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The Municipal Pardon Power

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NOTE

THE MUNICIPAL PARDON POWER

*Hayato Watanabe**

At the state and federal levels, the pardon power can be used to restore the dignity and legal rights lost by a criminal conviction. Unfortunately, those facing similar consequences from municipal convictions may not have access to a pardon. Although clemency is exceedingly rare at any level of government, municipal defendants face a unique structural problem that deprives them of the possibility of a pardon. Specifically, many cities have simply failed to create a local clemency power. This Note argues that the authority to grant pardons for municipal offenses is part of the toolbox of powers provided to cities through the doctrine of home rule. Accordingly, cities do not have to wait for the permission of their parent states to create a local clemency power. By failing to advocate for a local interpretation of clemency, cities are missing a valuable opportunity to help municipal defendants overcome the stigma and collateral consequences that accompany municipal convictions. While existing scholarship largely ignores the application of clemency to municipal law, this Note offers a legal framework for reimagining the next frontier of clemency.

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INTRODUCTION

In 2013, a group of reporters descended on San Antonio City Hall eager to document the inauguration of a momentous new tradition in city politics. Mayor Julián Castro looked effusive as he faced reporters and proudly announced the Thanksgiving pardon of a turkey named Drumstick.¹ Yet what feels out of place about Mayor Castro’s display of Thanksgiving-spirited clemency is not the absurdity of a mayor pardoning a turkey, but the very thought of a mayor pardoning at all. While the pardon power has become ubiquitous with modern American presidents and governors, the clemency² potential of local government has largely gone ignored.³ This blind spot in the clemency scholarship is detrimental because cities, like the states and the federal government, have the power to foist significant financial and legal consequences on municipal defendants.

1. Julie Moreno, *San Antonio Mayor Pardons Turkey*, KSAT 12 (Oct. 16, 2013, 5:50 PM), <https://www.ksat.com/news/san-antonio-mayor-pardons-turkey> [https://perma.cc/5ZA7-2WYP]; Sarah Tressler, *Castro Pardons Turkey, Looks Ahead to Jimenez Dinner*, MYSA (Oct. 16, 2013, 4:59 PM), <https://www.mysanantonio.com/news/local/article/Castro-pardons-turkey-looks-ahead-to-Jimenez-4900817.php> [https://perma.cc/9Y2T-UDV8].

2. “Clemency” is a multifaceted legal term that encompasses various forms of state-sanctioned mercy and forgiveness. See Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 575–78 (1991). Pardons, amnesty, commutations, remissions of fines and forfeitures, and reprieves are all legal mechanisms that fall under the umbrella of clemency. *Id.* While this Note is focused primarily on understanding how the municipal pardon power operates within the gray area of state and local law, that is not to deny that there are clemency powers beyond pardons that have important implications for cities. These other aspects of clemency will be explored throughout the piece.

3. See, e.g., Cara H. Drinan, *Clemency in a Time of Crisis*, 28 GA. ST. U. L. REV. 1123 (2012) (discussing the importance of revitalizing *state clemency*); Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States*, 9 U. ST. THOMAS L.J. 730 (2012) (discussing how the federal pardon process can be improved by emulating *state-level pardon procedures*); Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 BRANDEIS L.J. 85 (2002) (discussing limitations on the pardon power in the *state* and *federal* context).

In recent years, a public reckoning has exposed how local governments have weaponized broad criminal justice regimes to exploit vulnerable communities. For example, the Department of Justice's (DOJ) report on the Ferguson Police Department revealed that the city's courts and police force operationalized municipal fines to fund the city at the expense of its residents.⁴ The DOJ noted that in 2013 alone, over 9,000 warrants were issued in Ferguson for cases involving minor violations like parking tickets and housing code violations.⁵ The DOJ also emphasized the personal tolls that this system inflicted on individual residents. One African American woman who was interviewed for the investigation stated that she was forced to endure an odyssey of court dates, arrests, jail time, and additional fines all stemming from her inability to pay a single parking ticket.⁶ Over seven years later, she is still making payments on a fine that has now more than tripled.⁷ Similarly, in Chicago, poor residents have struggled with debt accumulated from unpaid parking, traffic, and vehicle compliance tickets.⁸ The debt has become so crushing that many residents have turned to bankruptcy for relief.⁹ Adding to the dire financial consequences of this situation, Chicago restricts access to municipal jobs and licenses for those with ticket debt.¹⁰

Recognizing the great weight of municipal offenses, some mayors and mayoral hopefuls have taken decisive steps toward embracing their authority to grant pardons.¹¹ In May 2018, the Omaha City Council granted Mayor Jean Stothert's request to expand her mayoral pardon power.¹² The City Council's action granted Mayor Stothert the authority to pardon individuals for virtually every criminal offense prosecutable under the Omaha City

4. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 3 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/WXK8-N2KA].

5. *Id.*

6. *Id.* at 4.

7. *Id.*

8. Melissa Sanchez & Sandhya Kambhampati, *How Does Chicago Make \$200 Million a Year on Parking Tickets? By Bankrupting Thousands of Drivers*, MOTHER JONES (Feb. 27, 2018), <https://www.motherjones.com/crime-justice/2018/02/how-does-chicago-make-200-million-a-year-on-parking-tickets-by-bankrupting-thousands-of-drivers/> [https://perma.cc/DLQ2-YZTQ].

9. *Id.*

10. *Id.*

11. While there is a renewed interest in the municipal pardon power, the exercise of this power is not a modern phenomenon. *See, e.g., In re Monroe*, 46 F. 52, 52–53, 59 (C.C.W.D. Ark. 1891) (“The mayor had wiped [the offense] out by his action . . . [the defendant] has been pardoned . . .”).

12. *Omaha City Council Broadens Mayor's Power to Pardon*, U.S. NEWS & WORLD REP. (May 2, 2018, 10:19 AM), <https://www.usnews.com/news/best-states/nebraska/articles/2018-05-02/omaha-city-council-broadens-mayors-power-to-pardon> (on file with the *Michigan Law Review*).

Code, from failing to restrain a dog to prostitution.¹³ Similarly, in March 2019, Kansas City mayoral candidate Quinton Lucas pledged to use the pardon power to “extinguish all stand-alone convictions for minor municipal marijuana violations.”¹⁴

Despite the potential benefits of a pardon process, few cities have created a local clemency mechanism.¹⁵ This means that while practically all state and federal crimes can be pardoned, the prospect of a municipal pardon may be a structural impossibility. In cities where a local pardon power has not been created and where the state is unable to grant relief at the local level, municipal defendants may not have any avenue to relief that is as effective or complete as receiving a pardon.¹⁶ Defendants stuck within this lacuna of state and local law are trapped inside what this Note calls the “municipal clemency bind.” Municipal defendants facing the threat of incarceration, fines, and collateral consequences should have the same access to clemency as state and federal defendants.

This Note argues for an interpretation of the clemency power that is grounded in the doctrine of home rule and local police powers. Understanding the pardon power as compatible with home rule will enable and encourage more localities to embrace values of mercy and forgiveness. Part I provides a primer on the organization of local government and the structure of state-municipal sovereignty. Specifically, this Part examines the power that cities have to criminalize offenses, the consequences that these expansive penal powers have for municipal defendants, and the importance of pardons to our criminal justice system. Part II introduces the “municipal clemency bind” and describes the state and local mechanisms that deny defendants access to a pardon process. Part II then provides a solution to this problem by arguing that the municipal pardon power is justified under the doctrine of home rule. Finally, Part III analyzes the administrability of the municipal pardon power and identifies areas where clemency can be used as an instrument to remedy broader social problems.

13. *Id.*

14. Quinton Lucas, *KC's Next Mayor Should Start with Local Justice Reform to Fight Crime*, KAN. CITY STAR (Mar. 21, 2019, 8:33 PM), <https://www.kansascity.com/opinion/readers-opinion/guest-commentary/article228224579.html> [<https://perma.cc/4KX3-U7PK>].

15. See *infra* Section II.B.

16. Some states expressly provide municipal defendants with the right to appeal their conviction to a state court. See, e.g., OR. REV. STAT. § 221.359(1) (2017). However, there is no common law right to appeal a violation of a municipal ordinance. 9A EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 27:84 (3d ed., rev. vol. 2016) (“[U]nless guaranteed by the constitution, [the right to review proceedings] is wholly statutory.”). Other post-conviction relief mechanisms like habeas may exist for municipal offenses. *Id.* § 27:95. But these processes alone will not help guilty defendants who seek mercy and forgiveness for their crimes, nor will they help innocent defendants who are unable to present the kind of evidence necessary to have their convictions overturned. As discussed *infra* Section II.A, additional mechanisms like expungement cannot provide a substitute for a general clemency power.

I. THE INTERSECTION OF MUNICIPAL LAW, CRIMINAL JUSTICE, AND MERCY

Municipal power has expanded significantly over the last century, becoming an omnipresent force that affects the lives of many residents. The rise of municipal power reflects the shifting dynamics between state and local control.¹⁷ As cities have accumulated power, municipal officials have embarked on ambitious social initiatives that have occasionally challenged the interests and powers guarded by their parent state.¹⁸ Section I.A describes the organization of municipal government and examines how these structures empower or disempower local actors. This Section also explains how cities exercise local control through two different doctrines of state-municipal sovereignty: Dillon's Rule and home rule. Section I.B catalogs the range of offenses and collateral consequences that stem from municipal criminal law. Section I.C provides a brief overview of the pardon power's importance to our constitutional order.

A. *The Contours of Municipal Law*¹⁹

Depending on the state constitutional and statutory framework, a multiplicity of local government structures can exist within a single state. The council-manager and mayor-council systems remain the most common structural forms.²⁰ The council-manager form lodges virtually all power with the city council, which is empowered to pass laws and provide oversight for the general administration of the city through the appointment of a professional manager.²¹ In contrast, the mayor-council form divides power between the mayor who is independently accountable to the electorate, and the city council.²² Mayoral power in these two systems is generally characterized as "strong" or "weak" depending on the authority a city's form vests in the mayor.²³ For example, in mayor-council cities, the mayor may have veto, ap-

17. See *infra* Section I.A.

18. See, e.g., *City of Fort Collins v. Colo. Oil & Gas Ass'n*, 369 P.3d 586, 589 (Colo. 2016) (noting that after the City of Fort Collins amended its municipal code to include an antifracking ordinance, the state's oil and gas association sued to invalidate it).

19. For the purposes of this Note, the term "city" will refer to a general-purpose local government that has the authority to enact and enforce a local penal system.

20. Victor S. DeSantis & Tari Renner, *City Government Structures: An Attempt at Clarification*, 34 ST. & LOC. GOV'T REV. 95, 95 (2002). Other general municipal structures like the commission, town meeting, and representative town meeting form do exist. *Id.* For the purposes of this Note, however, the council-manager and mayor-council systems will be the main focuses of analysis.

21. *Forms of Municipal Government*, NAT'L LEAGUE CITIES, <https://www.nlc.org/forms-of-municipal-government> [<https://perma.cc/VH5P-Z6VJ>].

22. *Id.*

23. *Id.*

pointment, and removal powers.²⁴ In council-manager cities, the mayor is often a de facto councilmember with no independent executive authority.²⁵

Municipal government does not provide a clean analogue to the traditional separation-of-powers doctrine that animates politics at the state and federal level because the functions of various city officials are often intermingled.²⁶ Nevertheless, some courts have shown a willingness to invalidate mayoral action that appears to encroach on the power of a coordinate “branch.”²⁷ Other courts, however, have questioned the wisdom of mapping traditional separation-of-powers doctrine onto municipal governance.²⁸ The differences in the structure and division of power within local government affect how intergovernment conflict, corruption, and the general administrability of the municipal pardon power are understood.²⁹

A locality’s ability to pursue policies like clemency is also affected by the basic structural relationship between a city and its parent state. “Dillon’s Rule” and “home rule” are the two primary models of municipal self-governance that loosely define the level of control afforded to a city.³⁰ Dillon’s Rule, named after Judge John Forrest Dillon, who published one of the preeminent treatises on municipal law,³¹ provides cities with only those powers that are “granted in express words,” “necessarily or fairly implied in or incident to the powers expressly granted,” or truly “essential to the accomplishment of the declared objects and purposes of the corporation.”³² Dillon’s Rule privileges the parent state’s right to exercise significant control over how cities operate, leaving cities with limited local authority. As a result, Dillon’s Rule “conforms to the common understanding that municipali-

24. Richard C. Schragger, Essay, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2544–45 (2006).

25. Alexander J. Kasner, Note, *Local Government Design, Mayoral Leadership, and Law Enforcement Reform*, 69 STAN. L. REV. 549, 559 (2017).

26. *Id.* at 557–58.

27. See, e.g., *Mun. Court v. Patrick*, 254 So. 2d 193, 194–95 (Fla. 1971) (affirming the ability of the mayor to “take command” of a city’s forces in a state of emergency, but prohibiting the mayor from enacting a curfew and setting penalties for its violation). The Supreme Court of Florida took specific pains to highlight the principles of separation of powers even in the municipal context: “It was the Commission as the sole legislative body, and not the Mayor, which was empowered to enact ordinances by Resolution establishing any violations and penalties. . . . We must zealously guard America’s traditional separation of powers in the legislative, executive and judicial bodies of government” *Id.* at 194 (citation omitted).

28. See, e.g., *Hubby v. Carpenter*, 350 S.E.2d 706, 710 (W. Va. 1986) (holding that separation-of-powers doctrine has “diminished vitality” at the municipal level because of the overlapping nature of functions between various local officials).

29. See *infra* Section III.C.

30. JON D. RUSSELL & AARON BOSTROM, FEDERALISM, DILLON RULE AND HOME RULE 1 (2016), <https://www.alec.org/app/uploads/2016/01/2016-ACCE-White-Paper-Dillon-House-Rule-Final.pdf> [<https://perma.cc/3H7L-UCYW>].

31. JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS (Little, Brown & Co., 5th ed. 1911) (1872).

32. *Id.* § 237 (emphasis omitted).

ties are inferior creatures of the state . . . [and] recognizes the existence of very limited and derivative local authority in decision-making.”³³

In contrast, home rule gives cities wider latitude to pursue policies free from state interference.³⁴ Although home rule tends to confer greater autonomy, cities must still rely on their parent states to delegate authority through statute or a state constitutional provision.³⁵ Home rule is best understood in terms of the dual objectives of the doctrine.³⁶ First, home rule can grant a city the ability to draft its own charter and pass ordinances in substantive areas that have not been expressly authorized by the state.³⁷ Second, home rule can immunize a city from state interference into that local decisionmaking process.³⁸ While home rule does not guarantee complete local control,³⁹ it can facilitate a city’s ability to use the police power to address issues of local concern.⁴⁰ For example, in Washington, the state constitution allows cities to exercise “all such local police, sanitary and other regulations” that are not in conflict with the state’s general laws.⁴¹ The broad police power created under this system has been used to justify everything from antigaming ordinances to the provision of broadband internet services.⁴²

Within home rule, there is variation with respect to the underlying legal theories that support the doctrine.⁴³ Some states have followed the *imperium in imperio* model, which creates a mini federal system in which “the state concern[s] itself with statewide affairs” and “local matters [are] constitutionally delegated to local authorities.”⁴⁴ This system creates a safe harbor where cities acting within the sphere of “local” concern are effectively shielded from

33. Terrence P. Haas, Note, *Constitutional Home Rule in Rhode Island*, 11 ROGER WILLIAMS U. L. REV. 677, 680 (2006).

34. See Rick Su, *Have Cities Abandoned Home Rule?*, 44 FORDHAM URB. L.J. 181, 190–91 (2017).

35. Hugh Spitzer, “Home Rule” vs. “Dillon’s Rule” for Washington Cities, 38 SEATTLE U. L. REV. 809, 820 (2015).

36. Franklin R. Guenther, Note, *Reconsidering Home Rule and City-State Preemption in Abandoned Fields of Law*, 102 MINN. L. REV. 427, 440 (2017).

37. *Id.* at 441.

38. See *id.* at 440.

39. Kenneth E. Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 280 (1968).

40. Brian W. Ohm, *Some Modern Day Musings on the Police Power*, 47 URB. LAW. 625, 636 (2015).

41. WASH. CONST. art. XI, § 11. Washington cities also enjoy statutory grants of power. Spitzer, *supra* note 35, at 857 (noting that the state legislature’s enactment of the Optional Municipal Code provided cities with “all powers possible for a city or town to have under the Constitution of this state, and not specifically denied to code cities by law” (quoting WASH. REV. CODE § 35A.11.020 (2012))).

42. Spitzer, *supra* note 35, at 826, 848.

43. *Id.* at 820.

44. *Id.*

state intervention.⁴⁵ But historically, state courts have shown a willingness to cabin local autonomy by narrowly interpreting the scope of “local” concern.⁴⁶ In contrast, some states have followed the model suggested by the National League of Cities, which “grants municipal corporations all powers not expressly denied to them by statute.”⁴⁷ This approach, often referred to as “legislative home rule,” shifts the authority to define municipal power to the state legislature.⁴⁸ The major limitation of local power in this system is that when local law and state law do conflict, the doctrine of preemption acts to resolve the conflict in favor of the state.⁴⁹

The debate over municipal power has evolved significantly over the last century. In 1902, the Supreme Court’s opinion in *Hunter v. City of Pittsburgh* reflected the general consensus that cities are “political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them.”⁵⁰ The Court explained that the state retains the absolute discretion to determine the extent of the powers conferred upon cities.⁵¹ Under this Dillon’s Rule framework, municipalities “exist[] only by an act of the state, and the state, as creator, has plenary power to alter, expand, contract or abolish at will any or all local units.”⁵² This century-old understanding of municipal power has remained prominent in the minds of many legal scholars.⁵³ Yet the conventional wisdom surrounding municipal power ignores many of the formal and informal legal powers that local governments possess.⁵⁴ This conventional wisdom also fails to acknowledge some of the rationales for local independence, like the need of a city to respond proactively to emerging challenges.⁵⁵ Thus, cities had to “embrace new definitions of local concern that the ‘anachronistic’ traditional model did not contemplate.”⁵⁶ A majority of states have now moved away from Dillon’s Rule in order to take advantage of the local autonomy provided by home rule.⁵⁷

45. Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1124–25 (2007).

46. *Id.* at 1125.

47. Spitzer, *supra* note 35, at 821.

48. Diller, *supra* note 45, at 1125–26.

49. *Id.* at 1126.

50. 207 U.S. 161, 178 (1907). Despite the consensus around Dillon’s Rule, there were still states like Missouri and California that were early advocates of home rule. See Spitzer, *supra* note 35, at 817.

51. *Hunter*, 207 U.S. at 178.

52. Richard Briffault, *Our Localism* (pt. 1), 90 COLUM. L. REV. 1, 7 (1990).

53. *Id.* at 6–7 & nn.4–5.

54. *Id.* at 7.

55. Guenther, *supra* note 36, at 438–39 (“[C]ities needed to be nimble enough to face challenges that the traditional model of city-state sovereignty was too rigid to regulate.”).

56. *Id.*

57. Briffault, *supra* note 52, at 8, 10–11. The siloing of states into home rule or Dillon’s Rule jurisdictions is complicated because the current state of municipal governance includes a “patchwork” of differing approaches to local autonomy. See Diller, *supra* note 45, at 1126 &

In the context of municipal criminal law, the sheer breadth of home rule should not be understated. Like the taxing and zoning power, a city's ability to enact criminal laws in accordance with home rule has received broad deference.⁵⁸ As a result, localities have long enjoyed substantial authority to criminalize behavior that offends the public order.⁵⁹ In fact, cities often have so much discretion that it is not uncommon for concurrent criminal jurisdiction to exist simultaneously between a city and the state.⁶⁰ Even ordinances that appear to conflict with state statutes have been upheld by courts.⁶¹ Thus, cities have considerable authority to control their own affairs, especially as it relates to public safety and punishing criminal behavior.

B. *Municipal Criminal Law and Its Consequences*

Cities have the ability to criminalize a variety of behaviors, including obscenity, gambling, prostitution, unlawful restraint, driving under the influence (DUI), indecent exposure, drug possession, shoplifting, vandalism, resisting arrest, and firearm possession.⁶² Like states, cities have the power to punish these offenses through imprisonment and fines.⁶³ Even at the local level, ordinance violations and other criminal sanctions can carry severe consequences. For example, courts have upheld the constitutionality of city ordinances that require convicted defendants to serve mandatory jail sentences.⁶⁴ Courts have also upheld a city's right to levy seemingly exorbitant fines.⁶⁵ And even more troubling, municipal courts have exercised their authority to jail defendants for their inability to pay minor violation fees like parking tickets.⁶⁶ But beyond the direct penalties associated with punishing

n.64. As a result, there may be disagreement about whether a state can be fairly categorized as a home rule or Dillon's Rule jurisdiction. *Id.* at 1127 n.65.

58. Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1413–14 (2001).

59. *Id.* at 1414.

60. *Id.* at 1429.

61. See, e.g., *City of Portland v. Jackson*, 850 P.2d 1093, 1093–94 (Or. 1993) (holding that no conflict existed between a state statute that criminalized the *intentional* public exposure of genitalia and a municipal ordinance that criminalized public exposure irrespective of the defendant's mental state).

62. Logan, *supra* note 58, at 1426–28 (documenting the panoply of offenses criminalized by cities).

63. 5 MCQUILLIN, *supra* note 16, § 17:8.

64. See *id.*

65. See, e.g., *Moustakis v. City of Fort Lauderdale*, 338 F. App'x 820 (11th Cir. 2009) (upholding a \$150 per day fine for failing to bring a personal home into compliance with municipal code). In *Moustakis*, the fine eventually totaled \$700,000, even though the home itself was worth only \$200,000. *Id.* at 821. Nevertheless, the court refused to find that the fine was unconstitutionally excessive. *Id.* at 822.

66. See, e.g., Annie Wu, *In Ferguson, People Are Tired of Being Jailed for Not Paying Parking Tickets*, EPOCH TIMES (Feb. 9, 2015), <https://www.theepochtimes.com/in-ferguson->

violations of local law, these convictions have serious social implications for an individual's reputation and self-worth.⁶⁷ A single conviction can impose grievous and lifelong collateral consequences on an individual's ability to participate meaningfully in society.⁶⁸

While collateral consequences are typically understood in the context of state and federal convictions, municipal offenses can also impose serious burdens on defendants. Under certain state, federal, and even foreign laws, a prior municipal conviction may affect sentence enhancements,⁶⁹ international travel,⁷⁰ impeachment,⁷¹ firearm rights,⁷² the pursuit of public office,⁷³ licensing,⁷⁴ professional discipline,⁷⁵ and employment.⁷⁶ Immigration law, in particular, highlights the steep collateral consequences that can follow from

people-are-tired-of-being-jailed-for-not-paying-parking-tickets_1244363.html [https://perma.cc/WS79-BAC7].

67. Cf. Camila Domonoske, *Legendary Boxer Jack Johnson Gets Pardon, 105 Years After Baseless Conviction*, NPR: TWO-WAY (May 24, 2018, 4:44 PM), <https://www.npr.org/sections/thetwo-way/2018/05/24/614114966/legendary-boxer-jack-johnson-gets-pardon-105-years-after-baseless-conviction> [https://perma.cc/2F4L-WAGC] (detailing the decades of stigma that boxer Jack Johnson endured after his federal conviction).

68. See generally Gabriel J. Chin, *Collateral Consequences and Criminal Justice: Future Policy and Constitutional Directions*, 102 MARQ. L. REV. 233, 260 (2018) (noting that “[c]ollateral consequences have proliferated in state and federal law, creating a vast network of restrictions on people with convictions”).

69. For example, Kansas state law allows a DUI sentence to be enhanced if the defendant has a prior municipal DUI conviction. KAN. STAT. ANN. § 8-1567(i)(1)–(3) (Supp. 2018).

70. See, e.g., *Barred from Japan for a Teenage Pot Conviction*, JAPAN TIMES (Feb. 1, 2011), <https://www.japantimes.co.jp/community/2011/02/01/voices/barred-from-japan-for-a-teenage-pot-conviction> [https://perma.cc/2G2W-J4WH].

71. See, e.g., Chandra S. Menon, Recent Development, *State v. Tolbert: The Louisiana Supreme Court Expands Use of Convictions to Impeach Witnesses in Criminal Cases*, 78 TUL. L. REV. 1719, 1719 (2004) (noting that the Louisiana Supreme Court has held that “evidence of municipal convictions is admissible to impeach a witness’s credibility in criminal cases”).

72. See, e.g., *Ward v. Tomsick*, 30 P.3d 824 (Colo. App. 2001) (holding that a defendant convicted of municipal misdemeanor domestic assault was restricted from possessing a firearm).

73. See, e.g., *Osborne v. Banks*, 439 So. 2d 695, 699–700 (Ala. 1983) (holding that, under Alabama law, a municipal larceny conviction can disqualify an individual from seeking public office because “[l]arceny is larceny and it makes no difference whether it is grand, petty, state or municipal”).

74. See, e.g., *Howell v. Metro. Sexually Oriented Bus. Licensing Bd.*, 466 S.W.3d 88 (Tenn. Ct. App. 2014) (upholding the suspension of a commercial license based on the violation of a municipal ordinance).

75. For example, California law regulates the licensing and discipline of medical professionals. CAL. BUS. & PROF. CODE §§ 490, 2761 (a), (f) (West 2012). A conviction for an offense like a DUI could be used as a basis for professional discipline. See *Sulla v. Bd. of Registered Nursing*, 140 Cal. Rptr. 3d 514 (Ct. App. 2012).

76. See Heather J. Garretson, *Legislating Forgiveness: A Study of Post-Conviction Certificates as Policy to Address the Employment Consequences of a Conviction*, 25 B.U. PUB. INT. L.J. 1, 8–9 (2016) (“Surveys reveal that up to 92% of employers use criminal background checks in their hiring decisions and that a criminal record reduces the likelihood of a callback by 50%.”).

municipal convictions. An immigrant who is convicted of a crime of moral turpitude that is punishable by a year or more in jail is subject to deportation.⁷⁷ Because municipal offenses can be punished as misdemeanors with a term of imprisonment of up to a year in jail, a municipal conviction can complicate an individual's ability to resist removal.⁷⁸

This long list of offenses and their attendant collateral consequences demonstrates that a municipal violation can mean more than just a littering citation or a traffic ticket. It can mean a lifelong badge of inferiority that even the innocent may be forced to bear.⁷⁹ This is precisely why the pardon power is so essential for the maintenance of an equitable criminal justice system.

C. *The Importance of Pardons to the Constitutional Order*

The pardon power in the United States has been described as a "living fossil"⁸⁰—it balances the deferential English traditions of royal prerogative that created the power⁸¹ and our modern skepticism of executive authority.⁸² At common law, the pardon power was grounded in the King's royal prerogative to grant mercy.⁸³ In a criminal system that afforded little discretion and flexibility in punishment, a power of this kind was fundamental.⁸⁴ Not surprisingly, the pardon power of the Crown was expansive. For example, the Crown could "pardon offenses either before or after indictment, conviction, and sentencing" and could "grant conditional or unconditional pardons

77. 8 U.S.C. § 1227(a)(2)(A) (2012). Note, the statute lays out other categories of offenses beyond crimes of moral turpitude that would affect a determination of removal. *Id.*

78. See, e.g., *Lucio-Rayos v. Sessions*, 875 F.3d 573, 576, 584 (10th Cir. 2017) (holding that the petitioner was ineligible for cancellation of removal because of a municipal theft conviction that carried a possible punishment of 365 days in prison). Some defendants seeking relief from removal have attempted to split hairs by arguing that municipal violations are civil rather than criminal offenses. See *Rubio v. Sessions*, 891 F.3d 344, 349 (8th Cir. 2018). Nevertheless, courts have held that as long as the municipal offense requires a finding of guilt beyond a reasonable doubt, there is no basis for distinguishing violations and infractions from traditional criminal convictions. See *id.* at 350.

79. See, e.g., MARK FLATTEN, CITY COURT: MISDEMEANOR CONVICTIONS LEAD TO LIFE-LONG, "BEYOND HORRIFIC" CONSEQUENCES 1–2 (2018), <https://goldwaterinstitute.org/wp-content/uploads/2018/04/City-court-cosequences-final.pdf> [<https://perma.cc/WSZ3-4BQB>] (noting the story of a Scottsdale, Arizona massage therapist who claims she was wrongfully convicted of a municipal prostitution offense).

80. Kobil, *supra* note 2, at 575.

81. *Id.* at 586–87.

82. See Adam Liptak, *How Far Can Trump Go in Issuing Pardons?*, N.Y. TIMES (May 31, 2018), <https://www.nytimes.com/2018/05/31/us/politics/pardons-trump.html> [<https://perma.cc/5AA4-T5QY>].

83. William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 476 (1977).

84. *Id.* at 479 ("Prior to the sixteenth century, the common law treated all homicides as felonies. In a society with no other means of flexibility, the pardon served as the sole instrument of justice for those who should not be punished.").

based on the performance of a precedent or subsequent action.”⁸⁵ For the most part, the pardon power was also absolute. With the exception of the crisis surrounding the impeachment of Thomas Osborne, Earl of Danby in 1678, “[t]he vesting of the clemency power in the Crown had survived in virtually absolute form for almost 165 years.”⁸⁶ The influence of this English tradition eventually found its way into colonial America as the Crown delegated broad clemency authority to the colonies.⁸⁷ Even after emancipation, the influence of this English legacy reverberated throughout the United States.⁸⁸

At the 1787 Constitutional Convention, figures like Alexander Hamilton and Edmund Randolph grappled with what constitutional limitations, if any, would be placed on executive clemency.⁸⁹ Proposed limitations on the pardon power were rejected in favor of an expansive definition of executive clemency.⁹⁰ Motivating this decision was an interest in having a robust check on the judicial branch.⁹¹ But the Framers were also interested in the clemency power’s “justice-enhancing function” and its potential to serve the nation’s “public welfare.”⁹² As Alexander Hamilton stated in *Federalist 74*: “The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.”⁹³ The Framers may not have envisioned the problems plaguing the modern criminal justice system, but they certainly understood that clemency has a role to play in remedying unjust criminal penalties.

Despite the potential merits of an expansive clemency power, the lack of substantive checks on the power has invited criticism from scholars who be-

85. James N. Jorgensen, Note, *Federal Executive Clemency Power: The President's Prerogative to Escape Accountability*, 27 U. RICH. L. REV. 345, 349 (1993).

86. Kobil, *supra* note 2, at 586–87 (footnotes omitted).

87. Duker, *supra* note 83, at 497. What this delegation of power suggests is that even in colonial times, there was an impulse toward local control of clemency. In fact, in England, mayors were exercising the pardon power as early as 1669. See ROBERT EAST, EXTRACTS FROM RECORDS IN THE POSSESSION OF THE MUNICIPAL CORPORATION OF THE BOROUGH OF PORTSMOUTH AND FROM OTHER DOCUMENTS RELATING THERETO 173 (new & enlarged ed. 1891).

88. Consider Chief Justice Marshall’s description of the pardon power in *United States v. Wilson*: “[T]his power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon . . .” 32 U.S. (7 Pet.) 150, 160 (1833).

89. Duker, *supra* note 83, at 501–06.

90. Jorgensen, *supra* note 85, at 352–53.

91. Kobil, *supra* note 2, at 636.

92. *Id.*

93. THE FEDERALIST NO. 74, at 376 (Alexander Hamilton) (Ian Shapiro ed., 2009).

lieve it breeds abuse.⁹⁴ Nevertheless, the power holds a fundamental place in our nation's history and legal tradition. At a basic level, a pardon can provide defendants not only with forgiveness, but also relief from the consequences of a conviction. Where courts may be unable to act for procedural reasons, clemency provides a fail-safe that protects defendants from unjust punishment.⁹⁵ Chief Justice Rehnquist echoed this sentiment in *Herrera v. Collins*, remarking that “[c]lemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.”⁹⁶ While clemency is generally framed in terms of tangible consequences like fines and jail time, petitions for clemency also facilitate the expression of values like forgiveness and mercy.⁹⁷ An example of the redemptive function of clemency can be found in Omaha, Nebraska, where a resident seeking a pardon was recently quoted as saying: “I wanted to ask [for a pardon] even if I didn’t get it . . . I wanted to express my regret, and so I did. I expressed my regret.”⁹⁸ With all of these important functions in mind, it is unacceptable that a municipal clemency power is not part of every local criminal justice system.

II. EFFECTUATING THE MUNICIPAL PARDON POWER

Whether elected officials regularly use the pardon power or not, clemency plays an important role in our criminal justice system. Political officials of all stripes often debate whether a grant of clemency is justified.⁹⁹ But even the most “law and order” among them would likely agree that, at a basic level, clemency should exist.¹⁰⁰ It is surprising, then, that municipal defendants across the country are left without any access to clemency. Section II.A introduces the “municipal clemency bind” and explains how it perpetuates a criminal justice system that offers municipal defendants no hope of clemency. Section II.B proposes that cities utilize the doctrine of home rule to create a local clemency process.

94. See, e.g., Jorgensen, *supra* note 85, at 346 (noting that the controversies surrounding the Iran-Contra scandal “provide incentive to reassess the nature and scope of the president’s clemency powers”).

95. Molly Clayton, Note, *Forgiving the Unforgivable: Reinventing the Use of Executive Clemency in Capital Cases*, 54 B.C. L. REV. 751, 762 (2013).

96. 506 U.S. 390, 411–12 (1993) (footnote omitted).

97. Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501, 1502–05 (2000).

98. Emily Nohr, *Omaha Mayor Jean Stothert Wants More Power to Issue Pardons*, OMAHA WORLD-HERALD (Apr. 24, 2018), https://www.omaha.com/news/metro/omaha-mayor-jean-stothert-wants-more-power-to-issue-pardons/article_ce437764-1d58-51f0-b7c6-dfcd98046e7e.html [<https://perma.cc/WN7F-WGXA>].

99. See, e.g., Fox News, *John McCain Reacts to Chelsea Manning Commutation*, YOUTUBE (Jan. 18, 2017), <https://www.youtube.com/watch?v=eiADzgL5Y6M>.

100. See, e.g., Trent Franks, Opinion, *Pardon America’s Toughest Sheriff*, USA TODAY (Aug. 21, 2017, 8:50 PM), <https://www.usatoday.com/story/opinion/2017/08/21/pardon-americas-toughest-sheriff-editorials-debates/588506001/> [<https://perma.cc/3SGX-B24N>].

A. The “Municipal Clemency Bind”

The vast majority of state and federal defendants have some basic access to a pardon process.¹⁰¹ Why, then, are so many municipal defendants left without any access to clemency? In other words, what is stopping a governor from simply issuing a pardon for a municipal offense? While some consider cities as simply creatures of the state,¹⁰² many state courts have declined to extend the governor’s pardon power¹⁰³ to include municipal offenses.¹⁰⁴ In fact, Kentucky even enshrines this gubernatorial limitation explicitly in its state constitution.¹⁰⁵ Though state constitutions often contain expansive gubernatorial pardon language, that does not necessarily mean that the governor or an analogous state body will actually have the ability to issue a municipal pardon. For example, under the New Mexico Constitution, the governor has the “power to grant reprieves and pardons, after conviction for *all offenses* except treason and in cases of impeachment.”¹⁰⁶ Despite this seemingly broad constitutional mandate, the New Mexico Supreme Court has limited the governor’s pardon power to state offenses only.¹⁰⁷

These limitations on the gubernatorial pardon power seem like a violation of first-order principles within state-municipal governance. After all, while states can grant cities the authority to order their own local affairs, the

101. See *50-State Comparison: Characteristics of Pardon Authorities*, RESTORATION RTS. PROJECT (Dec. 2018), <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities/> [<https://perma.cc/ZXZ6-L7BA>]. There are narrow categories of offenses like treason and impeachment for which a pardon is unavailable. E.g., TEX. CONST. art. IV, § 11; N.Y. CONST. art. IV, § 4.

102. Briffault, *supra* note 52, at 7.

103. To avoid technical confusion, this Note will refer to the gubernatorial pardon power as the general power of the state to pardon. While every state provides the governor with at least some control over the pardon process, see *50-State Comparison*, *supra* note 101, the ultimate decisionmaking power may be in the hands of an independent body. For example, in Connecticut, all pardon decisions are subject to the discretion of a board appointed by the governor. CONN. GEN. STAT. § 54-124a (Supp. 2019); Act of July 1, 2019, No. 19-84, 2019 Conn. Pub. Acts 84 (enacting minor revisions to § 54-124a).

104. At least five state high courts (Kentucky, Mississippi, Missouri, New Mexico, and Pennsylvania) have explicitly limited the governor’s ability to pardon municipal offenses. *City of Paris v. Hinton*, 116 S.W. 1197 (Ky. 1909); *Allen v. McGuire*, 57 So. 217 (Miss. 1912); *State ex rel. City of Kansas City v. Renick*, 57 S.W. 713 (Mo. 1900); *City of Clovis v. Hamilton*, 62 P.2d 1151 (N.M. 1936); *Shoop v. Commonwealth*, 3 Pa. 126 (1846).

105. The Kentucky Constitution states that the governor “shall have no power to remit the fees of the Clerk, Sheriff or Commonwealth’s Attorney in penal or criminal cases.” KY. CONST. § 77. However, the text of the constitution is silent as to whether the cities themselves have the power to issue municipal pardons. Nevertheless, mayors in Kentucky have pardoned without any kind of resistance from the courts. See *Moore v. City of Newport*, 248 S.W. 837 (Ky. 1923).

106. N.M. CONST. art. 5, § 6 (emphasis added).

107. *City of Clovis*, 62 P.2d at 1151.

state is still the sovereign.¹⁰⁸ Under this reasoning, the state's pardon power should reasonably extend to municipal offenses. Nevertheless, state courts have rejected constitutional constructions that give the state authority over municipal clemency.¹⁰⁹

In holding that the gubernatorial pardon power does not extend to municipal defendants, courts have put forward rationales that remarkably carve out an island of sovereignty at the expense of the state. In *City of Paris v. Hinton*, the Kentucky Court of Appeals alluded to a city's "interest" in controlling the fines and penalties associated with local offenses and suggested that this interest could be obstructed by the intrusion of a gubernatorial pardon.¹¹⁰ The *Hinton* court also reasoned that the governor could not pardon municipal offenses because the governor's prerogative did not encompass the enforcement of local law.¹¹¹ Without that duty, the court saw "no reason which require[d] [it] to extend the meaning of the words used in them to embrace the enforcement of municipal ordinances or so as to give him the power to pardon infractions of them."¹¹² Similarly, in *State ex rel. Kansas City v. Renick*, the Supreme Court of Missouri justified limiting the governor's ability to pardon municipal offenses on the grounds that "the pardoning power of the state executive reaches only to matters in which the state is interested."¹¹³ The *Renick* court went on to determine that the term "offenses," as used in the state constitution's pardon provision, encompassed only violations of state law.¹¹⁴ The court seemed to be highlighting a distinction between the nature of state and municipal offenses that justified excluding gubernatorial control over municipal clemency.¹¹⁵ Taken together, the case

108. Josh Bendor, Note, *Municipal Constitutional Rights: A New Approach*, 31 YALE L. & POL'Y REV. 389, 390 (2013).

109. Note, while the existing municipal clemency jurisprudence does not recognize the authority of the state to pardon municipal offenses, there are rare but documented instances in which a governor has pardoned a municipal offense. See, e.g., Samantha Marcus, *Christie Grants 10 People Clemency in Waning Days as Governor*, NJ.COM (Dec. 22, 2017), https://www.nj.com/politics/2017/12/christie_grants_10_clemency_in_waning_days_as_gove.html [<https://perma.cc/R6Z7-8FLV>] (noting that New Jersey Governor Chris Christie pardoned an individual convicted of a local ordinance violation). There are also instances in which state executive officials have taken the position that a governor can pardon a municipal offense. For example, in a 1941 advisory opinion, the Oregon attorney general stated that even absent supporting case law, the gubernatorial pardon power encompasses municipal offenses. 20 Or. Op. Atty. Gen. 383, 383 (1941), 1941 WL 42036.

110. See 116 S.W. 1197, 1197–98 (Ky. 1909).

111. *Id.* at 1197.

112. *Id.*

113. 57 S.W. 713, 715 (Mo. 1900).

114. *Id.* ("[T]here is a well-recognized distinction between the nature of offenses which consist in violation of city ordinances and of those which consist in the violation of a state law . . ."); see also *City of Clovis v. Hamilton*, 62 P.2d 1151, 1151 (N.M. 1936) ("[A]ll the authorities hold that a violation of a city ordinance is not an offense against the state.").

115. While the distinction between the nature of state and municipal offenses is not necessarily rigorously examined within the limited confines of municipal pardon jurisprudence,

law suggests that municipal defendants are unlikely to secure—or in some cases are constitutionally barred from securing—a gubernatorial pardon.¹¹⁶ Unfortunately, this line of cases means that municipal defendants may not be able to secure a direct pardon from the state.¹¹⁷ With the state unable to fill this vacuum, the question of how cities can help municipal defendants seek relief becomes critical.

States have attempted to take some of the guesswork out of determining the proper legal foundation for the municipal pardon power by granting cities and towns the power to control clemency for themselves. For example, Alabama,¹¹⁸ Kansas,¹¹⁹ Mississippi,¹²⁰ Missouri,¹²¹ Montana,¹²² Nebraska,¹²³ and the District of Columbia¹²⁴ expressly provide for a municipal pardon power through state statute. States like New Mexico,¹²⁵ Pennsylvania,¹²⁶ South Dakota,¹²⁷ Texas,¹²⁸ Utah,¹²⁹ and Vermont¹³⁰ do not explicitly mention

there is case law from state courts that have characterized municipal offenses as only quasi-criminal. *See, e.g., City of Danville v. Hartshorn*, 292 N.E.2d 382, 384 (Ill. 1973) (“The prosecution of municipal ordinances has been regarded somewhat ambiguously. Ordinances have long been treated as quasi-criminal in character but civil in form.”).

116. This is not to say that it would be impossible for the State to endow itself with the power of municipal clemency. The Supreme Court of Mississippi acknowledged as much in *Allen*, where the Court in dicta stated that the “Legislature can confide the power to the Governor to pardon for offenses against municipal ordinances.” *Allen v. McGuire*, 57 So. 217, 217 (Miss. 1912).

117. In addition to the state court jurisprudence limiting the authority of governors to pardon municipal offenses, states may also have a normative instinct to impose boundaries on their own power. *See, e.g., Jim Brunner & Asia Fields, Gov. Jay Inslee Offers Pardons for Thousands with Misdemeanor Pot Convictions*, SEATTLE TIMES (Jan. 4, 2019, 9:30 AM), <https://www.seattletimes.com/seattle-news/politics/gov-jay-inslee-offers-pardons-for-thousands-with-misdemeanor-pot-convictions/> [<https://perma.cc/X8HY-6GQU>] (noting that Washington Governor Jay Inslee’s marijuana clemency initiative specifically exempts relief for those convicted of municipal offenses).

118. ALA. CODE § 12-14-15 (LexisNexis 2012).

119. KAN. STAT. ANN. § 15-309 (2001).

120. MISS. CODE ANN. § 21-15-15 (2015).

121. MO. REV. STAT. §§ 77.360, 79.220 (2016).

122. MONT. CODE ANN. § 7-4-4305 (2017).

123. NEB. REV. STAT. § 15-315 (2012).

124. D.C. CODE § 1-301.76 (2001). There is a dispute between DOJ and the D.C. Mayor’s Office about whether the Code actually gives the mayor the authority to grant clemency for all local offenses committed in the jurisdiction. *State Clemency: District of Columbia*, CRIM. JUST. POL’Y FOUND., <https://www.cjpf.org/clemency-dc> [<https://perma.cc/K78L-7VRD>].

125. N.M. STAT. ANN. § 3-12-3(B) (2018).

126. 8 PA. STAT. AND CONS. STAT. ANN. § 1005 (West 2016).

127. S.D. CODIFIED LAWS § 9-29-23 (2004).

128. TEX. LOC. GOV’T CODE ANN. § 54.003 (West 2008).

129. UTAH CODE ANN. § 10-3b-202 (1)(d)(xi), (xiii) (LexisNexis 2015).

130. Interestingly, Vermont does not enumerate general municipal clemency powers, but instead endows these powers with specific cities. *See, e.g., VT. STAT. ANN. tit. 24 app., § 7-9* (2013) (“The Mayor [of Newport], with the consent of the Board of Aldermen, shall have the

a pardon power but nevertheless recognize other municipal clemency powers like the ability to remit fines and commute sentences.

But where should municipal defendants turn if there are no state or local clemency procedures established? The situation is further complicated by the fact that other procedures, such as expungement, fail to serve as an adequate substitute for a clemency power.¹³¹ While expungement can function as a safety valve that helps address many of the concerns raised by the absence of a pardon power,¹³² it alone cannot solve the municipal clemency bind. First, expungement law varies widely between states. This is because, in the absence of some kind of exceptional circumstance, the procedure is typically available only by statute.¹³³ Some states make expungement easy and accessible. In Wisconsin, defendants who are under the age of twenty-five at the time of the offense are eligible to have certain offenses expunged immediately after completion of their sentence.¹³⁴ Other states have expungement-like procedures that relieve defendants of a conviction's collateral consequences. For example, Colorado courts have the discretion to immediately relieve collateral consequences, such as those that might manifest in housing or employment, for offenders who are not sentenced to a term of incarceration.¹³⁵

But in many states, the scope and availability of relief through expungement is often limited by the criminal history of the petitioner and the offense for which they were convicted. For example, in Mississippi, expungement of non-traffic-related misdemeanors is only available to first-time offenders.¹³⁶ In North Carolina, adult defendants can only seek expungement for nonvio-

power to remit penalties for the breach of City ordinances, in whole or in part, and shall cause the reason for such remission to be entered on the City records.”); VT. STAT. ANN. tit. 24 app., § 3-119 (2013) (“The Mayor [of Burlington], with the consent of the City Council, shall have power to remit fines and costs, in whole or in part, in cases where the same are payable into the City Treasury, and shall cause the reasons for such remissions to be entered on the City records.”).

131. Expungement can be defined as “the process by which valid *nolo contendere* pleas, findings of guilt, or admissions of guilt are later vacated, reversed, sealed, purged, or destroyed by state expungement or rehabilitative statutes.” James A.R. Nafziger & Michael Yimesgen, *The Effect of Expungement on Removability of Non-Citizens*, 36 U. MICH. J.L. REFORM 915, 916 n.4 (2003). While some scholars might differentiate expungement from other procedures like sealing or the setting aside of a conviction, for the purposes of this Note, these procedures will fall under the general definition of expungement.

132. See Joseph C. Dugan, Note, *I Did My Time: The Transformation of Indiana's Expungement Law*, 90 IND. L.J. 1321, 1321 (2015) (“[E]xpungement ensures that employers, licensing agencies, and communities view an individual in light of her character today rather than the mistakes she made in her distant past.”).

133. See George L. Blum, Annotation, *Judicial Expunction of Criminal Record of Convicted Adult in Absence of Authorizing Statute*, 68 A.L.R. 6th 1, § 1 (2011).

134. WIS. STAT. ANN. § 973.015 (West Supp. 2018).

135. COLO. REV. STAT. § 18-1.3-107 (2018).

136. MISS. CODE ANN. § 99-19-71 (2015); Act of Mar. 29, 2019, 2019 Miss. Laws Adv. Sh. 428 (LexisNexis) (amending section 99-19-71); Act of Apr. 16, 2019, 2019 Miss. Laws Adv. Sh. 466 (LexisNexis) (amending section 99-19-71).

lent misdemeanors.¹³⁷ And in Arizona, courts are prohibited from setting aside a conviction when the violation fits the nebulous definition of a “dangerous offense.”¹³⁸ Even in states that do have an adequate expungement process, municipal defendants should nevertheless be permitted to pursue multiple avenues of clemency. After all, if expungement were a sufficient safety valve on its own, then the rationale for state pardons would inevitably collapse. Further, expungement cannot completely fill the void of clemency powers generally. Expungement is not typically used to commute a sentence¹³⁹ or remit a fine,¹⁴⁰ and many expungement-like procedures are not guaranteed to have the same legal effect in eliminating collateral consequences as a pardon.¹⁴¹

A system built exclusively on expungement also raises concerns about the necessary role clemency plays in our larger criminal justice system. A modern understanding of the pardon power recognizes its “public” nature and the importance this executive power can play in shaping a larger constitutional scheme.¹⁴² In contrast, expungement typically involves an individualized evaluation process in which a defendant initiates relief by petitioning the court.¹⁴³ These qualities may make it difficult for expungement to be used as an effective public policy device. Where courts can be slow and deliberate, a local official can use the pardon power to act proactively in the public interest.

Ultimately, the biggest obstacle for municipal defendants seeking relief is not the limitations that courts have placed on the gubernatorial pardon

137. N.C. GEN. STAT. § 15A-145.5 (2017).

138. ARIZ. REV. STAT. ANN. § 13-907(K)(1) (2010 & Supp. 2018); Act of Apr. 30, 2019, § 4, 2019 Ariz. Sess. Laws 149 (renumbering section 13-907 as 13-905 and enacting slight revisions).

139. Where expungement typically refers to the erasure of a conviction, commutation involves the “substitution of a lesser, partial, or milder punishment for the one inflicted by the court.” See 67A C.J.S. *Pardon & Parole* § 6 (2013). Further, commutation would not be possible under many expungement statutes since they require that the defendant first satisfy the obligations of their sentence. See, e.g., VT. ST. ANN., tit. 13, § 7602(b)(1)(A) (2017) (“At least five years have elapsed since the date on which the person *successfully completed* the terms and conditions of the sentence for the conviction, or if the person has *successfully completed* the terms and conditions of an indeterminate term of probation that commenced at least five years previously.” (emphasis added)).

140. See, e.g., MICH. COMP. LAWS § 780.622(2) (Supp. 2018) (“The applicant is not entitled to the remission of any fine, costs, or other money paid as a consequence of a conviction that is set aside.”).

141. See, e.g., *In re Nolan*, 19 I. & N. Dec. 539 (B.I.A. 1988) (holding that a Louisiana constitutional provision that automatically pardoned certain first-time offenders was not considered an “executive pardon” and would not qualify an individual for deportation relief).

142. See *Biddle v. Perovich*, 274 U.S. 480, 486 (1927) (“A pardon . . . is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.”).

143. See, e.g., MINN. STAT. ANN. § 609A.03, subdiv. 5 (West 2018) (mandating that a petition for expungement demonstrate a benefit to the individual petitioner).

power or the inadequacy of mechanisms like expungement. Instead, it is the fact that few cities have taken it upon themselves to create a clemency process at the local level. Where the state is prohibited from granting a pardon and where the city believes it is unable to establish a basic pardon process, municipal defendants are stuck in a bind that does not affect similarly situated state and federal defendants. States can provide cities with clemency powers through statute.¹⁴⁴ But cities, especially those with robust local criminal enforcement schemes, do not have to wait for the state to act. Instead, they should invoke the doctrine of home rule to advocate for a municipal pardon power.

B. *Locating the Pardon Power Within the Doctrine of Home Rule*

Municipal clemency should not be thought of as challenging the boundaries of local action. Rather, the clemency power should be understood as a logical extension of the police powers already provided by home rule. If one assumes, as home rule states do, that cities are entitled to a measure of autonomy—especially when it comes to the exercise of their police powers—then a municipal pardon power should be made more widely available. This Section situates the pardon power within a broader legal framework rooted in basic home rule principles.¹⁴⁵

Though few cities have embraced its use, the municipal pardon power is an appropriate application of a city's police power. The social and economic costs that municipal fines and convictions impose on communities are matters of local concern that cities have an inherent interest in addressing. Thus, a municipal pardon power, operationalized under the police power, is a tool that cities can use to manage the struggles of municipal defendants. The history of municipal power reflects a distinct "public" character premised on local police powers and regulation in the public interest.¹⁴⁶ While the amount of authority provided to cities can vary, home rule generally gives

144. See, e.g., ALA. CODE § 12-14-15 (LexisNexis 2012). A statutory grant of pardon authority is not an answer to the municipal clemency bind. For example, a group of lawyers lobbied Ferguson Mayor James Knowles III to grant amnesty to nonviolent offenders in 2014. Jason Rosenbaum, *Attorneys Ask Ferguson's Mayor to Commute Non-Violent Ordinance Offenses*, ST. LOUIS PUB. RADIO (Aug. 26, 2014), <https://news.stlpublicradio.org/post/attorneys-ask-fergusons-mayor-commute-non-violent-ordinance-offenses#stream/0> [<https://perma.cc/98TK-DDMX>]. Even though Missouri provides some cities with local clemency powers through statute, the statute applies to "third class cities," which does not include Ferguson. *Id.* Adding to this problem, the city has not taken the initiative to create a local clemency power for itself. *Id.*

145. This Section focuses on home rule jurisdictions. Cities would likely find it too difficult to justify the local creation of a pardon power under Dillon's Rule.

146. See WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 12 (1996) ("The legal doctrines and practices guaranteeing the rights of municipalities to regulate social and economic life were testaments to the importance of nonconstitutional public law to the American polity.").

cities police powers to enact local law without the permission of the state.¹⁴⁷ A city's ability to use its police powers to regulate the "health, comfort and general welfare" of its residents has long been recognized and affirmed.¹⁴⁸ Over time, the police power has evolved to embrace more applications of local control. As the New Mexico Supreme Court stated in *State ex rel. Hughes v. Cleveland*, "[t]raditionally, [the police power] was limited in its operation to laws concerned with the public health, safety and morals. This historic field for its operation now has been extended to embrace laws for the promotion of the general welfare, prosperity, comfort and convenience."¹⁴⁹

The quality of life in a community can be seriously affected by aggressive penal regimes that compound problems like financial instability¹⁵⁰ and recidivism.¹⁵¹ Recognizing that these issues are matters of local concern, cities have used a broad conception of the police power to address these problems. For example, cities across the country have pursued initiatives to ease the burden that the formerly incarcerated face when searching for employment.¹⁵² Cities like Los Angeles have put the police power to work by passing ordinances that prohibit employers from discriminating on the basis of an applicant's criminal history.¹⁵³ Specifically, Los Angeles's 2017 ordinance highlighted the city's interest in "eliminating [barriers] to employment," "reducing recidivism," and facilitating reintegration for those with prior convictions.¹⁵⁴ If a city can justify an employment discrimination ordinance under the familiar refrain of promoting the "public health, safety and welfare" of its residents,¹⁵⁵ then the creation of a local clemency power must also be justified. Municipal clemency could be used to discharge debt, prevent unnecessary incarceration, and remove collateral consequences that hinder an individual's ability to integrate and contribute to his or her community.¹⁵⁶ Considering municipal clemency's wide range of applications, there are many ways the power could be used to effectuate a city's interest in protecting the general welfare of its residents.

Not only is the pardon power an acceptable application of the state's police power, it is also a logical complement to a city's existing criminal en-

147. Ohm, *supra* note 40, at 636.

148. 6A MCQUILLIN, *supra* note 16, § 24:34.

149. 141 P.2d 192, 200 (N.M. 1943).

150. See Sanchez & Kambhampati, *supra* note 8.

151. Cf. John G. Malcolm & John-Michael Seibler, *Collateral Consequences: Protecting Public Safety or Encouraging Recidivism?*, HERITAGE FOUND. (Mar. 7, 2017), <https://www.heritage.org/sites/default/files/2017-03/LM-200.pdf> [<https://perma.cc/2N8H-UZL7>].

152. Betsy Pearl & Lea Hunter, *Second Chance Cities: Local Efforts to Promote Re-Entry Success*, CTR. FOR AM. PROGRESS (Apr. 19, 2018, 9:02 AM), <https://www.americanprogress.org/issues/criminal-justice/reports/2018/04/19/449474/second-chance-cities-local-efforts-promote-re-entry-success/> [<https://perma.cc/7QPW-ZGJV>].

153. L.A., CAL., MUN. CODE, ch. XVIII, art. 9, § 189.00 (2017).

154. *Id.*

155. *Id.*

156. See *infra* Section III.A.

forcement powers. If state courts are comfortable upholding exercises of the police power like the implementation of a public nudity ordinance,¹⁵⁷ then there should be some space in the doctrine to accommodate a city's use of the clemency power to pardon that same behavior. Home rule gives cities the authority to construct sweeping penal systems that criminalize a litany of criminal behaviors.¹⁵⁸ If a city is given broad discretion to penalize, then the power to forgive should be implied in that power.¹⁵⁹

One potential difficulty in harmonizing the pardon power and traditional understandings of municipal control may be that clemency is typically thought of as an executive power.¹⁶⁰ It is unclear where distinctly executive actions fit into this clemency framework because some states define municipal authority in terms of legislative power.¹⁶¹ As Dillon states, cities are endowed with powers by the legislature and these powers are of a "legislative and administrative" character.¹⁶² Ordinances that regulate matters like waste disposal or the obstruction of thoroughfares are part and parcel of that power. But compared to these quintessentially legislative actions, does the executive character of the pardon power somehow create dissonance? First, the distinction between executive and legislative functions may be inapt considering the overlapping nature of municipal government.¹⁶³ Second, even if this distinction is salient, framing the pardon power as a purely executive function may not be necessary. After all, the pardon processes in some states reflect a trend toward decentralizing executive control of clemency.¹⁶⁴ This trend also appears at the local level, where the mayoral power to grant clemency is expressly conditioned on the approval of nonexecutive officials.¹⁶⁵ Furthermore, some state courts have rejected the proposition that municipal clemency must be birthed in the cradle of executive authority. In *Moore v. City of Newport*, the Kentucky Court of Appeals stated that the municipal pardon power does not have to be vested in the mayor.¹⁶⁶ Thus, at the local

157. *State v. Lilley*, 204 A.3d 198, 213–14 (N.H. 2019).

158. *Logan*, *supra* note 58, at 1425–28.

159. *Cf. Ex parte Wells*, 59 U.S. (18 How.) 307, 310 (1855) ("Without such a power of clemency, to be exercised by some department or functionary of a government, it would be most imperfect and deficient in its political morality, and in that attribute of Deity whose judgments are always tempered with mercy.").

160. *See, e.g., Darling v. State*, 45 So. 3d 444, 455 (Fla. 2010) (stating that "[c]lemency is an executive power").

161. *See, e.g., ALASKA CONST.* art. X, § 11 ("A home rule borough or city may exercise all legislative powers not prohibited by law or by charter."); *N.M. CONST.* art. X, § 6D ("A municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter.").

162. DILLON, *supra* note 31, at 453 n.2.

163. *See supra* Section I.A.

164. *See infra* Section III.C.

165. *See, e.g., Allen v. McGuire*, 57 So. 217 (Miss. 1912) (noting that the city code at issue required that any mayoral clemency action receive the consent of the board of aldermen).

166. *See* 248 S.W. 837, 838 (Ky. 1923).

level, framing the pardon power as a purely executive function may not be necessary. Finally, even if the pardon power is purely executive, mayors have performed executive functions like protecting a city from insurrection and restricting behavior in a state of emergency.¹⁶⁷ As a result, executive action is not itself in conflict with the character of municipal power.

Cities hoping to institute a local clemency power must also confront the threat of preemption. Preemption is a driving force that defines the outer limits of a city's home rule power in most jurisdictions.¹⁶⁸ Traditional applications of home rule "favored city power that did not interfere, or have the potential to interfere, with state-level schemes that could be applied evenly."¹⁶⁹ Where there is a conflict between state and local law, the doctrine of preemption mandates that the conflict be resolved in favor of the superior authority.¹⁷⁰ In the pardon power context, however, preemption problems are a remote concern. Express preemption is a nonissue because no state has explicitly forbidden a city from exercising a municipal pardon power.¹⁷¹

Implied preemption, either through conflict or field preemption,¹⁷² is also unlikely to present a threat to a local clemency power.¹⁷³ Intrastate conflict preemption occurs when a local law "substantially interferes with state law or the state's constitutional responsibilities."¹⁷⁴ It is difficult to imagine a situation in which a city's local clemency power would literally conflict with or frustrate the state's clemency objectives. Courts that have addressed the topic of state control of municipal clemency have held that states have no authority to grant a municipal pardon.¹⁷⁵ Thus, a city's local clemency action cannot conflict with an objective or power that the state does not possess. The municipal clemency jurisprudence also reflects the sentiment that states have a limited enforcement duty with respect to local law.¹⁷⁶ This further

167. See, e.g., *Mayor of Baltimore v. Silver*, 283 A.2d 788 (Md. 1971) (upholding the ability of the mayor to form a posse comitatus to preserve the peace); *State v. Dobbins*, 178 S.E.2d 449 (N.C. 1971) (upholding the mayor's ability to declare a state of emergency and impose a curfew); *Farmer v. City of Sapulpa*, 645 P.2d 518 (Okla. 1982) (upholding the mayor's ability to restrict water usage in the event of an emergency).

168. Diller, *supra* note 45, at 1125–26.

169. Guenther, *supra* note 36, at 438.

170. Miles Coleman, Note, *Banning the Flames: Constitutionality, Preemption, and Local Smoking Ordinances*, 59 S.C. L. REV. 475, 480 (2008).

171. This Note has not identified any state statute that expressly forbids a local pardon power.

172. The degree and form of implied intrastate preemption can differ between states. Lauren E. Phillips, Note, *Impeding Innovation: State Preemption of Progressive Local Regulations*, 117 COLUM. L. REV. 2225, 2234 (2017).

173. Note, in some states the risk of implied preemption may not even be applicable because the state only recognizes express preemption. Paul S. Weiland, Comment, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENVTL. L. REV. 237, 267 (2000).

174. Diller, *supra* note 45, at 1141–42.

175. See *supra* note 104.

176. See *City of Paris v. Hinton*, 116 S.W. 1197, 1197–98 (Ky. 1909).

supports the proposition that the state has little claim over the area of municipal clemency. The state does have an interest in controlling clemency for state-level offenses, but a city's exercise of a local clemency power does not obstruct that prerogative.

Even if one assumes that the state does have some recognized interest or power in the arena of municipal clemency, conflict preemption still poses a negligible threat because a conflict between state and local control of municipal clemency is not necessarily presumed. Unlike areas such as international relations where the superiority and exclusiveness of a department or entity's power must be given near total deference,¹⁷⁷ the pardon power does not operate under the same imperative. It is not necessary that the pardon power be held exclusively by one entity. At the federal level, an exclusive power doctrine has theoretically not stopped Congress from holding an amnesty power.¹⁷⁸ Similarly, many states structure the pardon power around a power-sharing arrangement between the governor and the legislature.¹⁷⁹

Even though basic tenets of federalism stop federal and state officials from holding a concurrent pardon power for state and federal offenses,¹⁸⁰ this same dynamic should not apply to municipal pardons. First, several states have already recognized or hinted at a form of joint authority for powers that could be shared between state and municipal executives. Illinois, for instance, expressly allows cities to exercise power "concurrently with the State . . . to the extent that the [legislature] by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive."¹⁸¹ In *Allen v. McGuire*, the Supreme Court of Mississippi stated that the legislature could theoretically give the governor the power to pardon municipal offenses, but it did not expressly rule out the possibility that the municipal pardon power could be exercised at both the state and local levels.¹⁸² Second, the logic of concurrent power aligns with the general ap-

177. See generally Kerry Abrams, Essay, *Plenary Power Preemption*, 99 VA. L. REV. 601 (2013).

178. *Brown v. Walker*, 161 U.S. 591, 601 (1896) ("Although the Constitution vests in the President 'power to grant reprieves and pardons for offences against the United States, except in cases of impeachment,' this power has never been held to take from Congress the power to pass acts of general amnesty." (quoting U.S. CONST. art II, § 2)); see also Henry Weihofen, *Legislative Pardons*, 27 CALIF. L. REV. 371, 374 (1939).

179. See, e.g., IDAHO CONST. art. 4, § 7 (setting out the creation of a Board of Pardons by legislative enactment and providing the legislature with the power to "prescribe the sessions of said board and the manner in which application[s] shall be made").

180. See U.S. CONST. art. II, § 2, cl. 1 ("[The President] shall have Power to grant Reprieves and Pardons for Offenses against the United States . . ." (emphasis added)).

181. ILL. CONST. art. VII, § 6(i); Michael W. Halpin, Note, *Is the Living Wage Dead in Detroit? The Role of Stare Decisis, Home Rule, and Policy Preferences in the Michigan Supreme Court*, 2009 U. ILL. L. REV. 911, 923.

182. See 57 So. 217, 217 (Miss. 1912) ("Of course, the Legislature can confide the power to the Governor to pardon for offenses against municipal ordinances; but, until it has done so, he has no such power under the Constitution."). Nowhere does the court embrace the idea that

proach courts have used to “preserve local autonomy by avoiding the finding of a state-local conflict” and “determin[ing] that differing state and local regulations of the same subject are not inconsistent.”¹⁸³

Likewise, field preemption does not present an obstacle to a city’s local clemency pursuits. Intrastate field preemption occurs when the state’s regulation of an area of law is so extensive that it prohibits a city from supplementing the field with its own enactments.¹⁸⁴ But in the municipal clemency context, states have passed statutes that expressly delegate the municipal pardon power directly to cities.¹⁸⁵ In fact, the state regulations that do exist are premised on cities having the basic authority to enact a local clemency power.¹⁸⁶ Were these states actually interested in occupying the field, they would not have expressly invited cities to control clemency for themselves.

Even if one accepts the proposition that the pardon power is preempted, that would lead to the conclusion that municipal criminal law, generally, would also be preempted. Traditionally, the state legislature was responsible for determining the definition and scope of criminal punishment.¹⁸⁷ This was especially true in the context of “general criminal laws.”¹⁸⁸ However, “any inference of state hegemony with respect to criminal law making would be entirely incorrect.”¹⁸⁹ For example, criminal assault and battery offenses are generally considered state concerns, yet violations involving physical violence are still criminalized at the municipal level.¹⁹⁰

Once it is established that a city is acting within the confines of home rule, the next issue is determining where that power is anchored. Unlike the United States Constitution, most municipal charters do not feature a vesting clause that would allow a mayor to command a swath of implied powers. Courts would likely insist that the pardon power still be grounded in some kind of explicit authorization.¹⁹¹ But as long as the action is properly local, is authorized by local law, and does not trigger preemption issues, a city should be able to exercise the pardon power in accordance with home rule.

Ultimately, the broad leeway cities have with respect to local criminal law supports the justification of the pardon power as a matter of responsive

if it conferred the municipal pardon power onto the governor that it would have to simultaneously divest the city of its power.

183. Briffault, *supra* note 52, at 17.

184. Diller, *supra* note 45, at 1141.

185. *See supra* Section II.A.

186. *See, e.g.*, MO. REV. STAT. § 77.360 (2016).

187. Logan, *supra* note 58, at 1424–25.

188. *Id.*

189. *Id.* at 1425.

190. *Id.* at 1428.

191. *See Detroit Fire Fighters Ass’n v. City of Detroit*, 537 N.W.2d 436, 440 (Mich. 1995) (“Generally a mayor has only that authority which is expressly or impliedly conferred upon him by charter or by the council acting within the scope of the charter.”).

and practical governance.¹⁹² For example, the Supreme Court has articulated little concern about the lack of judicial controls over municipal criminal law.¹⁹³ Without substantive judicial controls, the pardon power becomes perhaps the only way for some municipal defendants to seek forgiveness, correct injustices, and relieve the collateral consequences of conviction. While the pardon power could address these important social issues, it could also give rise to serious abuses. Cities must confront how to integrate and manage this power at the local level.

III. THE ADMINISTRATION OF THE MUNICIPAL PARDON POWER

In 1988, H.T. Mathis, the Mayor of Florala, Alabama, was impeached and removed from office on charges of neglect of duty and incompetence stemming from his use of the pardon power.¹⁹⁴ Mayor Mathis stood accused of abusing his office after pardoning “more than 100 traffic offenders, including 27 drunken drivers.”¹⁹⁵ A city clerk even quoted the mayor as saying, “I have more power than Ronald Reagan.”¹⁹⁶ Mayor Mathis epitomizes the dark mythology of local politics: corrupt mayors, abuses of power, and a community powerless to effect change. Mayor Mathis’s exercise of the pardon power, and other abuses like it, may cast doubt on the efficacy of vesting a pardon power in a municipal authority. On the other hand, Mayor Mathis’s demise serves as an important reminder that, even at the local level, abuses of power can be controlled by public scrutiny and proper structural checks. Cities need not fear that the pardon power will devolve into a cabal of palm-greasing and double-dealing.

A thoughtfully designed and implemented process can ensure that local officials exercise their clemency powers responsibly. Further, letting the fear of corruption dash the creation of a local clemency process not only denies individual defendants the benefits of a pardon power, but it also squanders the opportunity to utilize clemency as a tool to remedy broader social issues. This Part examines the administrability of the municipal clemency process and analyzes the policy rationales that justify the pardon power. Section III.A discusses the social imperative of instituting a municipal clemency process. Section III.B addresses concerns about local corruption and describes various checks that would curb improper uses of the power. Finally, Section III.C outlines specific policy proposals that would not only guard against the possibility of local corruption but also encourage local officials to use clemency effectively.

192. Cf. Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 132 (2005).

193. Logan, *supra* note 58, at 1415–16.

194. *Mayor Who Pardoned Drunk Drivers Is Removed*, N.Y. TIMES (Sept. 1, 1988), <https://www.nytimes.com/1988/09/01/us/mayor-who-pardoned-drunk-drivers-is-removed.html> [<https://perma.cc/8VN2-GE42>].

195. *Id.*

196. *Id.*

A. *The Social Imperative to Institute a Municipal Pardon Process*

Cities can use the municipal pardon power to tackle a myriad of social problems that are experienced by both individual residents and the community as a whole. Considering that municipal law already touches so many aspects of everyday life, cities should embrace clemency as not only consistent with the expansion of local power, but curative of its excesses.

While this Note has detailed the serious collateral consequences faced by individuals convicted of municipal offenses, the pardon power also has the potential to alleviate some of the broader social problems caused by overexpansive municipal penal regimes. Cities have a checkered history of using local power to exclude and alienate minorities from the community.¹⁹⁷ Today, racially disparate municipal policing continues to affect how individuals live and participate in their community.¹⁹⁸ For example, municipal defendants who face unpaid fines and, by consequence, the possibility of arrest may find it difficult to engage in civic life.¹⁹⁹ The crisis in Ferguson highlights this dynamic. Lawyers working on behalf of municipal defendants in Ferguson lobbied local officials to create a clemency power, arguing that such a power could “bridge the gap between the town’s largely white leadership and the African-American community.”²⁰⁰ A local clemency power could do more than just release individuals from the devastating effects of fines and jail time—it could be used as a powerful tool of community building and racial equity.

Cities could also use the pardon power to advocate for humanitarian interests at the national level. Consider the context of immigration. A full and unconditional municipal pardon can shield an immigrant convicted of a crime of moral turpitude from deportation.²⁰¹ Some cities, like Denver, have enacted sweeping municipal sentencing reforms—though not the pardon power—to protect immigrant communities.²⁰² But municipal defendants should not have to wait for city councils to enact comprehensive criminal

197. Amy P. Meek, *Street Vendors, Taxicabs, and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level*, 75 OHIO ST. L.J. 1, 5 (2014).

198. See Rose Hackman, *Bratton-Style Policing Means More Fines and Arrests for Black Residents of Detroit*, GUARDIAN (Sept. 7, 2014, 12:00 PM), <https://www.theguardian.com/money/2014/sep/07/safer-detroit-fines-racial-profiling-black-residents> [<https://perma.cc/7WEZ-ER37>] (noting the way city policing practices can affect the displacement of communities of color).

199. Rosenbaum, *supra* note 144.

200. *Id.*

201. The Board of Immigration Appeals has recognized the full legal effect of a municipal pardon on removal. *In re C—R—*, 8 I. & N. Dec. 59 (B.I.A. 1958).

202. The rationale for the policy is that by reducing the maximum penalty for certain offenses to a term of less than one year, Denver is able to circumvent the tripwire that triggers removal. Jon Murray & Noelle Phillips, *Denver Is Set to Change Its Sentencing Ordinance to Help Some Immigrants Avoid Deportation*, DENV. POST (Apr. 27, 2017, 4:35 PM), <https://www.denverpost.com/2017/04/27/denver-sentencing-reform-immigrants-deportation/> [<https://perma.cc/JF2W-52H2>].

justice reform, especially when mayors could use the pardon power to provide immediate relief.

The history and constitutional tradition of clemency in the United States also support the use of the pardon power as a broad instrument of social policy. Modern history is replete with examples of “activist” pardoners-in-chief. President Jimmy Carter’s grant of amnesty to Vietnam draft evaders²⁰³ and President Barack Obama’s 2014 Clemency Initiative²⁰⁴ are both examples of ambitious social policies centered on executive clemency. There is no reason to believe that municipal clemency could not be deployed in the same way.²⁰⁵

B. *Municipal Authorities Can Be Trusted with a Pardon Power*

Fears of local corruption should not stop cities from instituting a local clemency process. State and federal officials are entrusted with a panoply of awesome powers that can run afoul of democratic institutions and ideals when used improperly.²⁰⁶ But when power is abused, competing branches of government and voters can engage accountability mechanisms.²⁰⁷ The same is true for municipal clemency. The municipal pardon power can be premised on a system of robust checks and balances and political accountability. Even though the specter of corruption is often lodged in society’s conventional understanding of local politics, it is worth noting that Americans still trust local government more than state government.²⁰⁸

Like federal and state pardons, some municipal pardons may lead to graft.²⁰⁹ History shows, however, that officials entrusted with the pardon power generally exercise restraint in the face of political realities.²¹⁰ Like

203. Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. CRIM. L. & CRIMINOLOGY 593, 598 n.29 (2012).

204. See Peter Baker, *Obama Plans Broader Use of Clemency to Free Nonviolent Drug Offenders*, N.Y. TIMES (July 3, 2015), <https://www.nytimes.com/2015/07/04/us/obama-plans-broader-use-of-clemency-to-free-nonviolent-drug-offenders.html> [<https://perma.cc/B7DP-RVYD>].

205. Cf. Sanjay K. Chhablani, *Legitimate Justice: Using Clemency to Address Mass Incarceration*, 16 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 48, 61–62 (2016).

206. See, e.g., Gideon Kanner, *The Public Use Clause: Constitutional Mandate or “Hortatory Fluff”?*, 33 PEPP. L. REV. 335, 337 (2006).

207. Cf. Ilya Somin, *The Political and Judicial Reaction to Kelo*, WASH. POST: VOLOKH CONSPIRACY (June 4, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/04/the-political-and-judicial-reaction-to-keelo> [<https://perma.cc/P9MJ-ZZMQ>].

208. Justin McCarthy, *Americans Still More Trusting in Local over State Government*, GALLUP (Sept. 19, 2016), <https://news.gallup.com/poll/195656/americans-trusting-local-state-government.aspx> [<https://perma.cc/VW9B-5WYX>].

209. See Max Kutner, *No President Has Pardoned Himself, but Governors and a Drunk Mayor Have*, NEWSWEEK (July 24, 2017, 2:22 PM), <https://www.newsweek.com/trump-granting-himself-pardon-governors-641150> [<https://perma.cc/7BCG-WH42>].

210. See Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President’s Duty to Be Merciful*, 27 FORDHAM URB. L.J. 1483, 1495 (2000) (“It appears more likely that pardon’s declining incidence since 1980 is attributable to the politics of crime con-

Mayor Mathis, those that do issue “unscrupulous” pardons often pay the political consequences of those actions.²¹¹ Beyond the political check from voters, municipal officials would also have to be mindful of institutional checks within local government. Even at the local level, the “executive” and “legislative” branches of government can police each other’s actions.²¹² Some state legislatures have even made concerted efforts to limit the gubernatorial pardon power after instances of unscrupulous pardons.²¹³ As detailed in the next Section, a city council or analogous municipal body could do the same.

There are also practical limitations built into the structure of local governments that can curb an overexpansive use of the municipal pardon power. Imagine a situation in which a mayor gets into a political skirmish with a local law enforcement official. In an act of political retribution, the mayor preemptively pardons all municipal offenders who happen to have been cited, fined, or arrested that day. The mayor’s actions would effectively turn the acts of local law enforcement into a nullity. Beyond earning the ire of voters and other local political institutions, the mayor’s overexpansive use of the pardon power would create serious consequences for the integrity of the city. Likewise, a clemency policy of mass pardons and accompanying remittances could dramatically impair a city’s revenue stream.²¹⁴ This reality would cause the municipal authority to internalize the economic costs of using the pardon power too liberally. Together, these institutional realities are among the many checks that reduce the likelihood of unscrupulous pardons.

C. *The Responsible Administration of the Municipal Pardon Power*

Even if Mayor Mathis is the rule rather than the exception, there are ways to vindicate the municipal pardon power while insulating the city from potential abuse. The United States Constitution places few textual restrictions on the presidential pardon power. In fact, Alexander Hamilton was

trol, a politics that has produced some of the most potent and divisive electoral issues of the last thirty years.”).

211. Scott Neuman, *When Pardons Become Political Dynamite*, NPR (Jan. 13, 2012, 3:38 PM), <https://www.npr.org/2012/01/13/145179319/when-pardons-become-political-dynamite> [https://perma.cc/Y8AK-HC93].

212. See, e.g., Elizabeth Fine & James Caras, *Twenty-Five Years of the Council-Mayor Governance of New York City: A History of the Council’s Powers, the Separation of Powers, and Issues for Future Resolution*, 58 N.Y.L. SCH. L. REV. 119, 126–30 (2013–2014) (noting that the New York City Council and the mayor have occasionally “disagreed on how far the Council’s legislative powers extend or where the Mayor’s executive authority begins and ends”).

213. See *Santos v. Brown*, 189 Cal. Rptr. 3d 234, 245 (Ct. App. 2015) (noting that after California Governor Arnold Schwarzenegger issued a publicly controversial commutation, the state legislature enacted several new checks on the governor’s clemency power such as a victim notification requirement).

214. See, e.g., Jonathan Blanks, *The NYPD’s Work Stoppage Is Costing the City Lots of Money. That’s Great for New Yorkers.*, WASH. POST (Jan. 7, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/01/07/the-nypds-work-stoppage-is-costing-the-city-lots-of-money-thats-great-for-new-yorkers> [https://perma.cc/69KT-ACZC].

skeptical of any language that might hamper the president's ability to exercise this power.²¹⁵ States, though, have experimented with various checks on the gubernatorial pardon power to promote accountability.

Local governments should draw from the lessons of these state pardon processes and create a municipal pardon authority that is cabined by public notice and internal checks. Notice requirements are found in many state pardon procedures. For example, the Arkansas Constitution requires the governor to provide the legislature with information about the individuals he or she has pardoned and the reasons for the pardon.²¹⁶ The Maryland Constitution provides that information about the pardon be published in a newspaper.²¹⁷ And in Alabama, the Board of Pardon and Paroles may not issue a pardon unless the action is taken at an "open public meeting" and notice is given to the state attorney general, the chief of police, the county sheriff, and the district attorney and trial judge who participated in the case.²¹⁸ These constitutional provisions, along with similar state statutory provisions, ensure transparency and give voters access to valuable information that can be used as a political check.²¹⁹ Cities could similarly include notice requirements when designing the clemency process.²²⁰

Cities should also consider adopting a pardon approval process like those found in Massachusetts and Rhode Island. In Massachusetts, the governor's ability to pardon is conditioned on the advice of a separate elected entity, the Massachusetts Governor's Council.²²¹ Modeling the municipal pardon power off of this mechanism would create an extra layer of accountability. Alternatively, cities and towns could rely on the already-existing city council as an advice and consent mechanism. Rhode Island uses this approach by conditioning the governor's ability to pardon on the advice and

215. See THE FEDERALIST NO. 74, *supra* note 93, at 376 (Alexander Hamilton) ("Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed.").

216. ARK. CONST. art. VI, § 18 ("He shall communicate to the General Assembly at every regular session each case of reprieve, commutation or pardon, with his reasons therefor; stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon or reprieve.").

217. MD. CONST. art. II, § 20 ("[H]e shall give notice, in one or more newspapers, of the application made for it, and of the day on, or after which, his decision will be given; and in every case, in which he exercises this power . . .").

218. ALA. CODE § 15-22-23(b)(1), (2) (LexisNexis 2018).

219. Note, some courts that have interpreted notice requirements have essentially nullified those provisions. See, e.g., *In re Hooker*, 87 So. 3d 401, 414 (Miss. 2012) (holding that the violation of the procedural publication requirement would not render a pardon facially void).

220. Some state statutes already mandate that cities provide notice. See, e.g., ALA. CODE § 12-14-15 (LexisNexis 2012) (stating that after a clemency action has been executed, the mayor "shall report his action to the council or other governing body . . . with his reasons therefor in writing").

221. MASS. CONST. ch. II, § I, art. VIII; see also *In re Op. of the Justices*, 98 N.E. 101, 102 (Mass. 1912) ("The granting of a full or a partial pardon is the result of concurrent action by both the Governor and the Council. Neither alone can take effective action.").

consent of the state senate.²²² The efficacy of the Massachusetts and Rhode Island approaches will inevitably depend on the size of the city and the way the clemency power is structured.²²³ Smaller cities may not have the resources or demand to justify a Massachusetts-modeled body to independently evaluate the clemency actions of municipal officials. And though the possibility of multiple layers of checks provides robust oversight in theory, in practice it could completely paralyze the power.²²⁴ While cities will have to take into account their own unique circumstances, there are plenty of ways to tailor these accountability mechanisms to local needs.

CONCLUSION

Municipal governments criminalize a broad range of behaviors. The collateral consequences that attend these municipal convictions are stark. From immigration to employment, the shadow of a municipal conviction can prevent the rehabilitated and even the innocent from reintegrating into society and moving on with their lives. The idea of a mayor wielding the pardon power may conjure fears of corruption and favoritism. But cities must be cognizant of the human consequences that come with not extending this power. As the Framers debated the clemency power in 1787, they too were concerned about the potential for abuse that this power may invite. Yet they felt the need to leave the clemency power unfettered because good policy demanded that mercy and forgiveness be a key part of the criminal justice system. In that same vein, municipalities should strive to give municipal defendants the same opportunity for clemency that state and federal defendants enjoy.

In a majority of states, it is unclear if municipal defendants can count on state action to alleviate their suffering. This is why it is incumbent on cities to use the powers afforded to them by home rule to exercise not only the power to punish but also the power to forgive. Cities regularly use home rule as the basis for an array of local actions. It is time that cities make clemency a priority and release municipal defendants from a bind that leaves them without hope of a pardon. Municipal clemency will never be a cure-all for the myriad of social problems that intersect our criminal justice system. Still, having a local authority that is empowered to grant pardons could provide relief where it is both desperately needed and otherwise unavailable.

222. R.I. CONST. art. IX, § 13.

223. In addition to structure and size, these accountability measures may also depend on exactly where the pardon power is vested. Naturally, in a mayor-council system, the mayor would wield the power, subject to certain constraints. In a council-manager system, however, exactly who would hold the power is not as intuitive. The clemency power could be lodged in the city manager or the council generally.

224. Cf. Maggie Clark, *Governors' Pardons Are Becoming a Rarity*, GOVERNING (Feb. 8, 2013), <http://www.governing.com/news/state/sl-governors-balance-politics-with-pardons.html> [<https://perma.cc/F95V-QZ6E>] (“In Rhode Island, the Senate must approve every pardon application before it can be granted. Needless to say, very few offenders receive pardons in Rhode Island.”).