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Chapter 2

Historical Background: Nature and Objectives

In this Chapter, the researcher has mainly confined his focus on the historical background and development of concept of pardon power with reference to the USA and UK jurisdiction, in addition to its entry to India in its modern version. Here, attempts have also been made to throw light on the nature and objectives of pardon power along with theoretical insights and doctrine of separation of powers. At the same time, further attempts have also been made to present the concept in terms of certain models created on the basis of its origin, growth and transmission into other countries from its birth place, and also highlighted on few problematic pardons already taken place in the USA and UK.

As is well-known, virtually every constitutional order in the common law world contains a provision for executive clemency or pardon in criminal cases. This facility for legal mercy is not limited to a single place in modern legal systems, but is instead realized through various practices such as a law enforcement officer's decision to arrest, a prosecutor's decision to prosecute, and a judge's decision to convict and sentence. Doubts about legal mercy in any form as unfair, unguided, or arbitrary are as ubiquitous as the exercise of mercy itself.

A pardon is a government decision to allow a person to be relieved of some or all of the legal consequences resulting from a criminal conviction. The pardon is sometimes and in some countries known as prerogative of mercy or clemency.[7] As such the power to pardon also includes more limited acts of clemency like reprieves (delay of sentencing) and commutation (reducing) of sentence or punishment.[8] The pardoning power is, no doubt, an essential component of even the absolute best system of laws in several countries in the world. As already stated, the power to grant a pardon is the instrument of mercy and the best approach to address those grave treacheries either on their realities or by the unforeseen activity of the criminal laws that basically should be helped. The granting a pardon is a demonstration of dexterity from the executive power that mitigates the discipline requested by the law for the offense and blame of the offender. The absence of any norms or keeps an eye on the activity of the clemency power has not placed the Indian arrangement of equity in an advantageous position the present changing political atmosphere underscores the requirement for the chief exercise of the clemency power, harsher condemning gauges and developing open slant for the death penalty have brought about an expanding number of capital punishment cases finding their way into their clemency procedure. That a person who has committed a crime or has been convicted for an offence is entitled to pardon if he wishes to seek and if the same is granted, it is called an act of clemency, which forgives the wrongdoer and restores the person's civil rights.

2.1 Pardon Defined

A pardon, in the most comprehensive sense, including all of its forms, is any relief from the penalty for crime enforceable by law. "A pardon", wrote Chief Justice Marshal, in defining the term within the meaning of the Federal Constitution, "is an act of grace,[9] proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed".[10] A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on

[7]Ekwenze, S.A.M., *Presidential Pardon and Prerogative of Mercy: A Necessary National Soothing Balm for Social Justice,* Anambra State University, Igbariam Campus, Lagos, (2011), p.2.
[8]Pfiffner, J.P., *The Scope of the President's Pardon Power*, George Mason University, (2010), p.1.
[9]*Roberts v. State,* 160 N.Y. 217, 222, 54N.E. 678, 679 (1899); People *ex rel. Patrick v. Frost*, 133 App. Div. 179, 183, 117 N.Y. Supp. 524, 528 (2d Dep't 1909).
[10]*United States v. Wilson*, 7 Pet. 150, 160 (U.S. 1833).

whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate……..”[11]

Justice Wayne supplemented the definition twenty-two years later: Pardon is “forgiveness, release, remission.” He further noted that historically, “a pardon was and act of mercy, whereby the king, either before attainder, sentence, or conviction, or after, forgiveth any crime, offense, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical.”[12]

According to Montesquieu, in ancient, continental monarchies, the pardoning power has long resided in the prince of the people.[13]Montesquieu in treating with the pardoning prerogative termed it as “the most glorious attribute of the sovereignty”.[14] In England, a pardon commonly proceeds from the Crown, although they have sometimes been granted by act of parliament.[15] The King’s royal power was said by our Saxon ancestors to be derived a *lege suae dignitatis*.[16]Originally it was said that it must be under the “Great Seal”, to be of itself a complete, irrevocable pardon.[17] But, now on conviction of any felony punishable with death or otherwise, a signed manual warrant, countersigned by a principal Secretary of State, has, on the discharge of the offender out of custody, or on the performance of the condition in the case of free and conditional pardons, the same effect as a pardon under the “Great Seal”.[18]In America, the pardoning prerogative has not only been written into the national constitution, but almost every State, by constitutional provisions and statutory enactments, has established the exercise of executive clemency as a principle of democratic government.[19]The New York Constitution also presents a provision typical of most jurisdictions.[20]It states that “The Governor shall have the power to grant reprieves,

[11]32 U.S. (7 Pet.) 150 (1833).
[12]*Ex parte Wells*, 59 U.S. (18 How.) 307, 311 (1855).
[13]Montesquieu*, Spirit of Laws*, 6th ed. 1793, p.57.
[14]*Ibid*.
[15]Bishop, *New Criminal Law*, 8th ed., 1892, pp.544-545; 3 Coke *Institute*, 6th ed., 1680.233 *et seq*..
[16]Cooley, Blackstone, 4th ed., 1899, p.1524.
[17]*Ibid*. at 1527.
[18]Halsbury, *Laws of England*, (1909) 404-405.
[19]Morris, *Some Phases of the PardoningPower* (1926) 12 A.B.A.J. 183; Bishop, *New Criminal Law* (8th ed. 1892) 545; Story, *Constitution* (5th ed. 1891) $$ 1496.
[20] N.Y. Const.art.IV, $$ 5.

commutations and pardons after conviction, for all offences except treason and cases of impeachment."[21]

At the time of the adoption of the Federal Constitution, American statesmen were most familiar with the prerogatives exercised by the king, so that obviously when the words "to grant pardons" were used in the Constitution of the United States, they conveyed to mind the authority as exercised by the English crown.[22] Hence, it may be truly stated that we(the Americans)adopted their principles respecting the operation and effect of a pardon, and relied on the early writings of the common law for rules prescribing the manner in which it is to be employed.[23] Nor is there any substantial difference in this matter (pardoning) between the executive power of pardon in our(American) government and king's prerogative.[24]

2.2 Different Terms Explained

There are certain terms which are often used in connection of the exercise pardon powers by the executive heads of the states. These terms differ subtly from country to country, but used in the same sense, in almost all the jurisdictions generally. **Clemency** is a general concept of amelioration of penalties, especially by action of executive officials; the forms it may take include the following:

(a) Amnesty: Amnesty is applied to a group of people rather than an individual. President Jimmy Carter offered amnesty to anyone who had evaded the draft. Weapon amnesties are often granted so that people can hand in weapons to the police without any legal questions being asked as to where they obtained them, why they had them, etc. After a civil war a mass amnesty may be granted to absolve all participants of guilt and 'move on'. Amnesties are typically applied in advance of any prosecution for the crime.

[21] Gilbert, *Code of Criminal Procedure*, (1936) $$ 692, 693, 694.
[22] *Ex parte Wells,* 18 How. 307, 311 (U.S. 1855).
[23] *United States v. Wilson*, 7 Pet. 150, 159 (U.S. 1833); *Ex parte* Grossman, 267 U.S. 87, 109 (1925).
[24] *Ex parte* Grossman, 267 U.S. 87, 113 (1925).

"Amnesty differs from pardon in that it applies to a whole class of persons or communities rather than to individuals. It also differs from pardon in that it is granted regardless of proof of the fact of guilt."[25]

The American Senator Ferry also drew a distinction between pardon and amnesty by describing amnesty as the obliteration of the offense and pardon as forgiveness of the offense.

The first known general pardon in post-conquest England was issued during the celebrations at the coronation of King Edward III in 1327. In 2006, all soldiers from England, Wales, Scotland, and Ireland who were executed for cowardice during the First World War were given a statutory pardon by an Act of Parliament (the Armed Forces Act, 2006), following a long-running controversy about the justice of their executions.

Legislative amnesties were frequent in certain civil law countries, such as France, where they were used as an instrument of pacification after periods of civil strife (Foviaux). In England, however, this institution did not take root. The last "Acts of Grace" took place after the Jacobite risings of 1715 and 1745.

(b) Pardon: The word 'Pardon' is the term which is used popularly in most of the Constitutions of countries of the world. A pardon completely absolves the offender from all sentences and punishment and disqualifications and places him in the same position as if he had never committed the offence. It nullifies the sentence as well as the conviction, and the convict is free of all penalties, punishments, and disqualifications. The first order, a pardon that the President of India can give under Article 72 is an order that totally absolves the criminal of his or her guilt.

(c) Commutation: Commutation means exchange of one thing for another. To put in simple words, it means to replace the punishment with less severe punishment, for example, for rigorous imprisonment-simple imprisonment, from death sentence to life imprisonment etc. Thus, a commutation is a narrower grant of mercy used to shorten a prison sentence while leaving the conviction intact. It refers to the replacement of one kind of punishment with a less severe form of punishment. A death

[25]J. Mathews, *The American Constitutional System*, 176 (1940). *Brown v. Walker,* 161 U.S. 591 (1896).

sentence, e.g., may be converted to a period of solitary confinement. Substituting the imposed penalty for a crime with a lesser penalty, whilst still remaining guilty of the original crime (e.g., someone who is guilty of murder may have their sentence commuted to life imprisonment rather than death, or the term of imprisonment may be reduced). Although sentence commutation is granted as a pardon, the former is different from the latter because a pardon is an act of grace proceeding from the power entrusted with the execution of the laws and it relieves the person named from the legal consequences of a specific crime while Sentence commutation is the substitution of a lesser punishment for a greater punishment.[26]

The former US President Barack Obama was the first president since Warren Harding to grant more commutations than pardons.

(d) Remission: The meanings of the word 'remit' are 'to pardon, to refrain from inflicting, to give up'. It means the reduction of the quantum of the sentence without changing its nature and character, for example, a sentence of 1 year may be remitted to 6 months *inter alia.* In the case of a remission, the guilt of the offender is not affected, nor is the sentence of the court, except in the sense that the person concerned does not suffer incarceration for the entire period of the sentence, but is relieved from serving out a part of it. A remission of sentence does not mean acquittal and aggrieved party has every right to vindicate himself or herself. Remission of punishment assumes the correctness of the conviction and only reduces the punishment in part or in whole.[27]Thus, remission refers to a reduction of a sentence without modifying the type or character of the penalty imposed by the court, for example, a two-year sentence of severe imprisonment might be reduced to one year of rigorous imprisonment. It entails shortening the sentence's duration without altering its meaning, say; a five year sentence of harsh imprisonment might be reduced to one year of rigorous imprisonment. Complete or partial cancellation of the penalty, is also remission whilst still being considered guilty of the said crime (i.e. reduced penalty). This should not be confused with what is known in USA as remission of remand, in which a case is sent back to a lower court from which it was appealed, with instructions as to what further proceedings should be held.

[26]*Hamilton v. Commonwealth*, 458 S.W. 2d 166 (Ky. 1970).
[27]*State (Govt. of NCT of Delhi) v. PremRaj*, (2003) 7SCC 121, 126 (para 10).

(e) Reprieve:– Reprieve means a stay of execution of sentence, or in other words, a postponement of capital sentence.[28] It means the temporary suspension of a death sentence when the case is pending proceeding for pardon or commutation. Thus, it refers to a temporary halt to the execution of a sentence. Its goal is to provide the criminal with enough time to petition the President for a pardon or commutation of his or her sentence. Temporary postponement of a punishment, usually bemade so that the accused can mount an appeal, especially if he or she has been sentenced to death.[29]

(f) Respite: Respite means awarding a lesser sentence instead of the penalty in view of the fact that the accused has no previous convictions. Itgenerally means awarding a lesser punishment on some special grounds. It is something like a release on probation for good conduct under Section 360, Cr.P.C.[30] It also includes awarding a lesser punishment on some special grounds such as medical grounds etc., for example, pregnancy may be a good ground to reduce the punishment of a woman offender. Thus, respite refers to imposing a lighter sentence in place of one that was initially imposed owing to a unique circumstance, such as a convict's physical impairment or a woman offender's pregnancy. In extraordinary situations, such as the pregnancy of a woman sentenced to death or the convict's insanity, this order can result in a temporary stay of a sentence. The delay of an ordered sentence, or the act of *temporarily* imposing *a lesser sentence* upon the convicted, is a respite whilst further investigation, action, or appeals can be conducted.

Expungement: The process by which the record of a criminal conviction is destroyed or sealed from the official repository, thus removing any traces of guilt or conviction.

Immunity from prosecution: A prosecutor may grant immunity, usually to a witness, in exchange for testimony or production of other evidence. The prosecutor (conditionally) agrees not to prosecute a crime that the witness might have committed in exchange for said evidence. For example, a car thief who witnesses a murder might

[28] *State (Govt. of NCT of Delhi) v. PremRaj*, (2003) 7SCC 121, 126 (para 10); *UOI v. V. Sriharan* (2016) 7 SCC 1 (para 112).
[29] *Encyclopedia Britannica* (11th ed.), 1911.
[30] *State (Govt. of NCT of Delhi) v. PremRaj*, (2003) 7SCC 121, 126 (para 10).

be granted immunity for his crime as an inducement to identify, and perhaps to truthfully testify against the murderer.

Other immunity: Several other types of immunity are available, depending on the status of a person as a member of the government.

It is to be mentioned here that there are substantial differences between a legislative immunity and a pardon; the latter carries an imputation of guilt and acceptance of a confession of it, while the former is noncommittal, and tantamount to silence of the witness. Similarly, there is also a distinction between amnesty and pardon; the former overlooks the offence, and usually addressed to crimes against the sovereignty of the state and political offences, the latter remits punishment and condones infractions of the peace of the state.

2.3 Nature and Objectives of Pardon Power

The pardoning power vested in the executive head of the State operates to uphold public policy. It acts as a check over the harshness or error which may have occurred in the course of administering the criminal law in a country. The act of pardoning aims at securing public welfare and attempts to prevent social unrest as a consequence of capital punishment. No judicial system is flawless, and therefore, it is important and essential too, for the government to possess a tool at the executive hands to rectify any flaws. Such a tool is needed in every democratic republican State to remedy the injustice caused to the convict by a tragic operation of law. In the administration of a penal code and criminal laws, there may arise such circumstances where the punishment inflicted upon a convict is gross, inappropriate and disproportional to the nature of the offence committed. In such situations, it is crucial for the executive head to remit or commute the severity of the punishment to a lesser degree. The Executive head, the President in case of India, does not nullify the decision of the Court,[31] but rather cures its defects.

In India, the power to pardon can also be exercised by the appropriate government by operation of Sections 432, 433, 433-A, 434 and 435 of the Code of Criminal Procedure and Sections 54 and 55 of the Indian Penal Code as a statutory

[31] *State of Haryana v. Jagdish and Harpal*, AIR 2010 SC 1690; (2010) 4 SCC 216.

right. But the pardoning powers under Articles 72 and 161 of the Constitution of India are complete, unrestrained and cannot be altered, modified or interfered by any statutory provision.

A pardon doesn't indicate that the convicted person is innocent. Pardons generally don't expunge convictions. But they will usually restore civil rights lost as a result of the conviction. So, pardons will generally restore: the right to vote; the right to run for, and hold public office; the right to serve on a jury (particularly in the USA); and the right to possess firearms (as in the practice in the USA). A pardon may prevent deportation if the pardoned conviction is a deportable offense. Thus, a pardon does not affect any civil consequences that might flow from the crime. So, even someone who receives a pardon for murder may still be subject to a lawsuit for wrongful death. Pardons also tend not to affect administrative consequences, such as license suspensions. In the US State Constitutions also, there is provision for Gubernatorial Pardons assigned with prescribed limits. There's no "right" to a pardon, which is often described as an individual act of grace granted by the governor. The decision to pardon typically rests in the governor's exclusive and absolute discretion, so the pardon-seeker can't appeal it to any court or have it overturned by another official, department or agency. One narrow exception is if the pardon involves illegal conditions. In that case, a court could review the conditions, but not the governor's decision to grant the pardon.

Although most states vest pardoning power in their governors, several states in the US have created "pardon boards." These boards make recommendations to the governor or, if the law authorizes it, the board makes the decision itself. Under either scenario, the governor either sits on the board, appoints its members or both. The board's decision doesn't have to be unanimous; depending on the state, a simple majority can be enough.

2.4 The Purpose of Pardoning Power

Pardon may substantially help in saving an innocent person from being punished due to miscarriage of justice or in cases of doubtful conviction. In the event of a false conviction or a miscarriage of justice, a pardon may be extremely beneficial in saving an innocent person from being punished. The prospect of being pardoned

acts as an incentive for the criminal to conduct well in jail, and thus aids in the resolution of the prison discipline problem. Giving liberty to a convicted perpetrator is always better than punishing an innocent person. Because no human system of judicial administration is flawless, the purpose of pardoning authority is, therefore, to repair judicial errors. A pardon is a tool of mercy and a means of redressing severe injustices, whether due to facts or the unanticipated functioning of criminal laws that must be recalled. As a result, even the most flawless legal system needs the power of mercy.

The hope of being pardoned itself serves as an incentive for the convict to behave himself or herself in the prison institution and thus, helps considerably in solving the issue of prison discipline. It is always preferable to grant liberty to a guilty offender rather than sentencing an innocent person. The object of pardoning is to correct possible judicial errors, for no human system of judicial administration can be free from imperfections.

In post-Reformation England, the royal prerogative of 'mercy' was used for three main purposes: (a) as a precursor to the as-yet-unrecognized defenses of self-defense, insanity, and minority; (b) to develop new methods of dealing with offenders unrecognized by legislation, such as transportation or military conscription; and (c) for the removal of disqualifications attaching to criminal convictions.[32]

2.5 Pardon When Granted?

A pardon is generally an executive decision to allow a person to be relieved of some or all of the legal consequences resulting from a criminal conviction. The power to grant pardon is an extraordinary power. It is extraordinary, because it can undo the efforts done for years by the judiciary and the prosecution for punishing the offender, the person convicted for the commission of an offence or offences. A pardon may be granted before or after conviction for the crime, depending on the laws of the jurisdiction. In other words, the pardon may be granted at any time either before institution of the criminal proceedings, but after commission of the crime, during pendency of the criminal proceedings or after conviction for the crime depending on

[32]law.jrank.org: http://law.irank.org.

the laws of the country.[33] The pardon is granted to the deserving persons especially to those who were thought to have been wrongly convicted or who claim to have been wrongly convicted.[34] By granting pardon the executive (the President generally) can set free any offender who has been tried and convicted by the courts. In some countries the persons who accept the pardon impliedly admit guilt. But once the person is granted pardon he is cleared of all guilt and he becomes as if he had never been tried or convicted of any offense. The persons who are granted pardon therefore has all the rights as any person who had never been subject to criminal charges in courts of law.

Pardons can be granted in many countries when individuals are deemed to have demonstrated that they have "paid their debt to society", or are otherwise considered to be deserving of them. In some jurisdictions of some nations, accepting a pardon may implicitly constitute an admission of guilt; the offer is refused in some cases. Cases of wrongful conviction are in recent times more often dealt with by appeal rather than by pardon. However, a pardon is sometimes offered when innocence is undisputed in order to avoid the costs that are associated with a retrial. Clemency plays a critical role when capital punishment exists in a jurisdiction.

The pardon is entrenched in the Constitution of the country as a way to supplement judicial justice. This is because it is possible sometimes that through judicial justice a wrong person may be convicted and the real criminal who should be convicted may be discharged or acquitted. In the case of *Umaru v. the State*,[35] Nnamani, JSC said, "Those accused persons ought not to have been discharged. Luckily for them, however, their case is not before this court there being no appeal against their discharge. What is, therefore, in issue is whether these errors do in any way affect this case of the appellant."[36]

The words of Nnamani, JSC confirm that it is sometimes possible for the offender to be acquitted wrongly and innocent person may wrongly be convicted. In view of that the pardon is taken to be mode of attaining social justice and as the last

[33]Hastedt, Glenn P. Presidential Pardon, *White HouseStudies Compendium*, Nova Science Publisher. Inc. (2007) p.328 ISBN 978-1-60021-680-0.
[34]Ekwenze, S.A.M., *op.cit*., p.2.
[35](1988) 1 NWLR (pt 7) 274.
[36]Ndamungu, Omari Issa, The Paradox Of The Presidential Power Of Pardon: Tanzania In Perspective, *International Journal of Scientific and Research Publications,* Vol. 10, Issue 9, (September 2020), p. 200.

line of defense for justice. Jurisprudence suggests that legislature and courts of law have no ability to infringe on the presidential power of pardon. It insists that the pardoning power is an enumerated power of the Constitution and that its limitations, if any, must be found in the Constitution itself.[37]

As to the grant of pardon and its consequences, American Justice Stephen Field wrote in *Ex Parte Garland* (1867), " If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching (thereto); if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity…… A pardon reaches both the punishment prescribed for the offence and guilt of the offender ……so that in the eye of the law the offender is as innocent as if he had never committed the offence".

Pardons are sometimes considered as a mechanism for combating corruption also, allowing a particular authority to circumvent a flawed judicial process to free someone that is seen as wrongly convicted. Pardons can also be a source of controversy. In extreme cases, some pardons may be seen as acts of corruption by officials in the form of granting effective immunity as political favours.

2.6 Types of Pardon

Pardon may be of different kinds. The several types of pardons an executive can generally grant in accordance with the constitutional provision include: reprieves; remittance of fines and forfeitures; sentence commutations and conditional pardons; and all kinds of pardons known to the common law. Apart from all these types of pardons, the President of the U.S. has the authority to grant amnesty by proclamation. However, the President has no power to grant reprieves in the case of impeachment and civil wrongs.

The constitutional power of the President to grant reprieves and pardons for offenses against the U.S. includes sentence commutation. Hence the power to commute a sentence forms part of the pardoning power and it can be exercised under a

[37]Menitove, J., The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency, *Harvard Law & Policy Review,* Vol. 3, (2009), p. 451.

general grant of that power.[38] However sentence commutation will not come within the purview of presidential pardoning power, if such grant is restricted by constitutional or statutory provisions.[39]

In addition to the power to grant pardon offenses, the constitution also gives the President the power to release penalties and forfeitures which accrue from such offenses. In certain cases, administrative and executive officers such as the secretary of the treasury are authorized by the Congress to remit forfeitures and penalties. In India, when the President of India takes an action over the case of punishment or the sentence any person convicted for an offence, it takes the form of his pardoning power. Under Article 72 0f the Constitution of India, the President shall have the power to grant pardons, reprieves, respites or remissions of punishment, remit or commute the sentence of any person convicted of any offence where the sentence is a sentence of death. Thus, they are of five types: Pardon, Reprieves, respites or remissions, suspension, and commutation.

There are different types of pardon granted, each having its own effect. Pardons can be full or partial, absolute or conditional.

(a) Partial Pardon: A partial pardon releases some, but not all of the guilt of a crime from the offender. In other words, pardon when granted partially, only relieves the person from some of the crime′s punishment or consequences. For e.g., if, on two different criminal charges, the offender was sentenced, the president may decide to pardon one of the other allegations. Thus, if the offender was found guilty of treason against the United States and alleged arson on a government building, the President could choose to forgive the wrongdoer, but not both, for either treason or just alleged arson.

(b) Absolute Pardon: An absolute pardon is granted without any conditions. An absolute pardon is the total extinction of the criminal liability of the individual to whom it is granted without any condition whatsoever resulting to the full restoration of his civil rights. An absolute pardon may be granted when the Governor is convinced that the petitioner is innocent of the charge for which he or she was charged. An absolute pardon is

[38] *Whittington v. Stevens*, 221 Miss. 598 (Miss. 1954).
[39] *Davis v. Grassie*, 84F. Supp. 832 (D. Ill. 1949).

often a remedy of last resort. In order to be eligible for an absolute pardon, the petitioner must at all the time plead not guilty throughout the judicial process.

(c) Conditional Pardon: A conditional pardon is "a pardon which does not become operative until the grantee has performed some specific act, or one which becomes void when some specific event transpires."[40]A pardon is conditional when its effectiveness depends on fulfilment of a condition by the offender. Its efficacy depends on the success of the accused's condition. The only restriction on the authority of the governor to grant conditional pardon is that the provision should not be unconstitutional, unethical, or difficult to satisfy. When a conditional pardon is granted, it shall bind the person who accepts it to all the terms, restrictions and limitations found therein. Only the conditions must be lawful, ethical, and enforceable; and the conditions related to the pardon should be explicit and precise to notify the person who has been pardoned. For conditional pardon, the prisoner shall have served at least one-half of the minimum of his or her original indeterminate and/or definite sentence. A conditional pardon can be issued in exchange for something; such a pardon will be granted if the person meets a certain condition, or complies with a request.

A Conditional Pardon is used to substitute the court's original penalty with a lesser sentence. The use of a Conditional Pardon has been historically limited to cases when the death penalty required by law had been imposed to commute that sentence to one of life imprisonment. Some conditions, usually to be fulfilled by the person seeking the pardon, must occur before the pardon takes effect. For instance, a pardon could be conditioned on helping the police solve a crime or locate a subject. Some conditional pardons become void when a specified condition occurs, such as the former offender committing another crime.

The use of the conditional pardon is identifiable in statutory form as early as 1336 in England[41], by which beneficiaries of the king's mercy were required to find sureties for their good behaviour. It was used to an excess in England during the seventeenth and eighteenth centuries, first as a means of colonizing and later as a tool for manning the

[40] *Black's Law Dictionary*, 1269 (Rev. 4th ed. 1968).
[41] 10 Edw. 3, c. 3, repealed in 1694 by 5 W. & M., c. 13.

navy.[42]A statistical study has shown that the eighteenth century English criminal law claimed fewer lives than in earlier periods, in spite of the growth in trade and population, the increased number of convictions, and the continual creation of new capital crimes. The decrease was attributed to the "increasing use of the royal pardon, by which transportation could be substituted for hanging. "[43]

2.7 Ancient Practice Similar to Pardon

The idea of pardon is a very old concept and has existed since ancient times. Historically, the power of Pardon was vested with the King since he was the executive. It emerged under the belief that the King's power is divine and unlimited.[44] This power to grant pardon, as an ancient in concept is still recognized today in different forms and shapes modified to suit the present day situations faced in almost every nation. It has its origin in Athens. In ancient Rome, ***circa*** 403 B.C., a process known as 'Adeia' facilitated a democratic pardon for individuals, such as athletes, orators and other powerful figures, who were successful in obtaining the approval of at least 6000 citizens by way of secret ballot.[45] Only if, he can meet this required support, then he can ask for pardon from the sovereign.

One of the earliest written codes, the 'Code of Hammurabi' also provided a unique power of pardon. For instance, in the context of marital offences, it provided, "If a man's wife be surprised (*in flagrante delicto*) with another man, both shall be tied and thrown into the water, but the husband may pardon his wife and the king his slaves".[46] The Code provided no restrictions to the power of the king and left it under his discretion.

In ancient India, as per the *Dharmashastra*, a king must do Rajadharma. He must keep in mind the welfare of the people whenever he takes decisions. Accordingly, Dharmasastra explains that the king possessed and solely retained the power to condemn a person. However, a convicted person can be pardoned during auspicious

[42]W. Holdworth, *A History of English Law,* 570-72, 575-76 (1938).
[43]D. Hay, P. Linebough, J. Rule. E. Thompson, & C. Winslow, *Albians Fatal Tree: Crime and Society in Eighteenth Century England*, 22 (1975).
[44] [Louise Halper, "Measure for Measure: Law, Prorogation, Subtraction" 13 Cardozo studies in Law and Literature, 229 (2001)].
[45]R. Nida and R. L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the President's Self-PardonPower*, 52 OKLA. L. REV. 197 (1999).
[46] [D Mac Dowell, *The Law in Clerical Athens*, 25 (Bryn Mawr Commentaries, London, (1978).

days or events for example on events like the king's birthday, full moon day, coronation ceremony of the prince, the birth day of a son to the king or on the victory day after conquest of any territory.

Although the source of this power to pardon was not an executive privilege, it is not difficult to see the similarities in the ancient concept of Adeia and the contemporary practice of pardon, which also often takes into consideration factors such as the public opinion in relation to the individual sought to be pardoned. Another ancient practice analogous to the power of pardon existed in ancient Rome, where instead of executing an entire army of transgressors, the Romans would execute every tenth condemned troop member.[47] The reasons for carrying out such a practice appear to be largely political, and hence, it is more difficult to draw parallels from this practice to the contemporary practice since it is not clear whether mercy was the intended motive. However, the effect of such an act seems to be similar to the effect of pardoning accused individuals in present times; although an individual is found guilty and sentenced to a punishment, the actual execution of the punishment does not take place.

2.8 Origin of Pardon Power in England

Antecedent of the royal pardon in England is rooted deep in antiquity. Grupp, S., for example suggests that the royal pardon has its origin among the Teutonic tribes.[48]Although one may encounter numerous references to the exercise of the prerogative of mercy in Mosaic Law, Greek Law, and Roman law too, yet it has been popularly observed to be a British heritage, and gradually and in juxtaposition with the growing nationalization of England the royal pardon became increasingly solidified. In 1535, Parliament permanently secured the King's power with the enactment of 27 Henry VIII, Chapter 24, which provided:

"That no person or persons, of what estate degree so ever they be ……shall have any power or authority to pardon or remit any treasons, murders, manslaughters or any felonies whatsoever they be ……, but that the king's highness, his heirs and successors, kings of the realm, shall have the whole and sole power and authority

[47]*Ibid*.
[48]Grupp, S., Some Historical Aspects of the Pardon in England, *The America Journal of Legal History*, Vol. 7, No. 1, (1963), p.52.

thereof united and knit to the Imperial Crown of this realm, as of good right and equality it appertaineth; any grants, usage, prescriptions act or acts of parliament, or any other things to the contrary notwithstanding."

Thus, it is also argued elsewhere that the roots of the presidential pardon power are found in the history of medieval England.[49] The Framers of the Constitution all over the world therefore, adapted the pardon provision from the royal English prerogative of Kings, which dated from before the Norman Conquest.[50]

Following the Norman conquest of England, the power to pardon was incorporated into the Codes of William the Conqueror (1066-1087). William, not known for his dedication to the novel, sought to confirm the traditional. Section 63 of his Codes stated: "This we also command that all our Subjects have and enjoy the Laws of King Edward in all Things; with the Addition of those which we have appointed for the Benefit of the English".[51] One must assume that if the subjects were allowed the same rights and privileges enjoyed previously, then the sovereign must have benefit of the powers held by former sovereigns. William's son Henry I (1100-1135) enlarged the scope of the King's pardon to facilitate the expeditious administration of justice. Under the *Leges Henrici Primi*, pleas concerning serious offenses that merited heavy punishment were assigned to the justice and mercy of the sovereign alone "so that more abundant pardon (could) be had for those seeking it and more abundant retribution for those transgressing."[52] The pardon was thus extended to "breach of his peace which he gives to anyone by his own hand; contempt of his writs and anything which slanders injuriously his own person or his command; causing the death of his servants in a town or fortress or anywhere else; breach of fealty and treason; contempt of him; construction of fortifications without permission; the incurring of outlawry (anyone who suffers this shall fall into the king's hand, and if he

[49]Ducker, W.F., "The President's Power to Pardon: A Constitutional History, *William and Mary Law Review*, Vol. 18, No. 3, (1977) cited from Pfiffner, J. P., *The Scope of the President's Pardon Power,* George Mason University, (2010), p. 1.
[50]Ndamungu, Omari Issa, The Paradox of the Presidential Power of Pardon: Tanzania in Perspective, *International Journal of Science and Research Publications*, Vol. 10, Issue 9 (September 2020) p. 202.
[51]R. Kelham, *The Laws Of William The Conqueror*, 86-88 (London), 1799.
[52]L. Downer, Leges Henrici Primi, $$ 11, 16a, at 115 (1971).

has any bocland it shall pass to the King's possession); manifest theft punishable by death".[53]

2.9 Historical Background of Pardoning Power in India

Before the Constitution of India came into force; the law of pardon in India was the same as in England since the Sovereign of England was the Sovereign of India. Therefore, to understand the concept of the President's power in India, it is important to look at the pardoning power in England and also in the United States of America to know subsequent development. Historically, in the UK, the power to grant pardon and exercise mercy towards prisoners was primarily exercised by the Sovereign, perhaps emerging from notions of the divinity of kings. Besides the power to declare war and make peace, the power to grant mercy to convicts has long been an essential component of sovereignty. The philosophy underlying the principle of the power of granting pardon is that *'every civilized country recognizes, and has therefore provided for, the pardoning power to be exercised as an act of grace and humanity in proper cases. Without such a power of clemency, to be exercised by some department or functionary of a government, a country would be most imperfect and deficient in its political morality and in that attribute of Deity whose judgments are always tempered with mercy.'*[54]Such powers of pardon and mercy were also exercised in India by the Mughal Emperors and rulers before them. In the early years of the East India Company's operation, mercy in their courts remained limited to the prerogative powers of the British King-Emperor and subsequently, some powers of mercy also appear to have been granted vide royal charter to the Governor-General in Council of Fort William and the Governors in Council of the Bombay and Madras Presidencies.[55]

As it is known that the Muslim criminal law largely prevailed in the mofussil territories in pre-independent India, a scheme of pardon consistent with that law prevailed, although the Governor-General in council also possessed the power to pardon and commute sentences after the establishment of the Sadar Nizamat Adalat in 1772. Eventually, with the amalgamation of the mofussil and presidency systems,

[53]*Ibid*. $$ 13,1, at 117.
[54]American Jurisprudence 2d, page 5, quoted in written submissions of senior counsel Soli Sorabjee in *Epuru Sudhakar and Anr. v. Govt. of A.P. and Ors.*WP (Crl.) No. 284-285/2006.
[55]MP Jain, *Outlines of Indian Legal History*, Wadhwa and Co, Nagpur: 2005 (5th ed), at 50 and 337. 18 Ibid, at 134-135.

statutory clemency powers were provided for in the Indian Penal Code and the Code of Criminal Procedure (hereinafter referred to as 'CrPC') that were enacted in 1860 and 1861 respectively. Although the British King-Emperor continued to exercise his prerogative right and however, the similar powers were also granted to Viceroy and Governor-General of India by way of the royal charter, however, it was the statutory powers that were regularly exercised. With respect to capital cases, the Indian Penal Code and Criminal Procedural Code granted clemency powers to the local governments and Governor-General in Council equally. Mercy petitions were thus first decided by the local government and upon rejection, were sent to the Centre for further adjudication. As the Government's 'rules of business' allowed for the delegation of such powers, at the central level, mercy petitions were effectively disposed of in the Home Department without even a reference to the Viceroy.[56]

That the drafting of the new 'Federal Constitution' in the 1930s upon the suggestion of the Joint Select Committee between 1933–34 brought about a substantive change, that the statutory determination of mercy should rest only with the Provincial Government, bearing the primary responsibility for law and order and the similar power should be taken away from the central government (Governor-General in Council).[57]However, to maintain the provision for an appeal and the two-tiered mercy system already in place, they proposed that the mercy power should now be exercisable by the Governor-General in his discretion, as the Viceroy which resulted in the amendment of Section 401 and a new section 402A was added in the CrPC along with Section 295(1) of the Government of India Act, 1935. That by way of the letters patent which changes came into effect from 1st April 1937 the Viceroy also derived and retained the prerogative power of pardon delegated. That further, the substantive

[56]The Governor General of India was empowered to make rules for the more convenient transaction of business in his Council and any order made or act done by following such rules should be deemed to be the order or act of the Governor General in Council. The Viceroy Lord Northbrook however made a change in the rules and required that all mercy petitions be sent to the Governor General for disposal as he was under the impression that the prerogative of mercy vested in the Viceroy personally. This practice however ended with his departure in 1876 although the rules were amended to their previous form only in 1889. Note by HA Adamson, 4 May 1907, File no. Home (Judicial) 373/23, NAI.

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change under clemency was that at the Centre, the decision ceased to be the decision of the centre and was transferred to the Viceroy. That the workload of the Governor-General increased dramatically with the filing of around 700 petitions annually and in order to reduce the pressure, the new procedure approved by Lord Linlithgow was adopted, which ensured that most of the work on mercy petitions would be continued by the Government as previously, and only the final adjudication was made by the Viceroy. The procedure provided for the provincial governments to submit mercy petitions in cases of death sentence to the Secretariat of the Governor-General (Public) by whom each case was forwarded to Law Member and if the Law Member was inclined towards rejecting the petition, the case was submitted directly to the Viceroy for orders. Further, if the Law member considered that there were grounds for interference, the case was referred to the Home Member for his opinion before submission to the Viceroy for further orders. That the Viceroy would seek opinions from the Law or Home Members but was however not bound by it and according to the eventual decision by him the order was lastly sent to the Secretariat of the Governor-General for final adjudication.

2.10 Models of Pardon Power

The constitutional jurists and philosophers have classified constitutions of different nations of the world designing like as the Unitary Constitutions and Federal Constitutions with Parliamentary Model or form of government, Presidential Model or form of government or semi-presidential lawmaking systems or Model and so on.But, there has been no attempt made so far by constitutional jurists and political philosophers to study executive pardoning powers through systematized models created intelligently based on intelligible differentia within such models. Here, we are making such attempts to study executive pardon powers exercised worldwide in terms of formalized models articulated on the basis of its origin and nature, and prolonging traditional and modern practices carried out in different political systems. However, such models will be the models within the constitutional models as recognized and accepted by different nations, that is, the traditions and modern Constitutional dictations are, no doubt, to be considered as prescribed limits, as well as the set boundaries decided by the Apex judiciary through judicial review, whenever deem fits and proper. The models are, therefore, derivative in nature.

In the backdrop of the constitutional provisions and traditional practices that are being followed in different countries in the world, certain models may perhaps be formulated which may help in better understanding the nature of pardon power exercised in the past and the present. Few such models are put forward as follows:

(a) Classical or the British Model: Pardoning power, originally with an extensive use, is a British heritage, soiled and watered in the U.K. by the British Crown, the Executive head of State. It was known as Royal Prerogatives. In England, the royal pardon power is a discretionary power based on the ancient rights and privileges of the Monarchs to grant mercy. This practice is based on the understanding that the Sovereign possesses the divine right and hence can exercise this prerogative on the ground of divine benevolence.[58] This model was originally based on unbridled discretions powered by the Kings.

For centuries in England, the royal pardon was the sole means to remedy an injustice by ameliorating harshness of sentence imposed by the courts. It also operated to temper the inadequacies of substantive law before the development of common law or statutory defenses, like insanity and self-defense. Finally, it also came to provide safety net when judicial appeal had been exhausted.

There were, however, evolutionary changes effected to the pattern of exercise of this power by the Kings of England from time to time since it started to grow conceptually and the British Parliament, through debates and enactments passed in times, properly guided in shaping the doctrine of pardon power with discretions, but within limits prescribed by laws.

The model got transmitted to other British territorial colonies during British Imperialism and imperialistic governance where such powers were exercised either through the Crown himself or by Crown's representatives as this power so delegated.

(b) Colonial Model : The colonial model is based on the presumptions that the concept and philosophy was carried with the British imperialism to its colonial or protectorate states ruled under British administration during 17th and 18th centuries. Britain's empire was the most extensive that the world has ever seen, and it lasted for

[58]Wolfe, G.B., *I Beg Your Pardon: A Call for Renewal of Executive Clemency and Accountability in Massachusetts,* (2007), p.27.

more than 300 years. It began to take shape during the early 17th century, with English settlement of North America and the smaller islands of the Caribbean, and the establishment of joint-stock Company, most notably the East India Company, to administer colonies and overseas trade. The age of modern colonialism began about 1500, following the European discoveries of sea route around Africa's southern coast (1488) and of America (1492). The first colony was officially founded at Jamestown, Virginia in 1607. The pardon power has its origin in the British monarchy, and from there back to amnesties granted by Greek, Roman and biblical kings.

It has generally been said that the Sun for the British Empire never sets, meaning thereby the British had once established its colonies in many parts of the world, and subjected to its ruling with almost the same principles the U.K. was ruled by the sovereign. The executive's pardoning power was also maintained to be transmitted along with its political administration over its colonies, with little modifications or changes in the content and nature of the power to be exercised or with no any major changes effected. The power was spread over to those colonial territories like a fish that usually follows the river, and the small fishes are swallowed up by the big fish. The model has been generally followed by the countries like the USA, Canada, Australia, and even India besides other Commonwealth Nations. It was a model based on powers delegated to the colonial rulers mainly the representatives of the British Crown.

(c) Contemporary or Constitutional Model : In the present contemporary world, the pardon power does exist to be exercised by the executive or executives in almost all the countries which has been made a constitutional or statutory provision by their respective constitutions. It is still well understood that a robust presidential pardon power is a necessary check on the criminal justice system. Alexander Hamilton once explained the reasoning on necessity of presidential pardon power saying that "Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel."

In the contemporary or constitutional model, we simply follow the constitutional provisions or mandates how, when or under what situations, the power is to be exercised by the executive or executives or the President of a country or what will be the restrictions imposed on it. For e.g., in the US constitutions it contains only two restrictions: The pardon must be for an offense against the United States, that is, a federal crime and not a state crime. Also, the President cannot use the pardon power to save himself or another official from impeachment.

In the Indian Democratic Republic too, the Constitutional Model is being followed which is based on purely constitutional scheme as provided in Article 72 (and Article 161, pardoning power of Governor of respective states) of the Indian Constitution. The Article clearly provides that in respect of which the President is to exercise pardon power and it also mentions sentences in respect of which this power is to be exercised. Now a day, this Model attracts popularity among the Democratic Republic countries in the world at large.

2.11 Theoretical Aspects of Pardoning Power

It seems to be pertinent to go insight into the theoretical foundations so far attempted from time to time by different political thinkers and jurists. Let's first discuss it from conceptual originality emerged in those days when the Kings used to rule in ancient states exercising absolute powers over his subjects. It was believed that the Kings were sent by God and what they did as agent of God, did as commanded directly by God in the Heaven. It was further believed that a King was divinely appointed by God as a ruler. He was effectively acting as a regent, an agent of God on Earth. While a King who held divine right to rule had an enormous amount of power, he was only accountable to God and was expected that he would abide by God's rule. This is what is called the **Divine theory.**

The Divine theory is one of the oldest theories of the origin of the state. This theory explains that state was created by the God and the King was His representative. This theory provides that the King derives his powers directly from the God and thus, had divine powers. Kings were regarded as absolute sovereign over his people. The King was the embodiment of the kingdom's identity, he was the perfect expression of his people, and he was often described as the father of the nation.

A theory of Divine Grace is developed on this notion. The gift of divine grace is the gift of redemption and forgiveness of sins from God that is offered to everyone who decides to acknowledge and accept it. Grace is the central to the lived experience of many Christians. Grace is the basis of Christian faith. John Wesley and Wesleyan Traditions speak of four types of grace: prevenient, justifying, sanctifying, and glorifying.

Not only in Christianity, such beliefs exist; but in Hindu and Islam community, divine grace is found to have existed in their respective religious philosophies and jurisprudence. *Kripa* is the concept of divine grace in Hinduism, which finds its origins in the Vedas; though variously it can mean "grace", "mercy", or "blessing", depending upon the context. Hindu *Dharma Shashtra* says that Sin (*Paapa*) is an offence against God. Sin or *Paapa* is a demerit due to one's own *Karma* and is an offence against oneself and not God. So, there is no direct concept of Divine Pardon in Hinduism. However, if a person sincerely practices spiritual disciplines and prays or asks God to reduce the punishment due to his sin, then God might do it. The way is to do *Prayaschitta* for Paapa one gained through his *Karma* (bad deeds). But at the same time, in ancient India, "……The *Dharma Shahstra* authors held that *Dharma* was the supreme power in the State and was above the king, who was only the instrument to realize the goal of *Dharma*".[59] Panikkar saying about the duties of the king observed, "You take oath by mind and words as follows: I shall protect the world considering it as equivalent to the creator; I shall act fearlessly and observe the whole of *Dharma* in accordance with *Dandaniti* and not according to my own sweet will".[60] The ancient English theory with respect to executive pardon is that all powers of government originates from the King, it was the King's peace or the peace and good order of the King's realm which was offended by crime; the King could bestow his mercy by pardon.[61] In UK, it was further believed that Kings do no wrongs; and what he did was considered to be right for all purposes caused to be done as representative of God as per religious belief. So, "The kings of England are absolute Sovereign …….the laws are the King's laws…….. the king has a power to dispense with any of the laws of Government as he sees necessary …….. He is the sole judge of that

[59] H. D. Vol. III, pp 237- 241 at 240.
[60] Panikkar, *Ideas of Sovereignty*, p. 31.
[61] *Burdwick v. United States*, 236 US 79: 59 L.ed. 476 at 480.

necessity; …….. no act of Parliament can take away that power".[62] In this context, it has been held, "The power to pardon …….is an act of the sovereign's mercy and grace."[63] Moore also expressed, "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". Rather, the executive must pardon only for "good and sufficient reasons", reasons relating to the offender's culpability, and to the proportionality of the offender's punishment. A pardon cannot be given simply because the executive wants to give it.[64] It must be morally justified. Thus, on analogy, and prolong practice since it originated, it can justly be said that pardon power of the executive, kings in those days, was found to have its base derived from the **theory of Divine Grace**.

So far as the ancient monarchy is considered the doctrine of executive 'grace' is perfectly natural and logical. For, the King is the source of all law and all justice, and he, like the divine monarch, may do what he will with his own. "As he (the King) cannot but have the administration of public revenge, so he cannot but have a power to remit it by his pardons, when he judges proper".[65]

However, there was a twist found in the US jurisprudence.Some influence of earlier British tradition in the beginning upon the US soil can't be overruled as it was also once a British colony. Even after the United States of America became independent, and US Federal Constitution was fully implemented, for quite a long time, the UK's influence was there so far executive pardon was concerned. Subsequently, in the US, pardon power jurisprudence sprang from Chief justice John Marshall's pen. In *United States v. Wilson,*[66] Marshall relied on the English common law to hold that a court could not take notice of, and therefore could not give effect to, a pardon that a prisoner had intentionally declined to plead in court. The court upheld

[62] F. Smith, *Debates ….. Relating to ……..Thomas, Earl of Danby*, p. 1050 -51 (London, 1679.
[63] Kathleen D. Moore, Pardon for Good and Sufficient Reasons, 27 *U. RICH. L. REV*.282 (1993).
[64] *Ibid.*
[65] *Dr. Groenvelt's* Case, 1 Ld. Raym. 213, 91 English Reports (Reprint) 1038 (1697).
[66] 32 U.S. (Pet.) 150 (1833).

the prisoner's conviction for robbing the mail despite a presidential pardon from an earlier capital conviction for the same misconduct.[67]

Wilson established that the English common law informs the President's pardon power. But Chief Justice Marshall justified adopting England's "principles respecting the operation and effect of a pardon" because the "pardon power had been exercised from time immemorial by the executive of England……., to whose judicial institutions ours [the U.S's] bear a close resemblance." Nearly every subsequent Supreme Court decision has reaffirmed the pardon power's common law basis,[68] "We must then give the word the same meaning as prevailed here and in England at the time it found a place in the Constitution".

Though pardon power jurisprudence consistently looks to English common law, it equivocates about both the substance of the King's common law pardon power.It appeared that in *Wilson,* the Court relied on English precedent to determine only the mechanics of effectuating a pardon.[69] To the extent *Wilson* reached broad conclusions about the substance of the King's pardon power, subsequent courts have conducted their own historical analyses regarding the substance of the King's pardon power,[70] and the extent to which the King's power was modified, if at all, when adopted in the American constitutional system. The disjointed jurisprudence provides no clear answers. Instead, it oscillates between two distinct conceptions of the President's pardon power with divergent substantive implications. Conflicting cases about pardon acceptance, *Burdick vs. United States* and *Biddle vs. Perovich*[71] highlight the distinct theories.

In *Burdick*, President Wilson pardoned a newspaper editor, George Burdick, who had refused to testify by invoking his Fifth Amendment right against self-incrimination.[72] President Wilson reasoned that Burdick, once pardoned, would no longer risk self-incrimination and therefore could not refuse to take the stand. When

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[67] *Ibid*. at 153, 163.
[68] *Schick vs. Reed*, 419 U.S.256, 263-64 (1974); *Ex parte Grossman,* 267 U.S. at 110; *Ex parte Wells,* 59 U.S. (18 How.) 307, 311 (1856).
[69] *Wilson*, 32 U.S. (7 Pet.) at 160-61.
[70] *Hoffa vs. Saxbe*, 378 F. Supp. 1221, 1226-30 (D.D.C. 1974).
[71] *Burdick,* 236 U.S. at 90.
[72] 236 U.S. at 85-86.

Burdick rejected the pardon and still declined to testify,[73] the Supreme Court held that a pardon must be accepted for it to have legal effect. In *Burdick* case, the Court relied heavily on Chief Justice Marshall's opinion in Wilson, which had found a pardon ineffective when not pleaded in court.

Burdick embodies what is called the **"merciful- contract" theory of pardons.** It conceives of a pardon as "a private deed" created by the President exclusively for the benefit of the individual upon whom it is bestowed.[74] Thus, *Burdick* might suggest labeling this theory a **"private-deed"** theory of pardon, but this prefers its own original term, the "merciful-contract' theory, for two reasons. First, the term "contract", which connotes an agreement between multiple parties, better recognizes the acceptance requirement's two-way agreement than does the term "deed", which can be signed by only one party and delivered to another.

Burdick's acceptance condition logically follows: a pardon, like all contracts, "must be delivered and accepted to be valid." The merciful-contract theory of pardons shuts the door to additional constraints beyond an acceptance requirement. If a pardon is a private contract, then a bad pardon is one which the parties do not benefit. Providing a "right….. against the exercise of executive power not solicited by [an offender] nor accepted by him[75] fully prevents bad pardons.

Shortly after *Burdick,* the US Supreme Court seemed to reverse the course in *Biddle vs. Perovich,* wherein Justice Holmes held that the President could commute a death sentence to life imprisonment without the offender's consent.[76] President Taft had reduced Vuco Perovich's death sentence to life in prison, whereby he was transferred from an Alaskan jail to a penitentiary in Kansas.[77] After unsuccessfully applying for complete pardons, he sought a writ of habeas corpus on the grounds that the commutation and subsequent transfer were without his consent.[78] The district court issued the writ and ordered him released. The Supreme Court reversed, finding that

[73] *Ibid*. at 86-87.
[74] *Burdick,* 236 U.S. at 90.
[75] *Burdick*, 236 U.S. at 91.
[76] *Biddle vs. Perovich,* 274 U.S. 480, 486-87 (1927).
[77] *Ibid.* at 485.
[78] *Ibid*.

substituting life in prison for a death sentence without the prisoner's consent was within the President's Article II powers.[79]

Biddle v. Perovich[80] forcefully articulated a **"public welfare"** theory of pardons. In this case, it was said by Justice Oliver Wendell Holmes that pardon "When granted it is the determination of the ultimate authority that public welfare will be better served by inflicting less than what the judgement fixed". It is incompatible with Burdick's merciful-contract theory. The public welfare theory considers "bad" pardons, those that do not improve "the welfare of the whole". It rejects the notion that exercising the power of a public office can be a "private deed"; because America has a Constitution and not king, "a pardon in our days is not a private act of grace from an individual happening to possess." Mercy still matters, but only for its moral and practical benefits.[81] An offender's consent, however, matters not at all: "just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent, determines what shall be done".

Advocates of a truly unfettered pardon power invariably adopt the merciful-contract theory, while those identifying limits to the pardon power correctly recognize the importance of public welfare. So, public welfare is also one of the main yardsticks used to decide whether a person may be granted pardon. In support of it, Indian jurist, H. M. Seervai on public welfare also rightly pointed out while saying that "Carrying out a sentence or setting the machinery of justice in motion might imperil the safety of the realm. If the enforcement of a sentence is likely to lead to bloodshed and revolution, the executives might well pause before exposing the State to such peril".[82]

Another important aspect of the theoretical foundation of pardoning power exercised by the executives needs to be considered in context of the modern developmental analysis and interpretation of political doctrine of separation of powers. In almost all the democratic republican states in the world, the influence of this doctrine more or less, is there in their political systems and the constitutions have been

[79] *Ibid* at 487-88.
[80] 274 US 480, 486 (1927).
[81] THE FEDERALIST No. 74, at 446.
[82] H.M.Seervai, *The Constitutional Law of India* (Universal Law Publishing Co. Pvt. Ltd., Delhi, vol. II, p.18, 12th ed., 2012.

framed separating state's powers to be exercised by Executive(s), Legislatures and the Judiciary. Judiciary is impartial and independent, and in principle, Executive(s) should never interfere in the justice process, while the Judiciary is administering justice according to laws passed by the Legislatures. But the only exception to this general principle has been made by almost all the Constitutions of world jurisdictions in respect of the Executive Heads of the States, the Presidents, Crown or Kings, or certain executive body to exercise pardoning power. This power so entrusted is actually a power belonging to the people and reposed in the highest dignitaries of the States. In other words, this power is impliedly delegated to such body or authority, in return to the promise made to become the ultimate protector of the people in case injustice is done or some great errors are caused even by the Judiciary which is likely under certain situations acting as human agency. It is a fact and also a common practice followed in almost all democratic republican countries in the world that Presidents, the highest dignitaries of the States are elected directly or indirectly by the people, though in some countries the hereditarily chosen dignitaries of the States have been given this power to exercise, but this exercise by them has been made subject to decision or advice rendered by the few other elected representatives of the people acting as a body or ministry. This power is delegated to the elected representative heads elected by the people to look into their interests and to protect their life and ensure safety, being politically superior. The power to pardon is meant to be used in those circumstances only where it would not be in the interest of justice to strictly apply the law even if the circumstances call for the same. The administration of justice by the Courts is not necessarily always be wise or certainly understanding of the circumstances which may properly alleviate guilt. It is a check entrusted to the Executive for special cases.[83] Executive pardon occurs to protect from excessive punishment or gross error in the execution or implementation of criminal law. It is also a duty or responsibility of the elected representative heads towards the people who elect them to represent their interests in terms of proper justice to be caused in case of an offender punished for crime, not for any mere violation of the legal rules. A pardon power is an executive power and is independent of the judiciary. The Executive or the President while exercising all pardoning power does not even sit as a court of appeal. The pardoning

[83] S.C.Jain, *the Constitution of India: Select Issues and Perceptions,* 57 (Taxmann, New Delhi, 2000.

power is basically the absolute discretion of the official, the President or Crown having that power who is supposed to act in accordance with sound principles and upon proper facts. The pardon granted by the executive is final and irrevocable. A country would be the most imperfect and deficient in political morality without such a power.

On the above backdrop and analogical deductions, to create a new perspective in theoretical foundation of pardon power, we may assume that people are sovereign, and not the Constitution as the Constitution is the result of human efforts and man-made aims at fulfilling the needs and aspirations of the people and at the same time may get amended from time to time as the needs vary. This sovereignty is delegated to the State in a democratic way functioned through different organs for the welfare of the people.

The Constitution as means to achieve these objectives only confers on the Executive body or the President the power to pardon by making certain expressed provisions in it; but it may impliedly inferred on reasoning that the power to pardon finds its roots in people delegating their power to such Executive(s) ultimately to act as people's representative on their behalf specially when people found committing offences and punishments seem to be very harsh or excessive imposed by the judiciary which only follows the set procedure established by law or laws by the Legislatures. In the present day world system, pardon power is a just constitutionally and expressly conferred power upon the Executive or the Executive body, but in reality, it is a power inherently supplied and delegated through election process to such person or persons who are actually elected for the highest office of the president. Thus, it has a strong base as last resort to those convicts who repose ultimate faith in it when they feel punished innocently or their punishment become excessive or harsh and not according to penal laws. Therefore, we may call it an '**Expressly, but Impliedly Delegated Theory of Pardon Power'** exercised by the Presidents, Executive Bodies [or Crown (Kings), an exceptional case] country wise in the present day world situations.

2.12 A Shift in the Philosophy of Pardoning Power

An authorized official can pardon, or forgive, a crime and its penalty; or grant clemency, or the lessening of the punishment, by means of a reprieve. The procedures for granting pardons vary according to each nation's legal system, as do the effects of the pardon. In particular, the issue of whether a pardon clears the individual from all

wrong-doing, as if they were innocent, or whether it merely removes the punishment in an act of forgiving their offense.

During the 20th century, the concept of laissez faire state has lost its existence and in its place, there comes to exist a new concept of welfare state. With the upcoming of welfare state, there has been a vast and inevitable increase in the relationship between the organs or parts and functionaries of the state. The governmental powers and functions are basically divided into following heads:

(1) The Legislature,

(2) The Executive, and

(3) The Judiciary.

This division of governmental powers among the organs of the state conforms to what Montesquieu propounded and called the separation of powers. In order to ejaculate the intrusions of these three wings of the government, the doctrine of separation of powers are also implemented in countries with democratic features with minor changes or modifications or without modification. The doctrine of separation of powers usually lays down that these three wings of the government must in a free democratic political set up always be kept separate and be exercised by the separate organs of the government. Accordingly, the Legislature cannot exercise Executive or judicial powers, the Executive cannot exercise Legislative or Judicial powers, and the Judiciary cannot exercise Legislative or Executive powers of the government. In its own sphere, each should remain independent in its functioning.

But in a modern democratic state which embraces as its philosophy the concept of welfare state, the implication of the doctrine of separation of power in its true sense is impossible. Frankfurter J. also supports this view when he says, “Enforcement of rigid conception of separation of power would make modern government impossible.” This non-enforcement of the doctrine as it is has now created certain critical problems and laid down such hectic situations where the three machineries of the state are found to over-power each other.

The idea behind putting the simple theme of the doctrine has one main purpose which may often relate to the power of the Executive so far administration of criminal justice system of a country is concerned. As already stated, apart from the primary

roles of criminal courts, the Executive has also been entrusted with the pardoning powers, in case of injustice done apparently to the offender by the sentencing court and if there are sufficient reasons for it.

It may be mentioned here that since the period of Renaissance right to life and liberty has been held as the most basic and foundation of any individual. It is also the source of other rights because without it no other right can exist. Therefore, apart from other constitutions of the world, the constitution of India also recognizes it as the fundamental right of every person. However in certain cases it can be curtailed yet the power to pardon which is also referred as mercy petition, is usually reserved for the highest body in the state. In our country where the President is the highest body representing the citizens this power falls in his domain. As already stated, before independence under Section 295 of the Government of India Act, 1935 Governor General had the prerogative to commute, refute or suspend such sentences. Bur after independence, the President has been empowered by Article 72(1) and Governors by Article 161; however, the ambit of power in case of Governor is narrower than that of the President. This power is exclusive and has to be used with great caution. Three words have been focused upon: (a) Offence, (b) Punishment and (c) Sentence. These three are the prerequisites and only when the justice is not met by execution of such sentence this power has to be exercised.

However, the position differs in the United Kingdom and the United States of America. In UK the Crown enjoys this power, but is subjected to advice of ministry. In USA the President gets this power from Article II Sec. 2 (1) and is unlimited in nature except in impeachment suits. The ancient English theory with respect to executive pardon is that all powers of government originate from the King, it was the King's peace or the peace and good order of the King's realm which was offended by crime; hence, the King could bestow his mercy by pardon. Meanwhile the American theory is established upon the principle that all governmental power is inherent in the people. Hence, crime is an offence against the people, prosecuted in the name of the people, and the people alone can bestow mercy by pardon. As subsequently is noted, the people may confer the pardoning power upon any officer or board that they see fit.[84]

[84] *S.A.Venkataraman v. Union of India*, AIR 1964 SC 375.

To understand the concept of president's power in India, it is, therefore, important to look at the pardoning power in England and also in the United States of America.

The important question involved is now how to maintain a proper balance between the two important wings of the State, the executive and Judiciary without disturbing the true spirit behind the concept of Executive Pardon and the power of judicial review by the Apex judiciary. For this, it is required proper implementation of the constitutional philosophies and schemes harmonizing both the situations, a major shift effected not in the interest of the county's political system, but in the interests of public benefits and fair justice to be ensured in the criminal justice system not only of India, but of any country of the world. So, the strict adherence to the doctrine of separation of power may cause adverse impacts rather than giving a desired result to remedy the errors committed, which may be possible by both the Executive and the Judiciary, all being the human beings.

2.13 Moore's Theory of Pardon

At this juncture, the researcher feels a necessity to present the theme of pardon power in the light of already set theories put forward by certain jurists. For this, let's have some insights of Moore's Theory of Pardons here. Moore in her book, and in an important follow-up article,[85] defends the pardoning power as an extension of retributive justice. Retributive justice, on her view, means punishing offenders because they deserve it. But in an imperfect system of criminal justice, offenders may not always get what they morally or legally deserve, and so need to be pardoned, either by being released or by having their sentence reduced. As Moore writes, "A pardon is justified when the procedures miscarry, giving the state a legal, but not a moral, license to punish".[86]

What exactly, "procedures miscarry" means here is ambiguous. For procedures can miscarry in a strictly legal sense, where a judge misapplies the sentencing guidelines, say, and gives an offender a higher sentence than is legally allowable. This would presumably be grounds for reversal by an appellate court, but could also presumably be the basis for pardon "for good and sufficient reasons," if all avenues for

[85] *Ibid.*
[86] *Ibid*.

appeal have been exhausted. Here the procedures that have miscarried can be deemed to have done so using only legal standards, that is, standards that are internal to the legal system itself. In other words, in cases like these, (the actors) the legal system has not performed their functions correctly.

But procedures might miscarry in other ways, not because they are not followed, but because when they are followed they lead to the morally wrong result. An innocent person may be convicted even though all the proper legal procedures have been followed. This happens, and there may be no *legal* error we can directly point to.[87] William Baude also puts the same view while defending value of finality in criminal proceedings with application to the Troy Davis case.[88]

Suppose, for instance, that the evidence that exists at the time of the trial leads a jury to convict someone of a crime.[89] Every appellate court also subsequently upholds the conviction. Nonetheless, many years after the trial, new evidence comes to light that clearly exculpates the convicted person, his available legal avenues for appeal now thoroughly exhausted. Here the procedures have nonetheless miscarried, not in the sense they were not followed, but because they lead to the wrong results. From a point of view external to those legal procedures, we can see that something has gone wrong, even though in a strictly sense, nothing has. 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 allowed correctly), but not in cases of moral error (where the procedures have been followed, but the result is morally wrong.

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

Or more controversially, suppose that a sentence handed down, while perfectly legal, is nonetheless, by some recognizable moral standard, too harsh or unfair. George

[87]William Baude, *Last Chance on Death Row*, 34 THE WILSON QUARTERLY, 18 (Autumn 2010).
[88]*Ibid.*

[89]Kathleen D. Moore, *Pardon for Good and Sufficient Reasons,* 27 U. RICH. L. REV.286 (1993).

W. Bush's pardon of Scooter Libby was arguably of this sort.[90] Presidents have also commuted sentences they feel are too harsh without removing the taint of the conviction. President George W. Bush did just 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". If this is the case, although the State may legally punish that person a certain term of years, it has no moral basis to do so. That person may have his sentence permissibly reduced by an act of executive mercy, according to Moore.[91] How to decide when a sentence is too harsh is a complicated question, which Moore does not attempt to answer. Moore defines harshness in retributive terms, as being a sentence that exceeds the offender's desert.[92] 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.[93]But we might intuitively agree that some sentences, in principle, might be too harsh for an offender given his crime, or given other factors. In those cases, the executive has a "good and sufficient reason" to reduce the sentence, or to end it altogether.

In general, says Moore, "Pardons should be used as part of a broader constitutional scheme to ensure that sentences are assigned justly."[94] This can happen when the legal procedures miscarry in an obvious way (the judge who has misapplied sentencing guidelines), or in a less obvious way: when the punishment is not consistent with the values that underlie the criminal justice system as a whole; of protecting innocence, or of assigning punishments that are proportional to the offense. "Procedures miscarry" when the legal system does not follow its own rules, or when they do not lead to results that are consistent with the values implicit in its procedures, such as fairness or avoiding cruel and unusual punishments. The pardoning power is

[90] Michael Lindenberger, *The Quality of Mercy: Don't Jump on Haley Barbour All at Once*, TIME (Jan. 2012).
[91]Kathleen D. Moore, *Pardon for Good and Sufficient Reasons,* 27 U. RICH. L. REV.287 (1993).
[92] Moore, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST, 93, 97-98 (1989).
[93]On this last point,see the illuminating remarks in David Gray, Punishment as Suffering, 63 VAND. L. REV. 1691-92 (2021).
[94]Kathleen D. Moore, *Pardon for Good and Sufficient Reasons,* 27 U. RICH. L. REV.286 (1993).

used for "good and sufficient reasons," in short, when it upholds the values that are at the basis of a just constitutional scheme.

It is to be mentioned that this is not possibly the place to present a fully worked out theory of pardons, which is acceptable to all; because here whatever is presented is mainly based on Moore's Theory, or is borrowed from it, for the most part, in order to test the question of whether even if pardons *taken individually* might be for good and sufficient reasons, they might be unjust when *taken as a whole.*

That an objection to Moore's theory is that Moore's theory is not really a theory of pardons at all. A theory of pardons, the objection goes, should specify those places where the executive can permissibly exercise *mercy*. But the above cases show no such thing; rather, they show cases where the 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.[95] Antony Duff puts his holds arguing that, in some cases, Moore's theory renders pardons "necessary or obligatory, not merely permissible".

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

We might worry, still, that on Moore's theory, there are only mandatory acts of pardoning, that there is no place for *discretion* on whom or when to pardon. Even if this is so, this may not be a decisive objection to it being a theory of pardons. The researcher does not think that pardons must contain only permissible acts. This may again be emphasized that we are more interested in *pardoning* not in *mercy*. Mercy may necessarily be discretionary act, tied to any reason or no reason at all, and be something that "someone has neither a natural nor a legal right to claim – it is bestowed on the offender – perhaps like some understanding of grace."[96]This may be

[95] Antony Duff, *Review Essay/Justice, Mercy, Forgiveness,* 9 CRIM. JUSTICE ETHICS 61 (1990).
[96]Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1453 (2004).

true of mercy, but it does not seem to be true of pardons. In some cases, a person may have a right to a pardon, (because, for example, he may be innocent, and cannot achieve vindication in any other way but an executive pardon.) but there is still something we can say to this. First, it will usually be a fuzzy matter what punishment it is, exactly, that an offender deserves. Does every offender who commits a wrong *deserve* to be arrested, to be prosecuted, to be given *this* sentence, and no other? The researcher does not think we can give any determinate answer to these questions. When an executive decides that a person's sentence is more than he deserves, he is acting with some discretion, in the same way that many other actors in the process have acted with discretion. When the executive makes this discretion, he may not be morally obligated to act in a certain way (to pardon or not to pardon); there may simply be no fact of the matter as to what the offender deserves in this case.

Indeed, the executive has a certain advantage in the process, because he comes at a later stage: he or she can see how the offender has responded to the punishment, whether conditions have changed so that the offender no longer deserves the original punishment, or has reformed him or herself.[97] No matter which overarching theory of punishment we believe in, the executive has more information about whether those purposes are being accomplished, or accomplished in a fair way. 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 the offender's competence or ability to choose at the time of trial seems to be a fallacy. Of course, new evidence can be found after a trial is concluded, which would also give obvious grounds, on retributive theory, for changing or removing the sentence. The Governor, the President or the Executive in such situations, say, can see if the punishment is still useful or just or deserved. There is still an enormous space for judgement here; and it is doubted there is a clear answer to the question of who deserves clemency and who does not. So even on Moore theory, there is room for saying that some pardons are permissible, and some are mandatory.

[97] Elizabeth Rapaport, Retribution and Redemption in the Operation of Executive Clemency, 74 CHI. KENT L. REV. 1501 (2000).

2.14 Instances of Misuse of Pardon Power

There are many instances of abuse of pardon power in the US, both at federal and states level. 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.[98]The move was nearly unprecedented in Mississippi,[99]although it was later upheld by the Mississippi Supreme Court against a procedural challenge.[100]*In re Hooker*,[101] the Court held,"We 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."There was ample evidence that Barbour had "played favorites" in handing out the pardons. Some of those pardoned had personal connections to the Governor through the controversial Mississippi's "trusty" program; "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.[102]It is stated that Barbour pardoned five people with life sentences – including four murderers – who had worked in the trusty program during his administration.[103]Others Barbour pardoned were "members of prominent Mississippi families, major Republican donors or others from the higher social strata of Mississippi life."[104] One individual pardoned was the cousin of football great Brett Favre, who had been convicted of killing a friend in a drinking-and-driving accident.[105]Taken as a whole, the pardons also showed a disturbing racial distribution. Nearly two-thirds of the pardons during Barbour's tenure were to whites, even though the majority of those convicted of crimes in Mississippi are black.[106]"Out of a total of 222 acts of clemency given by Barbour during his tenure ….two-thirds

[98]*Mississippi Governor Haley Barbour Pardons Nearly 200 People, Including Convicted Killers,* Crimesider (Jan. 11, 2012) ; Richard Fausset, *Outgoing Gov. Haley Barbour's Pardons Shock Mississippi*, L.A. TIMES (Jan. 12,2012).
[99]*Haley Barbour's Shocking Pardon Spree: A Guide*, THE WEEK (Jan. 13, 2012).
[100] Holbrook Mohr, *Haley Barbour Pardons: Mississippi Supreme Court Rules Pardons are valid,* HUFF. POST (Mar. 8, 2012).
[101] 87 So.3d 401 (Miss. 2012).
[102]Jessica Bakeman, Miss. Governor Ends Controversial Mansion Trusty Program, USA TODAY (Jan. 20, 2012).
[103] Rich Phillips, *Controversy Puts Mississippi's Longstanding "Trusty" Program in Spotlight*, CNN. COM (Jan. 18, 2012).
[104]Campbell Robertson & Stephanie Saul, List of Pardons included Many Tied to Power, *NY TIMES* A1 (Jan. 28, 2012).
[105]Judy Keen, Barbour's Pardons Stir Outrage in Mississippi,*USA TODAY* (Jan. 13, 2012).
[106]Patrik Jonsson, Haley Barbour Pardons: Why Were the Forgiven So Disproportionately White? *C. S. MONITOR* (Jan.21, 2012).

benefited white prisoners. Meanwhile, two-thirds of the state's prison population is black."[107]"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."[108]

In his public statements, Barbour gave only a vague theoretical justification for his mass pardons, saying that Christians believe people can be redeemed and deserve a second chance. Christianity teaches us forgiveness and second chances. 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."[109]He added that pardon board had recommended many, if not all, of those pardoned for executive clemency. "My decision about clemency was based upon the recommendation of the parole board in more than 90% of the cases."[110]Four of the trusties Barbour pardoned had been convicted of murder.[111]

Such dramatic exercises of the pardon power such as Barbour's raise deep and troubling questions, not only about the pardons taken individually, but also about the justifiability of the pardon power as a whole. When a Governor pardons (an individual or a large group), he or she is making an exception to the laws that apply to everybody.[112]Even pardons that look justifiable on their face, because the prisoner has suffered enough or because the governor deems a sentence against an individual to be too long or too harsh, violate the governor's duty to be an impartial administrator of the law.[113]Barbour's pardon also came at an inconvenient time: when there have been increasing calls for executives – including and perhaps especially the President[114]– to

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[107] Campbell Robertson & Stephanie Saul, List of Pardons included Many Tied to Power, *NY TIMES* A1 (Jan. 28, 2012)].
[108]*Ibid.*
[109]Haley Barbour, *Statement on Clemency* (Jan. 22, 2013).
[110]*Ibid*.
[111]Haley Barbour Pardons 4 Killers: Convicts Were Trusties at Governor's Mansion,*THE GRIO* (Jan, 10, 2012).
[112]Dan Markel, Against Mercy, 88 *MINN. L. REV*.1421, 1453 (2004)); Kathleen Moore, Pardons: *Justice, Mercy, And The Public Interest*, 28 (1997).
[113] Rachel E. Barkow, The Ascent of the Administrative State and the Demise of Mercy, 121 *Harvard L.Rev.* 1332 (2008) .
[114] Dafna Linzer, Obama Has Granted Clemency More Rarely Than Any Modern President,*ProPublica* (Nov. 2, 2012).

increase the number of pardons granted.[115]Clara H. Drinan's argument may cited for the time being who, for e.g., arguedfor greater use of pardon power;[116]Margaret Colgate Love also opined in support of same view saying that "Pardon 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."[117]Rachel E. Barkow also expressed favour in calling for a "return to an era in which clemency is a key part of a functioning system of justice". The pardon power has fallen in to disuse, perhaps in overreaction to certain manifestly political uses of the pardon, such as President Clinton's infamous pardon of Marc Rich.[118] But Barbour's pardons seem to show, in an elaborate and troubling fashion, how mass pardons can go very wrong and would seem to condone, if not justify, executive hesitancy, delay, and general over-caution in pardoning.[119]This is nothing more than political risks of pardoning.

This is only an example of abuse of pardon power in the US states. Instances in plenty are also available in this connection of abuse of pardon power by the US President.

2.15 Defending Pardoning Power

In spite of demerits and possibility of the abuses of executive pardoning powers, the popular trend leans in favour of forming sufficient grounds for executive pardoning power. The provision of pardoning power kept alive still in the Constitutions of world jurisdictions is not always bad; but has good virtues as well and well-founded in principles of modern welfare democracy. Hence, the Objective is to defend the pardoning power, especially against those who would find the power itself always and everywhere unjustifiable, while finding that there are and should be strong moral limits to when and how to, can be used. To see how the pardon power could be justified (and, as a result, individual instances of pardoning), we need to make a

[115] Clara H. Drinan, Clemency in a Time of Crisis,28 *GA.ST.U.L.REV*. 1123 (2012).
[116]Margaret Colgate Love, The Twilight of the Pardon Power,100 *J.of Crim.Law & Criminology*, 1169, (2010).
[117]Rachel E. Barkow, The Politics of Forgiveness: Reconceptualizing Clemency, 21 *FED.SENT.REP*. 153 (Feb. 2009).
[118]Jessica Reeves, The Marc Rich Case: A Primer,*TIME* (Feb. 13, 2001).
[119]Rachel E. Barkow, The Politics of Forgiveness: Reconceptualizing Clemency, 21 *FED.SENT.REP*. 157 (Feb. 2009).

distinction between ideal and non-ideal circumstances, a distinction, which may be borrowed and modified for our purpose from the work of John Rawls,[120]and one closely related to the idea of the "second best".[121] Lawrence Solum puts: "Despite its technical origins, the idea behind the second best is very general; sometimes the ideal solution to a problem [or "optimal policy option"] is infeasible. The best should not be the enemy of the good; so, when the first best policy option is unavailable, then normative legal theorists should consider second-best solutions."

Another thing, in Ideal or near ideal circumstances, as the concepts will be using, sentences are for the most part just, and the criminal justice system works by and large in a fair manner. In a perfectly ideal society, there would virtually no need for pardons. But in non-ideal circumstances, sentences tend to be overly long and harsh or cruel, and the criminal justice system is biased against certain groups. It seems fairly obvious that in America, i.e. the United States having the highest prison population in the world, with China a distant second,[122]and perhaps other parts of the world exist in non-ideal circumstances.[123]It appears, there is a crisis of mass incarceration in America.[124]In such a context, pardons can be justified as ways to more perfectly approximate what criminal justice would be like in ideal circumstances: by limiting unjust sentences, say, or by removing unjustified post-conviction disabilities. This, indeed, is how pardons are commonly justified in the literature.[125]And also, there lies the importance of pardon power as having a "safety valve" in system of mandatory punishments.

This, however, does not end the enquiry, but only begins it. For it leaves open the questions that there may be limitations on how the pardoning power can justly operate, even in non-ideal conditions. For even non-ideal theory operates under some constraints, constraints on *how far* we can relax certain moral absolutes so as to more perfectly approximate ideal justice.[126]John Rawls holds that "Existing institutions are

[120]John Rawls, *A Theory Of Justice* (1972).
[121]Lawrence Solum*, Second Best and Nonideal Theory* (May 17, 2005).
[122]Incarceration Rates by Country 2023; https://worldpopulationreview.com, retrieved on 28/06/2023.
[123] William J. Stuntz, *The Collapse Of American Criminal Justice* (2011) .
[124]Michelle Alexander, *The New Jim Crow: Mass Incarceration In The Age Of Colorblindness* (2010); Adam Gopnik, *The Caging of America*, NEW YORKER (jan.30, 2012).
[125] George Lardner & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases,* 1790- 1850, 16 FED. SENT. R. 212 (Feb. 1, 2004).
[126]John Rawls, *A Theory Of Justice*, 246(1972).

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". If pardons are applied in a reckless and morally arbitrary manner, this may be impermissible, even under non-ideal theory. This raises the interesting possibility that the way Haley Barbour pardoned in *general* is unjustifiable, even if some (or all) of his *individual* pardons were fully justified. It shows the possibility that not pardoning at all could be better in some cases than *pardoning in a discriminatory, biased, or random manner.*

In defending pardons, the researcher presents a theory that tries to provide a minimal account of the pardon power which should be unobjectionable, or nearly unobjectionable, to most scholars of the criminal law. Here the researcher does not mean to court controversy, and defends pardons on the narrowest of grounds, as necessary to secure justice in particular cases and not as grand acts of mercy. But in finding that pardons may be distributed in ways that are morally arbitrary, the researcher opens up a new avenue for criticizing pardons – as violations of equal treatment –one which has been previously underdeveloped in the literature. It might be that some have dealt with the problem of biased pardons, although they take a slightly different focus than the researcher does.[127]Elizabeth Rappaport, in this context, puts one independent view suggesting a possible positive role for biased pardons, based on a theory of "exemplary" pardons.[128]But Mark Strasser stresses upon possible Constitutional constraints on pardons based on gender or race. The researcher joins the chorus of voices that urge reform of the criminal law and criminal punishment, but show that there are good reasons to think that some reforms *even when motivated by a desire for justice* may themselves be morally problematic. We have already such evidences evident from above.

2.16 A theoretical Analysis of Barbour's pardons

In this context, the researcher examines a prominent theory of the pardoning power, that given by Karen Moore in her important book, *Pardons and in a related article*.[129]Moore defends a narrow view of pardons, which sees them as justified only

[127]Elizabeth Rappaport*, Staying Alive: Executive Clemency, Equal Protection and the Politics of Gender in Women's Capital Cases,* 4 BUFF.L.REV. 967 (2007).
[128]Mark Strasser, *The Limits of the Clemency Power*, 41 BRANDEIS L.J. 81, 117-124 (2002).
[129]Kathleen Dean Moore, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* (1989); Kathleen D. Moore, *Pardon for Good and Sufficient Reasons*, 27 U.RICH.L.REV. 281 (1993).

when they are necessary to correct an injustice in the administration of the criminal law. The researcher finds this view plausible and in the second, the researcher sympathetically presents it. The researcher also shows that, surprisingly, that under Moore's theory many, if not all, of Haley Barbour's pardons might have been justified.

The researcher also examines the possibility that even though many of Barbour's pardons might be able to be justified individually, there may nonetheless be something wrong with his pardons taken as a whole. Moore supports pardons as justifiable when done in the light of an injustice in an individual case, given that our criminal justice system as it exists is not fully just. But Haley Barbour's pardons show that even pardons that correct individual injustices in the *status quo* may still be, on one 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. This is the case, the researcher believes, with Haley Barbour's pardons, and possibly with the pardons in the second Bush administration.

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

The researcher also presents important qualifications to his thesis. Most importantly, it should be taken to promote the restrictive use of the pardon power. Rather the point is simply this: even if we should pardon more, there are, importantly, *better and worse ways of pardoning many people.*

Throughout the work, the researcher makes use of Barbour's pardons as exemplary of a problem with dispensing pardons on arbitrary or immoral grounds, where the pardons on a case by case basis may be justified, but when taken as a whole, a troubling pattern emerges. Recent research into the use of presidential pardons shows

them also to be made on an arbitrary or possibly discriminatory basis,[130]so the problem is not an isolated one. It shows a danger in the pardon power in general, and points to the pressing need to develop more elaborate standards for the proper use of that power. Almost a similar situation to that of Barbour's pardon we find in South Korea, a recent pardoning controversy where Choe Sang-Hun Wrote: "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".[131]

2.17 Defending a Theoretical Insight

The pardon power has long been controversial in itself, and not only the occasions of its use.[132]Dan Markel puts arguing against executive discretion to reduce or remove sentences on retributivist grounds.[133] Kathleen summarizing Kant's opposition to pardons, has given that rulers have a "categorical to punish those who have committed crimes". One influential understanding of when pardons are and are not justified given by Karen Moore in her book. 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 judgements based on whims or caprice or compassion rather than based on reasons.[134] Accordingly, a definition of mercy is put forward along these lines, "Mercy I define first as the remission of deserved punishment, in part or in whole, to criminal offenders on the basis of characteristics that evoke compassion or sympathy but that are morally unrelated to the offender's competence and ability to choose to engage in criminal conduct." Markel would more likely categorize Moore's defense of pardons as a defense of "equitable discretion."[135]

Moore defends pardoning, then, but she does not defend the pardon as an unfettered right of the executive to forgive crimes, a gift that falls on those the sovereign happens to favor (the traditional view which was arguably in the background

[130]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,* New York Times, Jan 15, 2013.
[131]The recent pardoning controversy in South Korea. Choe Sang-Hun, Departing South Korean Leader Creates Furor With Pardons, NY TIMES A 8 (Jan. 29, 2013).
[132]Dan Markel, Against Mercy, 88 MINN. L. REV. 1453 (2004).
[133]KATHLEEN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST, 28 (1997).
[134]Dan Markel, Against Mercy, 88 MINN. L. REV. 1436 (2004).
[135]*Ibid.,* at 1440.

of the Mississippi Supreme Court's ruling upholding Barbour's pardons 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.[136]It has been held, "The power to pardon …….is an act of the sovereign's mercy and grace."[137] Moore expressed, "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". Rather, the executive must pardon only for "good and sufficient reasons", reasons relating to the offender's culpability, and to the proportionality of the offender's punishment. A pardon cannot be given simply because the executive wants to give it.[138] It must be morally justified.

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

2.18 Problems with Pardons *En Masse*

The general thrust of Moore's view on pardons is that 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. Dan Markel makes a related argument about the values of the criminal justice system and of liberal democracy in justifying certain exercises of clemency. He limits his focus, however, to

[136] In re Hooker, at 141 (Pierce, J., dissenting).
[137] Kathleen D. Moore, Pardon for Good and Sufficient Reasons, 27 U. RICH. L. REV.282 (1993).
[138] *Ibid.*

the death penalty.[139]Insofar as an executive can pardon to correct those flaws, his pardon is justified. As we saw earlier, this means that there seems to be no *in principle* reason why all of Barbour's pardons might not have been justified, as a means of correcting morally flawed sentences. To see whether or not this was true, we would have to look at each pardon, taken one at a time.

There may, however, be 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. Let's first provide some cases, where intuitively, a group of pardons raise some moral questions. Then, after each case, let's try to explain why these moral questions might render some pardons as *a whole* unjustified, or at the very least problematic. Let's show that Barbour's pardons could be morally questionable in precisely these ways:

2.19 Discriminative Practice of Pardoning in USA

It is evident that in the United State of America and in some states, the pardons granted by the President or Governors are found to be influenced by discrimination exercised on unreasonable reasons or grounds on consideration of race, favoritism, or wrong reasons, etc. Accordingly, such pardons may be shown and classified as follows:

(a) Racist Pardons: These important aspects need little discussion mainly from the American point of view, though it has less implication in Indian context. A Governor in a Southern State (in America) decides to commute (technically, they are commutations, not pardons) the sentences of four murderers on death row to life in prison without the possibility of parole. He does this, he says, because he believes that the death penalty is deeply immoral and inconsistent with the rule of law; and we may presume that he is right about this. The death penalty is an unjustified and unjustifiable act of punishment, and so anytime the State does it, it is deeply in the wrong. So on Moore's account, pardons for those on death row would be pardons for good and sufficient reasons, for it is presumed that that preventing some form being given a deeply immoral punishment is (if anything is) a permissible reason for a pardon.

[139] Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty,* 40 HARV. C.R.- C.L. REV. 407 (2005).

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

Moreover (and this is the real problem), it turns out that the four he has decided to remove from death row are all of the same color. They are white, and the remaining non-pardoned death row inmates are black. Indeed, this seems to be the only obvious difference between those the Governor has pardoned and those he has not; no meaningful distinction can be manufactured from the different crimes the convicted murders have committed; all were grisly and gruesome, and all were convicted at roughly the same time. The Governor mumbles something about having no awareness of the race of those whom he pardoned. He said, "I just saw the names" 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.[140]But the fact is, the Governor's pardons were at best been selective and at worst implicitly racially motivated.

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

Does this render the pardon he has given illegitimate? The researcher believes there is a strong case that it would. The pardons while justified individually are on the whole distributed in a racially unfair way. Now, the question is whether it matters whether 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 anti-discrimination norm. Although the intuitions change if the governor had announced that the four black members of death row were to be pardoned, but not the eight white members. This shows that the norm operating might be anti-caste, and

[140] Patrik Jonsson, Haley Barbour Pardons: Why Were the Forgiven So Disproportionately White? C.S.MONITOR (Jan. 21, 2012).

not purely anti-discrimination. Pardons that are distributed in a racially discriminatory manner are not permissible, even if the pardons considered individually are justified by good and sufficient reasons. How we understand the force of this normis open to debate. We might wonder, for example, whether the norm is specifically an anti-racism norm, or one more tied to non-arbitrariness or respect more generally. But it is something like that norm exists, and underlies our intuitive reaction to the "all White" pardons scenario.

(b) Pardoning "Favorite" : Suppose we make this one, small change to the hypothetical: the people the Governor pardons are not all of the same race, but they do share something else in common: (a) they are friends of friends of the Governor, or (b) they have hired professional lobbyists to make their case to the Governor, (c) they are veterans of the Governor's "trusty" program, "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 successors or (d) they or their relatives are high-profile donors to the Governor's campaign. It has already been said that "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 successors.[141] Barbour pardoned five people with life sentences, including four murderers, who had worked in the trusty program during his administration.[142] Again, this seems to have been the case with many of Barbour's pardons.[143]Campbell Robertson and Stephanie Saul observed, "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";[144]Mississippi's pardon system, like those in other states, rewards applicants who have both the financial means and the connections to seek reprieves aggressively. So, on this hypothetical, instead of pardons that are based on race (or that happens to be given to members of the same race), we have selective pardons to those with connections of some sort or another to the Governor. Again, let us say that there

[141]Jessica Bakeman, *Miss. Governor Ends Controversial Mansion Trusty Program*, USA TODAY (Jan. 20, 2012).
[142]Rich Phillips, *Controversy Puts Mississippi's Longstanding "Trusty" Program in Spotlight,* CNN. COM (Jan. 18, 2012).
[143]Campbell Robertson & Stephanie Saul, List of Pardons Included Many Tied to Power, NY TIMES A1 (Jan. 28, 2012).
[144]Ibid.

are four people (out of twelve) who get pardoned, and all of them have this relevant feature. Once more, we are assuming that the death penalty is an immoral punishment, so that those four who *are* pardoned, have a good and sufficient reason *to* be pardoned.

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

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

Does it make better that the selective outcome of the lottery is random, rather than based on the racist or "favoritist" choices of the Governor? It is thought it makes them more acceptable, but still not acceptable all things considered. For while the norms against racial discrimination or favoritism is not violated, another norm is (of

which the norm against racial discrimination and favoritism may be instances): the norm against unequal treatment. The governor is not treating like cases alike; instead he is just choosing arbitrarily, based on nothing more than a random lottery. Those who do not win the lottery can complain that they have been unfairly treated, because there is nothing that makes their case different than those who have won.

The more ambivalent about this case, an ambivalence that was absent in the previous, is 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?

It is thought that they do, at least in the case of pardoning. For what the lottery system resembles is nothing so much as the old version of the sovereign's right to pardon: where the sovereign can decide how to pardon (for any reasonor for no reason at all) just because he is the sovereign, pardon power as exercise of the sovereign's power. 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, it may be concluded that pardons that are made on an arbitrary manner are problematic, even if those pardons taken one by one, can be justified by good and sufficient reasons. 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. They violate the norm against arbitrary treatment. 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.[145]

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 wrongness would be sufficient to outweigh the

[145]Stephen Nathanson, *Does It matter If the Death Penalty Is Arbitrarily Administered?*, 14 PHIL. & PUB. AFFAIRS, 153 (1985).

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

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

The death penalty is still, as we have been suggesting for the sake of argument, a deeply immoral penalty, so that it is never justified that someone be put to death for a crime they have committed. So, the pardons 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 in commuting the sentences. He says he is commuting their sentences because it is traditional to pardon members of the "trusty" program.[146]"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"[147]Barbour's past pardons of trusties were no less controversial or it could even be that the Governor says he's pardoning good and sufficient reasons (the immorality of the death penalty), but his real reason is because of the personal connections he has with the inmates. Moreover, unlike the previous

[146]Haley Barbour, *Why I Released 26 Prisoners,*WASH. POST (Jan. 18, 2012).
[147] Bob Herbert, *The Mississippi Pardons*, NY TIMES (Oct. 15, 2010).

three cases, the Governor has given all twelve of the death row inmates pardons, so that his treatment of them is not in any way "selective". To use Kant's helpful terminology, the Governor in this case is pardoning *according to duty,* but he is not pardoning *from the motive of duty*.[148]His pardons just happen to be coextensive with the pardons he ought to be giving.

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

So in short, we've eliminated the selectivity of the pardons, but reintroduced another problem, related to, but not quite the same as the problem of favoritism. The problem is that the reason why the Governor gave the pardons isn't the reasons he should have given. The researcher is 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 good and sufficient reasons for the –pardons, no other reasons will do.[149]It seems that the weakest form of wrongdoing that can be committed in a mass pardons case; it also seems that this type of wrong will usually not be unaccompanied by some actual favoritism that leaves some without pardons who deserve to be pardoned. That is to say, it will not usually be the case that the class

[148]The exposition of Kant in Barbara Herman, *On the Value of Acting from a Motive of Duty*, 90 PHIL. REVIEW 359 (1981).
[149] Micah Schwartzman, The Principle of Judicial Sincerity, 94 VA. L. REV. 1005-1008 (2008).

of those who deserve to be pardoned will always be coextensive with the class of those who are friends of the Governor.

It has been found that at the time of Barbour's pardons, there was widespread outrage.[150]Part of this, indeed probably most of it, was because of individual pardons, the murderers or the drunk drivers who were pardoned when the wounds from their crimes were not yet healed.[151]Yet many condemned the pardons as a whole, two-thirds of those Barbour pardoned were white, while two-thirds of the Mississippi prison population is black.[152]This at least gives the appearance that the anti-discrimination norm was being violated, if not intentionally, at least as a matter of discriminatory effects. Indeed, the pardons might have been part of a deeper, structural racism in the entire process of pardoning, from the recommendation by the parole board for pardons to the granting of the pardons themselves. So, even if Barbour did 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.[153]There might have also been the perception that the pardons were arbitrary, as because those who were pardoned were not treated equally, or one who did similar could survive and committed a similar crime was not, or a convicted criminal who was able to get the Governor's ear because he had a relative working for Barbour might have gotten a pardon, but one who had no connections to Barbour did not. Or still further, someone who could afford to hire an attorney to lobby Barbour got a pardon, but someone without money and an attorney does not. Pardons that are given on such an indiscriminate or random basis might be thought to be unfair, because they treated those who are similarly situated differently based on morally arbitrary factors.[154]The only deciding factor should be whether there were good and sufficient reasons for his or her pardon. In other words, the reason for the pardon should be the good and sufficient reason for the pardon, and not any other reason.

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[150]Judy Keen, *Barbour'sPardons Stir Outrage in Mississippi,* USA TODAY (Jan. 13, 2012.
[151]Julla Dahi, *8 of the Murderers Barbour Pardoned Killed Their Wives, Girlfriends,* CRIMESIDER (Jan. 13, 2012.
[152]Patrik Jonsson, *Haley Barbour Pardons: Why Were the Forgiven So Disproportionately White*? C. S. MONITOR (Jan.21, 2012).
[153]*Ibid*.
[154]Campbell Robertson & Stephanie Saul, *List of Pardons Included Many Tiedto Power*, NY TIMES A 1 (Jan. 28, 2012).

2.20 Recent Presidential Pardons in the U.S.

A recent searching report by the public interest group ProPublica has raised questions about presidential pardons, which reflect, on a smaller scale, the problems that were noted in relation to Barbour's pardons.[155] 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."[156]The study conducted by the authors was based on a random sample of five hundred people out of the nearly two thousand people who had requested pardons during the second Bush's presidency.[157]

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.[158] Yet they seem to reflect writ small what Barbour's pardons display writ large, viz., that when taken as a whole, pardons can be problematic in a way they are not when they are taken individually. The authors at ProPublica shows this point by a series of careful comparisons, between, say, a white woman who attempted to defraud the IRS of more than $25,000 who got a pardon, and an African-American beauty shop owner who was convicted of underreporting her income, who was not.[159] They also investigate, in detail, a case where a donation to a Congressman helped secure a last-minute pardon.[160] For e.g. pardon efforts of luxury car dealer Dale Critz Jr. helped by donations to Republican Representative Jack Kingston.

Those in the Bush administration expressed surprise at the result, and insisted that the process was "color-blind".[161] 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,[162] "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

[155] DAFNA LINZER & JENNIFER LAFLEUR, *PRESIDENTIAL PARDONS: SHADES OF MERCY* (2012).
[156]Ibid. at Loc.37.
[157]*Ibid.,* at Loc. 12.
[158]Ibid., at Loc.8.
[159]Ibid., at Loc. 50.
[160]Ibid., at Loc. 280ff.
[161]*Ibid*., at Loc. 92, 495.
[162]David Jackson, Obama Not a "Pardoning" Kind of President, USA TODAY (Nov. 2, 2012)]).

among any modern president[163], and was not necessarily their basis. There may also be problems of what are legitimate criteria for selecting people for pardons, a point of possible disagreement. The Bush administration's officials apparently took marriage as a key factor in signaling whether someone had been rehabilitated or not, as showing greater "stability".[164]But they also looked to more amorphous factors such as "attitude", something which might open the door to all sorts of bias, or might which give wiggle room to favor some over the others based on political pressure.[165]There was, in fact, one instance of obvious racial bias in the Bush's consideration of a pardon from a Nigerian minister.[166]

A final, notorious example might also be worth mentioning. In 2007, George W. Bush commuted the sentence of I. Lewis "Scooter" Libby, saving Libby from having to serve two and one half years for his role in leaking the identity of Central Intelligence Agent Valerie Plame.[167]In his remarks, defending the pardon, Bush said that a thirty-month prison sentence for Libby was "excessive".[168] Reportedly, Vice President Dick Chaney was furious that Bush did not give Libby a complete pardon (Libby was still on the hook for a $250,000 fine and remained a convicted felon).[169]Although many conservatives felt that Libby's fine was a miscarriage of justice (liberal disagreed), it seems clear that without Libby's close connection to the President and the Vice-President he would probably not have been even a candidate for a pardon. In short, whatever the *individual* merits of the Libby case, it certainly was a pardon based on favoritism.

And it seems fair to say that in many other cases, and not just in the Libby case, Bush's pardons were as problematic as Barbour's were. Even though they may have been granted, in most cases, for good and sufficient reasons, the *way* they were pardoned showed problems: problems of bias, or of favorable treatment, or of sheer

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[163]*Ibid.*
[164]LINZER & LAFLEUR, *PRESIDENTIAL PARDONS: SHADES OF MERCY*, at Loc. 105.
[165]*Ibid*., at Loc. 71.
[166]*Ibid.* at Loc. 215. See Allison Gender, *Furor over Bush Lawyer's Racism in Deportation Cases of Nigerian Minister*, NY DAILY NEWS (July 14, 2008).
[167]*Bush Commutes "Scooter" Libby's Pardon Sentence*, FOXNEWS.COM (July 7, 2007).
[168]Scott Shane and Neil A. Lewis, *Bush Commutes Libby's Sentence, Saying 30 Months "Is Excessive,"* NY TIMES (July 3, 2007).
[169]Thomas M. DeFrank, *Ex-VP Dick Cheney Outraged President Bush Didn't Grant "Scooter" Libby Full Pardon*, DAILY NEWS (Feb. 17, 2009).

arbitrariness. They show why a theory of pardons needs to regulate more than just individual pardoning, but the pardoning process as a whole, because sometimes why a pardon is wrong cannot be discovered in isolation, but only when compared to *other* instances of pardons granted or not granted.

2.21 A Move towards "Second-best" Theory of Pardon

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

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

But pardons can be second best in another way, too. They can be given out in ways that don't accord with our considered notions of fairness, or non-discrimination, or non-favoritism. The prevailing justifications of the pardoning power have focused too much on the way pardons can correct individual mistakes in the criminal justice system; but they have taken too little notice of the way in which pardons can *introduce* new kinds of injustices. So we have to be able to judge pardons along with both

individual and collective lines, and to explain how sometimes individual pardons can be unjustified for reasons that are unrelated to the justice of the particular case. This is what the researcher hopes, in introducing the distinction between ideal and non-ideal theory, to give us the tools to do.

It is usually desired to find a root and show how pardons are justified, but more importantly, also to give a theory on when they should be used. For this it is equally desirable to introduce two important constraints on the pardon power, one which constrains pardon when considered individually, and another which constrains pardons when we consider them as a whole. It is this latter ground that has been left mostly undeveloped in the literature, we seem to know that pardons when given *En Masse* can be controversial, but we lack adequate terms to explain why they might be morally problematic. It is, therefore, necessary to fill that gap in the literature, and in the process provides a general framework for analyzing when various "second-best" moves are permissible in reforming and correcting injustices in the application of the criminal law. Thus, as an important theory of pardons, there is, it is seemed, utility of having the "Second-best" theory in the criminal justice system.

2.22 Ideal and Non-Ideal Theory of Pardon

The idea of "ideal theory" was developed by John Rawls, in his now-classic *Theory of Justice.*[170]Rawls used the term to structure his political philosophy as a whole. What he was going to do, he said, was to sketch out his picture of an ideal society, a "realistic utopia",[171]"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", andas he would call it: a society which was, as much as it was possible for humans as they were, perfectly just. In doing so, he would make certain assumptions, one of which (the key one, actually) was that everyone would comply with the law."For 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".[172]

[170]Rawls*, A Theory of Justice, at 245-248.*
[171] Rawls, *The Law Of Peoples,* 128 (1999).
[172]Rawls*, ATheory Of Justice*, at 25.

If this is criterion (i.e., total compliance) is taken as the *sine qua non* of ideal theory, then there cannot be a full ideal theory of criminal justice.[173]If people obey the law, they will never be tried or punished, and so we will not need a complete understanding or description of the institutions of criminal justice. This explains, in part, Rawls's focus in his book on problems of distributive (and later, social) justice and his almost complete disregard of questions of crime and punishment.[174]Fortunately, however, we can find a use in Rawls's distinction between ideal and non-ideal theory.

We can still speak, almost in ordinary language terms, of *ideal theory* as that which comes close to embodying, or embodies, our idea of a perfectly just society. We can then speak of our society, in contrast, as a non-ideal one. The main point the researcher wants to borrow from Rawls is this: the rules that govern a non-ideal society will be different than those that govern the ideal society, because there may be some things we need to do to get to the ideal that may no longer be permissible once we live in the ideal society.[175] Rawls's book itself is short on examples, and here is no exception, but he gives some in this context. He considers the possibility that slavery or serfdom, given some economically distressed regimes, could be permissible *for a time*, until securing the basic liberties was economically feasible. He also proposes that certain restrictions on democracy could be justified as a matter of non-ideal theory.[176]Rawls means to apply these examples to cases of economically developing societies.

Rawls's first point in these examples is that in certain circumstances, ideal theory can't govern a society directly, because if it did, that society would never get to the ideal. We would starve before we got to the point of having a functioning constitutional democracy. In a way, non-ideal theory says that you can break the ideal rules. But Rawls also has a second point, which is this: *even when it departs from the ideal, non-ideal theory must aim at the ideal*. Non-ideal has to take ideal theory as its guide, because, after all, the point of breaking the rules is to get us closer to the ideal of

[173]*Ibid*., (putting "such topics as the theory of punishment" in non-ideal, or "partial compliance", theory).
[174]*Punishment and political Philosophy: The Case of John Rawls.*
[175]Rawls, *A Theory Of Justice,* at 279.
[176]*Ibid*.

the ideally just society. Ideal theory constrains non-ideal theory not absolutely, like strict rule, but more like a standard that the non-ideal society tries to approximate. [177]

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

There can be no general answer to this puzzle. The notion of "ideal theory" is at the end of the day a useful metaphor, to think about how to reform society for the better. Should we think mostly in terms of aiming towards an ideal society? Or should we think instead in terms of eliminating obvious injustices?[178] In the case of pardons, it seems 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 there are pardons that are done for morally arbitrary reasons, like race or favoritism: they show that there may be something wrong with a pardon, *even if that pardon in the individual case is done for good and sufficient reasons.*

2.23 Applying Non-Ideal Theory to Pardons

Let's now examine Barbour's pardons in the light of Non-Ideal theory of pardons. Barbour's pardons were not universally condemned. Some praised Barbour's conversion from a strict law-and-order man, to one who was capable of forgiveness, showing his Christian side.[179]Others, including the prominent civil rights lawyer John Payton, hailed Barbour's large number of pardons as (merely) putting a dent in mass

[177] Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).
[178]Amartya Sen is the most notable exponent of this position. See Sen, *THE IDEA OF JUSTICE* (2009).
[179]Molly M. Gill, *Why Did Governor Haley Barbour's Pardons Cause Such a Backlash?*HUFF. POST (Jan. 19, 2012).

incarceration. The main problem was that Barbour had not gone far enough. His pardons were only a drop in the bucket, Payton said.[180]

Payton's perspective is important, because it puts Barbour's pardons in the larger context of the injustice of America's criminal justice system as a whole. It is almost universally agreed that too many people are in prison, for too long, and for relatively minor offences. Recent declines in the prison population only serve to highlight how far we have to go. Moreover, the stigma and the harms of those offenses last well beyond their release from prison: they suffer hardships in receiving aid, getting jobs, and being able to vote.[181]Again, it is very probable that some if not all of Barbour's pardons were done for good and sufficient reasons. And again, most of the offenders were not ones that were just released from prison; rather they had been released for years, had reformed themselves, and were trying to get under the burden of a past conviction.

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

Then how could they be at the same time wrong? Here the researcher needs to step back and makes a larger point about progress towards a just society which is not limited to Barbour's pardons. Suppose that we lived in an ideally just society, where the criminal law was just and fairly administered. In this society, all or nearly all trials would result in the conviction of the guilty, and the guilty would be punished accordingly to their desert.[182]Beccaria held, "Clemency, which has often been deemed a sufficient substitute for every other virtue in sovereigns, should be excluded in a perfect legislation, where punishments are mild, and the proceedings in criminal cases regular and expeditious."] Still, we can imagine that there would be some mistakes in

[180]E.R.Shipp, *What's All The Fuss About In Missouri?* THE ROOT (Jan. 31, 2012).
[181]Zach Hoskins, "Hard times after hard time: Are ex-offender restrictions justified?".
[182]On this see, CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS*, A Chapter 37.

the administration of justice, where people slipped up, not necessarily intentionally, but as a matter of simple human error.

In this case, where the errors are relatively infrequent, we might see the importance of the pardon power as patching up some of the flaws in the system, in order to take a mostly or nearly just society closer to being a perfectly just society. Pardons are one way of doing this. Other places of discretion, in the hands of the police, the prosecutor, or the jury, could also work to "patch up" flaws.[183]Barkow viewed that "The 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".[184]Pardons and these other measures would be, as many have stated, necessary "safety valves" to the workings of the criminal justice system, to account for human fallibility. Note, however, that these would be entirely legalistic pardons, in Moore's use of the term. They would be pardons when human actors failed to follow (to the letter) the hypothetically just laws and punishments.

Now, suppose we live in a far from ideal society, where the many criminal laws themselves are irrational or unjust, where sentencing is on the whole too harsh, where mandatory minimums are the norm, and where the consequences of being imprisonment carry harms far past the date of release. In such a world, which the researcher takes it is very near (or identical) to *our* world, the use of "safety valves" would be especially important,[185]"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", and we might actively call for *greater* use of them, such as Paul Butler's case for greater jury nullification,[186] or pleas for governors to pardon everybody on death row.[187] What's more, the use of these would be in many cases amply justified as a way to mitigate, if not eliminate, much of the *legal* harshness of

[183] Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy,* 121 HARVARD L. REV. 1332 (2008).
[184] Ibid. at 1333n 5.
[185]Molly M. Gill, *Why Did Governor Haley Barbour's Pardons Cause Such a Backlash?* HUFF. POST (Jan 19, 2012).
[186]Paul Butler, *In Defense of Jury Nullification,* 31 LITIGATION 46 (2004).
[187] Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the abolition of the Death Penalty,* 40 HARV. C.R-C.L. REV. 407 (2005).

the criminal justice *status quo*. Barbour's pardons can certainly be seen as doing this, at least partly, even if it is only a drop in the bucket. It is probably true that in our society, as many have argued, the pardon power should be used more often and more aggressively than it is currently being used.[188]"Pardon 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".[189]

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

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

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

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[188] Clara H. Drinan, *Clemency in a Time of Crisis*, 28 GA. ST.U.L.REV. 1123 (2012); Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. OF CRIM. LAW & CRIMINOLOGY 1169, (2010).
[189]Rachel E. Barkow, *The Politics of Forgiveness: Re-conceptualizing Clemency*, 21 FED. SENT. REP. 153 (Feb. 2009)] Rachel E. Barkow (calling for a "return to an era in which clemency is a key part of a functioning system of justice").

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

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

There has been a growing chorus over the past decades that the pardon power has been used too sparingly by executives, especially the President. This chorus has practically grown to a roar over the number of pardons granted by Obama, one of the lowest of any President's term.[190]George W. Bush has also been criticized on this score. Given the present injustice of the status quo there are many, many pardons that not only *can* be made for good and sufficient reasons, but *ought to be made.*

[190]David Jackson, *Obama Not a "Pardoning" Kind of President*, USA TODAY (Nov. 2, 2012).

Thus, there are limits to the pardon power not only in the individual case, but when we consider (individually justified) pardons as a whole. This raised the possibility that an executive's pardon on-the whole might be morally unjustified. The answer to objections about problematic on-the whole pardons is an obvious one; it is not pardon at all, but to level up.[191]That is, instead of refusing to pardon because of fear of arbitrarily pardoning, one should, if anything, be more generous in granting pardons especially given the pervasive injustice in America's criminal justice system.[192]There are cases like Barbour's, where there *is* a question of whether the pardons can be justified *en masse*. We might even say that if Barbour leveled up this time around – pardoning not just trusties, but others on the pardon board's list – he had not leveled up *enough*. There were still more, similarly situated convicts who merited consideration for a pardon. So in his case, it is suggested, the arbitrariness, and possibly discriminatory nature of his pardons was enough to make all of this pardons problematic. He might have done many individual good acts, but there was something about the acts, taken together, that was morally questionable.

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

It has been seen that in America, over the years there have been many proposals from both practitioners and academics to remove the pardon power from the executive, or at least reduce it, and give the power to an independent board or commission.[193] The researcher is not sure this will happen, nor even sure that it necessarily should be. Because boards would mean greater delays in pardons, something which is not always good; boards might also mean fewer pardons, and more

[191]Chan Flanders, *Pardons and the Theory of the "Second Best"*, Legal Studies Research Paper Series, Saint Louis University School of Law, Forthcoming, Florida Law Review, p. 27 (2013).
[192] WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011) (CRISIS OF MASS INCARCERATION IN America); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); Adam Gopnik, *The Caging of America*, NEW YORKER (Jan. 13, 2012).
[193]Drinan, *Clemency in a Time of Crisis*, 28 GA. ST. U.L.REV. 1123 (2012).

bureaucratic delay, as there might be disagreement about who ought to be pardoned or who should be pardoned first. Executive power has always, historically, meant the power for quick action, whether for good or for bad. The researcher thinks pardoning is a place where quick action can often be desirable and necessary, and the best remedy. Some of the delay in recent pardons is due to too many layers of review, too much bureaucracy, too many hands in the pot.

Wherever the pardoning power resides, we need an important additional moral check on that power to be prescribed. The power should not be considered good or bad only in its individual instances, but also when we look at the pardons over time and as a whole. That is, we should look at patterns, not just at cases; because pardons can be wrong not just in individual instances, but also when we consider them in groups.

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

2.24 Problematic Pardon in the UK

The problems faced in the UK, are different in terms of pardons granted by the Kings than that of the USA. It was actually a long-struggled conflicts between the English Parliament and the Kings exercising pardon powers in regard to the excessive use of it. It seemed that on many occasions, members of Parliaments responded to the excessive use of the power with a series of petitions requesting the King to exercise his gift more prudently. From time to time, the British Parliament certain statutes to curtail the liberal clemency policy of the Crown, and one of such statute was the Statute of Northhampton which stated that "Whereas Offenders have been greatly encouraged, because the Charters of Pardon have been so easily granted in Times past, of Manslaughters, Robberies, Felonies and other Trespasses against the Peace: (2) it is ordained and Enacted, That such Charter shall not be granted, but only where the King

may do it by his Oath, that is to say, where a Man slayeth another in his own Defense, or by Misfortune"[194]

In the 1389 Act, Parliament tried to debase the King into a more prudent posture. The statute sought to remove from the purview of the clemency power pardons granted for "outrageous" crimes. With the unwilling support of Richard II, it was enacted that "no Charter of Pardon from henceforth shall be allowed before any Justice for Murder, or for the Death of a Man slain by Await, Assault, or Malice prepensed, Treason, or Rape …….., unless the same Murder, Death…….[etc.] ……be specified in the same Charter ……."[195] Parliament could not conceive that the King would ever pardon an offense by name that was attended by such aggravations,[196] but the check proved ineffective on an executive with power to dispense as well as power to pardon. Parliament soon realized the futility of the Act and in 1403 enacted a statute affixing a financial penalty on the intermediary.[197]

Parliament was equally unsuccessful when it attempted to control the use of the pardoning power through restrictions on the beneficiary of the executive gift. For example, a statute passed in 1336 mandated that the validity of a pardon would expire unless the grantee could find six main pardons within three months who would enter into bonds for his good behavior. This statute also was rendered defunct by the executive's dispensatory power.[198]The utility of these statutes and the efforts of the Parliament resulted in the growth and proper shaping of pardoning power in England.

In UK, the greatest constitutional crisis involving the executive power to pardon was occasioned by the impeachment of the Earl of Danby, Thomas Osborne, and Lord High Treasurer of England from 1673 to 1679. The resolution of the constitutional question raised by the Danby impeachment gave form to the pardoning power for almost three centuries.

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[194] 2 Edw, 3 c. 2 (1328).
[195] 13 Rich. 2, s. 2, c. 1 (1389).
[196] E. Coke, The Third Part of The Institutes of the Laws of England, 236 (London, 1747).
[197] 5 Hen. 4, c. 2 (1403).
[198] William F. Duker, The President's Power to Pardon: A Constitutional History, *William & Mary Law Review*, 485, Vol. 18, Issue 3 (1976-1977).

The resolve to impeachment Danby of high treason and other high crimes and misdemeanors was taken by the Commons on December 20, 1678.[199] The impetus for the impeachment proceedings was the revelation of a letter from Danby to Montague, the English minister at the Court of Versailles, written only five days after passage of an appropriation Act to raise supplies for conducting a war with France, empowering Montague to make an offer of neutrality between France and Holland for a price of 600,000 livres.[200] Danby's actions were only ministerial. Charles II appeared before the House of Lords March 22, 1679 and testified to Danby's innocence by informing the Lords that the letter to Montague had been written at his direction.

The word of Charles II was tainted. The underlying reason for the impeachment was no doubt the suspected pro-French, pro-papist proclivities of the king and his entourage. But only the pre-judiciously blind members of Parliament could have believed that Danby was pro-papist, though many rightly suspected Charles, and even more feared that James was so inclined.[201] Because the King was beyond reach, Joseph Chitty has observed that 'the law supposes it impossible that the King himself can act unlawfully or improperly. It cannot distrust him whom it has invested with supreme power: and visits on his advisors and ministers the punishment due to the illegal measures of government'.[202] However, Parliament settled for the apologist of the prerogative and the skillful manager of finance. Members of Parliament were not to be persuaded by the argument that Danby was acting merely as a faithful servant. Englishmen had long come to detest Danby for blindly following the commands of a King whose policies were incongruent with the notion of 'constitutional balance'. In this connection, Sir Robert Howard wrote: "If obedience is the excuse of all ill acts, it ceases to be a good duty." Sir Philip Warwick noted: "If the Prince' own counsels cast what is settled into danger, or make it to be obtained by extremities (though not illegalities) upon his own subjects, a good man would rather make his retreat and die obscurely than see His Majesty and his country run a great risk."[203]

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[199] W. Cobbett, Parliamentary History of England, 1067-69, (London, 1806).
[200] A. Browning, *Thomas Osborn, First Earl of Danby and Duke of Leeds*: 1632- 1712, 324-25 (1951).
[201] A. Browning, *Thomas Osborn, First Earl of Danby and Duke of Leeds: 1632-1712*, 324-25 (1951).
[202] J. Chitty, *A Treatise on the Law of the Prerogative of the Crown and the Relative Duties of the Subjects*, 5 (1820).
[203] Reprinted in C. Roberts, *The Growth of Responsible Government in Stuart England*, 223 (1966).

On the same day Charles admitted ordering Danby to send the letter, he informed the Lords that he had issued Danby a royal pardon. The pardon, Browning suggests, was the King's contribution to the resolution of a difficult problem. Charles was aware that hearing into Danby's conduct would produce numerous disclosures regarding the bribes he was receiving from the French.[204] The Pardon itself was issued in an unusual manner. It was kept secret, for it was doubtful whether the normal chain of ministers would have concurred in its issuance. All preliminary offices were by-passed. When the king summoned Lord Chancellor Finch to affix the Great Seal to the pardon, Finch refused and the king commanded Finch's secretary to do so. At the debates that followed, Sir Harbottle Grimstone suggested that because of the irregular manner in which the pardon was obtained, it was null and void.[205] Sir Thomas Clarges insisted that the law did not permit the king to do any ministerial act: thus the pardon was invalid. Mr. Vaughn remarks that during the debates, several moved that the pardon should not be attacked on the basis of irregularity, but rather on the illegality of any pardon that attempted to frustrate an impeachment. The scope of the prerogative of mercy became crucial: Could an impeachment be prevented by a pardon?

The members of Parliament who believed that the power of impeachment was a means to establish a better government were ready to force the constitutional confrontation. For them, impeachment had become the method whereby the most powerful aides of the Crown were brought to their knees before the Lords. Mr. Bennett remarked that if Danby were unpunished, 'it will always be thus, whilst after an Impeachment of High Treason, any man should go at large. It was for the safety of the King and the Nation, that a Minister be afraid of this House."[206] Sir Thomas Clarges feared that because those about the king "had his ear and represented things to him", then "not two or ten could protect the king" if such men intercept the king's grace.[207] Sir Francis Winnington continued the argument and added that "if such great men exorbitances with pardon, it takes away *culpa* as well as *pena*. There's an end of all Justice among men if such Pardons are allowed."[208] Colonel Titus, following the theme of equal justice, predicted that if the Danby pardon were pleaded to the House of

[204]Z. Chapee, Three Human Rights in the Constitution of 1787, 130-31 (1956).
[205]7 A. Grey, Debates of the House of Commons, 176 (London, 1763).
[206]A. Grey, Debates of the House of Commons, 20 (London, 1763).
[207]*Ibid*., at 23.
[208]*Ibid*., at 134.

Commons and made valid, "ours will be like the *Athenian* Laws, to catch flies, while wasps and hornets break out."[209] In response to an appeal from the king, Mr. Booth observed: "The King has told us, that it is usual for him to pardon his servants when he discharges them, etc. If it would be the custom, it is an ill one, and the worst that it can be."[210] Indeed, it was common during the reign of Charles II for a statesman to take out a pardon upon his departure from office. All of the members of the 'Cabal' had done so before meeting with Parliament in 1673. Moreover, others feared that pardons would silence all testimony and thus suppress the truth of any plot.[211] Parliament presumed that a sovereign would benefit by a complete investigation; if the evidence supported the charge against his heretofore trusted servant, the king would abandon him. One member suggested that this use of the king's mercy was a violation of his duty to be merciful to his people.[212] Others feared the precedent such a pardon would establish.[213]

It was suggested that the pardon was contrary to abstract concepts of justice, however, would not stop the pardon. The Commons had to find something illegal about it to preserve the constitutional integrity of the House and the concept of accountability before that body. Sir John Knight thought that the pardon was pleaded at the wrong time. Knight argued that "when a man comes to be tried, then is his proper time to plead his Pardon. This man must come to be tried, to show the world, how ill a minister he has been to the king"[214] To this Mr. Sterne commented: "We have spent much time in talking of the Treasurer's Pardon. Everyone knows the king's power of pardoning is unlimited; in cases of appeal only accepted; but if you will have a Bill to restrain the power in them, that may prevent it for the future."[215] But there were members of Parliament who thought the future too far off, and Danby had many enemies. According to Barillon, Charles would have surrendered the power to pardon, in principle, if thereby he could prevent Danby's trial. Barillon wrote: "The King agrees to a law by which those impeached in the future may have no pardon, if only

[209] *Ibid*., at 135.
[210] *Ibid*., at 21.
[211] *Ibid*., at 24 (remarks of Mr. Harbord).
[212] *Ibid*., at 30.
[213] *Ibid.,* at 136 (remarks of Mr. Sacheverrell).
[214] *Ibid*., at 21.
[215] *Ibid*., at 24.

Danby's is allowed."[216] Parliament finally agreed that the strongest position to take was based on the lack of precedent for such a pardon, and thus concluded that a pardon would be no bar to impeachment,[217] "We find no Precedent, that ever any Pardon was granted to any Person impeached by the Commons of High Treason, or other High Crime, depending the Impeachment."

Prior to Danby impeachment, the King's prerogative of mercy always had been known to be absolute, as by definition, prerogative was the king's "power to do all things which were not expressly forbidden him by law……."[218] Although Parliaments had tried often to restrain the power, they always had failed. No act on the statute books limited the royal attribute of mercy in cases of impeachment. The issue of pardon in bar of impeachment, however, had been debated twice before in the Parliament. In 1348, Parliament investigated fraudulent merchants and requested that no pardon be granted to them.[219] This is the first time the word "impeachment" is found on the Rolls of Parliament. At that time, and at the time of the Danby pardon, impeachments were considered indictments for offenses against the king.[220] In 1376, the following entry appeared on the Rolls of Parliament: Likewise the Commons petitions our said Lord the King, that no Pardon be granted to any person, great or small, who have sat on his Council and sworn an oath, and who are seized by this present Parliament of life or member of money or of real estate, of confiscation of Lands, possessions, Goods, or Cattles, and who are or will be found in any breach of their allegiance and the keeping of their said oaths; but let them be duly punished according to their deserts: Nor will they ever be Counselors or Officers of the King, but completely removed from the King's Court and from the Council forever. And concerning this, let a Statute be made in the present Parliament, if it please the King and of all others in similar cases in the future; for the profit of the King and his Realm. Advocates, such as John Trevot,[221] is of the position that no act could be found that might limit pardons in cases of impeachment were ignored.

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[216]C. Roberts, *The Growth of Responsible Government in Stuart England*, 235 (1966).
[217]9 H.C.Jour, 606.
[218]G. B. Adams, *Constitutional History of England*, 78 (1921).
[219]1 Rotuli Parliamentorum, 438.
[220] C. Hill, *The Century of Revolution 1603-1714*, 60-66 (1961).
[221]A. Grey, Debates of the House of Commons, 136 (London, 1763).

The Lords were much less excited by the pardon.[222] Whereas the Commons on May 9, 1679, had voted not to allow Danby's lawyers to argue the validity of the pardon,[223] The Commons resolved that no commoner should consider the pardon valid, and that any "person so doing shall be accounted betrayers of the Liberties of the Commons of England." But the Lords ordered the debate. Thus, Danby's attorneys were placed in the precarious position of either violating the will of the Commons or acting contrary to the order of the Lords. Roberts suggests four reasons for the more liberal attitude on the part of the Lords: a sense of their responsibility as judges of the highest court of the land, a reverence for the high estate of the king, a distrust for popular causes, and a belief that they might someday be appointed ministers of the king, and thus might also need his royal mercy.[224] Infuriated by the attitude of the Lords, the Commons passed a series of resolutions to give effect to their own position. For example, they voted that a joint committee rather a committee of the upper House should arrange Danby's trial and that the Bishops, who had a stronger attachment to the Crown, should not participate in the vote on the legality of the pardon, because the issue tangentially affected "life or limb". However, almost two-thirds of the Lords voted to allow the Bishops to participate.[225]

This was not the first time the two Houses had clashed over the Danby pardon.The Lords attempted an alternative solution to the constitutional crisis by voting a bill of banishment. The Commons were unwilling to let Danby off so readily, and voted that Danby surrender himself. The issue was resolved in favour of the lower House.

The Lords were forced to acknowledge "that Banishment [was] …..not the legal judgement in any case whatsoever." However, they saw "no reason why the Legislative Authority should always be bound to act to the utmost Extent of their Power" and they offered to assure that Danby's pardon could not be used as precedent

[222] L.O.Pike, *A Constitutional History of the House of Lords 223-34* (!894).
[223]9 H.C. Jour. 614-18. See also 13 H.L. Jour. 555-56.
[224]Reprinted in C. Roberts, *The Growth of Responsible Government in Stuart England*, 220-21 (1966).
[225]*Ibid*., at 221.

for future cases of the kind.[226] The Commons had the strongest legal position in the battle, but before a clear victor could be declared, Charles prorogued Parliament. Although Charles did not wish to lose a trusted and effective servant, Danby was not worth another civil war. The unlimited power of pardon was at stake, not the life or death of Danby. Danby was to spend five years in the Tower, untried, with a full pardon. The impeachment was never resumed.[227]

2.25 Summing up

It has been found that the countries' constitutional schemes of pardoning powers of the executives may be studied directly taking the impacts of positive law in jurisprudential sense, imposed directly from above, by the fundamental law of the countries, to be observed by their citizens. The constitutional parameters set the limits, and divide the powers between the organs. There is nothing more to do in it, if we simply and literally commit to follow them as right. But if we proceed beyond the political philosophy as wise man views, go deep into the doctrine and theories with proper highlight on our traditional practice, thinking of an ideal State where people could live a life with personal liberty, dignity, security and protection, an image of just criminal justice system can't be erased totally; and in that case we have enough to do for it for ensuring what we desire to have and establish harmoniously in our criminal justice system, so that no one is deprived from getting proper justice in the society or punished harsh, if not deserved, or in other words, is innocent, but suffered for not being able to prove himself innocence.

In that sense, it would be unjust on our part if we only study the constitutional provisions, and remain static; rather it seems to be appropriate to study the concept of pardoning powers of the executive with a theoretical base and models based on historically evolutionary growth since the concept originated with a particular philosophy of corrective criminal jurisprudence, may it be reformative, rehabilitative or retributive, as a sub-way to the judicial process. This is the one of the reasons, why the researcher has tried to deviate a little from a simple study of pardoning powers

[226] 13 H.L. Jour. 505.
[227] Danby was bailed in February, 1684.

exercised by the executives worldwide. Many times, we have seen some problematic pardons occurred in those countries we referred most as ideal to follow.

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