Reviving the Benign Prerogative of Pardoning

by Margaret Colgate Love

Pardon is a mysterious, alien presence that hovers outside the legal system. It is capable of undoing years of criminal investigation and prosecution at the stroke of a pen, but it is of questionable present-day relevance even for criminal law practitioners. Pardon is like a lightning strike or a winning lottery ticket, associated with end-of-term scandals and holiday gift giving. It is capricious, unaccountable, inaccessible to ordinary people, easily corrupted, and regarded with deep suspicion by politicians and the public alike. To the extent that scholars think about it, pardon is regarded as a constitutional anomaly, not part of the checks-and-balances package, a remnant of tribal kingship tucked into Article II that has no respectable role in a democracy. One of pardon's few friends in the academy, Daniel T. Kobil, has called it "a living fossil."

Unkindest cut of all, pardon is not taken very seriously as an instrument of government. Even President Clinton's final pardons now are recalled more as an embarrassing lapse of judgment than as a genuine abuse of power. His successor's pardoning has been meager and meaningless. A lot of state governors don't use their pardon power at all. Indeed, it appears that the only two incumbent chief executives who approach their pardoning responsibilities with any amount of proper respect are Governor Robert Ehrlich of Maryland and President Josiah Bartlet of *The West Wing*.

I managed the Justice Department's pardon program for a number of years, and since leaving government I have represented pardon applicants and written about the power. While I am no "originalist," I often wonder how the Framers, and Hamilton in particular, would view the state of pardoning in America in the early twenty-first century. Maybe they would agree that we have so far perfected the legal system, it is now fully capable of delivering a just result in every case, and we no longer need pardons to point out general shortcomings in the law or to correct its specific mistakes. Maybe they could be persuaded by the modern notion that making exceptions to the rules undermines the values of uniformity, predictability, and fairness that stabilize the criminal justice system. Maybe they would understand that it is simply too risky for a chief executive to deliver a general message of forgiveness in the form of specific endorsements of people who, after all, are convicted criminals. Maybe they would agree that prosecutors are better suited to dispense the government's mercy through the exercise of their discretion.

But somehow I doubt it.

The irony of it all is that, fossil or no, pardon is still assigned a surprisingly important part in the justice system of almost every U.S. jurisdiction. Condemned criminals are directed to the pardon process when the law mandates a punishment that judge and jury consider too harsh, or when courts have no authority to consider changed circumstances. Prisoners must seek executive clemency if they want to go home to care for orphaned children, or to die. People who have completed their sentences must apply for pardons if they want to be hired for many jobs or qualify for many benefits, and sometimes even if they want to vote. I recently surveyed pardoning practices throughout the United States and found that 42 states and the federal government make pardon the exclusive remedy for most criminal offenders seeking to mitigate the collateral penalties and disqualifications that flow from a criminal conviction. *See* M.C. Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide (Hein 2006)*, available in part at www.sentencingproject.org/rights-restoration.cfm.

Yet it probably will come as no surprise that in most jurisdictions, very few pardons or sentence commutations are granted. In most jurisdictions, average persons cannot expect

Margaret Colgate Love practices law in Washington, D.C.

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to get a pardon no matter how minor their offense, how sincere their remorse, and how exemplary their rehabilitation. Pardons are granted on more than a token basis in only 13 states and are a realistically available remedy in only about half of those. A recent investigative series in the *New York Times* documents the connection between the growing population of lifers in U.S. prisons and the waning role of executive clemency. *See* Adam Liptak, "To More Inmates, Life Term Means Dying Behind Bars," *N.Y. Times*, Oct. 2, 2005, at A1.

Federal pardoning has gradually dried up since the Carter administration, a process of decline that was hastened by the orgy of irregular grants with which President Clinton capped his eight years in office. President Bush's pardoning record has been anemic to say the least: As of January 2006 he had granted only 69 pardons and two commutations while denying many hundreds of applications of both kinds. Hundreds of applications are still pending in the Justice Department, some left over from the Clinton administration.

Surely pardoning should rank among the happiest of sovereign duties—though it can also be among the most difficult when a life is at stake or public opinion is inflamed. And there is a compelling present need for pardon because the criminal justice system has never been more harsh and unforgiving. Aggressive prosecution strategies and mandatory sentencing have filled our prisons to the bursting point and tagged more than 13 million of our fellow citizens with lingering collateral disabilities and the stigma of a criminal record. Evidently Justice Anthony Kennedy thought so when he called on the American Bar Association in August of 2003 to "consider a recommendation to reinvigorate the pardon process at the state and federal levels"—and evidently so did the ABA House of Delegates when it urged states and the federal government the following year to "expand the use of executive clemency."

If pardoning is so gratifying to the giver and so necessary to the system, why is there so little of it going on? Why do governors and presidents act as if they no longer have the same freedom to pardon that their predecessors had? How can we make them understand that, if pardoning was unacceptably dangerous a few years ago, it is now safe to go back in the water? To get the answers, we need to look at the history and practice of pardoning in the United States.

Hamilton's Vision

In 74 The Federalist (1778), Alexander Hamilton described the constitutional pardon power as a "benign prerogative" by which the president could dispense "the mercy of the government." Hamilton perceived pardons as having two distinct functions, both very public and useful. The first was a justice-dispensing function made necessary by the harsh statutory punishments of the time: "[W]ithout an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel." In his address to the North Carolina Ratifying Convention, James Iredell, another Framer, agreed: "It is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice."

The second function of the pardon power, as Hamilton saw it, was more purely political, although it was equally public and useful to the executive. Pardon might, for example, play a role in domestic upheavals or emergencies: "[I]n seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth, and which, if suffered to pass unimproved, it may never be possible afterwards to recall." Iredell also mentioned pardon's usefulness in time of "civil war" and added that it could be used to obtain the testimony of accomplices and to protect spies.

In describing pardon as "prerogative," Hamilton no doubt understood that term in the Lockean sense of "doing public good without a rule." Congress would enact rules of punishment, but the decision about when to make exceptions to the rules would be entirely the president's free choice, an act of grace. In support of the Framers' decision to make the president exclusively responsible, without advice from the other branches of government or power of revision, Hamilton remarked that "the sense of responsibility is always strongest in proportion as it is undivided." Iredell added that the president would be restrained in his pardoning by fear of "the damnation of his fame to all future ages." (As it turned out, Iredell's prognostication proved correct for more than 200 years, until the end of the Clinton presidency.)

The first state constitutions all included pardon provisions, though most showed little confidence in the governor's ability to go it alone. Several states required the governor to obtain consent of an executive council, others gave the legislature power to regulate the power "in the manner of its exercise," and three states (Connecticut, Georgia and Rhode Island) kept the pardon power in the legislature. Every state admitted to the Union in later years made some provision for pardoning, though the constitutional arrangements for who or what would exercise the power, and under what sort of limitation, varied. Every state agreed that there should be a pardon power somewhere and, presumably, that it should do something useful.

From the earliest days of the Republic, federal pardons served both justice-dispensing and political functions, much as the Framers had envisioned. In 1795, President Washington granted an unconditional pardon to many of the participants in the Pennsylvania Whiskey Rebellion. A few years later, John Adams pardoned everyone involved in Fries' Rebellion, in order to serve "the public good." After the Republican victory in the election of 1800, President Jefferson set free those still in prison under the Alien and Sedition Act, which had been used by the Federalists to silence their political opponents. During the War of 1812, Madison pardoned army deserters on condition that they return to their units, as well as the Barataria pirates as a reward for their assistance in the defense of the City of New Orleans.

At the same time, the first presidents began a regular practice, which would continue for almost two hundred years, of pardoning and commuting prison sentences of ordinary people. In the early years of the Republic, presidents sometimes were approached by federal judges who were frustrated by the severity of the penalties the law required them to impose. Between 1790 and 1850, judges regularly asked the president to delay an execution, free a prisoner, reduce a fine, grant immunity from prosecution, reward cooperation, return forfeited property, and restore an individual's civil

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rights. Judging from the handwritten comments jotted in the margins of archival pardon documents, the early presidents felt pretty comfortable—even casual—about their pardoning responsibilities. The pardon power also was used in a variety of ways to aid law enforcement, as Iredell had predicted. Pulitzer prize-winning reporter George Lardner Jr. has unearthed a goldmine of information about early pardoning practices. *See* Lardner & Love, "Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790-1850," 16 *Fed. Sent. Rep.* 212-21 (Feb. 2004).

Before the federal parole system was formally established in the 1920s, the president commuted several hundred prison sentences each year, and even afterward, the number of commutations remained surprisingly high. With the rise of the rehabilitative ideal in the twentieth century, post-sentence pardons grew in popularity as a way for the president to recognize and encourage offenders who had served their sentences and returned to a productive life in their communities. Between 1932 and 1980, more than 100 of these kinds of pardons were granted almost every year, and in some years the president signed more than 300 separate pardon warrants. While there were from time to time colorful and controversial grants—like those to Marcus Garvey, Eugene Debs, Tokyo Rose, George Steinbrenner, Patty Hearst, and Marvin Mandel—the vast majority of pardons went unnoticed and unremarked.

Throughout most of the nineteenth century, the secretary of state was responsible for administering the federal pardon power, sharing this role after 1854 with the attorney general. In 1893, the president gave the attorney general exclusive responsibility for administering the power and making recommendations in all pardon cases, reinforcing the idea that pardoning was an integral part of the criminal justice system. But no standards for considering applications were articulated, and after 1934, no reasons were given for the president's grants. The system, however, was perceived as generally fair and accessible, scandals were rare, and a substantial percentage of the people who asked for a pardon went away happy. Justice Department records reveal that not much more was required of an applicant than that he have a clear record and a few friends to vouch for him. The percentage of pardon petitions acted on favorably approached or exceeded 30 percent in every administration from Franklin Roosevelt's to Jimmy Carter's.

The history of pardoning at the state level has not been equally well documented. In colonial charters the governor's pardon power tended to be regulated by the legislature, and many of the first state constitutions reflected this somewhat more cautious approach to executive power. From time to time over the years, administrative arrangements were modified, sometimes in response to a scandal. Many state constitutions now allow the legislature to regulate the power and provide for a regular accounting from the governor. In some states, the governor's pardon power is dependent upon his receiving a recommendation from a board of appointed officials. In others, the governor has been cut out of the pardon process entirely and the pardon power placed in an independent appointed board. But existing records indicate that pardons, whatever the arrangements for their administration, played as important an operational role in most state justice systems as they did in the federal one until quite recently.

Between 1980 and 2005, Hamilton's "benign prerogative" gradually faded from the American justice scene, as executive decision makers became increasingly uncomfortable with acting in criminal matters outside the parameters of a rule-based system. Jimmy Carter was the last president to pardon frequently and generously. Although both Presidents Reagan and George H. W. Bush maintained a semblance of administrative regularity in their pardoning practices, the war on crime depressed production. During the Clinton administration, federal pardoning fell into a serious slump and then imploded. George W. Bush has kept the power under wraps.

In the states, available records confirm a pattern of generous pardoning by most governors until about 1990, and a precipitous trend downward in most states thereafter; the numbers hit bottom about the turn of the century. While pardons and commutations are still granted in a handful of states, notably those whose constitutions give the pardon decision maker some protection from the political process, pardon for the most part has ceased to play an operational role in the American justice system.

Jimmy Carter was the last president to pardon frequently and generously.

The decline in pardoning that began around 1980 can be attributed to three influences:

- **The theory of just deserts,**
- **The politics of crime, and**
- **The hostility of prosecutors.**

In different ways, each discouraged the exercise of the pardon power. In combination, they constituted a perfect storm that overwhelmed the administrative process that historically had protected the pardoner, and ended pardoning in most jurisdictions.

Just deserts theory. Until about 1980, the philosophical underpinning for the exercise of the pardon power was Hamilton's simple notion of official prerogative, or doing public good without a rule. If in practice pardon grants sometimes resembled lightning strikes or lottery tickets, at least in theory they were supposed to be "a determination by the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed." *Biddle v. Perovich,* 274 U.S. 480, 486 (1927). Prerogative was as comfortable a part of the harsh mandatory punishments of the early nineteenth century as it was of the indeterminate rehabilitative sentencing systems that came later. Parole grew out of pardon, though it never entirely replaced it.

But the retributivist philosophers never liked the idea of pardon, regarding it as an unprincipled and unnecessary interference with the law's enlightened process. Writing at the same time the Framers were deciding to include pardon among the president's powers, Kant was particularly hostile, calling pardon "the most slippery of all the rights of the sovereign, by which he can demonstrate the splendor of his majesty and yet thereby wreak injustice to a high degree." Because by Kant's hypothesis the legal system always pro-

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duced a just result, pardons necessarily produced an unjust—and therefore unjustifiable—one. The nineteenth century utilitarians were equally opposed to giving the executive power to pardon, arguing that the laws themselves ought to incorporate the criteria for pardoning. As Cesare Beccaria put it, "Clemency is a virtue which belongs to the legislator, and not to the executor of the laws, a virtue which ought to shine in the code, and not in private judgment." Indeterminate sentencing reflected Beccaria's optimistic view of the law's ability to temper justice with mercy.

In the second half of the twentieth century, the "new retributivism," with its theory of punishment as "just deserts," gradually supplanted the rehabilitative ideal in American penal theory. Indeterminate sentencing was also discredited as providing too many opportunities for discretionary departures from the norm by judges and parole boards, thereby sacrificing safety, efficiency, and fairness. The architects of determinate sentencing believed that all three of these values would be better served by a rule-based system in which discretion—particularly judicial discretion—was strictly limited. In theory and practice, there would be no need for pardon in this new system because the punishment provided by law would, by definition, be just.

A few retributivist thinkers recognized that one-size sentencing did not and could not fit all cases, and they attempted to find a place for pardon to individualize sentences. They also recognized that there should be a way to make mid-course corrections in exceptional cases. They insisted, however, that a pardon ought to be "an act of justice rather than an act of mercy," and that it was proper only if it was "deserved." Philosopher Kathleen Dean Moore proposed that pardons, like punishment, have to be "justified by reasons having to do with what is just." *Pardons: Justice, Mercy, and the Public Interest* 91 (1989). This reasoning went so far as to suggest that if a pardon was justified at all, it was in most cases *required*, since a pardon was justifiable only if punishment was undeserved and therefore unwarranted. Even the Supreme Court seemed to subscribe to this idea of pardon as a means of arriving at just deserts, calling it a "safety valve" necessary to remedy "miscarriages of justice." *Herrera v. Collins*, 506 U.S. 390, 412 (1993). Pardon would be admitted grudgingly into the company of determinate sentences, but only on the condition that it agreed to play by the same rules. Pardon must be harnessed to accomplish a person's just desert, justified in terms of legal mistake or procedural default. The Hamiltonian idea of pardon as prerogative was at the same time quaint and threatening.

In practice, the triumph of the retributivist theory of pardon meant that governors and presidents could comfortably justify a refusal to grant clemency simply by pointing to the fact that the person had had a fair trial and received a legal sentence. Alternatively, they could justify a failure to act on grounds that it would not be "fair" to single out one person for special favor. Terry Sanford, governor of North Carolina in the early 1960s, called the clemency decision "a lonely one," requiring the governor to "blend mercy with justice as best he can, involving human as well as legal considerations, in the light of all circumstances after the passage of time, but before justice is allowed to overrun mercy in the name of the power of the state." There would be no such hand-wringing for the next generation of governors.

The politics of crime. In the early 1980s, coincident with the demise of indeterminate sentencing and the rehabilitative ideal, the politics of crime increased the perceived risks of pardoning in America. Political strategists and others began to suggest for the first time that an administration's pardons might detract from the message sent by its tough prosecutive policies. The "war" on crime required universal conscription and a united front. The Willie Horton episode that doomed Massachusetts Governor Michael Dukakis's bid for the presidency in 1988 brought home just how dangerous it could be to make a mistake in pardoning. Somehow Dukakis allowed himself to be held personally responsible for a released prisoner's murderous rampage, even though Horton had been furloughed by prison officials and not by action of the governor. The Horton episode was replicated in Pennsylvania in 1992, when Lieutenant Governor Mark Singel's gubernatorial hopes were extinguished by his vote as a member of the state clemency board to release a man who killed again. Although politicians always had known that pardoning was unlikely to win many votes, they now appreciated that pardoning could ruin a political career.

One-size sentencing did not and could not fit all cases.

The retributivist view of pardon was perfectly attuned to this political environment and justified the imposition of tough new standards of desert on pardon applicants. Even people who had long since served their court-imposed sentences and were looking merely for a restoration of their rights had to demonstrate their "merit" for a gesture of forgiveness. As one high official in the Justice Department explained: "It's not enough that someone convicted does not commit another offense and is gainfully employed . . . There has to be extraordinary conduct after conviction that shows they contributed to the community in a unique or significant fashion [and] have gone the extra mile over what an ordinary citizen may do." Larry Margasak, "Any Pardons Would Come After Election Day, Observers Say," Assoc. Press, Jan. 18, 1988. Once freely bestowed, pardon now had to be earned. Presumably, there would be no more pardons for people in trailers.

The hostility of prosecutors. Finally, the negative influence of prosecutors tended to depress the level of pardoning. In most jurisdictions, prosecutors traditionally had been accorded a formal role in the pardon process. Until the 1980s, however, pardon was not viewed as inconsistent with the prosecutorial agenda. What prosecutors sought in the war on crime was control over the process from start to finish, which led them to support limits on the role of trial judges and politicians in deciding who should be convicted and how they should be punished. The goal of the retributivist sentencing reformers was to tip the balance in the system toward rules and away from discretion; the goal of the prosecutors was to pay lip service to rules and exercise the discretion themselves, through plea bargaining and manipulation of mandatory sentencing guidelines. It was to the prosecutors' advantage in gaining control of the process, at least in the

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beginning, to encourage an increased role for victims and to position themselves as advocates for victims rather than for the public at large. In the heat of battle, they would brook no interference in the form of discretionary leniency, unless of course it was their own.

The federal pardon process came under the dominant influence of prosecutors almost by accident, after President Carter's attorney general Griffin Bell delegated responsibility for making pardon recommendations to subordinate officials within the Justice Department whose duties were exclusively concerned with law enforcement. This facilitated the absorption of pardon into the department's larger crime control agenda during the crime war of the 1980s. During the Reagan administration, a succession of former prosecutors (Rudy Giuliani, Lowell Jensen, Stephen Trott, Frank Keating) was responsible for making clemency recommendations. During the senior Bush administration, prosecutors in the field were given the whip hand in deciding whether a case would be recommended favorably to the president. By the time President Clinton entered office in 1993, the pardon program at the Justice Department had lost whatever independence and integrity it once enjoyed, functioning primarily to ratify the results achieved by prosecutors, not to provide any real possibility of revising them. Pardoning was no longer taken seriously at the department, except in the rare case where it might correct a prosecutor's mistake. President Clinton himself displayed no interest in pardoning throughout most of his tenure, and senior political officials at the Justice Department took their cue from his apparent indifference.

I have written elsewhere about the breakdown of the federal pardon process that precipitated the final Clinton pardons. *See* "The Pardon Paradox: Lessons from Clinton's Last Pardons," 32 *Capital L. Rev.* 185 (2002). Suffice it to say here that these pardons might never have happened if the attorney general had been a better steward of her advisory responsibilities, and if federal prosecutors had been forced to relax their tight grip on the flow of pardon recommendations. As it was, in its weakened condition, federal pardoning was ready for the coup de grâce.

Some may doubt the relevance of pardon to a modern-day justice system. But not since the nineteenth century has pardon played as important a role for those who make and apply the law, as well as for those convicted of breaking it. No one should be fooled into thinking otherwise by the fact that governors grant so few of them. The advent of rule-based determinate sentencing has severely limited the government's ability to take into account extraordinary facts or circumstances in particular cases, whether they arise at sentencing or midway through imprisonment. The proliferation of collateral penalties and easy access to criminal history information have made it more difficult for offenders to put their pasts behind them. Without pardon, the overwhelming majority of people convicted of a crime in America have no hope of ever being able to fully discharge their debt to society.

Pardon serves the justice system not only as a safety valve and sign of official forgiveness but also as an instrument of law reform. In the nineteenth century, pardon pointed the way for the development of administrative mitigation mechanisms like parole, furlough, and compassionate release; legal defenses like insanity, duress, and self-defense; and individualized sentencing rather than the one-size-fits-all mandatory sentences of the early nineteenth century. At the same time, pardon is rarely appropriate for large-scale application except in the context of an amnesty, and it cannot serve as a permanent substitute for law reform. As Daniel Freed and Stephen Chanenson wrote: "While presidents may wish to use systemic pardons or exemplary commutations to prompt debate or to motivate a recalcitrant Congress, they ought not invoke the power to turn the presidency into a legislature of one." "Pardon Power and Sentencing Policy," 13 *Fed. Sent. Rep.* 119-24 (Jan.-Feb. 2001).

One recent example of pardon's performing a "motivating" function comes from Maryland. In spring 2005, after Governor Ehrlich granted early release to three prisoners serving 25-year mandatory minimum terms for daytime housebreaking, under an ill-advised three-strikes law that has since been repealed, the Maryland legislature made other similarly situated prisoners eligible for parole consideration.

Pardon also is an important policy and management tool for those who have the power to bestow it. Pardon allows the president or governor to check the other branches of government and provides a bird's-eye perspective of how the jurisdiction's criminal justice system is being administered. It can be used to send a message to other executive officials—including prosecutors—about how they should exercise their discretion. Pardon can be used for reasons of state, or to satisfy a particular political constituency. In such cases it is useful to have in place an active pardoning program that produces lots of unremarkable garden-variety grants, if only to avoid the glare of publicity.

Finally, pardon can send good news about the justice system to the public. The chief executive's personal intervention in a case reassures the public that the legal system is capable of just and moral application. It permits correction of legal errors that, for one reason or another, escaped correction by the courts, and it provides equitable accommodation where a sentence has been imposed according to the strict requirements of the law but nonetheless seems unfair. At the other end of the clemency spectrum, post-sentence pardons provide an opportunity to emphasize the rehabilitative goals of the justice system by recognizing criminal justice success stories.

The less the pardon power is used, the harder it becomes to use it. When the power is neglected, public confidence in it may be so undermined as to make it constructively unavailable to serve the benign purposes that the Framers envisioned. In this way, failure to exercise the power may have the same consequence as abusive exercise.

Before pardon can be restored to a useful role in the justice system, it is necessary to address directly the influences that have discouraged pardoning in recent years. Specifically, we must do the following:

- Assess the validity of the theory that ties pardoning closely to the operation of the legal system and insists that pardon operate only as a corrective and not as a free act of grace.

One important reason why governors and presidents do not feel free to exercise their pardon power is that they misunderstand it. They have been persuaded that pardon is supposed to correct mistakes made by the legal system and

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deliver what an individual actually deserves. It follows that the pardoner should act as a court of last resort and apply quasi-judicial rules of decision. If pardon's role is to compensate for failings in the legal system, it follows that there is no place for pardon if the legal system works as intended.

Now substitute the idea that pardon operates in opposition to a rule-based system, not in service to it. When Hamilton spoke of a person's "unfortunate guilt," he assumed that the legal system had operated perfectly correctly and fairly but had produced an unacceptable result. He would allow the president the prerogative to extend public mercy to that person—not because the law had malfunctioned, and not because the person somehow "deserved" it, but because, in his judgment, the law had exacted too high a price in the circumstances. That judgment, which has both moral and political dimensions, is entrusted to the president under the Constitution and to the governors and clemency boards of the states. Philosopher Austin Sarat suggests, in a new study of capital clemency, that seeing mercy as public "helps us to live with the continuing and unresolvable tension between rules and exceptions, between the rule of law's insistence on subjecting power to rule and the confrontation with a power that cannot be subject to rule."

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When pardon is conceptualized as mercy as opposed to justice, it doesn't have to be distributed fairly. Philosopher Jeffrie Murphy has proposed that public mercy, as a collective exercise of mercy by the community as a whole through its chief executive, is not constrained by principles of fairness in the same way that justice is, because it is entirely voluntary and because it has a political dimension. For example, mercy is "more likely to be needed by the poor and weak than by the rich and powerful." And there also is a pragmatic reason why mercy should not be constrained by any obligation to be evenhanded. As Murphy notes: "[I]f rational persons thought that once having shown mercy they would be stuck with making a regular practice of it, they might be inclined never to show it at all." "Mercy and Legal Justice," *in* Jeffrie Murphy & Jean Hampton, *Forgiveness and Mercy* 180-83. Decision makers are sometimes reluctant to pardon because they fear that similarly situated individuals will all lay justifiable claim to the same benefit. Fear no more.

- Prepare the public to welcome and support serious and sensible efforts to encourage criminal offenders to remain law-abiding, including pardoning them when they are successful.

Pardoning dropped out of a chief executive's job description because free-form public mercy seemed inconsistent with the public mood and with legislative sentencing strategies guiding the war on crime in the 1980s and 1990s. It is time now to take the temperature of the community to determine whether we are prepared to revisit prosecution and sentencing policies that have resulted in a 600 percent increase in our prison population in the past 25 years. A number of states have begun to recognize that it is wiser not to send some people to prison in the first place, and to be willing to make midcourse corrections in some draconian sentences and support policies facilitating reentry and reintegration of criminal offenders. The press is beginning to ride the wave of this change: Florida's Governor Jeb Bush has been criticized for the sluggish and ungenerous operation of his state's clemency program, while Maryland Governor Robert Ehrlich and Virginia Governor Mark Warren have been applauded on the editorial page of the *Washington Post* for being "willing to assume some political risk in order to show mercy." Perhaps the public is ready to appreciate a chief executive who knows that pardoning is a necessary and important part of the job, and who will act on that knowledge. If the will to pardon is present, it is relatively easy to demonstrate, by contemporary examples from states and snapshots from past federal pardoning, that the pardoner can protect himself by careful administration of the power.

- Challenge prosecutors to regard pardon as a useful tool in the law enforcement arsenal, rather than as a sign of weak resolve or loss of control.

Prosecutors tend to oppose pardons reflexively, without appreciating the many ways in which pardon can advance a law enforcement agenda. Rehabilitation of a criminal offender, recognized with a post-sentence pardon, can indicate good news about the successful operation of the justice system and add to a prosecutor's credibility in the community. Commutations can advance goals of consistency and fairness embedded in the sentencing laws themselves. Particularly where prison sentences are very long, intervening changes in the public's view of what is just, as well as changes in a particular prisoner's circumstances, may lead a prosecutor to decide to support—or at least not to oppose—a grant of clemency.

To illustrate this point, David Zlotnick analyzed five commutations issued by President Clinton well before the end of his term, four of which were recommended favorably by the U.S. Attorney in the relevant district. In each, Zlotnick found a specific reason why a prosecutor might support a grant of clemency: One grant went to reward cooperation with the government that could not be recognized by the sentencing court for jurisdictional reasons; another was intended to "even out the worst injustices created by the cooperation lottery"; a third corrected severe intra-case disparity; a fourth gave retroactive effect to a change in the law. The final grant went to a woman convicted of a minor role in a conspiracy, who had demonstrated extraordinary accomplishments during the 15 years she had already spent in prison and whose clemency petition was strongly supported by the sentencing judge. Prosecutors might be encouraged to view a favorable pardon recommendation as another manifestation of prosecutorial discretion, one that presents the opportunity of doing what Zlotnick calls "hindsight justice." David M. Zlotnick, "Federal Prosecutors and the Clemency Power," 13 *Fed. Sent. Rep.* 168 (Jan-Feb. 2001).

- Ensure that the system for administering the pardon

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power is perceived by the public as accessible, reliable, and accountable.

The federal pardon power operated as freely as it did for so many years because the system for its administration was perceived to be generally reliable and accessible. For many years, the fact that the attorney general personally advised on all pardon cases reassured both the president and the public. When the Justice Department's advisory system stopped reflecting the views of the attorney general as political counselor and instead reflected the tough-on-crime agenda of the law enforcement establishment, it ceased to serve the president well. This had disastrous results at the end of the Clinton administration, when the department's clemency program essentially collapsed and the president resorted to using his own inexperienced staff in his race to match President Reagan's pardoning record. Under Clinton's successor, White House control of pardoning has evidently taken the form of cherry-picking unremarkable cases a few at a time from among hundreds of applications recommended by the Justice Department. It is unclear what will happen to the enormous backlog of pardon cases that likely will be left undecided toward the end of President Bush's term. Most likely, the next president will want to rethink and rebuild the entire federal pardon process.

In the states, the pardon power appears to operate best in jurisdictions where its administration is open and accountable. In a small number of states, the pardon process is structured to maximize its independence from politics and prosecutors, and routine pardoning has continued unabated during the crime war. Alabama, Connecticut, Georgia, Idaho, and South Carolina all have independent boards that conduct a regular clemency business. Pennsylvania, Oklahoma, Delaware, and Nebraska have appointed boards that make binding pardon recommendations to the governor, a process of regular vetting that evidently encourages a degree of gubernatorial freedom in pardoning. Arkansas has a tradition of pardoning that has survived despite a process that is less than entirely protective of the governor. In Maryland, a Republican governor is making an effort to revive the pardon power, but without either a reliable administrative procedure or established tradition of pardoning in the state, his efforts remain at a token level.

What can these "laboratories of democracy" teach us about how the pardon power might be set free once again to play a helpful role in the justice system? Each of them seems to have managed to neutralize to some degree the adverse influences of theory and politics discussed above. It appears to help to have a formal administrative structure that is shielded from politics and not connected to the law enforcement establishment. On the other hand, it is not clear that any of these jurisdictions has worked out a coherent theory of what role pardon is supposed to play in a justice system in the twenty-first century. For example, all of the independent clemency boards are responsible for paroles as well as pardons, suggesting some blurring of the distinction between the two forms of relief.

Kant and Beccaria believed that a just system of laws has no need for pardon. The problem is that no system produces perfect justice in all cases, and there always will be the exception to the rule that calls out for an exceptional response. The less mercy "shines in the code," the more the need for "private judgment" operating outside the law.

After 20 years, it is apparent that very little mercy shines in determinate sentencing codes. Rather than eliminating discretion, legislators simply have shifted it to the prosecutor's office, where it operates under the table to produce new forms of unfairness and disparity. It is also apparent that determinate sentencing has not fulfilled its architects' hopes for increased efficiency, and there is disagreement about the extent to which it has reduced crime. No one seems happy about the role that victims now play in deciding an offender's fate.

It would seem that we have reached a time when pardon can once again become part of the conversation about law reform, to signal the executive's priorities at a time when reform is clearly on the horizon. The public mood is changing as it wakes up to the downstream effects of our 20-year prison binge. Pardon is an ideal tool to let the chief get out in front of the wave.

As lawyers, we can help restore public confidence in the pardon process by taking pardon seriously ourselves. One of the ABA's Justice Kennedy Commission recommendations, adopted by the House of Delegates in August 2004, was that the ABA urge state bars to establish programs to encourage and train lawyers to assist convicted persons, including prisoners, to apply for pardon, restoration of rights, and sentence commutation. Most clemency cases are neither time-consuming nor technically difficult. If every lawyer reading this magazine agreed to help one person seeking a pardon, or one prison inmate seeking early release, the revitalization of the pardon power that Justice Kennedy hoped for would become a reality. □

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