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Pardons and the Theory of the "Second-Best"

Chad Flanders

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Abstract

This Article 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 response to 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 it ideally should. Pardons, in the nonideal world we live in, are sometimes necessary.

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

This Article takes up the task of showing how pardons are justified, but more importantly, this Article also theorizes *how* pardons should be used. Specifically, it introduces two constraints on the pardon power, one that constrains pardons when we consider them individually and another that constrains pardons when we consider them as a whole. It is this latter ground that has especially been underdeveloped in the literature, and this Article provides grounds for evaluating pardons not merely taken one-by-one, but when more than one pardon is given out at a time, or over the course of an administration.

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.[1] Although the move was nearly unprecedented in Mississippi,[2] the Mississippi Supreme Court later upheld it against a procedural challenge.[3] The "pardons" (as I shall collectively call them, following most reporters) were—and properly remain—intensely

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1. Richard Fausset, *Outgoing Gov. Haley Barbour's Pardons Shock Mississippi*, L.A. TIMES (Jan. 12, 2012), http://articles.latimes.com/2012/jan/12/nation/la-na-barbour-pardons-20120113; *Mississippi Gov. Haley Barbour Pardons Nearly 200, Including Convicted Killers*, CRIMESIDER (Jan. 11, 2012, 4:44 PM), http://www.cbsnews.com/8301-504083_162-57357252-504083/mississippi-gov-haley-barbour-pardons-nearly-200-including-convicted-killers.

2. *Haley Barbour's 'Shocking' Pardon Spree: A Guide*, WEEK (Jan. 13, 2012), http://theweek.com/article/index/223306/haley-barbours-shocking-pardon-spree-a-guide (stating that the previous pardon high for a Mississippi governor was thirteen).

3. *See In re* Hooker, 87 So. 3d 401, 403 (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."); Holbrook Mohr, *Haley Barbour Pardons: Mississippi Supreme Court Rules Pardons Are Valid*, HUFFINGTON POST (Mar. 8, 2012, 6:19 PM), http://www.huffingtonpost.com/2012/03/08/haley-barbour-pardons-mississippi-supreme-court_n_1332769.html.

controversial.[4] 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 Mississippi's controversial "trusty" program;[5] others Barbour pardoned were "members of prominent Mississippi families, major Republican donors or others from the higher social strata of Mississippi life."[6] One individual pardoned was football great Brett Favre's brother, who had been convicted of killing a friend in a drinking-and-driving accident.[7] Taken as a whole, the pardons also showed a disturbing racial distribution. Nearly two-thirds of the pardons during Barbour's tenure were granted to whites, even though the majority of those convicted of crimes in Mississippi are black.[8]

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.[9] He added that the

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4. 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.").

5. "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, 10:59 AM), 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 Long-standing 'Trusty' Program in Spotlight*, CNN (Jan. 18, 2012, 12:03 PM), http://www.cnn.com/2012/01/16/justice/mississippi-trusty-program.

6. Campbell Robertson & Stephanie Saul, *List of Pardons Included Many Tied to Power*, N.Y. TIMES, Jan. 28, 2012, at A1, *available at* http://www.nytimes.com/2012/01/28/us/many-pardon-applicants-stressed-connection-to-mississippi-governor.html.

7. Judy Keen, *Barbour's Pardons Stir Outrage in Mississippi*, USA TODAY (Jan. 13, 2012, 9:43 AM), 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.").

8. Patrik Jonsson, *Haley Barbour Pardons: Why Were the Forgiven So Disproportionately White?*, CHRISTIAN SCI. MONITOR (Jan. 21, 2012), 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 ("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.").

9. Haley Barbour, *Statement of Former Governor Haley Barbour on Clemency*, OFF. GOVERNOR HALEY BARBOUR, http://web.archive.org/web/20121023090030/http://www.governorbarbour.com/news/2011/dec/1.13barbourclemencystatement.html (last visited Aug. 30, 2013). The Governor stated:

Christianity teaches us forgiveness and second chances. I believe in second

pardon board had recommended many, if not all, of those pardoned for executive clemency.[10] In an op-ed written later, Barbour defended the tradition of pardoning "trusties" and asserted that those who commit crimes of passion such as murder are least likely to re-offend and so are no longer dangers to society.[11] Four of the trusties Barbour pardoned had been convicted of murder.[12]

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 (whether an individual or a large group), he or she is making an exception to the laws that otherwise apply to everybody.[13] Even pardons that look justifiable on their face (because a prisoner has suffered enough or because the governor deems a sentence against an individual to be too long or too harsh) may violate the governor's duty to impartially administer the law.[14] Taken to an extreme, this argument would even limit a governor's ability to pardon in an error-correcting capacity (say, if someone were actually innocent),

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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.

Id.

10. *Id*. ("The State Parole Board reviewed about ninety-five percent of these 215 cases as well as many, many more applications that were rejected. I accepted the Parole Board recommendations about ninety-five percent of the time.").

11. Haley Barbour, Op-Ed, *Why I Released 26 Prisoners*, WASH. POST (Jan. 19, 2012), http://articles.washingtonpost.com/2012-01-18/opinions/35439863_1_inmates-clemency-trusties.

12. *Haley Barbour Pardons 4 Killers: Convicts Were Trustees at Miss. Governor Mansion*, GRIO (Jan. 10, 2012, 11:21 AM), http://thegrio.com/2012/01/10/haley-barbour-pardons-4-killers-convicts-were-trustees-at-miss-governor-mansion.

13. *See* KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 28 (1997) (summarizing Kant's opposition to pardons, given that rulers have a "categorical moral obligation to punish those who have committed crimes"); *see also* Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1455–56 (2004) (arguing against excessive discretion to reduce or remove sentences on retributivist grounds). In raising concerns about the possible arbitrariness of pardons, this Article is in broad sympathy with Markel's thesis.

14. 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 HARV. L. REV. 1332, 1334 (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."); *id.* at 1333 n.5 (collecting sources on the tension between mercy and justice).

provided that the correct procedures had been used.[15]

Barbour's pardons also came at an inconvenient time: when there have been increasing calls for executives—including and perhaps especially the President[16]—to *increase* the number of pardons granted.[17] The pardon power has been underused of late, especially by the current and former Presidents, perhaps in overreaction to certain manifestly political uses of the pardon, such as President Clinton's infamous pardon of Marc Rich.[18] 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 overcaution in pardoning.[19]

This Article defends the pardoning power (especially against those who would find the power always unjustifiable) while finding that there are, and should be, strong moral limits to how it can be used. To see how the pardon power can be justified (and, as a result, how individual pardons are justified), we need to distinguish ideal from nonideal circumstances. In identifying a distinction, this Article borrows from and modifies the work of John Rawls.[20] The distinction between ideal and nonideal circumstances is closely related to the idea of the "second-best."[21]

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15. *See generally* William Baude, *Last Chance on Death Row*, WILSON Q., Autumn 2010, at 18 (defending the value of finality in criminal proceedings with application to the Troy Davis case).

16. *See* Dafna Linzer, *Obama Has Granted Clemency More Rarely Than Any Modern President*, PROPUBLICA (Nov. 2, 2012, 9:00 AM), http://www.propublica.org/article/obama-has-granted-clemency-more-rarely-than-any-modern-president (commenting on the infrequent use of pardons by President Obama).

17. *See generally* Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT'G REP. 153, 158 (2009) (calling for a "return to an era in which clemency is a key part of a functioning system of justice"); Clara H. Drinan, *Clemency in a Time of Crisis*, 28 GA. ST. U. L. REV. 1123, 1123 (2012) (arguing for greater use of pardon power); Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1212 (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."); PARDON POWER, http://www.pardonpower.com/ (last visited Mar. 30, 2013) (blog of P.S. Ruckman, Jr.).

18. Jessica Reeves, *The Marc Rich Case: A Primer*, TIME (Feb. 13, 2001), http://www.time.com/time/nation/article/0,8599,99302,00.html (providing details of the controversial pardon of Marc Rich).

19. *See* Barkow, *supra* note 17, at 157 (noting political risks of pardoning).

20. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971).

21. Lawrence B. Solum, *Legal Theory Lexicon: Second Best & Nonideal Theory*, LEGAL THEORY BLOG (May 17, 2009), http://lsolum.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

In ideal or near-ideal circumstances sentences are for the most part just, and the criminal justice system works by and large in a fair manner. In an ideal society, there is virtually no need for pardons. But in nonideal circumstances, sentences tend to be overly long, 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[22]) exist in nonideal circumstances.[23] In such a context, pardoning can be justified as a way to more perfectly approximate what the criminal justice system would accomplish in ideal circumstances— by limiting unjust sentences, for example, or by removing unjustified post-conviction disabilities. This, indeed, is how pardons are commonly justified in the literature.[24]

This justification does not end the enquiry, however, but only begins it, for it leaves open the question of what constraints on the pardon power may exist even in nonideal conditions. Even nonideal theory operates under some constraints—constraints on *how far* we can relax certain moral absolutes so as to more perfectly approximate ideal justice.[25] If pardons are applied in a reckless and arbitrary manner, this may be impermissible, even under nonideal theory. This constraint on nonideal theory raises the possibility that the way Haley Barbour pardoned in general is unjustifiable, even if some (or all) of his individual pardons were fully justified. It also suggests that not pardoning at all could be better in some cases than pardoning in a discriminatory, biased, or random manner.

This Article seeks to define a consensus in some areas of the criminal law but to challenge the consensus in others. In defending pardons, this Article tries to provide a minimal account of the pardon

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solutions."). For a different, though related use of second-best, see generally Adrian Vermuele, *Hume's Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421 (2003).

22. The United States has the highest prison population in the world, with China a distant second. *See World Prison Populations*, BBC NEWS, http://news.bbc.co.uk/2/shared/spl/hi/uk/06 /prisons/html/nn2page1.stm (last visited Mar. 21, 2013).

23**.** *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (discussing the crisis of mass incarceration in America); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011) (same); Adam Gopnik, *The Caging of America: Why Do We Lock Up So Many People?*, NEW YORKER (Jan. 30, 2012), http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_ gopnik (same).

24. *See, e.g.*, Barkow, *supra* note 14, at 1364 n.144 (collecting uses of the "safety valve" justification for pardons); George Lardner, Jr. & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790–1850*, 16 FED. SENT'G REP. 212, 212 (2004) (explaining the importance of having a "safety valve" in a system of mandatory punishments).

25. 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.").

power and in doing so tries to be unobjectionable, or nearly unobjectionable, to most scholars of the criminal law. This portion of the Article does not mean to court controversy, and it defends pardons on the narrowest of grounds: pardons can be necessary to secure justice in particular cases—not as grand acts of mercy but in many cases as matters of individual right.

But in finding that pardons may be arbitrarily distributed, this Article opens a new avenue for challenging pardons, one that has been largely underdeveloped in legal literature: as violations of fair or equal treatment.[26] Even when we have considered an executive's pardons one by one, there is still another level on which we can evaluate them: were the pardons just *considered as a whole?* Justice, this Article maintains, has to be considered both at the retail and at the wholesale level.

The Article proceeds in three parts. Part I examines a prominent theory of the pardoning power advanced by Kathleen Moore.[27] Moore defends a narrow view which sees pardons as justified only when they are necessary to correct an injustice in the administration of the criminal law. Part I also shows, surprisingly, that many if not all of Haley Barbour's pardons may have been justified under Moore's theory.

Part II examines the possibility that even though many of Barbour's pardons might be justifiable individually, there may be something wrong with his pardons taken as a whole. Moore supports pardons as justifiable when done to correct an injustice in an individual case, given that our criminal justice system is flawed. 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.[28] Part II examines whether this is the case with Haley Barbour's pardons and with pardons in the second Bush administration.

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26. Some have dealt with the problem of biased pardons, although they take a slightly different focus than I do. *See generally* Elizabeth Rapaport, *Staying Alive: Executive Clemency, Equal Protection, and the Politics of Gender in Women's Capital Cases*, 4 BUFF. CRIM. L. REV. 967 (2001) (suggesting a possible *positive* role for biased pardons, based on a theory of "exemplary" pardons); Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 BRANDEIS L.J. 85, 117–23 (2003) (discussing possible Constitutional constraints on pardons based on gender or race).

27. *See generally* MOORE, *supra* note 13; Kathleen Dean Moore, *Pardon for Good and Sufficient Reasons*, 27 U. RICH. L. REV. 281 (1993) [hereinafter Moore, *Pardon for Good and Sufficient Reasons*].

28. 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 Unjust?* 3 (Univ. of Tex. Sch. of Law Pub. Law & Legal Theory Research Paper Series No. 243, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2146749.

Part III extends the analysis of Barbour's pardons into a larger point about reforming the criminal justice system in nonideal circumstances. There are constraints on giving pardons that go beyond basing them on good and sufficient reasons. These constraints focus on how reform in the criminal justice system ought to 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—that is, even if we should pardon more, there are better and worse ways of pardoning many people.

This Article uses Barbour's pardons as examples 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 that they also have been granted on an arbitrary or possibly discriminatory basis.[29] So the problem is not an isolated one, reserved to a particular governor of a particular state. It shows a danger in the pardon power in general and underscores the pressing need to develop more elaborate standards for the proper use of the pardon.[30]

I. A DEFENSE OF THE PARDONING POWER

The pardon power has long been controversial in itself, and not only because of the controversy surrounding instances of the power's use.[31] This part illustrates Karen Moore's influential explanation of when pardons are justified. 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 specific reasoning.[32] This may well be an advantage of Moore's account,

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29. See especially the excellent e-book produced by ProPublica, DAFNA LINZER & JENNIFER LAFLEUR, PRESIDENTIAL PARDONS: SHADES OF MERCY (2012). *See also* Editorial, *The Quality of Mercy, Strained*, N.Y. TIMES (Jan. 5, 2013), http://www.nytimes.com/2013/01/06/opinion/sunday/the-quality-of-mercy-strained.html?_r=0 (discussing the possible racial bias in presidential pardons).

30. Regarding the recent pardoning controversy in South Korea, see Choe Sang-Hun, *Departing South Korean Leader Creates Furor with Pardons*, N.Y. TIMES (Jan. 29, 2013), http://www.nytimes.com/2013/01/30/world/asia/outgoing-south-korean-leader-creates-furor-with-pardons.html ("With less than one month left in office, the departing 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.").

31. *See generally* Markel, *supra* note 13.

32. *See id.* at 1436 ("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. For more on the distinction between

because it can help us to separate *acts of pardoning* from *acts of mercy*. Not all acts of pardoning are acts of mercy, and some acts of pardoning might be morally obligatory.

Moore defends pardoning, then, but not as an unfettered right of the executive to forgive crimes or as 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).[33] For Moore, an executive cannot just pardon for any reason or for no reason at all. Rather, the executive must pardon only for "good and sufficient reasons" relating to the offender's culpability and to the proportionality of the offender's punishment. A pardon, in other words, cannot be given simply because the executive wants to give it.[34] It has to be justified morally.

While we might think that Barbour's pardons could only be defended on the traditional view (under which the sovereign has an absolute right to pardon), this part argues that Barbour's pardons might also 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 the pardons were justified, we would need to examine each case separately on its own merits.

A. *Moore's Theory of Pardons*

Moore defends the pardoning power as an extension of retributive justice,[35] but adopting her theory does not require adopting retributivism *tout court*.[36] Retributive justice, in her view, punishes offenders because they deserve it. In an imperfect system of criminal justice, offenders may not always get what they morally or legally deserve, and so need to

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pardoning and mercy, see *infra* Section I.B.

   33. 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, 87 So. 3d 401, 440 (Miss. 2012) (Pierce, J., dissenting) ("[T]he power to pardon . . . is an act of the sovereign's 'mercy and grace.'" (quoting Whittington v. Stevens, 98 So. 111, 114 (Miss. 1923))); *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.").

   34. Moore, *supra* note 27, at 283.

   35. *See generally* MOORE, *supra* note 13, at 87–178 ("A Retributivist Theory of Pardons").

   36. *See infra* note 44.

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."[37]

What exactly Moore means by "procedures miscarry" is ambiguous, and could mean at least two things. She could first mean that somewhere in the process a *legal* mistake has been made. This could happen when, say, a judge misapplies the sentencing guidelines and gives a longer than authorized sentence, or instructs the jury incorrectly, leading to a conviction. These legal mistakes are presumably ones that could be corrected by an appellate court, but could also be the basis for an executive pardon for "good and sufficient reasons." If the law were followed correctly, the state may have had the right to punish as it did, but the law wasn't followed, so it doesn't have that right. A pardon can correct the failure of actors within the legal system to live up to the legal system's own commands.

But there is another, deeper way in which procedures can miscarry. A legal process, even when it is followed correctly, can lead to a morally wrong result. For example, an innocent person may be convicted even though all the proper legal procedures have been followed—no actor in the legal system has made a legal mistake. When something like this happens, there may be no legal error we can directly or obviously identify.[38] What this leaves us with is a moral error that needs correcting.

Suppose, for instance, that the evidence that exists at the time of a trial leads a reasonable jury to convict someone of a crime.[39] Every appellate court subsequently upholds the conviction. Nonetheless, many years after the trial, new evidence comes to light that clearly exculpates the convicted person. Here the procedures have nonetheless miscarried, not because they were not followed (they were), 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.[40] In cases like these, a pardon can be justified, because the reason for the legal procedures (ideally) is to protect the innocent. To prevent a morally innocent person from being punished is a "good and sufficient reason" to pardon, says Moore.[41]

More controversially, suppose that a sentence handed down, while

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37. Moore, *Pardon for Good and Sufficient Reasons*, *supra* note 27, at 286 (emphasis added).

38. *See* Baude, *supra* note 15, at 19.

39. I borrow this example from Moore, *Pardon for Good and Sufficient Reasons*, *supra* note 27, at 286.

40. 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).

41. Moore, *Pardon for Good and Sufficient Reasons*, *supra* note 27, at 287.

perfectly legal, is nonetheless, by some recognizable moral standard, too harsh or unfair.[42] If this is the case, although the state may legally punish that person a certain term of years, the state has no moral right to do so. That person may have his sentence permissibly reduced by an act of executive mercy, according to Moore.[43] How to decide when a sentence is too harsh is a complicated question, which Moore does not attempt to answer, nor will this Article.[44] 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, for Moore, "pardons should be used as part of a broader constitutional scheme to ensure that sentences are assigned justly."[45] 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, such as protecting innocence, or of assigning punishment that is proportional to the offense.[46] A legalistic pardon, then, would be one that corrected a legal failing in the relevant procedures: to fix a legal mistake that somewhere along the line has been made but has not yet been rectified. A moralistic pardon does something different—it corrects a moral error that has occurred even though the legal procedures have been followed correctly. A moralistic pardon looks at the procedures and announces, in light of the spirit of the legal system (but not its letter) that a mistake

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42. George W. Bush's pardon of Scooter Libby was arguably of this sort. One commentator noted:

> 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.

Michael A. Lindenberger, *The Quality of Mercy: Don't Jump on Haley Barbour All at Once*, TIME (Jan. 17, 2012), http://www.time.com/time/nation/article/0,8599,2104577,00.html.

43. Moore, *Pardon for Good and Sufficient Reasons*, *supra* note 27, at 287.

44. Moore defines harshness in retributive terms, as being a sentence that exceeds the offender's desert. MOORE, *supra* note 13, at 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. 1619, 1691–93 (2010).

45. Moore, *Pardon for Good and Sufficient Reasons*, *supra* note 27, at 286.

46. Markel also makes a similar point. Markel, *supra* note 13.

has been made and fixes it. In sum: a legalistic pardon upholds the rules of the system that for whatever reason weren't followed in the earlier proceedings; a moralistic pardon upholds the values of the system that—again, for whatever reason—the rules of the system didn't track.

B. *An Objection Briefly Considered*

This, again, is not the place to present a fully vetted theory of pardons; this Article borrows Moore's theory, for the most part, to test 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 this Article's main contribution to the debate over pardons, and this Article pursues this contribution in Part II. But first, considering an objection to Moore's theory may help flesh it out a bit.

Some might object 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 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.[47]

But it is not truly an objection to Moore's theory to note that it diagnoses at least some acts of pardon as morally mandatory. Indeed, there are certain cases in which presidents or governors *are* morally required to prevent a grave injustice. 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 pardons, 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 its classification as a theory of pardons (in short, I do not think that pardons *must* contain only permissible acts).[48] But there is still

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47. Antony Duff makes a version of this point in his review of Moore's book. *See* R.A. Duff, *Review Essay/Justice, Mercy, and Forgiveness*, 9 CRIM. JUST. ETHICS 51, 61 (1990) (arguing that, in some cases, Moore's theory renders pardons "necessary or obligatory, not merely permissible").

48. 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 upon the offender—perhaps like some understandings of grace." Markel, *supra* note 13, at 1437. 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, 1325–30 (2004).

something to say to this. First, exactly what punishment an offender deserves will usually be controversial. Does every offender who commits a wrong *deserve* to be arrested, to be prosecuted, to be given *this* sentence and no other? Always? There are no definitive answers to these questions.[49] When an executive decides that a person's sentence is *more than he deserves*, the executive is acting with some discretion, in the same way that many other actors in the criminal justice system 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 ambiguity as to what the offender deserves in this case.

Indeed, the executive has a certain advantage in the process because she comes at a later stage: 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 whether the offender has reformed herself.[50] No matter which overarching theory of punishment we adopt, the executive has more information about whether those purposes are being accomplished in a fair way.[51] The governor, say, can see if the punishment is still useful, just, or deserved. There is still enormous room for judgment here; as stated, there is no 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*

Moore's theory of pardons in the end is relatively unambitious. It does not rely (or need to rely) on a theory of mercy or even (as I have presented it) on any particular theory of punishment. What it says is fairly simple. 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 rules and values of the legal system itself. But can such a narrow view justify Haley Barbour's pardons, or does it instead show why the pardons may be illegitimate?

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49. I make this point about the indeterminacy of desert at length in another paper, Chad Flanders, *The Limits of Retribution*, 2014 B.Y.U. L. REV. (forthcoming 2014) (manuscript at 23–24). Also see the excellent paper by Alice Ristroph on the same point, Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293 (2006).

50. *See* Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501, 1533 (2000).

51. 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 an offender's competence or ability to choose to commit a crime at the time of trial seems to be a mistake. Of course, new exculpatory evidence can be discovered after a trial is concluded, which would also give obvious grounds, on retributive theory, for changing or removing the sentence.

The answer to this question is 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.[52] 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*.[53] We do not have to look to any other pardon to see whether a pardon in an individual case was justified.

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. Barbour may have rightly believed that some offenders had suffered enough from their punishments or faced collateral consequences from their punishments 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's office defended these pardons, rather cynically, in terms of saving the state money).[54]

In particular, Barbour may have felt that some offenders had been given too long of a sentence, even if the offenders were properly sentenced 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.[55] In the case of Earnest Scott Favre (the brother of Brett Favre), Favre was originally sentenced to one-year house arrest for his crime, but had that increased

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52. Some of the early news reports covering Barbour's pardons conceded this.

53. For a related, but more technical, use of these terms, see generally THOMAS HURKA, *Desert: Individualistic and Holistic, in* DRAWING MORALS: ESSAYS IN ETHICAL THEORY 154 (2011) (distinguishing between desert in an individual case and desert across cases, and calling the latter way of looking at desert "holistic").

54. *Barbour Issues Statement on Clemency*, NESHOBA DEMOCRAT (Jan. 11, 2012, 7:10 PM), http://neshobademocrat.com/main.asp?FromHome=1&TypeID=1&ArticleID=25005 &SectionID=63&SubSectionID=493 ("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's office did go on to say that these people no longer represented threats to society.

55. Patrik Jonsson, *Did Haley Barbour's Pardon Spree Go Too Far?*, CHRISTIAN SCI. MONITOR (Jan. 11, 2012), http://www.csmonitor.com/USA/2012/0111/Did-Haley-Barbour-s-pardon-spree-go-too-far ("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.").

to a suspended fifteen-year sentence "after he left his house to go fishing."[56] In these three cases, Barbour probably thought that the resulting sentences were too harsh, and so a pardon was warranted.[57]

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 burden of a past felony conviction, or to reclaim their right to vote, or to hunt.[58] Indeed Barbour's office made this last point explicit in his remarks defending his pardons.[59] Especially if we believe such things as felony disenfranchisement are per se unjust and immoral punishments,[60] 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, it is hard to argue against the supposition that *at least some* of Barbour's pardons were justified under Moore's analysis. Probably at least some 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 for 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

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56. *Id.*

57. At the same time, it could be argued that Favre's original sentence was too lenient, and that the later, longer sentence fixed this.

58. On this score, see Molly M. Gill, Op-Ed., *Why Did Governor Haley Barbour's Pardons Cause Such a Backlash?*, HUFFINGTON POST (Jan. 19, 2012, 5:29 PM), 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.").

59. "The pardons were intended to allow them to find gainful employment or acquire professional licenses as well as hunt and vote." *Barbour Issues Statement on Clemency*, *supra* note 54.

60. *See generally* 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).

for each of Barbour's pardons (assuming 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. In what follows, this Article argues that, even if all of the pardons were granted 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. There can be objections to the pardoning power that appear only, or at least most clearly, on the wholesale level. Part II considers these objections.

II. 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.[61] If an executive pardons to correct those flaws, his pardon is justified. As we saw in the last part, this means that there seems to be *in principle* no reason why all of Barbour's pardons might not have been justified, as a means of correcting morally flawed sentences. To see whether this was true, we would have to look at each pardon individually.

This part raises 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. This part first provides cases where a group of pardons intuitively raise some moral questions. After each case, this part explains why these moral questions might render some pardons *as a whole* unjustified, or at the very least problematic. Part II concludes 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[62] the sentences of four murderers on death row to life in prison without the possibility of

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61. Dan Markel makes a related argument about the values of the criminal justice system and of liberal democracy in justifying certain exercises of clemency. *See generally* 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. L. REV. 407 (2005).

62. This Article will sometimes refer to these commutations as "pardons," just for ease of reference. But technically, they are commutations, not pardons.

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.[63] The death penalty is an unjustified and unjustifiable act of punishment, and so anytime the state does it, the state is deeply in the wrong. On Moore's account, pardons for those on death row would be pardons for good and sufficient reasons, because preventing some from being given a deeply immoral punishment is (if anything is) a permissible reason for a pardon.

But there is a catch. There are *eight other people* on the state's death row 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 the others.

Moreover (and this is the deeper 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 murderers have committed; all were grisly and gruesome, and all offenders 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").[64] But the fact is, the governor's pardons were at best selective and at worst 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) immoral. But the problem is that the pardons were

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63. The hypothetical case here bears some resemblance to Governor George Ryan's commutation of death sentences in Illinois, which has been much discussed in the legal literature. *See* Markel, *supra* note 61 and sources cited therein. 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. See my paper, Chad Flanders, *The Case Against the Case Against the Death Penalty*, 17 NEW CRIM. L. REV. (forthcoming 2013).

64. 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. One news report stated:

> "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."

See Jonsson, *supra* note 8.

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 illegitimate? There is a strong case that it would. The pardons while justified individually are on the whole distributed in a racially unfair way (ignoring for now whether it matters if this was done intentionally or accidentally). 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 antidiscrimination norm.[65] Pardons that are distributed in a racially discriminatory manner would seem to be morally objectionable, even if the pardons considered individually are justified by good and sufficient reasons. How we understand the force of this norm is open to debate,[66] but something like that norm exists and underlies our intuitive reaction to the "all white" pardons scenario.

2. Pardoning "Favorites"

Suppose we make this one small change to the hypothetical: the people the governor pardons are not all of the same race, but they share something else in common: (1) they are friends of friends of the governor, (2) they have hired professional lobbyists to make their case to the governor, (3) they are veterans of the governor's "trusty" program,[67] or (4) they or their relatives are high-profile donors to the governor's campaign.[68] 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

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65. Although it would seem intuitively different 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 antidiscrimination. For a discussion of the anti-caste principle, see Owen M. Fiss*, Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 162 (1976).

66. We might wonder, for example, whether the norm is specifically an anti-racism norm, or one more tied to nonarbitrariness or respect more generally.

67. *See supra* note 5 and sources cited (explaining the trusty program).

68. Again, this seems to have been the case with many of Barbour's pardons:

    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.

    . . . .

    Mississippi's pardon system, like those in other states, rewards applicants who have both the financial means and the connections to seek reprieves aggressively.

Robertson & Saul, *supra* note 6.

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 those four who are pardoned have a good and sufficient reason to be pardoned.

These pardons are nonetheless morally problematic for a similar, though not identical, reason to the pardons based on race: the pardons pick out a non-morally salient characteristic (closeness to the 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 in 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. It is wrong and unjust to show favoritism in pardoning, 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 she does not choose on the basis of race or family (or happens to distribute her mercy only to those of a particular race or with family ties); rather, she 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 reason. For each person on death row who wins the lottery, consequently, there was a good and sufficient reason to have his sentence commuted.[69]

Does it make better sense that the selective outcome of the lottery is random, rather than based on the racist or otherwise biased choices of the governor? It may make the pardons more acceptable, but still not fully acceptable all things considered. For while the norms against racial discrimination or favoritism are not violated, another norm is violated: the norm against unequal treatment. The governor is not treating like

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

cases alike; instead she 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?

In the case of pardoning, we may worry about a further implication that randomness suggests—for what the lottery system resembles is nothing so much as the old version of the sovereign's right to pardon in which the sovereign can decide how to pardon (for any reason, or for no reason at all) just because he is the sovereign.[70] 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, pardons that are arbitrarily granted are problematic, even if those pardons *taken one by one*, can be justified by good and sufficient reasons.[71] Such pardons violate the norm against arbitrary treatment.[72]

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70. The ability of the sovereign to pardon only those he or she favored (on whatever grounds) would also be an example of this. *See* Sang-Hun, *supra* note 30 (describing the pardon power as the exercise of the sovereign's power).

71. 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 it 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.

72. 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. One has commentator has observed:

> 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.

This principle requires qualification, though. 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 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 (i.e., unjust, harsh) punishment and the harm done by a racist, biased, or random pardon. It was only in the cases of racism and favoritism that it seemed clearer that *those* wrongs were 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 were a question of arbitrarily pardoning some who had been wrongly convicted or 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. There is no question of unfair or arbitrary treatment of any of them; they all get their sentences commuted and 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 are *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 for commuting the sentences. He says he is commuting their sentences because it is traditional to pardon members of the "trusty" program.[73]

Stephen Nathanson, *Does It Matter If the Death Penalty Is Arbitrarily Administered?*, 14 PHIL. & PUB. AFF. 149, 153 (1985). Selective pardons made for efficiency reasons too could be justified—indeed, even if a lottery were used to make the choices. This is a point that deserves much more investigation, for it deals with what are permissible means of selectively pardoning. But that is for another paper: here I am interested in *impermissible* means. Thanks to John Inazu for pressing me on this point.

73. 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*, N.Y. TIMES (Oct. 15, 2010), http://www.nytimes.com/2010/10/16/opinion/

Or it could even be that the governor *says* he's pardoning the inmates for 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 pardoned all twelve of the death row inmates, so his treatment of them is not in any way "selective." To use Immanuel Kant's helpful terminology, the governor in this case is pardoning *according to duty*, but he is not pardoning *from the motive of duty*.[74] His pardons happen to be coextensive with the pardons he ought to be giving.

Is there anything wrong with the pardons in this case? I think so, because the professed reasons the governor gives 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 justified 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 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.[75] 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 that the governor gives for the pardons isn't the reason 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.[76] 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 be accompanied by some actual favoritism that leaves some deserving individuals without

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   74. *See, e.g.*, Barbara Herman, *On the Value of Acting from the Motive of Duty*, 90 PHIL. L. REV. 359, 362 (1981) (providing an exposition of Kant).

   75. For a similar sentiment, see Nathanson, *supra* note 72, at 157.

   76. For a good explanation of the value of sincerity, and the related concept of publicity, see Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 1005–08 (2008).

pardons.[77]

B. *Barbour's Pardons Revisited*

At the time of Barbour's pardons, there was widespread outrage.[78] Part of this, indeed probably most of it, was because of individual pardons: the murderers who were pardoned when the wounds from their crimes were not yet healed.[79] 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 the above section may explain why this happened. Consider the antidiscrimination norm. Two-thirds of those Barbour pardoned were white, while two-thirds of the Mississippi prison population is black.[80] Overwhelmingly, you had a better chance at a pardon if you were white than if you were black. This at least gives the appearance that Barbour violated the antidiscrimination norm, 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. 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.[81]

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77. 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.

78. Keen, *supra* note 7; Mark Memmott, *Hundreds of Pardons, Some for Killers, Spark Outrage in Mississippi*, NPR (Jan. 11, 2012, 1:08 PM), 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., Op-Ed., *Barbour's Last-minute Rush to Pardon*, CNN (Jan. 12, 2012, 4:41 PM), http://www.cnn.com/2012/01/12/opinion/ruckman-haley-barbour-pardons/?hpt=us_c2.

79. *See* Memmott, *supra* note 78; Julia Dahl, *8 of the Murderers Barbour Pardoned Killed Their Wives, Girlfriends*, CRIMESIDER (Jan. 13, 2012, 2:13 PM), http://www.cbsnews.com/8301-504083_162-57358839-504083/8-of-the-murderers-haley-barb our-pardoned-killed-their-wives-girlfriends.

80. *See* Jonsson, *supra* note 8.

81. One commentator has opined:

> 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

There might have also been the perception that the pardons were arbitrary, that they were simply indiscriminately given. The person who 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 further, someone who could afford to hire an attorney to lobby Barbour got a pardon, but someone without money and an attorney did not.

Pardons that are given on such an indiscriminate or random basis might be thought to be unfair, because they treat those who are similarly situated differently based on morally arbitrary factors.[82] It becomes a matter of mostly chance whether you would be pardoned: 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 and sufficient reasons for the 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. The pardons seemed not to have been made in any sort of orderly or reasoned manner.[83] Even if many of those pardoned were pardoned for good and sufficient reasons, there may have been others who were not pardoned but who should have been,

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may have led to fewer black prisoners requesting a pardon in the first place.

Id. Professor Stephen Nathanson has also noted:

> 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.

Nathanson, *supra* note 72, at 160 (emphasis in original).

  82. *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.").

  83. *See* Ruckman Jr., *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.").

because there were also good and sufficient reasons for pardoning *them*.[84] It at least looked as if Barbour might not have been entirely consistent in choosing whom to pardon.

But with Barbour, it was worse than simply appearing inconsistent. The pardons Barbour made didn't seem to be based merely on chance but were instead made for the wrong sort of reasons. 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 degree. Rather, the people who were 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.[85] It would have been better if the pardons had been entirely random; still morally problematic, but better.

If this were 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.[86]

C. *Some Recent Presidential Pardons*

A recent, searching report by the public interest group ProPublica has raised questions about presidential pardons. The report reflects, on a smaller scale, the problems that were noted in relation to Barbour's pardons.[87] The two conclusions of the study, which were reported in the *Washington Post*, were that the pardons granted by George W. Bush heavily favored whites, and that "political influence . . . continued to boost pardon applicants."[88] 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 Bush's

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

85. *Id.*

86. 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).

87. *See* LINZER & LAFLEUR, *supra* note 29.

88. *Id.* at 30.

presidency.[89]

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.[90] Yet they seem to reflect writ small what Barbour's pardons display writ large: when taken as a whole, pardons can be problematic in a way they are not when they are taken individually. The authors at ProPublica show 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 received a pardon, and an African-American beauty shop owner who was convicted of underreporting her income, who did not.[91] The report's authors also investigate in detail a case where a donation to a congressman helped secure a last-minute pardon.[92]

Those in the Bush Administration expressed surprise at the result, and insisted that the process was "colorblind."[93] 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),[94] and not necessarily their basis, a point to which Part III returns. Another problem may involve disagreement about the appropriate criteria for selecting people for pardons. The Bush Administration's officials apparently took marriage as a key factor in signaling whether an offender had been rehabilitated or not, as showing greater "stability."[95] But the officials also looked to more amorphous factors such as "attitude," which could open the door to all sorts of bias or could give leeway to favor some over the others based on political pressure.[96] There was, in fact, one instance of patent racial bias in Bush's consideration of a pardon for a Nigerian minister.[97]

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89. *Id*. at 19.

90. *Id*. at 5; Campbell Robertson, *Mississippi Governor, Already Criticized on Pardons, Rides a Wave of Them Out of Office*, N.Y. TIMES, Jan. 11, 2012, at A13, *available at* http://www.nytimes.com/2012/01/11/us/gov-haley-barbour-of-mississippi-is-criticized-on-wave -of-pardons.html?_r=0 (noting that Barbour pardoned a total of 193 criminals).

91. LINZER & LAFLEUR, *supra* note 29, at 51.

92. *Id*. at 280 (noting the pardon efforts of luxury car dealer Dale Critz Jr. helped by donations to Republican Representative Jack Kingston).

93. *Id*. at 90, 493.

94. David Jackson, *Obama Not a 'Pardoning' Kind of President*, USA TODAY (Nov. 2, 2012, 5:31 PM), 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*.

95. LINZER & LAFLEUR, *supra* note 29, at 102.

96. *Id*. at 71.

97. *See id*. at 215; *see also* Alison Gender, *Furor over Bush Lawyer's Racism in Deportation Case of Nigerian Minister*, N.Y. DAILY NEWS (July 14, 2008, 10:57 PM), http://www.nydailynews.com/news/world/furor-bush-lawyer-racism-deportation-case-nigerian-

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 2.5 years for his role in leaking the identity of Central Intelligence Agent Valerie Plame.[98] In his remarks defending the pardon, Bush said that a thirty-month prison sentence for Libby was "excessive."[99] Reportedly, Vice President Dick Cheney was furious that Bush did not give Libby a complete pardon (Libby still owed a $250,000 fine and remained a convicted felon).[100] 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 even been 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. Even though Bush may have granted most of the pardons for good and sufficient reasons, the way that Bush pardoned en masse showed problems of bias, of favorable treatment, and of sheer arbitrariness. These pardons show that a theory of pardons needs to regulate the pardoning process as a whole, because sometimes a pardon is wrong only when compared to other instances of pardons granted or not granted.

III. TOWARD A SECOND-BEST THEORY OF PARDONS

The second and third parts of this Article, taken together, frame a dilemma that arises in many real-world pardons. On the one hand, some pardons will be clearly justified by good and sufficient reasons. So, for example, an executive is justified in pardoning when an innocent person has been convicted and sentenced, or when the sentence is too harsh. But, if an executive pardons only *some* of those whom the executive has good and sufficient reasons to pardon, and selects pardon recipients along some forbidden ground (race or favoritism) or randomly, then even individually justified pardons can become morally problematic. The result is cases such as those examined in the last part: where even

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98. *See Bush Commutes 'Scooter' Libby's Prison Sentence*, FOXNEWS.COM (July 2, 2007), http://www.foxnews.com/story/0,2933,287780,00.html.

99. Scott Shane & Neil A. Lewis, *Bush Commutes Libby Sentence, Saying 30 Months 'Is Excessive,'* N.Y. TIMES (July 3, 2007), http://www.nytimes.com/2007/07/03/washington/03 libby.html?pagewanted=all&_r=0.

100. Thomas M. DeFrank, *Ex-VP Dick Cheney Outraged President Bush Didn't Grant 'Scooter' Libby Full Pardon*, N.Y. DAILY NEWS (Feb. 17, 2009, 11:00 AM), http://www.nydailynews.com/news/politics/ex-vp-dick-cheney-outraged-president-bush-didn-g rant-scooter-libby-full-pardon-article-1.370889.

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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 does not always happen, so we need a way to assess when pardons are both *good* and *bad*: good because they serve the demands of justice in individual cases, or bad because they might also involve some other unfairness. To do this, Part III employs John Rawls's language of "ideal" and "nonideal" theory, a distinction closely related to the idea of "second-best" theory. Pardons are nonideal 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 just. But pardons can be second-best in another way, too. Pardons can be granted in ways that do not accord with our considered notions of fairness.

Prevailing justifications of the pardoning power focus too much on the way that pardons can correct individual mistakes in the criminal justice system; but the justifications have taken too little notice of the way in which pardons can introduce new kinds of injustices in the way they are distributed. 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 part, in introducing the distinction between ideal and nonideal theory, attempts to give us the tools to do just that.

A. *Ideal and Nonideal Theory*

"Ideal theory" was developed by John Rawls, in his now classic *Theory of Justice*.[101] Rawls used the term to structure his political philosophy as a whole. Rawls attempted to sketch his picture of an ideal society, a "realistic utopia,"[102] as he called it: a society that was (as much as possible for humans) perfectly just. In so doing, Rawls made certain assumptions. The key assumption was that everyone would comply with the law.[103]

If total compliance is taken as the sine qua non of ideal theory, then there cannot be a full ideal theory of criminal justice.[104] If people obey

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101. RAWLS, *supra* note 20, at 245–48 (discussing ideal and nonideal theory).

102. *See* JOHN 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.").

103. RAWLS, *supra* note 20, 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.").

104. *Id*. (putting "such topics as the theory of punishment" in nonideal, or "partial compliance," theory).

the law, they will never be tried or punished, and so we will not need a complete understanding or description of the criminal justice system. 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.[105] Fortunately, however, we can still use Rawls's distinction between ideal and nonideal theory.

We can speak, almost in plain language terms, of ideal theory as describing 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 nonideal one. The main point that this Article borrows from Rawls is this: the rules that govern a nonideal society will differ from those that govern an ideal society, because some things that are necessary to get to the ideal society may no longer be permissible once we achieve the ideal society.[106] We may have to permit some things in the nonideal society, in other words, as a way of getting closer to the ideal society.

Rawls's book is short on examples, and his discussion of nonideal theory is no exception. 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 nonideal theory.[107] Rawls makes two points by means of these examples. His first point is that in certain circumstances, the rules of an ideal society can't govern a nonideal society directly, because if they did, that society would never get to the ideal. The people would starve before the society ever had a functioning constitutional democracy, for example. In a way, nonideal theory says that you can bend the ideal rules if you need to, that is, if it is necessary to one day get to the ideal society.

But Rawls also has a second point which is that even when a society departs from the ideal, nonideal theory must nonetheless aim for the ideal. You can bend the ideal rules in some circumstances, but not to the point of breaking them. Nonideal theory has to take ideal theory as its guide, because, after all, the point of bending the rules is to get us closer to the ideal society. Ideal theory constrains nonideal theory not absolutely, but by presenting a standard that the nonideal society tries to approximate.[108] Not anything goes when circumstances are less than

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105. I examine this point further in Chad Flanders, *Punishment and Political Philosophy: The Case of John Rawls* (unpublished manuscript) (on file with author).

106. RAWLS, *supra* note 20, at 279.

107. *Id.* (intending to apply these examples to cases of economically developing societies).

108. 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). Nonideal theory is the realm of standards; ideal theory deals with rules—or at least to a rough approximation. *See also* Tamar Schapiro, *Compliance, Complicity, and the Nature of Nonideal Conditions*, 100 J. PHIL. 329, 335 (2003).

ideal: there will be some point where we have to obey the ideal

The puzzle then 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 departures were never permissible, but this would just be to reject the possibility of nonideal theory. At the other extreme we could simply give up on ideal theory and just balance on each occasion. But this extreme is also unpalatable, because we need a conception of what we are aiming for in order to give content to our balancing.

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?[109] 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 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 offenders are pardoned for morally arbitrary reasons, like race or favoritism. Ideal theory shows 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 Nonideal Theory to Pardons*

Barbour's pardons were not condemned universally. Some praised Barbour's conversion from a strict law-and-order man to one who was capable of forgiveness, showing his Christian side.[110] 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. Barbour's pardons were only a drop in the bucket, Payton said.[111]

Importantly, Payton's perspective 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.[112] 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 persist

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109. Amartya Sen is the most notable exponent of this position. *See* AMARTYA SEN, THE IDEA OF JUSTICE (2009).

110. Gill, *supra* note 58 (defending Barbour in part on religious grounds).

111. *See* E.R. Shipp, *What's All the Fuss About in Mississippi?*, ROOT (Jan. 30, 2012, 12:16 AM), http://www.theroot.com/views/whats-all-fuss-about-mississippi?page=0,1.

112. For references, see Chad Flanders, *Retribution and Reform*, 70 MD. L. REV. 87, 87 & n.3 (2010).

well beyond prisoners' release: they struggle to receive aid and find jobs, and often cannot vote.[113] 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 those who were just released from prison; rather they had been released for years, had reformed themselves, and were trying to shed the burden of a past conviction.

This is in a way to repeat what Part II suggested: probably many of Barbour's pardons could have been justified by good and sufficient reasons. But if these pardons were so justified, then 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 simultaneously be wrong?

It may be useful at this point to step back, and to consider the problem more abstractly. 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 punishment according to desert.[114] Still, there would necessarily be some mistakes in the administration of justice, where people slipped up, not necessarily intentionally, but as a matter of simple human error.

In an ideal society, where errors are relatively infrequent, we might see the importance of the pardon power as patching some of the flaws in the system to make a mostly or nearly just society closer to being a perfectly just society. Pardons are one way to do this. Other areas of discretion, in the hands of the police, the prosecutor, or the jury, could also patch flaws.[115] 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 theoretically just laws and punishments.

Now suppose we live in a nonideal society in which many criminal laws themselves are irrational or unjust, sentencing is too harsh, mandatory minimums are the norm, and past imprisonment harms offenders far past the date of their release. In such a world, which is

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113. *See* Zachary Hoskins, *Ex-Offender Restrictions*, 30 J. APPLIED PHIL. (forthcoming 2013) (manuscript at 1), *available at* http://onlinelibrary.wiley.com/doi/10.1111/japp.12028/pdf.

114. On this, see CESARE BECCARIA, ON CRIMES AND PUNISHMENTS pt. 1, § 46, at 84 (Aaron Thomas ed., Aaron Thomas & Jeremy Parzen trans., University of Toronto Press 2008) (1764) ("[C]lemency, a virtue that for sovereigns has sometimes served as a supplement to all the duties of the throne, should be excluded from the perfect legal code, in which punishments would be mild and the method of judgment regular and expeditious.").

115. Barkow groups these points of discretion in her essay on administrative law and the demise of mercy. Barkow, *supra* note 14, at 1339–40.

very near (or identical) to our world, the regular use of "safety valves" would be especially important.[116] We might actively call for greater use of safety valves, including jury nullification[117] or pardons for everybody on death row.[118] What's more, the use of these safety valves would be amply justified as a way to mitigate, if not eliminate, the harshness of the criminal justice status quo. Barbour's pardons can certainly be seen in this light, 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.[119] So again, what is the problem with Barbour's pardons given that we live in such a nonideal world?

The problem, in a sentence, is that although pardons (and other safety valves) can be used as means of achieving a substantively just society, there comes a point at which the discriminatory or indiscriminant use of the pardon power conflicts with the ideal of the just society. This is what arguably happened in the case of Barbour. It does no honor to the goal of a racially fair justice system to disproportionately pardon members of the white race. And it does not support the idea that justice is nonarbitrary to assign pardons in a seemingly random manner. Further, a just criminal law is not promoted when the law is found to bend in favor of family or 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 just society. These are the constraints that, to use John Rawls's terminology, ideal theory places on actors in the real world.

If pardons are to be given, they should ideally be given for good and sufficient reasons, and should be distributed because of only those reasons. That means that pardons cannot be distributed in other ways, ways that might be racially biased, arbitrary, or based on favoritism. If pardons are distributed in these ways, then 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 manner. Some

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116. Gill, *supra* note 58 ("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.").

117. *See generally* Paul Butler, *In Defense of Jury Nullification*, 31 LITIG. 46 (2004).

118. *See* Markel, *supra* note 61, at 410.

119. *See supra* note 17 and accompanying text.

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 the next section explains in greater detail. 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 standards for offering pardons. This means that, even if in one sense pardons are permissible acts of justice, in another sense they are not, insofar as justice also ideally requires consistency and fairness among like cases. When pardoning decisions fail to adhere to these ideals, they are morally problematic, even when they individually have good and sufficient reasons behind them.

C. *Two Important Qualifications*

Two qualifications are necessary to clarify the above implications. The first qualification is that the constraints placed by nonideal theory still leave considerable room for pardoning. We can pardon all those we have good and sufficient reasons to pardon, 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 kick in, there may be some cases where we decide that those constraints must be abandoned. We might decide 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 outweighs the fact that the pardon is arbitrary, racist, or insincere.

A growing chorus over the past two decades has argued that executives, especially the President, have used the pardon power too sparingly. This chorus has grown to a roar over the number of pardons granted by Obama, one of the lowest of any president's term.[120] George W. Bush has also been criticized on this score. This Article joins this chorus. Given the injustice of the status quo there are many pardons that not only can be made for good and sufficient reasons, but morally ought to be made.

So this Article should not be taken as a condemnation of the pardon power—far from it. As elaborated upon in Part I, there is a powerful moral case for the pardon power in many circumstances. Part II showed only that there are limits to the pardon power in the individual case and 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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120. Jackson, *supra* note 94.

But this is not the last word. The answer to objections about problematic on-the-whole pardons is an obvious one. Rather than not pardon at all, executives should level up.[121] 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.[122] In the example referenced above about the two roughly situated individuals (one who evaded taxes and the other who committed tax fraud[123]) the answer to the question of which person should be pardoned is relatively easy: both should be. Generally, one arbitrary pardon does not render many legitimate pardons illegitimate. So executives, if anything, should generally be *more* generous in giving pardons, not less. It is only when, in cases such as Barbour's, one senses that nearly all of the pardons were arbitrarily granted, that the problem of arbitrary pardons arises.

What Barbour should have done was to level up across the board: he should have pardoned many more people, not fewer.[124] He should have pardoned not only trusties but all the others on the pardon board's list. He should, in short, have pardoned everyone who was justified in getting a pardon. But the problem is that he did not; he pardoned some people and failed to pardon others. And this leads to a question: Is there reason to think that the values of nonarbitrariness, nondiscrimination, etc., should outweigh the good and sufficient reasons Barbour may have had for pardoning those he did pardon? In other words, would it have been better for Barbour to have "leveled down" and pardoned no one rather than pardon those he did? There is a plausible case to be made that, yes, he should have. Sometimes the values of ideal theory should outweigh justice in individual cases, especially when the value of that justice is relatively minor.

Most of the sentences Barbour commuted were already served; 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.[125] The value that would actually come from the pardon would be mostly in avoiding the stigma (and associated harms) of conviction rather than avoiding the harm of unjust imprisonment; the person who had finished

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121. I am grateful to Ronen Avraham for emphasizing this point to me in correspondence. E-mail from Ronen Avraham, Professor in Law, Univ. of Tex. Sch. of Law, to Chad Flanders (Jan. 23, 2013) (on file with author).

122. *See supra* note 23 and accompanying text.

123. *See supra* notes 90–92 and accompanying text.

124. This may have only increased the outrage, but if all of the pardons were individually justified *and* no one was arbitrarily excluded from a pardon, then the outrage would have been unwarranted.

125. The title of Barbour's *Washington Post* op-ed advertises this fact. *See* Barbour, *supra* note 11.

her 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, the ideals of ideal theory should probably win out, because 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 unjust, nor does it mean that the best thing for Barbour to do would have been to pardon more people.

Then we get to the cases that make up most of this Article's examples,[126] in which the death sentences of some were reduced to life in prison, but not for all of those who were similarly situated. Is the answer to this to not pardon any of them, and let them all be executed? Should the value of consistency win out even here?[127] 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 to pardon none? This sounds like an 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 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.[128] But their counterparts replied that the remedy for randomness was to equally give more people the death penalty rather than to abolish the penalty altogether.[129] This Article does not get into the particulars of this debate but only notes the similarity to the question above. On one side were those favoring the rule-of-law values of consistency and fairness. On the other side were those who favored the substantive justice of the death penalty in individual cases. Of course, in the death penalty debate, 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, substantive justice or procedural values?

There may be no general answer to this question in some extreme cases, including the death penalty. This Article uses the examples in

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126. *See supra* Section II.A.

127. One is reminded in this respect of the old adage that "consistency is the hobgoblin of little minds."

128. *See* Nathanson, *supra* note 72 (arguing that the arbitrariness of the death penalty was a reason to oppose it).

129. See especially the contribution of Ernest van den Haag in ERNEST VAN DEN HAAG & JOHN P. CONRAD, THE DEATH PENALTY: A DEBATE 55–56 (1983) (arguing that the individual justice of executing one person was not affected at all by the fact that some escaped justice).

Part II to identify situations in which the use of pardons could be morally problematic, and not morally prohibited. Racism, favoritism, and arbitrariness seem to be strong reasons to question the justice of a punishment, whether a punishment is being imposed or removed. This is why 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.[130]

CONCLUSION

Over the years there have been many proposals from both practitioners and academics to remove the pardon power from the executive or to reduce the power and give it to an independent board or commission.[131] I am not sure this will happen, nor am I sure that it should. Boards would mean greater delays in pardons, something that is not always good; boards might also mean fewer pardons, as there might be disagreement about who ought to be pardoned. Executive power has historically meant the power for quick action, whether for good or for bad. In pardoning, quick action can often be desirable, necessary, and the best remedy. Some of the delay in recent pardons owes to too many layers of review, too much bureaucracy, and too many hands in the pot.

But if we favor quick action, we need to be even clearer on the moral constraints that operate on anyone exercising the pardon power. Solving the question of who should pardon does not get us any closer to specifying what the ground rules for pardoning should be. Wherever the pardoning power rests, this Article has described an additional moral check on that power. The power should be considered good or bad not only individually, but also when we look at the pardons over time and as a whole. We should look at patterns, in other words, not just at cases—because pardons can be wrong not just in individual instances, but also when considered in groups.

More generally, this Article proposes 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 considered 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 system need to be mindful not only of how they act in a single case, but of what legal

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130. 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.

131. *See, e.g.*, Cara H. Drinan, *Clemency in a Time of Crisis*, 28 GA. ST. U. L. REV. 1123, 1149 (2012).

virtues they display over time and across many cases.