

AMERICAN BAR ASSOCIATION JUSTICE KENNEDY COMMISSION

Report to the House of Delegates

Recommendation

1 RESOLVED, That the American Bar Association urges states, territories and the federal
2 government to establish standards and provide an accessible process by which prisoners may
3 request a reduction of sentence in exceptional circumstances, both medical and non-medical,
4 arising after imposition of sentence, including but not limited to old age, disability, changes in
5 the law, exigent family circumstances, heroic acts, or extraordinary suffering; and to ensure that
6 there are procedures in place to assist prisoners who are unable to advocate for themselves.

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9 FURTHER RESOLVED, That the American Bar Association urges expanded use of the
10 procedure for sentence reduction for federal prisoners for “extraordinary and compelling
11 reasons” pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) and that:

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13 (1) the Department of Justice ensure that full and fair consideration is given to prisoner
14 requests for sentence reduction, including the implementation of procedures to assist
15 prisoners who are unable to advocate for themselves; and

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17 (2) the United States Sentencing Commission promulgate policy guidance for sentencing
18 courts and the Bureau of Prisons in considering petitions for sentence reduction,
19 which will incorporate a broad range of medical and non-medical circumstances.

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22 FURTHER RESOLVED, That the American Bar Association urges states, territories and the
23 federal government to expand the use of executive clemency and:

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25 (1) establish standards governing applications for executive clemency, including both
26 commutation of sentence and pardon; and

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28 (2) specify the procedures that an individual must follow in order to apply for
29 clemency and ensure that they are reasonably accessible to all persons.

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32 FURTHER RESOLVED, That the American Bar Association urges states, territories and the
33 federal government to establish an accessible process by which offenders who have served their
34 sentences may request pardon, restoration of legal rights and privileges, and relief from other
35 collateral disabilities.

37 FURTHER RESOLVED, That the American Bar Association urges bar associations to establish
38 programs to encourage and train lawyers to assist prisoners in applying for pardon, restoration of
39 legal rights and privileges, relief from other collateral sanctions, and reduction of sentence.

REPORT

Justice Kennedy observed that the legal profession has an “obsessive focus” on the process for determining guilt or innocence, to the exclusion of what happens after a conviction has become final and the prisoner is taken away. When a mandatory sentence has been imposed, the law may provide no mechanism for a mid-course correction, years down the road when the prisoner’s circumstances (or society’s values) may have changed. To address this shortcoming in the legal system, Justice Kennedy asked the ABA “to consider a recommendation to reinvigorate the pardon process at the state and federal levels.” Noting that the pardon process in recent years seems to have been “drained of its moral force,” and that pardon grants have become “infrequent,” he remarked memorably that “[a] people confident in its laws and institutions should not be ashamed of mercy.”

Although Justice Kennedy’s comments about the pardon power specifically addressed the situation of prisoners under sentence – those who have not served their full sentence but have served “long enough,” and who deserve “another chance” – our Commission also considered the role that pardon plays in recognizing and rewarding rehabilitation for convicted persons who have served their time and successfully reentered the community.

At first blush, Justice Kennedy’s suggestion that pardon should play a role in revising and reducing prison sentences seems to fly in the face of the fundamental tenets of current determinate sentencing policies: i.e., long prison sentences should be imposed on those who commit crime, and that those sentences should be largely served in full. But, a close examination of Justice Kennedy’s address indicates that he did not call for a return to a system whereby individuals sentenced to a specific term of years might predictably expect to be released early on parole. As we understand Justice Kennedy’s message, it is that, wholly aside from the question whether some system of parole should be employed in a given jurisdiction, there is good reason to consider use of the pardon power to provide a mechanism for early release in the same kinds of compelling equitable circumstances that historically have resulted in executive mercy.¹

Although Justice Kennedy identified the chief executive’s pardon power as a method of sentence reduction, the Commission concluded that there are other possible mechanisms for reducing a prison sentence mid-term where equitable circumstances seem to warrant it. For example, the legislature could authorize periodic administrative review of a prisoner’s situation, as is the case with military prisoners. Or, it could empower a court to consider prisoner petitions advancing extraordinary and compelling reasons for sentence reduction, as is the case in the federal system.²

¹ See also *Dretke v. Haley*, ___ U.S. ___, slip op. at 2 (May 3, 2004)(Kennedy, J., dissenting)(“Among its benign if too-often ignored objects, the clemency power can correct injustices that the ordinary criminal process seems unable or unwilling to consider.”).

² See 18 U.S.C. § 3582(c)(1)(A)(i). The court’s authority under this provision to review a prisoner’s petition seeking sentence reduction depends upon a motion being brought by the Federal Bureau of Prisons (BOP). In the absence of guidance, BOP has interpreted its mandate under this statute very narrowly. See note 8, *infra*.

Whatever the mechanism chosen, the fundamental question for the Commission was whether the criminal justice system in the United States would be improved if it included some opportunity to re-examine sentences years after they are imposed, not only for errors in their original imposition, but in light of intervening developments in a prisoner's situation. In a word, should there be some readily available mechanism by which a court or executive agency could review a prisoner's situation, perhaps years after the sentence was imposed, to determine whether it warrants a gesture of forgiveness or mercy.

Our conclusion is that such a mechanism is desirable in a comprehensive criminal justice system. In the movement toward "truth in sentencing" and the elimination of disparity, American criminal justice has gravitated toward ever-longer sentences. The practical absence of post-sentence review in many jurisdictions presents a risk that, as Justice Kennedy noted, some people will serve sentences that are too long and be denied a second chance that would benefit both them and the community. Justice Kennedy pointed out the number of people incarcerated in the United States and how unusually high a percentage it is when compared to the rest of the world, and the Commission has provided some additional detail on the growth of imprisonment in our Report and Recommendations Regarding Punishment, Incarceration and Sentencing.

Justice Kennedy's concern about the need to breathe new life into the pardon process is equally relevant in the context of offender rehabilitation and reentry, since in many jurisdictions pardon is the only way of regaining rights and privileges lost as a collateral consequence of conviction. Offenders returning to the community may be ineligible for many jobs and housing and even welfare benefits by virtue of their conviction, and are often subject to unreasonable discrimination. Offenders subject to such continuing disabilities may understandably feel that they can never discharge their full debt to society, a circumstance that hinders their successful reintegration into the free community and may even lead them back to crime.

The Commission reviewed the state of pardoning in the United States and found that in most jurisdictions the pardon power is rarely utilized to reduce sentences or to promote reentry of individuals to the community. Although procedures are in place in all jurisdictions for convicted persons to apply for commutations and post-prison pardons, and although the pardon power appears to be administered efficiently in most jurisdictions, the end result is almost universally the same: i.e., with only a few exceptions the pardon process produces very few grants. The atrophy of the clemency function is troublesome not for its own sake, but because the legal system in many jurisdictions offers no dependable alternative relief.³

A. Background – The Changing Role of Pardon

³ The perceived need for pardon can be a useful barometer of the health of the legal system. See Kathleen Dean Moore, PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST 129 (1989) ("If pardons grew to an unmanageable number, one would have to be suspicious that the legal codes were seriously out of kilter with the moral code."); Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI. KENT L. REV. 1501, 1534 (while clemency is "ill-suited as a means to overcome wholesale legislative failures," it "may play a role in reopening channels of politics to systemic reform").

In *Harsh Justice*, Professor Whitman points out that throughout the 19th and well into the 20th century, pardon had a fully operational role in the American justice system.⁴ At a time when the legal system was relatively primitive, presidential and gubernatorial pardons were issued generously to cut short prison sentences and remit fines.⁵ Although the popular view of pardon was that it was an antidemocratic power that could easily be abused,⁶ in fact pardon operated efficiently and out of public view “as part of the ordinary management of the [prison] population.”⁷ In addition, pardon was the time-honored way that criminal offenders could regain their civil rights, and be restored to their place in society.

By the mid-point of the 20th century, the development of legal defenses such as duress and diminished capacity, the availability of appellate review of sentences in some jurisdictions, and the institution of administrative relief in the form of parole and probation in virtually all jurisdictions, made pardon less necessary to the fair and efficient functioning of the penal system. And, by the end of the 1970s, many states had enacted alternative judicial or administrative mechanisms for restoring rights to offenders who had served their time.

The pardon power never became entirely obsolete, however. It was the only remedy in some cases of hardship and in cases in which there were equitable grounds for relief that did not entitle an offender to a specific remedy. Moreover, pardon remained the primary means of restoring rights in many state jurisdictions, and the only restoration mechanism available to federal offenders.

By the end of the 20th century, clearly identifiable movements in both law and politics took their toll not only on the pardon power, but also on the entire notion of taking a second look at sentences. The most significant legal development was the movement toward determinate sentencing based on a retributive model of justice. During his campaign for President in 1968, Richard Nixon declared his intent to declare war on crime, which he did when he became President. That war has been continually fought by every President since. The war on crime had its own sub-war on drugs. The end result was abolition of parole and reduction in the use of probation in many jurisdictions, and a dramatic decline in the number of pardons granted in most jurisdictions.

⁴ James Q. Whitman, *HARSH JUSTICE* 183 (2003) (hereafter “Whitman”)

⁵Relying upon statistics compiled by philosopher Kathleen Dean Moore, Professor Whitman notes that “In the period from 1869 to 1900, 49 percent of federal pardon applications were granted, and in the last five years of the century, 43 percent of federal inmates received some kind of pardon.” Whitman, *supra* note 4 at 183, citing Moore, *supra* note 2 at 53. A 1939 study of release procedures by the federal government described pardon as “the patriarch of release procedures.” 3 U.S. Dep’t of Justice, *The Attorney General’s Survey of Release Procedures: Pardon* 295 (1939).

⁶ Objections to pardon were philosophical (18th century reformers like Beccaria objected that pardon interfered with the operation of the law) and practical (pardons benefited primarily persons of wealth and/or political connections). Whitman says that “[t]his belief that it was the well-connected who benefited from pardons was in fact false – which only makes the strength of the belief more striking.” Whitman, *supra* note 4 at 184.

⁷ Whitman, *supra* note 4, at 183 (“American officials needed pardoning, and they used it. But doing so touched a raw egalitarian nerve among Americans, as it would continue to do down to the Clinton pardons of 2000.”)

It was not inevitable that the advent of determinate sentencing and the abolition of parole should be accompanied by a diminished use of the pardon power. In theory, of course, the pardon power could have become more important, because without parole only use of the pardon power could provide a safety valve to protect against excessive sentences.⁸ But, the reality was that in the atmosphere created by the war on crime many legislators and executive branch officials were more concerned about being perceived as “soft” on crime, than they were worried about sentences being inappropriately long in particular cases.

Witnesses before the Commission made the point that highly publicized crimes often accounted for strong executive and legislative calls for increased punishment. Few voices of moderation can be identified in the aftermath of highly publicized crimes. This is not entirely surprising, given the evidence, however anecdotal it may be, that appearing soft on crime can be any political figure’s undoing. Many examples could be offered. One of the most memorable arose during the 1988 presidential campaign. The release of Willie Horton from a Massachusetts prison by former Governor Michael Dukakis became a cause celebre during the race between former Governor Dukakis and Vice President George H.W. Bush. The Bush campaign ads seized on Horton’s release and subsequent homicide – an undeniable fact – and identified Governor Dukakis as one of those who was “soft” on crime. In reality, Horton was not released as a result of any action by the Governor, but rather pursuant to an ordinary prison furlough, but the significance of this distinction appears to have escaped the Dukakis campaign. Whether or not the Bush campaign attacks were overdone, they certainly resonated with some people worried about public safety. The Willie Horton episode drove home what many politicians had recognized for many years: i.e., liberal use of the pardon power is unlikely to produce strong voter support. The political reality is that there are few criticisms of officials who say “no” to a clemency request, and there is considerable risk of political backlash if an offender released by action of the executive commits another crime. There no doubt have been some bold chief executives who continued the practice of pardoning to restore rights to rehabilitated offenders, but by the end of the 20th century even this attenuated function had atrophied in most jurisdictions.

The federal government led the retreat. Historically stable pardon grant rates fell dramatically during the Reagan administration, and continued to slide for the ensuing two decades.⁹ The decline in federal pardoning was, not accidentally, accompanied by a degradation

⁸ Scholars have proposed competing theories of clemency’s role in a retributivist system. On the one hand, Kathleen Dean Moore and Daniel Kobil have posited that clemency should function as an “extrajudicial corrective,” a final court of appeal for persons who have been unjustly convicted or whose punishment exceeds their just deserts. See Moore, *supra* note 2; Daniel T. Kobil, “*The Quality of Mercy Strained: Wrestling the Pardoning Power From the King*,” 69 TEX. L. REV. 569, 613 (1991). In contrast, Elizabeth Rapaport and Margaret Love have argued that clemency plays a redemptive role that is distinct from justice, and that governors or clemency commissions are not bound by the same desert-based considerations as might limit a court. See Rapaport, *supra* note 3, at 1519; Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President’s Duty to Be Merciful*, 27 FORDHAM URB. L. J. (2000).

⁹ During the Reagan and first Bush administrations there were only 16 commutations, compared to 111 during the preceding 12 years (Nixon, Ford and Carter), and 348 in the 12 years preceding that (Eisenhower (2), Kennedy and Johnson). President Clinton had granted only 21 commutations prior to the very end of his term, while President George W. Bush has granted none at all since he took office. Post-sentence pardons also declined, from just under

of the process for its administration, so that clemency policy and clemency recommendations are now effectively controlled by prosecutors. If federal prosecutors oppose clemency, it is extremely unlikely to be granted. There is no other generally available remedy for someone who has been convicted. The only statutory mechanism for federal sentence reduction is controlled by prison officials, who use it only in cases of imminent (and certain) death.¹⁰ There is no general mechanism for relief from disabilities imposed on convicted persons under federal law, either for state or federal offenders.¹¹

In the states, the practice of pardoning varies so widely that it is difficult to accurately offer many generalizations. However, two things appear to be true: 1) in almost every jurisdiction the instance of pardoning decreased markedly after 1990; and 2) the vitality of the pardon power in a particular state jurisdiction varies depending upon the extent to which its decision-maker is insulated from politics. Thus, pardons tend to be granted more regularly and generously in the five states where the pardon power is exercised by an independent board with no involvement by the governor,¹² than it is in the 22 states where the governor exercises the power subject to no procedural constraints.¹³ Pardoning tends to be somewhat more frequent in the ten states where the governor may act only upon the advice of a board,¹⁴ though sometimes the board doesn't recommend (Texas) or the governor denies in spite of a favorable Board

2000 in each of the two twelve-year periods from 1956-1968 and 1969-1980, to 467 between 1980 and 1992. Bill Clinton issued more than half of his 398 pardons on his last day in office. By the end of his third year in office, George W. Bush had granted 11 pardons, and denied 601 applications for pardon.

¹⁰ Under 18 U.S.C. § 3582(a)(1)(A), the sentencing court may reduce a defendant's sentence at any time upon motion of the Director of the Bureau of Prisons, for "extraordinary and compelling reasons." According to the statute that directs the United States Sentencing Commission to promulgate policy guidance for courts considering such motions, 28 U.S.C. § 994t, "rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." The Commission began a study of the issues in anticipation of issuing policy guidance in 2003, at the urging of the ABA Criminal Justice Section's Corrections and Sentencing Committee, but at the time of this writing had issued no proposals for comment. See Mary Price, "The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)," 13 FED. SENT. RPTR. 188 (2001).

¹¹ See Margaret Colgate Love, *Starting Over With a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB.L. J. 101 (2003). A few federal statutes specifically give effect to state provisions for pardon or restoration of rights. For example, under the Firearms Owners Protection Act of 1986, state convictions that have been expunged, set aside, or pardoned, or for which a person has had civil rights restored, do not constitute "convictions" for purposes of prosecution as a felon in possession. 18 U.S.C. § 921(20) (2000); James W. Diehm, *Federal Expungement: A Concept in Need of a Definition*, 66 ST. JOHN'S L. REV. 73, 99 (1992). In certain cases, an alien may avoid deportation based on conviction if he is pardoned. See Elizabeth Rapaport, *The Georgia Immigration Pardons: A Case Study in Mass Clemency*, 13 FED. SENT. REP. 184, 184 (2001).

¹² Alabama, Connecticut, Georgia, Idaho and South Carolina. In Georgia and South Carolina, the board of pardon grants more than half of the petitions for a post-sentence pardon that it receives. In another six states (Utah, Florida, Minnesota, Nebraska, Nevada and North Dakota), the Governor sits as one member of the clemency board.

¹³ In 13 of these 22 states the Governor may but is not required to seek the advice of a board (generally the Parole Board). In the other nine, and in the federal system, the chief executive's power is subject to no legal constraints at all.

¹⁴ Arizona, Delaware, Indiana, Maine, Massachusetts, Montana, Oklahoma, Pennsylvania, Rhode Island, Texas. In another seven states (Arkansas, Illinois, Iowa, Kansas, Michigan, New Hampshire, and Ohio), the governor is required to seek a board's advice, but may override its negative recommendation.

recommendation (Arizona) or the governor doesn't act at all (Delaware). Ironically, pardon has continued to perform a useful role in mitigating sentences only in jurisdictions that also have a healthy parole system, with the two forms of early release often administered by the same personnel.¹⁵

In sum, today the pardon power remains an important equitable remedy in theory, but, as a practical matter, it has become essentially unavailable to imprisoned offenders in almost every American jurisdiction.

Pardon's atrophy does not merely deny convicted persons the opportunity to seek shorter sentences; it also makes it difficult or impossible to avoid the collateral consequences of conviction. Though some states have experimented with administrative certificates of good conduct and judicial expungement or sealing, pardon still provides the most thorough and respectable form of relief from legal disabilities. Pardon also has a powerful symbolic value in restoring an offender's status in the community that even judicial restoration mechanisms do not share. As more and more people are convicted, and as collateral penalties continue to grow in number and severity, an increasing number of convicted individuals have a genuine need for the time-honored "second chance" offered by pardon. Yet, the realistic chance that the need will be met has decreased dramatically in many jurisdictions. In the federal system, although pardon is the only way to regain rights lost as a result of conviction, it has become for all intents and purposes a dead letter.

The Commission is persuaded that pardon must remain an essential component of any just system of punishment, particularly at a time when punishment appears harsh when judged against historical standards, collateral disabilities arising from a conviction are often disabling, and forgiveness is only possible through pardon. Recently, budget-driven reforms in some jurisdictions are mitigating the harshness of some sentences, and reformers in some jurisdictions are working hard to develop alternative sentence reduction mechanisms, including opportunities for prisoners to earn additional good time and to obtain judicial sentence modification. But no similar budgetary link has yet been made to encourage states to facilitate post-sentence restoration of rights. Federal sentencing has become increasingly rigid as well as severe, and federal forgiveness has for all practical purposes become a dead letter.

B. The Contemporary Need for a Pardoning Mechanism

The Commission concludes that every just system of punishment must include some accessible mechanism for reducing a prison sentence or mitigating other penalties in extraordinary circumstances, particularly those that could not be foreseen at sentencing. Such a safety valve was considered an essential component of a sentencing scheme prior to the advent of determinate sentencing. Today it remains essential, because no court is capable of predicting the changed circumstances that might transform a sentence that appears fair and reasonable at the

¹⁵ Georgia and Oklahoma, for example, appear to treat parole and commutation decisions more or less interchangeably. In Georgia, the pardon power is administered by an independent Board, and the Governor has no part in the process. In Oklahoma, the Governor retains the ultimate power, but the Parole Board effectively makes the release decision.

time of imposition into a cruel and unreasonable punishment that may have tremendously undesirable side-effects.

For example, a healthy prisoner sentenced to a term of imprisonment may develop a serious or deadly illness not foreseen at the time sentence was imposed; or, an inmate with a diagnosed illness or condition may suffer a turn for the worse to a degree unforeseeable at the time of sentencing. Similarly, when a custodial parent is sentenced to incarceration and leaves young children in the care of other family members, the death or serious illness of the care-taking family members may leave the children orphaned if the custodial parent's sentence is not modified. In some cases changes in the law that reflect society's new view of a particular crime are not made retroactive, leaving prisoners sentenced under an old regime effectively stranded.¹⁶ If a sentencing court is permitted to take into account serious health problems and exigent family circumstances in determining an offender's sentence in the first instance, it would seem both reasonable and just to provide a means of bringing these circumstances to the court's attention when they develop or become aggravated unexpectedly mid-way through a prison term. If society's view of the seriousness of a crime changes, it would seem fair (if not entirely efficient) to give those punished under a harsher regime a chance to win their freedom.

Today, in many determinate sentencing jurisdictions the pardon process is the only way that prisoners can have their claims of exigency considered. In such jurisdictions, pardon is necessary to the just and efficient functioning of the criminal justice system. But preliminary research indicates that even in those jurisdictions where the pardon process appears on the surface to be working efficiently, it rarely produces any grants.¹⁷

The Commission also recommends that, in addition to clemency, jurisdictions adopt a legal mechanism to permit individuals serving prison sentences to obtain a reduction of sentence for "extraordinary and compelling" reasons that were not foreseen at sentencing and to provide, as broadly as practicable, opportunities for offenders to apply for restoration of rights and relief from collateral sanctions. One model that could be considered is that employed by the military services, where prisoners come up for periodic review by an administrative board that is empowered to release them using either the parole or pardon authority. Another model is that set forth in 18 U.S.C. § 3582(c)(1)(A)(i), which empowers federal courts to entertain prison petitions for sentence reduction in certain situations, and is discussed below.

Just last year the ABA House of Delegates approved policy urging jurisdictions to evaluate their practices and procedures relating to prisoner requests for reduction or modification of sentence based on extraordinary and compelling circumstances arising after sentencing, to ensure their timely and effective operation. As part of this same resolution, the ABA urged jurisdictions to develop criteria for evaluating such prisoner requests, and procedures to assist mentally or physically disabled prisoners in making them. The Commission believes that the

¹⁶ Maryland officials told the Commission that Governor Ehrlich intends to consider for clemency the cases of some prisoners sentenced under a draconian "three strikes" law, now repealed, applicable to so-called "day-time burglars."

¹⁷ For example, in the first three years of his administration, President Bush granted 11 pardons and no commutations, not quite one grant apiece for the staff of twelve in the Justice Department's pardon office. During this same period, President Bush denied 580 requests for pardon and 2400 requests for commutation.

ABA must do more. Specifically, it should specify the criteria for sentence reduction in a broad range of exceptional circumstances arising after imposition of sentence, both medical and non-medical, including but not limited to old age, disability, changes in the law, exigent family circumstances, and heroic acts or extraordinary suffering. It also calls upon jurisdictions to ensure that there are procedures in place to assist prisoners who are unable to advocate for themselves, for example by reason of mental or physical disability. State bars should take the lead in implementing this resolution, and specifically endorse more expansive non-medical criteria for early release. If executive clemency is the only avenue within a particular jurisdiction by which such prisoner requests may be made, then that mechanism should be the subject of review and evaluation.

Although the federal government has a statutory mechanism in place that would permit consideration of sentence reduction requests, it has been slow to implement it. The United States Sentencing Commission has yet to promulgate policy guidance for sentencing courts and the federal Bureau of Prisons in considering federal prisoner petitions filed under 18 U.S.C. § 3582(c)(1)(A), as directed by 28 U.S.C. § 994(t). The Commission urges that the Sentencing Commission direct its attention at an early date to the only generally applicable statutory “safety valve” that exists under federal law. We also urge that, in developing policy guidance, the Commission incorporate a broad range of medical and non-medical circumstances warranting sentence reduction for “extraordinary and compelling reasons.” We believe it is significant that Congress specified that “rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason,” indicating that rehabilitation may combine with other equitable factors to make out the necessary elements of an “extraordinary and compelling” case. We also recommend that the Department of Justice ensure that full and fair consideration is given to prisoner requests for sentence reduction, and implement procedures to assist prisoners who are unable to advocate for themselves, including by reason of mental or physical disability.¹⁸

There is another contemporary need and place for the pardon power in a comprehensive criminal justice system: i.e., to signal that a convicted individual has successfully rejoined the community and is forgiven. At the time of sentencing, no court can know with certainty whether the defendant will reform, meet all conditions of the sentence imposed, and commit to a post-sentence life without crime. Those who take advantage of treatment, education, and counseling and who reform themselves and become law-abiding members of the community make a powerful case of entitlement to formal recognition of their successful reentry. This is as true in a determinate sentence system as in an indeterminate one.

Post-sentence pardons are entirely consistent with determinate sentences based on the notion that the individual who is punished is receiving just desserts for whatever criminal acts were committed. A just desserts sentence may well be fair and appropriate in proportion to criminal conduct, but once that sentence is served the individual has paid the dues imposed.

¹⁸ The Commission considered recommending that prisoners be allowed to bring petitions for relief under § 3582(c)(1)(A)(i) directly to the courts, without requiring a motion by the Bureau of Prisons. However, it seemed unnecessary to recommend so drastic a change in current practice before the other recommended reforms have been attempted, and potentially burdensome to courts.

Once society has exacted its price from an individual, there is a strong case to be made that society should not only permit, but should encourage, that person to make a positive contribution to society. To make this possible, it is vital that, to the greatest extent practicable, an individual who has successfully completed a sentence should be permitted to exercise rights of citizenship and to be relieved of the collateral consequences of conviction in order to have a real chance of working, providing for family, and avoiding recidivism.

Accordingly, the recommendations presented by the Commission urge jurisdictions to expand the use of the pardon power, both to commute sentences and to restore legal rights lost as a result of conviction. Jurisdictions should also make clear the standards that govern applications for commutation and pardon; specify the procedures that an individual must follow in order to qualify for a grant of clemency; and ensure that clemency procedures are reasonably accessible to all persons. In this fashion, states may share information about “best practices,” and ensure that the pardon process can work to promote justice without jeopardizing safety, and to restore its “moral force.”¹⁹

Last August, the House of Delegates approved new Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons. To promote the development of a more consistent and reasonable approach to collateral consequences, the Commission has encouraged wide circulation of these Standards, and has discussed the desirability of an implementation project in one or more jurisdictions.²⁰

The Commission believes that state bars can play an important role in encouraging the responsible exercise of the pardon power by creating programs and training lawyers so that they may become involved in the pardon process by representing individual clemency applicants. Bar programs would be capable of advertising the availability of clemency and encouraging bar members to represent prisoners with meritorious cases, on a pro bono basis if necessary. Bar

¹⁹ The Commission’s inquiry into the functioning of the pardon process in a number of states suggests that frequent and regular consideration of cases, along with careful staffing, are essential elements of a credible and reliable pardon process. Other important elements appear to be a formal advisory role for a politically accountable official or officials, and an appropriate balance of confidentiality prior to grants and openness after them. For example, the Commission was informed by Maryland officials familiar with that state’s clemency process that Governor Robert Ehrlich has established a regular routine of monthly meetings in which he gives personal attention to about twenty clemency cases, which have been reviewed by the parole board and then by a member of his personal staff. In each case the prosecuting attorney has also been asked to make a recommendation, and in appropriate cases the sentencing judge as well. Pardon grants are announced to the press, and memorialized in an executive order giving details of the offense and the terms of relief. Governor Ehrlich has evidenced a strong personal commitment to the exercise of his clemency power, and has gone so far as to initiate his own inquiry into the cases of certain incarcerated individuals serving long sentences imposed under a law that was subsequently changed.

²⁰ For example, in the fall of 2004 a symposium at the University of Toledo Law School will feature scholarly presentations measuring Ohio law and practice against the requirements of the Collateral Sanctions Standards. It will include a student project to identify and analyze collateral consequences under Ohio law. An ABA project could build on this symposium. In addition, the New Jersey Institute for Social Justice published a study of collateral consequences in New Jersey that discusses the new ABA Standards in a number of contexts. See Nancy Fishman, *Legal Barriers to Prisoner Reentry in New Jersey*, prepared for the New Jersey Reentry Roundtable (April 11, 2003). New Jersey agencies are currently engaged in an effort to identify and codify all collateral sanctions in state law, and have asked the ABA to provide technical assistance.

programs should encourage broad participation and not seek to impose an obligation only upon criminal law practitioners. The ordinary non-capital clemency case requires neither special skills nor a major commitment of time or resources. Clemency representation should become a staple in pro bono bar programs. Bar members who take on clemency representation should be encouraged to propose recommendations for improving the clemency process and making it more accessible.

The Commission also recommends in its Report and Recommendations on Prison Conditions and Prisoner Reentry that law schools give consideration to establishing clinics in which students may gain both understanding and experience in representing those who have committed crimes and are imprisoned as a result, or who are seeking to reestablish themselves in the free community through restoration of rights. Law schools and state bars easily could develop coordinated efforts to expand clemency and reentry efforts.

The best way to discourage the potential for mischief in pardoning are to ensure that the process is open to all, that standards for pardon and commutation are clearly articulated and fairly applied, and that the decision-making process is perceived to be a reliable one. Lawyers are most likely to concern themselves with these issues if they participate in the process through representation of prisoners seeking sentence reduction and released offenders seeking restoration of rights, including pro bono representations.

By taking an interest in the pardon process, the ABA can encourage a national conversation about the role of forgiveness in the justice system, and what the need for a pardoning mechanism teaches about the health of the legal system. Bar groups can reach out to pardon decision-makers, and help create a climate of public acceptance for clemency actions by working with victims' rights and other groups with an interest and stake in a fair, just, compassionate and equitable criminal justice system.

Respectfully submitted,

Stephen Saltzburg, Chairperson
Justice Kennedy Commission

August 2004