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REFLECTIONS ON THE ATROPHYING PARDON POWER

PAUL ROSENZWEIG*

Today more than 2.2 million Americans sit in jails and prisons across the nation.¹ More than 200,000 of them are under the care of the Federal Bureau of Prisons (the remainder being remanded to the custody of state and local authorities).² As a percentage of the population, that number is greater than that of any other Western nation and rivals the degree to which citizens are imprisoned in China and Russia, authoritarian regimes to which Americans are not used to being compared (and whose official incarceration rates may understate the actual numbers).³

To be sure, a significant majority of those currently in prison deserve to be where they are under any conception of justice. Nobody doubts that murderers, rapists, and robbers are rightly subject to punishment and imprisonment in any society of ordered liberty. But at some level these figures serve to confirm what we already instinctively know: that America is in the throes of a bout of overcriminalization, reflecting our instinct to make a case (and often a federal case) out of every transgression of societal norms.

It was not always so. The growth in criminal law today reflects a divergence from its treatment early in our republic and under the traditional common law rules of Anglo-American culture. We have, for example,

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¹ LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATION IN THE UNITED STATES, 2010 (2011).

² *Id.* Of this 2.2 million, some 750,000 are held in local jails, many of which involve pretrial or juvenile detention. Over 7 million people, or more than 3% of the U.S. population, are under some form of correctional supervision (including probation and parole).

³ See ROY WALMSLEY, KING'S COLLEGE LONDON, WORLD POPULATION LIST 3-5 (6th ed. 2005). A good general source for current and historical data on incarceration in America is WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011).

diluted the traditional requirement that criminal acts require criminal intent.⁴ We have expanded concepts of civil liability and wrongdoing into the criminal sphere, such that those who cause an injury that traditionally would require compensation are now jailed.⁵ We have seen the federalization of criminal laws formerly thought of as the proper domain of the state's police power.⁶ We have diverged from the Founders' conception of the separation of powers, allowing the devolution of unchecked authority to unelected prosecutors without the oversight of the other branches of government.⁷ And with the growth in mandatory and lengthy sentences, we have seen an explosive growth in the old-age prisoner population.⁸

This short essay explores yet another way in which criminal justice today no longer resembles a justice system that the Founders would recognize: the atrophying of the executive's pardon power. For much of our history, the President used his pardon power to correct wrongs, forgive transgressors, and temper justice with mercy.⁹ Governors, likewise, used their power to prevent the perpetuations of injustice.¹⁰ Today, those instincts have died, buried under a legacy of prosecutorial zeal and a fear of adverse political criticism.¹¹ And that's a shame, for the pardon power,

⁴ Paul Rosenzweig, *The History of Criminal Law*, in ONE NATION UNDER ARREST 127, 139–43 (Paul Rosenzweig & Brian W. Walsh eds., 2010).

⁵ A classic example of the criminalization of formerly civil offenses was *United States v. Park*, 421 U.S. 658 (1975), which imposed criminal liability on the manager of a food-storage warehouse company for maintaining unsanitary conditions.

⁶ One example of this phenomenon, subject to the limitation of the Commerce Clause power, was Congress's effort to make all violence against women a federal offense. See *United States v. Morrison*, 529 U.S. 598 (2000).

⁷ BRIAN W. WALSH & BENJAMIN P. KEANE, HERITAGE FOUND., LEGAL MEMORANDUM NO. 64: OVERCRIMINALIZATION AND THE CONSTITUTION (Apr. 13, 2011), available at http://thf_media.s3.amazonaws.com/2011/pdf/lm64.pdf.

⁸ Between 2007 and 2010 the number of sentenced state and federal prisoners age sixty-five or older increased by 63%, while the overall population of sentenced prisoners grew only 0.7% in the same period. There are now 26,200 prisoners age sixty-five or older. See *Old Behind Bars*, HUMAN RIGHTS WATCH (Jan. 27, 2012), <http://www.hrw.org/reports/2012/01/27/old-behind-bars>.

⁹ Margaret C. Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1169 (2010) ("For most of our nation's history, the president's constitutional pardon power has been used with generosity and regularity to correct systemic injustices and to advance the executive's policy goals.").

¹⁰ Joanna M. Huang, *Correcting Mandatory Injustice: Judicial Recommendation of Executive Clemency*, 60 DUKE L.J. 131, 133 (2010) ("Executive clemency[']s . . . flexible and broad nature allows the president and state governors to pardon or commute sentences at will, including those sentenced during the mandatory-injustice period.").

¹¹ A recent example is the decision of Mississippi Governor Haley Barbour to pardon more than 200 individuals during his last days in office—a decision which generated a firestorm of criticism. See *infra* notes 83–85 and accompanying text.

properly understood, is one of the great bulwarks of individual liberty. It is, in effect, the personification of the government acting as a check on the institutions of the government. Leaders today would do well to remember the value of the pardon power and restore it to its former prominence.

I. PARDONS AND JUSTICE—A FOUNDER’S CONCEPTION

I begin, appropriately enough, at the beginning—with the conception of the pardon power in the first days of the American republic. To be sure, this inquiry may have some normative import. For many in today’s academy and judiciary, the originalist interpretation of law at the time of the founding is an important guide to the interpretation of texts from that era.¹² But it is not my intention here to make that strong a claim. Indeed, inasmuch as the Constitution makes only brief mention of the pardon power (and virtually no mention of the substantive criminal law to which the power is inextricably linked),¹³ a Founder’s conception of the pardon might appear somewhat less than controlling of its contemporary interpretation.

Thus, I advance the far more modest claim that how the American legal system and its Founders treated the pardon authority is (and ought to be) relevant to policymakers and jurists alike who are charged with developing and interpreting contemporary American criminal statutes. For example, if we were to conclude, at a minimum, that the founding generation was skeptical of the exercise of pardon authority, then we might approve of our current practice of limiting clemency. Conversely, if we were to conclude that the exercise of the pardon authority was thought to be linked to the severity of the punishment to be imposed, we might develop a greater skepticism of, say, the movement towards felony punishment for simple negligence offenses.

My conclusions from reviewing the history are relatively straightforward. At the time the Constitution was framed, the pardon was conceived of as having a dual purpose—both as a political means of ameliorating dissent,¹⁴ broadly understood, and as a moral expression of

¹² See 6 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW* § 23.5(b) (4th ed. 2008); see also Raoul Berger, *Originalist Theories of Constitutional Interpretation*, 73 *CORNELL L. REV.* 350, 350–51 (1988); Mitchell N. Berman, *Originalism is Bunk*, 84 *N.Y.U. L. REV.* 1, 19 (2009) (describing the originalist belief as one in which “the original understanding of the constitutional text *always trumps* any contrary understanding of that text in succeeding generations”) (citation omitted); Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 *HASTINGS L.J.* 707, 711 (2011).

¹³ U.S. CONST. art. II, § 2, cl. 1.

¹⁴ See Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 *N.Y.U. REV. L. & SOC. CHANGE* 43, 50 (1998) (“[T]he Framers, themselves steeped in the tradition of English law, were in substantial agreement about the need for an executive pardoning power and favored its adoption. . . .

just deserts.¹⁵ There was, in the Founders' conception, a link between criminal liability and some form of moral blameworthiness—a link that led to mitigation of punishment where criminal intent was lacking.¹⁶

That link between pardons and intent can be inferred from the contemporaneous materials from this era. It can be seen in the writings of some of the Founders—Jefferson and Wilson, most clearly. It can be inferred, with moderate force, from the acts of the First Congress in defining federal crimes and, more significantly, in providing for the mitigation of penalties where intent was deemed lacking.¹⁷

Naturally, none of this is dispositive. My assessment, however, is that the connection between crime and moral blame was far more predominant and influential at the founding than it is today. It would have been unusual for punishment to be directed at acts where the alleged criminal acted with diminished intent.¹⁸ Today, by contrast, we are in the midst of a near orgy of creating crimes with either no criminal intent requirement or diminished intent requirements.¹⁹ Given the Founders' focus on the need for intentionality in criminal acts, it appears that the pardon authority historically was much more widely and commonly deployed in earlier times to mitigate the punishment of those lacking criminal intent than it is today.

The presidential power to pardon is granted under Article II, Section 2 of the Constitution: “The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of

[A]n executive pardon would allow the President to heal the country in times of civil unrest, thereby protecting national security.”).

¹⁵ See Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 BRANDEIS L.J. 85, 89 (2002) (“[P]ardons may be issued when justice would otherwise not be served either because the sentence was too harsh or because the person was wrongly convicted.”).

¹⁶ See *infra* Part III.

¹⁷ See *infra* Part III.

¹⁸ Indeed, it was likely not until the mid-1800s (some seventy-five years after the American Revolution) that the first instance of a criminal prosecution without any criminal intent can be identified—prior to that time all common law crimes required proof of some form of mens rea. See Ann Hopkins, Comment, *Mens Rea and the Right to Trial by Jury*, 76 CALIF. L. REV. 391, 397 (1988). An early example is *Regina v. Stephens*, [1866] 1 Q.B. 702 (Eng.), where the bed-ridden eighty-year-old owner of a granite quarry had given management of the quarry to his children. Contrary to his direct orders (and those of his sons), workers at the quarry deposited rubbish in the River Tivy, thereby creating a nuisance. The owner, Stephens, was deemed strictly liable and convicted of the criminal offense.

¹⁹ See, e.g., BRIAN W. WALSH & TIFFANY M. JOSLYN, HERITAGE FOUND. & NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW (Apr. 2010), available at https://s3.amazonaws.com/thf_media/2010/pdf/WithoutIntent_lo-res.pdf.

Impeachment.”²⁰ The text does not provide any standard for the presidential exercise of the power. For all it appears, the power can be exercised for any reason or no reason at all.²¹ And substantively there is only one limitation: that impeached officeholders can’t be pardoned.

Why such a broad and unfettered pardon power? It was considered essential for both normative reasons of justice and utilitarian reasons of power.

First, the pardon power coincided with the Founders’ conception of justice. As Alexander Hamilton put it in Federalist No. 74:

The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. As the sense of responsibility is always strongest in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives, which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations, which were calculated to shelter a fit object of its vengeance. The reflection that the fate of a fellow creature depended on his *sole fiat*, would naturally inspire scrupulousness and caution: The dread of being accused of weakness or connivance, would beget equal circumspection, though of a different kind.²²

Thus, Hamilton concluded: “Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed.”²³

Hamilton was not alone in his view that the pardon power’s purpose is to temper justice with mercy. Chief Justice John Marshall said much the same thing: “A pardon is an act of grace, 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.”²⁴

But pardons were also seen as playing a practical role in public policy. Here is Hamilton on the use of pardons as a critical component of reconciliation: “In seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or

²⁰ U.S. CONST. art. II, § 2, cl 1.

²¹ Indeed, even Bill Clinton’s infamous pardon of donor Marc Rich did not violate the Constitution. To be sure, it was contrary to every understanding of good governance (the selling of justice has been anathema at least since the Magna Carta). See MAGNA CARTA ch. 40 (1215) (“To none will we sell, to none will we deny, to none will we delay right or justice”). But no constitutional barrier to the exercise is apparent. See Albert W. Alschuler, *Bill Clinton’s Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131, 1168 (2010).

²² THE FEDERALIST NO. 74 (Alexander Hamilton).

²³ *Id.*

²⁴ *United States v. Wilson*, 32 U.S. 150, 160 (1833).

rebels may restore the tranquility of the commonwealth.”²⁵ Likewise, James Wilson argued during the Constitutional Convention that a “pardon before conviction might be necessary in order to obtain the testimony of accomplices.”²⁶ For public policy reasons, as much as anything else, President Washington granted amnesty to those who participated in the Whiskey Rebellion,²⁷ and Lincoln and Johnson did the same for Confederate soldiers who fought in the Civil War.²⁸ Indeed, this aspect of the pardon was relatively recently used when Ford pardoned President Nixon and Carter granted amnesty to Vietnam-era draft evaders.²⁹

These conceptions of mercy and utility distinguished the Founders’ understanding of the pardon power from the pre-Revolutionary pardon power exercised by the king of England. In England, the power to pardon was part of the king’s royal prerogative and, indeed, likely dated back to the time of the Norman invasion.³⁰ The Parliament tried, unsuccessfully, to limit the king’s pardon power (which was often granted in exchange for money or military service). Finally, in the Act of Settlement in 1701, the Parliament managed to preclude the king from pardoning officials

²⁵ THE FEDERALIST NO. 74 (Alexander Hamilton).

²⁶ *Madison Debates August 27*, YALE LAW SCH., http://avalon.law.yale.edu/18th_century/debates_827.asp (last visited Feb. 27, 2012). The practice that has arisen regarding the compulsion of testimony under a grant of immunity (e.g. 18 U.S.C. § 6002 (2006)) makes this particular ground for the pardon power a historical curiosity.

²⁷ Jonathan T. Menitove, Note, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, 3 HARV. L. & POL’Y REV. 447, 452 (2009) (“[T]he President’s ability to pardon federal offenders swiftly has helped to heal the nation and serve the public interest. George Washington used the first presidential pardon in 1795 when he granted amnesty to participants in the Whiskey Rebellion.”).

²⁸ *Id.* (“Perhaps the best known examples of the presidential pardon being employed to restore tranquility to the nation arose during and after the Civil War. In 1863, President Lincoln issued a proclamation of general amnesty to those who rebelled against the Union; President Andrew Johnson, on Christmas Day 1868, pardoned Jefferson Davis and other confederate soldiers in what one scholar has called ‘the most salient exercise of executive clemency to date.’” (citation omitted)).

²⁹ *Id.* at 453 (“Similarly, on his first full day in office, Jimmy Carter pardoned those who had evaded the draft during the Vietnam War in an effort to ‘bind the wounds that an unpopular war had inflicted on society and on its young people, so that healing could begin.’” (citation omitted)).

³⁰ See JANICE HAMILTON, THE NORMAN CONQUEST OF ENGLAND 23 (2008) (explaining that prior to the Norman invasion, King Canute had the power to grant “peace” (i.e. pardon) to his subjects); Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardon Power from the King*, 69 TEX. L. REV. 569, 586 (1991).

impeached by Parliament,³¹ a limitation carried forward in our own Constitution.³²

For the Founders the pardon power was thus transformed into an authority that was both utilitarian in nature and an effort to develop a constitutional conception of just deserts, rather than an exercise of absolute authority by an unaccountable king. As Justice Holmes put it: “A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme.”³³

Indeed, as Akhil Reed Amar has noted in his history of the American Constitution, the federal pardon power was far broader than that possessed by state governors.³⁴ The governor of Massachusetts, for example, could issue a pardon only with “the advice” of a legislatively chosen council.³⁵ New York’s governor could not pardon before trial and, for murder and treason, could only suspend a sentence pending legislative review of the matter.³⁶ For this reason, Amar characterizes the federal pardon power as one of the “threads that defined America’s presidency”—threads that allowed for decisiveness of action and the unity of executive power.³⁷

The conception of the pardon as an exercise of justice found a ready echo in some of the early enactments of the new federal government. The most prominent example was the Mitigation and Remittance Act of 1790.³⁸ About one year earlier, Congress had enacted a number of forfeiture provisions and penalties relating to the avoidance of customs duties. For example, it was unlawful to unload a ship after dark (an act that might facilitate the evasion of tariffs) or to do so without a license (an early example of a *malum prohibitum*) crime.³⁹ Other early customs penalties imposed fines or forfeiture for failing to get clearance to sail⁴⁰ and departing without a manifest.⁴¹

Within a year, however, it became apparent that a number of ship owners had incurred liability for penalties or forfeitures principally through

³¹ See Act of Settlement, 1701, 12 & 13 Will. 3, c. 2 (Eng.). The Act received royal assent in 1701; hence it is commonly dated in that year.

³² U.S. CONST. art. II, § 2, cl 1.

³³ *Biddle v. Perovich*, 274 U.S. 480, 486 (1926).

³⁴ AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 189 (2006).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Act of May 26, 1790, ch. 12, 1 Stat. 122.

³⁹ Act of Jul. 31, 1789, ch. 5, 1 Stat. 29.

⁴⁰ Act of Sept. 1, 1789, ch. 11, 1 Stat. 55.

⁴¹ Act of Sept. 1, 1789, 1 Stat. at 63.

ignorance of the recently enacted customs regulations, tariffs, and duties.⁴² The First Congress provided a means of mitigating the punishments (in effect, a statutory pardon) with district judges finding the facts of the matter and reporting on them to the Secretary of the Treasury. The Secretary, in turn, had the “power to mitigate or remit” any penalty “if in his opinion the same was incurred without wilful negligence or any intention or fraud.”⁴³ In other words, Congress recognized that it had created criminal liability where intent might be lacking and provided a mechanism for the mitigation of punishment for those deemed to lack criminal intent.⁴⁴

The sentiment behind mitigating penalties when criminal intent was lacking was no stray or isolated thought. Indeed, it survived even in times of conflict on the brink of war. In 1800, when Congress passed a law suspending commerce with France, it imposed a series of penalties and forfeitures to enforce the adopted restrictions.⁴⁵ Yet even here, in the midst of heightened tensions, Congress also saw fit to extend the provisions of the Mitigation and Remittance Act and apply them to “all penalties and forfeitures incurred by force of this act.”⁴⁶

The same was true nine years later, in 1809, when Congress imposed an embargo on trade with Great Britain in the run-up to the War of 1812.⁴⁷ Though the embargo was a critical component of American opposition to British actions on the high seas, the mitigation and remittance provisions were again adopted to excuse those who acted without willful negligence or the intent to defraud.⁴⁸

There is also modest evidence of this ameliorating conception of the pardon power in some of the writings of the early Founders—writings that might be thought by some to bear less weight than congressional

⁴² DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS* 50–51 (1997).

⁴³ Act of May 26, 1790, 1 Stat. 122, 122–23. Although initially passed as a temporary measure, the provision suspending operation of the Act was repealed in 1800, making the underlying provision a permanent part of the law. Act of Feb. 17, 1800, ch. 6, 2 Stat. 7.

⁴⁴ See David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. CHI. L. SCH. ROUNDTABLE 161, 213 (1995); see also David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 827 (1994) (“Congress perceived no constitutional impediment to this convenient use of judicial officers for purely administrative purposes.” (citation omitted)).

⁴⁵ Act of Feb. 27, 1800, ch. 10, 2 Stat. 7.

⁴⁶ *Id.* § 9.

⁴⁷ Act of Jan. 9, 1809, ch. 5, 2 Stat. 506.

⁴⁸ *Id.* § 12.

enactments or expositions in the Federalist Papers, but which are, nevertheless, indicative of the tenor of the times, so to speak.⁴⁹

Jefferson, for example, often wrote of punishment for criminal law violations as grounded in concepts of morality and just desert. Punishment, he said, must be “proportioned to the injury”⁵⁰ caused and the scale of the punishment must reflect the “atrociousness of the crime.”⁵¹ Like most who viewed just deserts as the grounds for criminal punishment, Jefferson often focused on the intent of the offender as the basis for culpability. As he wrote to his relative Philip Turpin, “it is the intention alone which constitutes the criminality of any act.”⁵² Though not speaking directly of the pardon power, the underlying penological theory grounding Jefferson’s thinking linked punishment to justice and intent and would have been a background for the foundations of justice and mercy reflected in the pardon authority. And when Jefferson later became President, his actions reflected that understanding. He pardoned some dissenters who had been convicted under the Sedition Act, deeming that act “a nullity, as absolute and palpable as if Congress had ordered us to fall down and worship a golden image.”⁵³

James Wilson⁵⁴ took an even more definite view of the foundation of law. He was, by all accounts, convinced that criminal law in particular flowed from a natural law.⁵⁵ His understanding of that foundation translated, again, into a strong view of just deserts. His view was that only conduct that actually was unjust was properly called a crime. “Every crime includes an injury: every offence is also a private wrong: it affects the publick, but it affects the individual likewise.”⁵⁶ And, like Jefferson, Wilson believed strongly that punishment must be proportional to the crime

⁴⁹ I am indebted for much of the brief discussion that follows in the text to the far more detailed insights in RONALD PESTRITTO, *FOUNDING THE CRIMINAL LAW* 122–38 (2000).

⁵⁰ Thomas Jefferson, *A Bill for Proportioning Crimes and Punishments, in Cases Heretofore Capital*, in 1 *THE WRITINGS OF THOMAS JEFFERSON* 218, 219 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905).

⁵¹ Thomas Jefferson, *Answers to Questions Addressed to Him by Monsieur de Meusnier*, in 17 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 50, at 49, 79.

⁵² Letter from Thomas Jefferson to Philip Turpin (July 29, 1783), in 6 *THE PAPERS OF THOMAS JEFFERSON* 324, 326 (Julian P. Boyd ed., 1952).

⁵³ Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), in 4 *MEMOIR, CORRESPONDENCE, AND MISCELLANIES: FROM THE PAPERS OF THOMAS JEFFERSON* 22, 23 (Thomas Jefferson Randolph ed., 1829).

⁵⁴ For more on this constitutional framer, law professor, and Associate Justice of the Supreme Court, see Andrew C. Laviato, *James Wilson*, in *THE SUPREME COURT JUSTICES, 1789–1995*, at 16, 17–18 (Claire Cushman ed., 2d ed. 1995).

⁵⁵ See, e.g., James Wilson, *Lectures on Law of the Law of Nature*, in 1 *WORKS OF THE HONOURABLE JAMES WILSON* 107, 131–33 (Bird Wilson ed., 1804).

⁵⁶ James Wilson, *Lectures on Law of the Nature of Crimes*, in 3 *WORKS OF THE HONOURABLE JAMES WILSON*, *supra* note 55, at 3, 6.

committed.⁵⁷ Here too, though he said little about the link of just punishment to the pardon power, his underlying penological theory supported that authority.

To be sure, neither Jefferson nor Wilson spoke directly to the pardon power. They both might as readily be read to say that intentionality (and thus the justness of punishment) was for a jury or a judge to determine and nothing more. According to this reading, their penological theories speak only to the degree of punishment, not to the identity of the actor with whom the obligation to judge the justness of the punishment rests. But that, I submit, narrows the nature of their theory of just deserts. It seems more likely that they would have seen the substantive result of just punishment as more important and significant than the identity of the actor who assured that justice had been done.

Finally, we can see a broad acceptance of the pardon power in the early practice of the republic. Although Washington and Adams made little use of the pardon power (16 and 21 pardon statements, respectively), other early presidents were far more generous with their mercy.⁵⁸ Jefferson signed at least 119 pardon statements; Madison, 196 (or possibly 202—the records are unclear); Monroe, 419; and John Quincy Adams, 183.⁵⁹ Plainly, the pardon was a regular aspect of the criminal justice system early in American history.

II. THE ATROPHY OF THE PARDON

Today, the pardon power is little used. While the Constitution places no significant limitations on the ability of a president to grant pardons, presidents have issued fewer and fewer of them over the years. Abraham

⁵⁷ *Id.* at 44 (“As the punishment ought to be confined to the criminal; so it ought to bear a proportion, it ought, if possible, to bear even an analogy, to the crime.”).

⁵⁸ P.S. Ruckman, Jr., Policy as an Indicator of “Original Understanding”: Executive Clemency in the Early Republic (1789–1817), at 6–7 (Nov. 1994) (paper presented to Annual Meeting of the Southern Political Science Association), *available at* <http://www.rvc.cc.il.us/faclink/pruckman/pardoncharts/Paper7.pdf>.

⁵⁹ Actual pardon numbers are difficult to state with certainty, both because of the age of the records and because early presidents frequently made pardon or clemency grants to a number of people in a single instrument. In general, the actual number of people receiving pardons is greater than the number of pardon signing statements—for example, Madison’s approximately 200 pardon statements granted relief to more than 250 individuals. The data offered in text is taken from *id.* at 7; P.S. Ruckman, Jr., Federal Executive Clemency in United States, 1789–1995: A Preliminary Report 16 tbl.2 (Nov. 1995) (paper presented to Annual Meeting of the Southern Political Science Association) (on file with the Journal of Criminal Law and Criminology).

Lincoln granted more than 200 pardons in his first two years in office.⁶⁰ He once granted clemency to sixty-two deserters in a single day.⁶¹

The commonplace of 150 years ago is the exception today. The Department of Justice's Office of the Pardon Attorney's statistics on the issuance of pardons reflects this decline over time.⁶² At the start of the twentieth century, presidents routinely granted between 100 and 200 pardons every year.⁶³ As recently as 1933, President Franklin Roosevelt granted 204 pardons in his first year in office. By contrast, President George W. Bush granted only 200 pardons or commutations during his entire eight-year term. And in his nearly four years in office, President Obama has granted only twenty-two pardons along with one grant of clemency.⁶⁴

This is all the more stunning a figure when one considers the radical growth we have seen in federal prosecutions. President Obama's twenty-two pardons are but a minuscule fraction of the 200,000 federal prisoners today. Indeed, strictly speaking, since all of President Obama's pardons have been granted to those who had already served their terms of imprisonment, not a single individual has been released from prison by virtue of a presidential pardon during the Obama Administration. By contrast, in the early 1900s, when fewer than 10,000 federal prisoners were incarcerated nationwide,⁶⁵ pardons averaged roughly 300 each year.⁶⁶ Both in absolute terms and, far more notably, as a percentage, the rate of pardons has decreased significantly.

Many have speculated as to reasons for the decline. One reason may be theoretical (or perhaps one should say, "ideological"). Some have argued that pardon powers are inconsistent with a solid theory of criminal law.⁶⁷ They are, after all, an inherently idiosyncratic and sometimes even

⁶⁰ Love, *supra* note 9, at 1170 (citing P.S. Ruckman, Jr. & David Kincaid, *Inside Lincoln's Clemency Decision Making*, 29 PRESIDENTIAL STUD. Q. 84 (1999)).

⁶¹ Ruckman & Kincaid, *supra* note 60, at 85.

⁶² All data in the text was taken from the Office of the Pardon Attorney, U.S. DEP'T OF JUST., CLEMENCY STATISTICS, <http://www.justice.gov/pardon/statistics.htm> (last visited Dec. 8, 2012).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ For example, in 1925 only 6,430 prisoners were incarcerated in federal prisons. See PATRICK A. LANGAN ET AL., U.S. DEP'T OF JUSTICE, HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAREND 1925-86, Table 1.

⁶⁶ Love, *supra* note 9, at 1188.

⁶⁷ For example, Cesare Beccaria contended that pardons were capricious and irregular and thus inconsistent with a good theory of criminal justice. See KATHLEEN DEAN MOORE, PARDONS 39 (1989) (citing C. B. BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENT 158-59 (photo. reprint 1953) (2d ed. 1819)).

arbitrary exercise of presidential authority—one person making a decision without standards or formal guidance. Thus, some see pardons as a “lawless” exercise that threatens the rule of law.⁶⁸ For the same reason, many utilitarian thinkers might oppose pardons as making suboptimal allocations of punishment.

Other related reasons also offer some explanation for the decline of the pardon. Improved pretrial and trial procedures,⁶⁹ improvements in forensic science (e.g., DNA testing),⁷⁰ and a greater opportunity for review on direct appeal and by habeas corpus may have reduced materially the number of erroneous convictions that otherwise would have led to clemency. Likewise, limits on sentencing discretion⁷¹ may well have reduced the number of unduly lengthy sentences (though the development of many stiff mandatory minimum sentencing rules works in the opposite direction).⁷²

⁶⁸ E.g., AUSTIN SARAT, *MERCY ON TRIAL* 69 (2005).

⁶⁹ By this I mean the familiar improvements of *Brady v. Maryland*, 373 U.S. 83 (1963), *Miranda v. Arizona*, 384 U.S. 463 (1966), and the like.

⁷⁰ Projects like the Innocence Project have generally been successful in securing relief through collateral review in the courts. See *Know the Cases*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/> (last visited Feb. 25, 2012). Were that not the case, DNA testing might call for greater rather than less pardon authority.

⁷¹ See Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (codified at 18 U.S.C. §§ 3551–3625, 3673, 3742 and 28 U.S.C. §§ 991–98 (2006)) (creating the U.S. Sentencing Commission and abolishing parole to promote “honest” length sentences and to avoid “unwarranted sentencing disparities . . .”). The Court in *United States v. Booker*, 543 U.S. 220, 245 (2005) (Breyer, J., writing for the Court in part), invalidated the mandatory nature of the Sentencing Guidelines as violating the Sixth Amendment guarantee of a jury trial and made the Guidelines advisory. However, this advisory nature of the Guidelines does not eliminate their influence. At least one study found that in the year after *Booker* most district courts continued to sentence within the Guideline’s sentencing range. Frank O. Bowman, III, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations about the Operation of the Federal Sentencing System after Booker*, 43 HOUS. L. REV. 279, 300 (2006).

⁷² See, e.g., 18 U.S.C. § 3559(c) (2006) (imposing a mandatory sentence of life imprisonment on a defendant convicted of a violent felony if he has two or more prior convictions of violent felonies or a conviction for a violent felony and a drug conviction in either state or federal court); CAL. PENAL CODE § 667(e) (West 2010) (imposing a maximum term of life imprisonment and a minimum term of the greater of three times the underlying offense or twenty-five years for those with two or more prior felony convictions); IND. CODE ANN. § 35-50-2-8 (West 2004 & 2011 Supp.) (allowing the state to seek to classify defendants with two or more prior felony convictions as habitual offenders, which requires the court to sentence the defendants to an additional fixed term of at least the length of the underlying offense but no longer than three times that length or thirty years); LA. REV. STAT. ANN. § 15:529 (2005 & 2012 Supp.) (increasing imprisonment lengths for each subsequent felony conviction to not less than the longest possible penalty for a first offense after the fourth felony conviction); see also Michael Vitiello, “Three Strikes” and the Romero Case: *The Supreme Court Restores Democracy*, 30 LOY. L.A. L. REV. 1643, 1625 n.142 (1997)

This perception might also be linked to an increase in the professionalization of law enforcement (both investigators and trial attorneys in the federal system), which also would have reduced the number of erroneous convictions.

To be sure, this conclusion is not ineluctable. One need only think, for example, of the controversy regarding prosecutorial misconduct in the trial of former Senator Ted Stevens to realize that our comfort with the inerrancy of the criminal trial system is, perforce, far from absolute.⁷³ On the other hand, it may be fair to say that justice today is meted out through a more regularized and professional process than it was a century ago. And if we accept (as seems plausible) that to some degree trial proceedings are now fairer and more accurate than they were 100 years ago, a concomitant decline in the use of pardons to correct injustice is to be expected.⁷⁴

Another theory is that the recent decline in the use of the pardon is a direct result of the actions of President Clinton during his last days in office. The flood of pardons issued by President Clinton was unseemly, at best.⁷⁵ There are at least some grounds for thinking that his discretionary exercise of authority has poisoned the well of pardon mercy—particularly for Democratic presidents who are seeking to avoid a “soft on crime” label. While certainly a partial explanation, it is incomplete. The decline in pardon authority long predated the Clinton presidency (and followed it as well, as the minimal use of the pardon by President Bush attests) and Clinton’s ill-considered use of the pardon cannot explain that earlier decline.

A final (and to my mind more plausible) theory is that the atrophy of the pardon power arises from its institutionalization. Before the Office of the Pardon Attorney was established, presidents considered pardons individually, often on their own time. Now, the pardon attorney is resident

(reporting that in the first two years of California’s three strikes law, the majority of its applications were for nonviolent drug offenses).

⁷³ See, e.g., *In re Contempt Finding in U.S. v. Stevens*, 744 F. Supp. 2d 253, 255 (D. D.C. 2010) *aff’d*, 663 F.3d 1270 (D.C. Cir. 2011) (denying motion to vacate February 13, 2009, contempt finding against three Department of Justice officials but dismissing contempt charges as documents were produced); see also Nedra Pickler, *Justice Dept. Lawyers in Contempt for Withholding Stevens Documents*, WASH. POST, Feb. 14, 2009, at A7.

⁷⁴ One related trial change has clearly reduced the need for pardons. As noted earlier, the development and use of immunity statutes, and their blessing by the Supreme Court in *Kastigar v. United States*, 406 U.S. 441, 451–53 (1972), has eliminated the need for a president to grant an individual a pardon in order to enable the prosecution to use that person as a trial witness. On the other hand, this change is something of a one-way ratchet—the United States rarely (if ever) grants immunity to defense witnesses so that a defendant may secure their testimony, effectively limiting the availability of some exculpatory information.

⁷⁵ See Alschuler, *supra* note 21, at 1136–37 (one observer likened the atmosphere to a “Middle Eastern bazaar”).

in the Department of Justice and assists the President in reviewing requests for pardons according to settled guidelines.⁷⁶ These recommendations from the pardon attorney are just that—recommendations and nothing more. The President is not required to follow them and retains full pardon authority. And yet, it would be a bold—or foolhardy—president who overrode the recommendations of his pardon attorney.⁷⁷

More importantly, the advent of a pardon attorney has institutionalized the hostility of prosecutors to the exercise of the pardon power. When the President exercised the pardon power directly or, more recently, when he reviewed recommendations made by the Attorney General, pardon applications were examined with two views in mind. To be sure, they brought the perspective of law enforcement officers sworn to uphold the law and take care that federal criminal statutes are faithfully executed. But, as political actors, the President and the Attorney General also brought to the review a more finely tuned sense of political judgment and a generalized appreciation for the American body politic and its sensitivity to criminal law.

That has changed. In the late 1970s, Attorney General Griffin Bell delegated the recommendation role to the same officials who made prosecution policy.⁷⁸ This has had the natural tendency of modifying the DOJ approach to pardon applications—they are now seen as a challenge to an administration's law enforcement policy rather than as an effort to individualize justice. The trend only accelerated under President Reagan when a tighter control of pardon authority was instituted in order to ensure that the policy “better reflect[ed] his administration's philosophy toward crime.”⁷⁹ This isn't “wrong” as a matter of philosophy, but it is fair to say that using career prosecutors to screen pardon applications⁸⁰ has the natural tendency of subjecting pardon applications to greater scrutiny with less lenity. This is to be expected, because career prosecutors (like any human beings) are products of their culture and less likely to see flaws in the actions of their colleagues.

⁷⁶ 28 C.F.R. §§ 1.1–1.10 (2011).

⁷⁷ Take President Clinton, for example. See Alschuler, *supra* note 21, at 1136–60 (detailing numerous questionable, end-of-term pardons issued by President Clinton).

⁷⁸ See Love, *supra* note 9, at 1197.

⁷⁹ Pete Earley, *Presidents Set Own Rules on Granting Clemency*, WASH. POST, Mar. 19, 1984, at A17 (quoting David C. Stephenson, Acting U.S. Pardon Attorney).

⁸⁰ All but a handful of the individuals officially responsible for approving Justice Department clemency recommendations since 1983 have been former federal prosecutors. See Margaret Colgate Love, *Fear of Forgiving: Rule and Discretion in the Practice of Pardoning*, 13 FED. SENT'G REP. 125, 132 n.23 (2001).

The incentive structures surrounding the creation of criminal laws exacerbate this tendency. For too long, we have failed to examine the causes of criminalization, and as a result we have allowed ourselves to criminalize conduct that ought not, in any just world, be criminal. This trend in criminalization is part of a broader social trend to use more severe punishments as a means of deterring crime and of deterring other social behavior—with the natural result that we tend to dismiss more readily the necessity for pardons and mercy.

The expansion of criminal law is the product of institutional pressures that have more to do with politics than social necessity.⁸¹ Few, if any, groups regularly lobby legislators regarding criminal law. Those groups that do are more likely to seek harsher penalties and more criminal laws, rather than more lenient penalties and fewer laws. As a consequence, political considerations give the legislator every incentive to be overinclusive in crafting criminal laws rather than underinclusive.⁸² The same political impulse tends to limit the willingness to use the powers of clemency.

Indeed, if any proof that the political winds disfavored mercy is necessary, the recent experiences of former Mississippi Governor Haley Barbour serve to demonstrate the point.⁸³ Barbour, widely regarded as a conservative executive, granted more than 200 pardons as his term as Governor neared its conclusion. More than twenty-five of them were to individuals still serving terms of imprisonment and a few were even for individuals convicted of violent murders. Though sometimes couched as a legal dispute,⁸⁴ the hailstorm of criticism that rained down on Governor Barbour had, one suspects, far more to do with a generalized objection to the use of a pardon authority to show mercy than it did to any real concern about the legal niceties of the mechanism by which the pardons were

⁸¹ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001).

⁸² PAUL J. LARKIN, JR., HERITAGE FOUND., LEGAL MEMORANDUM NO. 75: OVERCRIMINALIZATION: THE LEGISLATIVE SIDE OF THE PROBLEM 1 (Dec. 13, 2011), available at http://thf_media.s3.amazonaws.com/2011/pdf/lm75.pdf.

⁸³ There are hundreds of reports of the controversy generated by the Governor's pardons. E.g., Richard Fausset, *Pardons Could Haunt Barbour*, L.A. TIMES, Jan. 13, 2012, at A1.

⁸⁴ See *Miss. High Court Steps into Flap Over Pardons*, USA TODAY, Feb. 2, 2012, at A3. The Mississippi Supreme Court rejected the state attorney general's request to void pardons granted by the governor despite the applicants' alleged failure to publish notice of their requests in the manner required by the state constitution. See *In re Hooker*, 87 So.3d 401, 407 (Miss. 2012).

granted. Governor Barbour has defended his actions, but at some significant cost to his political reputation.⁸⁵

In addition, the trend toward criminalization is aided by legislative reliance on the existence of prosecutorial discretion. As the late Professor William Stuntz of Harvard has noted, American criminal law “covers far more conduct than any jurisdiction could possibly punish.”⁸⁶ This broad span of American law is the product of institutional pressures that attract legislators to laws with broader liability rules and harsher sentences.⁸⁷ When a legislator is faced with a choice between drafting a new criminal statute narrowly and potentially underinclusive or broadly and potentially overinclusive, political considerations give the legislator an incentive to be overinclusive. The political dynamic is exacerbated by the consideration, usually implicit, of the costs associated with the criminal justice system. Broad and overlapping statutes with minimum obstacles to criminalization and harsh penalties are easier to administer and reduce the costs of the legal system to the government. They induce guilty pleas and produce high conviction rates, minimizing the costs of the cumbersome jury system and producing outcomes popular with the public.⁸⁸

The final piece of the equation is legislative reliance on the existence of prosecutorial discretion as a means of avoiding responsibility for the consequences of their decisions. When a broad and harsh statute produces an unpopular outcome that the public dislikes, blame will lie with prosecutors for exercising their discretion poorly and never with the legislators who adopted the overbroad statute in the first instance.⁸⁹ But the natural consequence is that prosecutors, relishing their discretion, are poorly positioned to second-guess their own exercise of that power though the mechanism of clemency—if you give the prosecutor broad authority to make decisions, you cannot be surprised when he is impressed with his own rectitude and judgment.

⁸⁵ Not everyone was opposed to the pardons. For one of the few editorials in support of Governor Barbour, see *A Quality of Mercy in Haley Barbour's Pardons*, CHRISTIAN SCI. MONITOR (Jan. 24, 2012), <http://www.csmonitor.com/Commentary/the-monitors-view/2012/0124/A-quality-of-mercy-in-Haley-Barbour-s-pardons>.

⁸⁶ Stuntz, *supra* note 81, at 507.

⁸⁷ *See id.* at 510 (explaining that the political atmosphere created by “[t]he current tough-on-crime phase of our national politics” is responsible for the present trend toward broader liability and harsher sentences).

⁸⁸ *See id.* at 536–39 (demonstrating that costs related to the criminal justice system can be reduced by limiting the number of cases filed, restricting the amount of time spent per case and by encouraging plea-bargaining in lieu of a criminal trial).

⁸⁹ *See id.* at 548 (noting that Kenneth Starr’s investigation of President Clinton created hostility to Starr and not to Congress, which wrote the federal perjury and obstruction of justice statutes).

III. TOWARD A NEW APPROACH

How then to navigate the Scylla and Charybdis of pardons—allowing the invocation of mercy and the amelioration of an excessive criminal code while avoiding the specter of lawless, unprincipled, and, in some cases, overly politicized exercises of the pardon power?

In an ideal world, the need for clemency would exist at the margins of the law, to take care of extraordinary cases. This would be the result of a well-developed, well-regulated, and moderate criminal law. As the philosopher Cesare Beccaria put it while opposing the power of a pardon as a lawless exercise: “Clemency is . . . a virtue which ought to shine in the code, and not in private judgment.”⁹⁰

Sadly, our current system does not see the judicious application of punishment as a virtue. Rather, it has become a system where criminal intent is no longer required to be a criminal and where traditional concepts of responsibility for the acts of another have become subsumed within amorphous doctrines with names like “responsible corporate officer.”⁹¹ In short, within the confines of our prosecutorial structures there is no virtue of clemency.

Reinvigorating that spirit is urgently required both as a practical matter and as a matter of fidelity to the original Founders’ understanding of the proper scope of criminal law. But we cannot get there with the current architecture of pardon review. It simply is asking too much for DOJ prosecutors to review their own work.

On the other hand, no matter how much an originalist might wish for a return to limited government, it is also asking too much for us to expect a president to find time to personally conduct an independent inquiry and consider every application for a pardon or the commutation of a sentence. That just isn’t feasible at this juncture.

What is needed is an institutional solution that honors the Founders’ expectations of personal justice and political reality. The institution should, therefore, reflect the sentiments of its presidential sponsor while affording the President a realistic and unbiased opportunity to review cases and make an informed decision. The current institutional solution—locating the

⁹⁰ BECCARIA, *supra* note 67, at 158.

⁹¹ The responsible corporate officer doctrine, first developed in *United States v. Dotterweich*, 320 U.S. 277 (1943) and *United States v. Park*, 421 U.S. 658 (1975), stands broadly for the proposition that a corporate officer can be convicted of a crime even though he took no direct part in its commission if he stands in some “responsible relationship” to the criminal actions (as, for example, if he has a duty and capability of preventing their occurrence). See *Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction: Standards of Liability*, 92 HARV. L. REV. 1227, 1263–64 (1979).

pardon attorney under the deputy attorney general in the Department of Justice and staffing it with a career prosecutor—does not meet this need.

The pardon authority is an unfettered executive power. The President needs no statutory authority to change how he administers pardons and reviews clemency applications. He is free to change the current rules as and when he sees fit. If this Administration (or any administration for that matter) wanted to reinvigorate the pardon power and return it to its original function, it would:

- Recreate a pardon-reviewing authority either outside of the Department of Justice, as part of the Executive Office of the President, or as a direct function of the Attorney General as the President's personal representative; and
- Staff the new Pardon Office with a range of staff, including prosecutors, sociologists, psychologists, historians, and even defense attorneys.

Doing either, or both, of these things would alleviate most of the systemic problems that plague the current way in which the pardon process is implemented. Moving the office outside of the Department of Justice would restore the pardon function to its traditional status as an exercise of pure presidential authority. Including staff who are not exclusively career prosecutors would bring a more balanced perspective to the decisionmaking and would eliminate the natural and understandable institutional tendency of prosecutors to be confident in the rectitude of their own judgment.⁹²

The location of the reinvigorated office is, naturally, capable of some debate. Placing it in the Executive Office of the President would return the pardon to its original status as a matter of the personal judgment of the President. It would also greatly diminish concerns that agents and prosecutors are strongly motivated to defend their investigative and charging decisions. But placing the Pardon Attorney in the White House may be seen as further politicizing the process, rather than dealing with those concerns. The alternative, which might be a “best of both worlds” compromise, would staff the Pardon Office with professionals from various fields but place the Pardon Office as part of the Attorney General's office, with the Pardon Attorney reporting directly to the Attorney General without going through the deputy attorney general. An alternative might be to have

⁹² One particularly good candidate for the systematic application of a revived pardon power would be the increasingly older prisoners. Studies in Florida, Colorado, and New York suggest that older prisoners are less likely to be recidivists when released than are equivalent younger prisoners. HUMAN RIGHTS WATCH, *supra* note 8. Perhaps of equal significance, medical expenditures for aged prisoners are three to nine times greater than for younger ones, *id.*, making release a possible win-win social proposition.

the Pardon Office be a separate independent agency (much like the Sentencing Commission).

If the President were to delegate the initial review of clemency applications to this new Pardon Office we might, just might, see a positive result—the amelioration of harsh justice in America today and the restoration of a traditional conception of presidential power.

