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PARDON IN THE HEBREW BIBLE AND MODERN LAW

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"We pardon to the extent that we love."

From the *Reflections* of Francois,
Duc de La Rochefoucauld (1665)

I. INTRODUCTION

On February 19, 1991, Virginia Governor L. Douglas Wilder commuted the death sentence of convicted murderer Joseph Giarrantano.¹ Wilder's action was a "conditional pardon" that reduced Giarrantano's death sentence to a term of life imprisonment without the possibility of parole for twenty-five years, but with a credit for the twelve years Giarrantano already had spent behind bars.² Wilder did not pardon Giarrantano's crime, but the Governor did exercise executive clemency in sparing Giarrantano's life. Predictably, this exercise of even a limited measure of executive mercy produced widely divergent reactions. Giarrantano commented that he would "like to give the governor

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1. See John F. Harris, *Wilder Grants Reversal of Death Sentence*, WASH. POST, Feb. 20, 1991, at A1, col. 1.

2. The terms of the commutation effectively mean that Giarrantano will be eligible for parole in eleven more years, or in 2004. *Id.* at A5, col. 1.

a hug.”³ Relatives of the mother and fifteen-year-old daughter Giarrantano was convicted of killing decried the commutation and stated that “[Wilder’s] let a killer get away” and that “Giarrantano is sitting there now laughing at the system.”⁴ Supporters of Giarrantano still maintain his innocence and protest that Wilder did not go far enough because “prison is not the right place for a man who may well be innocent.”⁵

Controversy surrounds virtually every aspect of executive clemency in the American system of justice. The United States Supreme Court recently noted that “clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.”⁶ Despite this importance, no established guidelines exist against which executive clemencies may be judged as “fair,” “just,” or “merciful.” Whenever an application for pardon or commutation is denied, prisoners and their advocates criticize a system in which only the rich or well-connected are able to obtain clemency. Whenever an application is granted, victims, their families, and their advocates criticize a system that has gone “soft on crime.” The President and the governors, constitutionally empowered to exercise clemency, agonize over decisions that often involve life and death and always involve more than just mere questions of law.⁷ Underlying the debate surrounding executive clemency are the eternal questions asking (1) Can people truly change and be rehabilitated?, and (2) What is the appropriate response of the State when they do? Underlying these issues are the even more difficult legal and theological questions asking (1) Does anyone ever “earn” pardon?, (2) When should pardon be granted?, and (3) Can and should the State grant pardons in the same way that God grants pardon?

A. *The Case of Joseph Giarrantano*

In many ways, the case of Joseph Giarrantano crystallizes these issues. Giarrantano was convicted of the heinous murders

3. John F. Harris, *Terry Rules Out New Trial for Pardoned Killer*, WASH. POST, Feb. 21, 1991, at B3, col. 1.

4. Harris, *supra* note 1, at A5, col. 1 (remarks of Earl F. Jones, a victim’s brother-in-law).

5. *Id.* (remarks of Mandy Bath of the Virginia Coalition on Jails and Prisons).

6. *Herrera v. Collins*, 113 S.Ct. 853, 866 (1993) (footnotes omitted).

7. Walter Shapiro, *A Life in His Hands*, TIME, May 28, 1990, 23 (discussing Louisiana Governor Buddy Roemer’s refusal to pardon condemned murderer Dalton Prejean).

of Barbara Kline and her fifteen-year-old daughter Michelle in Norfolk, Virginia in 1979. Giarrantano confessed to the crimes no fewer than five times, and in the absence of eyewitnesses to the murders, was convicted largely on the basis of these confessions. In 1981, Giarrantano was spared from imminent execution when a federal judge ruled that he was incompetent to waive his right of appeal.⁸ Since that watershed, Giarrantano has undergone nothing short of a metamorphosis. He purged himself of all drug use. He became a noted jailhouse lawyer. He personally wrote the petitions that propelled a bid to guarantee state-funded counsel to Death Row inmates in post-conviction proceedings all the way to the United States Supreme Court.⁹ He published an article in the *Yale Law Journal*.¹⁰ Even more importantly, a new team of defense lawyers compiled extensive evidence that Giarrantano could not have committed the murders and that he only confessed because of a drug-induced haze and fear of the police.¹¹

Giarrantano's case became a symbol of the death penalty debate, and focused intense scrutiny on his plea for clemency from Governor Wilder. Prominent liberals and death penalty opponents urged Wilder to pardon Giarrantano. Even noted conservative columnist and death penalty advocate James Kilpatrick became a Giarrantano supporter.¹² Forces demanding Giarrantano's execution, including numerous victims' rights groups and Virginia Attorney General Mary Sue Terry, also dug in and pressed the Governor not to retreat.¹³ Wilder eventually compromised. He exercised enough clemency to save Giarrantano's life, but not enough to make him a free man. Significantly, Wilder gave no reason for his action. He merely stated that he had reviewed the evidence, and found his decision "complex, but not difficult."¹⁴

Wilder's comments leave significant questions unanswered. Why was Giarrantano given a "conditional pardon"? Did he earn

8. See John F. Harris, *A Widely Watched Date With Death*, WASH. POST, Feb. 17, 1991, at A19, col. 1.

9. See William H. Brooks, Recent Development, *Meaningful Access for Indigents on Death Row: Giarrantano v. Murray and the Right to Counsel in Post-Conviction Proceedings*, 43 VAND. L. REV. 569, 583 (1990).

10. Joseph M. Giarrantano, "To the Best of our Knowledge, We Have Never Been Wrong": *Fallibility vs. Finality in Capital Punishment*, 100 YALE L.J. 1005 (1991).

11. See Harris, *supra* note 8, at A19, col. 2.

12. See *id.* at A1, col. 3.

13. See Harris, *supra* note 3, at B3, col. 1.

14. See Jean McNair, *Condemned Killer Has His Life Spared*, NASHVILLE BANNER, Feb. 20, 1991, at A6, col. 1.

it by completely making himself over while on Death Row? Did public pressure force Governor Wilder to take some action on his behalf? Did significant doubts exist as to whether Giarrantano was guilty at all? If so, why did Wilder not pardon Giarrantano outright instead of merely commuting his sentence? Or did Wilder act merely out of caprice or whim, taking an action he was constitutionally empowered to take and simply acting out of his benevolent largesse? Are any of these reasons better than any other reason? This article will attempt to shed light on answers to these questions by examining the views of pardon in the Hebrew Bible and in modern law.

B. Defining Types of Pardons

Initially, certain basic nomenclature needs to be explained. In modern legal terms, pardon is "a generic term covering several legal processes that involve an act of leniency or determination by an executive authority to mitigate some consequence of a sentence,"¹⁵ or "an official act by an executive that removes all or some of the actual or possible punitive consequences of a criminal conviction."¹⁶ A more descriptive term for the modern understanding of pardon might be "executive clemency," which is a scholarly term that encompasses several different acts of leniency or mitigation, only one of which is a proper pardon. Specifically, five types of executive clemency are generally recognized: pardon, amnesty, commutation, reprieve, and remission of a fine.¹⁷

Within this scheme, a pardon is the act of an executive that actually sets aside a past or potential conviction for a crime. It implies a type of "official forgiveness" and diminishes punishment either by freeing an incarcerated individual or blocking any possible prosecution for a crime.¹⁸ When an executive issues a full pardon, an inmate simply walks away from jail as if he or she had never been tried and sentenced. A full pardon usually restores basic civil rights normally denied a convicted felon, such as the right to vote, the right to sit on a jury, and even the

15. Susan E. Martin, *Commutation of Prison Sentences: Practice, Promise, and Limitation*, 29 CRIME & DELINQ. 593, 593 (1983).

16. KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 4 (1989).

17. See Martin, *supra* note 15, at 594; see also Joel Cohen, *Petitions for Clemency—Don't Rule Them Out*, NEW YORK LAW JOURNAL, March 6, 1989, at 4, col. 4.

18. See Martin, *supra* note 15, at 594.

eligibility to work in a business that sells alcohol.¹⁹ Most pardons occur after an individual has been convicted and sentenced, but as in the cases of President Gerald Ford pardoning Richard Nixon and President Bush pardoning Caspar Weinberger, an individual may be pardoned before any formal accusation of a crime has been made.

Executives also may grant amnesties. One commentator describes an amnesty as a declaration simply to "forget about the whole thing."²⁰ They may be distinguished from usual pardons in that amnesties typically are granted to large groups of people, often the unnamed members of a particular class composed of people who committed the same type of offense. An example would be President Jimmy Carter's grant of amnesty to Vietnam War-era draft evaders.²¹

A commutation effectively reduces the severity of a sentence by substituting a lesser punishment. A perfect example is Governor Wilder commuting Joseph Giarrantano's sentence from death to a term of years. In some instances, a commutation can mean an immediate release from prison because a prison sentence may be reduced to time already served or to a term that makes an inmate eligible for parole.²²

A reprieve is a very limited form of executive clemency. It merely delays the carrying out of a sentence for a period of time. Examples include a delay of an execution until a condemned killer's child can be born, or delaying a period of incarceration until an illness can be cured.²³

Remission of a fine is perhaps the least used of all forms of executive clemency. It involves reducing the amount of a fine, or eliminating it altogether, usually in cases of severe financial hardship when a good faith effort to make payment has been made.²⁴

All of these legal processes are acts of clemency. In popular parlance, they are examples of pardons. For the purposes of this article, the word "pardon" will be used to denote or refer to all of these types of executive clemency.

19. *Id.*

20. MOORE, *supra* note 16, at 5.

21. *See, e.g.,* Barry W. Lynn, *Mr. Carter's Pardon-Amnesty: Selective Redemption*, 37 CHRISTIANITY AND CRISIS 37 (March 7, 1977).

22. *See* Cohen, *supra* note 17, at 4, col. 4.

23. *See* MOORE, *supra* note 16, at 5.

24. Cohen, *supra* note 17, at 4, col. 5.

C. Theological Definitions of Pardon

Theologically, the concept of pardon stems from notions of mercy, grace, and forgiveness. To be pardoned by God is to be forgiven for one's sins and transgressions against God's will. It also means to be atoned for those transgressions. God wipes clean an individual's slate regardless of what may have been written on it. A pardon means a new beginning, a new opportunity to move beyond the mistakes and difficulties of the past into a renewed relationship with God in the present and future.²⁵

Various commentators note that particularly in the Hebrew Bible or Old Testament, "pardon" is effectively the equivalent of "forgiveness."²⁶ Harper's Bible Dictionary defines pardon as "the act by an empowered authority of reversing a sentence rendered under a verdict of guilty," and states that this legal context "is not unrelated to the biblical understanding of pardon."²⁷ To the various writers of the different sections of the Hebrew Bible, pardon is not merely an idea, a concept, or a mystery. It is an unfolding reality and understanding that humanity is not Divine, that humanity is subject to a created order and must answer to the Divine Creator for violations of that order, that humanity will violate that order, and that humanity would exist in a hopeless condition if the Creator were not, somehow, mercifully disposed to grant humanity pardon.

For the purposes of this article, the theological concept of pardon generally will be equated with Divine forgiveness of human sin, particularly as such forgiveness is demonstrated in the Hebrew Bible. The definition of this type of forgiveness, in its contexts throughout the Hebrew Bible, will be explored as various passages are examined.

25. This paper addresses images of pardon in the Hebrew Bible. It should be noted, however, that the concept of pardon is central to the New Testament story and the Christian faith because it is specifically through Christ that Christians receive pardon and opportunity for a renewed relationship with God. *See Acts 13:38* (Revised Standard Version) ("through this man forgiveness of sins is proclaimed to you.").

26. *See Forgiveness in THE NEW INTERNATIONAL DICTIONARY OF THE BIBLE* 360 (1987). It should be noted that other commentators describe Christian faith itself as forgiveness, and then equate forgiveness with pardon. *See* Carnegie S. Calian, *Christian Faith as Forgiveness*, 37 *THEOLOGY TODAY* 439, 440-41 (January 1981). Calian acknowledges that "forgiveness is dependent upon God's grace," and that this "factor places a limitation on all explanations as to how pardon takes place," but this "mystery of salvation does not diminish its reality." *Id.* at 441.

27. *See Pardon in HARPER'S BIBLE DICTIONARY* 750 (1985).

D. Toward a Better Understanding of Pardon

This article will not attempt to do certain things. It will not attempt to analyze every aspect of pardons or forgiveness in the Hebrew Bible, much less the New Testament. For example, it will not focus on Hebrew Bible concepts like "cities of refuge,"²⁸ or "sabbatical years" or "jubilee years."²⁹ These concepts are important and indeed may be precursors to modern legal theories of diminished responsibility, sanctuary, or the forgiveness of debts in bankruptcy, but they will not be discussed here. Perhaps the most famous Biblical pardon of all, when Pontius Pilate released Barabbas to the crowd, will not be analyzed because it occurs in the New Testament.³⁰ From a modern legal perspective, the article will not focus on the mechanics of how one petitions for a pardon but rather what modern law understands a pardon to be and when pardons are appropriate.³¹

Ultimately, the article hopes to achieve a better understanding of what the modern concept of pardon is and should be by looking at its roots in the Hebrew Bible. The article's thesis includes four contentions. First, law traditionally has had an understanding of pardon taken more from a Calvinist reading of Scripture—that a sovereign simply bestows grace or pardon upon a chosen few with minimal or no objective criteria existing to evaluate the propriety of the "gift." Second and relatively recently, law and popular opinion have shifted to view pardon from a Hebrew Bible perspective—a harsh, judging sovereign requires pardon to be earned, and only intervenes to grant pardon in extraordinary circumstances. Third, neither of these simplistic views of pardons does justice to the numerous, often inconsistent lessons that the Hebrew Bible teaches about pardons. And fourth,

28. A city of refuge was one of six Levitical cities appointed to receive and give asylum to accidental manslaughterers. See M. Greenberg, *City of Refuge* in 1 THE INTERPRETER'S DICTIONARY OF THE BIBLE 638 (Abingdon Press, 1962). The cities are discussed in *Exodus* 21:12-14 and *Numbers* 35:9-34. *Joshua* 20:7-8 lists the six cities as Kedesh, Shechem, Hebron, Bezer, Ramoth-Gilead, and Golan.

29. Sabbatical and Jubilee years involved the forgiveness of all debts and the returning of all lands to original owners or their heirs. See Roy B. Herron, *The Land, the Law, and the Poor*, 6 WORD & WORLD: THEOLOGY FOR CHRISTIAN MINISTRY 76, 82-83 (1986). For Scriptural references, see *Leviticus* 25:8-17, 23-55.

30. See *Matthew* 27:15-26, *Luke* 23:13-25; see also Robert L. Merritt, *Jesus Barabbas and the Paschal Pardon*, 104 JOURNAL OF BIBLICAL LITERATURE 57 (1985). For a fascinating fictional account, see P. LAKERKVIST, BARABBAS (transl. by A. Blair, 1951).

31. Although it should be noted that petition procedures are vitally important. See Note, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 YALE L.J. 863 (1981).

our modern legal understanding of pardon could be greatly enhanced by incorporating some, if not all, of these lessons.

For purposes of cohesion and clarity, the case of Joseph Giarrantano will be mentioned at points throughout the article. The questions of whether Giarrantano deserved any type of pardon and whether Governor Wilder acted properly or improperly will be considered by using Giarrantano as a case study for applying lessons about pardons learned from the Hebrew Bible.

II. THE OLD TESTAMENT UNDERSTANDING OF PARDON

Normally, when considering both the Hebrew Bible and the New Testament, one expects to find a richer understanding of pardon in the latter. The New Testament, after all, tells the story of Jesus Christ, the Savior who died so that humanity might be pardoned for its sinfulness. The Hebrew Bible does not conjure up images of a gentle, patient Deity that would allow that Deity's self to die on a cross. The God of the Hebrew Bible is viewed as a harsher, judging God. The stereotypical Hebrew Bible image of God is one of battle and warfare. It is a God that brings the powers of pestilence to bear against a stubborn Pharaoh. It is the angry God of Mt. Sinai who forges covenants with God's people, promising them prosperity when they obey God's will and pain, banishment, and destruction when they do not.

Alongside all of this judgment, the Hebrew Bible reveals an unexpected wealth of information about God's willingness to pardon. Each time the people of Israel wander from God's will and are punished, a remnant is saved. Indeed, in many instances the Hebrew Bible presents a God who is eager to pardon and that encourages people to turn away from errant behavior with no penalty being exacted.³² Instances of pardon in the Hebrew Bible will be divided into two groups: (1) Uses of the word "pardon" in the Hebrew Bible as identified by a word search in the Revised Standard Version of the Bible;³³ and (2) Examples of pardon in the Hebrew Bible in which the word "pardon" is not used, such as God effectively commuting Cain's penalty for slaying Abel,³⁴ and the prophet Hosea's forgiving and taking back of his faithless wife.³⁵

32. See, e.g., *Nehemiah* 9:17 (King James Version) ("thou art a God ready to pardon. . .").

33. Specifically, the word search was conducted in EERDMAN'S ANALYTICAL CONCORDANCE 784 (1988) under the word "pardon."

34. *Genesis* 4:13-16; see also *infra* notes 74-79 and accompanying text.

35. See *Hosea* 3:1-5; see also *infra* notes 95-100 and accompanying text.

A. Uses of the Word "Pardon" and Images They Suggest

Sixteen specific uses of the word "pardon" occur in the Hebrew Bible. The situations in which the word pardon is used fall into three categories, each of which suggests an understanding of pardon and an image of the God who pardons. First, in several instances, pardons are not obtainable, and these instances support the popular image of a harsh, judging God raining brimstone on the doers of evil. Second, in several instances, pardons are obtainable if they are earned. A sinner must perform some specific task or attain some inner growth to "earn" a pardon from God. These instances suggest a just God who harms evil-doers but opens up a path to repentance and pardon. And third, some instances indicate a very merciful God who pardons freely out of some Divine largesse without requiring that the pardon be earned.

1. The Harsh View of God and Pardon

The first Biblical reference to the word "pardon" appears in Exodus at the conclusion of the Covenant Code. The Covenant Code is a collection of laws assembled to help govern the Israelites in the settled land of Canaan.³⁶ After all of the specific laws have been listed, the Scripture states:

Behold, I send an angel before you to guard you on the way and to bring you to the place which I have prepared. Give heed to him and hearken to his voice, do not rebel against him, for he will not pardon your transgression; for my name is in him.³⁷

The angel generally is considered to be the Lord, or some manifestation of the Holy Spirit. Because the passage appears at the end of a lengthy listing of laws, it clearly implies the Lord, or the Lord's angel, will be watching over the people of Israel to see if any transgressions or violations of those laws occur. The passage makes plain that such transgression or rebellion against God's will shall not be pardoned.

This passage's writer has conveyed an image of a harsh, unforgiving God. The laws have been explained. The punishments spelled out. Break these laws, and the angel of the Lord will not pardon your transgressions, apparently under any circumstances. Significantly, Exodus 23:22 makes plain that if the Israelites hearken to and obey the angel, then the Lord "will be an enemy

36. The Covenant Code also is known as the Book of the Covenant. See W.J. Harrelson, *Covenant, Book of the* in 1 THE INTERPRETER'S DICTIONARY OF THE BIBLE 723 (Abingdon Press, 1962).

37. *Exodus 23:20-21* (Revised Standard Version).
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to your enemies and an adversary to your adversaries."³⁸ This model of God is precisely the one that the family of Joseph Giarrantano's victims wanted Governor Wilder to emulate: Giarrantano knew the law; he was found guilty of breaking the law; the punishment should be carried out; there should be no pardon for him under any circumstances. The victims' family, as faithful followers of Virginia's laws, wanted the Governor to be a stern "enemy to their enemies," and not grant a pardon.

Other Scripture passages buttress this popular image. In 1 Samuel, the Lord told King Saul, through the prophet Samuel, to go and utterly destroy the sinful Amalekites—"do not spare them, but kill both men or women, infant and suckling, ox and sheep, camel and ass."³⁹ Saul, however, decided after defeating the Amalekites that he would spare their fatted herds and rich king to gain wealth for Israel. The Lord, through Samuel, chastised Saul for disobeying a direct command to carry out the Lord's will. Saul acknowledged that "I have sinned . . . I have transgressed the commandment of the Lord. . . . Now therefore I pray, pardon my sin. . . ."⁴⁰ The Lord absolutely refused to pardon Saul, "for you have rejected the word of the Lord. . . ."⁴¹ According to this version of the story of Saul's reign, this incident alone triggered God's ire with Saul and cost Saul his kingship.⁴²

In 2 Kings, the Scriptures describe the first fall of Jerusalem and the deportation to Babylon in the reign of Nebuchadnezzar. In explaining why this calamity befell Judah, the Scripture states:

Surely this came upon Judah at the command of the Lord, to remove them out of his sight for the sins of Manasseh, according to all that he had done, and also for the innocent blood that he had shed; for he filled Jerusalem with innocent blood, and the Lord would not pardon.⁴³

38. *Exodus* 23:22 (Revised Standard Version). Indeed, *Exodus* 23:23-33 echoes this theme of God blessing God's servants but venting God's wrath against both the enemies of God's faithful servants and God's disobedient servants themselves.

39. *1 Samuel* 15:3 (Revised Standard Version). This kind of passage certainly promotes the image of a wrathful, Old Testament God who orders God's people to slaughter babies.

40. *1 Samuel* 15:24-25 (Revised Standard Version).

41. *1 Samuel* 15:26 (Revised Standard Version).

42. See *1 Samuel* 15:28-35 (Revised Standard Version) ("And the Lord repented that he had made Saul King over Israel").

43. *2 Kings* 24:3-4 (Revised Standard Version) (emphasis added). Because of the reference to Manasseh, most scholars attribute these two verses to the second Deuteronomist. Manasseh ruled Judah from 687 to 642 BCE, and was considered a weak, polytheistic, and corrupt king whose apostasy would be harshly punished. See H.B. MacLean, *Manasseh* in 3 THE INTERPRETER'S DICTIONARY OF THE BIBLE 252, 254-55 (Abingdon Press, 1962).

Again, the Scriptures indicate that there are certain transgressions that will not be pardoned, and the spilling of innocent blood—like that of the victims in the Giarrantano case—is one of these unpardonable transgressions.

Still other passages indicate a general unavailability of pardons, although they also reflect a God who can temper Divine harshness in very isolated circumstances. In Numbers, Moses asks God to “[p]ardon the iniquity of this people, I pray thee, according to the greatness of thy steadfast love, and according as thou has forgiven this people, from Egypt even until now.”⁴⁴ The people are the Israelites who grumbled incessantly during their sojourn in the wilderness. Moses makes his plea for pardon after the Israelites have sent spies into Canaan and determined that it will be impossible for them to supplant the land’s inhabitants. Tired of the fickle, doubting Israelites, God vows to “strike them with a pestilence and disinherit them.”⁴⁵ After Moses’ plea, however, God announces that God has pardoned Israel, but that none of the generation freed from Egypt, “the men who have seen my glory and my signs . . . and yet have put me to the proof . . . and have not hearkened my voice,” shall see the land of Canaan.⁴⁶ The episode indicates a God who will pardon on occasion but who has little patience or forgiveness for those who continually doubt God’s power and word. Pardons are obtainable, but not if a person has committed certain transgressions.

Similarly, sections of Deuteronomy deal with the sojourn in the wilderness, and at one point, Moses exhorts the Israelites not to walk “in the stubbornness” of their hearts or to turn away from the Lord to follow the gods of other nations.⁴⁷ For emphasis, Moses adds that the Lord would not pardon one who walked in stubbornness, “but rather the anger of the Lord and his jealousy would smoke against that man, and the curses written in this book would settle upon him, and the Lord would blot out his name from under heaven.”⁴⁸ This image is harsh, but it holds out hope for those who repent and do not walk in stubbornness. When Job stubbornly asks God “[w]hy dost thou not pardon my transgression and take away my iniquity?,”⁴⁹ the question implies that God occasionally does pardon. And eventually, God does

44. *Numbers* 14:19 (Revised Standard Version).

45. *Numbers* 14:12 (Revised Standard Version).

46. *Numbers* 14:20-23 (Revised Standard Version).

47. *See Deuteronomy* 20:18-19 (Revised Standard Version).

48. *Deuteronomy* 29:20 (Revised Standard Version).

49. *Job* 7:21 (Revised Standard Version).

somehow pardon Job and restore him to good fortune, although no one, including Job, ever really understands why Job had to endure such suffering in the first place.⁵⁰

All of these passages suggest a stern, harsh God in line with the Hebrew Bible stereotype. They also suggest a God who rarely pardons. They support a theory of pardons that frowns upon granting pardons because pardons enable transgressors to escape punishment. And punishment is presumably exactly what transgressors deserve. Such passages support the position of not granting any type of pardon to Joseph Giarrantano, a man convicted of killing two innocent people.

2. A More Just God and Pardons to Be Earned

Other Hebrew Bible passages suggest a different view of God and pardons. Several passages suggest a stern but somewhat more benevolent God who pardons transgressors when certain conditions are met. It is a God who is willing to make deals. For example, in Exodus, Moses attempts to ameliorate God's anger toward the Israelites after they had worshipped the Golden Calf of Baal. The Scripture states that "Moses made haste to bow his head toward the earth, and worshipped," and that Moses said, "[i]f now I have found favor in thy sight, O Lord, let the Lord, I pray thee, go in the midst of us, although it is a stiff-necked people; and *pardon our iniquity and our sin*, and take us for thy inheritance."⁵¹ God, however, does not merely grant or deny a pardon. God forges a whole new agreement with Israel: "Behold, I make a covenant."⁵² Under this new or renewed covenant, God will do marvels for the people, and the people agree to be God's people and live by God's laws. The covenant functions as a pardon because it gives Israel a fresh start, but Israel is required to do certain things as a condition of this new beginning.⁵³

An episode in 2 Kings illustrates another instance of God requiring certain behavior to merit a pardon. The Syrian general Naamen sought out the prophet Elisha to obtain a cure for

50. The entire Book of Job raises tremendous questions about the nature of God and God's benevolence or harshness, and also God's ability and willingness to grant pardon or make amends to one wrongfully punished. See generally N. HABEL, *THE BOOK OF JOB: A COMMENTARY* (Westminster Press, 1985).

51. *Exodus* 34:8-9 (Revised Standard Version) (emphasis added).

52. *Exodus* 34:10 (Revised Standard Version).

53. For the whole account of the renewed covenant, see generally *Exodus* 34:1-35 (Revised Standard Version).

leprosy. To Naamen's indignant incredulity, Elisha advised him merely to wash in the Jordan River.⁵⁴ When the cure amazingly worked, Naamen wished to give a gift to Elisha. Elisha refused, so Naamen requested to take home to Syria "two mules' burden of earth" so he could offer burnt sacrifices to none but Elisha's Lord.⁵⁵ Naamen further stated that when he returned to Syria and his king went into "the house of Rimmon" to worship, that Naamen also would have to bow to Rimmon, but that he really would be bowing to Elisha's Lord. Naamen sought the Lord to "pardon your servant in this matter."⁵⁶ Elisha acknowledged the Syrian's new-found faith and sincerity and said, "Go in peace."⁵⁷

The story continues as one of Elisha's servants, Gehazi, decides to pursue Naamen and claim the gift the Syrian offered Elisha. After returning home with two talents of silver, Gehazi is confronted by Elisha. The servant lies to Elisha, but Elisha knows the truth anyway and punishes Gehazi for his impudence and falsehoods by giving him Naamen's leprosy.⁵⁸ No pardon was available to the servant who disobeyed his master and lied about it. Pardon was granted, however, to the outsider who, even though he went on committing a technical wrong (bowing to Rimmon), had a real change of heart in terms of wanting to follow the Lord and seeking the Lord's pardon after internal repentance.

Similarly, when many executives pardon criminal offenders, they do so only when the criminals have "earned" pardon, or done something to merit the favor of the executive. For example, Governor Wilder may have commuted Joseph Giarrantano's sentence because he believed the inmate had been totally transformed. Giarrantano earned the commutation by turning his life around and becoming an individual who could serve society instead of threaten it. Other examples of inmates "earning" pardons include inmates who have saved prison guards or visitors during riots, or who have saved the life of a warden's family member while working as a trustee.⁵⁹

Often the only requirement for God to grant pardon is that the transgressor has repented of his or her sin and turned away

54. See *2 Kings* 5:1-5 and 8-12 (Revised Standard Version).

55. *2 Kings* 5:17 (Revised Standard Version). Naaman needed to take the two loads of earth or soil because of the then-popular idea that a god could not be worshipped apart from that god's own land. See J.M. Ward, *Naaman* in 3 THE INTERPRETER'S DICTIONARY OF THE BIBLE 490 (Abingdon Press, 1962).

56. *2 Kings* 5:18 (Revised Standard Version) (using this phrase twice).

57. *2 Kings* 5:19 (Revised Standard Version).

58. See *2 Kings* 5:20-27 (Revised Standard Version).

59. See, e.g., MOORE, *supra* note 16, at 3.

from wicked ways and unrighteous thoughts. Isaiah observes that God will “abundantly pardon” when these conditions are met, and the transgressor returns to God.⁶⁰ This requirement is vitally important, and without it a pardon will not be granted. In this sense, a pardon is very much a quid pro quo, for God needs to be given a reason to pardon. For example, in Jeremiah, God seems to want to pardon Jerusalem but cannot find a single reason to do so. According to Jeremiah, the Lord says, “[s]earch her squares to see if you can find a man, one who does justice and seeks truth; that I may pardon her [the city].”⁶¹ Apparently unable to find such an individual, the Lord asks Jerusalem, “[h]ow can I pardon you?”⁶² This “may” and “can” language indicates a God with the power to pardon but a God who needs a reason to pardon. The pardoning power will not be exercised unless the transgressor shows some redeeming characteristic or merit to show that a pardon is deserved.

Often executives who grant pardons follow this model. Exercising the constitutional power to pardon can be a politically unpopular move, and executives frequently must have a good reason to pardon an individual before they will do so. Governor Wilder gave no reason for pardoning Joseph Giarrantano, but other executives frequently give reasons such as “an inmate has paid his or her debt to society,” or even “new evidence has determined that the inmate is innocent.”⁶³ Some of these reasons can be perceived as being better than others. If an executive’s reason for pardoning is the receipt of a check from the pardonee, this reason would not be considered as strong as other rationales. President Ford, upon his historical pardon of Nixon, reasoned that his former boss had suffered enough and that a time of national healing needed to begin.⁶⁴ When provided a “good” reason, an executive pardoning an inmate for this reason gets the best of both images—stern on crime yet sympathetic to individuals; in short, being perceived as “just.”

3. A More Merciful God and Pardons Freely Given

Other Hebrew Bible passages suggest a third view of God and pardons, which initially seems more at home in the New

60. See *Isaiah* 55:7 (Revised Standard Version).

61. *Jeremiah* 5:1 (Revised Standard Version).

62. *Jeremiah* 5:7 (Revised Standard Version).

63. See, e.g., MOORE, *supra* note 16, at 53-54.

64. See *id.* at 79-82.

Testament. Numerous passages indicate a God who is eager to pardon and who pardons freely and abundantly without needing a pardon to be earned. In 2 Chronicles, King Hezekiah led a period of religious revival in Israel, and at one point, a multitude of persons who had not properly cleansed themselves took part in the passover meal during a great Passover Festival.⁶⁵ The Scripture records that Hezekiah prayed for these technically guilty individuals and asked the "good Lord to pardon every one who sets his heart to seek God . . . even though not according to the Sanctuary's rules of cleanness."⁶⁶ The Chronicler indicates that the Lord heard Hezekiah and healed or pardoned the people.⁶⁷

The Psalms also record numerous suggestions of a God who pardons out of Divine grace. Psalm 25 exalts "[f]or thy name's sake, O Lord, pardon my guilt, for it is great."⁶⁸ Psalm 85 acknowledges that "Lord thou wast favorable to thy land; thou didst restore the fortunes of Jacob. Thou didst forgive the iniquity of thy people; *thou didst pardon all their sin.*"⁶⁹ Neither Psalm indicates any need to earn this pardon, or any restriction on the largesse of God to grant it. One translation of Psalm 103 says simply that God is love, and that God will have mercy and abundantly "pardon[] all your iniquities."⁷⁰ One commentator observes that the Hebrew word used for forgiveness or pardon in this instance, "salach," is used only when indicating "divine pardon prompted by divine grace."⁷¹

Several of the prophets attest to God's overarching mercy and willingness to pardon. Isaiah states, "Comfort, comfort my people, says your God. Speak tenderly to Jerusalem, and cry to her that her warfare is ended, that her iniquity is pardoned, that she has received from the Lord's hand double for all of her sins."⁷² Jeremiah proclaims that "[i]n those days and in that time, says the Lord, iniquity shall be sought in Israel, and there shall be none; and sin in Judah, and none shall be found; for I will

65. See 2 Chronicles 30:17-18 (Revised Standard Version).

66. 2 Chronicles 30:19 (Revised Standard Version).

67. 2 Chronicles 30:20 (Revised Standard Version).

68. Psalm 25:11 (Revised Standard Version).

69. Psalm 85:1 (Revised Standard Version) (emphasis added).

70. See Psalm 103:3 (New American Standard Version); see also N.H. Parker, *Psalm 103: God is Love. He will have Mercy and Abundantly Pardon*, 1 CANADIAN JOURNAL OF THEOLOGY 191 (1955).

71. See Parker, *supra* note 70, at 193.

72. Isaiah 40:2 (Revised Standard Version).

pardon those whom I leave as a remnant."⁷³ Neither passage suggests that punishment is not deserved, yet God still pardons when no apparent acts or changes have been undertaken to merit pardon. God pardons because God is faithful and merciful even when God's followers are not.

As far as the public may perceive, this model is the one employed by Governor Wilder in pardoning Joseph Giarrantano. Wilder gave no reason for his actions. He did not indicate that he required anything of Giarrantano to perform this task. Given the political realities of the situation, Wilder had some reason to pardon Giarrantano, but it is significant that Wilder felt no need or obligation to disclose that reason. Wilder merely acted out of the largesse of his position, just as the God these images reflect did when pardoning out of Divine largesse.

B. Examples of Specific Pardons in the Hebrew Bible

The Hebrew Bible contains other examples of pardons that do not use the word "pardon" or, in Hebrew, "salach." These episodes still provide insight into what type or image of God performed these different acts of pardon. The episodes selected for discussion here all suggest the image of a God who pardons somewhat freely, but who pardons for an ascertainable reason. Of the three images suggested above, this image comes closest to matching the image of a merciful God with pardons freely given, because this image of God obviously does not deny all pardons, nor does this image require a specific task or earned merit from the individual to be pardoned. Rather, these episodes suggest a God who pardons out of a sense of commitment and fealty to a relationship in which God refuses to abandon all hope in anyone.

1. God and Cain

The first act of "executive clemency" in the Hebrew Bible occurs in Genesis when God commutes the sentence given to the first murderer, Cain. After his offering to the Lord received no regard but his brother Abel's did,⁷⁴ Cain rose up against Abel

73. *Jeremiah* 50:20 (Revised Standard Version) (emphasis added). For more on the idea of God graciously pardoning a remnant, see *infra* notes 101-108 and accompanying text.

74. *Genesis* 4:5 (Revised Standard Version).

and killed him.⁷⁵ Cain denied the crime, but the Lord knew the truth and sentenced Cain to no longer till the earth but to “be a fugitive and wanderer on the earth.”⁷⁶ This sentence amounted to a sentence of death for Cain because as a fugitive and a wanderer, “whoever finds me will slay me.”⁷⁷ The Lord, however, effectively commutes this sentence of death by putting a mark on Cain so that anyone who encounters him in his wanderings will not kill him.⁷⁸

The episode reflects a God who wants to punish wrongdoing, but does not want this punishment to be too severe. In this instance, God does not extract a life for a life because such a punishment does not fit with God’s plan. God punishes Cain, but God also protects him. And Cain, even in punishment, fulfills a purpose by traversing to Nod, establishing the city of Enoch, and starting a long line of productive descendents.⁷⁹ God punishes wrongdoing, but the punishment is not so severe as to thwart God’s overriding purpose. God’s act of commutation, putting the mark on Cain to prevent him from being killed, is the means used to balance the need for punishment with God’s overriding purpose. In like manner, Governor Wilder’s commutation of Joseph Giarrantano’s death sentence to life-without-parole for twenty-five years allows Giarrantano to be punished but does not thwart any potential benefit that a living Giarrantano might achieve for himself or society.

2. God and King David

The God of the Hebrew Bible acts frequently as a pardoning God in the lives of the leaders of Israel. God always selects very human, flawed leaders like Jacob, Moses, and the revered but mistake-prone King David. The actions of God in dealing with one of King David’s worst sins—the seduction of Bathsheba and the killing of her husband, Uriah the Hittite—show God’s tendency to punish sternly but to pardon freely and allow good to emerge from previous evils.

75. *Genesis* 4:8 (Revised Standard Version).

76. *Genesis* 4:9-12 (Revised Standard Version).

77. *Genesis* 4:13-14 (Revised Standard Version).

78. See *Genesis* 4:15 (Revised Standard Version); see also MOORE, *supra* note 16, at 16.

79. See *Genesis* 4:16-24 (Revised Standard Version).

As related in 2 Samuel, the story of David's relationship with Bathsheba shows the King at his human worst.⁸⁰ David spies the beautiful Bathsheba bathing, has her brought to him, lays with her, and she conceives a child.⁸¹ Recognizing the potential scandal of the King being implicated in a paternity suit, David schemes to make it appear that Bathsheba's husband, the noble warrior Uriah the Hittite, is the father. David recalls Uriah from battle and gives him every opportunity to lay with his wife.⁸² Uriah, however, will not allow himself the comfort of being with his wife while the King's other soldiers remain fighting and camping "in the open field."⁸³ Frustrated in this scheme, David orders Uriah sent into the heaviest of fighting where Uriah is slain.⁸⁴ With the Hittite conveniently, and apparently innocently, out of the way, David took Bathsheba as his wife and she bore him a son.⁸⁵

David's cleverness, scheming, and sin did not escape God's attention, and "the thing that David had done displeased the Lord."⁸⁶ Through the prophet Nathan and the story of the rich man taking the poor man's lamb, God upbraids David.⁸⁷ God also promises punishment for the sin. The Lord will "raise up evil against you out of your own house; and I will take your wives before your eyes and give them to your neighbor," and all of this disgrace and punishment will be public.⁸⁸ Under the idea of *lex taliones*, David also would have to forfeit his own life for causing the death of Uriah.⁸⁹

David, however, repents and acknowledges his sin.⁹⁰ Through Nathan, the Lord assures David that because of this repentance God "has put away your sin; you shall not die."⁹¹ While David's

80. In other parts of the Hebrew Bible, this story is completely ignored or just glossed over in accounts of David's reign. See *1 Chronicles* 20:1-3 and *1 Samuel* 13:14.

81. See *2 Samuel* 11:2-5 (Revised Standard Version).

82. See *2 Samuel* 11:6-13 (Revised Standard Version).

83. Uriah's reluctance to lay with his wife also could have resulted from the practice of requiring continence of soldiers consecrated for holy war. See *2 Samuel* 11:11.

84. *2 Samuel* 11:14-17 (Revised Standard Version).

85. *2 Samuel* 11:27 (Revised Standard Version).

86. *Id.*

87. *2 Samuel* 12:1-10 (Revised Standard Version).

88. *2 Samuel* 12:11-12 (Revised Standard Version).

89. *Lex taliones* is the idea of the law of exact retaliation, an "eye for [an] eye." See, e.g., *Exodus* 21:23-25; see also E. Fisher, *Lex Taliones in the Bible and Rabbinic Tradition*, 19 JOURNAL OF ECUMENICAL STUDIES 582, 583-85 (1982).

90. *2 Samuel* 12:13 (Revised Standard Version).

91. *Id.*

own life is spared, God still exacts a punishment when the child born to David and Bathsheba from their illicit tryst dies.⁹² As a special favor and pardon to David, the King's sentence is commuted. He suffers the loss of a child instead of his own life.⁹³ Again, God acts to punish, but God does not punish as severely as God might because God grants a type of pardon. This pardon allows events to proceed in a manner consistent with God's overriding purpose, and something positive emerges from the evils of the sin. In this case, Bathsheba eventually bears David his son Solomon, who will carry on the Davidic dynasty.⁹⁴

3. Hosea and His Faithless Wife

Perhaps no book in the Hebrew Bible more vividly portrays the image of a God who pardons freely than Hosea. In particular, the first three chapters of Hosea are unified by the image of the prophet Hosea taking as his wife the harlot Gomer, and then abundantly pardoning Gomer each time she strays from the marriage covenant with other men.⁹⁵ Hosea operated as a prophet in Samaria during the eighth century B.C.E, with his career spanning the end of Jeroboam II's prosperous reign and the chaos and instability that followed the King's death in 746 B.C.E.⁹⁶ This instability in the northern kingdom ended with the coming of the Assyrian invasion under Tiglath-pileser and the exiling of Israel in 721 B.C.E.⁹⁷ In this era of arrogance turned to confusion turned to despair, Hosea preached a message that restoration and renewal would follow judgment and doom. For Hosea, God would not utterly forsake God's people even when they had utterly forsaken God. God would pardon God's people and renew their covenant.

Hosea's personal life and marriage to Gomer serve as an illustration of God's relationship with Israel. Just as Israel fre-

92. See 2 Samuel 12:15-23 (Revised Standard Version).

93. Of course, this type of episode raises profound questions about the mercy of a God who would exact punishment from an innocent baby for the misdeeds of a promiscuous King. The point of this story, however, is to show God's mercy and pardon in David's life, not that of the child or even of Uriah the Hittite. The larger theological questions must be reserved for a much more comprehensive theological discourse.

94. See 2 Samuel 12:24-25 (Revised Standard Version).

95. See JAMES L. MAYS, HOSEA: A COMMENTARY 34-60 (G. Ernest Wright, et al. eds., 1969).

96. See generally BERNARD W. ANDERSON, UNDERSTANDING THE OLD TESTAMENT 301-04 (4th ed. 1986).

97. *Id.*

quently forgot God and pandered to other gods and cultures, Gomer "played the harlot," went after her other lovers, and "acted shamefully."⁹⁸ Despite this behavior, Hosea does not abandon his wife to her deserved punishment. Instead, Hosea buys back his wife, reproaches her mildly, and reaffirms his love and devotion for her.⁹⁹ In effect, Hosea pardons his wife despite the travesties she commits against their marriage covenant because he loves her and will not give up on her. In like manner, God will not give up on the faithless Israel. God will call Israel back to God's self after a period of punishment, and God will pardon Israel and reaffirm God's love for God's children. Indeed, God promises to "heal their faithlessness; I will love them freely, for my anger has turned from them."¹⁰⁰ The perfect definition of pardon is to turn away one's anger and to free a wrong-doer from deserved judgment.

4. God and the Remnant of Israel

Several other prophets in the Hebrew Bible express examples of God's pardoning of those who deserve punishment so that God's greater, overriding purpose can be achieved. Generally, prophets in the Hebrew Bible speak of "gloom and doom," of God judging the faithless Israel for her transgressions and shortcomings.¹⁰¹ This image of God as a harsh judge rests snugly beside the Hebrew Bible image of God as a terrible warrior exacting punishment and wreaking vengeance upon God's enemies. Alongside the image of God as a harsh judge of Israel, however, also rests the image of God as the faithful deliverer of at least a remnant of God's people. Each time that God punishes the Hebrews with military defeat and exile, God also saves and pardons a remnant of the people so that God's covenant with the Hebrews can be renewed and will endure.¹⁰²

For example, Jeremiah states that "[i]n those days and in that time, says the Lord, iniquity shall be sought in Israel, and there shall be none; and sin in Judah, and none shall be found;

98. See *Hosea* 2:5 (Revised Standard Version).

99. *Hosea* 3:1-5 (Revised Standard Version).

100. *Hosea* 14:4 (Revised Standard Version).

101. See *Micah* 6:1-8 (Revised Standard Version) (an excellent image of God judging Israel in a courtroom setting).

102. See generally E. Jenni, *Remnant* in 4 THE INTERPRETER'S DICTIONARY OF THE BIBLE 32 (George Arthur Buttrick, et al. eds., 1962); G. H. Davies, *Remnant* in A THEOLOGICAL WORD BOOK OF THE BIBLE 188 (A. Richardson ed., 1950).

for *I will pardon those whom I leave as a remnant.*"¹⁰³ Isaiah talks about a time of restoration when "the branch of the Lord shall be beautiful and glorious, and the fruit of the land shall be the pride and glory of the survivors [or remnant] of Israel."¹⁰⁴ The prophet Joel tells of survivors or a remnant that will escape the judgment of the "terrible day of the Lord."¹⁰⁵ According to Amos, the Lord God says that, "The city that went forth a thousand shall have a hundred left, and that which went forth a hundred shall have ten left to the house of Israel," so "it may be that the Lord, the God of hosts, will be gracious to the remnant. . . ."¹⁰⁶ Despite the fact that all Israel could be condemned, God pardons a remnant; at least a handful are saved.

In certain instances, a remnant deserves to be saved. Noah, for example, and his family were spared destruction in the flood because he was the only righteous person on earth. As a righteous person, Noah did not deserve death in the flood, so God saved him on the ark.¹⁰⁷ In the remnant examples from the later prophets, however, these remnants that were saved were no more righteous than the majorities who were condemned and exiled. Rather, these remnants were subject to judgment, but such judgment was mercifully limited "by God's free grace" and abundant pardon.¹⁰⁸ Although the Scriptures make it clear that it is God's option whether to grant pardons to the remnants, they also reveal that God often chooses to do so. The remnants do not so much earn pardon as it is freely given to them so that God's eternal covenant with God's people can be allowed to continue despite the people's transgressions. A harsh punishment is exacted, but through a selective pardon, God's promise is not irrevocably broken. In the case of Joseph Giarrantano, the Commonwealth of Virginia exacts a harsh twenty-five-year sentence from the inmate, but through Governor Wilder's selective pardon, another citizen's life is not irrevocably taken.

C. *Pardons in the Hebrew Bible—More Complex Than Harsh*

This brief study of several pardons in the Hebrew Bible indicates that stereotypes will not explain the Judeo-Christian

103. *Jeremiah* 50:20 (Revised Standard Version) (emphasis added).

104. *Isaiah* 4:2 (Revised Standard Version).

105. *See Joel* 2:30-32 (Revised Standard Version).

106. *Amos* 5:3 and 5:15 (Revised Standard Version).

107. *See Genesis* 6:8-7:24 (Revised Standard Version); *see generally* Davies, *supra* note 102, at 189.

108. *See Jenni, supra* note 102, at 32.

origins of pardon. The God of the Hebrew Bible is not simply a harsh, wrathful God that punishes those who refuse to obey God's will. Rather, the God of the Hebrew Bible pardons frequently and under a variety of circumstances. Sometimes pardons must be grudgingly earned by performing specific, concrete tasks. Other times, this God grants pardons merely upon a promise for repentance, or as an act of Divine grace that requires no human action at all. In still other situations, the God of the Hebrew Bible grants no pardons. Most consistently, the God of the Hebrew Bible grants pardons when they are required in order for God's overriding purpose to be achieved despite human failings.

Contrary to popular rhetoric and convenient proof-texting, the God of the Hebrew Bible does not always demand an eye for an eye. The Hebrew Bible indicates that God easily could have acted just as Wilder did in this situation—granting a type of pardon after still exacting a harsh penalty—just possibly because even Joseph Giarrantano might have more to contribute to the Commonwealth of Virginia alive than dead. This action presumably would be more consistent with both Virginia's interests and God's higher plan.

III. THE UNDERSTANDING OF PARDON IN MODERN LAW

The concept of pardon always has been part of the American system of criminal justice. Early royal colonial governors wielded the power to pardon crimes before the American Revolution. After a period of extreme distrust of executive power, the Framers of the Constitution gave the President "Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."¹⁰⁹ Broad powers to pardon also have been granted to governors, pardon boards, parole commissions, or equivalent bodies in all fifty states, although the power is more restricted in some states than others.¹¹⁰ Traditionally, a full and unconditional pardon for a crime in the United States has meant the effective blotting out of both the legal existence

109. U.S. CONST. art. II, § 2. See generally Carla Ann Hoge Johnson, *Entitled to Clemency: Mercy in the Criminal Law*, 10 LAW & PHILOSOPHY 109, 113-14 (1991); Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power From the King*, 69 TEX. L. REV. 569, 589-92 (1991).

110. See Kobil, *supra* note 109, at 604-10. For example, in Alabama, the governor and the parole commission may grant outright pardons and commute most sentences, but neither authority can commute a death sentence. See Martin, *supra* note 15, at 597.

of a conviction or crime and any resulting guilt or infamy,¹¹¹ subject to the exceptions of "occupational license proceedings," use in impeachment testimony of a witness, private tort litigation, and sovereign immunity.¹¹² Traditionally, the executive or appropriate constitutionally-designated authority has had virtually unfettered discretion in granting pardons of any sort for any reason.¹¹³

Recently, however, the American legal concept of pardon has come under attack from all sides. As early as Gerald Ford's pardon of the man who gave him his job, Richard Nixon, commentators have lambasted the idea of giving such unfettered, unreviewable control of the criminal justice process to political executives.¹¹⁴ In the wake of the Iran-Contra scandal and President Bush's pardoning of several officials allegedly involved in it, there have been renewed calls to impose standards and safeguards on the pardoning process to prevent executives from abusing the power.¹¹⁵ One commentator has called for the creation of an Article I Clemency Commission to handle all clemency decisions instead of the President.¹¹⁶

During the 1980s, the United States moved farther away from a rehabilitative model of criminal justice and toward a purely retributive model. Conservative "law and order" candidates like Ronald Reagan appealed to a citizenry tired of being victimized by violent crime. Victims' rights were called for to counteract an era of criminals' rights and "coddling" criminals ushered in by the Warren Supreme Court of the 1960s. In this era of being tough on crime, the use of pardons has drastically diminished. Between 1981 and 1987, President Reagan granted 286 pardons and commutations out of the 3,086 requests received by the Office of the Pardon Attorney, a division of the Department of Justice.¹¹⁷ These numbers represent an all-time low of a

111. See Philip P. Houle, *Forgive and Forget: Honoring Full and Unconditional Pardons*, 41 ME. L. REV. 273, 273-75 (1989); but see Samuel Williston, *Does a Pardon Blot Out Guilt?* 28 HARV. L. REV. 647 (1915).

112. Houle, *supra* note 111, at 289-90.

113. See Kobil, *supra* note 109, at 572-75; MOORE, *supra* note 16, at 62-65 and 69-72.

114. See, e.g., Richard A. Saliterman, *Reflections on the Presidential Clemency Power*, 38 OKLA. L. REV. 257 (1985); William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475 (1977); Hugh C. Macgill, *The Nixon Pardon: Limits on the Benign Prerogative*, 7 CONN. L. REV. 56 (1974).

115. See Christopher E. Smith & Scott P. Johnson, *Presidential Pardons and Accountability in the Executive Branch*, 35 WAYNE L. REV. 1113 (1989); Mark J. Rozell, *The Presidential Pardon Power: A Bibliographic Essay*, 5 J. L. & POLITICS 459 (1989).

116. Kobil, *supra* note 109, at 622-24.

117. MOORE, *supra* note 16, at 82.

nine percent rate of approval. The previous low was Franklin Roosevelt's twenty-two percent rate of approval.¹¹⁸ In conformity with the national mood, governors and state boards also have been granting fewer pardons.¹¹⁹ The new retributivism so prevalent in criminal justice has caused the pardon in America to atrophy, and its future is in doubt. Actions like those of Governor Wilder in the Giarrantano case are becoming rare. This trend is particularly disturbing given that the Supreme Court even acknowledges that "our judicial system, like the human beings who administer it, is fallible," and that executive clemency provides the "fail safe" in such a system.¹²⁰

This article's position on pardons in America is twofold. First, the current retributivist trend in criminal justice shares many superficial similarities with the stereotypical view of the God of the Hebrew Bible always judging and being a God of wrath. They share an underlying presumption that it is "good" to be "harsh" with "evil" for the sake of being harsh. As was seen in the section on pardons in the Hebrew Bible, this view is flawed. Second, and more importantly for this section of the article, the diminishing role of pardons in American criminal justice and the attempts to impose exact standards and criteria on granting pardons are unfortunate and misguided. Pardons should be allowed to play a significant role in American criminal justice. Their use should be increased. While pardon decisions should be informed by general principles of justice and beneficial forgiveness, they should not be shackled to a set of listed, objective criteria. As in the Hebrew Bible, pardons should be available for a wide, evolving variety of reasons that include the State acting out of its own largesse to achieve ends consistent with its overriding purpose.

A. The Historical Understanding of Pardon in American Law

In order to appreciate the role of pardon in modern American law, one must understand how pardon has evolved through the American legal system. Not surprisingly, courts in different eras have interpreted pardons and executives' powers to grant them differently. These differences are important because they reflect

118. *Id.*

119. See generally NAT'L GOVERNORS' ASS'N FOR POLICY RESEARCH, GUIDE TO EXECUTIVE CLEMENCY AMONG THE AMERICAN STATES (1988).

120. *Herrera v. Collins*, 113 S.Ct. 853, 868 (1993) (citations omitted).

the changing understanding of pardon that has culminated in the movement toward restricting pardons and making them an extension of the criminal justice system itself. Pardons should be outside the criminal justice system so as to provide an outlet to override it when it errs and a standard against which to judge it when it becomes bureaucratized.

1. Nineteenth-Century Pardons as Free Acts of Grace

The United States Supreme Court first addressed the executive power to pardon in the 1833 case of *United States v. Wilson*.¹²¹ Wilson made a lucrative living robbing the United States mails. In 1831, he was caught and convicted, but mutual friends used their influence to secure a pardon from President Andrew Jackson. Wilson's pardon came through at approximately the same time he was being tried for a legally separate but factually related charge.¹²² Wilson worried that accepting Jackson's pardon for his first crime would imply that he was guilty in the second. Rather than lessen his chances for acquittal in the second case (with its sterner penalty), Wilson wanted to refuse Jackson's pardon. In a famous decision, the Supreme Court ruled that Wilson could refuse a pardon just as anyone could refuse a free gift.¹²³

Chief Justice John Marshall wrote that "[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. It is the private, though official act of the executive . . ."¹²⁴ Marshall based his opinion on the rationale that the President's power to pardon was based on English common law and the King's power to pardon. Because the King's pardoning power was based on God's pardoning power, it was absolute as a free act of grace.¹²⁵ The free gift could be refused, as Wilson was allowed to do, but nothing could impinge on the executive's power to pardon. Implicit in the *Wilson* definition of pardon is the idea "that the executive can dispense such" an act of grace "at any time," "in any form," and "for any reason."¹²⁶

121. 32 U.S. (7 Pet.) 150 (1833).

122. *Id.* at 152-54.

123. *Id.* at 161.

124. *Id.* at 160-61.

125. *See id.* at 160; *see also* MOORE, *supra* note 16, at 50-51.

126. Kobil, *supra* note 109, at 594.

The 1855 case of *Ex parte Wells* elaborated on this idea.¹²⁷ In *Wells*, President Millard Fillmore commuted the sentence of William Wells from hanging to natural life imprisonment for the crime of murder. Wells filed a writ of habeas corpus, claiming that Fillmore had overstepped his power in adding the condition of life imprisonment to the pardon.¹²⁸ Wells argued that pardon meant just "pardon," and did not give the President power to commute sentences. If Fillmore had pardoned him, Wells argued, he was free with no strings attached. The Supreme Court disagreed. It held that the power to commute sentences was inherent in the power to pardon and that President Fillmore could attach any conditions to a pardon that he desired.¹²⁹ The Court broadly defined a pardon as "forgiveness, release, remission"¹³⁰ for a crime, and also broadly defined the power of the executive to grant and place stipulations on pardons.¹³¹

In the aftermath of the Civil War, the Court gave its most expansive characterization of the scope of executive clemency. The case of *Ex parte Garland* involved the validity of pardons granted to attorneys who took up arms against the Union during the war.¹³² Factions aligned with the Radical Republicans in Congress sought to restrict lawyers who previously fought for the Confederacy from practicing law in the District of Columbia and before all federal courts. These factions attempted to argue that Presidential pardons could not trump the requirement of oaths taken by practicing lawyers swearing that they never had participated in open rebellion.¹³³ The Supreme Court smashed this Radical Republican ploy by reaffirming in the strongest language possible that a full pardon exonerated both punishment and the underlying conviction and existence of a crime. After a pardon, "in the eye of the law the offender is as innocent as if he had never committed the offence."¹³⁴

The *Garland* Court stated that the executive pardon power conferred by the Constitution

is unlimited. . . . It extends to every offence known to the law, and may be exercised at any time after its commission,

127. 59 U.S. (18 How.) 307 (1855).

128. *Id.* at 308-09.

129. *Id.* at 314-15.

130. *Id.* at 309.

131. *Id.* at 309-10.

132. 71 U.S. (4 Wall.) 333, 337 (1866).

133. *Id.* at 365-66 and 376-77.

134. *Id.* at 380.

either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered . . .¹³⁵

Under this approach, an executive wields absolute power subject to no review of standards when the executive pardons. The pardon is an act of mercy flowing from a fountain of unrestrained grace and executive power. Under this model, an executive like Governor Wilder is free to act just as Wilder did in the Giarratano case without giving specific reasons and without being subject to any formal review.

2. Twentieth-Century Pardons as More Limited Acts of a Government Bureaucracy

In the twentieth century, the Supreme Court has retreated somewhat from the holding of *Garland*. Theoretically, the power of the executive to pardon and the power of the pardon to absolve guilt remain considerable. In practical terms, while the executive remains somewhat unshackled in his or her actions, the undergirding concept of a pardon has changed drastically to decrease its once sweeping power.

The first diminishing of the scope of the pardon power occurred in the context of a case upholding the basic principle of *United States v. Wilson*, that a pardon is a gift that can be rejected.¹³⁶ In *Burdick v. United States*, a grand jury attempted to force a City Editor of the New York Tribune to testify about his sources for a series of articles on fraud in the United States Customs Service.¹³⁷ Burdick pled the Fifth Amendment and refused to divulge his sources on the grounds that it might incriminate him. In an attempt to disgorge the information, President Woodrow Wilson pardoned Burdick in advance for any crime about which he might testify.¹³⁸ Burdick still did not want to testify and refused the pardon. Relying heavily on *Wilson*, the Supreme Court ruled that Burdick did not have to accept the

135. *Id.*

136. See *supra* notes 121-26 and accompanying text.

137. 236 U.S. 79, 84-85 (1915).

138. *Id.* at 85-86.

pardon and that Burdick did not have to testify before the grand jury.¹³⁹

The Court held that acceptance as well as delivery of a pardon is essential to its validity. Unless the gift of a pardon is accepted, it really is not a pardon, and like any gift, a pardon may be refused.¹⁴⁰ At first blush, *Burdick* seems like a reaffirmation of the sweeping power of pardon as a free gift. The emphasis in this case, however, was not on a pardon being a free gift of grace. Rather, the case stressed what the President could and could not do with a pardon. Because of the facts in the case, the Court stressed that there were things a President could not do with a pardon, such as give one to someone who did not want one.¹⁴¹ Seen in this light, *Burdick* becomes the first case to stress that an executive's pardoning power is restricted in any significant way.

The Supreme Court made the most sweeping and dramatic change in its interpretation of the power to pardon in the 1927 case of *Biddle v. Perovich*.¹⁴² President William Howard Taft had commuted the death sentence of an Alaskan murderer named Perovich to natural life imprisonment. Perovich attempted to argue, as William Wells had, that the President could not merely commute a death sentence but had to grant a full pardon.¹⁴³ Further, Perovich, who had been imprisoned at Leavenworth by 1926, argued that because he no longer wanted to accept Taft's free gift of pardon, it was no longer valid, and that he was free to leave prison and be executed.¹⁴⁴ The Supreme Court held that Taft's commutation of the sentence had been valid, remained valid despite Perovich's fickleness, and that Perovich was not free to go anywhere.¹⁴⁵ To reach this result, the Court had to redefine radically what it considered a pardon to be.

Specifically, Justice Oliver Wendell Holmes wrote

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

139. *Id.* at 90-92.

140. *Id.* at 94.

141. *Id.* at 94-95.

142. 274 U.S. 480 (1927).

143. *Id.* at 485-86. Pardon law in general was in a state of flux after 1915, with the *Burdick* decision, see *supra* notes 137-40 and accompanying text, and the publication in the Harvard Law Review of Professor Williston's influential article on whether pardons actually should blot out guilt, see Williston, *supra* note 111. Given this state of flux, the Court allowed the reargument of nineteenth-century holdings. See 274 U.S. at 481-85.

144. 274 U.S. at 485.

145. *Id.* at 487-88.

Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.¹⁴⁶

In one sweeping decision, the Court altered the whole concept of pardon. No longer was it a "free gift of grace" that could be rejected. It was an executive decision within the Constitutional scheme over which the recipient of the pardon had no say. "The public welfare" determines what will be done, and just as no consent was needed to sentence Perovich, he need not consent to his pardon, or commutation, for it to be valid.

In one sense, *Biddle* greatly increased the President's power to pardon, for now the executive could cram a pardon down someone's throat. In another sense, *Biddle* greatly restricted the pardon power. First, *Biddle* limited the power to an administrative act within the Constitutional scheme. Second, the President no longer could pardon for any reason, but had to act to benefit what the Court interpreted as the "public welfare." While "acting in the public welfare" is a broad, easily-met standard, *Biddle* marks the first time that any express or implied standard of behavior was imposed on the President in making pardoning decisions. Ultimately, the new definition of pardon established in *Biddle* greatly reduced the power to pardon.¹⁴⁷ It changed the nature of a pardon from an executive act of grace that functioned outside the criminal justice system to a purely administrative, executive task or order that could be reviewed for its consistency with the utilitarian standard of "public welfare."

A more recent Supreme Court case, *Schick v. Reed*,¹⁴⁸ theoretically bolsters the power to pardon, although doing so within the parameters of *Biddle's* new definition of pardon. President Dwight Eisenhower commuted the death sentence of a former Army Sergeant, Maurice Schick, to life imprisonment without parole in 1960.¹⁴⁹ In the aftermath of *Furman v. Georgia* in 1972, which commuted all death sentences to life imprisonment with the possibility of parole,¹⁵⁰ Schick argued that his death sentence should have been commuted to a life term which allowed for parole. Schick argued that Eisenhower's commutation of his sentence had to be altered to make him eligible for parole.¹⁵¹

146. *Id.* at 486.

147. See MOORE, *supra* note 16, at 64-65.

148. 419 U.S. 256 (1974).

149. *Id.* at 257-59.

150. 408 U.S. 238 (1972).

151. *Schick*, 419 U.S. at 259-60.

The Court disagreed. In language evocative of *Biddle*, the Court stressed that the President's power to pardon or commute derives from the Constitution.¹⁵² As part of the Constitutional scheme, the President's power cannot be constrained by the provisions of statutes or the procedures of the Furman decision. The President remains free to attach any condition to a pardon, such as the life-without-parole condition in *Schick*. Even as *Schick* reaffirms the President's power to pardon, it also acknowledges the limits of *Biddle*. The Court stresses that the President pardons as part of the overall Constitutional scheme, not as a matter of executive grace.¹⁵³ Thus, the Supreme Court recognizes the broad authority of the Executive to pardon, but only as a part of the Constitutional scheme. The Court implies that it expects all pardons to meet the vague but still existing standard of promoting the public welfare. The power to pardon is considerable, but it is not absolute.

B. *The Current Retributivist Model*

The entire concept of what a pardon is and when the power to pardon should be exercised has continued to evolve throughout the 1980s and 1990s as America has embraced a more retributivist ideal of criminal justice. In this ideal, pardons are interpreted as a part of the criminal justice system meant only to supply extraordinary relief. America has moved away from a rehabilitative ideal to one that promotes "just deserts," and the granting of pardons has fallen out of favor. A different concept of what the "public welfare" entails has meant more of an emphasis on keeping criminals behind bars for determined periods, not releasing them at the sole prerogative of an executive. The retributivist model of justice and pardons also has led to the promotion of specific standards to determine when a pardon is permissible.

1. From Rehabilitation to Retribution

From at least the middle of the nineteenth century until the 1970s, the American criminal justice system operated under a

152. *Id.* at 266.

153. *Id.* at 262-66. For more analysis on *Schick*, see Julian H. Wright, Jr., Note, *Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?*, 43 VAND. L. REV. 529, 534-38 (1990).

rehabilitative model.¹⁵⁴ Those who broke the laws were seen as diseased in some way, frequently as being made ill from an upbringing in a hostile, deprived environment. The criminal justice system in general and prisons in particular played the role of a benevolent doctor who would cure the criminals and then return them to society.¹⁵⁵ This view of criminal justice led to the origin of several staples of modern criminal justice, namely indeterminate sentencing and parole. Indeterminate sentencing is exactly what it says—sentencing criminals to indeterminate sentences (i.e. “five to twenty-five years”) and then having the length of the sentence determined by how well the criminals respond to programs and rehabilitative treatments in prison. Once criminals respond satisfactorily, they are “paroled,” or released back into society with minimal supervision.

In the 1970s and 1980s, the abuses of the rehabilitative ideal far outstripped its supposed benefits. People recognized that criminals were not being rehabilitated. Recidivism rates stayed the same or grew. Violent crime increased. Society became disenchanted with the idea of indeterminate sentences under which one person might serve only a few months for the same crime as someone who might serve years.¹⁵⁶ People became frightened at the prospect of paroled criminals being loosed upon the streets to commit more crime.

Correspondingly, Americans shifted to a more conservative ideal of criminal justice—retribution. The 1976 Report of the Committee for the Study of Incarceration, entitled *Doing Justice*, provided the blueprint.¹⁵⁷ This “new retributivism” started from the principle that “certain things are simply wrong and ought to be punished.”¹⁵⁸ Retributivism stems from the idea that punishment must be closely linked with what a criminal has done, not who that criminal is or what that criminal may do.¹⁵⁹ Society punishes criminals for what they do—the wrongs they perpetrate against others—in direct retribution for those wrongs, not others

154. See generally D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (2d ed. 1991) (providing a history of the trend toward rehabilitative institutions in America).

155. See MOORE, *supra* note 16, at 55-62 and 66-68.

156. *Id.* at 69-72.

157. See A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (Report of the Committee for the Study of Incarceration) (1976). The independent Committee for the Study of Incarceration was created and funded by the Field Foundation and the New World Foundation. See MOORE, *supra* note 16, at 74 n.34.

158. VON HIRSCH, *supra* note 157, at xxxix.

159. See MOORE, *supra* note 16, at 75-76.

that might be committed, and not to deter other people from committing wrongs. Criminals are punished, not rehabilitated, because they have done wrong, and similar wrongs or crimes merit reasonably similar punishments. Retributivism has led, in roughly this order, to the reemergence of determinate sentencing (as set by the United States Sentencing Commission and comparable state bodies),¹⁶⁰ longer prison sentences, less parole, and continued prison overcrowding.¹⁶¹

2. Retributivist Standards for Granting Pardons

The new retributivism has led to a reexamination in scholarly literature of the role and nature of pardons. The two most impressive and influential studies call for significant reform of the pardon-granting process in America, most particularly by advocating specific retributivist criteria for when pardons should and should not be granted. In her *Pardons: Justice, Mercy, and the Public Interest*, Professor Kathleen Dean Moore advances a retributivist theory of pardon.¹⁶² She argues that pardons are appropriate when they advance retributivist goals, such as when a too harsh sentence is commuted to a more lenient one, or when an innocent person is spared any punishment at all.¹⁶³ In his "The Quality of Mercy Strained: Wrestling the Pardoning Power from the King," Professor Daniel T. Kobil advocates even more extreme reform.¹⁶⁴ He divides pardons into "justice-enhancing" and "justice-neutral" categories, the former promoting retributivist ideals of justice and the latter not. He then proposes to remove all "justice-enhancing" pardon power from the executive and give it to an independent, Article I Clemency Commission.¹⁶⁵ The executive still could make "justice-neutral" pardons, but with certain limitations, most alarmingly, the approval of Congress. Each academic would largely gut the power to pardon as an act of free grace.

Professor Moore advocates a system in which pardons are granted to prevent injustice. This retributive definition of injus-

160. See *Mistretta v. United States*, 488 U.S. 361 (1989) (confirming the constitutionality of the United States Sentencing Commission).

161. See *Grubbs v. Bradley*, 552 F. Supp. 1052 (M.D. Tenn. 1982) (describing problems of prison overcrowding in the 1980s in the fairly representative state of Tennessee).

162. See MOORE, *supra* note 16.

163. *Id.* at 155-77.

164. See Kobil, *supra* note 109, at 569.

165. *Id.* at 636-38.

tice occurs only in the neat categories in which pardon is available. These are: (1) pardons for false convictions; (2) pardons for reduced ability offenders such as the insane and retarded; (3) pardons for crimes without tangible gain, such as unsuccessfully attempted crimes and repaired crimes; (4) pardons for crimes with no gain at all, such as strict liability offenses and coerced crimes; (5) pardons for morally justified or conscientious crimes, like Vietnam draft evasion or some civil disobedience; and (6) pardons to adjust disproportionately harsh sentences, particularly deathbed pardons, pardons for youthful offenders, and pardons after the passage of long periods of time.¹⁶⁶

Professor Moore also lists certain types of pardons that never should be granted, including: (1) pardons to promote the public welfare;¹⁶⁷ (2) pardons to promote the pardoner's private welfare; (3) pardons to reward past actions; (4) pardons for pity's sake; (5) pardons based on the recommendation of a judge, jury, or attorney; (6) pardons based on sex or family status; and (7) pardons granted for any reason other than that punishment is not deserved.¹⁶⁸ She also advocates specific changes in the way pardons are granted, at least at the federal level, although she does have the President retain ultimate pardoning power. Her suggestions include conceptual acknowledgments that pardons are not gifts, are not discretionary, and do not imply guilt,¹⁶⁹ as well as procedural changes whereby pardons are available only after trial, conviction, and sentencing, only for specified crimes, that they be accompanied by written reasons, and that the acceptance requirement for a pardon be restored.¹⁷⁰

Professor Kobil promotes a slightly less retributive system than Moore's, but with narrower categories and more sweeping

166. See generally MOORE, *supra* note 16, at 132-78.

167. In this instance, Professor Moore moves far beyond even the *Biddle* Court in promoting very strict standards to be applied for when pardons are appropriate. By removing the executive's ability to pardon for the promotion of public welfare, Moore moves totally away from the Hebrew Bible model of a sovereign being able to pardon for the sake of consistency with that sovereign's overriding purpose. In the Hebrew Bible, this purpose was fealty to the covenant with Israel. In modern America, this purpose is the promotion of the welfare of *all* of the public. In this respect, Moore's retributivist model moves too far away from this writer's understanding of what pardon should be.

168. MOORE, *supra* note 16, at 209-10.

169. *Id.* at 212-16.

170. *Id.* at 216-21. For three book reviews on Professor Kathleen D. Moore's book see Walter L. Barkdull, *Greater Role for Pardon Theorized*, 54 FED. PROBATION 88 (1990); John Fahle, Book Review, 17 AM. J. CRIM. LAW 95 (1989); and Book Note, 89 COLUM. L. REV. 1972 (1989).

procedural changes. For Kobil, pardons are only appropriate when they are "justice-enhancing," with justice defined in retributive terms.¹⁷¹ Pardons promote justice for Kobil when they are bestowed in situations of: (1) "substantial doubt of guilt;" (2) "diminished mental capacity, retardation, intoxication, or youth;" (3) disparate sentences (when a sentence is not proportionate to the crime or when individual "special circumstances" make a sentence disproportionate); (4) "sentencing that is unrelated to [the crime's] deserts;" (5) "crimes committed out of necessity, coercion, or adherence to moral principles;" and (6) "crimes in which an offender has suffered enough."¹⁷² Kobil's categories overlap somewhat with Moore's, but Kobil also acknowledges the "justice-neutral" pardon, or in Moore's terms a pardon to promote public welfare, which an executive can make for more political reasons. Kobil does not automatically consider all such pardons wrong, as does Moore, but he considers them suspect and seeks to restrain them.¹⁷³

Most radically, Kobil would effectively rewrite the Constitution to strip the President of pardoning power in cases of "justice-enhancing" pardons and give it to a proposed Article I Clemency Commission.¹⁷⁴ This Clemency Commission would be appointed by the executive to wield total authority, consistent with the pardon categories described above, in all requests and considerations of "justice-enhancing" pardons. The executive, under Kobil's system, would retain authority to make "justice-neutral" pardons, or pardons that do not fall into any of the above categories.¹⁷⁵ To make such a pardon, however, the executive would have to jump through certain hoops: (1) the Clemency Commission must have considered and rejected the pardon request on "justice-enhancing" grounds; (2) the executive must set out reasons for the clemency decision to the public; and (3) the clemency decision must not be overridden by a super-majority of the legislature.¹⁷⁶ Kobil's strategy stands out just as boldly as Moore's for denying an executive unfettered freedom to act as he or she sees fit to promote the State's overriding responsibility to promote the public welfare.

171. Kobil, *supra* note 109, at 575-83.

172. *Id.* at 624-33.

173. *Id.* at 621-22 and 636-38.

174. *Id.* at 622-24.

175. *Id.* at 636.

176. *Id.* at 637-38.

C. *The Use of Pardons in Modern Law*

While Moore and Kobil have made scholarly, constructive suggestions to improve the pardoning process, their ideas are not law. Despite the fact that their suggestions are nonbinding, their initial purpose for writing about pardons has been largely achieved. Each scholar wrote because of perceived abuses of the pardoning power by executives operating without any standards or controls. Many of these perceived abuses, however, already have been “corrected” because executives are not wielding their pardoning power at all, much less abusing that power. The use of pardons in modern law has dwindled to the point of virtual neglect. Governor Wilder’s limited pardon to Joseph Giarrantano is the exception, not the rule. Executives increasingly see themselves not as checks outside of the criminal justice system, but as extensions of the judicial system needing legal grounds to act. As a result, pardons in modern law are in a state of atrophy.

1. Making Governor Wilder’s Action the Exception

As noted earlier, the granting of federal pardons reached an all-time low during the 1980s, and the states largely followed suit.¹⁷⁷ Despite massive overcrowding in America’s prisons and frequent dissatisfaction with America’s criminal justice system, the extrajudicial remedy of executive pardons has been employed less and less.¹⁷⁸ This situation makes it more remarkable that Governor Wilder took any sort of action involving clemency in the case of Giarrantano. In the current political climate, such actions require political courage, and are the exception, not the rule, when executive clemencies are sought.

It is worth pointing out that under the standards advanced by both Moore and Kobil, Governor Wilder acted improperly in the Giarrantano case. Primarily, Governor Wilder gave absolutely no reason for his partial pardon of Giarrantano. Under both academic schemes, Wilder should have provided reasons so that his decision could be critiqued and evaluated. Governor Wilder could have pardoned Giarrantano for several “correct” reasons—false conviction or reasonable doubt about guilt, Giarrantano’s diminished responsibility as a drug addict, and perhaps even the

177. See *supra* notes 117-20 and accompanying text.

178. See Kobil, *supra* note 109, at 611-14.

disproportionality of the death sentence itself.¹⁷⁹ Likely factors in Wilder's decision, though, were Giarrantano's metamorphosis while on Death Row and the support he earned from many friends and supporters. Under either of the retributivist theories advanced above, these reasons would not be acceptable for granting a pardon, and Wilder would not have acted appropriately. Under such retributivist constraint, actions like Wilder's would be an almost freak occurrence.

2. Executives Functioning as Mere Extensions of the Judicial System

It cynically could be suggested that executives do not wield their pardoning power very often in modern law because they are afraid of losing the "law and order" vote by appearing soft on crime.¹⁸⁰ Most executives, however, give much more substantial reasons for denying pardons. Perhaps the most frequent reason given involves an executive refusing to upset a determination that has been made in accordance with due process of the law. Such executives see their pardoning power bound by rules of law that they are not free to upset. They see the power to grant clemency not as an absolute power to confer a gift, but as "a quasi-judicial power providing the opportunity for a final [legal] review."¹⁸¹ For these executives, the pardoning power exists to afford relief from an evident mistake in the operation of the law. Absent such a mistake (that presumably should have been caught by a court of appeals), an executive will not grant a pardon.

A prime example of this syndrome of "executive doing nothing while acting as some sort of super-supreme court," occurred in North Carolina in 1984. Governor Jim Hunt was locked in a United States Senate race with arch-conservative Jesse Helms when Hunt had the chance to spare Velma Barfield from the electric chair. Barfield, a former nurse, was unquestionably

179. Because the vast majority of murderers do not receive capital punishment, it could be argued that it is disproportionate for anyone to receive it. In other words, if Charles Manson and Sirhan Sirhan are still alive and eligible for parole, does Joseph Giarrantano really deserve to die?

180. See, e.g., Paul W. Cobb, Jr., Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 YALE L.J. 389, 394 (1989).

181. Hugo A. Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 NYU REV. L. & SOC. CHANGE 255, 257 (1990-91). See also Winthrop Rockefeller, *Executive Clemency and the Death Penalty*, 21 CATH. U. L. REV. 94 (1971).

guilty of poisoning her fiancée, her mother, and two of her former patients.¹⁸² In prison, evaluations revealed that Barfield had been a victim of child and sexual abuse and suffered from a variety of psychiatric disorders never brought up at her trial. With proper treatment behind bars, she emerged as a model prisoner, leading Bible studies, knitting items for other prisoners, and doting on her grandchildren.¹⁸³

As the first woman scheduled to be executed in the post-*Furman* era, Barfield's case received considerable publicity. Public pressure mounted to pardon Barfield, and even the Warden of the Women's Prison in Raleigh pleaded with the Governor to spare Barfield's life.¹⁸⁴ Governor Hunt refused. With the Senate election only a few weeks away, Governor Hunt commented that he "[could] not in good conscience justify making an exception to the law."¹⁸⁵ Hunt acted as an extension of the court system, instead of an executive empowered to intervene when that system threatens to inflict injustice. Hunt hid behind the law, refused to act, and Velma Barfield died.

This type of thinking skews the very purpose of pardons. Pardons are extrajudicial mechanisms to prevent legal systems from carrying out injustices. They are not merely extensions of that legal system which give criminals one more shot at an appeal to a different judge who happens to reside in an executive's mansion. Pardons are not bound by rules of law, for if they were, they would cease to be pardons. Executives are popularly elected to their jobs so they can wield power on behalf of the populace. This power includes the power to pardon. It should be wielded responsibly; but first, it must be wielded. As long as executives hide behind a quasi-judicial role, little need exists for the additional standards and categories of academics like Moore and Kobil.¹⁸⁶

182. See JOSEPH B. INGLE, *LAST RIGHTS: THIRTEEN FATAL ENCOUNTERS WITH THE STATE'S JUSTICE* 233-34 (1990).

183. *Id.* at 236-37.

184. *Id.* at 240.

185. See *TIME*, Oct. 8, 1984, at 27.

186. This executive reluctance to pardon is especially unfortunate in light of the Supreme Court's decision in *Herrera v. Collins*, 113 S.Ct. 853 (1993). In *Herrera*, the Supreme Court held that claims of "actual innocence" should not be heard by federal courts in habeas corpus petitions unless the innocence claims are linked to other, specific constitutional violations. *Id.* at 859. The court discussed at some length the traditional role of pardons in providing relief for actually innocent persons who have been wrongfully convicted. *Id.* at 861. The court essentially deferred to state executives in these situations, thus making it imperative that executives be willing to act in situations in which courts will not. At stake in *Herrera*—as in the cases of Giarrantano, Barfield, and others—was nothing less than the life of a person sentenced to die.

3. The Atrophy of Pardoning Power

The unfettered use of the pardoning power by the executive faces hostility from all sides. The public's preoccupation with being tough on crime discourages executives from granting clemency in any form. Supreme Court decisions indicate that pardons should not be viewed as free acts of grace, but as part of a constitutional scheme that should be exercised only to promote the public welfare. Retributivist academics theorize that pardons should be granted when very specific standards are met, and that the executive's power to pardon should be curtailed and shackled to specific standards. In reality, such standards are unnecessary, because executives so seldom wield their pardoning power. In this atmosphere of lethargy and uncertainty, it is fair to say that pardoning power has atrophied.¹⁸⁷ It is a far cry from the images of pardon portrayed in the Hebrew Bible.

IV. CONCLUSION: TOWARD A BETTER UNDERSTANDING OF PARDON

Most "law and order" politicians and retributivist scholars would like to consider the modern use of pardons as evocative of the "More Just God and Pardons to be Earned" model of the Hebrew Bible. The "earning" involved means fitting into one or more of the retributivist categories described above. Executives gain the public advantage of being perceived as "just" even in a retributivist age. In reality, the modern use of pardons mirrors "The Harsh View of God and Pardon," in which pardons are virtually never granted. Society is afraid of violent crime and wants steps taken to reduce it. As a by-product of this fear, pardons are viewed with suspicion. People console themselves with thoughts of emulating the popular image of the God of the Hebrew Bible—being tough on crime, sternly punishing those who break the societal contract or covenant of law and order, taking "an eye for an eye," and granting a limited number of pardons for a limited number of reasons.

The problem with this state of affairs is that it ignores one of the most prevalent images in the Hebrew Bible and one of the best modern reasons for embracing a more flexible approach to granting pardons. The biblical image is that of "A More

187. See MOORE, *supra* note 16, at 82-84.

Merciful God and Pardons Freely Given." Embracing a more flexible approach to pardons allows the sovereign—the State and its elected executive—to remain loyal to the sovereign's overriding purpose while acknowledging that both the sovereign and the citizens that constitute it make mistakes that are manifested in the criminal justice system. The sovereign's overriding purpose is to promote the welfare of all of its citizens, those who break the law and those who do not. The mistakes that the sovereign and its citizenry make manifest themselves in poverty, a lack of educational opportunities, widespread drug use, and other factors that contribute to crime, as well as the individual exercises of free will that result in many citizens choosing to commit crimes that hurt others. A more balanced understanding of what a pardon enables the sovereign to do would help correct the effects of these mistakes in individual lives and in society as a whole. This standard should be the one against which pardons are evaluated.

A. The Giarrantano Pardon Reexamined

Governor Wilder's commutation of Joseph Giarrantano's sentence stands as an excellent example of pardon when viewed in this context. Because Wilder gave no reasons for Giarrantano's pardon it was not proper from a retributivist perspective. It could have been, but because of the way Wilder chose to act, it was not. Under the emerging model of pardon advanced in this paper, Wilder's act of pardon was proper the way he carried it out. It was proper because it acknowledged that the sovereign's higher purpose could be better served by punishing Giarrantano to a certain extent, but then pardoning him, and not unleashing the ultimate penalty of death into a situation in which too much death already had occurred.

In one sense, Governor Wilder simply acknowledged that the Commonwealth he was elected to lead had a higher purpose than killing its own citizens. Certainly, the Commonwealth of Virginia has a duty to protect all of its citizens from murderers and to punish wrongdoers, but it also should promote the welfare and fullness of life for all of its citizens. Wilder acknowledged that Joseph Giarrantano changed while in prison on Death Row. Giarrantano confronted his past mistakes—his drug use, his lack of education, his crimes—and dealt with them in a positive way. Wilder did not reward Giarrantano for his few years of good behavior but instead acknowledged that Giarrantano had become

fit to serve the higher purposes of the Commonwealth of Virginia. Wilder decided that Giarrantano should be allowed to do so after Giarrantano was sternly punished for his crimes with twenty-five years imprisonment. Wilder correctly used a pardon to let the past be the past and to get on with the purpose and living of life.

B. The Hebrew Bible and the Executive's Unfettered Pardon Power

This writer acknowledges the need to reform basic elements of the American system of granting pardons at the state and federal level.¹⁸⁸ Total authority over pardons by an unrestrained executive in all situations can lead to abuse and a breakdown in the public's confidence in the pardoning system. It arguably has. This writer applauds the efforts of academics like Professor Moore and Professor Kobil to provide philosophical rationales and concrete suggestions for how to improve the wielding of the pardoning power.

As this process of education, discussion, and reform in the area of pardons continues, the tradition of and need for the executive to wield considerable, unfettered pardoning power in many circumstances must not be dismissed. The Hebrew Bible provides us with many images and ideas still prevalent in our criminal justice system. For generations, it has functioned as a guide and partial blueprint for how our society deals with criminal offenders. Its imagery, examples, and models in the area of pardons should not be dismissed either. The Hebrew Bible provides us with powerful images which suggest that a pardon functions best when it allows a sovereign to look beyond immediate mistakes calling for immediate retribution and to get on with carrying out that sovereign's ultimate will and plan despite the shortcomings and failures of that sovereign's particular adherents or citizens.

188. As the American system of pardons gropes for a better understanding of pardon, it would be wise to examine not only its roots in the Hebrew Bible, but also how other countries apply pardons. For a partial list of resources, see John C. Palenberg, *Mass Amnesty: The East German Answer to Prison Overcrowding*, 11 AM. J. CRIM. LAW 369 (1983); A. T. H. Smith, *The Prerogative of Mercy, The Power of Pardon and Criminal Justice*, 1983 PUBLIC LAW 398 (studying pardons in Great Britain); Christopher H.W. Gane, *The Effect of a Pardon in Scots Law*, 1980 JURID. REV. 18 (1980); and K.C. Horton, *Life Imprisonment and Pardons in the German Federal Republic*, 29 INT'L. & COMP. L.Q. 530 (1980).

In the Hebrew Bible, God pardons in many ways. Chiefly, God pardons when God refuses to let a human mistake frustrate the greater good of God's plan. Cain went on to build cities, David a dynasty, Hosea's wife Gomer a marriage, and the people of Israel a covenant relationship with God. Our society and its executives should learn from these examples when they wield their pardoning power. When a criminal has been punished and a pardon can be used to enable that individual to benefit society's higher purpose, a pardon should be used. As Governor Wilder showed in the Giarrantano case, that ability to benefit an overriding purpose may not fit neatly into a retributivist category or meet some other judicial standard. It should not have to. Our modern understanding of pardon should incorporate this lesson and allow executives the unfettered power, and the wisdom, to grant pardons under this rationale.