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**Pardons and the Theory of the 'Second Best'**

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Pardons and the Theory of the "Second Best"

Chad Flanders

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## *Pardons and the Theory of the “Second Best”*

Chad Flanders\*

*This paper explains and defends a “second-best” theory of pardons. Pardons are “second-best” in two ways. First, pardons are second-best because they represent, in part, a failure of justice: the person convicted was not actually guilty, or he or she was punished too harshly, or the punishment no longer fits the crime. In the familiar analogy, pardons act as a “safety valve” on a criminal justice system that doesn’t work as, ideally, it should. Pardons, in the non-ideal world we live in, are sometimes necessary.*

*But pardons are also “second-best” in another way, because they can represent deviations from certain other values we hold dear in the criminal law: fairness, consistency, and non-arbitrariness. Pardons, when they are given, can all too often reflect patterns of racial bias, favoritism, and sheer randomness, both when they are given too generously or not generously enough. So we need to have a theory of how the pardoning power should be used, even when it is used to correct what are obvious injustices in the criminal justice system.*

*This paper both takes up the task both of showing how pardons are justified, but more importantly, also gives a theory on when they should be used. It introduces two constraints on the pardon power, one which constrains pardons when considered individually, and another which constrains pardons when we consider them as a whole. It is this latter ground that has been left mostly underdeveloped in the literature: we seem to know that pardons when given en masse can be controversial, but we lack adequate terms to explain why they might be morally problematic. This paper fills that gap in the literature, and in the process provides a general framework for analyzing when various “second-best” moves are permissible in reforming and correcting injustices in the application of the criminal law.*

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## I. Introduction

In January 2012, near the end of his term of office, Mississippi Governor Haley Barbour gave some form of executive clemency (pardon, early release, or suspension of sentences) to nearly two hundred people.<sup>1</sup> The move was nearly unprecedented in Mississippi,<sup>2</sup> although it was later upheld by the Mississippi Supreme Court against a procedural challenge.<sup>3</sup> The “pardons” – as I shall collectively call them, following most reporters -- were, and properly remain, intensely controversial.<sup>4</sup> There was ample evidence that Barbour had “played favorites” in handing out the pardons. Some of those pardoned had personal connections to the Governor through the controversial Mississippi’s “trusty” program;<sup>5</sup> others Barbour pardoned were

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<sup>1</sup> *Mississippi Governor Haley Barbour Pardons Nearly 200 People, Including Convicted Killers*, CRIMESIDER (Jan. 11, 2012) available at [http://www.cbsnews.com/8301-504083\\_162-57357252-504083/mississippi-gov-haley-barbour-pardons-nearly-200-including-convicted-killers/](http://www.cbsnews.com/8301-504083_162-57357252-504083/mississippi-gov-haley-barbour-pardons-nearly-200-including-convicted-killers/); Richard Fausset, *Outgoing Gov. Haley Barbour’s Pardons Shock Mississippi*, L.A. TIMES (Jan. 12, 2012) available at <http://articles.latimes.com/2012/jan/12/nation/la-na-barbour-pardons-20120113>.

<sup>2</sup> See *Haley Barbour’s Shocking Pardon Spree: A Guide*, THE WEEK (Jan. 13, 2012) available at <http://theweek.com/article/index/223306/haley-barbours-shocking-pardon-spree-a-guide> (previous pardon high for a Mississippi Governor was 13).

<sup>3</sup> See Holbrook Mohr, *Haley Barbour Pardons: Mississippi Supreme Court Rules Pardons are Valid*, HUFF. POST (Mar. 8, 2012) available at [http://www.huffingtonpost.com/2012/03/08/haley-barbour-pardons-mississippi-supreme-court\\_n\\_1332769.html](http://www.huffingtonpost.com/2012/03/08/haley-barbour-pardons-mississippi-supreme-court_n_1332769.html); In re Hooker, 87 So.3d 401 (Miss. 2012) (“[W]e are compelled to hold that—in each of the cases before us—it fell to the governor alone to decide whether the Constitution’s publication requirement was met.”).

<sup>4</sup> Fausset, *supra* note 1 (“The actions have brought criticism from victims’ families, everyday Mississippians like [local resident Terrance] Winters, and Democratic officials including Jim Hood, the state attorney general, who persuaded a judge to put some of the pardons on hold.”).

<sup>5</sup> “Trusties” were convicts who worked for the Governor, at his mansion, doing routine maintenance and landscaping. The program has since been abolished by Barbour’s successor. Jessica Bakeman, *Miss. Governor Ends Controversial Mansion Trusty Program*, USA TODAY (Jan. 20, 2012) available at <http://usatoday30.usatoday.com/news/nation/story/2012-01-20/mississippi/52694334/1>. Barbour pardoned five people with life sentences – including four murderers -- who had worked in the trusty program during his administration. See Rich Phillips, *Controversy Puts Mississippi’s Longstanding “Trusty” Program in Spotlight*,

“members of prominent Mississippi families, major Republican donors or others from the higher social strata of Mississippi life.”<sup>6</sup> One individual pardoned was the cousin of football great Brett Favre, who had been convicted of killing a friend in a drinking-and-driving accident.<sup>7</sup> Taken as a whole, the pardons also showed a disturbing racial distribution. Nearly two-thirds of the pardons during Barbour’s tenure were to whites, even though the majority of those convicted of crimes in Mississippi are black.<sup>8</sup>

In his public statements, Barbour gave only a vague theological justification for his mass pardons, saying that Christians believe people can be redeemed and deserve a second chance.<sup>9</sup> He added that pardon board had recommended many, if not all, of those pardoned for executive clemency.<sup>10</sup> In an op-ed written later, Barbour defended the tradition of pardoning trustees, and asserting that those who commit crimes of passion such as murder are least likely to re-offend and so are no longer a danger to society.<sup>11</sup> Four of the trustees Barbour pardoned had been convicted of murder.<sup>12</sup>

Such dramatic exercises of the pardon power such as Barbour’s raise deep and troubling questions, not only about the pardons taken individually, but also about the justifiability of the pardon power as a whole. When a governor pardons (an individual or a large group), he or she is making an exception to the laws that apply to everybody.<sup>13</sup> Even pardons that look justifiable on

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CNN.COM (Jan. 18, 2012) available at <http://www.cnn.com/2012/01/16/justice/mississippi-trusty-program/index.html>.

<sup>6</sup> Campbell Robertson & Stephanie Saul, *List of Pardons Included Many Tied to Power*, NY TIMES A1 (Jan. 28, 2012).

<sup>7</sup> Judy Keen, *Barbour’s Pardons Stir Outrage in Mississippi*, USA TODAY (Jan. 13, 2012) available at <http://usatoday30.usatoday.com/news/nation/story/2012-01-12/mississippi-barbour-pardons/52511486/1> (“Among those pardoned was Earnest Scott Favre, brother of former NFL quarterback Brett Favre. He pleaded guilty to driving in front of a train while drunk in 1996, resulting in the death of his best friend.”).

<sup>8</sup> Patrik Jonsson, *Haley Barbour Pardons: Why Were the Forgiven So Disproportionately White?* C.S. MONITOR (Jan. 21, 2012) available at <http://www.csmonitor.com/USA/2012/0121/Haley-Barbour-pardons-Why-were-the-forgiven-so-disproportionately-white> (“Out of a total of 222 acts of clemency given by Barbour during his tenure ... two-thirds benefited white prisoners. Meanwhile, two-thirds of the state’s prison population is black.”); see also Robertson & Saul, *supra* note 6, at A1 (“Yet in a state with the highest poverty rate in the nation, where nearly 70 percent of convicts are black, official redemption appears to have been attained disproportionately by white people and the well connected.”).

<sup>9</sup> “Christianity teaches us forgiveness and second chances. I believe in second chances, and I try hard to be forgiving. The historic power of gubernatorial clemency by the Governor to pardon felons is rooted in the Christian idea of giving second chances. I’m not saying I’ll be perfect, that no one who received clemency will ever do anything wrong. I’m not infallible, and no one else is. But I’m very comfortable and totally at peace with these pardons, especially of the Mansion inmates.” Haley Barbour, *Statement on Clemency* (Jan. 22, 2013) available at <http://www.governorbarbour.com/news/2011/dec/1.13barbourclemencystatement.html>.

<sup>10</sup> *Id.* (“My decision about clemency was based upon the recommendation of the parole board in more than 90% of the cases.”)

<sup>11</sup> Haley Barbour, *Why I Released 26 Prisoners*, WASH. POST (Jan. 18, 2012) available at [http://articles.washingtonpost.com/2012-01-18/opinions/35439863\\_1\\_inmates-clemency-trusties](http://articles.washingtonpost.com/2012-01-18/opinions/35439863_1_inmates-clemency-trusties).

<sup>12</sup> *Haley Barbour Pardons 4 Killers: Convicts Were Trustees at Governor’s Mansion*, THE GRIO (JAN. 10, 2012) available at <http://thegrio.com/2012/01/10/haley-barbour-pardons-4-killers-convicts-were-trustees-at-miss-governor-mansion/>.

<sup>13</sup> Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1453 (2004) (arguing against executive discretion to reduce or remove sentences on retributivist grounds); KATHLEEN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 28 (1997) (summarizing Kant’s opposition to pardons, given that rulers have a “categorical to punish those who have committed crimes”).

their face, because the prisoner has suffered enough or because the governor deems a sentence against an individual to be too long or too harsh, violate the governor's duty to be an impartial administrator of the law.<sup>14</sup> Taken to an extreme, this argument would even limit an executive's ability to pardon in an error correcting capacity (say, if someone were actually innocent), provided that the correct procedures had been used.<sup>15</sup>

Barbour's pardons also came at an inconvenient time: when there have been increasing calls for executives – including and perhaps especially the President<sup>16</sup> – to *increase* the number of pardons granted.<sup>17</sup> The pardon power has fallen in to disuse, perhaps in overreaction to certain manifestly political uses of the pardon, such as President Clinton's infamous pardon of Marc Rich.<sup>18</sup> But Barbour's pardons seem to show, in an elaborate and troubling fashion, how mass pardons can go very wrong and would seem to condone, if not justify, executive hesitancy, delay, and general over-caution in pardoning.<sup>19</sup>

In this Article, I defend the pardoning power (especially against those who would find the power itself always and everywhere unjustifiable) while finding that there are and should be strong moral limits to when and how it can be used. To see how the pardon power could be justified (and, as a result, individual instances of pardoning), we need to make a distinction between ideal and non-ideal circumstances, a distinction I borrow and modify from the work of John Rawls,<sup>20</sup> and one closely related to the idea of the "second best."<sup>21</sup>

In ideal or near ideal circumstances, as I will be using the concepts, sentences are for the most part just, and the criminal justice system works by and large in a fair manner. In a perfectly ideal society, there would be virtually no need for pardons. But in non-ideal circumstances,

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<sup>14</sup> For an excellent statement of the tension between mercy (including pardons) and the rule of law norms of the administrative state, see Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARVARD L. REV. 1332 (2008) ("[T]he rise of the administrative state has made unchecked discretion an anomaly in the law, and a phenomenon to be viewed with suspicion. The expansion of the administrative state has showcased the dangers associated with the exercise of discretion."); see also *id.* at 1333n. 5 (collecting sources on the tension between mercy and justice).

<sup>15</sup> See William Baude, *Last Chance on Death Row*, 34 THE WILSON QUARTERLY 18 (Autumn 2010) (defending value of finality in criminal proceedings with application to the Troy Davis case).

<sup>16</sup> See Dafna Linzer, *Obama Has Granted Clemency More Rarely Than Any Modern President*, ProPublica (Nov. 2, 2012), available at <http://www.propublica.org/article/obama-has-granted-clemency-more-rarely-than-any-modern-president> (news story on infrequent use of pardons by President Obama).

<sup>17</sup> See Clara H. Drinan, *Clemency in a Time of Crisis*, 28 GA. ST. U. L. REV. 1123 (2012) (arguing for greater use of pardon power); Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. OF CRIM. LAW & CRIMINOLOGY 1169, (2010) ("[P]ardon has important uses in the federal justice system, and recent experience has shown that a president who fails to pardon regularly throughout his term will have difficulty dealing with pent-up demand at its conclusion."); Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT. REP. 153 (Feb. 2009) (calling for a "return to an era in which clemency is a key part of a functioning system of justice"). See generally P.S. Ruckman, Jr., *Pardon Power*, <http://www.pardonpower.com/>.

<sup>18</sup> Jessica Reeves, *The Marc Rich Case: A Primer*, TIME (Feb. 13, 2001) (details of controversial pardon of Marc Rich).

<sup>19</sup> See Barkow, *The Politics of Forgiveness*, *supra* note 17, at 157 (noting political risks of pardoning).

<sup>20</sup> JOHN RAWLS, A THEORY OF JUSTICE (1972).

<sup>21</sup> Lawrence Solum, *Second Best and Nonideal Theory* (May 17, 2005) available at <http://solum.typepad.com/legaltheory/2009/05/legal-theory-lexicon-second-best-nonideal-theory.html> ("Despite its technical origins, the idea behind the second best is very general: sometimes the ideal solution to a problem [or "optimal policy option"] is infeasible. The best should not be the enemy of the good; so, when the first-best policy option is unavailable, then normative legal theorists should consider second-best solutions.")

sentences tend to be overly long and harsh or cruel, and the criminal justice system is biased against certain groups. I think it fairly obvious that we (in America, and perhaps other parts of the world<sup>22</sup>) exist in non-ideal circumstances.<sup>23</sup> In such a context, pardons can be justified as ways to more perfectly approximate what criminal justice would be like in ideal circumstances: by limiting unjust sentences, say, or by removing unjustified post-conviction disabilities. This, indeed, is how pardons are commonly justified in the literature.<sup>24</sup>

This, however, does not end the enquiry, but only begins it. For it leaves open the questions that there may be limitations on how the pardoning power can justly operate, even in non-ideal conditions. For even non-ideal theory operates under some constraints, constraints on *how far* we can relax certain moral absolutes so as to more perfectly approximate ideal justice.<sup>25</sup> If pardons are applied in a reckless and morally arbitrary manner, this may be impermissible, even under non-ideal theory. This raises the interesting possibility that the way Haley Barbour pardoned in *general* is unjustifiable, even if some (or all) of his *individual* pardons were fully justified. It shows the possibility that *not pardoning at all* could be better in some cases than *pardoning in a discriminatory, biased, or random manner*.

My paper seeks to define a consensus in some areas of the criminal law but to unsettle it in others. In defending pardons, I present a theory that tries to provide a minimal account of the pardon power which should be unobjectionable, or nearly unobjectionable, to most scholars of the criminal law. Here I do not mean to court controversy, and I defend pardons on the narrowest of grounds: as necessary to secure justice in particular cases and not as grand acts of mercy. But in finding that pardons may be distributed in ways that are morally arbitrary, I open up a new avenue for criticizing pardons -- as violations of equal treatment -- one which has been previously underdeveloped in the literature.<sup>26</sup> Lastly, I join the chorus of voices that urge reform of the criminal law and criminal punishment, but show that there are good reasons to think that some reforms *even when motivated by a desire for justice* may themselves be morally problematic.

My paper proceeds in three parts.

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<sup>22</sup> The United States has the highest prison population in the world, with China a distant second. *See* World Prison Populations, available at <http://news.bbc.co.uk/1/shared/spl/hi/uk/06/prisons/html/nn2page1.stm>.

<sup>23</sup> *See generally* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011) (crisis of mass incarceration in America); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (same); Adam Gopnik, *The Caging of America*, NEW YORKER (Jan. 30, 2012) available at [http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat\\_atlarge\\_gopnik](http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik) (same).

<sup>24</sup> *See, e.g.*, Barkow, *supra* note 14, at 1354n. 44 (collecting uses of the “safety valve” justification for pardons); George Lardner & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases 1790-1850*, 16 FED. SENT. R. 212 (Feb. 1, 2004) (importance of having a “safety valve” in system of mandatory punishments).

<sup>25</sup> RAWLS, *supra* note 20, at 246 (“Existing institutions are to be judged in the light of [the ideal] conception and held to be unjust to the extent that they depart from it without sufficient reason.”)

<sup>26</sup> Some have dealt with the problem of biased pardons, although they take a slightly different focus than I do. Elizabeth Rappaport, *Staying Alive: Executive Clemency, Equal Protection and the Politics of Gender in Women’s Capital Cases*, 4 BUFF. L. REV. 967 (2007) (suggesting a possible *positive* role for biased pardons, based on a theory of “exemplary” pardons); Mark Strasser, *The Limits of the Clemency Power*, 41 BRANDEIS L. J. 81, 117-124 (2002) (possible Constitutional constraints on pardons based on gender or race).

In the first Part, I examine a prominent theory of the pardoning power, that given by Karen Moore in her important book, *Pardons* and in a related article.<sup>27</sup> Moore defends a narrow view of pardons, which sees them as justified only when they are necessary to correct an injustice in the administration of the criminal law. I find this view plausible, and in the second part, I sympathetically present it. I also show that, surprisingly, that under Moore's theory many, if not all, of Haley Barbour's pardons might have been justified.

In the second and longest Part, I examine the possibility that even though many of Barbour's pardons might be able to be justified individually, there may nonetheless be something wrong with his pardons taken as a whole. Moore supports pardons as justifiable when done in the light of an injustice in an individual case, given that our criminal justice system as it exists is not fully just. But Haley Barbour's pardons show that even pardons that correct individual injustices in the status quo may still be, on another level, unjustified. This happens when pardons are done in the wrong way, including when they are distributed in a morally discriminatory, or morally arbitrary, manner.<sup>28</sup> This is the case, I believe, with Haley Barbour's pardons, and possibly with the pardons in the second Bush administration.

In the third Part, I extend the analysis of Barbour's pardons into a larger point about reforming the criminal justice system in non-ideal circumstances. There are constraints on giving pardons that go beyond having them be based on good and sufficient reasons, constraints that go to the proper *distribution* and *implementation* of pardons, and not just the fact that pardons must be given for good and sufficient reasons. These types of constraints are constraints on *how* reform in the criminal justice system can happen: even when we pursue just ends, such as when we pardon those who have been sentenced unjustly, we must pursue them within some limits.

I also present important qualifications to my thesis. Most importantly, my paper should not be taken to promote the restrictive use of the pardon power. Rather, my point is simply this: even if we should pardon more (and I think we should) there are, importantly, *better and worse ways of pardoning many people*.

Throughout my essay, I used Barbour's pardons as exemplary of a problem with dispensing pardons on arbitrary or immoral grounds, where the pardons on a case by case basis may be justified, but when taken as a whole, a troubling pattern emerges. Recent research into the use of presidential pardons shows them also to be made on an arbitrary or possibly discriminatory basis,<sup>29</sup> so the problem is not an isolated one. It shows a danger in the pardon power in general, and points to the pressing need to develop more elaborate standards for the proper use of that power.<sup>30</sup>

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<sup>27</sup> KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* (1989); Kathleen D. Moore, *Pardon for Good and Sufficient Reasons*, 27 U. RICH. L. REV. 281 (1993).

<sup>28</sup> This has obvious implications for the debate on "comparative desert." See e.g., Ronen Avraham & Daniel Statman, *More on the Comparative Nature of Desert: Can a Deserved Punishment Be Just?* (ms, Sep. 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2146749](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2146749).

<sup>29</sup> See especially the excellent ebook produced by ProPublica, DAFNA LINZER & JENNIFER LAFLEUR, *PRESIDENTIAL PARDONS: SHADES OF MERCY* (2012); see also Editorial, *The Quality of Mercy, Strained*, New York Times, Jan. 15, 2013, at , available at <http://www.nytimes.com/2013/01/06/opinion/sunday/the-quality-of-mercy-strained.html> (possible racial bias in Presidential pardons).

<sup>30</sup> See also the recent pardoning controversy in South Korea. Choe Sang-Hun, *Departing South Korean Leader Creates Furor With Pardons*, NY TIMES A8 (Jan. 29, 2013) ("With less than one month left in office, the departing



## II. A Defense of the Pardoning Power

The pardon power has long been controversial in itself, and not only the occasions of its use.<sup>31</sup> I sketch out below, briefly, one influential understanding of when pardons are and are not justified given by Karen Moore in her book and in an important later article. Moore defends pardons narrowly, as necessary to correct serious injustices in the legal system. Moore's view of the pardon power is strict, and on some accounts might not amount to a theory of executive "mercy" at all, if by "mercy" we mean judgments based on whim or caprice or compassion rather than based on reasons.<sup>32</sup>

Moore defends pardoning, then, but she does not defend the pardon as an unfettered right of the executive to forgive crimes, a gift that falls on those the sovereign happens to favor (the traditional view which was arguably in the background of the Mississippi Supreme Court's ruling upholding Barbour's pardons<sup>33</sup>). Rather, the executive must pardon only for "good and sufficient reasons," reasons relating to the offender's culpability, and to the proportionality of the offender's punishment. A pardon cannot be given simply because the executive wants to give it.<sup>34</sup> It must be morally justified.

While we might think that Barbour's pardons could only be defended on the traditional view (where the sovereign has an absolute right to pardon), I show in this part that they might also in principle be defended under Moore's view. For it could turn out that Barbour had, in Moore's terms, "good and sufficient reasons" to pardon each offender: one offender's sentence might have been too harsh, for instance, or another offender might have been wrongly convicted. To see whether they were justified, we would need to examine each case separately, on its own merits.

### A. Moore's Theory of Pardons

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president of South Korea, Lee Myung-bak, granted special pardons on Tuesday to political allies, a longtime friend and dozens of others who have been convicted of corruption and other crimes.")

<sup>31</sup> See generally, Markel, *supra* note 13.

<sup>32</sup> See Markel, *supra* note 13, at 1436 for a definition of mercy along these lines ("Mercy I define first as the remission of deserved punishment, in part or in whole, to criminal offenders on the basis of characteristics that evoke compassion or sympathy but that are morally unrelated to the offender's competence and ability to choose to engage in criminal conduct."). Markel would more likely categorize Moore's defense of pardons as a defense of "equitable discretion." *Id.* at 1440.

<sup>33</sup> The Mississippi Supreme Court's ruling was made on narrow, separation of powers grounds, but the idea that the executive's decision was unreviewable by any other branch certainly suggests a power that is accountable to no other body. One of the dissenters was more explicit about the roots of the pardon power. See *In re Hooker*, at ¶ 141 (Pierce, J., dissenting) ("[T]he power to pardon ... is an act of the sovereign's 'mercy and grace.'") See also Moore, *Pardon for Good and Sufficient Reasons*, *supra* note 27, at 282 ("The pardoning power of the great monarchs of seventeenth and eighteenth century Europe was analogous in theory and practice to divine grace. Like grace, the freely given, unearned gift of divine favor, a royal pardon was thought of as a personal gift. Therefore, it required no justification and was not subject to criticism")

<sup>34</sup> Kathleen D. Moore, *Pardon for Good and Sufficient Reasons*, *supra* note 27.

Moore, in her book, and in an important follow-up article,<sup>35</sup> defends the pardoning power as an extension of retributive justice,<sup>36</sup> although I (as I explain) do not believe adopting her theory means adopting retributivism *tout court*.<sup>37</sup> Retributive justice, on her view, means punishing offenders because they deserve it. But in an imperfect system of criminal justice, offenders may not always get what they morally or legally deserve, and so need to be pardoned, either by being released or by having their sentences reduced. As Moore writes, “A pardon is justified when the procedures miscarry, giving the state a legal, but not a moral, license to punish.”<sup>38</sup>

What exactly, “procedures miscarry” means here is ambiguous, and Moore does not exactly clarify in her article (her book employs different concepts), and so I do not pretend to be strictly following her here.<sup>39</sup> For procedures can miscarry in a strictly legal sense, where a judge misapplies the sentencing guidelines, say, and gives an offender a higher sentence than is legally allowable. This would presumably be grounds for reversal by an appellate court, but could also presumably be the basis for a pardon “for good and sufficient reasons,” if all avenues for appeal have been exhausted. Here the procedures that have miscarried can be deemed to have done so using only legal standards, that is, standards that are internal to the legal system itself. In other words, in cases like these, the legal system has not performed their functions correctly.<sup>40</sup>

But procedures might miscarry in other ways, not because they are not followed, but because when they are followed they lead to the morally wrong result. An innocent person may be convicted even though all the proper legal procedures have been followed. This happens, and there may be no *legal* error we can directly point to.<sup>41</sup>

Suppose, for instance, that the evidence that exists at the time of the trial leads a jury to convict someone of a crime.<sup>42</sup> Every appellate court also subsequently upholds the conviction. Nonetheless, many years after the trial, new evidence comes to light that clearly exculpates the convicted person, his available legal avenues for appeal now thoroughly exhausted. Here the procedures have nonetheless miscarried, not in the sense they were not followed, but because they led to the wrong result. From a point of view external to those legal procedures, we can see that something has gone wrong, even though in a strictly legal sense, nothing has.<sup>43</sup>

In this case, nonetheless, a pardon is justified, because the reason for the legal procedures is to protect the innocent. But those procedures have not done this. To prevent a (morally, but not legally) innocent person from being punished is a “good and sufficient reason” to pardon, says Moore.

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<sup>35</sup> MOORE, PARDONS, *supra* note 27; Moore, *Pardon for Good and Sufficient Reasons*, *supra* note 27.

<sup>36</sup> MOORE, PARDONS, *supra* note 27, Part II (“A Retributivist Theory of Pardons”).

<sup>37</sup> See *infra* note 46.

<sup>38</sup> Moore, *Pardon for Good and Sufficient Reasons*, *supra* note 27, at 286.

<sup>39</sup> In particular, I believe that there are cases when the state does in fact lack a *legal* basis for punishment, and where a pardon is therefore justified. I give an example of this shortly in the text.

<sup>40</sup> More precisely, the *actors* in the legal system may have failed to perform their functions correctly.

<sup>41</sup> See Baude, *Last Chance on Death Row*, *supra* note 15.

<sup>42</sup> I borrow this example from Moore, *Pardon for Good and Sufficient Reasons*, *supra* note 27, at 286.

<sup>43</sup> As a result, we can imagine a theory of pardons that justifies them only in cases of strict legal error (the rules have not been followed correctly), but not in cases of moral error (where the procedures have been followed, but the result is morally wrong).

Or more controversially, suppose that a sentence handed down, while perfectly legal, is nonetheless, by some recognizable moral standard, too harsh or unfair.<sup>44</sup> If this is the case, although the state may legally punish that person a certain term of years, it has no moral basis to do so. That person may have his sentence permissibly reduced by an act of executive mercy, according to Moore.<sup>45</sup> How to decide when a sentence is too harsh is a complicated question, which Moore does not attempt to answer (nor will I attempt to do so at any length, here).<sup>46</sup> But we might intuitively agree that some sentences, in principle, might be too harsh for an offender given his crime, or given other factors. In those cases, the executive has a “good and sufficient reason” to reduce the sentence, or to end it altogether.

In general, says Moore, “pardons should be used as part of a broader constitutional scheme to ensure that sentences are assigned justly.”<sup>47</sup> This can happen when the legal procedures miscarry in an obvious way (the judge who has misapplied sentencing guidelines), or in a less obvious way: when the punishment is not consistent with the values that underlie the criminal justice system as a whole, of protecting innocence, or of assigning punishments that are proportional to the offense. “Procedures miscarry” when the legal system does not follow its own rules, or when they do not lead to results that are consistent with the values implicit in its procedures, such as fairness or avoiding cruel and unusual punishments. The pardoning power is used for “good and sufficient reasons,” in short, when it upholds the values that are at the basis of a just constitutional scheme.

## B. An Objection Briefly Considered

This, again, is not the place to present a fully worked out theory of pardons; here, I mean to borrow Moore’s theory, for the most part, in order to test the question of whether even if pardons *taken individually* might be for good and sufficient reasons, they might be unjust *when taken as a whole*. This will be my main contribution to the debate over pardons, and I pursue it in Part II. But here I want to consider an objection to Moore’s theory that will help us flesh it out a bit.

That objection is that Moore’s theory is not really a theory of pardons at all. A theory of pardons, the objection goes, should specify those places where the executive can permissibly exercise *mercy*. But the above cases show no such thing; rather, they show cases where the

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<sup>44</sup> George W. Bush’s pardon of Scooter Libby was arguably of this sort. See Michael Lindenberger, *The Quality of Mercy: Don’t Jump on Haley Barbour All at Once*, TIME (Jan. 17, 2012) available at <http://www.time.com/time/nation/article/0,8599,2104577,00.html> (“Presidents have also commuted sentences they feel are too harsh without removing the taint of the conviction. President George W. Bush did just that when he commuted the sentence of Scooter Libby, Dick Cheney’s former chief of staff. ‘I respect the jury’s verdict,’ Bush said at the time. ‘But I have concluded that the prison sentence given to Mr. Libby is excessive. Therefore, I am commuting the portion of Mr. Libby’s sentence that required him to spend 30 months in prison.’”).

<sup>45</sup> Moore, *Pardon for Good and Sufficient Reasons*, *supra* note 27, at 287.

<sup>46</sup> Moore defines harshness in retributive terms, as being a sentence that exceeds the offender’s desert. MOORE, PARDONS, *supra* note 27, at 93, 97-98. But one could also imagine it being defined in other theoretical terms: a harsh sentence could be one that no longer had any utilitarian point (it didn’t deter other offenders, or rehabilitate the offender), or that caused too much suffering. On this last point, see the illuminating remarks in David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1691-92 (2010).

<sup>47</sup> Moore, *Pardon for Good and Sufficient Reasons*, *supra* note 27, at 286.

executive *must* act, so that he or she is morally required to stop the injustice. Moore's theory of pardons makes pardons mandatory and not permissible.<sup>48</sup>

But I do not see it as an objection to a theory of pardons that it diagnoses at least some acts of pardon as morally mandatory. Indeed, there are certain cases, I think, where Presidents or Governors *are* morally required from stopping a grave injustice from being done. It would be a flaw in a theory if it could not identify these instances. A pardon that a Governor is morally required to give -- say of a person who is actually innocent of his crime -- is not any less a pardon for that.

We might worry, still, that on Moore's theory, there are only mandatory acts of pardoning, that there is no place for *discretion* on whom or when to pardon. Even if this is so, this may not be a decisive objection to it being a theory of pardons (in short, I do not think that pardons *must* contain only permissible acts<sup>49</sup>). But there is still something we can say to this. First, it will usually be a fuzzy matter what punishment it is, exactly, that an offender deserves. Does every offender who commits a wrong *deserve* to be arrested, to be prosecuted, to be given *this* sentence, and no other? Always? I do not think we can give any determinate answer to these questions.<sup>50</sup> When an executive decides that a person's sentence is *more than he deserves*, he is acting with some discretion, in the same way that many other actors in the process have acted with discretion. When the executive makes this decision, he may not be morally obligated to act in a certain way (to pardon or not to pardon); there may simply be no fact of the matter as to what the offender deserves in this case.

Indeed, the executive has a certain advantage in the process, because he comes at a later stage: he or she can see how the offender has responded to the punishment, whether conditions have changed so that the offender no longer deserves the original punishment, or has reformed him- or herself.<sup>51</sup> No matter which overarching theory of punishment we believe in, the executive has more information about whether those purposes are being accomplished, or accomplished in a fair way.<sup>52</sup> The governor, say, can see if the punishment is still useful, or just,

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<sup>48</sup> Antony Duff makes a version of this point in his review of Moore's book. See Antony Duff, *Review Essay/Justice, Mercy, Forgiveness*, 9 CRIM. JUSTICE ETHICS 61 (1990) (arguing that, in some cases, Moore's theory renders pardons "necessary or obligatory, not merely permissible.").

<sup>49</sup> This may be the place to again emphasize that I am interested in *pardoning* not in *mercy*. Mercy may necessarily be a discretionary act, tied to any reason or no reason at all, and be something that "someone has neither a natural nor a legal right to claim—it is bestowed on the offender—perhaps like some understandings of grace." Markel, *Against Mercy*, *supra* note 13, at 2004. This may be true of mercy, but it does not seem to me to be true of pardons. In some cases, a person *may* have a right to a pardon (because, for example, she is innocent, and cannot achieve vindication in any other way but an executive pardon). For a similar distinction (between mercy and equity) see Stephen P. Garvey, *Is it Wrong To Commute Death Row? Retribution, Atonement, and Mercy*, 82 N.C. L. REV. 1319 (2004).

<sup>50</sup> I make this point about the indeterminacy of desert at length in another paper, *How Retribution Fails* (manuscript on file with author). See also the excellent paper by Alice Ristroph on the same point: *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293 (2006).

<sup>51</sup> See Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501 (2000).

<sup>52</sup> Even on a retributive theory, it seems incorrect to say that we can learn *nothing* about an offender's act after he had committed it: we may learn about his culpability, or his character, only later. The idea that we have perfect knowledge of offender's competence or ability to choose at the time of trial seems to me a fallacy. Of course, new evidence can be found after a trial is concluded, which would also give obvious grounds, on retributive theory, for changing or removing the sentence.

or deserved. There is still an enormous space for judgment here; as I said, I doubt there is a clear answer to the question of who deserves clemency and who does not. So even on Moore's theory, there is room for saying that some pardons are permissible, and some are mandatory.

### C. Justifying Haley Barbour's Pardons

I want to withhold any further objections to Moore's view, for the time being, although I should be clear that I find her account rather persuasive. If there are flawed moral or legal judgments in the criminal justice system, a pardon is one way that those judgments can be corrected, and corrected in the name of the values of the legal system itself. The question I want to deal with now is this: can such a narrow view of pardons justify Haley Barbour's pardons, or does it instead show why they may be illegitimate?

The answer to this question is, I think, rather straightforward on Moore's view, although perhaps in other respects unsatisfying: we can only tell if we look at the pardons one at a time, and see if they are supported by "good and sufficient reasons," in Moore's phrase.<sup>53</sup> If some sentences were incorrectly imposed, then Barbour was right to pardon those who received those sentences. If some other legal, procedural rule were not followed, then that case, too, would be eligible for a pardon. In short, the analysis under Moore's theory is *individualistic*, rather than *holistic*.<sup>54</sup> We don't have to look to any other pardon to see whether a pardon in an individual case was justified or not.

It is unlikely that there were many such "legalistic" pardons granted by Barbour; indeed if there were any at all; Barbour would have wanted to draw attention to these pardons. More probable is that Barbour gave many "moralistic" pardons. Some, Barbour may have rightly believed, had suffered enough from their punishments, or faced collateral consequences from their punishment that were no longer warranted (if they ever were). Certainly this could have been the case for those who were given early release for medical reasons (although Barbour defended these pardons, rather cynically, in terms of saving the state money<sup>55</sup>).

In particular, Barbour may have felt that others had been given too long sentences, even if those sentences were legally and properly arrived at under the criminal code of Mississippi. For example, the summer before his departure from office, Barbour commuted the sentences of two African-American women who were sentenced to life for an armed robbery that netted a total of eleven dollars.<sup>56</sup> In the case of Earnest Scott Farve, (the relative of Brett Farve), Farve

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<sup>53</sup> As some of the early news reports conceded.

<sup>54</sup> For a related, but more technical use of these terms see Thomas Hurka, *Desert: Holistic and Individualistic*, manuscript available at [http://homes.chass.utoronto.ca/~thurka/docs/desert\\_hi\\_rev.pdf](http://homes.chass.utoronto.ca/~thurka/docs/desert_hi_rev.pdf) (distinguishing between desert in an individual case and desert across cases, and calling the later way of looking at desert "holistic").

<sup>55</sup> Barbour, *supra* note 9 ("Half of the people who were incarcerated and released were placed on indefinite suspension due to medical reasons because their health care expenses while incarcerated were costing the state so much money. These individuals suffer from severe chronic illnesses, are on dialysis, in wheelchairs or are bedridden.") Barbour did go on to say that these people no longer represented threats to society.

<sup>56</sup> Patrik Jonsson, *Did Haley Barbour's Pardon Spree Go Too Far?* C.S. MONITOR (Jan. 11, 2012) ("Last summer, Barbour was hailed by the National Association for the Advancement of Colored People as a "shining example" for commuting the life sentences of two African-American women who had spent 16 years in prison for an armed robbery that yielded \$11.").

was originally sentenced to one year house arrest for his crime, but had that increased to a suspended fifteen year sentence “after he left his house to go fishing.”<sup>57</sup> In these three cases, Barbour (we can guess) thought that the resulting sentences were simply too harsh, and so a pardon was warranted.

More compelling still, Barbour may have believed that some suffered from the stigma of their criminal conviction, and that this was too much: they had, in his view, suffered enough from their crimes. They deserved the right to be able to apply for a job without the stigma of a past felony conviction, or to reclaim their right to vote, or to hunt.<sup>58</sup> Indeed Barbour made this last point explicit in his remarks defending his pardon.<sup>59</sup> Especially if we believe such things as felony disenfranchisement are *per se* unjust and immoral as punishments,<sup>60</sup> a pardon designed to negate this feature of Mississippi sentences would seem to be one that is done for good and sufficient reasons.

In short, I find it hard to argue against the supposition that *at least some* of Barbour’s pardons were justified under Moore’s analysis. Probably at least of the sentences were cases where the state had a narrow legal right to punish, but the punishments were in fact morally unjustified. Barbour, on Moore’s view had the power to pardon in these cases. Some of the cases, though, were probably not cases of pardons for good and sufficient reasons: they were based on ties of friendship, or because of lobbying, or some other non-morally salient reason. They could not be based on good and sufficient reasons.

Suppose, then (even if counterfactually), that all of Barbour’s pardons were done for “good and sufficient” reasons. We would have to tell a long and detailed story about how this was so. We would have to say which punishments were too long, or who (if anyone) was wrongly convicted. We might have to tell a story about how some punishments, such as the taking away the right to vote for convicted felons, are never permissible, so that removing those punishments via an act of clemency, would be justified. *If* we could tell a story that gave a good and sufficient reason for each of Barbour’s pardons (and again, I doubt that we could), then there would be no objection to them, at least on Moore’s view.

But I want to register a sense of uneasiness about this conclusion, a sense that goes beyond the suspicion that not all of Barbour’s pardons could be individually justified. My argument in the remainder of the paper will be that, even if all of the pardons granted were done for good and sufficient reasons, there can be problems with a Governor’s pardons taken as a whole. That is, we have to analyze the justifiability of pardons on two levels: first, on the level of the individual pardon; and second, on the level of all the pardons granted by an executive.

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<sup>57</sup> *Id.*

<sup>58</sup> See, on this score, the op-ed by Molly M. Gill, *Why Did Governor Haley Barbour’s Pardons Cause Such a Backlash?* HUFF. POST (Jan. 19, 2012) available at [http://www.huffingtonpost.com/molly-m-gill/haley-barbour-pardons\\_b\\_1217237.html](http://www.huffingtonpost.com/molly-m-gill/haley-barbour-pardons_b_1217237.html) (“What is it about former Mississippi Governor Haley Barbour’s pardons that irk us so much? It can’t be because 189 people who were already out of prison and obeying the law will have better job prospects and restored civil rights because he pardoned them.”)

<sup>59</sup> “The pardons were intended to allow them to find gainful employment or acquire professional licenses as well as hunt and vote.” Barbour, *supra* note 9.

<sup>60</sup> See Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147 (2004) (discussing the Constitutionality and morality of laws disenfranchising felons).

There can be objections to the pardoning power that appear only, or at least most clearly, on the wholesale level. It is to these objections that I now turn.

### III. Problems with Pardons En Masse

The general thrust of Moore's view on pardons is this: there can be flaws in the system of criminal justice that lead to results that are not consistent with the underlying (for Moore, retributive) values of the criminal justice system itself.<sup>61</sup> Insofar as an executive can pardon to correct those flaws, his pardon is justified. As we saw in the last part, this means that there seems to be no *in principle* reason why all of Barbour's pardons might not have been justified, as a means of correcting morally flawed sentences. To see whether or not this was true, we would have to look at each pardon, taken one at a time.

In this part, I raise some doubts about the moral sufficiency of this approach. For there may be groups of pardons, all of which could be justified individually, but which might still be morally wrong taken together. I first provide some cases, where intuitively, a group of pardons raise some moral questions. I then, after each case, try to explain why these moral questions might render some pardons *as a whole* unjustified, or at the very least problematic. I conclude this Part by showing that Barbour's pardons could be morally questionable in precisely these ways.

#### A. Some Problematic Pardons

##### 1. Racist Pardons

A Governor in a southern state, decides to commute<sup>62</sup> the sentences of four murderers on death row to life in prison without the possibility of parole. He does this, he says, because he believes that the death penalty is deeply immoral and inconsistent with the rule of law; and let us suppose, just for the sake of argument that he is right about this.<sup>63</sup> The death penalty is an unjustified and unjustifiable act of punishment, and so anytime the state does it, it is deeply in the wrong. So on Moore's account, pardons for those on death row would be pardons for good and sufficient reasons, for I presume that preventing some from being given a deeply immoral punishment is (if anything is) a permissible reason for a pardon.

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<sup>61</sup> Dan Markel makes a related argument about the values of the criminal justice system and of liberal democracy in justifying certain exercises of clemency. He limits his focus, however, to the death penalty. See Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. REV. 407 (2005). I raise some questions about Markel's argument (and other arguments like his) in my paper, *The Case Against The Case Against The Death Penalty* (unpublished ms, on file with author).

<sup>62</sup> I will sometimes refer to these commutations as "pardons," just for ease of reference. But technically, they are commutations, not pardons.

<sup>63</sup> The case here bears some resemblance to Governor George Ryan's commutation of death row in Illinois, which has been much discussed in the legal literature. See Markel, *supra* note 61, for citations. I should be clear, however, that nothing hangs on the particular example; indeed, I have my doubts that the death penalty is in fact *per se* immoral.

But there is a catch. There are *eight other people* on death row in his state who the governor has decided not to pardon. He makes a vague promise that he will pardon the others later, when it is politically feasible, but he is at the end of his term, and his announcement of the four pardons has engendered considerable controversy. He will most likely *not* pardon any of the others.

Moreover (and this is the real problem), it turns out that the four he has decided to remove from death row are all of the same color. They are white, and the remaining non-pardoned death row inmates are black. Indeed, this seems to be the only obvious difference between those the Governor has pardoned and those he has not; no meaningful distinction can be manufactured from the different crimes the convicted murders have committed; all were grisly and gruesome, and all were convicted at roughly the same time. The governor mumbles something about having no awareness of the race of those whom he pardoned (“I just saw names”<sup>64</sup>). But the fact is, the Governor’s pardons were at best been selective and at worst implicitly racially motivated.

Here we have a case where the four pardons taken individually are done for good and sufficient reasons. Each white person pardoned is pardoned because his sentence of death was (we are supposing for the sake of argument) was immoral. But the problem is that the pardons were not comprehensive, or consistent; or rather, if they were consistent, they were consistent on the basis of *race*. The governor did not pardon *all* of those who he had a good and sufficient reason to pardon.

Does this render the pardons he has given illegitimate? I think there is a strong case that it would. The pardons while justified individually are on the whole distributed in a racially unfair way (I bracket for now the question of whether it matters whether this was done intentionally or accidentally, a question to which I will return). So there is a norm that may govern the granting of pardons that appears only on the level of pardoning *en masse*, which we can call an anti-discrimination norm.<sup>65</sup> Pardons that are distributed in a racially discriminatory manner are not permissible, even if the pardons considered individually are justified by good and sufficient reasons. How we understand the force of this norm, I think, is open to debate.<sup>66</sup> But I think something like that norm exists, and underlies our intuitive reaction to the “all white” pardons scenario.

## 2. Pardoning “Favorites”

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<sup>64</sup> This was, in fact, a justification offered for the color-blindness of Barbour’s pardons – that race was not listed on the application for pardon. See Patrik Jonsson, *Haley Barbour Pardons: Why Were the Forgiven So Disproportionately White?* C.S. MONITOR (Jan. 21, 2012) available at <http://www.csmonitor.com/USA/2012/0121/Haley-Barbour-pardons-Why-were-the-forgiven-so-disproportionately-white> (“A majority of the clemency cases were reviewed by the Parole Board before being sent to Governor Barbour,” Barbour spokesperson Laura Hipp told Reuters, which conducted an analysis of Barbour’s pardons. ‘Race was not a factor in his decision. In fact, it wasn’t even listed on the Parole Board’s application.’”)

<sup>65</sup> Although my intuitions change if the governor had announced that the four *black* members of death row were to be pardoned, but not the eight *white* members. This shows that the norm operating might be anti-caste, and not purely anti-discrimination. For a discussion of the anti-caste principle, see Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976).

<sup>66</sup> We might wonder, for example, whether the norm is specifically an anti-racism norm, or one more tied to non-arbitrariness or respect more generally.



Suppose we make this one, small change to the hypothetical: the people the Governor pardons are not all of the same race, but they do share something else in common: (a) they are friends of friends of the Governor, or (b) they have hired professional lobbyists to make their case to the Governor, or (c) they are veterans of the Governor's "trusty" program,<sup>67</sup> or (d) they or their relatives are high-profile donors to the Governor's campaign.<sup>68</sup> So, on this hypothetical, instead of pardons that are based on race (or that happen to be given to members of the same race), we have selective pardons to those with connections of some sort or another to the Governor. Again, let us say that there are four people (out of twelve) who get pardoned, and all of them have this relevant feature. Once more, we are assuming that the death penalty is an immoral punishment, so that those four who *are* pardoned, have a good and sufficient reason *to* be pardoned.

Are these pardons nonetheless morally problematic? I would again say yes, of course, and for a similar, though not identical, reason to the pardons that we based on race: they pick out a non-morally salient characteristic (closeness to governor) as a basis for distinguishing between like offenders. Here the characteristic is possibly not as *bad* as race (given the fraught history of race relations in America, and especially the South), and may be less invidious than choosing on the basis of race. But it still seems wrong to show favoritism to those lucky enough to be friends of friends of the Governor, or who have the money to hire a lawyer to lobby the Governor. So I think it is wrong to show favoritism in pardoning, and I think that this wrongness puts into question the justifiability of the pardons, even though the pardons taken individually have "good and sufficient reasons" to support them. Call this norm against selective pardoning, the *anti-favoritism* norm.

### 3. Random Pardons

Take many of the same facts from the two previous hypotheticals: a governor decides to pardon some, but not all, of those on death row, because it would be too politically unpopular to commute all of their sentences. But this time he does not choose on the basis of race or family (or happens to distribute his mercy only to those of a particular race or with family ties), rather, he decides to hold a lottery, commuting the sentences of the four who win the lottery. Again, let us suppose that the death penalty is a deeply immoral punishment, and the state is never justified in imposing it on anyone. So a commutation of a person's death sentence is *always* justified, for preventing someone from suffering an immoral punishment is always a good and sufficient

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<sup>67</sup> See *supra* note 5 (explaining the trusty program).

<sup>68</sup> Again, this seems to have been the case with many of Barbour's pardons. Campbell Robertson & Stephanie Saul, *List of Pardons Included Many Tied to Power*, NY TIMES A1 (Jan. 28, 2012) ("Yet in a state with the highest poverty rate in the nation, where nearly 70 percent of convicts are black, official redemption appears to have been attained disproportionately by white people and the well connected."); *id.* ("Mississippi's pardon system, like those in other states, rewards applicants who have both the financial means and the connections to seek reprieves aggressively.")

reason. For each person on death row who “wins” the lottery, consequently, there was a good and sufficient reason to have his sentence commuted.<sup>69</sup>

Does it make better that the selective outcome of the lottery is random, rather than based on the racist or “favoritist” choices of the Governor? I think it makes them more acceptable, but still not acceptable all things considered. For while the norms against racial discrimination or favoritism are not violated, another norm is (of which the norm against racial discrimination and favoritism may be instances): the norm against unequal treatment. The governor is not treating like cases alike; instead he is just choosing arbitrarily, based on nothing more than a random lottery. Those who do not win the lottery can complain that they have been unfairly treated, because there is nothing that makes their case different than those who have won.

Or can they? I confess to feeling more ambivalent about this case, an ambivalence that was absent in the previous, race-based and favorite-based cases. Those who win the lottery have not benefitted from racial discrimination or from family ties. Instead, those who win the lottery get a gift, one that those who lose the lottery do not: and each had an equal shot at *getting the gift*. Is the implication of the norm against arbitrary treatment that unless all get the pardon, no one can? Do gifts have to be distributed equally, or not at all?

I think they do, at least in the case of pardoning. For what the lottery system resembles is nothing so much as the old version of the sovereign’s right to pardon: where the sovereign can decide how to pardon (for any reason, or for no reason at all) just because he is the sovereign.<sup>70</sup> This seems inconsistent with a system that asks its officials, at all levels, to act according to rule of law values like consistency and uniformity. So although this is a closer case, I conclude that pardons that are made on an arbitrary manner are problematic, even if those pardons *taken one by one*, can be justified by good and sufficient reasons.<sup>71</sup> They violate the norm against arbitrary treatment.<sup>72</sup>

At the same time, I need to qualify this (and I will return to this qualification later, in Part III of the essay). For it seems that here, more than in the previous cases, we might want to weigh more heavily the wrongness of the underlying punishment: in this case, an immoral and unjust

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<sup>69</sup> A similar example is introduced in Markel, *Against Mercy*, *supra* note 13, at 1464, but for different purposes. The classic thought-experiment of chance and the criminal law is David Lewis, *The Punishment That Leaves Something to Chance*, 18 PHIL. & PUB. AFFAIRS 53 (1989).

<sup>70</sup> See *supra* note 30 (pardon power as exercise of the sovereign’s power).

<sup>71</sup> Avraham and Statman argue that the race case differs from the random case, because in the race case one has been disrespected, but not when one has been randomly favored or disfavored. But my intuitions differ here: why isn’t a matter of disrespect to decide desert questions on the basis of a lottery? Why wouldn’t this, as well, show a disrespectful attitude towards the offender’s fate? Wouldn’t it also suggest a possible trifling attitude towards questions of desert and justice? Avraham & Statman, *supra* note 28, at 8.

<sup>72</sup> It is important to note that not all *selective* pardons are arbitrary. A *favoritist* method of selection and a random method of selection may be objectionable, but not a method that, say, selects whom to pardon based on the fact that some of those on death row committed less gruesome crimes than others, or that some convicts were more reformed. See, on this point, Stephen Nathanson, *Does It Matter If the Death Penalty Is Arbitrarily Administered?*, 14 PHIL. & PUB. AFFAIRS, 153 (1985) (“For example, though we may acknowledge the impossibility of ticketing all speeding drivers and still favor ticketing some, we will not find every way of determining which speeders are ticketed equally just. Consider the policy of ticketing only those who travel at extremely high speeds, as opposed to that of ticketing every tenth car. Compare these with the policy of giving tickets only to speeders with beards and long hair or to speeders whose cars bear bumper stickers expressing unpopular political views. While I shall not pursue this point in detail, I take it to be obvious that these different selection policies are not all equally just or acceptable.”). Selective pardons made for efficiency reasons, too, could be justified – indeed, even if a lottery was used to make the choices.

execution. It may be that *that* wrongness would be sufficient to outweigh the wrong done by a random pardon (however we might specify that wrong). This may suggest that we are always doing an implicit balancing between the harm of the wrong (unjust, harsh) punishment and the harm done by the pardon being racist, biased, or random. It was only that in the cases of racism and favoritism, it seemed clearer that *those* wrongs were more possibly worse than the wrong of the unfair punishments (or at least the unfair punishments of those who were lucky enough to be pardoned). Our calculation could be more complicated still if it was a question of pardoning some who had been wrongly convicted by a lottery, and not pardoning any.

#### 4. Pardons for the Wrong Reasons

Now consider a final twist on the above example. Let us suppose that the governor now commutes the sentences of *all twelve members* of death row. So there is no question of unfair or arbitrary treatment of any of them; they all get their sentences commuted, no one is excluded for any reason. But there is again a catch. The reason, this time, that the governor pardons all of them, is that they are (similar to the case of favoritist pardons) friends of friends. He cannot get them out of prison altogether (that would be politically infeasible), but he can prevent them from being executed.

The death penalty is still, as we have been suggesting for the sake of argument, a deeply immoral penalty, so that it is never justified that someone be put to death for a crime they have committed. So the pardons *in fact* consistent with good and sufficient reasons for mercy, because it is a good and sufficient reason to prevent someone from receiving an immoral punishment.

But this, of course, is not the reason the Governor gives in commuting the sentences. He says he is commuting their sentences because it is traditional to pardon members of the “trusty” program.<sup>73</sup> Or it could even be that the Governor *says* he’s pardoning good and sufficient reasons (the immorality of the death penalty), but his real reason is because of the personal connections he has with the inmates. Moreover, unlike the previous three cases, the Governor has given all twelve of the death row inmates pardons, so that his treatment of them is not in any way “selective.” To use Kant’s helpful terminology, the Governor in this case is pardoning *according to duty*, but he is not pardoning *from the motive of duty*.<sup>74</sup> His pardons just happen to be coextensive with the pardons he ought to be giving.

Is there anything wrong with the pardons in this case? I think there is, because the professed reasons the Governor gave don’t match up with the proper reasons, and the professed reasons are not, in fact, good and sufficient reasons for pardoning. To put it another way, there is a disconnect between what would justify the commutations, and what in fact did justify them for the Governor. What justified the pardons for the Governor was that the people who had their sentences commuted had a personal connection to him. But (we are supposing) it turns out that

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<sup>73</sup> Barbour, *supra* note 11 (“This was not a new thing. For decades, Mississippi governors have granted clemency to the inmates who work at the mansion. I followed that tradition four years ago and did so again at the end of my second term. No one should have been surprised.”); Barbour’s past pardons of trusties were no less controversial. See Bob Herbert, *The Mississippi Pardons*, NY TIMES (Oct 15, 2010).

<sup>74</sup> See, e.g., the exposition of Kant in Barbara Herman, *On the Value of Acting from a Motive of Duty*, 90 PHIL. REVIEW 359 (1981).

those who had a personal connection with him also were justified in having their sentences commuted.

Still, it was in some sense a matter of sheer chance that those who are no longer on death row in fact should not have been on death row in the first place. They got off ultimately because of their connection to the governor (and the Governor's subsequent favoritism), not for the "good and sufficient" reasons that were available to justify their commutations.<sup>75</sup> It just happens that all twelve had this characteristic this time, rather than just four of them.

So in short, we've eliminated the selectivity of the pardons, but reintroduced another problem, related to, but not quite the same as the problem of favoritism. The problem is that the reason why the Governor gave the pardons isn't the reasons he should have given. I am not sure exactly what to call this disconnect, but for the sake of convenience, let us say that there is a *sincerity* constraint on pardoning: the actual reasons for pardons have to be the good and sufficient reasons for the pardons, no other reasons will do.<sup>76</sup> It seems to me the weakest form of wrongdoing that can be committed in a mass pardons case; it also seems to me that this type of wrong will usually not be unaccompanied by some actual favoritism that leaves some without pardons who deserve to be pardoned.<sup>77</sup>

## B. Barbour's Pardons Revisited

At the time of Barbour's pardons, there was widespread outrage.<sup>78</sup> Part of this, indeed probably most of it, was because of individual pardons: the murderers or the drunk drivers who were pardoned when the wounds from their crimes were not yet healed.<sup>79</sup> But I also think there was a larger disillusionment with Barbour's pardons, which came not from analyzing each case one at a time and deciding that the pardon in that case was not warranted. After all, it seems very likely that *some* of the pardons were justified by good and sufficient reasons: the ones who needed medical release, for example, or those who were convicted long ago for minor drug possession, and who wanted to be able to vote, or have an easier time getting a job.

Yet many condemned the pardons *as a whole* and I think the above section explains why this might have happened. Consider the anti-discrimination norm. Two thirds of those Barbour pardoned were white, while two thirds of the Mississippi prison population is black.<sup>80</sup>

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<sup>75</sup> For a similar sentiment see Nathanson, *supra* note 72, at 157.

<sup>76</sup> For a good explanation of the value of sincerity, and the related concept of publicity, see Micah Schwartzman, *The Principle of Judicial Sincerity*, 94 VA. L. REV. 1005-1008 (2008).

<sup>77</sup> That is to say, it will not usually be the case that the class of those who deserve to be pardoned will always be coextensive with the class of those who are friends of the governor).

<sup>78</sup> Judy Keen, *Barbour's Pardons Stir Outrage in Mississippi*, USA TODAY (Jan. 13, 2012), available at <http://usatoday30.usatoday.com/news/nation/story/2012-01-12/mississippi-barbour-pardons/52511486/1>; Mark Memmott, *Hundreds of Pardons, Some for Killers, Spark Outrage in Mississippi*, NPR, (Jan. 11, 2012), available at <http://www.npr.org/blogs/thetwo-way/2012/01/11/145039829/hundreds-of-pardons-some-for-killers-spark-outrage-in-mississippi>; P.S. Ruckman Jr., *Barbour's Last Minute Rush to Pardon*, CNN, (Jan. 12, 2012), available at [http://www.cnn.com/2012/01/12/opinion/ruckman-haley-barbour-pardons/?hpt=us\\_c2](http://www.cnn.com/2012/01/12/opinion/ruckman-haley-barbour-pardons/?hpt=us_c2)

<sup>79</sup> See Memmott, *supra* note 78; Julia Dahl, *8 of the Murderers Barbour Pardoned Killed Their Wives, Girlfriends*, CRIMESIDER (Jan. 13, 2012) available at [http://www.cbsnews.com/8301-504083\\_162-57358839-504083/8-of-the-murderers-haley-barbour-pardoned-killed-their-wives-girlfriends/](http://www.cbsnews.com/8301-504083_162-57358839-504083/8-of-the-murderers-haley-barbour-pardoned-killed-their-wives-girlfriends/).

<sup>80</sup> See Jonsson, *supra* note 8.

Overwhelmingly, then, you had a better chance at a pardon if you were white than if you were black. This at least gives the appearance that the anti-discrimination norm was being violated, if not intentionally, at least as a matter of discriminatory effects. Indeed, the pardons might have been part of a deeper, structural racism in the entire process of pardoning, from the recommendation by the parole board for pardons to the granting of the pardons themselves. So even if Barbour did not knowingly pardon more whites than blacks (he was not aware of the race of those he pardoned), the pardons may still have been the *product* of racism, and so problematic for that reason.<sup>81</sup>

There might have also been the perception that the pardons were arbitrary, that they were simply indiscriminately given. The person that Barbour happened to get to know as a trusty was pardoned, but one who did similar service, and committed a similar crime, was not. Or a convicted criminal who was able to get the Governor's ear because he had a relative working for Barbour might have gotten a pardon, but one who had no connections to Barbour did not. Or still further, someone who could afford to hire an attorney to lobby Barbour got a pardon, but someone without money and an attorney does not.

Pardons that are given on such an indiscriminate or random basis might be thought to be unfair, because they treated those who are similarly situated differently based on morally arbitrary factors.<sup>82</sup> It turns it into a matter of mostly chance whether you would be pardoned or not: whether you, or someone close to you, knew someone who could get the Governor's ear. But chance shouldn't be the deciding factor. The only deciding factor should be whether there were good or sufficient reasons for your pardon. In other words, the reason for the pardon should be the good and sufficient reason for the pardon, and not any other reason.

So people may have been reacting to the apparently arbitrary nature of many of Barbour's pardons. They seemed not to have been made in any sort of orderly or reasoned manner.<sup>83</sup> Even if many of those pardoned were pardoned for good and sufficient reasons, there may have been others who were not, but who should have been, because there were also good and sufficient reasons for pardoning *them*.<sup>84</sup> It at least looked as if Barbour might not have been being entirely consistent in choosing whom to pardon.

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<sup>81</sup> *Id.* (“Perhaps more than incarceration rate disparities, however, pardon rate inconsistencies suggest that biases may be less individual and more systemic. In Mississippi, for example, black prisoners, on the whole, have fewer resources than white prisoners, including access to personal lawyers, which may have led to fewer black prisoners requesting a pardon in the first place.”); *see also* Nathanson, *supra* note 72, at 160 (“What I want to stress here is that the arbitrariness and discrimination need not be purposeful or deliberate. We might discover, as critics allege, that racial prejudice is so deeply rooted in our society that prosecutors, juries, and judges cannot free themselves from prejudice when determining how severe a punishment for a crime should be. Furthermore, we might conclude that these tendencies cannot be eradicated, especially when juries are called upon to make subtle and complex assessments of cases in the light of confusing, semi-technical criteria. Hence, although no one decides that race will be a factor, we may predict that it will be a factor, and this knowledge must be considered in evaluating policies and institutions.”).

<sup>82</sup> See Robertson & Saul, *supra* note 6 (“Many of the applications contain the type of recommendations that a poor person could be hard-pressed to collect: character references from state legislators or local elected officials. ... In other cases, applicants relied on someone who had the connections they lacked.”).

<sup>83</sup> See Ruckman, *supra* note 78 (“The signs of a last-minute rush abound. Well over half of the warrants do not even provide the specific sentences that were handed down by the courts. Other critical dates are missing right and left.”).

<sup>84</sup> See Robertson & Saul, *supra* note 6 (giving examples of similarly situated convicts who were not pardoned).

But with Barbour, it was worse than simply appearing inconsistent. For the pardons Barbour made didn't seem to be made merely on the basis of chance but were instead made for reasons of the wrong sort. They were made because of connections to the Governor, whether these were personal, familial, or the result of lobbying. It wasn't as if Barbour held a lottery to see who would get pardoned; this would still be unfair, but the unfairness might be of a lesser kind. Rather, *the people who got pardoned* (it seemed) *had a connection to the Governor*. In fact, it was as if the main factor in many cases was the existence of this connection.<sup>85</sup> It would have been better if the pardons had been entirely random; still morally problematic, but better.

If this was true in many cases, and not just one or two, then this provides another reason for criticizing the pardons as a whole, even if they can be justified case-by-case. For if the mode of distributing the pardons is not just arbitrary, but based on favoritism, then the pardons as a whole may be problematic, not because there are not good and sufficient reasons for them (we are assuming there might be) but because of the *way* they are given out. A bad mode of distribution (connections to the governor) might put into question all of the pardons, even pardons that *could have been* justified for good and sufficient reasons.<sup>86</sup>

### C. Some Recent Presidential Pardons

A recent, searching report by the public interest group ProPublica has raised questions about presidential pardons, which reflect, on a smaller scale, the problems that were noted in relation to Barbour's pardons.<sup>87</sup> The two conclusions of the study, which were reported in the *Washington Post*, was that the pardons granted by George W. Bush heavily favored whites, and that "political influence ... continued to boost pardon applicants."<sup>88</sup> The study conducted by the authors was based on a random sample of five hundred people out of the nearly two thousand people who had requested pardons during the second Bush's presidency.<sup>89</sup>

The number pardoned by Bush during his *entire presidency* was 189, a little less than the total number that Barbour pardoned in the final days of his governorship.<sup>90</sup> Yet they seem to reflect writ small what Barbour's pardons display writ large, viz., that when taken as a whole, pardons can be problematic in a way they are not when they are taken individually. The authors at ProPublica shows this point by a series of careful comparisons, between, say, a white woman who attempted to defraud the IRS of more than \$25,000 who got a pardon, and an African-American beauty shop owner who was convicted of underreporting her income, who was not.<sup>91</sup> They also investigate, in detail, a case where a donation to a Congressman helped secure a last-minute pardon.<sup>92</sup>

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<sup>85</sup> *Id.*

<sup>86</sup> To be sure a bad mode of distribution can be present even in one pardon; but when it is done with many pardons, the badness of it becomes more evident (as was the case with Barbour).

<sup>87</sup> See DAFNA LINZER & JENNIFER LAFLEUR, PRESIDENTIAL PARDONS: SHADES OF MERCY (2012).

<sup>88</sup> *Id.* at Loc. 37.

<sup>89</sup> *Id.* at Loc. 12.

<sup>90</sup> *Id.* at Loc. 8.

<sup>91</sup> *Id.* at Loc. 50.

<sup>92</sup> *Id.* at Loc. 280ff. (pardon efforts of luxury car dealer Dale Critz Jr. helped by donations to Republican Representative Jack Kingston).

Those in the Bush administration expressed surprise at the result, and insisted that the process was “color-blind.”<sup>93</sup> And we may think that the real problem here is the paucity of pardons (something that has continued with a vengeance into the Obama administration<sup>94</sup>), and not necessarily their basis, a point which I return to in Part III. There may also be problems of what are legitimate criteria for selecting people for pardons, a point of possible disagreement. The Bush administration’s officials apparently took marriage as a key factor in signaling whether someone had been rehabilitated or not, as showing greater “stability.”<sup>95</sup> But they also looked to more amorphous factors such as “attitude,” something which might open the door to all sorts of bias, or might which give wiggle room to favor some over the others based on political pressure.<sup>96</sup> There was, in fact, one instance of obvious racial bias in the Bush’s consideration of a pardon from a Nigerian minister.<sup>97</sup>

A final, notorious example might also be worth mentioning. In 2007, George W. Bush commuted the sentence of I. Lewis “Scooter” Libby, saving Libby from having to serve two and one half years for his role in leaking the identity of Central Intelligence Agent Valerie Plame.<sup>98</sup> In his remarks defending the pardon, Bush said that a thirty-month prison sentence for Libby was “excessive.”<sup>99</sup> Reportedly, Vice President Dick Cheney was furious that Bush did not give Libby a complete pardon (Libby was still on the hook for a \$250,000 fine and remained a convicted felon).<sup>100</sup> Although many conservatives felt that Libby’s fine was a miscarriage of justice (liberals disagreed), it seems clear that without Libby’s close connection to the President and the Vice-President he would probably not have been even a candidate for a pardon. In short, whatever the *individual* merits of the Libby case, it certainly was a pardon based on favoritism.

And it seems fair to say that in many other cases, and not just in the Libby case, Bush’s pardons were as problematic as Barbour’s were. Even though they may have been granted, in most cases, for good and sufficient reasons, the *way* they were pardoned showed problems: problems of bias, or of favorable treatment, or of sheer arbitrariness. They show why a theory of pardons needs to regulate more than just individual pardoning, but the pardoning process as a whole, because sometimes why a pardon is wrong cannot be discovered in isolation, but only when compared to *other* instances of pardons granted or not granted.

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<sup>93</sup> *Id.* at Loc. 92, 495.

<sup>94</sup> David Jackson, *Obama Not a “Pardoning” Kind of President*, USA TODAY (Nov. 2, 2012) available at <http://www.usatoday.com/story/theoval/2012/11/02/obama-mitt-romney-pardons/1676909/> (“Obama has pardoned only 22 individuals during his time in office, while denying 1,019 other clemency requests[.]”). Obama’s pardon rate is the lowest among any modern president. *Id.*

<sup>95</sup> LINZER & LAFLEUR, *PRESIDENTIAL PARDONS: SHADES OF MERCY*, at Loc. 105.

<sup>96</sup> *Id.* at Loc. 71.

<sup>97</sup> *Id.* at Loc. 215. See Allison Gender, *Furor over Bush Lawyer’s Racism in Deportation Cases of Nigerian Minister*, NY DAILY NEWS (July 14, 2008) available at <http://www.nydailynews.com/news/world/furor-bush-lawyer-racism-deportation-case-nigerian-minister-article-1.349796>.

<sup>98</sup> See *Bush Commutes “Scooter” Libby’s Prison Sentence*, FOXNEWS.COM (July 7, 2007) available at <http://www.foxnews.com/story/0,2933,287780,00.html>.

<sup>99</sup> Scott Shane and Neil A. Lewis, *Bush Commutes Libby’s Sentence, Saying 30 Months “Is Excessive*, NY TIMES (July 3, 2007) available at [http://www.nytimes.com/2007/07/03/washington/03libby.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2007/07/03/washington/03libby.html?pagewanted=all&_r=0).

<sup>100</sup> Thomas M. DeFrank, *Ex-VP Dick Cheney Outraged President Bush Didn’t Grant “Scooter” Libby Full Pardon*, DAILY NEWS (Feb. 17, 2009) available at <http://www.nydailynews.com/news/politics/ex-vp-dick-cheney-outraged-president-bush-didn-grant-scooter-libby-full-pardon-article-1.370889>.

#### IV. Toward a Second Best Theory of Pardons

The second and third Parts of this paper, taken together, frame a dilemma that arises in many real-world cases of pardoning. On the one hand, some pardons will be clearly justified by good and sufficient reasons. So, for example, an executive will be justified in pardoning when an innocent person has been convicted and sentenced, or when the sentence is too harsh. But on the other hand, if an executive pardons only *some* of those he has good and sufficient reasons to pardon, and the basis on which he does so is selective along some forbidden ground (race or favoritism) or is done randomly, even individually justified pardons can become morally problematic. The result is cases such as the ones we examined in the last Part: where even facially “good” pardons, when distributed on a “bad” basis, become suspect. In an ideal world, an executive would pardon all those who should be pardoned, and not make choices on whom to pardon for invidious or arbitrary reasons.

But this is not always what happens, and so we need a way to assess when pardons are both *good* and *bad*: good because they sometimes serve individual justice, bad because they also involve some other unfairness. To do this, I employ in this Part John Rawls’s language of “ideal” and “non-ideal” theory a distinction closely related to the idea of “second-best” theory. Pardons are non-ideal or second best in two ways. First, they are second best, because in an ideal world, we would never need to pardon: the laws would be fair, and the sentences given would be justice.

But pardons can be second best in another way, too. They can be given out in ways that don’t accord with our considered notions of fairness, or non-discrimination, or non-favoritism. The prevailing justifications of the pardoning power have focused too much on the way pardons can correct individual mistakes in the criminal justice system; but they have taken too little notice of the way in which pardons can *introduce* new kinds of injustices. So we have to be able to judge pardons along both individual and collective lines, and to explain how sometimes individual pardons can be unjustified for reasons that are unrelated to the justice of the particular case. This is what I hope, in introducing the distinction between ideal and non-ideal theory, to give us the tools to do.

##### A. Ideal and Non-Ideal Theory

The idea of “ideal theory” was developed by John Rawls, in his now-classic *Theory of Justice*.<sup>101</sup> Rawls used the term to structure his political philosophy as a whole. What he was going to do, he said, was to sketch out his picture of an ideal society, a “realistic utopia,”<sup>102</sup> as he would call it: a society which was, as much as it was possible for humans as they were, perfectly just. In doing so, he would make certain assumptions, one of which (the key one, actually) was that everyone would comply with the law.<sup>103</sup>

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<sup>101</sup> RAWLS, A THEORY OF JUSTICE, at 245-248 (discussion of ideal and non-ideal theory).

<sup>102</sup> See RAWLS, THE LAW OF PEOPLES 128 (1999) (“By showing how the social world may realize the features of a realistic utopia, political philosophy provides a long-term goal of political endeavor, and in working toward it gives meaning to what we can do today.”).

<sup>103</sup> RAWLS, A THEORY OF JUSTICE, at 25 (“[F]or the most part I examine the principles of justice that would regulate a well-ordered society. Everyone is presumed to act justly and to do his part in upholding just institutions.”).



If this is criterion (i.e., total compliance) is taken as the sine qua non of ideal theory, then there cannot be a full ideal theory of criminal justice.<sup>104</sup> If people obey the law, they will never be tried or punished, and so we will not need a complete understanding or description of the institutions of criminal justice. This explains, in part, Rawls's focus in his book on problems of distributive (and later, social) justice and his almost complete disregard of questions of crime and punishment.<sup>105</sup> Fortunately, however, we can find a use in Rawls's distinction between ideal and non-ideal theory.

We can still speak, almost in ordinary language terms, of *ideal theory* as that which comes close to embodying, or embodies, our idea of a perfectly just society. We can then speak of our society, in contrast, as a non-ideal one. The main point I want to borrow from Rawls is this: the rules that govern a non-ideal society will be different than those that govern the ideal society, because there may be some things we need to do to *get* to the ideal that may no longer be permissible once we live in the ideal society.<sup>106</sup> Rawls's book itself is short on examples, and here is no exception, but he gives some in this context. He considers the possibility that slavery or serfdom, given some economically distressed regimes, could be permissible *for a time*, until securing the basic liberties was economically feasible. He also proposes that certain restrictions on democracy could be justified as a matter of non-ideal theory.<sup>107</sup>

Rawls's first point in these examples is that in certain circumstances, ideal theory can't govern a society directly, because if it did, that society would never get to the ideal. We would starve before we got to the point of having a functioning constitutional democracy. In a way, non-ideal theory says that you can break the ideal rules. But Rawls also has a second point, which is this: *even when it departs from the ideal, non-ideal theory must aim at the ideal*. Non-ideal has to take ideal theory as its guide, because, after all, the point of breaking the rules is to get us closer to the ideal of the ideally just society. Ideal theory constrains non-ideal theory not absolutely, like strict rule, but more like a standard that the non-ideal society tries to approximate.<sup>108</sup>

But then the puzzle becomes: how do we determine when departures from the ideal rules are permissible and when they are not? We could imagine one extreme, saying that they were never permissible, but this would just be to reject the possibility of non-ideal theory. At the other extreme would be to simply give up on the idea of ideal theory and just simply balance on each occasion. But it seems that we need a conception of what we *aiming for* in order to give content to our balancing, so this extreme seems unpalatable as well.

There can be no general answer to this puzzle. The notion of "ideal theory" is at the end of the day a useful metaphor, to think about how to reform society for the better. Should we think mostly in terms of aiming towards an ideal society? Or should we think instead in terms of eliminating obvious injustices?<sup>109</sup> In the case of pardons, I think it is best to think in terms of an *ideal* we are aiming for: the ideal that we have a criminal justice system that *both* operates fairly

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<sup>104</sup> *Id.* (putting "such topics as the theory of punishment" in non-ideal, or "partial compliance," theory).

<sup>105</sup> I examine this point further in *Punishment and Political Philosophy: The Case of John Rawls* (ms on file with author).

<sup>106</sup> RAWLS, A THEORY OF JUSTICE, at 279.

<sup>107</sup> *Id.* Rawls means to apply these examples to cases of economically developing societies.

<sup>108</sup> Here the massive literature on rules and standards is relevant. See, e.g., Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

<sup>109</sup> Amartya Sen is the most notable exponent of this position. See SEN, THE IDEA OF JUSTICE (2009).

for all *and* does not unjustly punish anyone. So we have to ask, what measures can we use to arrive at this ideal, without sacrificing the ideal in the process? Ideal theory helps us show what is at stake when there are pardons that are done for morally arbitrary reasons, like race or favoritism: they show that there may be something wrong with a pardon, *even if that pardon in the individual case is done for good and sufficient reasons.*

## B. Applying Non-Ideal Theory to Pardons

Barbour's pardons were not universally condemned. Some praised Barbour's conversion from a strict law-and-order man, to one who was capable of forgiveness, showing his Christian side.<sup>110</sup> Others, including the prominent civil rights lawyer John Payton, hailed Barbour's large number of pardons as (merely) putting a dent in mass incarceration. The main problem was that Barbour had not gone far enough. His pardons were only a drop in the bucket, Payton said.<sup>111</sup>

Payton's perspective is important, because it puts Barbour's pardons in the larger context of the injustice of America's criminal justice system as a whole. It is almost universally agreed that too many people are in prison, for too long, and for relatively minor offenses. Recent declines in the prison population only serve to highlight how far we have to go. Moreover, the stigma and the harms of those offenses last well beyond their release from prison: they suffer hardships in receiving aid, getting jobs, and being able to vote.<sup>112</sup> Again, it is very probable that some if not all of Barbour's pardons were done for good and sufficient reasons. And again, most of the offenders were not ones that were just released from prison; rather they had been released for years, had reformed themselves, and were trying to get under the burden of a past conviction.

This is in a way to repeat what I suggested in Part II of the paper: that there were probably many of Barbour's pardons that could have been justified by good and sufficient reasons, if he wanted to. But we should emphasize that if these pardons were so justified, they were, according to Moore, *matters of justice*. It was unjust that these people should have suffered from their sentences, and it was a matter of justice that Barbour should pardon them. The Barbour pardons were at least in some cases done in the interests of making sentences just.

Then how could they be at the same time wrong? Here I need to step back and make a larger point about progress towards an just society which is not limited to Barbour's pardons. Suppose that we lived in an ideally just society, where the criminal law was just and fairly administered. In this society, all or nearly all trials would result in the conviction of the guilty, and the guilty would be punished according to their desert.<sup>113</sup> Still, we can imagine that there would be some mistakes in the administration of justice, where people slipped up, not necessarily intentionally, but as a matter of simple human error.

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<sup>110</sup> Molly M. Gill, *Why Did Governor Haley Barbour's Pardons Cause Such a Backlash?* HUFF. POST (Jan. 19, 2012) available at [http://www.huffingtonpost.com/molly-m-gill/haley-barbour-pardons\\_b\\_1217237.html](http://www.huffingtonpost.com/molly-m-gill/haley-barbour-pardons_b_1217237.html) (defending Barbour in part on religious grounds).

<sup>111</sup> E.R. Shipp, *What's All The Fuss About In Missouri?* THE ROOT (Jan. 31, 2012) available at <http://www.theroot.com/views/whats-all-fuss-about-mississippi?page=0,1>

<sup>112</sup> See Zach Hoskins, "Hard times after hard time: Are ex-offender restrictions justified?" (ms on file with author).

<sup>113</sup> On this, see CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS*, chapter 37 ("Clemency, which has often been deemed a sufficient substitute for every other virtue in sovereigns, should be excluded in a perfect legislation, where punishments are mild, and the proceedings in criminal cases regular and expeditious.").

In this case, where we errors are relatively infrequent, we might see the importance of the pardon power as *patching up* some of the flaws in the system, in order to take a mostly or nearly just society closer to being a perfectly just society. Pardons are one way of doing this. Other places of discretion, in the hands of the police, the prosecutor, or the jury, could also work to “patch up” flaws.<sup>114</sup> Pardons and these other measures would be, as many have stated, necessary “safety valves” to the workings of the criminal justice system, to account for human fallibility. Note, however, that these would be entirely *legalistic* pardons, in Moore’s use of the term. They would be pardons when human actors failed to follow (to the letter) the hypothetically just laws and punishments.

Now suppose we live in a far from ideal society, where the many criminal laws themselves are irrational or unjust, where sentencing is on the whole too harsh, where mandatory minimums are the norm, and where the consequences of being imprisonment carry harms far past the date of release. In such a world, which I take it is very near (or identical) to *our* world, the use of “safety valves” would be especially important,<sup>115</sup> and we might actively call for *greater* use of them, such as Paul Butler’s case for greater jury nullification,<sup>116</sup> or pleas for governors to pardon everybody on death row.<sup>117</sup> What’s more, the use of these would be in many cases amply justified as a way to mitigate, if not eliminate, much of the *legal* harshness of the criminal justice status quo. Barbour’s pardons can certainly be seen as doing this, at least partly, even if it is only a drop in the bucket. It is probably true that in our society, as many have argued, the pardon power should be used more often and more aggressively than it is currently being used.<sup>118</sup>

The problem is that although pardons (and the like) can be used as means to achieving the substantively just society, there comes a point when the use of that means conflicts with the ideal of the just society. This is what, arguably, happened in the case of Barbour. It does not do any honor to the idea of a racially fair justice system to reinforce that bias by pardoning, disproportionately, members of the white race. And it does not support the idea that justice is non-arbitrary to assign pardons in a seemingly random and scatter-shot manner. Further, a just criminal law is not promoted when the law is found to bend in favor of family, or in favor of those with money.

The larger point is that *the way the criminal justice system is patched up, or reformed, must be on the whole consistent with the values of an ideal criminal justice system.* This seems especially important when those reforms are made in a large-scale manner, as was the case with Barbour’s pardons. In short, there are constraints on acting justly in pursuit of a more perfectly justice society. These are the constraints that, to use John Rawls’s terminology, ideal theory places on actors in the real world.

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<sup>114</sup> Barkow groups these points of discretion in her essay on administrative law and the demise of mercy; Barkow, *supra* note 14.

<sup>115</sup> Molly M. Gill, *Why Did Governor Haley Barbour’s Pardons Cause Such a Backlash?* HUFF. POST (Jan. 19, 2012) available at [http://www.huffingtonpost.com/molly-m-gill/haley-barbour-pardons\\_b\\_1217237.html](http://www.huffingtonpost.com/molly-m-gill/haley-barbour-pardons_b_1217237.html) (“The pardon power is often the only remedy for those who have been unfairly or excessively punished in the harsh and inflexible sentencing system we have spent 30 years building. Pardons and commutations can correct some of these injustices.”)

<sup>116</sup> Paul Butler, *In Defense of Jury Nullification*, 31 LITIGATION 46 (2004).

<sup>117</sup> See Markel, *supra* note 63.

<sup>118</sup> See references *supra* note 17.

This means that if pardons are to be given, they should ideally be given for good and sufficient reasons, and should only be distributed *because* of those reasons. That means that they cannot be distributed in other ways, ways that might be racially biased, or arbitrary, or based in favoritism. If they are distributed in these ways, they go against the larger ideals of criminal justice, and for that reason, are morally suspect, if not morally impermissible.

Of course, in the real world, pardons will never be perfectly fair. Like cases will not always be treated in a like matter. *Some* arbitrariness seems inevitable in a system administered by human beings and not by machines (it will also be very difficult, if not impossible, to compare cases along a common metric). This should not be a barrier to allowing *any* pardons, as I explain in greater detail in the next section. It is only when the moral arbitrariness is so large as to be obvious that it becomes a problem, when there does not seem to be *any* semblance of following a uniform procedure, or uniform standards for offering pardons. This means that even if in one sense pardons are permissible violations of rule of law values (such as consistency and finality), then must still be held to *ideals* of the rule of law, ideals of anti-discrimination, non-arbitrariness, and sincerity. When pardoning decisions fail to adhere to these ideals, they are morally problematic, even when taken one by one they have good and sufficient reasons behind them.

### C. Two Important Qualifications

I should be clear what the implications of the above are by making two qualifications. The first qualification is that the constraints placed by non-ideal theory still leave considerable room for pardoning. We can pardon all those we have good and sufficient reasons for pardoning, provided that we do so with minimal bias (no overt racism or favoritism or randomness). Of course there is not *total* room; at some place the constraints of ideal theory have to kick in. This leads to my second qualification: even when the constraints do kick in, there may be some cases where we decide that those constraints, too, must be abandoned. We might decide, that is, that the present injustice is so great that even ideal theory has to give way, and that the force of the reasons underlying the individual pardons outweigh the fact that the pardon is arbitrary, or racist, or insincere.

There has been a growing chorus over the past two decades that the pardon power has been used too sparingly by executives, especially the President. This chorus has practically grown to a roar over the number of pardons granted by Obama, one of the lowest of any President's term.<sup>119</sup> George W. Bush has also been criticized on this score. I join my voice to this chorus: given the present injustice of the status quo there are many, many pardons that not only *can* be made for good and sufficient reasons, but *ought to be made*.

So my conclusions in the previous sections of this paper should not be taken as a condemnation of the pardon power; far from it. As I elaborated in Part I, I believe that there is a powerful moral case for the pardon power. What I showed in Part II is only that there are *limits* to the pardon power not only in the individual case, but when we consider (individually justified) pardons as a whole. This raised the possibility that an executive's pardons on-the-whole might be morally unjustified.

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<sup>119</sup> David Jackson, *Obama Not a "Pardoning" Kind of President*, *supra* note 94.

But this is not the last word. For the answer to objections about problematic on-the-whole pardons is an obvious one: it is not to *not pardon at all* but to *level up*.<sup>120</sup> That is, instead of refusing to pardon because of fear of arbitrarily pardoning, one should, if anything, be *more* generous in granting pardons *especially* given the pervasive injustice in America's criminal justice system.<sup>121</sup> In the case referenced above, about the two roughly situated individuals, one who evaded taxes, and the other who committed tax fraud, the answer to the question of which should be pardoned is relatively easy: pardon both of them. Generally, it does not seem the case that *one* arbitrary pardon renders *many* legitimate pardons illegitimate. It is only when, in cases such as Barbour's one gets the sense that nearly *all* of the pardons were granted on arbitrary basis, that the problem of arbitrary pardons arises. Moreover, there are types of seeming randomness, that can reflect acceptable (or at least morally neutral) types of selectivity, such as budget pressures.<sup>122</sup>

But then, of course, there are cases like Barbour's, where there *is* a question of whether the pardons can be justified *en masse*. We might even say that, if Barbour leveled up this time around – pardoning not just trusties, but others on the pardon board's list – he had not leveled up *enough*. There were still more, similarly situated convicts who merited consideration for a pardon. So in his case, I have suggested, the arbitrariness, and possibly discriminatory nature of his pardons was enough to make all of this pardons problematic. He might have done many individual good acts, but there was something about the acts, taken together, that was morally questionable.

So this leads us to the question: Is there reason to think that with Barbour's pardons, the values of non-arbitrariness, non-discrimination, etc., should have outweighed the “good and sufficient reasons” Barbour had for pardoning? There is a strong case to be made that, yes, they should have. Sometimes the values of ideal theory should outweigh justice in individual cases, especially when the value of that justice is relatively minor.

For consider: most of the sentences Barbour commuted were already served out; most of those who were suffering from their crimes were no longer suffering from the sentences *per se*, but from the stigma of their crimes. As Barbour hastened to point out, he freed very few people from prison.<sup>123</sup> The value that would *actually* come from the pardon would be mostly be in terms of avoiding the stigma (and associated harms) of conviction, and not avoiding the harm of unjust imprisonment; the person who had finished his term of years would now no longer be considered a “felon” in the eyes of the law thanks to Barbour's pardons. In these cases, we should say: the ideals of ideal theory should win out, because the injustices, the individual injustices, that would be cured are relatively minor, and the violation of the values of consistency and fairness seemed patent. (Of course, that does not make them any less injustices, nor does it mean that the best thing for Barbour to have done would have been to *pardon more people*.)

Then we get to the cases that made up most of my examples, where the death sentences of some were reduced to life in prison, but not all of those who were similarly situated. Is the

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<sup>120</sup> I am grateful to Ronen Avraham for emphasizing this point to me in correspondence. Ronen Avraham, *E-mail to Author* (Jan. 23, 2013) (on file with author).

<sup>121</sup> See the sources cited *supra* note 23.

<sup>122</sup> *Supra* note 72.

<sup>123</sup> As the title of his *Washington Post* op-ed advertises. See Haley Barbour, *Why I Released 26 Prisoners*, WASH. POST (Jan. 18, 2012).

answer to this to not pardon *any* of them, and let them all be put to death? Should the value of consistency win out even here?<sup>124</sup> Certainly, this would not be the favored outcome: the favored outcome would be that *none* of them should be put to death. But then we have to ask, what if this outcome (for whatever reason) is unavailable? Does that mean that the *second best* option (to pardoning some) is that all should not be pardoned? This sounds like a harsh, even unacceptably harsh, result. Arbitrary pardons in this case might be the true “second best.” Better that some avoid death than *all* face the death penalty.

In the death penalty debate in the 1970s, the arbitrariness (and racial selectiveness of the death penalty) was hotly debated: those who were against the death penalty vigorously argued that the randomness of the death penalty was a strong reason against it.<sup>125</sup> But they faced the reply that if this was so, then the remedy was equally to give more people the death penalty rather than to abolish the penalty altogether.<sup>126</sup> I do not want to get into the particulars of this debate, but to note the similarity to the question above: one on side were those favoring the rule of law values of consistency and fairness, up against those who favored the substantive justice of the death penalty in individual cases. Of course, in this case, the rule of law values were supported by the death penalty opponents, and the substantive justice values by the proponents. But the structure of the debate seems similar to the question we are facing: in the case of the conflict, what should win, the substantive justice or the procedural values?

There may be no general answer to this question in some extreme cases, of which the death penalty cases must surely be. My point in the use of the examples in the second Part was to point where the use of pardons could be morally problematic, and not morally prohibited. Racism, favoritism, and arbitrariness seem to me to be strong reasons to question the justice of a punishment, whether this is a case of a punishment being *imposed* or a punishment being *removed*. This is why it still seems to me that in the race case, the awfulness of the discriminatory message sent by pardoning only whites might be sufficient to trump the substantive injustice (if it is one) of execution.<sup>127</sup> *Might*.

## V. Conclusion

Over the years there have been many proposals from both practitioners and academics to remove the pardon power from the executive, or at least reduce it, and give the power to an independent board or commission.<sup>128</sup> I am not sure this will happen, nor am I sure that it necessarily should: boards would mean greater delays in pardons, something which is not always good; boards might also mean *fewer* pardons, and more bureaucratic delay, as there might be disagreement about who ought to be pardoned or who should be pardoned first. Executive power

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<sup>124</sup> One is reminded in this respect of the old adage that “consistency is the hobgoblin of little minds.”

<sup>125</sup> See Nathanson, *supra* note 72 (arguing that the arbitrariness of the death penalty was a reason to oppose it).

<sup>126</sup> See especially the contribution of Ernest van den Haag in ERNEST VAN DEN HAAG AND JOHN P. CONRAD, *THE DEATH PENALTY: A DEBATE* (1983) (arguing that the individual justice of executing one person was not affected at all by the fact that some escaped justice).

<sup>127</sup> Again, I am only dealing with the case of *guilty* people who are given an unjust penalty. I think the calculus changes if we move to consider innocent people facing the death penalty. Then, it seems to me that justice would require saving *anyone* you could, even if this could only be done on morally arbitrary grounds.

<sup>128</sup> See Drinan, *Clemency in a Time of Crisis*, 28 GA. ST. U. L. REV. 1123 (2012)

has always, historically, meant the power for quick action, whether for good or for bad. I think pardoning is a place where quick action can often be desirable and necessary, and the best remedy. Some of the delay in recent pardons is due to too many layers of review, too much bureaucracy, too many hands in the pot.

But if we are going to favor quick action, this means we need to be even clearer on the moral constraints that operate on the pardon power. Nor does solving the question of *who* should pardon get us any clearer in specifying what the ground rules for pardoning should be. Wherever the pardoning power resides, this paper has described an important additional moral check on that power. The power should not be considered good or bad only in its individual instances, but also when we look at the pardons over time and as a whole. That is, we should look at patterns, not just at cases -- because pardons can be wrong not just in individual instances, but also when we consider them in groups.

More generally, this paper has proposed a framework for evaluating what we might call “discretionary acts of justice” throughout the criminal justice system, and not only in the executive. Those acts, too, should be looked at in terms of whether they are, broadly speaking, consistent with an *ideal* theory of criminal justice. Do they help us bring about that ideal, in a way that reflects the values of that ideal? Or do they violate those values? Actors within the criminal justice need to be mindful, not just of how they act in *this* or *that* case, but what legal virtues they display over time and across many cases.