federal model, by the creation of advisory boards, councils, or some body of persons that shared the power with the governor.<sup>378</sup> With respect to limitations on the pardon power, the federal model enjoyed “mixed success.”<sup>379</sup> Many states required “advance notice that a pardon [was] being considered.”<sup>380</sup> Many “demand[ed] that pardons be accompanied by reasons for their issuance.”<sup>381</sup> Most states explicitly prohibited pre-conviction pardons.<sup>382</sup>

Should federal practice be informed by developments in the states? Dinan was not sure the president was as proximate to (or as personally involved in) the pardon process as a typical governor might be, so many of the concerns behind the need for independent bodies might not have applied.<sup>383</sup> In addition, the president had the OPA to process applications and make recommendations. Dinan worried, however, that “contemporary presidents” had become “more susceptible . . . to entreaties from pardon applicants and their friends and families.”<sup>384</sup> One possible solution might be an executive order by each incoming president creating an advisory body.

Although multivariate models of federal executive clemency date back to 1994,<sup>385</sup> in 2006 Andrew B. Whitford and Holona Ochs became the first political scientists to actually publish the findings of such a model in a political science journal.<sup>386</sup> Within a year, a second such model, by H. Abbie Erler, appeared in *Presidential Studies Quarterly*.<sup>387</sup> At least on the surface, each of these articles had the markings of the typical article one might find today, in the more prestigious journals of the discipline. However, a closer look also revealed the somewhat primitive state of clemency research.

376. *Id.* at 392–93.

377. *Id.* 394–404.

378. *Id.* at 403.

379. *Id.* at 411.

380. Dinan, *supra* note 374, at 411.

381. *Id.*

382. *Id.*

383. *Id.* at 412–13.

384. *Id.* at 413.

385. P.S. Ruckman, Jr., *Executive Clemency in the United States, 1900–1993: An Empirical Analysis*, (Sept. 2, 1994) (paper presented at the Annual Meeting of the American Political Science Association, New York, New York).

386. Andrew B. Whitford & Holona Ochs, *The Political Roots of Executive Clemency*, 34 AM. POL. RES. 825 (2006).

387. H. Abbie Erler, *Executive Clemency or Bureaucratic Discretion? Two Models of the Pardons Process*, 37 PRESIDENTIAL STUD. Q. 427 (2007).

Even a casual glance at the reference sections in these articles revealed the normal path to publication was not operative.<sup>388</sup> Whitford and Ochs referenced only five of almost forty articles and books on clemency appearing before they went to press, and only two of nineteen articles and books written since the 1980s.<sup>389</sup> Amazingly, Humbert was not referenced *at all*. Even research and commentary focusing on the same data employed by Whitford and Ochs (aggregate statistics on clemency, arranged by fiscal year, originating from the Department of Justice) were ignored<sup>390</sup> or, in one instance, swiftly dismissed as being merely “historical.”<sup>391</sup> Similarly, Erler’s piece cited only five works from the entire literature, without reference to three of four previous studies that employed the same data set—including Whitford and Ochs!<sup>392</sup> This means the clemency literature can now boast of having two multivariate statistical analyses in print, but neither is particularly connected to the rest of the literature, or even to each other.

The consequences of a lack of communication with the previous literature were obvious. There was so little of substance regarding clemency in the Whitford and Ochs piece, it might be better described a statistical test of a theory regarding the residual effects of “[inter]institutional signaling” that just *happened* to employ aggregate data on clemency.<sup>393</sup> The authors claimed to move “beyond [the] anecdotal evidence” that contributed to the “belief” or “widespread conventional wisdom” that presidential pardons were “political”—without explaining what exactly that meant, or identifying anyone who held such a view, especially in relation to broad trends in aggregate data.<sup>394</sup>

The statistical model found the percentage of applications denied in fiscal years from 1954 through 1994<sup>395</sup> was correlated with such factors as

388. Normally, journal editors send un-attributed manuscripts to two or three anonymous reviewers, persons with expertise in a particular field of study and/or adept at a statistical technique employed by the author(s). Reviewers who are substantive experts ensure the related literature on the topic is acknowledged in a competent fashion and fairly reviewed. In most instances, they also ensure that the piece flows reasonably from the previous literature and/or provides some significant improvement to it. Methodological experts, of course, ensure statistical techniques have been correctly applied and interpreted.

389. Whitford & Ochs, *supra* note 386, at 843–46.

390. Ruckman, *supra* note 306; Morris, *supra* note 320.

391. Whitford & Ochs, *supra* note 386, at 829 (in reference to Ruckman, *supra* note 306). Whitford and Ochs claimed political scientists had been “notably silent in recent years on the political determinants of the use of the power to pardon”—a dubious statement at best. Yet, at page 836, they observed (without a reference) the notion that conservative presidents were “less likely to exercise the power of the pardon” was “supported in the literature.”

392. Erler, *supra* note 387, at 446–48.

393. Whitford & Ochs, *supra* note 386, at 832.

394. *Id.* at 825–26.

395. The dependent “variable [was] constructed by adding the clemency applications pending and received to obtain the processed applications; then, dividing the number of applications denied by the number of applications processed. This variable is then transformed to the logarithm

the percentage of lines in “the *State of the Union Address* dedicated to the problem of crime and criminal justice concerns,”<sup>396</sup> the percentage of cases the Supreme Court heard in a given year concerning criminal justice issues (but excluding the due process rights of prisoners),<sup>397</sup> the percentage of entries in a random sample of the *New York Times Index* that dealt with criminal justice issues,<sup>398</sup> the percentage of *Gallup* respondents who named crime as “the most important problem [that faced] the nation,”<sup>399</sup> and the national homicide rate.<sup>400</sup> The exercise led Whitford and Ochs to the conclusion that the practice of pardon was “constitutional, yet political” and “unilateral, yet constrained.”<sup>401</sup>

Erler also examined aggregate data on pardons, from 1953 to 2000, arranged by fiscal year.<sup>402</sup> Whatever the weaknesses in her bibliography, she at least displayed greater sensitivity to (if not outright awareness of) some of the concerns of the many scholars who had written before her. In her view, the issuance of pardons had “dropped precipitously since Ronald Reagan took office in 1980.”<sup>403</sup> On the other hand, she found “no corresponding decline in the number of clemency applications.”<sup>404</sup> Erler also found that, in half of the administrations in her study, “the highest pardon rate . . . occur[red] during the final year in office.”<sup>405</sup>

She then tested two models of the clemency process, one “which identif[ied] the president as the main decision maker” and a second which “identif[ied] officials within the Justice Department as the most important set of actors in the pardons process.”<sup>406</sup> The first model controlled for the lame duck status of presidents, presidential approval ratings, war, and the political party of the president.<sup>407</sup> The second controlled for the crime rate, the beginning of the term, and the number of applications pending (workload).<sup>408</sup> Each model was applied to the number of applications per fiscal year, the percentage of applications approved, and the number of pardons granted.<sup>409</sup>

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of the odds, given the bounding implicit in a measure of grouped data that are expressed as a proportion.” *Id.* at 830.

396. *Id.* at 832.

397. *Id.* at 834, 842.

398. *Id.* at 834.

399. Whitford & Ochs, *supra* note 386, at 834.

400. *Id.* at 835.

401. *Id.* at 841.

402. Erler, *supra* note 387, at 431.

403. *Id.*

404. *Id.* at 431–32.

405. *Id.* at 433.

406. *Id.* at 434, 437.

407. *Id.* at 434–37.

408. Erler, *supra* note 387, at 437–39.

409. *Id.* at 440.

Erler found the “presidential model” did an “adequate job of predicting the number of applications received.”<sup>410</sup> None of its variables, however, were statistically significant with respect to the percentage of applications approved or the number of pardons granted.<sup>411</sup> When Erler retested the model for the number of pardons controlling for the Ford and Carter Vietnam amnesties the war variable was statistically significant.<sup>412</sup> Increases were associated with war.<sup>413</sup> Decreases were associated with Republican administrations and (unexpectedly) lame duck status.<sup>414</sup>

On the other hand, the variables in the “agency model” (crime rate, beginning of the term, application pending, and number of applications denied) were statistically significant with respect to both the number of applications and the percentage of applications approved.<sup>415</sup> In a final model, these variables remained significant when controlling for changes in the rules for the pardon process in 1983.<sup>416</sup> Erler concluded in the “vast majority of cases the president act[ed] merely as a rubber stamp at the end of a long and complex process.”<sup>417</sup> The exercise of the pardon power was thus best thought of as “the last step of a highly bureaucratized and routinized process.”<sup>418</sup>

Jeffrey Crouch’s 2008 *Presidential Studies Quarterly* article on presidential “misuse” of the pardon power<sup>419</sup> was somewhat of a prelude to an extended discussion in his 2009 book, *The Presidential Pardon Power*.<sup>420</sup> Crouch’s “main argument” was that modern presidents had “abused” the pardon power “to protect themselves or their subordinates or to reward [political] supporters.”<sup>421</sup> In his view, the power had become a “political weapon” in the post-Watergate world, which was “different from what preceded it.”<sup>422</sup> More specifically, pre-Watergate pardons had been granted “as ‘acts of mercy’ for the individuals involved, or granted in ‘the public interest,’” principles from which post-Watergate pardons had “strayed.”<sup>423</sup> Crouch’s analysis of Watergate, special counsel investigations, Iran-Contra, FALN, Clinton’s last-minute pardons, and George W. Bush’s commutation

410. *Id.*

411. *Id.* at 439–40.

412. *Id.*

413. *Id.* at 440.

414. Erler, *supra* note 387, at 440–41.

415. *Id.* at 441–42.

416. *Id.* at 444, Table 3.

417. *Id.* at 446.

418. *Id.*

419. Jeffrey Crouch, *Presidential Misuse of the Pardon Power*, 38 *PRESIDENTIAL STUD. Q.* 722 (2008).

420. JEFFREY CROUCH, *THE PRESIDENTIAL PARDON POWER* (2009).

421. *Id.* at 4, 9.

422. *Id.* at 4.

423. *Id.* at 64–65.

of Scooter Libby's sentence rendered his work a suitable companion to Humbert's classic.

Given the basic argument, Crouch's commentary on potential solutions (or "reforms") was especially important. After he noted examples of attempts to "involve Congress in clemency decisions or otherwise limit" the pardon power, Crouch argued such proposals typically threw off the "existing balance of powers and [went] against the separation-of-powers doctrine."<sup>424</sup> "Self-interested clemency decisions may indeed reveal a weakness" in the framers' belief that "impeachment would be an adequate check for egregious abuses of the clemency power[.]"<sup>425</sup> but it was not a "fatal flaw." Said Crouch: "[w]hen a president abuses the clemency power, we need to decide that his actions will trigger real sanctions . . . . It is only by punishing presidents who exploit the clemency power that we can uphold the rule of law, and—ultimately—preserve and defend our Constitution."<sup>426</sup> Crouch's 2011 examination of George W. Bush's pardon—and "unpardon"—of Isaac Robert Toussie assessed the validity of the legal claim that presidential pardons must be "delivered" and "accepted" before they are considered valid.<sup>427</sup> His discussion of the particulars of the case and various arguments were punctuated by an informative discussion of the modern clemency process.<sup>428</sup>

Crouch noted Jimmy Carter's attorney general, Griffin Bell, passed his "clemency tasks and overseeing responsibilities" to the deputy attorney general.<sup>429</sup> The end result was that the task of advising the president on pardons was assumed by "lower-ranking" officials who were "more concerned with punishment than mercy."<sup>430</sup> There followed a "tough on crime" mentality (during the Reagan administration) as well as "harsher drug sentences" and "tighter sentencing requirements."<sup>431</sup> Toss in a "vigilant press corps" always in search of a "gaffe," and the result was a "dysfunctional Department of Justice" and a political environment that excelled in its ability to "choke off" grants of federal executive clemency.<sup>432</sup>

In response, Crouch insisted the president, while "ultimately responsible—and accountable—for clemency decisions," had a "duty to use the

424. *Id.* at 147–48.

425. *Id.* at 149.

426. CROUCH, *supra* note 420, at 149.

427. Jeffrey Crouch, *The Toussie Pardon, "Unpardon," and the Abdication of Responsibility in Clemency Cases*, 38 CONGRESS & THE PRESIDENCY 77, 77 (2011).

428. *Id.* at 92–95.

429. *Id.* at 93.

430. *Id.* at 93–94. It should be noted that a large portion of this section references the work of Margaret Colgate Love, a former U.S. Pardon Attorney. See Margaret Colgate Love, *Fear of Forgiving: Rule and Discretion in the Theory and Practice of Pardoning*, 13 FED. SENT'G REP. 125, 126 (2001) (discussing the tension present in the pardon power that emerges from the duty to balance law enforcement with mercy).

431. Crouch, *supra* note 427, at 94.

432. *Id.* at 94–95.

clemency power vigorously.”<sup>433</sup> Crouch also argued the “regular” use of clemency could actually protect the president from missteps and allow the public to develop “confidence” that clemency decisions are “fair.”<sup>434</sup> More interestingly, he reasoned the steady, consistent exercise of clemency would render the public less “suspicious or cynical” when “controversial” grants were made.<sup>435</sup>

Anthony J. Eksterowicz and Robert N. Roberts agreed that the pardon power had “become embroiled in a much larger battle related to the ongoing political polarization of American politics.”<sup>436</sup> After consideration of the Iran-Contra pardons and Clinton’s controversial grants, however, they recommended the creation of an “advisory panel” as a means to address the “strong resistance of the Department of Justice to pardons.”<sup>437</sup> Eksterowicz and Roberts discussed other potential reforms, but were clearly less specific or certain as to their need. They suggested, for example, that a ban on pre-conviction pardons would be a “least drastic option.”<sup>438</sup> A constitutional amendment might ban pardons during periods of presidential transition.<sup>439</sup> Without much explanation, they also threw out the possibility of disallowing pardons if the president was “directly or indirectly involved” with potential recipients.<sup>440</sup>

The most recent article on the pardon power published by a political scientist focused on the idea of “seasonal clemency.”<sup>441</sup> Working with a data set of individual clemency warrants from 1931 to 2009, gathered in conjunction with a research team at the University of Chicago, P.S. Ruckman, Jr. found that one out of every two pardons granted over the last thirty-nine years had been granted in the month of December.<sup>442</sup> This skew toward a single month was even more pronounced in recent administrations,<sup>443</sup> and was *not* accounted for by fourth-year surges in pardon activity.<sup>444</sup> Additional evidence was provided to show that the skew toward December was not so much a function of trends in pardon applications or even decision making in the Department of Justice. It was, instead, a matter

433. *Id.* at 91–92.

434. *Id.*

435. *Id.* at 92.

436. Anthony J. Eksterowicz & Robert N. Roberts, *The Specter of Presidential Pardons*, 6 WHITE HOUSE STUD. 377, 377 (2006).

437. *Id.* at 388.

438. *Id.*

439. *Id.*

440. *Id.*

441. P.S. Ruckman, Jr., *Seasonal Clemency Revisited: An Empirical Analysis*, 11 WHITE HOUSE STUD. 21 (2011).

442. *Id.* at 29.

443. *Id.* at 28, Figure 2.

444. *Id.* at 27–29.



of the White House sitting on pardons throughout the year, delaying their release until December arrived.<sup>445</sup>

Echoing Crouch, Ruckman argued that pardons should be granted more frequently, and spread more evenly throughout the term, dispelling the popular notion that they are “gifts” (some being deserved and others perhaps not).<sup>446</sup> The need for pardons was exacerbated by an increasingly federalized criminal code, the booming prison population, and the negative impact of mandatory minimum and three-strikes laws.<sup>447</sup>

### III. WHAT POLITICAL SCIENTISTS KNOW (AND DON'T KNOW)

In the pages above, I have reviewed the literature on clemency produced by political scientists. In addition, I have reviewed literature on clemency written by individuals outside of the discipline but appearing in political science journals. Now, I will provide an overview of this body of work with an emphasis on prominent findings and conclusions.

Political scientists have generally been comfortable with the idea that clemency powers are an integral part of our system of checks and balances and separation of powers. To some, the use of the death penalty renders such powers an absolute necessity.

While most have seen pardon abuses as rare exceptions, almost all agree that specifically amending the clemency power is more desirable than abolishing it altogether, or even instituting major changes. Some go so far as to see a distinct duty to pardon and have been willing to define abuse of the pardon power in such a way as to include *failure* to act when appropriate or necessary.

The literature on clemency displays a steady, consistent concern about news media reaction to (and potential impact of news media on) the use of pardons. The clear anxiety is that media will rarely be as fair and accurate as they could be,<sup>448</sup> and, as a result, gubernatorial popularity and civic understanding and acceptance of clemency will suffer. Even worse, the quality of justice may be threatened.

Finally, there has been a clear sense that the use of parole had (and perhaps *should* have) a negative impact on the use of clemency. At the state level, several political scientists have conducted several surveys of clemency powers. Invariably, these exercises have uncovered a wide range of

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445. *Id.* at 29.

446. *Id.* at 35.

447. See Ruckman, *supra* note 441.

448. For example, reporting that Arkansas Governor Mike Huckabee “pardoned” Maurice Clemmons, who then murdered four police officers, will always sound more provocative/interesting than reporting that Huckabee merely commuted Clemmons’ 108-year prison sentence to make him eligible for parole, and that the State Parole Board released Clemmons, not once, but *twice* (after a parole violation). The Parole Board members are nameless and faceless. Huckabee, however, was a Republican presidential hopeful.

practices. Most of the literature on clemency in the states has been sympathetic to the Progressive idea of creating clemency boards to assist governors in decision making in order to reduce the possibility of “abuse,” ease the workload of governors, to deflect criticism, and/or to generally increase the quality of decision making. There is little sense, however, that state procedure and practice informs federal procedure and practice (or should).

At the federal level, multivariate statistical analyses suggest the pardon power is unilateral yet somewhat affected (if not actually limited) by subtle signals sent by other political institutions, and that presidential decisions typically represent the last step of a highly bureaucratized and routine process.

Political scientists have been cognizant of a clear decline in the use of the pardon power. Today, the typical act of federal executive clemency is a presidential pardon, granted to an individual who has already served his/her time (if time was required), taken care of all associated fines, and has integrated back into the community as a law abiding citizen (as documented by character affidavits and an FBI investigation). The effect of the pardon is to simply restore the recipient’s civil rights.<sup>449</sup> Meanwhile, at the federal level, commutations of sentence, once quite commonplace, have become exceedingly rare.

Of equal importance, political scientists have also given some attention to increases in the number of applications for clemency, the number of cases left pending from one fiscal year to the next, as well as increases in the overall workload of the OPA. These interests follow quite naturally from the discipline’s general view that the non-decisions of decision makers can constitute a substantive category of decision making in and of itself.

Political scientists from the 1940s to present have expressed concern that the clemency process may be too heavily influenced by federal judges and U.S. attorneys. Most recently, they have taken the position that pardons and commutations of sentence should be granted much more often and they should be granted on a regular basis throughout the term. The justifications for greater use range from concern for equilibrium in our system of checks and balances to the over-criminalization of the law, the economic burden of booming prison population and the harmful effects of mandatory sentencing laws.

More recently, political scientists have recommended that presidents should give some attention to systematic outlining of broad goals with respect to the exercise of the pardon power and the creation of associated decision-making guidelines. Put another way, the pardon power should not be so much of an afterthought and should be taken more seriously.

There is some evidence to suggest the partisan identification of the president has an impact on clemency policy (Democrats being more gener-

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449. *E.g.*, the right to vote, serve on a jury, hold public office, own a hunting rifle, etc.

ous with pardons than Republicans). However, few other personal attributes of presidents have been tested, or even discussed, in any systematic manner.

While some authors have placed the primary blame for the overall decline in clemency on *recent* administrations, Figure 1 strongly suggests the downward trend actually began in the early 1900s. Figure 1 also suggests, if anything, the decline has probably continued for a *variety* of reasons that have been prominent at different points in time (the advent of probation and parole, the “law and order” campaigns of Richard Nixon, the dominance of the “retributive justice” model, a series of Republican administrations, the presence of former Governors in the White House, changes in Department of Justice rules, etc.).

Bill Clinton’s last-minute pardon splurge was far from “normal,” but the evidence shows that, throughout history, most presidents *have* granted the largest number of pardons in the fourth and final year of the term. The evidence also suggests the percentage of decisions that are positive (grants) tends to increase throughout the term. While some attribute this to the intentional exercise of discretion in a manner that avoids accountability, regular change in administrations, learning curves, and policy prioritization might account for such trends just as well.

Pardon activity seemed to increase in the months of May and June, previous to the 1930s. However, one out of every two acts of clemency granted for the last thirty-nine years has been granted in the month of December. This trend clearly remains, even if one excludes Decembers that occur in the fourth and final year of the term.

#### IV. CLEMENCY WRITING AND RESEARCH: THE FUTURE

Despite the widespread attention given to (and utter fascination with) the president and the presidency, relatively few political scientists have brought their research and writing skills to the sub-field known in the discipline as “presidential studies.” The institution itself features hurdles between researchers and rigorous scientific understanding that simply do not exist when one redirects one’s attention to the legislative or judicial branches.<sup>450</sup> Of course, even fewer political scientists have focused on the pardon power in particular—all of the recent wildly controversial pardons notwithstanding.<sup>451</sup>

It follows that the major journals of the discipline have rarely featured articles on the president, or the presidency.<sup>452</sup> Moreover, as demonstrated above, the clemency literature to date has, at least arguably, produced very

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450. Freeman, *supra* note 4, at 26–27.

451. I would number current political scientists with a primary interest in researching and writing on the pardon power at about two—myself and Professor Jeffrey Crouch.

452. Studies on presidential elections are, of course, abundant, but primarily focus on voting behavior (turnout and choice).

little in the way of systematic cumulative knowledge and—for many—is *most* distinctive for its lack of methodological rigor. A large number of the writings reviewed here are best described as legal or historical, and they feature a considerable amount of repetition (see *infra* Table 1).<sup>453</sup>

A plurality of the pieces utilized the case study approach. However, as interesting as many of those pieces are, they have uncovered little that is generalizable—a classic potential weakness of the approach. Throw in several more pieces that are primarily normative and a mere tip of the literature holds its head above the level of descriptive analysis.

Perhaps parents should not let their babies grow up to write and research on pardons!<sup>454</sup>

TABLE 1  
Books, Monographs, and Articles Written by Political Scientists and  
Articles Appearing in Political Science Journals  
On the Pardon Power (State and Federal), 1910–2011

Normative Analysis	Legal Analysis	Historical Approach	Case Study Approach	Descriptive Analysis	Aggregate Data Analysis	Multivariate Statistical Analysis
Lieber (1967)	Barnett (1910)	Scoville (1914)	Griffin (1928)	Lieber (1853)	Humbert (1941)	Whitford & Ochs (2006)
Roosevelt (1913)	Brown (1940)	Colburn (1976)	Stewart (1931)	Jensen (1922)	Pederson (1977)	Erler (2007)
Hadley (1913)	Gathings (1949)	Adler (1989)	Stewart (1930)	Stoke (1927)	Ruckman (1995)	
Smithers (1914)	Adamany (1963)	Sarat (2005)	Ewing (1933)	Wilcox (1931)	Ruckman (1997)	
Smith & Johnson (1989)	Orman & Rudoni (1979)	Crouch (2008)	Schichor & Ranish (1980)	Scott (1952)	Morris (1998)	
Johnson & Smith (1999)	Joyner (1979)		Ruckman & Kincaid (1999)	Dinan (2003)	Ruckman (2011)	
Breslin & Howley (2002)	Rozell (1994)		Baumgartner & Morris (2001)	Sarat (2005)		
Eksterowicz & Roberts (2008)			Fisher (2002)			
			Genovese & Almquist (2002)			
			Crouch (2011)			

453. This repetition is, likewise, present in many articles written by members of the legal profession that appear in law reviews.

454. All due respect to Ed and Patsy Bruce.

**NOTE:** *Not all of the pieces reviewed here are classified and the categorizations employed are not thought to be entirely pure. In addition, some works could easily fit into more than one category.*

On the other hand, there are reasons to retain hope (and even have moderately high expectations) for future political science research and writing on clemency powers. The recent publication of multivariate statistical models of clemency policy—whatever their shortcomings—*has* to be a positive sign for the literature as a whole. The way has certainly been paved for the testing of more substantive and literature-based multivariate models, possibly even in the pages of the more prestigious journals. What is *not* needed is more multivariate analysis disconnected from the literature, and high on theory and mathematical complexity, while short on substance and insight.

For years, research and commentary on clemency produced by political scientists and those in the legal profession (primarily law professors) has been something like ships sailing past each other, unknowingly, in choppy water. In the last five to ten years, however, it has been increasingly common to see members of *both* professions quoted in the same articles of the Nation's newspapers, referencing each other's scholarly work and findings, and engaging in public collaborations—such as the symposium recently held at the University of Saint Thomas School of Law.<sup>455</sup> This is, of course, *exactly* the kind of intellectual cross-pollination that the founders of political science desired for the discipline and demanded from their students.

The graduate student who bothers to make the effort can learn quickly enough that there has been no better time to conduct solid empirical research on presidential pardons. As a result of my own effort, the effort of Sam Morison (former pardon advisor in the OPA), and the effort of a team at the University of Chicago (headed by the Honorable Richard A. Posner and William Landes), researchers can, for the first time, develop—or benefit from an already created—researchable data set of individual pardons from George Washington to Barack Obama. The benefits of this breakthrough in available information have been seen not only in professional journals, but also in the pages of *Congressional Quarterly*,<sup>456</sup> on *The Rachel Maddow Show*,<sup>457</sup> and in episodes of the popular PBS television show *History Detectives*.<sup>458</sup>

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455. Symposium, *Sentence Commutations and the Executive Pardon Power*, 9 U. ST. THOMAS L.J. 665 (2012).

456. P.S. Ruckman, Jr., *Presidential Pardons Chart*, 59 CONGRESSIONAL Q. 408 (2001).

457. *The Rachel Maddow Show: On Cancelled Pardons* (MSNBC television broadcast Dec. 30, 2008).

458. *History Detectives: Native-American Pardon* (PBS television broadcast 2009), available at <http://www.pbs.org/opb/historydetectives/video/1192734705/>; *History Detectives: Prohibition Pardon* (PBS television broadcast 2011), available at <http://www.pbs.org/opb/historydetectives/video/2146335184/>.

Nonetheless, it would perhaps be more ideal if the Department of Justice would invest time and resources for the creation of a definitive, “official” data set of individual pardons. George Lardner, Jr., an associate at the *Center for the Study of the Presidency and Congress* and former *Washington Post* reporter has, for example, discovered a clemency warrant issued previous to the earliest warrant found in State Department records.<sup>459</sup> Aggregate data posted on the U.S. Pardon Attorney’s webpage are—in addition to being awkwardly arranged by fiscal year—clearly erroneous.<sup>460</sup> When an applicant manages to bypass the normal processes to extract a pardon from the president, no one should have to guess how often that has happened in the past, or wonder if there are particular (knowable and researchable) circumstances that encourage such behavior.

On a related front, it is likely that political scientists will explore the potential benefits of litigation from 2008. Mr. Lardner submitted a Freedom of Information Act (FOIA) request to the OPA, requesting the identities of individuals whose requests for pardons and commutations of sentence were denied by George W. Bush. The Pardon Attorney declined to deliver any such list (although one was maintained)<sup>461</sup> so Lardner appealed the denial, waited a while, and filed suit. His victory in federal court bodes well for ambitious and creative researchers. If we are fortunate, we may soon be able to enjoy the publication of Lardner’s history of presidential pardons, which is certain to be a very fine work, and may itself generate a wave of research.

There are also signs in the political environment that clemency will enjoy prominence in policy debates. *The Fair Sentencing Act* of 2010 (Public Law 111-220) reduced the disparity between the amount of crack cocaine and powder cocaine needed to trigger federal criminal penalties from a 100:1 weight ratio<sup>462</sup> to an 18:1 weight ratio, and eliminated the five-year mandatory minimum sentence for simple possession of crack cocaine.

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459. P.S. Ruckman, Jr., *Significance of the Lardner Warrant*, THE PARDON POWER BLOG (Nov. 24, 2010), <http://www.pardonpower.com/2010/11/significance-of-lardner-warrant.html>.

460. For example, DOJ data credit Theodore Roosevelt with 1,099 pardons, commutations, respites and remissions of fines and forfeitures. CLEMENCY STATISTICS: THEODORE ROOSEVELT, <http://www.justice.gov/pardon/statistics.htm>. On the other hand, the *Annual Report* of the Attorney General (from 1902 to 1909), credits Roosevelt with only 1,033. 1902–1909 ATT’Y GEN. ANN. REP. The difference is entirely accounted for by the fact that the DOJ data combine clemency actions taken by Presidents McKinley (in fiscal year 1902) and Taft (in fiscal year 1909), before and after Roosevelt came into office.

461. Citing FOIA Exemptions 6 and 7(C) as the basis for withholding the information. See Freedom of Information Act, 5 U.S.C. §§ 552(b)(6), 552(b)(7)(c) (2012) (listing the exemptions cited by the Pardon Attorney for withholding a list of George W. Bush’s denied pardons).

462. If a person was convicted of felony possession of five grams of crack, he or she was sentenced to a minimum prison term of five years, but it would take 500 grams of powdered cocaine to get the same sentence.

The pardon power would, of course, be the perfect tool for adjusting sentences retroactively, especially for any president who, as a candidate, was openly critical of the 100:1 ratio, and said things like:

If you're convicted of a crime involving drugs, of course you should be punished. But let's not make the punishment for crack cocaine that much more severe than the punishment for powder cocaine when the real difference between the two is the color of the skin of the people using them. Judges think that's wrong. Republicans think that's wrong. Democrats think that's wrong, and yet it's been approved by Republican and Democratic Presidents because no one has been willing to brave the politics and make it right. That will end when I am President.<sup>463</sup>

The conservative desire for economic austerity and the increasing recognition that a booming prison population can be an economic burden has caused some members of "the right" to embrace clemency in a manner that might not have been possible in the heyday of Richard Nixon's "law and order" campaigns.<sup>464</sup> Today, the *Right on Crime* website<sup>465</sup> offers a "conservative case for reform." In doing so, it takes an interest in "treatment," and the "reform" of "amenable offenders" who can "return to society." The "soft" on criminals charge will probably always be around, but it is not nearly so loud and ever-present.

Finally, as this review documents, political scientists have traditionally not shied away from normative issues and debates related to the pardon power, regardless of the broad trends in the discipline or the tastes of the editors of the major journals. If anything, the cross-pollination of disciplines mentioned above will only *encourage* participation on these fronts in the future. That is because the members of the legal profession and the pages of law reviews have done an outstanding job of raising consciousness about such things as the negative consequences of three-strikes laws, mandatory minimum sentencing, and the use (and non-use) of clemency in death penalty cases. It is also safe to say that, today, one generally finds members of the legal profession among the most visible, authoritative commentators calling for greater, more serious use of clemency powers (at the state and federal level).

In sum, there is room for optimism that political science research on the pardon power will indeed blossom into a more systematic, empirical-

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463. Senator Barack Obama, Address at Howard University (2007) (transcript available at <http://www.howard.edu/newsroom/news/2007/071001RemarksOfSenatorBarackObama.htm>). See also Mimi Hall, *Convict Petitions Obama to Reduce Crack Penalty*, USA TODAY, Apr. 28, 2010, [http://www.usatoday.com/news/washington/2010-04-27-clemency\\_N.htm](http://www.usatoday.com/news/washington/2010-04-27-clemency_N.htm) (discussing the unequal drug laws and a convict's plea to Barack Obama to equalize the penalties).

464. See David Keene, *Left and Right Agree on Criminal Justice Reforms*, WASH. TIMES, Aug. 15, 2012, available at <http://www.washingtontimes.com/news/2012/aug/15/left-and-right-agree-on-criminal-justice-reforms/>.

465. THE CONSERVATIVE CASE FOR REFORM, <http://www.rightoncrime.com/>.

based enterprise and the result will be growth in cumulative knowledge and understanding, maybe even some theory building. At the same time, there is every reason to expect political scientists will continue to mix it up with lawyers and, to some degree journalists, in analyses of controversial individual acts of clemency, and will take a keen interest in any attempt to reform or amend the power, at the state or federal level.