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Kathleen Dean Moore

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PARDON FOR GOOD AND SUFFICIENT REASONS

*Kathleen Dean Moore**

To all to whom these presents shall come, greetings

Whereas it does not appear that the ends of justice require that the [offender] serve the aforesaid sentence in its entirety;

NOW, THEREFORE, BE IT KNOWN, that I, . . . , the President of the United States, in consideration of the premises, divers other good and sufficient reasons me hereunto moving, do hereby commute the aforesaid prison sentence¹

INTRODUCTION

The preamble to an executive grant of clemency from the President of the United States implies that pardons are granted on the basis of "premises, . . . good and sufficient reasons." Yet, pardons have not always been regarded as the sort of acts that need to be justified by argument. In fact, most presidential pardons are issued without any statement of justification beyond the assurance that good reasons do exist. As a result, the issue of what constitutes good and sufficient reasons for a presidential pardon is seldom addressed and still unresolved.

In this Essay, I presuppose that presidents should make pardoning decisions on the basis of reasons and that those reasons should be made public. I suggest that the only good and sufficient reason for pardoning a felon is that justice is better served by pardoning than by punishing in that particular case. It follows that some kinds of reasons do not justify a pardon and so pardons granted on those grounds constitute an abuse of the pardoning power. It also follows that it is possible to specify in advance the general kinds of cases that call for pardons.²

* Associate Professor and Chair, Department of Philosophy, Oregon State University. B.A., 1969, College of Wooster; M.A., 1973, Ph.D., 1977, University of Colorado.

1. OFFICE OF THE PARDON ATTORNEY, WARRANTS OF PARDON: 1942-1987.

2. For a philosophical exposition of this argument, see KATHLEEN D. MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST (1989). For a legal exposition of a similar view,

HISTORICAL JUSTIFICATIONS FOR PARDONS

The history of pardoning in Anglo-American culture reveals both the gradual development of the idea that pardons should be justified by reasons, and a rough moral progress in the kinds of justifications offered.

The pardoning power of the great monarchs of seventeenth and eighteenth century Europe was analogous in theory and practice to divine grace. Like grace, the freely given, unearned gift of divine favor, a royal pardon was thought of as a personal gift. Therefore, it required no justification and was not subject to criticism. As personal favors, acts of beneficence and benevolence, pardons were beyond the reach of both positive and moral law. Thus, pardons could be granted for any reason whatsoever or for no reason at all. The monarchs used "gifts of grace" to reward their friends and undermine their enemies, to populate their colonies, to man their navies, to raise money and to quell rebellions.³ Unusual only in the price he charged, James II sold pardons for 16,000 pounds sterling, of which he received "one half and the other half was divided among the two ladies then most in favour."⁴

Fully aware of the abuses of the royal pardoning power, the Framers of the United States Constitution nonetheless granted analogous power to the president of the new republic. They expected that, unlike kings, presidents would pardon with "scrupulousness and caution,"⁵ because a president who abused the power would be answerable through the impeachment process. However, the Framers provided no criteria for distinguishing between proper and improper uses of the pardoning power and put no constitutional limit on the president's use of that power, except to prohibit pardons in cases of impeachment. In 1833, the United States Supreme Court defined a presidential pardon as a personal "act of grace,"⁶ effectively confirming that presidential pardons fall into the category of things needing no reasoned justification.

see Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 569-641 (1991). See also JEREMY BENTHAM, *PRINCIPLES OF MORALS AND LEGISLATION* ch. XIII (1976).

3. Kathleen D. Moore, *Would Public Be Served by a Pardon for North?*, L.A. TIMES, July 6, 1989, pt. II at 7.

4. C. HEWITT, *THE QUEEN'S PARDON* 20 (1978).

5. *THE FEDERALIST* No. 74, at 482-83 (Alexander Hamilton) (Random House ed., 1937).

6. *United States v. Wilson*, 32 U.S. (1 Pet.) 150, 160 (1833).

Nevertheless, presidents often did explain their reasons for granting a pardon. A systematic record of the reasons cited by presidents between 1885 and 1931 shows that the most common reason given for pardoning was doubt about the guilt of the accused or about the justice of the proceedings.⁷ For example, presidents cited "grave doubt as to justice of conviction," "dying confession of real murderer," "mental infirmity of judge," and "mistaken identity."⁸ A significant number of pardons, however, were granted for reasons that are clearly unacceptable today. Some of those reasons related to gender ("for the sole reason that the applicant was a woman and in order to avoid the spectacle of a woman being executed"⁹), powerful friends ("recommendation by influential citizen"¹⁰), and family connections ("respectability of prisoner's family"¹¹). All of these reasons provide unearned advantage to some felons and unfairly disadvantage others based on factors beyond their control and irrelevant to the purposes of punishment. Unjust as they are, these rationales were shielded from criticism by the "legacy of the arbitrary exercise of clemency"¹² — the fact that it is conceptually incoherent to criticize a personal gift.

In 1927, the United States Supreme Court gave up the "pretense"¹³ that the pardoning power of a president is akin to the divine or royal prerogative.¹⁴ In *Biddle v. Perovich*, Justice Oliver Wendell Holmes spoke for the Court: "A pardon in our days is not a private act of grace from an individual happening to possess power, . . . [but rather] it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."¹⁵ The Constitution does not give the president power to pardon arbitrarily as a personal favor. It does give him the power to make pardoning decisions based on reasoned judgments.

7. W.H. HUMBERT, AMERICAN COUNCIL ON PUBLIC AFFAIRS, THE PARDONING POWER OF THE PRESIDENT 124f (1941).

8. *Id.*

9. REPORTS OF THE ATTORNEYS GENERAL OF THE UNITED STATES, 1921-1941, at 691.

10. HUMBERT, *supra* note 7, at 124f.

11. *Id.*

12. Kobil, *supra* note 2, at 572.

13. In *Burdick v. United States*, 236 U.S. 79, 90 (1915), the Supreme Court suggested that "the grace of a pardon . . . may be only in pretense . . ."

14. See *Biddle v. Perovich*, 274 U.S. 480 (1927).

15. *Id.* at 486.

Since then, in the unusual case of a controversial pardon,¹⁶ presidents have generally given public explanation of their reasons. For example, to support his decision to pardon former President Richard Nixon, President Gerald Ford used reasons that carefully echo Alexander Hamilton's discussion of justified pardons. Hamilton wrote: "[T]here are often critical moments, when a well-timed offer of pardon . . . may restore the tranquility of the commonwealth. . . ."¹⁷ President Ford said: "[T]he tranquility to which this nation has been restored by the events of recent weeks could be irreparably lost by the prospects of bringing to trial a former President of the United States."¹⁸ Regardless of the questionable *wisdom* of President Ford's decision, what is significant is that he clearly recognized the need to argue for the *validity* of his decision using historically recognized reasons.

Gradually shedding a view of pardons that was based on the divine right of kings, the United States has reached a point where pardoning decisions are expected to be justified by reasons. What constitutes good and sufficient reasons, however, is not clear.

DEFINING GOOD AND SUFFICIENT REASONS TO PARDON

Public debate about what makes a pardon appropriate is needed. The United States Supreme Court has provided a place to start, a standard against which presidential pardons can be measured: Is the public welfare better served by pardoning than by punishing this particular felon?¹⁹

In my view, pardons best serve the public interest when they serve justice. The judicial system is a complex system through which general rules are applied to particular cases in contexts marked by uncertainty. It is therefore particularly vulnerable to error. The pardoning power is a backup system that works outside of the rules to correct mistakes, making sure that only those who deserve punishment are punished.

16. Usually a petitioner must wait five to seven years after sentence was served and then meet a carefully defined set of standards before he or she can be considered for a presidential pardon. 28 C.F.R. §§ 1.1 to 1.10 (1992). Very few of these petitions are granted and reasons are seldom given.

17. THE FEDERALIST No. 74, *supra* note 5, at 481.

18. Proclamation No. 4311, 39 Fed. Reg. 32,601 (1974).

19. *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

Accordingly, a president abuses the pardoning power when he makes decisions based only on self-interest or narrow partisan interests, or when he is moved by pity or concern for the welfare of the accused. A president uses the pardoning power properly when he uses it to prevent or correct a potential injustice.

POOR AND INSUFFICIENT REASONS TO PARDON

By the standard set out in *Biddle v. Perovich*,²⁰ pardons granted — or not granted — solely as a means to advance the interests of the president, his friends, or his party are a clear abuse of the pardoning power.²¹ Montesquieu was wary of rulers who were moved to grant pardons to win public support, “so many are the advantages which monarchs gain by clemency, so greatly does it raise their fame, and endear them to their subjects.”²² Today, when the presidential pardoning power is atrophying from lack of exercise,²³ one might equally criticize presidents who refuse to pardon, when their refusals are based on political calculations alone. Whether a president decides to pardon too many people or too few, the president who makes pardoning decisions based solely on self-regarding purposes is abusing the pardoning power.

By the same standard, pardons granted solely out of pity, or kindness, to prevent the “further punishment and degradation” of an accused person,²⁴ as President Gerald Ford said of former President Richard Nixon, are not based on sufficient reason. Because a pardon singles someone out for special treatment, every pardon is potentially a comparative injustice, a violation of the principle of equal treatment under the law.²⁵ Although a personal favor might be justified on the principle that a little kindness is better than none, pardons are not personal favors; they are part of the “constitutional scheme.”²⁶

20. 274 U.S. 480 (1927).

21. See *supra* text accompanying notes 13-15.

22. MONTESQUIEU, *THE SPIRIT OF LAWS*, bk. 6, ch. 21.

23. See the statistics in Kobil, *supra* note 2, at 640-41.

24. Proclamation No. 4311, 39 Fed. Reg. 32,601 (1974).

25. See Kathleen D. Moore, *When Mercy Weakens Justice*, N.Y. TIMES, Aug. 10, 1989, at A19, A23.

26. *Biddle v. Perovich*, 274 U.S. 480, 486 (1927). In the Reagan and Bush administrations, the nation saw the worst of both worlds — a stunning decline in the overall number of presidential pardons granted (from 91 in 1983 to zero in 1990), with exceptions made to grant clemency to a few chosen friends (Marvin Mandel, Armand Hammer, and George Steinbrenner).

GOOD AND SUFFICIENT REASONS TO PARDON

In my view, pardons should be used as part of a broader constitutional scheme to ensure that sentences are assigned justly. The criminal justice system is based on a limited set of fundamental moral principles which are rooted in a retributivist tradition. This tradition holds that it is wrong to punish a person who has committed no crime, that punishment must be in response to wrongdoing, and that the severity of the punishment ought to be proportional to the seriousness of the wrongdoing.²⁷ Elaborate procedural rules have been put into place in an effort to honor these principles in practice.

A pardon is justified when the procedures miscarry, giving the state a legal, but not a moral, license to punish. I believe Alexander Hamilton had this in mind when he argued for a pardoning power to provide "easy access to exceptions in favor of unfortunate guilt, [without which] justice would wear a countenance too sanguinary and cruel."²⁸ To prevent a legal punishment that violates any one of these moral principles is, I suggest, good and sufficient reason to pardon.

Good and sufficient reason to pardon exists when a person convicted of a crime may not have committed that crime.²⁹ The clearest cases are those in which new evidence surfaces after sentencing, giving some ground for believing that the wrong person was convicted. For example, to prevent an innocent person from being punished President Franklin Roosevelt pardoned convicted bankrobber Martin Prisament on grounds that Prisament was "innocent of the offense for which he is now being held."³⁰ On the same basis, it may be possible to justify the type of presidential pardon most frequently granted over the past thirty years — pardons granted to felons who have served their time, turned their lives around, and become, in effect, "new people." Craig Martin, formerly an armed robber, now a boy scout leader, argued that Presi-

27. Sidney Gendin, *A Plausible Theory of Retribution*, V J. OF VALUE INQUIRY 1 (1970).

28. THE FEDERALIST, *supra* note 5, at 482.

29. Perhaps the most famous example comes from *Luke* 23:13-25:

Pilate then called together the chief priests and the rulers and the people, and said to them, "You brought me this man as one who was perverting the people; and after examining him before you, behold, I did not find this man guilty of any of your charges against him; neither did Herod, for he sent him back to us. Behold, nothing deserving death has been done by him; I will therefore chastise him and release him."

30. *Prisament v. United States*, 92 Ct. Cl. 434, 434 (1941).

dent Reagan "gave the pardon to a totally different person than the one that existed a quarter-century ago. Granted I have the same body, but it's a totally different mind."³¹ To the extent this transformation is real, it is appropriate for a president to prevent a transformed person from having to bear the continuing effects of punishment for a crime committed by the person he or she no longer is.

Good and sufficient reason exists to pardon a person who is guilty under the law but is not morally blameworthy. If people are to be punished only for their blameworthy acts, then acts that are not blameworthy do not call for punishment. In ways that sentencing guideline cannot, a president can be sensitive to distinctions in moral blameworthiness and can protect from punishment a person who has done no wrong. Examples of such situations are complex and problematic, but may include pardons for crimes committed out of necessity (such as Ohio Governor Celeste's pardon of twenty-five women who killed or assaulted husbands who had subjected them to continuous violent abuse),³² pardons for crimes committed because of coercion (such as Patricia Hearst Shaw's continuing campaign for a pardon for crimes she committed while under the influence of the Symbionese Liberation Army), or pardons for crimes committed in compliance with sincerely held moral beliefs such as a presidential pardon granted to a Vietnam war era draft evader who believed that "peace among human beings is of the ultimate necessity".³³

Good and sufficient reason to pardon exists when the sentence is too harsh when measured against the seriousness of the offender's wrongdoing. Questions about what punishment is deserved raise a number of philosophical and legal issues, making a judgment of "fitting" punishment difficult. In theory, however, it is appropriate for a president to grant a pardon to prevent or mitigate the comparative injustice that occurs when one person's sentence is more severe than that of another whose act was identical. For example, in the wake of Governor Celeste's pardons of battered women in Ohio, there are ongoing campaigns in the state of Washington to win gubernatorial pardons for battered women who killed or as-

31. Ted Gup, *For Seekers of Forgiveness at Lofty Levels, a Presidential Pardon*, WASH. POST, Apr. 17, 1987, at A21.

32. *Women Granted State's Clemency*, COLUMBUS DISPATCH, Dec. 22, 1990, at 1A, cited in Kobil, *supra* note 2, at 614.

33. U.S. PRESIDENTIAL CLEMENCY BOARD REPORT 319 (1975).

saulted their assailants. Pardons can also prevent the noncomparative injustice that occurs when a sentence is too harsh. For example, believing that forcing convicts to work on chain gangs was cruel, Governor George W. Donaghey of Arkansas pardoned 396 prisoners in one day.³⁴ Finally, pardons can prevent punishments from becoming too harsh, given the suffering that an offender has already undergone.

CONCLUSION

Presidents should be called to account for their pardoning decisions. A president is not a "fountain of nothing but bounty and grace"³⁵ whose pardons flow from "his own breast."³⁶ He is a public official making a decision that is part of the constitutional scheme of criminal justice.

34. Ernest Morris, *Some Phases of the Pardoning Power*, 12 A.B.A. J. 183, 189 (1926).

35. 4 WILLIAM BLACKSTONE, COMMENTARIES 397.

36. *Id.* at 395.