

# Measured Mercy: Managing the Intersection of Executive Pardon Power and Victims' Rights with Procedural Justice Principles

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## I. INTRODUCTION

During his last days in office in January of 2012, Mississippi Governor Haley Barbour granted executive clemency to 215 individuals, a number of whom had been convicted of violent crimes, including murder. The public outcry to the pardons was quick and immediate.<sup>1</sup> In response, the state attorney general brought

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<sup>1</sup> See, e.g., CNN Wire Staff, *Attorney General: Barbour Tried to Rule the State Like Boss Hogg*, 12 NEWS, <http://www.12newsnow.com/story/16506836/attorney-general-barbour-tried-to-rule-the-state> (last visited Sept. 29, 2015); Sarah Fowler, *Barbour's Pardons Spark National Outrage*, COLUMBUS PACKET (Jan. 12, 2012), <http://packet-media.com/2012/01/12/barbours-pardons-spark-national-outrage/>; *Mississippi Judge Blocks Release of 21 Inmates Given Pardons by Gov. Barbour*, FOX NEWS (Jan. 12, 2012), <http://www.foxnews.com/politics/2012/01/11/mississippi-judge-blocks-release-21-inmates-given-pardons-by-governor-barbour/> [hereinafter *Mississippi Judge Blocks Release*]; Rich Phillips, *Mississippi Pardons Challenged at Court Hearing*, CNN (Feb. 10, 2012), <http://cnn.com/2012/02/09/us/mississippi-governor-pardons/>; *Appeals Court Upholds Haley Barbour Pardons*, ROAD2JUSTICE (Mar. 10, 2012), <https://road2justice.wordpress.com/2012/03/10/appeals-court-upholds-haley-barbour-pardons/>; Campbell Robertson, *Mississippi Governor, Already Criticized on Pardons, Rides a Wave of Them Out of Office*, N.Y. TIMES, Jan. 10, 2012, at A13; Randy Walker, *Can Victims of Haley Barbour's Pardoned Murderer Find Justice?*, DAILY BEAST

an action challenging the constitutionality of the Governor's clemency orders. The state attorney alleged that the governor's actions were unlawful because he issued the pardons in derogation of the Mississippi Constitution's thirty-day publication requirement, thereby leaving the public and, more pointedly, the victims, without notice or an opportunity for any type of hearings regarding the pardons.<sup>2</sup> However, upon review, the Mississippi Supreme Court upheld the governor's actions, declining to address whether he had acted inappropriately.<sup>3</sup>

While the initial outcry against the Governor's pardons was fevered, response to the state Supreme Court's decision was relatively muted, with very little public or scholarly debate devoted to analyzing the state court's decision.<sup>4</sup> Nor has there been much discussion inquiring as to how the court's decision impacted victims' rights.<sup>5</sup> There is certainly ample scholarship addressing how to ground and define the executive pardon power within our system of democratic government.<sup>6</sup>

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(Feb. 11, 2012), <http://www.thedailybeast.com/articles/2012/02/11/can-victims-of-haley-barbour-s-pardoned-murderer-find-justice.html>.

<sup>2</sup> See *infra* Part VI.

<sup>3</sup> *In re Hooker*, 87 So.3d 401, 414 (Miss. 2012).

<sup>4</sup> See generally, Chad Flanders, *Pardons and the Theory of the "Second-Best"*, 65 FLA. L. REV. 1559 (2013); Daniel T. Kobil, *Compelling Mercy: Judicial Review and the Clemency Power*, 9 U. ST. THOMAS L.J. 698 (2012) [hereinafter Kobil, *Compelling Mercy*]; Jackson C. Smith, Note, *In re Hooker: A Political Question Doctrine Game Change*, 32 MISS. C. L. REV. 531 (2014); Katie R. Van Camp, Comment, *The Pardoning Power: Where Does Tradition End and Legal Regulation Begin?*, 83 MISS. L.J. 1271, 1285–90 (2014).

<sup>5</sup> See, e.g., Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 413, 437 (1999) (briefly discussing victim interests in pardon process); Austin Sarat & Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparring Life*, 56 STAN. L. REV. 1307, 1313–37 (2004) (same).

<sup>6</sup> See Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT'G REP. 153, 153–55 (2009); Beau Breslin & John J.P. Howley, *Defending the Politics of Clemency*, 81 OR. L. REV. 231, 233–34 (2002); P.E. Digeser, *Justice, Forgiveness, Mercy and Forgetting: The Complex Meaning of Executive Pardoning*, 31 CAP. U. L. REV. 161, 162 (2003); John Dinan, *The Pardon Power and the American State Constitutional Tradition*, 35 POLITY 389, 392 (2003); Dorne & Gewerth, *supra* note 5, at 415–17; Cara H. Drinan, *Clemency in a Time of Crisis*, 28 GA. ST. U. L. REV. 1123, 1130 (2012); William F. Ducker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 479 (1977); Flanders, *supra* note 4, at 1567–70; Brian Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 572 (2001); Kobil, *Compelling Mercy*, *supra* note 4, at 699–702; Daniel T. Kobil, *How to Grant Clemency in Unforgiving Times*, 31 CAP. U. L. REV. 219, 219 (2003) [hereinafter Kobil, *How to Grant Clemency*]; Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardon Power from the King*, 69 TEX. L. REV. 569, 580 (1991) [hereinafter Kobil, *The Quality of Mercy*]; Margaret Colgate Love, *Fear of Forgiving: Rule and Discretion in the Theory and Practice of Pardoning*, 13 FED. SENT'G REP. 125, 125 (2001); Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to be Merciful*, 27 FORDHAM URB. L.J. 1484, 1500–06 (2000) [hereinafter Love, *Of Pardons*]; Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States*, 9 U. ST. THOMAS L.J. 730, 735 (2012) [hereinafter Love, *Reinvigorating the Federal Pardon Process*]; Margaret Colgate Love, *Reviving the Benign Prerogative of Pardoning*, 32 LITIG. 25, 28–29 (2006) [hereinafter Love, *Reviving the Benign Prerogative of*

Similarly, there is an ever-growing body of scholarship addressing the increased integration of victim interests into the criminal justice process.<sup>7</sup> However, there is a dearth of literature addressing the intersection of these two areas of law. To date, no one has directly asked how our legal system can square victims' rights to have notice and be heard on matters involving the crimes committed against them with the executive branch's largely exclusive and discretionary right to pardon those convicted for crimes. This article strives to make an initial foray into that chasm.

The Mississippi Supreme Court's *In re Hooker* decision highlights the many intractable questions that surround the executive branch's power to pardon and how that power impacts crime victims. At bottom, the decision suggests that in practice, a victim's ability to be heard in the context of a pardon decision, much less assert any rights he or she may possess in that context, is very much limited by the grace and mercy of the government. In response to this problem, I suggest that the social science theory of procedural justice can bring some cohesion to pardon practice, whereby the interests of defendants, victims, and broader society are appropriately taken into account.<sup>8</sup> So doing, even though pardon practices remain predominantly discretionary and driven by notions of mercy and grace, procedural justice theory can help measure and temper that mercy, thereby allowing for the smoother intersection of pardon practice and victims' rights.

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*Pardoning*]; Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1187–93 (2010) [hereinafter Love, *The Twilight of the Pardon Power*]; Kathleen Dean Moore, *Pardon for Good and Sufficient Reasons*, 27 U. RICH. L. REV. 281, 282 (1993); Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501, 1502, 1510–12 (2000); Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 26 N.Y.U. REV. L. & SOC. CHANGE 43, 77–78 (1998); Sarat & Hussain, *supra* note 5, at 1311; Lahny R. Silva, *Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders*, 79 U. CIN. L. REV. 155, 176–77 (2010); Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 BRANDEIS L.J. 85, 89–90 (2002) [hereinafter Strasser, *The Limits of the Clemency Power*].

<sup>7</sup> See generally David E. Aaronson, *New Rights and Remedies: The Federal Crime Victims' Rights Act of 2004*, 28 PACE L. REV. 623 (2008); Richard Barajas & Scott Alexander Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1 (1997); Douglas E. Beloof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 CATH. U. L. REV. 1135 (2007) [hereinafter Beloof, *Weighing Crime Victims' Interests*]; Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357 (1986); Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861 (2007); Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. L. 839 (1997); Jon Kyl, Steven J. Twist, & Stephen Higgins, *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581 (2005); Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21 (1999); Steven J. Twist, *The Crime Victims' Rights Amendment and Two Good and Perfect Things*, 1999 UTAH L. REV. 369 (1999) [hereinafter Twist, *The Crime Victims' Rights Amendment*].

<sup>8</sup> See *infra* Part V.

This article will use the *In re Hooker* decision as a point of departure to examine the conflict between the executive branch's broad pardon power and crime victims' rights to be heard and consulted in regard to a defendant's punishment. I will begin with a discussion of pardon practice, laying out its competing theoretical foundations as well as highlighting how that competition embodies itself in state and federal practice.<sup>9</sup> I will then turn to a brief overview of the victims' rights movement.<sup>10</sup> Having laid a foundation of both pardon practice and the victims' rights movement, I will then discuss the inherent difficulties of attempting to integrate victim interests into the unsettled nature of pardon practice.<sup>11</sup> It is here that I will devote substantial discussion to the social science theory of procedural justice and assert that this framework can establish a measure of harmony between pardon practice and victim interests. With that substantive foundation in place, I will engage in an examination of the *In re Hooker* decision, highlighting how that case exhibits many of the inherent and intractable challenges that exist when pardon practices and victim rights intersect.<sup>12</sup>

## II. PARDON PRACTICE AND THEORY

### A. Introduction

From time immemorial, pardon practices have been part of organized government.<sup>13</sup> And from the very beginning, pardon practice has served two seemingly irreconcilable masters—justice and mercy.<sup>14</sup> When speaking of justice, I do so in the classic retributivist stance of asking what is right or moral.<sup>15</sup> From this perspective, a pardon is moral if it is what is deserved by the offender and can

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<sup>9</sup> See *infra* Part II.

<sup>10</sup> See *infra* Part III.

<sup>11</sup> See *infra* Part IV.

<sup>12</sup> See *infra* Part VI.

<sup>13</sup> Linda L. Ammons, *Discretionary Justice: A Legal and Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 J.L. & POL'Y 1, 23–27 (1994); Dorne & Gewerth, *supra* note 5, at 415–17; Ronald S. Everett & Deborah Periman, "The Governor's Court of Last Resort: An Introduction to Executive Clemency in Alaska," 28 ALASKA L. REV. 57, 60–62 (2011); Paul J. Haase, Note, "Oh My Darling Clemency: Existing or Possible Limitations on the Use of the Presidential Pardon Power," 39 AM. CRIM. L. REV. 1287, 1289–91 (2002); Todd David Peterson, *Congressional Power Over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1228–29 (2003); Silva, *supra* note 6, at 176–77.

<sup>14</sup> Haase, *supra* note 13, at 1287; Love, *Of Pardons*, *supra* note 6, at 1500–06; Ridolfi, *supra* note 6, at 77–78; Robert Weisberg, *Apology, Legislation and Mercy*, 82 N.C. L. REV. 1415, 1415 (2004).

<sup>15</sup> Love, *Of Pardons*, *supra* note 6, at 1501; Kobil, *How to Grant Clemency*, *supra* note 6, at 219; Kobil, *The Quality of Mercy*, *supra* note 6, at 580.

be legally justified as such.<sup>16</sup> In contrast to this so-called justice-enhancing view of pardons, others proffer that pardons should be viewed through a more utilitarian or justice-neutral lens.<sup>17</sup> Under this alternative approach, pardons exist outside the legal system, but such a-legality does not make pardons improper. Rather, pardon exists as an act motivated by influences other than justice and hence is not bound by legal rules and structures.<sup>18</sup> Under this approach, a pardon can serve as a vehicle to enhance broader political goals and extend mercy and grace to the offender.<sup>19</sup>

Theoretically and practically, pardon practice has always embodied the dual themes of justice and mercy. As a specific and integral part of the criminal justice system, pardon largely serves as an antidote to punishment, whether as a corrective measure or as an extension of executive grace.<sup>20</sup> More broadly, pardons have served as a means to balance the powers among our political branches.<sup>21</sup> These competing approaches have created an ever-repeating loop in how scholars and practitioners have examined pardon's place within our judicial and political structures, and no one theory or practice wholly dominates.

For example, Sir William Blackstone famously proffered that while the power to pardon was important for a monarch, “[i]n democracies . . . this power of pardon can never subsist; for there nothing higher is acknowledged than the magistrate who administers the laws; and it would be impolitic for the power of judging and of pardoning to center in one and the same person.”<sup>22</sup> Blackstone seemed to be suggesting that vesting so much power in one branch of a democratic government was unwise and could result in abuse. Conversely, Founding Father Alexander Hamilton claimed that the pardon power was necessary as a “benign prerogative” of the executive so that exceptions in favor of “unfortunate guilt” could be made

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<sup>16</sup> Digeser, *supra* note 6, at 162; Kobil, *The Quality of Mercy*, *supra* note 6, at 580; Love, *Of Pardons*, *supra* note 6, at 1501; Rapaport, *supra* note 6, at 1502, 1510–12; Strasser, *The Limits of the Clemency Power*, *supra* note 6, at 89–90; Mark Strasser, *Some Reflections on the President's Pardon Power*, 31 CAP. U. L. REV. 143, 143 (2003) [hereinafter Strasser, *Some Reflections*].

<sup>17</sup> Digeser, *supra* note 6, at 165–68; Dorne & Gewerth, *supra* note 5, at 417–20; Kobil, *The Quality of Mercy*, *supra* note 6, at 582–83; Rapaport, *supra* note 6, at 1516–17; Sarat & Hussain, *supra* note 5, at 1311.

<sup>18</sup> Digeser, *supra* note 6, at 162; Dorne & Gewerth, *supra* note 5, at 417–20; Love, *Of Pardons*, *supra* note 6, at 1502; Sarat & Hussain, *supra* note 5, at 1340; Strasser, *The Limits of the Clemency Power*, *supra* note 6, at 100–02; Weisberg, *supra* note 14, at 1415–16.

<sup>19</sup> Digeser, *supra* note 6, at 162; Rapaport, *supra* note 6, at 1502–03; Sarat & Hussain, *supra* note 5, at 1322; Strasser, *Some Reflections*, *supra* note 16, at 143, 149–50.

<sup>20</sup> Ridolfi, *supra* note 6, at 78.

<sup>21</sup> *Id.*

<sup>22</sup> Lauren Schorr, Note, *Breaking into the Pardon Power: Congress and the Office of the Pardon Attorney*, 46 AM. CRIM. L. REV. 1535, 1536–37 (2009) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*397).

lest “justice would wear a countenance too sanguinary and cruel.”<sup>23</sup> Hamilton also asserted that executive pardon power was essential to maintaining peace within our nation, where in “seasons of insurrection” a grant of pardon to rebels or insurgents could preserve government structures.<sup>24</sup> Hamilton appeared to be advocating that pardons were not only necessary to ensure that a defendant’s sentence was fair, but also that pardons could fulfill larger practical societal goals. These competing positions of justice verses mercy repeat throughout any discussion regarding pardon practices.

### B. *Retributive Justice or Utilitarian Grace?*

The retributive or justice-enhancing theory for pardon is best credited to Kathleen Dean Moore and her influential monograph *Pardons: Justice, Mercy and the Public Interest*.<sup>25</sup> In charting the fluid history and practice of pardons, Moore claims that the gift-giving nature of pardons should be abandoned, and that pardons should only be granted when morally mandated. Echoing Blackstone’s concerns that the person executing the law should not also have the power to create exceptions to the law,<sup>26</sup> Moore asserts that the gift-giving and mercy nature of pardons is inappropriate in a constitutional democracy where there should be little or no room for the unjustified and unexplained use of power.<sup>27</sup> If pardons can be granted for any reason or no reason at all, then the practice can be easily abused.<sup>28</sup>

Moore asserts that pardons should be evaluated in the same manner as criminal punishments—through the framework of retributivism. Under the basic retributivist structure,<sup>29</sup> a punishment should only be rendered against an individual to the extent that person deserves to be punished. A punishment exceeding that which is deserved is unjust and unfair, just as a punishment that is too lenient is equally unfair. According to Moore, the same reasoning should be applied to pardons. Just as the government has a duty to punish only to the extent to which punishment is due, the government has a commensurate duty to pardon where an offender’s previously rendered punishment is otherwise unfair or unjust. Hence, pardons should serve as a failsafe check on the punishment process and correct any errors in the state’s administration of justice.<sup>30</sup>

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<sup>23</sup> Kobil, *The Quality of Mercy*, *supra* note 6, at 591 (citing THE FEDERALIST NO. 74, at 447–49 (Alexander Hamilton)); *see also*, Love, *Of Pardons*, *supra* note 6, at 1485 n.8 (discussing Hamilton’s view of the pardon power).

<sup>24</sup> Kobil, *The Quality of Mercy*, *supra* note 6, at 592.

<sup>25</sup> KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST* (1989).

<sup>26</sup> *See* Schorr, *supra* note 22 and accompanying text.

<sup>27</sup> MOORE, *supra* note 25, at 90.

<sup>28</sup> *See infra* notes 31–32, 36, 35, 51 and accompanying text.

<sup>29</sup> *See supra* notes 15–16, 26 and accompanying text. *See also infra* notes 169–174 and accompanying text.

<sup>30</sup> *See infra* notes 85–94 and accompanying text.

Under Moore's model, unacceptable pardons would include those which promote the public welfare, promote the private welfare of the pardoner, and reward past positive actions of the offender.<sup>31</sup> Additionally, pardons issued for pity's sake, on the basis of recommendations by a judge, jury, or attorney, or based on sex, family, or social status, are unacceptable.<sup>32</sup> As Moore explains, each of these instances represent a pardon granted for a reason other than to correct an otherwise undeserved punishment.<sup>33</sup> Hence, a pardon that is granted for the health of the nation,<sup>34</sup> or with the goal to gain the pardonee's testimony in subsequent court proceedings,<sup>35</sup> would be inappropriate. The same could be said of "good will pardons" granted on national holidays such as Thanksgiving and Christmas,<sup>36</sup> rendered largely with the goal to increase the popularity of the grantor. None of these reasons serve to ensure that an offender's punishment is fair. Therefore, Moore contends these pardons represent an inappropriate use of the practice.

Moore's justice-enhancing retributive approach to pardons has an inherent fairness to it and brings a "bright-line rule" quality to pardon practice. If, under the standard precepts of retributivism, individuals are meant to be treated as moral agents responsible for their actions, but only their own actions, then punishment should be tailored to the individual's specific acts. Pardon fits within this model where it serves as a means to ensure that punishments are precise, fair, and just. If, for whatever reason, the criminal justice system has not operated in a fair manner, the executive's power to pardon ensures that the scales of justice are properly balanced.

Despite the attractiveness of a justice-centered retributivist approach to pardon, Moore's justice-enhancing theory is not without its critics. First, determining what is a just and fair sentence is not a simple mathematical task.<sup>37</sup> Second, a closer examination of Moore's differentiation between just and unjust pardons highlights that her groupings may not be as easily applied as one might like.<sup>38</sup> For example, Moore proffers that lessening the determinate sentence for an

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<sup>31</sup> MOORE, *supra* note 25, at 209. *See also* Strasser, *The Limits on the Clemency Power*, *supra* note 6, at 93; *infra* note 82.

<sup>32</sup> MOORE, *supra* note 25, at 209. *See also* Strasser, *The Limits on the Clemency Power*, *supra* note 6 at 93.

<sup>33</sup> MOORE, *supra* note 25, at 199.

<sup>34</sup> *See infra* notes 76–77 and accompanying text.

<sup>35</sup> MOORE, *supra* note 25, at 200. *See also* *Burdick v. United States*, 236 U.S. 79 (1915).

<sup>36</sup> MOORE, *supra* note 25, at 201.

<sup>37</sup> Kobil, *The Quality of Mercy*, *supra* note 6, at 579–80. Likewise, when crafting restitution awards for victims, courts have struggled with calculating victim losses and harms per the defendant's wrongful acts. *See, e.g.*, Mary Margaret Giannini, *Continuous Contamination: How Traditional Restitution Principles and § 2259 Undermine Cleaning up the Toxic Waste of Child Pornography Possession*, 40 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 21 (2014); Mary Margaret Giannini, *Slow Acid Drips and Evidentiary Nightmares: Smoothing out the Rough Justice of Child Pornography Restitution with a Presumed Damages Theory*, 49 AM. CRIM. L. REV. 1723 (2012).

<sup>38</sup> Strasser, *The Limits of the Clemency Power*, *supra* note 6, at 93–94.

offender who is dying of a fatal disease could be justified.<sup>39</sup> If the prisoner is sentenced to 15 years, but is only likely to live for another three, the 15-year sentence would amount to a life sentence, rather than a set term of years. Hence, the 15-year sentence would be unjust. However, what if a pardon was granted in this setting not because of the alleged unfairness of the sentence, but rather, out of pity?<sup>40</sup> Would the retributivist look the other way if the pardon could still be justified even if the executive's reasons for the grant were not grounded in justice principles? Likewise, what about the ailing offender who is released and then does not die? Does the pardon become unjust because of the improved health of the offender?<sup>41</sup> Finally, if a pardon, like a punishment, must be granted when it is moral and just to do so, then should it not be a mandated procedure?<sup>42</sup> If an executive failed to pardon an individual as justice so required, would not the lack of pardon undermine the legitimacy of the pardon process of our criminal justice system as a whole? In essence, under Moore's retributive approach to the practice, executive pardons would have to become a final level of appellate review for any criminal matter.<sup>43</sup> The executive branch would then be acting like a super-court operating outside the bounds of both Articles II and III of the Constitution.

A second core criticism of Moore's approach is that framing pardon practice and theory solely on retributivist grounds presents a crabbed and limited view of the power.<sup>44</sup> Moore's retributive approach disregards how pardons are placed within our federal and state constitutional structures and have been used throughout history.<sup>45</sup> The reality is that pardon practice has always furthered more than simply rendering justice. Therefore, while there is value in grounding a discussion about pardons with questions of just deserts,<sup>46</sup> the discussion should not end there. Rather, it should embrace the many other productive but justice-neutral reasons for which pardons are granted.<sup>47</sup>

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<sup>39</sup> MOORE, *supra* note 25, at 173–75.

<sup>40</sup> Strasser, *The Limits of the Clemency Power*, *supra* note 6, at 94; Strasser, *Some Reflections*, *supra* note 16, at 147.

<sup>41</sup> Strasser, *Some Reflections*, *supra* note 16, at 148.

<sup>42</sup> Digeser, *supra* note 6, at 164.

<sup>43</sup> *Id.*; Love, *Of Pardons*, *supra* note 6, at 1502.

<sup>44</sup> Breslin & Howley, *supra* note 6, at 233–34; Digeser, *supra* note 6, at 164; Kobil, *The Quality of Mercy*, *supra* note 6, at 580–81; Kobil, *How to Grant Clemency*, *supra* note 6, at 219; Rapaport, *supra* note 6, at 1502–03.

<sup>45</sup> See *infra* notes 50, 53–63, 74, 115–119 and accompanying text.

<sup>46</sup> Kobil, *The Quality of Mercy*, *supra* note 6, at 581; Kobil, *How to Grant Clemency*, *supra* note 6, at 223.

<sup>47</sup> Digeser, *supra* note 6, at 162; Kobil, *The Quality of Mercy*, *supra* note 6, at 581–83; Rapaport, *supra* note 6, at 1502–05; Kathleen (Cookie) Ridolfi & Seth Gordon, *Gubernatorial Clemency Powers: Justice or Mercy?*, CRIM. JUST., Fall 2009, at 26, 27; Sarat & Hussain, *supra* note 5, at 1311.

The a-legal, merciful, and grace-centered theory of pardon is allied with the utilitarian approaches to punishment and criminal justice.<sup>48</sup> Rather than asking whether a pardon is morally just and deserved, this more nuanced and flexible approach recognizes that along with furthering justice, pardons can promote reconciliation and peace, relief from political strife, and perhaps even forgiveness.<sup>49</sup>

Connected to the notion that kings and leaders were divine emissaries was the premise that a pardon was a gift. Just as a god could bestow grace upon its supplicants, so too might a king or emperor.<sup>50</sup> Pardons embodied this divine gift-giving idea. The downside, of course, to a gift-giving theory of pardons is that inherent in the nature of gift giving is discretion, and discretion is always accompanied with the risk of arbitrariness and abuse. For this reason, Immanuel Kant, the father of retributivism, believed that any type of discretionary pardon power was entirely inappropriate in the criminal justice system. He asserted that executive pardons represented “the most slippery of all the rights of the sovereign [by which] he can demonstrate the splendor of his majesty and yet thereby wreak injustice to a high degree.”<sup>51</sup> Indeed, it is often when an executive exercises his discretion to grant a pardon that the practice receives its most negative press.<sup>52</sup>

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<sup>48</sup> See *supra* notes 17–18, *infra* notes 175–178 and accompanying text.

<sup>49</sup> Digeser, *supra* note 6, at 162, 166–68; Rapaport, *supra* note 6, at 1528–34. See also *supra* notes 17–18, *infra* notes 175–178 and accompanying text.

<sup>50</sup> Dorne & Gewerth, *supra* note 5, at 419.

<sup>51</sup> Sarat & Hussain, *supra* note 5, at 1307 (quoting IMMANUEL KANT, *METAPHYSICAL ELEMENTS OF JUSTICE* 144 (John Ladd trans., Hackett Publishing Company, 2d. ed. 1999) (1787)).

<sup>52</sup> MOORE, *supra* note 25, at 12. See, e.g., Drinan, *supra* note 6, at 1130 (discussing the seemingly inappropriate 2010 posthumous pardon by Florida Governor Charlie Crist to the musician and rock star, Jim Morrison). The pardon “appeared to reflect the instincts of a fan rather than a governor.” *Id.* In the meantime, the governor declined to address the appropriateness of pardoning specific juveniles serving life sentences. *Id.* at 1130–31.

For example, President George Bush, Sr.’s pardons of numerous individuals involved in the Iran-Contra controversy were viewed by many as a self-serving exercise to protect himself from investigations involving his alleged participation in the scandal. See, e.g., Charles D. Berger, *The Effect of Presidential Pardons on Disclosure of Information: Is our Cynicism Justified?*, 52 OKLA. L. REV. 163, 169 (1999); James N. Jorgensen, *Federal Executive Clemency Power: The President’s Prerogative to Escape Accountability*, 27 U. RICH. L. REV. 345, 363 (1993); Robert Nida & Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 OKLA. L. REV. 197, 214–15 (1999); Peterson, *supra* note 13, at 1236–37. See also Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENT’G REP. 139, 140 (2001) (listing broad presidential pardons from 1795 to 1977). Similarly, President Bill Clinton was broadly criticized for the cavalcade of pardons he issued as he left office. On his last day in office, President Clinton pardoned 177 individuals. Love, *The Twilight of the Pardon Power*, *supra* note 6, at 1198. Sidestepping the normal pardon application procedures followed by the U.S. Department of Justice Pardon Attorney’s Office, see *infra* notes 79–81, many of Clinton’s pardon decisions seemed to be driven by his intent to “reward friends, bless strangers, and settle old scores.” Love, *The Twilight of the Pardon Power*, *supra* note 6, at 1198. To the extent President Clinton hoped to leave office with a positive legacy, his pardon decisions muddied rather than cleansed his tenure. *Id.* at 1200; Love, *Reinvigorating the Federal Pardon Process*, *supra* note 6, at 738–41; Love, *Fear of*

### C. Pardon as a Mixed Practice

The mixed theories for why we pardon have been evident in pardon practice from its inception.<sup>53</sup> From the first moment a king or tribal leader exercised the power to punish a subject, that leader might also be found to exercise his grace to excuse or pardon those who had caused offense. However, to the extent early pardons were viewed as an expression of divine grace, there was no question that pardons also served practical political goals. Leaders used their pardon powers to quell rebellions, foster public peace, and bring healing to a nation after civil war or otherwise unpopular military activity.<sup>54</sup> Similarly, a leader's use of his discretionary pardon power could increase loyalty among his subjects.<sup>55</sup> Hence, the pardon power has been used by leaders since its earliest days to fulfill a discretionary gift-giving function, as well as to bring about specific political and utilitarian goals.

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*Forgiving*, *supra* note 6, at 3. In this regard, Clinton undermined the hopes of our founders that a president would exercise care in using his discretionary pardon power lest improvident decisions result in the "damnation of his fame to all future ages." See Duker, *supra* note 6, at 503 (quoting JAMES IREDELL, PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 351–52 (Paul Leicester Ford ed., Burt Franklin, 1968)(1787)). See also Love, *The Twilight of the Pardon Power*, *supra* note 6, at 1173 n.13; Gregory C. Sisk, *Suspending the Pardon Power During the Twilight of a Presidential Term*, 67 MO. L. REV. 13, 19 (2002).

In contrast to President Clinton, and probably in reaction to the negative press associated with his actions upon leaving office, both President Bush, Jr., and President Obama have been quite circumspect in the use of their pardon powers. For example, during his two terms as President, George W. Bush only granted 198 pardons out of the 2,498 requests he received. See CLEMENCY STATISTICS, <http://www.justice.gov/pardon/clemency-statistics> (last visited Sept. 29, 2015). President Obama has been equally careful in granting pardons, issuing relief to only 64 of the 1,866 requests he has thus far received. *Id.* Perhaps heeding the warnings raised by our forefathers that an abuse of executive discretion would result in "damnation of [presidential] fame to all future ages," Sisk, *supra*, at 19; Margaret Colgate Love, *The Pardon Paradox: Lessons of Clinton's Last Pardons*, 31 CAP. U. L. REV. 185, 187 (2003); Love, *The Twilight of the Pardon Power*, *supra* note 6, at 1173 n.13; See also Margaret Colgate Love, *Reinventing President's Pardon Power*, 20 FED. SENT'G REP. 5, 6 (2007) [hereinafter Love, *Reinventing President's Pardon Power*]. Presidents Bush, Jr., and Obama have been so careful about using their executive pardoning discretion that they have hardly used it at all. See also *infra* note 112.

<sup>53</sup> See generally Dorne & Gewerth, *supra* note 5, at 413–17 (discussing early history of pardon power); Kobil, *The Quality of Mercy*, *supra* note 6, at 575, 583–84 (discussing the nature and origins of the clemency power).

<sup>54</sup> See Dorne & Gewerth, *supra* note 5, at 417–18 (discussing use of pardon to "subdue a restive populace, punish mutinous troops without destroying the entire army, foster public confidence in a new government following a revolution, heal deep divisions in a population torn apart by civil war, or fractured in the aftermath of an unpopular one, or avert a looming constitutional crisis"); Kobil, *The Quality of Mercy*, *supra* note 6, at 584–85 (discussing early Roman use of pardon power to discipline mutinous troops through the process of decimation); Love, *Reinventing President's Pardon Power*, *supra* note 52, at 6 (discussing political uses of the pardon power).

<sup>55</sup> See, e.g., Dorne & Gewerth, *supra* note 5, at 440; Kobil, *The Quality of Mercy*, *supra* note 6, at 571; Moore, *supra* note 6, at 282.

As our criminal justice systems developed, leaders also exercised their pardon power to correct seemingly harsh aspects of the criminal justice system. In this regard, pardon practice fulfilled more justice-centric and retributive goals. For example, at common law, all homicides were treated as felonies. Therefore, pardon served as the only way to ensure that those who might otherwise not deserve punishment could be spared.<sup>56</sup> Similarly, it was not until 1907 that federal prisoners possessed a statutory right to appeal their sentences.<sup>57</sup> As a result, presidents used their pardon power routinely, often at the very bidding of judges, to soften what might otherwise be deemed harsh and unyielding criminal sentences.<sup>58</sup> Hence, pardon practice has always served, in part, to ensure sentences were fair. Pardons also fulfilled an important role within our government structure whereby the executive could check the other branches for seemingly overreaching in the crafting or application of laws.<sup>59</sup>

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<sup>56</sup> See Duker, *supra* note 6, at 479. Professor Duker describes a case dating from 1249 in which a four year old girl was imprisoned because in “opening a door, she accidentally pushed a younger child into a vessel of hot water, killing the child.” *Id.* Without pardon, the young girl would have to serve a full sentence. *Id.*

<sup>57</sup> Hoffstadt, *supra* note 6, at 572; Love, *Reinventing President’s Pardon Power*, *supra* note 52, at 6 n.10.

<sup>58</sup> See Love, *Reinvigorating the Federal Pardon Process*, *supra* note 6, at 735; Love, *Reinventing President’s Pardon Power*, *supra* note 52, at 6. See also George Lardner, Jr., & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790–1850*, 16 FED. SENT’G REP. 212 (2004). For example, in the early part of the 19th Century, federal criminal law mandated that courts impose “at least some sort of fine and/or some prison time, and sometimes a whipping, in almost every non-capital felony offense. . . . Many of the most frequently prosecuted categories of federal offenses carried mandatory minimum prison terms and fines, if not death.” *Id.* at 213. As a result, many judges, who otherwise felt bound to the criminal code, would nonetheless directly advocate to the president that defendants be pardoned. *Id.* Examples ranged from a case regarding two, and likely foolish, young men who stole a hog, *id.* at 215, cases addressing defendants who suffered from some form of diminished capacity, *id.*, cases where the judges thought the sentence was inherently excessive, *id.* at 217, or cases in which there existed newly discovered evidence, *id.*

<sup>59</sup> For example, President Obama has recently taken action to commute sentences for individuals convicted under federal crack cocaine laws, asserting that laws under which the individuals were punished allowed for unfair sentencing disparities. See David Jackson, *Obama Commutes 8 Crack Cocaine Sentences*, USA TODAY (Dec. 18, 2013, 4:53 PM), <http://www.usatoday.com/story/news/politics/2013/12/19/obama-commutations-crack-cocaine/4126693/>; Brendan Kirby, *Obama Commutes Life Sentences of Mobile, Birmingham Men Convicted of Crack Dealing*, AL.COM, [http://www.al.com/news/index.ssf/2014/12/obama\\_commutes\\_life\\_sentences.html](http://www.al.com/news/index.ssf/2014/12/obama_commutes_life_sentences.html) (last updated Dec. 18, 2014, 4:53 PM). So doing, President Obama seems to be signaling to Congress and the courts that the current status of U.S. drug sentencing is in need of reform. See also Hoffstadt, *supra* note 6, at 572–88 (providing examples of pardon being used to address mistakes or oversights by other branches of government); Lardner & Love, *supra* note 58, at 215 (providing an example of a lessened sentence for some foolish boys who stole a hog); Love, *Of Pardons*, *supra* note 6, at 1490 (noting one use for pardons is to correct a miscarriage of justice or defect in the underlying conviction); Ridolfi, *supra* note 6, at 48 (providing an example of king pardoning where punishment was otherwise unjust).

Pardons, however, have not always been used to advance justice-centered and retributive goals. In the early twentieth century, the American criminal justice system refined many of its procedures while also adopting a host of rehabilitative ideals.<sup>60</sup> Increased procedural protections, such as a right to counsel, the right to direct and collateral appeal, and defenses for diminished capacity, all sought to ensure that criminal sentences were appropriately tailored for a given defendant.<sup>61</sup> Hence, the apparent need for pardons as a justice-enhancing tool lessened. At the same time, the parole system and indeterminate sentences highlighted the penological approach that punishment could serve to redeem and reform offenders.<sup>62</sup> Instead of merely ensuring that an offender received his or her due, criminal sanctions were viewed as a means to reform and rehabilitate the wrongdoer. If during his or her time of imprisonment, the offender could show his or her reformation, early release was possible.<sup>63</sup> Hence, the criminal justice system appeared, at least to some measure, to have crafted better measures to ensure fair punishments, thereby undermining the need for pardons to serve as a corrective device.

However, the rehabilitative model of punishing was short-lived and was declared by many as unsuccessful.<sup>64</sup> Policy makers and judges increasingly stopped asking how an offender's punishment might serve some sort of reformatory purpose, and instead questioned whether, in focused retributive terms, the punishment appropriately fit the extent of the offender's crime.<sup>65</sup> This generally "tough on crime" stance was reinforced by the "war on drugs,"<sup>66</sup> leading many leaders to be wary about the political costs of extending any form of sentencing grace to offenders.<sup>67</sup> Consequently, contemporary pardon practice is

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<sup>60</sup> Everett & Periman, *supra* note, 13 at 69–70; MOORE, *supra* note 25, at 55–56.

<sup>61</sup> Hoffstadt, *supra* note 6, at 573–74; Love, *Of Pardons*, *supra* note 6, at 1490–91; Love, *Reinventing President's Pardon Power*, *supra* note 52, at 7.

<sup>62</sup> Love, *Of Pardons*, *supra* note 6, at 1494–95; Love, *The Twilight of the Pardon Power*, *supra* note 6, at 1187–93; Rapaport, *supra* note 6, at 1509–10.

<sup>63</sup> MOORE, *supra* note 25, at 59.

<sup>64</sup> MOORE, *supra* note 25, at 55–89; Love, *Of Pardons*, *supra* note 6, at 1494–96; Love, *Reinventing President's Pardon Power*, *supra* note 52, at 7; Love, *Reviving the Benign Prerogative of Pardoning*, *supra* note 6, at 28–29; Love, *The Twilight of the Pardon Power*, *supra* note 6, at 1193–94; Rapaport, *supra* note 6, at 1509–10.

<sup>65</sup> See generally Everett & Periman, *supra* note 13, at 71; Love, *Of Pardons*, *supra* note 6, at 1494–98; Love, *Reinventing President's Pardon Power*, *supra* note 52, at 7; Rapaport, *supra* note 6 at 1509–12; Silva, *supra* note 6, at 178–79.

<sup>66</sup> Drinan, *supra* note 6, at 1137–38; Everett & Periman, *supra* note 13, at 71; Love, *Of Pardons*, *supra* note 6, at 1495–96; Love, *Reinventing President's Pardon Power*, *supra* note 52, at 7; Love, *Reviving the Benign Prerogative of Pardoning*, *supra* note 6, at 28–30; Love, *The Twilight of the Pardon Power*, *supra* note 6, at 1193–94; Ridolfi & Gordon, *supra* note 47, at 32–33.

<sup>67</sup> MOORE, *supra* note 25, at 203–04; Ammons, *supra* note 13, at 48–51; Everett & Periman, *supra* note 13, at 71; Kobil, *The Quality of Mercy*, *supra* note 6, at 607–10; Love, *Of Pardons*, *supra* note 6, at 1497; Love, *Reinventing President's Pardon Power*, *supra* note 52, at 8; Love, *The*

generally quite anemic,<sup>68</sup> leading many to assert that it has become a living fossil,<sup>69</sup> a remnant of tribal kingship,<sup>70</sup> or, like collar buttons, something that has long since outlived its usefulness and should silently fade away.<sup>71</sup> Despite these negative bellwethers, the practice persists and continues to embody its seemingly contrary purposes of furthering merciful as well as retributive goals.

At the federal level, the pardon power is structured in such a way to imply that it bends toward a discretionary gift-giving model. The federal Constitution exclusively vests the pardoning power with the President and limits those powers only to the extent that pardons apply to federal offenses and cannot be granted in cases of impeachment.<sup>72</sup> Congress may not curtail the President's pardon power, and the Supreme Court has been reticent to review pardon decisions.<sup>73</sup>

From a utilitarian and politically practical perspective, such discretionary executive power is desirable, if not vital, to effective governance. As stated by Alexander Hamilton in the Federalist No. 74, "in seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to

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*Twilight of the Pardon Power*, *supra* note 6, at 1171; Rapaport, *supra* note 6, at 1506–07; Ridolfi & Gordon, *supra* note 47, at 32–33.

<sup>68</sup> For the last thirty years, federal pardon practice has declined. While it is impossible to pinpoint the precise reason for this decline, it is not unreasonable to credit a combination of the resurgence of retributive sentencing ideas, the tough on crime stance, and the perceived political costliness of granting grace to offenders. See *supra* notes 51, 64–67 and accompanying text. Between 1932 and 1980, each year there were over 100 post-sentence pardons granted at the federal level. Love, *Of Pardons*, *supra* note 6, at 1494–98; Silva, *supra* note 6 at 177–78. However, starting with Ronald Reagan's presidency, the rate of pardons dropped precipitously. Love, *Of Pardons*, *supra* note 6, at 1494. During his presidency, Ronald Reagan granted 393 pardons from 2099 requests. See Kobil, *The Quality of Mercy*, *supra* note 6, at 640. His predecessors, Richard Nixon, Gerald Ford, and Jimmy Carter, all granted far more given their terms of office. *Id.* Richard Nixon granted 863 pardons from 1699 requests. *Id.* Gerald Ford granted 382 pardons out of the 978 requests he received. *Id.* Jimmy Carter granted 534 pardons out of the 1581 requests he received. *Id.* Following the trend started by Reagan, George H.W. Bush granted 74 pardons out of 731 requests, and Bill Clinton awarded a total of 396 out of 2001 requests. See *Clemency Statistics*, *supra* note 52. George W. Bush only granted 189 pardons out of the 2498 he received during his two terms in office. *Id.* Finally, at the time of writing, President Obama, now into his second term in office, has only granted 64 pardons out of the 2,078 requests he has received. *Id.*

<sup>69</sup> Kobil, *The Quality of Mercy*, *supra* note 6, at 575.

<sup>70</sup> Love, *Reinvigorating the Federal Pardon Process*, *supra* note 6, at 735.

<sup>71</sup> Love, *Of Pardons*, *supra* note 6, at 1484 (citing MOORE, *supra* note 25, at 84).

<sup>72</sup> U.S. CONST. art. II, § 2, cl. 1 ("[H]e shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.").

<sup>73</sup> *United States v. Klein*, 80 U.S. 128 (1871) (Congress cannot limit President's pardon powers). See also Ammons, *supra* note 13, at 28–30 (discussing limited review of presidential pardon powers); Haase, *supra* note 13, at 1291–97 (same); Kobil, *The Quality of Mercy*, *supra* note 6, at 614–20 (same); Kobil, *Compelling Mercy*, *supra* note 4, at 699–702; Peterson, *supra* note 13, at 1231–35; Strasser, *Some Reflections*, *supra* note 16, at 153–58; Strasser, *The Limits of the Clemency Power*, *supra* note 6, at 116–48. See also *infra* notes 95–101 and accompanying text.

recall.”<sup>74</sup> And indeed, throughout our nation’s history, Presidents have used their pardon power for such purposes.<sup>75</sup>

Perhaps the most noted pardon from contemporary history is President Ford’s pardon of President Nixon. In explaining his pardon decision to the American public—something he was not obliged to do—Ford emphasized how pardoning Nixon would serve as a means to heal the nation and allow the citizenry to move beyond the polarizing events which prompted Nixon’s resignation.<sup>76</sup> Fearing the extensive time and energy the nation might otherwise devote to Nixon’s pending impeachment, Ford noted that

[d]uring this long period of delay and potential litigation, ugly passions would again be aroused. And our people would again be polarized in their opinions. And the credibility of our free institutions of government would again be challenged at home and abroad . . . . As President, my primary concern must always be the greatest good of all the people of the United States whose servant I am . . . . I cannot prolong the bad dreams that continue to reopen a chapter that is closed. My conscience tells me that only I, as President, have the constitutional power to firmly shut and seal this book. My conscience tells me it is my duty, not merely to proclaim domestic tranquility but to use every means that I have to insure it.<sup>77</sup>

Hence, vesting within one person the power to extend grace and mercy within our government systems has served an important role in our nation’s history.

Even federal pardons not aimed to restoring the tranquility of the commonwealth tend to be grounded in concepts of grace and mercy rather than

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<sup>74</sup> Hoffstadt, *supra* note 6, at 587 (citing THE FEDERALIST NO. 74, at 444–49 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

<sup>75</sup> For example, our first president, George Washington, pardoned individuals involved in the Pennsylvania Whiskey Rebellion in 1795. Hoffstadt, *supra* note 6, at 587–589; Kobil, *The Quality of Mercy*, *supra* note 6, at 592. Likewise, President Jefferson pardoned individuals who had been convicted under the Alien and Sedition Act. Hoffstadt, *supra* note 6, at 589; Kobil, *The Quality of Mercy*, *supra* note 6, at 592. Following the Civil War, both Presidents Lincoln and Johnson pardoned individuals who had fought against the Union. Hoffstadt, *supra* note 6, at 590; Kobil, *The Quality of Mercy*, *supra* note 6, at 593; Love, *Reinventing President’s Pardon Power*, *supra* note 52, at 6. In slightly more modern times, Presidents Ford and Carter extended amnesty to individuals who violated military draft laws or who were military deserters in the Vietnam conflict. Hoffstadt, *supra* note 6, at 590. President Bush, Sr., pardoned numerous individuals involved in the Iran-Contra controversy, claiming in part, that in doing so, he was seeking to heal divisions over complicated issues of national policy. Stephen L. Carter, *The Iran-Contra Pardon Mess*, 29 HOUS. L. REV. 883, 887 (1992); Jorgensen, *supra* note 52, at 364–65; Sisk, *supra* note 52, at 17–18. See also *supra* note 51 and accompanying text.

<sup>76</sup> See generally Berger, *supra* note 52, at 166–68; Peterson, *supra* note 13, at 1235–36.

<sup>77</sup> Gerald Ford, Remarks Upon Signing a Proclamation Granting a Pardon to Former President Richard Nixon, White House (Sept. 8, 1974) (transcript available at 2001 WL 1750565).

rendering justice. Most federal pardon practice, while solely vested in the President's discretion, is managed and overseen by the Pardon Attorney's Office.<sup>78</sup> That office is charged with reviewing applications and making recommendations to the President, with the goal of ensuring completeness, consistency, and apolitical results in the pardon process.<sup>79</sup> Federal statutes and regulations further guide that offenders may not even seek consideration for pardon from the office until five years after they have completed their sentences, or seven years if their crime was serious.<sup>80</sup> The regulations further guide that pardons should be "granted on the basis of the petitioner's demonstrated good conduct for a substantial period of time after conviction and service of sentence."<sup>81</sup> Hence, to the extent a pardon might serve to relieve an offender from an otherwise unfair or disproportionate sentence, the regulations guiding the Pardon Attorney's Office undermine this goal.<sup>82</sup> Instead, the federal regulations appear to be more focused on rewarding offenders for their reformation upon release from prison.

Just as the history, practice, and theory surrounding the federal executive pardon power blends retributive and utilitarian themes, the United States Supreme Court's examination of the practice is equally blended. When discussing the topic, the Court has used language regarding grace and discretion as well as language suggesting that executive pardons are important aspects of a constitutional checks and balances system.<sup>83</sup> However, mirroring contemporary federal practice,<sup>84</sup> the

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<sup>78</sup> Having existed in one manner or another since 1865, the Pardon Attorney oversees federal pardon applications and makes pardon recommendations to the president. Haase, *supra* note 13, at 1293–94; Love, *Of Pardons*, *supra* note 6, at 1489; Love, *Reinventing President's Pardon Power*, *supra* note 52, at 6; Love, *The Twilight of the Pardon Power*, *supra* note 6, at 1179–87. Governed by statute and regulations, *see* 28 C.F.R. § 1.0–1.10 (2014); 28 C.F.R. § 0.35–0.36 (2014), the Pardon Attorney's work is entirely advisory and does not create enforceable rights in those applying for clemency. Likewise, the Pardon Attorney regulations in no way "restrict the authority granted to the President under Article II, section 2 of the Constitution." 28 C.F.R. § 1.11 (2014). Hence, the President may entirely accept the Pardon Attorney's recommendations, reject them, or issue pardons entirely independently of the Office's recommendations.

<sup>79</sup> Haase, *supra* note 13, at 1293–94; Love, *Of Pardons*, *supra* note 6, at 1489.

<sup>80</sup> Eligibility for Filing Petition for Pardon, 28 C.F.R. § 1.2 (2014). *See also* Hoffstadt, *supra* note 6, at 580–81; Kobil, *The Quality of Mercy*, *supra* note 6, at 603.

<sup>81</sup> Hoffstadt, *supra* note 6, at 580 (quoting U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, § 1–2.112 (Sept. 1997)).

<sup>82</sup> The Office's work has also been criticized as furthering a bias against pardons. If a pardon is meant, in part, to serve as a form of review as to the fairness of the prosecutorial process, then having pardon applications reviewed by the Department of Justice, the same office engaged in the initial prosecution of an offender, would appear to represent a type of conflict of interest. Hence, the Pardon Attorney's work has often been characterized as serving the interests of federal prosecutors rather than those seeking pardons. Love, *Of Pardons*, *supra* note 6, at 1496–97; Love, *Reinventing President's Pardon Power*, *supra* note 52, at 7–8; Love, *The Twilight of the Pardon Power*, *supra* note 6, at 1194–95.

<sup>83</sup> *See Ex parte Garland*, 71 U.S. 333, 380 (1866) (noting exclusive power of pardon in the president); *United States v. Wilson*, 32 U.S. 150, 160–61 (1833) (noting pardon is an act of grace). *Cf. Biddle v. Perovich*, 274 U.S. 480, 486 (1927) (noting pardon is inherent part of constitutional

Court tends to predominantly lean toward the discretionary gift-giving model for pardons, leaving the practice largely free from judicial oversight and legislative control.

On limited occasions, the Court has suggested that the executive pardon power is meant to be a measured and cabined practice designed to check the other branches of government in the administration of criminal justice.<sup>85</sup> In this regard, the Court has noted that the pardon power is an explicit part of the constitutional scheme<sup>86</sup> and that pardons should be granted when in the “determination of the ultimate authority . . . the public welfare will be better served by inflicting [punishment] less than what the judgment fixed.”<sup>87</sup> When considering pardon as an explicit part of our constitutional structure, the Court has suggested that it is not an entirely discretionary power and can be reviewed by the judicial branch to ensure that a pardon does not violate some other clause of the Constitution.<sup>88</sup> For example, in *Knote v. United States*,<sup>89</sup> the Court ruled that a pardon could not undermine the vested property rights in another individual.<sup>90</sup> Likewise, in *Burdick v. United States*,<sup>91</sup> the Court ruled that the President could not force an offender to accept a pardon which required the offender give up his Fifth Amendment protection against self-incrimination.<sup>92</sup> Finally, in the context of death penalty appeals, some members of the Court have suggested that the pardon power serves

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scheme); *Schick v. Reed*, 419 U.S. 256, 267 (1974) (“[T]he pardoning power is an enumerated power of the Constitution and . . . its limitation, if any, must be found in the Constitution itself.”).

<sup>84</sup> See *supra* notes 72–82 and accompanying text.

<sup>85</sup> *Ex parte Grossman*, 267 U.S. 87, 121 (1925).

<sup>86</sup> *Biddle*, 274 U.S. at 486. See also *Schick*, 419 U.S. at 267 (“[T]he pardoning power is an enumerated power of the Constitution and . . . its limitations, if any, must be found in the Constitution itself.”).

<sup>87</sup> *Schick*, 419 U.S. at 267. Accordingly, some have argued that if the pardon power is exercised to serve the public welfare, it must be justified in one manner or another. Dorne & Gewerth, *supra* note 5, at 420.

<sup>88</sup> *Schick*, 419 U.S. at 266 (“The plain purpose of the broad power conferred by § 2, cl. 1, was to allow plenary authority in the President to ‘forgive’ the convicted person in part or entirely, to reduce a penalty in terms of a specified number of years, or to alter it with conditions which are in themselves constitutionally unobjectionable.”).

<sup>89</sup> 95 U.S. 149 (1877).

<sup>90</sup> *Id.* at 154. See also *infra* notes 186–189 and accompanying text.

<sup>91</sup> 236 U.S. 79 (1915).

<sup>92</sup> *Id.* at 90–92. *Burdick* represents one of the few cases where the Court has indicated that a presidential pardon crossed a constitutional boundary and was inappropriate. Conversely, in *Hoffa v. Saxbe*, 378 F. Supp. 1221 (D.D.C. 1974), a federal district court ruled that a pardon containing conditions that allegedly infringed upon a defendant’s First Amendment speech and association rights was nonetheless valid because the pardon’s conditions were appropriately tailored in accordance with First Amendment jurisprudence. *Id.* at 1239–41.

as a “fail safe” check for the innocent,<sup>93</sup> and, accordingly, some measure of minimal procedural safeguards should accompany the practice.<sup>94</sup>

Despite the Court’s hints that the executive’s pardon power should not be entirely unfettered, the Court’s decisions nonetheless bend heavily toward characterizing the practice as grounded in grace. The Court predominately refers to pardons as gifts motivated by the discretionary grace of the executive,<sup>95</sup> even in those cases where it also discusses potential limits on pardon practice.<sup>96</sup> In viewing pardon as a gift, the Court has rejected arguments that an executive’s reasoning for granting a pardon can be reviewed or curtailed by the legislative and judicial branches.<sup>97</sup> If gift giving is a discretionary activity, questioning the reasons for why the gift was bestowed undermines the inherently unrestricted nature of gift giving. Moreover, despite the Court’s slight suggestions that pardon requests in death penalty cases should be accompanied with some measure of procedural safeguards,<sup>98</sup> the Court has nonetheless explicitly stated there is not a constitutionally protected liberty or property interest in a right to pardon.<sup>99</sup> Likewise, the Court’s reference to minimal procedural safeguards was indeed minimal at best. Justice O’Connor has suggested that judicial review of a pardon process might be “warranted in the face of a scheme whereby [an official] flipped a coin to determine whether to grant clemency, or in a case where the [government]

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<sup>93</sup> *Herrera v. Collins*, 506 U.S. 390, 415 (1993) (“Executive clemency has provided a ‘fail safe’ in our criminal justice system. It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible.”); *id.* at 428 (Scalia, J., concurring) (suggesting that overwhelming evidence of innocence would compel an executive pardon).

<sup>94</sup> *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288–94 (1998) (O’Connor, J. and Stevens, J., concurring).

<sup>95</sup> *United States v. Wilson*, 32 U.S. 150, 160–61 (1833) (“A pardon is an act of grace . . . which . . . is the private, though official, act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court.”).

<sup>96</sup> *See, e.g., Woodard*, 523 U.S. at 280–81, 285 (the executive’s clemency authority would cease to be a matter of grace if it were constrained by procedural requirements); *Herrera*, 506 U.S. at 413 (quoting and citing *Wilson*, 32 U.S. at 160–61); *Burdick*, 236 U.S. at 89–90 (pardon is an act of grace granted by the executive); *Knote v. United States*, 95 U.S. 149, 153–54 (1877) (same).

<sup>97</sup> *Woodard*, 523 U.S. at 284–85; *Schick v. Reed*, 419 U.S. 256, 263–64 (1974); *United States v. Klein*, 80 U.S. 128, 147–48 (1871); *Ex parte Garland*, 71 U.S. 333, 380 (1866).

<sup>98</sup> *Woodard*, 523 U.S. at 289 (O’Connor, J. concurring).

<sup>99</sup> *Dist. Attorney’s Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 67–68 (2009) (“[N]oncapital defendants do not have a liberty interest in traditional state executive clemency, to which no particular claimant is *entitled* as a matter of state law.”) (emphasis in original); *Woodard*, 523 U.S. at 280 (“[A] petition for commutation, like an appeal for clemency, ‘is simply a unilateral hope.’”); *Solem v. Helm*, 463 U.S. 277, 303 (1983) (the possibility of clemency does not create an enforceable right in a defendant); *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465, 467 (1981) (there is no protected liberty interest in commutation or clemency). *See also* *McQueen v. Patton*, 118 F.3d 460, 465 (6th Cir. 1997); *Hatch v. Oklahoma*, 92 F.3d 1012, 1016 (10th Cir. 1996); *Bundy v. Dugger*, 850 F.2d 1402, 1423–24 (11th Cir. 1988); *Binion v. U.S. Dep’t of Justice*, 695 F.2d 1189, 1190 (9th Cir. 1983).

arbitrarily denied a prisoner any access to its clemency process.”<sup>100</sup> However, the Court has never on procedural grounds afforded judicial review to an individual challenging the lack of pardon relief.<sup>101</sup> Hence, even though the Court has fleetingly described the pardon power as a justice-enhancing tool, those references are limited by the Court’s fealty to the otherwise discretionary aspects of the power.

If one views pardon as a discretionary gift, then under the political question doctrine, the ground upon which one can challenge a pardon decision is all the more limited.<sup>102</sup> The Constitution’s text guides that the President “shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”<sup>103</sup> There is nothing in this language, nor any other language in the Constitution, to suggest that this power is shared or otherwise checked by another branch of government. Hence, not unlike the Senate’s power to oversee impeachments,<sup>104</sup> or Congress’s overall power to expel one of its members,<sup>105</sup> the executive should be left to his or her individual devices when making pardon decisions. Therefore, so long as a pardon does not violate other portions of the Constitution, a presidential pardon is generally unreviewable.<sup>106</sup>

The highly discretionary nature of federal pardoning makes it very difficult for anyone to challenge its grant or denial thereof. A challenger could try to make a case that the President’s actions rose to the level of an impeachable offense.<sup>107</sup> This option has limited utility considering many presidents (and governors) exercise their pardon power as they are exiting office.<sup>108</sup> A challenger could also express his displeasure regarding an executive’s pardon decision by exercising his

<sup>100</sup> *Woodard*, 523 U.S. at 289 (O’Connor, J., concurring).

<sup>101</sup> See generally Kobil, *How to Grant Clemency*, *supra* note 6, at 235–36; Kobil, *Compelling Mercy*, *supra* note 4, at 723–28; Strasser, *The Limits of the Clemency Power*, *supra* note 6, at 123–34; Strasser, *Some Reflections*, *supra* note 16, at 157–58 (discussing Supreme Court’s limits on procedural review of pardons).

<sup>102</sup> Haase, *supra* note 13, at 1300–01; Kobil, *Compelling Mercy*, *supra* note 4, at 704; Kobil, *The Quality of Mercy*, *supra* note 6, at 618–20; Strasser, *The Limits of the Clemency Power*, *supra* note 6, at 139–43.

<sup>103</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>104</sup> U.S. CONST. art. I, § 3, cl. 6 (the senate has the “sole power to try all Impeachments.”). See also *Nixon v. United States*, 506 U.S. 224 (1993).

<sup>105</sup> U.S. CONST. art. I, § 5. See also *Powell v. McCormack*, 395 U.S. 486, 507 (1969).

<sup>106</sup> See *supra* notes 85–94 and accompanying text. Scholars have also suggested that there may be limited grounds to challenge a pardon decision where it might violate an individual’s fundamental rights or the Equal Protection Clause. See Kobil, *Compelling Mercy*, *supra* note 4, at 714–23; Strasser, *The Limits of the Clemency Power*, *supra* note 6, at 117–23; Strasser, *Some Reflections*, *supra* note 16, at 153–57. However, the likelihood of success on these claims is far from assured, and an appropriate remedy for an otherwise unsound pardon or denial of one, equally unclear. Kobil, *Compelling Mercy*, *supra* note 4, at 722–23.

<sup>107</sup> Sisk, *supra* note 52, at 18.

<sup>108</sup> *Id.*

or her political voice, and not vote again for the President.<sup>109</sup> For example, some have attributed President Ford's pardon of Nixon to his 1976 loss of the presidency to Jimmy Carter.<sup>110</sup> However, the threat of a lost election is again a reason why many executives delay their pardon decisions until they are exiting office. Finally, a challenger could hope that the President's concerns regarding his historical legacy might temper otherwise improvident or unpopular pardon decisions.<sup>111</sup> Here, the founders presumably hoped that the "damnation of fame to all future ages"<sup>112</sup> would lead presidents to exercise restraint when making pardon decisions. Certainly, Clinton's last minute pardons were not received well by the American public,<sup>113</sup> and Governor Barbour's pardons were equally reviled.<sup>114</sup> However, none of these methods to challenge a pardon decision assure the challenger any immediate relief, thereby reinforcing the overwhelmingly discretionary aspect of the power.

The states address the pardon power in measurably similar ways to how the power is administered by the federal government. Under their individual constitutions, the states have crafted a variety of methods by which the pardon power is exercised. A majority of states, like the federal government, have vested the pardon power primarily in the governor, who can seek advice from some sort of pardoning board if he or she so chooses.<sup>115</sup> In these states—like Mississippi, out of which the *In re Hooker* case originated—the rules and rationales surrounding

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<sup>109</sup> *Id.* at 18–19.

<sup>110</sup> Brenton Becker, *The History of the Nixon Pardon*, 30 CUMB. L. REV. 31, 44–45 (2000); Alison M. Madden, *Clemency for Battered Women Who Kill Their Abusers: Finding a Just Forum*, 4 HASTINGS WOMEN'S L.J. 1, 72 n.361 (1993); Sisk, *supra* note 52, at 18; Allen L. Williamson, Note, *Clemency in Texas—A Question of Mercy?*, 6 TEX. WESLEYAN L. REV. 131, 136 n.38 (1999).

<sup>111</sup> Sisk, *supra* note 52, at 19.

<sup>112</sup> *See id.*; Love, *The Pardon Paradox*, *supra* note 52, at 188 n.10; Love, *The Twilight of the Pardon Power*, *supra* note 6, at 1173 n.13; Love, *Reinventing President's Pardon Power*, *supra* note 52, at 6.

<sup>113</sup> *See supra* note 51 and accompanying text.

<sup>114</sup> *See supra* note 1, *infra* notes 230–236 and accompanying text.

<sup>115</sup> *See, e.g.*, ALASKA CONST. art. III, § 21; CAL. CONST. art. V, § 8; COLO. CONST. art. IV, § 7; HAW. CONST. art. V, § 5; ILL. CONST. art. V, § 12; IND. CONST. art. V, §17; IOWA CONST. art. IV, § 16; KY. CONST. art. LXXVII; ME. CONST. art. V, pt. 1, § 11; MD. CONST. art. II, § 20; MISS. CONST. art. V, § 124; N.J. CONST. art. V, § 2, cl. 1; N.M. CONST. art. V, § 6; N.Y. CONST. art. VI, § 4; N.C. CONST. art. III, § 5(6); N.D. CONST. art. V, § 7; OR. CONST. art. V, § 14; S.D. CONST. art. IV, § 3; TENN. CONST. art. III, § 6; VT. CONST. ch. II, § 20; VA. CONST. art. V, § 12; WASH. CONST. art. III, § 9; W.VA. CONST. art. VII, § 11; WIS. CONST. art. V, § 6; WYO. CONST. art. IV, § 5. *See also* MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE, 34–35 (William S. Hein & Co. 2006) (providing list). In some instances, state law vests the entire pardoning power in the governor, while in other settings, the governor may seek the advice of a pardon board or be subject to procedural limitations laid out in statute. *Id.* at 34–35. *See also* Dorne & Gewerth, *supra* note 5, at table 2 (organizing the states slightly differently); Van Camp, *supra* note 4, at 1285–90 (same).

how one might challenge a pardon decision mirror opinions of the federal courts.<sup>116</sup> Other states have created shared power models between the governor and a review board. In some states, a pardon decision is reached collectively by the governor and an independent board.<sup>117</sup> In other shared environments, the governor is the final decision maker, but only after consulting with the state pardon board.<sup>118</sup> Finally, and departing most dramatically from the federal model, six states entirely strip the governor of any pardoning power and place the pardon solely within the authority of an independent board or body.<sup>119</sup>

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<sup>116</sup> See, e.g., *State v. Rice*, 626 P.2d 104, 115 (Alaska 1981) (non-capital defendants do not have a liberty interest in state executive clemency); *Schwartz v. Owens*, 134 P.3d 455, 459 (Colo. App. 2005) (inmates do not possess a due process right to clemency); *People v. Lyons*, 618 P.2d 673, 675 (Colo. App. 1980) (executive branch has the sole authority to modify sentence after final conviction); *People ex rel. Gregory v. Pate*, 203 N.E.2d 425, 427 (Ill. 1964) (power to pardon belongs to the governor and cannot be undermined by the legislature or court); *Jackson v. Rose*, 3 S.W.2d 641, 643 (Ky. 1928) (court does not have power to review a governor's grant of pardon); *Elliott v. Kentucky*, 45 F. Supp. 902, 905 (W.D. Ky. 1942) (court does not have power to review governor's grant, or lack thereof, of pardon); *Chestnut v. State*, 524 A.2d 1216, 1220 (Me. 1987) (statute which attempted to commute an existing sentence is an unconstitutional infringement of governor's power to pardon); *Pope v. Wiggins*, 69 So.2d 913, 915 (Miss. 1954) (governor's constitutional power to pardon cannot be limited by other branches of government); *State v. Mangino*, 86 A.2d 425, 427 (N.J. Super. Ct. App. Div. 1952) (power to pardon is vested solely in the governor); *People ex rel. Page v. Brophy*, 248 A.D. 309, 310 (N.Y. 1936) (governor's power to pardon cannot be otherwise limited by statute or the courts); *Ex parte Bustillos*, 194 P. 886, 888 (N.M. 1920) (ultimate power to pardon is vested in the discretion of the governor); *State ex rel. Rowe v. Connors*, 61 S.W.2d 471, 472 (Tenn. 1933) (power to grant pardons belongs to the governor and cannot be controlled by the courts or legislature); *In re Conditional Discharge of Convicts*, 51 A. 10, 11 (Vt. 1901) (governor's pardon power cannot be restricted by the legislature); *State ex rel. Stafford v. Hawk*, 34 S.E. 918 (W. Va. 1900) (power to pardon is vested in the governor and cannot be restricted by the courts); *Kennedy v. State*, 595 P.2d 577, 578 (Wyo. 1979) (possibility of commutation is a matter left to the discretion of the governor and not the courts).

<sup>117</sup> See, e.g., ARIZ. CONST. art. V, § 5; DEL. CONST. art. VII, § 1; FLA. CONST. art. IV, § 8(a); LA. CONST. art. IV, § 5(E)(1); MASS. CONST. pt. 2, ch. II, § 1, art. VIII; MINN. CONST. art. V, § 7; MONT. CONST. art. VI, § 12; NEB. CONST. art. IV, § 13; N.H. CONST. pt. II, art. 52; NEV. CONST. art. V, § 14; OKLA. CONST. art. VI, § 10; PA. CONST. art. IV, § 9(a); R.I. CONST. art. IX, § 13; TEX. CONST. art. IV, § 11(b); ARIZ. REV. STAT. § 31-402(A) (2004); MONT. CODE § 46-23-301-307, 315-316 (2004). See also Dorne & Gewerth, *supra* note 5, at table 2 (organizing the states slightly differently); Kobil, *The Quality of Mercy*, *supra* note 6, at 605 n.232 (same); Love, *Reinvigorating the Federal Pardon Process*, *supra* note 6, at 745-47 (same).

<sup>118</sup> See, e.g., ARK. CONST. art. VI, § 18; KAN. CONST. art. I, § 7; MICH. CONST. art. 5, § 14; MO. CONST. art. IV, § 7; OHIO CONST. art. III, § 11. See also Love, *Reinventing President's Pardon Power*, *supra* note 74, at 32 (providing list); Dorne & Gewerth, *supra* note 5, at table 2 (organizing the states slightly differently); Kobil, *The Quality of Mercy*, *supra* note 6, at 605 n.233 (same); Love, *Reinvigorating the Federal Pardon Process*, *supra* note 6, at 747-48 (same).

<sup>119</sup> See ALA. CONST. amend. XXXVIII (amending art. V § 124); CONN. CONST. art. IV, § 13; GA. CONST. art. IV, § 2, para. II; IDAHO CONST. art. IV, § 7; S.C. CONST. art. IV, § 14; UTAH CONST. art. VII, § 12. See also Love, *Reinventing President's Pardon Power*, *supra* note 52, at 23-24 (providing list); Dorne & Gewerth, *supra* note 5, at 427-28 (organizing the states slightly differently); Kobil, *The Quality of Mercy*, *supra* note 6, at 605 n.234; Love, *Reinvigorating the Federal Pardon Process*, *supra* note 6, at 744-45 & n.62.

State practices vary widely in how pardons are administered. For example, in a majority of states, even those in which the governor has the final authority to issue a pardon, some sort of review board oversees the investigation and data collection for pardon applications.<sup>120</sup> State pardon hearing procedures also vary across the nation, including full board hearings, *ex parte* review, use of the Federal Rules of Evidence, and partial due process rights for the applicant.<sup>121</sup> Finally, a majority of states require that victims receive notice of a pardon application.<sup>122</sup>

Because each state has crafted its own pardon structure, it is difficult to draw any absolute conclusions about state pardon practice. Nonetheless, some broad trends can be identified. First, pardoning on the state level appears to impose far more immediate political consequences on governors than on presidents.<sup>123</sup> For example, at least one governor has been impeached and removed from office for granting pardons to the highest bidder,<sup>124</sup> while another governor's pardon practices (again, including the sale of pardons), resulted in his federal prosecution for conspiring to take kickbacks on liquor store licenses.<sup>125</sup> Similarly, governors have suffered in subsequent elections due to their pardon decisions. For example, Illinois Governor John Peter Altgeld pardoned a series of individuals associated with the 1887 bombing of Chicago's Haymarket Square.<sup>126</sup> The public reaction to his pardons was swift and fierce, and he was not elected to a second term.<sup>127</sup> Similarly, former Ohio Governor Michael DiSalle partially attributes his 1962 loss of the governor's mansion to his death sentence commutation of several individuals.<sup>128</sup> Hence, if only out of fear of political criticism, pardon practice on the state level is far from robust.<sup>129</sup>

Perhaps correlated to the fear of political reprisal from unpopular pardons, studies also indicate that where a state's pardon power is not vested solely or predominately with the governor, the overall rate, frequency, and speed by which

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<sup>120</sup> See Dorne & Gewerth, *supra* note 5, at table 8. See also *supra* notes 78–82 and accompanying text.

<sup>121</sup> Dorne & Gewerth, *supra* note 5, at table 9.

<sup>122</sup> *Id.* at 10.

<sup>123</sup> Kobil, *The Quality of Mercy*, *supra* note 6, at 607–11; Love, *Reinventing President's Pardon Power*, *supra* note 52, at 18; Barkow, *supra* note 6, at 153–55; Dinan, *supra* note 6, at 392.

<sup>124</sup> Dinan, *supra* note 6, at 392 (citing Kobil, *The Quality of Mercy*, *supra* note 6, at 607); Kobil, *The Quality of Mercy*, *supra* note 6, at 607 (referencing the 1923 impeachment of Oklahoma Governor J.C. Walton).

<sup>125</sup> Dinan, *supra* note 6, at 392 (citing Kobil, *The Quality of Mercy*, *supra* note 6, at 607); Kobil, *The Quality of Mercy*, *supra* note 6, at 607 (discussing Tennessee Governor Ray Blanton's prosecution in the 1980s for activities associated with his pardon activities).

<sup>126</sup> Kobil, *The Quality of Mercy*, *supra* note 6, at 607.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Love, *Reinventing President's Pardon Power*, *supra* note 52, at 19–20; Drinan, *supra* note 6, at 1129–30; Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239, 291–97 (2003).

pardons are granted is higher than in other states.<sup>130</sup> Likewise, where governors have the option of receiving advice from a pardon board, governors appear slightly more inclined to issue pardons.<sup>131</sup> In these settings, governors are more likely to have the sense that their decisions are bolstered and validated by the board's recommendation, and hence are less concerned about a negative response from their constituents.<sup>132</sup>

When examining pardon practice on both the federal and state levels, it is evident that executive pardon power is a hybrid creature. Its practical application, along with how scholars and courts have attempted to ground it in legal theory, highlights that pardon power embodies both justice-enhancing goals and justice neutral goals. Using the pardon power as a means to ensure fairness in our criminal justice system suggests that the practice should be mandatory, subject to articulated reasons by the grantor, and reviewable by the courts. Conversely, pardons have been granted to further goals that are far more political and utilitarian in nature. Here, the gift-giving nature of the practice strongly implies that pardon decisions should be left entirely to the executive and not be subjected to strenuous judicial review or oversight. And indeed, most pardon practice has been treated accordingly.

What we are left with is a practice that sits uneasily between justice and grace, both in its utilization and in its theory. The problem with this teetering balance is that if it is difficult for offenders to challenge the grant or denial of a pardon, fitting crime victims into the balance is all the more precarious.

### III. VICTIMS' RIGHTS PRACTICE AND THEORY

Victims' attempts to have their interests acknowledged in criminal justice proceedings have represented an ongoing tension for state and federal governments since the founding of our country.<sup>133</sup> For most of our nation's history, victims have been relegated to a limited role in the prosecution of defendants.<sup>134</sup> Victims have been called upon by the government to serve as witnesses or evidence, but have otherwise been largely disregarded and treated as Victorian children who should be seen and not heard.<sup>135</sup>

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<sup>130</sup> Love, *Reinventing President's Pardon Power*, *supra* note 52, at 20–21, 23–26; Love, *Reinvigorating the Federal Pardon Process*, *supra* note 6, at 744–51.

<sup>131</sup> Love, *Reinvigorating the Federal Pardon Process*, *supra* note 6, at 747–51.

<sup>132</sup> *Id.*

<sup>133</sup> Barajas & Nelson, *supra* note 7, at 8–11; Cardenas, *supra* note 7, at 371; Cellini, *supra* note 7, at 845; Tobolowsky, *supra* note 7, at 25–26.

<sup>134</sup> Barajas & Nelson, *supra* note 7, at 11; Cardenas, *supra* note 7, at 372; Cellini, *supra* note 7, at 849; Tobolowsky, *supra* note 7, at 26.

<sup>135</sup> *Kenna v. U.S. Dist. Ct.*, 435 F.3d 1101, 1013 (9th Cir. 2006); Barajas & Nelson, *supra* note 7, at 11.

The victim's traditionally narrow role within the criminal system is predicated largely on the public prosecution model.<sup>136</sup> Under this model, crime is not viewed as the act of a perpetrator which caused harm to an individual victim. Rather, the public prosecution model views the defendant's acts as such a gross violation of what is accepted behavior in civil society that the state should exercise its power to recognize and punish such wrongs.<sup>137</sup> Hence, crime is viewed as having been committed against the state.<sup>138</sup> The ensuing prosecutorial battle is framed between the state's interests in preserving peace, righting the social order, and punishing wrongdoers, and the defendant's interest in asserting his innocence or at least being fairly prosecuted for his illegal acts.<sup>139</sup> Within this structure, there are only two acknowledged parties with interests in the proceeding: the state and the defendant. The victim is generally not included within the matrix.

In the 1960s and early 1970s, victims began to chafe against their treatment under the public prosecution model and mobilized to address the criminal justice system's failure to adequately acknowledge the variety of needs and interests victims brought to a criminal proceeding.<sup>140</sup> Despite the physical, financial, and emotional harms victims suffered at the hands of an offender, many victims felt even more abused by the state in the course of the defendant's prosecution.<sup>141</sup> As

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<sup>136</sup> Barajas & Nelson, *supra* note 7, at 10–11; Cardenas, *supra* note 7, at 371–72; Tobolowsky, *supra* note 7, at 25–26. This was not always the case. In some of our earliest government structures, victims controlled the prosecution of those who had committed crimes against them. *See generally* Cellini, *supra* note 7, at 841; Mary Margaret Giannini, *Redeeming an Empty Promise: Procedural Justice, the Crime Victims' Rights Act, and the Victim's Right to be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47, 74 (2010) [hereinafter Giannini, *Redeeming an Empty Promise*]; Tobolowsky, *supra* note 7, at 23; Thad H. Westbrook, *At Least Treat Us Like Criminals!: South Carolina Responds to Victims' Pleas for Equal Rights*, 49 S.C. L. REV. 575, 577 (1998).

<sup>137</sup> *See, e.g.*, Giannini, *Redeeming an Empty Promise*, *supra* note 136, at 74–75.

<sup>138</sup> Scholar Casare Beccaria is credited with advancing the argument that crime is not a private matter between the victim and perpetrator, but rather represents a broader societal concern. Cardenas, *supra* note 7, at 366–72. Therefore, the proper focus for the criminal justice system was on societal needs, and not the needs of individual victims. *Id.* *See also* Mary Margaret Giannini, Note, *The Swinging Pendulum of Victims' Rights: The Enforceability of Indiana's Victims' Rights Laws*, 34 IND. L. REV. 1157, 1198 (2001) [hereinafter Giannini, *The Swinging Pendulum*]; Barajas & Nelson, *supra* note 7, at 8–9; Cellini, *supra* note 7, at 847–48 (criminal prosecutions should serve societal interests of deterrence and retribution rather than interests of individual victims in private redress); Tobolowsky, *supra* note 7, at 25–26 (goals of the criminal justice system focus more on vindicated harms done to society as opposed to harms suffered by the individual); Twist, *The Crime Victims' Rights Amendment*, *supra* note 7, at 369.

<sup>139</sup> Cardenas, *supra* note 7, at 371–72.

<sup>140</sup> *See generally* Aaronson, *supra* note 7, at 623; Beloof, *Weighing Crime Victims' Interests*, *supra* note 7, at 1138–39; Cassell, *supra* note 7, at 861; Kyl et al., *supra* note 7, at 613; Tobolowsky, *supra* note 7, at 28–30.

<sup>141</sup> *See, e.g.*, Senate Floor Statements in Support of the Crime Victims' Rights Act, 105 CONG. REC. S460, S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl), reprinted in 19 FED. SENT'G REP. 62, 64 (2006); DOUGLAS E. BELOOF ET AL., VICTIMS IN CRIMINAL PROCEDURE 20 (2d ed. 2006); Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, 293–98 [hereinafter Beloof, *The Third Model*]; Edna Erez, *Victim Voice, Impact*

noted by one victim, my “sense of disillusionment with the judicial system is many times more painful [than the crime itself]. I could not, in good faith, urge anyone to participate in this hellish process.”<sup>142</sup>

In response to overwhelming victim dissatisfaction, grassroots organizations fostered increased governmental awareness of crime victims.<sup>143</sup> The efforts of victim advocates took a quantum leap in 1982 after the release of the Final Report of the President’s Task Force on Victims of Crime.<sup>144</sup> The Task Force was established by President Reagan and was charged to “conduct a review of national, state and local policies and programs affecting victims of crime,”<sup>145</sup> and to “advise the President and Attorney General with respect to actions which can be undertaken to improve . . . efforts to assist and protect victims of crime.”<sup>146</sup> The Task Force recognized that there was no quick fix to the criminal justice system’s seeming disregard of victims,<sup>147</sup> and issued over sixty specific recommendations to better integrate victims within the criminal justice process.<sup>148</sup>

Energized by the Task Force’s recommendations, nearly every state has passed victims’ rights laws,<sup>149</sup> and over thirty states have passed victims’ rights

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*Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings*, 40 CRIM. L. BULL. 483 (2004); Kyl et al., *supra* note 7, at 613; Ilyssa Wellikoff, Note, *Victim-Offender Mediation and Violent Crimes: On the Way to Justice*, 5 CARDOZO ONLINE J. CONFLICT RESOL. 2 (2004), <http://www.cardozoicr.com/issues/volume-5-1/note-1/>.

<sup>142</sup> Barajas & Nelson, *supra* note 7, at 15 n.47.

<sup>143</sup> See, e.g., Aaronson, *supra* note 7; Beloof, *Weighing Crime Victims’ Interests*, *supra* note 7, at 1138–39; Frank Carrington & George Nicholson, *The Victims’ Movement: An Idea Whose Time Has Come*, 11 PEPP. L. REV. 1, 2 & n.3 (1984) (discussing California’s passage in 1965 of the first victims’ compensation legislation); Cassell, *supra* note 7 at 865–70; Cellini, *supra* note 7, at 853; Kyl et al., *supra* note 7, at 613; Tobolowsky, *supra* note 7, at 28–30.

<sup>144</sup> Exec. Order No. 12,360, 47 Fed. Reg. 17975 (April 23, 1982).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Kyl et al., *supra* note 7, at 584.

<sup>148</sup> *Id.*; Tobolowsky, *supra* note 7, at 29–30. Among these recommendations were ensuring that police and prosecutors kept victims informed as to the status and progress of the prosecution of the individual who had committed the crime against the victim, setting up systems to ensure that prosecutors effectively communicated to the court a victim’s views on charging and release decisions, allowing for more victim-impact statements at sentencing, granting restitution to victims, and allowing victims and their family members to be present at trials, even where they were called as witnesses. Finally, the Report advocated the passage of an amendment to the United States’ Constitution providing victims with protected rights. Cassell, *supra* note 7, at 865.

<sup>149</sup> State statutes have included providing victims with the right to be informed of the status of their case, see e.g., ALASKA STAT. § 12.61.015(a)(2) (2014); CAL. PENAL CODE § 679.03 (Deering 2015); IND. CODE ANN. § 35-40-5-2 (LexisNexis 2015); LA. REV. STAT. ANN. § 1844.A (LexisNexis 2014); S.C. CODE ANN. § 16-3-1530 (2014); TEX. CRIM. PROC. CODE ANN. §§ 56.08, 56.11–.12 (LexisNexis 2013); UTAH CODE ANN. §§ 64-13-14.7(2)-(4), 77-38-3 (LexisNexis 2015); and the right to be heard at any proceeding involving sentencing or post-conviction release decisions. See, e.g., ALA. CODE § 15-23-74 (2015); FLA. STAT. ANN. ch. 960.001(1)(a)(5) (LexisNexis 2015); MISS. CODE

amendments to their constitutions.<sup>150</sup> On the federal level, the effort to pass a victims' rights amendment to the United States Constitution has not yet been successful,<sup>151</sup> but Congress has passed numerous laws ensuring that victims are more integrated into the criminal process.<sup>152</sup>

Generally, federal and state laws provide victims with a number of opportunities to have a more direct role in the prosecution of those who have committed crimes against them. Under the federal Crime Victims' Rights Act [CVRA],<sup>153</sup> victims have been afforded with a litany of rights, including

[t]he right to be reasonably protected from the accused; [t]he right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused; [t]he right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding; [t]he right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; [t]he reasonable right to confer with the attorney for the Government in the case; [t]he right to full and timely restitution as provided in law; [t]he right to proceedings free from unreasonable delay; [and t]he right to be treated with fairness and with respect for the victim's dignity and privacy.<sup>154</sup>

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ANN. § 99-36-5(1)(e) (LexisNexis 2014); TEX. CRIM. PROC. CODE ANN. § 56.02(a)(5) (LexisNexis 2013); WASH. REV. CODE § 7.69.030(13) (LexisNexis 2015).

<sup>150</sup> Thirty-two states have passed victims' rights amendments to their constitutions. See ALA. CONST. art. I, § 6.01; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, § 28; COLO. CONST. art. II, § 16a; CONN. CONST. amend. XXIX; FLA. CONST. art. I, § 16(b); IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. I, § 13(b); KAN. CONST. art. XV, § 15; LA. CONST. art. I, § 25; MD. DECL. OF RIGHTS art. XLVII; MICH. CONST. art. I, § 24; MISS. CONST. art. III, § 26A; MO. CONST. art. I, § 32; NEB. CONST. art. I, § 28; NEV. CONST. art. I, § 8; N.J. CONST. art. I, para. 22; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10a; OKLA. CONST. art. II, § 34; OR. CONST. art. I, § 42; S.C. CONST. art. I, § 24; R.I. CONST. art. I, § 23; TENN. CONST. art. I, § 35; TEX. CONST. art. I, § 30; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8-A; WASH. CONST. art. I, § 35; WIS. CONST. art. I, § 9m.

<sup>151</sup> See generally Cassell, *supra* note 7, at 865–70; Giannini, *Redeeming an Empty Promise*, *supra* note 136, at 103; Kyl et al., *supra* note 7, at 596.

<sup>152</sup> See, e.g., Victim Rights Clarification Act of 1997, 18 U.S.C. § 3510 (2000); The Victims' Rights and Restitution Act of 1990, 42 U.S.C. § 10,606 (2006); The Victims of Crime Act of 1984, 42 U.S.C. § 10,601 (2006); The Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982).

<sup>153</sup> 18 U.S.C. § 3771 (2006).

<sup>154</sup> *Id.* at § 3771(a)(1)-(8).

Similarly, numerous federal statutes provide victims with the right to seek restitution from their offenders, as well as general compensation and other assistance from government sources.<sup>155</sup> State-based victims' rights laws afford similar protections to victims.<sup>156</sup> These laws are not solely aspirational. Victims have experienced a measure of success in exercising their rights in state and federal criminal actions.<sup>157</sup>

However, crime victims are still not fully integrated into the public prosecution model. Some victims' rights are difficult to define and therefore are difficult to grant or enforce.<sup>158</sup> For example, many states, as well as the federal government, assert that victims have the right to be treated with fairness, dignity, and respect.<sup>159</sup> However, legislators have provided little guidance as to what is

<sup>155</sup> See, e.g., Victim Witness and Protection Act, Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified as amended at 18 U.S.C. § 3663-3664); Crime Control Act, Pub. L. No. 101-647, § 2509, 104 Stat. 4789, 4863 (Nov. 29, 1990); Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403 (1992) (codified at 18 U.S.C. § 228); Violent Crime Control and Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1904 (Sept. 13, 1994); Mandatory Victim Restitution Act of 1996, 18 U.S.C. § 3663A.

<sup>156</sup> See, e.g., ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, § 28; CONN. CONST. amend. XVII; IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; LA. CONST. art. I, § 25; MICH. CONST. art. I, § 24; MO. CONST. art. I, § 32; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; OKLA. CONST. art. II, § 34; OR. CONST. art. I, § 42; R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24; TENN. CONST. art. I, § 35; TEX. CONST. art. I, § 30; WIS. CONST. art. I, § 9(m); ALASKA STAT. § 12.55.045 (2014); COLO. REV. STAT. § 16-11-101.5(6)(a) (2014); FLA. STAT. ANN. § 775.089 (LexisNexis 2015); OKLA. STAT. tit. 22, § 991f (West 2014); WYO. STAT. ANN. § 7-9-103 (2014).

<sup>157</sup> *In re Allen*, 701 F.3d 734, 735 (5th Cir. 2012) (district court required to consider whether individuals should be afforded victim status under the CVRA); *United States v. Belfort*, No. 98-CR-0859, 2014 WL 2612508 (E.D.N.Y. June 11, 2014) (court protects victim privacy in the context of releasing information about restitution award); *United States v. Camick*, No. 13-10042-01-JTM, 2014 WL 644997, \*2 (D. Kan. Feb. 19, 2014) (court bars individual from filing court actions against victims where such actions represent a form of witness retaliation); *Pann v. Warren*, No. 5:08-CV-13806, 2010 WL 2836879 (E.D. Mich. July 19, 2010) (victims have the right to be heard by a court on matters of restitution); *J.D. v. Hegyi*, 335 P.3d 1118, 1122 (Ariz. 2014) (parents or guardians who assert victim rights for minors will still be protected by the victim rights laws when the child reaches the age of 18); *State v. Pumphrey*, 338 P.3d 819, 824 (Or. Ct. App. 2014) (victim could receive restitution for safety measures taken by the victim in response to the defendant's actions); *State v. Brown*, 342 P.3d 239, 242 (Utah 2014) (victims should be afforded limited purpose party standing in a criminal case when seeking restitution).

<sup>158</sup> See e.g., *In re McNulty*, 597 F.3d 344 (6th Cir. 2010) (explaining who is a victim under the CVRA); *In re Rendon Galvis*, 564 F.3d 170 (2d Cir. 2009) (same); *In re Stewart*, 552 F.3d 1285 (11th Cir. 2008) (same); *In re Antrobus*, 519 F.3d 1123 (10th Cir. 2008) (same); *United States v. Atlantic States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453 (D. N.J. 2009) (same); *United States v. Sharp*, 463 F. Supp. 2d 556 (E.D. Va. 2006) (same).

<sup>159</sup> See, e.g., 18 U.S.C. § 3771(a)(8) (2006); ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1(a)(1); CAL. CONST., art. I, § 28; COLO. REV. STAT. § 24-4.1-1-302.5(1)(a) (2014); CONN. CONST. art. I, § 8; IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; KAN. STAT. § 74-7333(a)(1); LA. CONST. art. I, § 25; MD. CONST. DECL. OF RIGHTS art. 47(a); MICH. CONST. art. I, § 24; MISS. CONST. art. III, § 26A; N.H. Stat. § 21-M-8-k.II(c); N.J. CONST. art. I, para. 22; N.M. CONST. art. II, § 24;

embodied in such a set of rights,<sup>160</sup> much less what would serve as an appropriate remedy in response to a violation. Likewise, many state and federal laws provide victims with a right to be protected from the accused.<sup>161</sup> However, almost all would agree that such a right does not ensure that the state can guarantee no further harm will befall the victim at the hands of the accused.<sup>162</sup> Hence, one is left guessing as to what substance exists within this right.<sup>163</sup>

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OKLA. CONST. art. II, § 34.A; OR. CONST. art. I, § 42; R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24; TEX. CONST. art. I, § 30(a)(2); UTAH CONST. art. I, § 28(1)(a); VA. CONST. art. I, § 8-A(1); WIS. CONST. art. I, § 9m.

<sup>160</sup> For example, in speaking on the floor of the Senate in support of the Crime Victims' Rights Act, 18 U.S.C. § 3771, Arizona Senator Jon Kyl addressed in a general manner what he perceived to be "fair" treatment of crime victims. He stated

[T]he right to fairness for crime victims and the right to notice and presence and participation are deeply rooted concepts in the United States of America. This country is all about fair play and giving power to the powerless in our society. . . . Fair play for victims, meaningful participation of crime victims in the justice system, protection against a government that would take from a crime victim the dignity of due process—these are consistent with the most basic values of due process in our society.

Senate Floor Statements in Support of the Crime Victims' Rights Act, 105 CONG. REC. S460, S4269 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl), reprinted in 19 FED. SENT'G REP. 62, 63 (2006). However, unlike his discussion of other portions of the law wherein the Senator, along with Senator Feinstein, provided far more specific detail regarding what victims might expect in terms of the rights afforded to them under the Crime Victims' Rights Act, *see generally*, 150 CONG. REC. S4260-01, 2004 WL 867940 (Thursday, April 22, 2004), the Senator's words regarding a victim's right to dignity were sparse.

<sup>161</sup> *See, e.g.*, 18 U.S.C. § 3771(a)(1) (2006); ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1(A)(1); CAL. CONST. art. I, § 28(a); CONN. CONST. art. I, § 8(b)(3); ILL. CONST. art. I, § 8.1(a)(7); MICH. CONST. art. I, § 24(1); MO. CONST. art. I, § 32(6); N.M. CONST. art. II, § 24(3); OHIO CONST. art. I, § 10a; OR. CONST. art. I, § 43(1)(a); S.C. CONST. art. I, § 24(A)(6); TENN. CONST. art. I, § 35(2); TEX. CONST. art. I, § 30(2); VA. CONST. art. I, § 8-A(1); WIS. CONST. art. I, § 9m; 18 U.S.C. § 3771(a)(1); ALASKA STAT. § 12.61.010(4) (2014); COLO. REV. STAT. § 24-4.1-302.5(a) (2014); HAW. REV. STAT. § 801D-4(3) (2015); IND. CODE ANN. § 35-40-5-1(2) (LexisNexis 2015); KAN. STAT. ANN. § 74.7333(7) (2014); MD. CODE ANN. CRIM. PROC. § 11-1002(4) (LexisNexis 2014); MASS. GEN. LAWS ch. 258B § 3(d) (2015); MISS. CODE ANN. § 99-36-5(1)(a) (2015); NEB. REV. STAT. § 81-1848(c) (2015); N.H. REV. STAT. ANN. § 21-M:8-k(II)(c) (2014); N.Y. EXEC. LAW § 646-a (2014); OKLA. STAT. tit. 19, § 215.33(A)(2) (2014); R.I. GEN. LAWS § 12-28-3(3) (2015); S.D. CODIFIED LAWS § 23A-28C-1(4) (2015); TEX. CODE CRIM. PROC. ANN. § 56.02(a)(1) (2013); WASH. REV. CODE § 7.69.030(4) (2015); WYO. STAT. ANN. § 14-6-504(c) (2014). *See also generally* Giannini, *Redeeming an Empty Promise*, *supra* note 136.

<sup>162</sup> When the CVRA was presented to Congress, one of its sponsoring legislators, Senator Jon Kyl of Arizona, stated "Of course the government cannot protect the crime victim in all circumstances. However, where reasonable, the crime victim should be provided accommodations such as a secure waiting area, away from the defendant before and after and during breaks in the proceedings." 150 CONG. REC. S10910 (daily ed. Oct. 9, 2004) (statement of Sen. Kyl). The Federal Attorney General Guidelines regarding victim services under the CVRA exhibit a similarly limited understanding of the victim's protection right. The Guidelines direct that, where possible, separate waiting areas should be provided to victims at trial or at parole hearings and that victim protection services could aid "a victim in changing his or her telephone number[,] to the extreme measure of proposing the victim for inclusion in the Federal Witness Security Program." The Guidelines nonetheless make clear that the victim's protection right should not be construed to "require personal protection of a victim, such as by bodyguards." *See* OFFICE FOR VICTIMS OF CRIME, OFFICE OF

An allied problem victims have faced is that even in circumstances in which they can raise a colorable claim that their rights have been violated, it can often be difficult for them to obtain relief from the courts. Even if a court concludes that a victim has standing to raise a claim, a court may decline to extend relief to the victim.<sup>164</sup> Likewise, even if the victim's rights have been violated, providing a remedy to the victim could undermine a defendant's established constitutional rights.<sup>165</sup> At bottom, despite the increased integration of victims within the criminal process, the primary adversarial relationship remains between the state

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JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, ATT'Y GEN., GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 30–32, 35 (2005). *See also, e.g.*, *United States v. Rubin*, 558 F. Supp. 2d 411, 419–421 (E.D.N.Y. 2008) (noting limited judicial interpretation of right, and questioning whether the right provides anything to victims); *United States v. Turner*, 367 F. Supp. 2d 319, 322, 336 (E.D.N.Y. 2005) (providing limited review of the victim's right to be reasonably protected from the accused); Eric Blondel, *Victims' Rights in an Adversary System*, 58 DUKE L.J. 237, 269 (2008); Giannini, *Redeeming an Empty Promise*, *supra* note 136, at 47–48.

<sup>163</sup> *But see* *United States v. Camick*, No. 13-10042-01-JTM, 2014 WL 644997 (D. Kan. 2014) (providing relief to victims from intimidation and harassment from defendant).

<sup>164</sup> *See, e.g.*, *United States v. Marcello*, 370 F. Supp. 2d 745 (N.D. Ill. 2005) (declining to permit victim to exercise hearing rights based on the court's determination that victim information was not relevant to release determination); *United States v. Kennedy*, 643 F.3d 1251, 1266 (9th Cir. 2011) (declining to award restitution because it "is likely to be a rare case where the government can directly link one defendant's viewing of an image to a particular cost incurred by the victim"); *United States v. Aumais*, 656 F.3d 147, 155 (2d Cir. 2011) (victim impact and psychological evaluation were made prior to defendant's possession of images, therefore proximate cause could not be established); *United States v. Covert*, Crim. no. 09-332, 2011 WL 134060, \*9 (W.D. Pa. 2011) (evidence did not indicate how victim suffered additional harm upon learning of defendant's possession of her images); *United States v. Chow*, 760 F. Supp. 2d 335, 344 (S.D.N.Y. 2010) (government failed to present evidence as to how defendant's specific acts caused victim's losses).

<sup>165</sup> *See, e.g.*, *Cianos v. State*, 659 A.2d 291 (Md. 1995) (declining to award relief to victims despite clear violation of rights, where to do so would infringe on defendant rights); *People v. Pfeiffer*, 523 N.W.2d 640 (Mich. Ct. App. 1994) (same). In contrast to crime victims, who have struggled to have their interests in a criminal proceeding recognized by statute and by state constitutional law, American law has long enshrined constitutional protections to criminal defendants. *See, e.g.*, U.S. CONST. amend. IV (search and seizure rights); U.S. CONST. amend. V (grand jury, double jeopardy, self-incrimination, and due process rights); U.S. CONST. amend. VI (speedy and public trial by impartial jury, confrontation, compulsory process for obtaining witnesses, assistance of counsel rights); U.S. CONST. amend. VIII (limits on excessive bail or cruel or unusual punishments). *See also* *Miranda v. Arizona*, 384 U.S. 436 (1966) (suspect must be given notice of his right to an attorney before the police may question the suspect); *Douglas v. California*, 372 U.S. 353 (1963) (defendant has right to assistance of counsel on first appeal of right); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (defendant has fundamental right to assistance of counsel where punishment will include incarceration); *Mapp v. Ohio*, 367 U.S. 643 (1961) (evidence obtained by searches and seizures in violation of the constitution is inadmissible); *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (accused has right to be confronted with witnesses against him). *See also generally* Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocation, Defendant Allocation, and the Crime Victims' Rights Act*, 26 YALE L. & POL'Y REV. 431, 484 (2008) [hereinafter Giannini, *Equal Rights*]; Giannini, *The Swinging Pendulum*, *supra* note 138, at 1198; Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 942–48 (1985); Robert P. Mosteller & H. Jefferson Powell, *With Disdain for the Constitutional Craft: The Proposed Victims' Rights Amendment*, 78 N.C. L. REV. 371 (2000); Westbrook, *supra* note 136, at 579–80.

and defendant. As a result, victims' interests are consistently ranked below the interests of the state and defendant.

The difficulty of integrating victims into criminal proceedings is highlighted all the more when one attempts to think about victims' rights in relationship to executive pardons. Given that there lacks firm consensus as to whether, why, and how we should include pardon practice within our legal system,<sup>166</sup> trying to insert victim interests into that already swirling mass of functioning disorder is no easy task.

#### IV. THE MESSY INTERSECTION OF PARDON PRACTICE AND VICTIMS' RIGHTS

In similar fashion to the debates as to whether pardon should be categorized as a grace- and utilitarian-furthering function or as a justice-enhancing retributive tool,<sup>167</sup> comparable conversations have surrounded the victim's place within the criminal justice system.<sup>168</sup> And just as there lacks clear consensus regarding pardon practice, the theories and foundations for victim involvement in the criminal justice system continue to evolve.

When trying to find the best fit between a retributive or utilitarian approach to prosecution and punishment, victims traditionally have not been as welcome in the former construct and instead have established more ground in utilitarian structures. However, any such argument gets upended when viewing victims within a pardon system. Through this prism, a retributive or justice-enhancing model may be the area where victims can establish a steadier gait. However, that potentially solid ground is undermined by the inescapably grace-centered aspects of pardon practice. Hence, within the orbit of pardon practice, victims often find themselves floating and untethered.

To the extent our criminal justice system is designed to mete out justice in a retributivist fashion, prosecutions and their attendant punishments must be fair.<sup>169</sup>

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<sup>166</sup> See *supra* Part II.

<sup>167</sup> *Id.*

<sup>168</sup> See generally Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 *FORDHAM URB. L.J.* 1599 (2000); Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 *BYU L. REV.* 255 (2005) [hereinafter Beloof, *The Third Wave*]; Beloof, *The Third Model*, *supra* note 141, at 293–98; Cardenas, *supra* note 7, at 357; Blanche Bong Cook, *Stepping Into the Gap: Violent Crime Victims, The Right to Closure, and a Discursive Shift Away from Zero Sum Resolutions*, 101 *KY. L.J.* 671 (2012); Lynne N. Henderson, *Co-opting Compassion: The Federal Victims' Rights Amendment*, 10 *ST. THOMAS L. REV.* 579 (1998); Henderson, *The Wrongs of Victims' Rights*, *supra* note 165; Jody Lyneé Madeira, "Why Rebottle the Genie?": *Capitalizing on Closure in Death Penalty Proceedings*, 85 *IND. L. J.* 1477 (2010); Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 *GA. L. REV.* 407 (2008); Erin Sheley, *Reverberations of the Victim's "Voice": Victim Impact Statements and the Cultural Project of Punishment*, 87 *IND. L.J.* 1247 (2012); Leo Zaibert, *The Ideal Victim*, 28 *PACE L. REV.* 885 (2008).

<sup>169</sup> See Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just Punishment,"* 96 *NW. U. L. REV.* 843, 855–67 (2002); Markus Dirk Dubber, Note, *The Unprincipled Punishment of*

The defendant should be held fully responsible for the harms he or she caused, but no more or no less. In this context, a victim's personal desires for vengeance, which are often characterized as out of proportion to the defendant's true wrongdoing, are deemed misplaced.<sup>170</sup> Nonetheless, appropriately measured information from the victim regarding the extent of harm caused by the defendant helps ensure a retributively sound response to the crime.<sup>171</sup> Here, while the prosecutorial contest remains one between the state and the defendant, the victim's harm and suffering plays a central role in calculating the scope of the defendant's full liability.<sup>172</sup> The deficit in this position is that while it creates space for the victim, victims are nonetheless confined to the role of witness and, perhaps even worse, mere evidence.<sup>173</sup> Hence, while the victim may be asked to provide important information, the victim is often left feeling limited and devalued.<sup>174</sup> Therefore, victims may have a place within a retributivist approach to prosecution and punishment, but the fit leaves many dissatisfied.

Conversely, to the extent our criminal justice system is designed to further broader utilitarian goals,<sup>175</sup> there may exist more space for victims. Utilitarians view a defendant's punishment as a means to prevent future evils and wrongs.<sup>176</sup> A punishment should serve to improve society rather than to merely calculate the

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*Repeat Offenders: A Critique of California's Habitual Criminal Statute*, 43 STAN. L. REV. 193, 202–04 (1990); George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 52–53, 60–63 (1991); Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 73–74, 76–79 (2005); Giannini, *Redeeming an Empty Promise*, *supra* note 136, at 79; Matthew Haist, *Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"?*, 99 J. CRIM. L. & CRIMINOLOGY 789, 793–94 (2009); Henderson, *The Wrongs of Victims' Rights*, *supra* note 165, at 991–93. *See also supra* notes 15–16, 26 and accompanying text.

<sup>170</sup> *See generally* Bandes, *supra* note 168, at 1605–06; Kenworthy Bilz, *The Puzzle of Delegated Revenge*, 87 B. U. L. REV. 1059, 1063–64, 1072 (2007); Steven Eisenstat, *Revenge, Justice and Law: Recognizing the Victim's Desire for Vengeance as a Justification for Punishment*, 50 WAYNE L. REV. 1115, 1149 (2005); Fletcher, *supra* note 169, at 52; Giannini, *Redeeming an Empty Promise*, *supra* note 136, at 79–80; Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 244 (1991); Henderson, *The Wrongs of Victim's Rights*, *supra* note 165, at 994–95; Sheley, *supra* note 168, at 1252–53; Zaibert, *supra* note 168, at 886.

<sup>171</sup> *See* Fletcher, *supra* note 169, at 52–53, 60–63.

<sup>172</sup> *Id.* at 57–58.

<sup>173</sup> *See, e.g.,* Christopher, *supra* note 169, at 933–53; Fletcher, *supra* note 169, at 55.

<sup>174</sup> *See* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 137–39 (2004); Cellini, *supra* note 7, at 853; Giannini, *Redeeming an Empty Promise*, *supra* note 136, at 80–83; Karen L. Kennard, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 CAL. L. REV. 417, 426 (1989); Sheley, *supra* note 168, at 1272–75; Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 18 (2003).

<sup>175</sup> Christopher, *supra* note 169, at 857; Frase, *supra* note 169, at 70; Giannini, *Redeeming an Empty Promise*, *supra* note 136, at 77–78; Haist, *supra* note 169, at 794; Andrew R. Strauss, *Losing Sight of the Utilitarian Forest for the Retributivist Trees: An Analysis of the Role of Public Opinion in a Utilitarian Model of Punishment*, 23 CARDOZO L. REV. 1549, 1556–57 (2002).

<sup>176</sup> Strauss, *supra* note 175, at 1556–57.

costs of the defendant's acts.<sup>177</sup> Therefore, punishment is not solely about determining just deserts, but also about finding ways to deter future crime and rehabilitate the offender.<sup>178</sup> Because the utilitarian approach to punishment is broader, there is more room for the victim's voice.

As between the retributive and utilitarian approaches to prosecution and punishment, victims appear to stand on firmer ground under the latter construct. Here, the criminal justice system is not narrowly focused on the relationship between the defendant and the state, but takes a broader view of the many goals and purposes that could be achieved through the prosecution and punishment of an offender. Hence, one might initially contend that a victim-centered utilitarian criminal justice system would align with a utilitarian focused pardon system. However, a utilitarian foundation for victims' rights does not necessarily merge with ease into the utilitarian and grace-focused nature of pardon practice.

First, while utilitarian theory does generally cast a wider perspective when evaluating the value of a prosecution or punishment,<sup>179</sup> its manifestation in the pardon context tends to be narrower. As a utilitarian practice, pardon does focus on the broader social and political gains that could be accomplished through the gift of pardon,<sup>180</sup> but often to the exclusion of victims.<sup>181</sup> Second, a grace-centered pardon construct does not provide an easy avenue for victims to challenge the executive's pardon of an offender. Under a grace construct of pardon, even defendants are limited in their ability to challenge the denial or scope of a pardon grant.<sup>182</sup> In rejecting defendant requests for court oversight in the pardon process, courts have characteristically emphasized that a pardon is a gift and hence something to which the defendant is not entitled.<sup>183</sup> Third, given that the courts view pardons as something to which defendants are not absolutely entitled, any challenge raised as to the process by which pardons are granted is limited. Without a legitimate underlying property interest, fair procedures are unnecessary or only required in the most limited of fashions.<sup>184</sup> The Court has also rejected the

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.*; Giannini, *Redeeming an Empty Promise*, *supra* note 136, at 77–78.

<sup>179</sup> *See supra* notes 17–18, 175–178 and accompanying text.

<sup>180</sup> *See supra* notes 48–49, 74–77 and accompanying text.

<sup>181</sup> For example, very little of the literature addressing pardon as an act of grace discusses victim perspectives. *See supra* note 5.

<sup>182</sup> *See supra* notes 95–101, 107–109 and accompanying text.

<sup>183</sup> *See supra* notes 95–101 and accompanying text.

<sup>184</sup> *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 285 (1998) (pardon is a matter of grace and hence not constrained by procedural safeguards); *id.* at 288–289 (while pardon decisions are normally not reviewed by the courts, they should be accompanied by minimal procedural safeguards) (O'Connor, J., concurring).

argument that a statutory grant of process can rise, in and of itself, to the level of a protected property interest.<sup>185</sup>

It must nonetheless be acknowledged that in *Knote v. United States*,<sup>186</sup> the Supreme Court did indicate that a pardon decision could not infringe upon a vested property right.<sup>187</sup> In this context, however, the Court was speaking specifically about forfeited real property owned by the defendant and subsequently sold by the government.<sup>188</sup> The Court indicated that once the property was sold and fully vested in another, the defendant's subsequent pardon could not undermine the vested rights in the new property owner.<sup>189</sup> Therefore, in suggesting that a pardon could not undermine vested property rights, the Court was focused on real property directly implicated by the defendant's conviction, rather than any potentially broader concepts of property rights or interests. Moreover, as the Supreme Court has developed its jurisprudence around protected property interests, it has expressed an unwillingness to expand such interests too broadly.<sup>190</sup> None of this bodes well for crime victims seeking to challenge an executive's pardon grant.

Just as a defendant is not entitled to a pardon, a victim is not entitled to see the offender serve a full sentence. Nor do any of the processes which might accompany the grant or denial of a pardon rise to the level of being a protected entitlement.<sup>191</sup> Finally, even if there did exist legally recognized pardon interests in both victims and defendants, the courts would eventually have to tip the scales in favor of one party or the other. So doing, we would likely find ourselves back to the uncomfortable reality that a criminal prosecution and any accompanying pardons are first and foremost deemed a relationship between the offender and the state, with the victim relegated to a secondary position.<sup>192</sup>

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<sup>185</sup> See *e.g.*, *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 771 (2005) (a state does not "create a property right merely by ordaining beneficial procedure unconnected to some articulable substantive guarantee") (Souter, J., concurring); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) ("Property cannot be defined by the procedures provided for its deprivation."); *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) (process is not an end in and of itself).

<sup>186</sup> 95 U.S. 149 (1877).

<sup>187</sup> *Id.* at 153–55.

<sup>188</sup> *Id.* at 152.

<sup>189</sup> *Id.* at 154.

<sup>190</sup> See, *e.g.*, *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 766–68 (2005) (suggesting that protected property interests must have some form of ascertainable monetary value and represent a traditional conception of property). See also *Dist. Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52, 67–68 (2009) (rejecting defendant's argument that a liberty interest existed in the right to pardon).

<sup>191</sup> See *Town of Castle Rock*, 545 U.S. 748; *Dist. Attorney's Office*, 557 U.S. 52.

<sup>192</sup> See *Giannini, The Swinging Pendulum*, *supra* note 138, at 1160–62; *Mosteller & Powell*, *supra* note 165. See also, *e.g.*, *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 70 (1976) (when balancing between the right of a woman to end her pregnancy, and her spouse to receive notice and provide consent to the procedure, the woman's interests will prevail over that of her spouse).

The silver lining for victims in a grace-centered pardon practice is that both state and federal executives appear increasingly aware of the political costs that accompany unchecked discretion and therefore tend to exercise their power with care.<sup>193</sup> Hence, there is ground to postulate that when a pardon is not granted, the executive's denial of such grace may have been prompted by the recognition that victim interests outweigh the value of any grace bestowed on the offender. However, given that most pardon structures emphasize the inherently discretionary nature of the act, the grant or denial of grace need not be explained. Hence, where a pardon is denied and therefore could possibly be viewed as incorporating victim interests, that position can only be verified should the executive actor, *in his or her discretion*, decide to share the reasoning behind the pardoning decision.<sup>194</sup> But absent articulated reasons, one cannot be assured that the motivating force in denying a pardon request represented an executive response to victim interests, as opposed to the executive's concern about maintaining political power or establishing a sound legacy. Given the breadth of concerns that infiltrate a utilitarian approach to criminal justice, victim voices may simply be drowned out by other concerns. Therefore, the grace and utilitarian construct for pardon practice imposes a variety of barriers to formalized victim involvement.

Conversely, there may be more room for victims within a retributive and justice-focused framework of pardon practice. While victims have normally had less of a place in retributivist discussions,<sup>195</sup> the opposite may be true within the context of pardon practice. Under this construct, the traditional focus has sought to ensure the appropriate and fair punishment for the offender, without the seemingly emotional distractions of victim responses to the crime.<sup>196</sup> Pardons should only be issued as a means to ensure that the offender is punished no more or no less than he or she absolutely deserves, serving as an ultimate appeal or check on all the criminal justice processes.<sup>197</sup>

However, if a pardon is meant to ensure a fair punishment, victim input is important and necessary.<sup>198</sup> While measuring and calculating the depth of harms caused by offenders to their victims may be undoubtedly difficult,<sup>199</sup> failing to hear from victims would undermine assurances that a defendant's punishment and any

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<sup>193</sup> See *supra* note 68 and accompanying text.

<sup>194</sup> This is not to suggest executive actors never explain their reasons for granting a pardon. President Ford provided the nation with an explanation of his pardon of former President Nixon. See *supra* note 76–77 and accompanying text. Likewise, when George Ryan, Governor of Illinois, pardoned or commuted the sentences of the state's death row inmates, he provided his citizenry with a long explanation detailing why he had done so. See Sarat & Hussain, *supra* note 5, at 1330–43.

<sup>195</sup> See *supra* notes 169–174 and accompanying text.

<sup>196</sup> See *supra* note 170 and accompanying text.

<sup>197</sup> See *supra* notes 27–33, 85–94, 169–170 and accompanying text.

<sup>198</sup> See *supra* notes 170–174 and accompanying text.

<sup>199</sup> See *supra* note 37 and accompanying text.

potential pardon is indeed fair and just.<sup>200</sup> Hence, even as a mere witness, the victim's voice plays an important role in furthering justice.

Unfortunately, despite the general predominance of retributive theory in our criminal justice system, a retributive mold of pardon practice has not entirely taken hold.<sup>201</sup> Federal and state laws overwhelmingly treat pardon practice as a discretionary executive activity outside the normal checks and balances of our government branches.<sup>202</sup> Only in the narrowest of situations have courts willingly reviewed, much less overturned, pardon decisions or the lack thereof.<sup>203</sup> Characteristic of the courts' analyses is a recognition that pardons are driven by discretion and grace, as well as shielded from judicial review through separation of powers and the political question doctrine.<sup>204</sup> Hence, to the extent a more retributive-focused version of pardon practice might encourage more attention on victim interests, the wall of grace stands in the way.

The difficulty in both pinning down pardon practice as well as establishing a settled place for victims within the criminal justice system makes it equally challenging to determine how the two should intersect. As developed in the foregoing discussion, that intersection appears just as fluid and slippery as the topics themselves. However, there remains an avenue that could work with the unsolidified nature of both concepts and allow for a more unified and satisfactory process.

#### V. MEASURED MERCY THROUGH PROCEDURAL JUSTICE

As I have written elsewhere, the intentional integration of procedural justice theory into our criminal justice system could go a great distance in reconciling some of the difficulty in including victims in our judicial processes.<sup>205</sup> In using the phrase procedural justice, I am not referring to standard rules of criminal procedure or the constitutional concept of procedural due process.<sup>206</sup> Rather, procedural justice theory is a social science discipline which examines individual satisfaction with official decisions based on the perceived fairness of the process by which the decisions were reached, as well as how individuals were treated in the decision

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<sup>200</sup> Beloof, *The Third Model*, *supra* note 141, at 321–22; Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 619–22 (2009).

<sup>201</sup> Kobil, *How to Grant Clemency*, *supra* note 6, at 221–25; Kobil, *The Quality of Mercy*, *supra* note 6, at 579–83; Love, *Of Pardons*, *supra* note 6, at 1501–06; Rapaport, *supra* note 6, at 1509–19; Strasser, *supra* note 6, at 91–94.

<sup>202</sup> See *supra* notes 72–82, 115–118 and accompanying text.

<sup>203</sup> See *supra* notes 85–101 and accompanying text.

<sup>204</sup> See *supra* notes 83–106 and accompanying text.

<sup>205</sup> See generally Giannini, *Redeeming an Empty Promise*, *supra* note 136.

<sup>206</sup> *Id.* at 85 n.230.

making process.<sup>207</sup> The theory has developed into two different branches, one focused on process control and the other on group value.<sup>208</sup>

Under the process control theme of procedural justice, social scientists have examined individuals' acceptance of a decision based on the individuals' perception of whether the process by which the decision was reached was fair.<sup>209</sup> In criminal settings, where a process was perceived to be fair, even where the outcome was unfavorable to individual defendants, the defendants were nonetheless more likely to comply with the final decision and tended to have lower recidivism rates.<sup>210</sup> Under the process control model of procedural justice, the fairer the process is perceived to be, the more likely those impacted by the outcome will view that outcome as legitimate.

When thinking about the process control model as applied to crime victims, one must recall that much of the criminal justice system cannot function without the cooperation and input of victims.<sup>211</sup> It is often the victim who reports the crime, provides evidence to the police, and testifies at trial. Crime victims who perceive that the process by which crimes are investigated and prosecuted is fair will be more likely to continue to report crimes, provide evidence, and participate in trial.<sup>212</sup> These positive perspectives are likely to spill over into broader society and result in a citizenry that bears more faith in the workings of the criminal justice system and that is therefore more likely to cooperate and share information with authorities in order to aid the system's smooth functioning.<sup>213</sup>

The second strain of procedural justice theory goes deeper. Rather than just inquiring as to whether the decision making process is perceived to be fair, the group value approach focuses on how decision makers treat participants in the decision making process.<sup>214</sup> This aspect of procedural justice proffers that an

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<sup>207</sup> See Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 26–46 (2009); Jonathan D. Casper, Tom Tyler & Bonnie Fisher, *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483, 486–87 (1988); Giannini, *Redeeming an Empty Promise*, *supra* note 136, at 85–92; Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 477 (2008); Tracy L. Meares & Tom R. Tyler, *Justice Sotomayor and the Jurisprudence of Procedural Justice*, 123 YALE L.J. F. 525, 535–38 (2014); O'Hear, *Plea Bargaining and Procedural Justice*, *supra* note 168, at 420–24.

<sup>208</sup> Giannini, *Redeeming an Empty Promise*, *supra* note 136, at 85–92.

<sup>209</sup> *Id.* at 86–88.

<sup>210</sup> Raymond Paternoster, Robert Brame, Ronet Bachman & Lawrence W. Sherman, *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC'Y REV. 163, 163 (1997); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 233 (2008).

<sup>211</sup> See generally Beloof, *The Third Model*, *supra* note 141.

<sup>212</sup> O'Hear, *Plea Bargaining and Procedural Justice*, *supra* note 168, at 444–45; Michael M. O'Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323, 326–32 (2007).

<sup>213</sup> O'Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, *supra* note 212.

<sup>214</sup> Giannini, *Redeeming an Empty Promise*, *supra* note 136, at 89–96.

individual's perceptions of fair treatment contribute to the individual's sense of acceptance and integration in society.<sup>215</sup> When a person encounters a neutral decision maker who appears to be caring and trustworthy, treats everyone with dignity, and gives all before him or her the opportunity to be heard, that individual is more likely to believe they are honored members of their society and therefore tends to extend additional legitimacy to the decision making system in which they are involved.<sup>216</sup> Collectively, therefore, procedural justice theory proffers that legal systems that strive to administer fair processes, while also treating in a dignified and respectful manner those who are subjected to those processes, will be systems that are respected, used, and upheld by their citizenry.

Integrating procedural justice theory into executive pardon practice should make intuitive sense. Procedural justice theory is about ensuring fairness in processes, regardless of the outcome. Given the varied and discretionary nature of pardon practice,<sup>217</sup> coupled with the unsettled place of victims within the criminal justice system,<sup>218</sup> a theory that encourages broad unifying themes of fairness is welcome and needed. Moreover, overlaying procedural justice principles to pardon practice could bring to the fore certain retributive principles raised by those who have expressed concern about the grace and utilitarian focused nature of pardons.<sup>219</sup> For example, Kathleen Dean Moore, the predominant advocate for a retributively grounded pardon practice, has argued that in a democracy there should be very little room for discretionary, unexplained, and un-reviewed uses of executive power.<sup>220</sup> Even if procedural justice practices did not transform pardons into a fully retributive practice, the theory could go a great distance in ensuring that whatever the pardon outcome, those affected by the outcome believed the decision was reached in a fair manner with accompanying fair treatment of all involved.

So what might a pardon practice infused with procedural justice principles look like? In many regards, it would capitalize on much that the states and federal government are already doing, but would be more explicit in doing so. First, a robust procedural justice pardon practice would include a strong educational component so that anyone touched by the process would understand its steps, scope, and limits. So doing, all involved, offenders and victims alike, would understand what to expect from the process and any of its potential outcomes. Even if an offender or victim was unhappy to learn that the governor or president had largely unfettered discretion to make his or her decision, at the very least, the offender or victim would have that knowledge, and could manage his or her

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<sup>215</sup> *Id.* at 89–90.

<sup>216</sup> *Id.* at 90–91; O'Hear, *Plea Bargaining and Procedural Justice*, *supra* note 168, at 420–24.

<sup>217</sup> *See supra* Part II.

<sup>218</sup> *See supra* Part III.

<sup>219</sup> *See supra* notes 26–28, 31–36, 51 and accompanying text.

<sup>220</sup> *See supra* notes 26–28, 31–36, 51 and accompanying text.

expectations accordingly. Second, a procedural justice pardon practice should systematically utilize oversight and processing units, such as the Federal Pardon Attorney's Office or state pardon boards.<sup>221</sup> Doing so would create efficiency for both the decision maker as well as those seeking to influence that decision. The pardon attorney office or pardon board could serve as the central clearinghouse for education and information gathering, as well as information transmission. Moreover, by having aspects of the decision making process somewhat centralized, much of the mystery which often accompanies the pardon process would be minimized.

Allied to the centralization of the pardon process, a procedural justice approach to pardon would also intentionally gather information from defendants, victims, and other interested parties regarding the providence, or lack thereof, of a pardon grant. So doing, the procedural justice goal of treating all parties with respect would be furthered. Likewise, a system in which all relevant voices are heard, even if the ultimate decision is discretionary, would imbue the process with an increased sense of legitimacy. Finally, the individual or body granting the pardon should be strongly encouraged, if not required, to provide an explanation to the public for the pardon decision. Of course, in acknowledging the inherently discretionary nature of pardons, any proffered explanation would be just that—an explanation. However, despite the absence of any formal judicial review of the pardon explanation, the explanation would nonetheless be subject and available to public scrutiny. Decision makers, concerned about their legacies, might therefore be tempered from rash or improvident decisions.<sup>222</sup> All told, these practices, many of which exist in some form already within current pardon practice, would cabin the otherwise discretionary practice of pardon with soft retributive bookends. Without eradicating the longstanding grace-centered nature of executive pardons, procedural justice practices could bring increased legitimacy to the practice by bolstering victim, offender, and societal perceptions that the process was also motivated by notions of fairness and justice.

There is no easy or tidy way to untangle the Gordian knot presented by pardon practice and victims' rights. Despite the ancient lineage of pardon practice and the far more recent vintage of victim rights, both share the characteristic of lacking a clear home or foundation within the criminal justice system. The nomadic natures of both make it difficult to bring the two together in a cohesive fashion, even though the two inevitably intersect. Procedural justice theory, while broad in its construct, nonetheless provides a means to bring some unification to the two. Animated by the overall desire to infuse trust and legitimacy to government structures and decision making processes, procedural justice theory emphasizes the importance of fair treatment and fair processes, even if in the context of highly discretionary and fluid situations. Hence, its use and integration in the criminal justice system, and particularly in the pardon context, could go a

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<sup>221</sup> See *supra* notes 78–82, 117–118, 120 and accompanying text.

<sup>222</sup> See *supra* notes 51, 111–112 and accompanying text.

great distance in improving victim, defendant, and societal views of pardon practice. This leads one to question whether if the Mississippi pardon process was more grounded in procedural justice principles, the governor's decisions, and public reaction to the same, could have been different.

#### VI. THE *IN RE HOOKER* DECISION

Returning full circle to the Mississippi governor's 2012 pardons and *In re Hooker* decision,<sup>223</sup> one can see the multiple complexities of pardon practice and victim rights in full force, along with the court's missed opportunity to integrate procedural justice theories into the state's executive pardon practice.

A majority of Governor Barbour's pardons were uncontroversial. Nearly ninety of those pardoned were no longer in state custody, and of those still in custody, the governor granted "ten full pardons; thirteen medical releases; one suspension of sentence; one conditional, indefinite suspension of sentence; and one conditional clemency."<sup>224</sup> The governor's actions nonetheless received national attention because some of those who received full pardons had been convicted of violent crimes. For example, one defendant had been involved in a robbery and shot the victim in the face when the victim mistook the defendant robber as someone coming to the victim's aid. The shot was fatal.<sup>225</sup> Another pardoned individual shot his ex-wife in the head as she held their young child in her arms.<sup>226</sup> He shot another man who was also in the room and left him for dead.<sup>227</sup>

When challenged in the press for his actions, the governor declined to discuss or justify his decision. However, after leaving office, he issued a press release which stated:

Some people have misunderstood the clemency process and think that all or most of the individuals who received clemency from former Gov. Haley Barbour were in jail at the time of their release. Approximately 90 percent of these individuals were no longer in custody, and a majority of them had been out for years. The pardons were intended to allow them to find gainful employment or acquire professional licenses as well as hunt and vote. My decision was based upon the recommendation of the Parole Board in more than 90 percent of the cases. The 26 people released from custody due to clemency is just slightly more than one-tenth of one percent of those incarcerated.<sup>228</sup>

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<sup>223</sup> 87 So. 3d 401 (Miss. 2012).

<sup>224</sup> *Id.* at 403.

<sup>225</sup> ROAD2JUSTICE, *supra* note 1; *Mississippi Judge Blocks Release*, *supra* note 1.

<sup>226</sup> ROAD2JUSTICE, *supra* note 1.

<sup>227</sup> *Id.*; Walker, *supra* note 1.

<sup>228</sup> Fowler, *supra* note 1.

The governor was also cited as justifying the pardons on the ground that many of those who had been convicted of murder had acted in a heat of passion, and were therefore less likely to commit such acts again.<sup>229</sup> However, surviving victim Randy Walker challenged that premise, asserting that the defendant had engaged in premeditated murder.<sup>230</sup>

The last-minute nature of the governor's pardons also raised public ire. Because the governor issued the pardons as he was exiting office, he preempted any political impact the pardons might have had on his authority and power.<sup>231</sup> While many individuals were unhappy with the governor's decision, there were few to no avenues to challenge his actions. For many of the impacted victims, the governor's actions left them feeling entirely disregarded, in fear, and not at all part of the picture.<sup>232</sup>

Upon learning of the pardons, surviving victim Randy Walker reported that he felt "like [his] safety was in jeopardy,"<sup>233</sup> and went on to say, "I wonder if [the defendant] is going to finish what he's started."<sup>234</sup> Another victim stated, "I think the governor himself ought to look me in the eye and say, 'Hey, I let this guy go.' But there wasn't any of that. That's the coward's way out, if you ask me."<sup>235</sup> Hence, the individuals who bore the direct impact of the convicts' actions, and perhaps received the most relief from the defendants' convictions, were left feeling ignored and disenfranchised from a decision that could have a direct impact on their lives.<sup>236</sup>

Allied to these concerns was the fact that the governor's pardons allegedly failed to comply with the state constitutional requirement that all pardons be preceded by a thirty-day publication period. It was this claimed defect that served as the basis of the state attorney general's lawsuit asking the state supreme court to void the pardons as unconstitutional.

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<sup>229</sup> Walker, *supra* note 1.

<sup>230</sup> *Id.*

<sup>231</sup> Jim Rosenblatt, *Pardon Me: The Need for a Fair and Impartial Judiciary*, BENCHER, AM. INNS OF CT., (Jul./Aug. 2012), <http://home.innsforcourt.org/for-members/current-members/the-bencher/recent-bencher-articles/julyaugust-2012/pardon-me-the-need-for-a-fair-and-impartial-judiciary.aspx>.

<sup>232</sup> Phillips, *supra* note 1.

<sup>233</sup> CNN Wire Staff, *supra* note 1.

<sup>234</sup> *Id.* Walker was shot and left for dead by the defendant.

<sup>235</sup> *Mississippi Judge Blocks Release*, *supra* note 1.

<sup>236</sup> The governor's pardons also received national attention because of their sheer number. Barbour's immediate predecessor, Ronnie Musgrove only issued one full pardon, and to a man convicted of marijuana possession. Robertson, *supra* note 1. Governor Kirk Fordice, who served the state between 1992 and 2000, only issued 13 full pardons during his tenure, and Governor Ray Maybus only issued four full pardons during his tenure between 1988 and 1992. Conversely, as he was leaving office, Governor Barbour granted full pardons to over 203 individuals, seventeen of whom were convicted murderers. *Id.*

In *In re Hooker*, the state court was specifically asked to review whether the governor had complied with the state constitution's language regarding pardon procedures.<sup>237</sup> The attorney general's civil action asserted that he had "reason to believe that Former Governor Barbour's attempted pardons . . . were in violation of Section 124 of the Mississippi Constitution," and requested the trial court to "declare all pardons it found to be in violation of Section 124, null, void, and unenforceable."<sup>238</sup> Section 124 of the Mississippi state constitution guides that

[i]n all criminal and penal cases, excepting those of treason and impeachment, the governor shall have the power to grant reprieves and pardons . . . [I]n cases of felony, after conviction no pardon shall be granted until the applicant therefor shall have published for thirty days, in some newspaper in the county where the crime was committed, . . . his petition for pardon, setting forth therein the reasons for why such a pardon should be granted.<sup>239</sup>

The state supreme court narrowed its scope of review to a single question: "[W]hether the judicial branch of government has constitutional authority to void a facially-valid pardon issued by the coequal executive branch, where the only challenge is compliance with Section 124's publication requirement."<sup>240</sup> In a focused opinion, the court determined that the state's constitution exclusively reserved the pardon power to the executive branch, and therefore, under a separation of powers and political question analysis, the court lacked jurisdiction to review the governor's actions.<sup>241</sup> The court further suggested that the state constitution's publication requirement established, at most, a process by which the governor was meant to issue a pardon, rather than any type of protected individual property right. Therefore, in the absence of an alleged justiciable violation of a personal right,<sup>242</sup> the court had no grounds to address whether the governor's actions were inappropriate, much less whether his actions violated victims' rights. At its very core, the court's decision made clear that it lacked jurisdiction to evaluate the lawfulness of the governor's pardons.

The state court's decision embodies many of the quandaries that have challenged courts, scholars, and members of the executive branch who grant pardons. In particular, the *In re Hooker* decision shines a spotlight on four different, but interrelated, matters. First, the decision questioned the purpose of the pardon publication requirement and concluded it existed solely as a tool for the

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<sup>237</sup> See *infra* note 239 and accompanying text.

<sup>238</sup> *In re Hooker*, 87 So. 3d 401, 403 (Miss. 2012).

<sup>239</sup> MISS. CONST. art. V, § 124.

<sup>240</sup> *In re Hooker*, 87 So. 3d at 403.

<sup>241</sup> See *infra* notes 245–254, 268–274, 280–287 and accompanying text.

<sup>242</sup> See *infra* notes 245–254, 268–274, 280–287 and accompanying text.

governor to gather information to help him decide whether to grant a pardon. Therefore, it was a procedure that was unreviewable by the courts. Second, this conclusion raised the broader question of what role and purpose the pardon power serves within our judicial and governmental structure. Mirroring the messy landscape of pardon jurisprudence and scholarship, the *In re Hooker* majority held true to the grace-centered approach to pardon,<sup>243</sup> while the dissenting justices presented a mix of theories regarding the practice.<sup>244</sup> Third, and largely because of the court's marked lack of a discussion on the impact the governor's pardons would have on crime victims, the *In re Hooker* decision is instructive because of the questions it raises regarding the extent to which the executive pardon power should take into consideration, if at all, the interests of crime victims. Finally, throughout the entire arc of the *In re Hooker* controversy, one can observe any number of missed opportunities for the court to overlay procedural justice theory onto its pardon analysis and allow for a more satisfactory process for all involved.

From the outset, the court signaled its view that the executive pardon power is discretionary in nature and hence largely unreviewable. By grounding its analysis within the context of justiciability, the *In re Hooker* court indicated that pardons are certainly an important part of any governmental system, but exist outside legal and court structures. Blending the allied principles of separation of powers and the political question doctrine, the court invoked the seminal case of *Marbury v. Madison*<sup>245</sup> for the proposition that a court's primary role is to "decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."<sup>246</sup> Then quoting from a key political question case, *Nixon v. United States*,<sup>247</sup> the Mississippi Supreme Court noted that it would be inappropriate to exercise jurisdiction over a case where there was a "textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it."<sup>248</sup> The Mississippi Supreme Court noted that in *Nixon*, the Supreme Court declined to review an impeached judge's allegations that the process by which he was removed from office did not comply with the federal Constitution.

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<sup>243</sup> See *supra* notes 48–50, 54–55, 95–101 and accompanying text.

<sup>244</sup> See *infra* notes 256–267 and accompanying text.

<sup>245</sup> 5 U.S. 137 (1803). In *Marbury*, the Supreme Court addressed, in part, whether it had the power to require the executive branch to perform specific functions—in this instance, delivering a commission letter to a recently appointed justice of the peace. The Court concluded that where the executive action was purely ministerial, the judicial branch could mandate executive action, but that where the executive action was otherwise discretionary in nature, the Court should honor separation of powers principles and not police the actions of a co-equal branch of government. *Id.* at 170.

<sup>246</sup> *In re Hooker*, 87 So. 3d 401, 405 (Miss. 2012) (quoting *Marbury*, 5 U.S. at 170).

<sup>247</sup> 506 U.S. 224 (1993).

<sup>248</sup> *In re Hooker*, 87 So. 3d at 405 (quoting *Nixon*, 506 U.S. at 228 (internal citations omitted)).

The U.S. Supreme Court held that to do so “would be mandating and regulating a procedure specifically committed to the Senate—not the Court . . . [and that] the Senate must function independently and without interference from another branch in order to maintain the constitutional separation of powers.”<sup>249</sup> Just as it was inappropriate for the Supreme Court to review impeachment procedures which had been assigned by the Constitution to be within the Senate’s purview, so too was it inappropriate for the Mississippi court to review pardon procedures which had been assigned to the governor by the state constitution.<sup>250</sup> The constitutional assignment of the pardon power to the executive branch indicated that this was an activity that existed outside of the judicial process and was vested in the governor alone.<sup>251</sup>

The *In re Hooker* court nonetheless acknowledged that in limited circumstances, executive pardons could still be reviewed by the judicial branch. From the very start of its opinion, the court sent a very strong message that, absent an allegation of a “justiciable violation of a personal right,”<sup>252</sup> it would not assume “the absolute power to police . . . other branches of government in fulfilling their constitutional duties to . . . execute orders.”<sup>253</sup> So doing, the Mississippi court impliedly mirrored how the Supreme Court has approached its power to review pardons. Unless the grant or denial thereof is alleged to violate an otherwise acknowledged constitutional or vested property right, the court has declined to inquire into the wisdom or reasoning of the executive’s grant of mercy.<sup>254</sup>

Central to the Mississippi governor’s power to issue a pardon was the state constitution’s publication requirement. However, the Mississippi court reasoned that unless the publication requirement vested within identified individuals a personal or property right, the question of whether the publication requirement was satisfied solely rested with the governor.<sup>255</sup> The divided court wrestled with

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<sup>249</sup> *In re Hooker*, 87 So. 3d at 405–06.

<sup>250</sup> *Id.* at 406. It must be noted that not all state courts take a narrow view of their pardon review power. See, e.g., Strasser, *The Limits of the Clemency Power*, *supra* note 6, at 144–48 (discussing some state courts who have overruled pardon decisions where those decisions have not complied with state constitutional notice and formality requirements). Hence, the Mississippi court certainly could have extended its scope of judicial review. See, e.g., Smith, *supra* note 4 (suggesting that the Mississippi Supreme Court’s *In re Hooker* decision extended the boundaries of the political question doctrine too far).

<sup>251</sup> *In re Hooker*, 87 So. 3d at 412 (citing *Pope v. Wiggins*, 69 So. 2d 913, 915 (Miss. 1954)) (“Under Section 124 of the Constitution of 1890, the power to grant pardons and to otherwise extend clemency, after the judicial process whereby one has been convicted of a crime has come to an end, is vested in the governor alone.”).

<sup>252</sup> *In re Hooker*, 87 So. 3d at 402.

<sup>253</sup> *Id.*

<sup>254</sup> See, e.g., *Burdick v. United States*, 236 U.S. 79, 94 (1915) (pardon powers cannot be used to undermine other constitutional rights); *Knote v. United States*, 95 U.S. 149, 154 (1877) (a pardon cannot undermine the vested property rights existing in another individual).

<sup>255</sup> *In re Hooker*, 87 So. 3d at 411. In stating this proposition, the court relied on *State v. McPhail*, 180 So. 387 (Miss. 1938). In *McPhail*, the governor, concerned with the lawlessness in a

competing theories regarding whether the publication and notice provision created a vested personal or property right that, if violated, could permit the court to review a challenge to a gubernatorial pardon.

The dissenting justices, implicitly integrating procedural justice theories into their analyses, asserted that the state constitution's publication and notice requirements existed for the benefit of the citizenry to ensure that the pardon power was properly executed. Each of the dissenting justices grounded their argument on the proposition that the pardon power should not be described as belonging to the governor. Rather, the pardon power was something that belonged to and emanated from the people and was subsequently entrusted to the governor by the people through the state constitution.<sup>256</sup> The dissenting justices painted a picture of the pardon power as an extension of grace from the people to be exercised by the governor.<sup>257</sup> Under this construct, the governor could not exercise this constitutionally granted pardon power beyond the "extent that the people . . . constitutionally granted it" to him.<sup>258</sup> In particular,

The people did *not* give the governor the power to pardon individuals convicted of treason or impeachment. The people did *not* give the governor the power, without the consent of the Senate, to remit forfeitures or to grant reprieves to those convicted of treason. The people did *not* give the governor the power to pardon an individual before he or she has been convicted of a crime. And the people did *not* give the governor the power to pardon a convicted felon until the felon applying for pardon "shall have published for thirty days . . . his petition for pardon, setting forth therein the reasons why such pardon should be granted."<sup>259</sup>

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specific town, called out the state militia to enforce certain laws in the town. A tavern owner challenged the validity of the militia's search of his establishment, asserting that the governor lacked the power to call the militia to engage in the law keeping activities it had performed in the tavern owner's town. The Mississippi Supreme Court acknowledged that generally, "when the Governor calls out the militia, his decision whether the exigency is such as to authorize him to do so is solely for his determination and is not subject to judicial question or review." *Id.* at 391. The court nonetheless noted that where such executive action "comes into collision with the private personal or private property rights of any person within the jurisdiction of the state, such personal and property rights of the citizen and their infringements are always subject to inquiry and redress by the courts." *Id.* at 391–92.

<sup>256</sup> *In re Hooker* 87 So. 3d at 419 (Waller, C.J., dissenting); *id.* at 440 (Pierce, J., dissenting).

<sup>257</sup> *Id.* at 426–27 n.85 (Waller, C.J., dissenting) (pardon is an example of the people's mercy through the governor's acts); *id.* at 440 (Pierce, J., dissenting) (pardon power is an act of "mercy and grace" by the people who vest pardoning power in their government).

<sup>258</sup> *Id.* at 426 (Randolph, J., dissenting).

<sup>259</sup> *Id.* at 419–20 (Waller, C.J., dissenting) (emphasis in original citations omitted) (citing MISS. CONST. art V, § 124).

Stemming from the dissenting justices' view that the pardon power was entirely vested in the people and merely entrusted to the executive branch, it followed that the state constitution's notice provision existed to ensure that the governor appropriately extended the people's grace and mercy. Hence, the dissenting justices suggested that the publication requirement existed to ensure that the process by which a governor decided to pardon an individual was fair.

The dissents also proffered that the publication requirement embodied the people's right to petition the government<sup>260</sup> and was included in the constitution to serve as a check on the executive branch to ensure transparency in its pardon decisions.<sup>261</sup> Originally, the state constitution did not contain a pardon publication requirement, thereby leaving far more unfettered power in the executive branch to grant pardons.<sup>262</sup> However, 1890 amendments to the state constitution included the pardon publication provision.<sup>263</sup> The *In re Hooker* dissenting justices postulated that the reason for this change arose from a "widespread belief . . . that the [previous] constitution gave too much power to the governor. It was charged that his patronage and pardoning powers were too broad,"<sup>264</sup> could sometimes be improperly used, and therefore needed to be limited.<sup>265</sup> The publication requirement thus existed to ensure that the people could provide information to the governor to operate as a check on the exercise of his otherwise substantive discretion in granting pardons, "making the exercise thereof transparent to the public."<sup>266</sup> As noted by one dissenting justice,

Absent publication—which provides public notice that a convicted felon is seeking a pardon—the general public is silently and blindly cordoned off from the mansion and office of the governor, left unaware that its right to petition the government slowly disappears, before completely vanishing once pen touches paper.<sup>267</sup>

Therefore, for the dissenting justices, the pardon power was an embodiment of the people's acknowledgment that sometimes mercy was warranted within the broad arc of criminal justice. However, the exercise of that mercy was possible only by virtue of the people granting such powers to the executive branch through the state constitution. The constitution's publication requirement served as a

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<sup>260</sup> *Id.* at 421 (Randolph, J., dissenting).

<sup>261</sup> *Id.* at 422, 426–27 n.85; *id.* at 442 (Pierce, J., dissenting).

<sup>262</sup> *Id.* at 441–42 (Pierce, J., dissenting).

<sup>263</sup> *Id.* at 442.

<sup>264</sup> Attorney General Jim Hood's Brief on Interlocutory Appeal at 17, *In re Hooker*, 87 So. 3d 401 (Miss. 2012) (No. 2012-IA-00166-SCT).

<sup>265</sup> *In re Hooker*, 87 So. 3d at 442 (Pierce, J., dissenting).

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 421 (Randolph, J., dissenting); *see also id.* at 426–27 n.85.

means to check any potential executive overreaching. Again, the dissenting justices were suggesting that by ensuring that the governor heard from the citizenry prior to reaching a pardon decision, there was a greater guarantee that the final outcome would be viewed as legitimate.

A majority of the *In re Hooker* court disagreed with this line of argument.<sup>268</sup> According to the majority, the publication requirement, just like the pardon power itself, was something that belonged entirely to the governor, and served merely as an internal process to be followed by the governor. The *In re Hooker* majority strongly indicated that when a challenge was raised against the processes and procedures belonging to another branch of government, the judiciary should be very careful about second-guessing the internal processes of its co-equal branches of government.<sup>269</sup> The majority also disagreed with the dissenters' assertion that

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<sup>268</sup> The majority did not necessarily undercut the dissent's assertion that the pardoning power was something originally vested in the people that was subsequently entrusted to the governor, and in fact, discussed state precedent which supported such a proposition. For example, the majority cited to and relied upon *Montgomery v. Cleveland*, 98 So. 111 (Miss. 1923) for the position that governor had the sole authority to determine whether the state constitution's publication requirements were satisfied. *Montgomery* guided in part that the governor "is the sole judge of the sufficiency of the facts and of the propriety of granting the pardon, and no other department of the government has any control over his acts or discretion in such matters." *Id.* at 114. However, the language relied upon by the majority in *In re Hooker* from the *Montgomery* opinion was enveloped within a larger discussion which resonated far more with the dissenting justices' view of the pardon power.

While a pardon is a matter of grace, it is nevertheless the grace of the state, and not the personal favor of the Governor. It is granted out of consideration of public policy, for the benefit of the public as well as of the individual, and is to be exercised as the act of the sovereign state, not of the individual caprice of the occupant of the executive office as an individual. He is supposed to act in accordance with sound principles and upon proper facts presented to him. *Of course, he is the sole judge of the sufficiency of the facts and of the propriety of granting the pardon, and no other department of the government has any control over his acts or discretion in such matters.* Nevertheless he acts for the public. He dispenses the public mercy and grace; the efficacy of the pardon flows from the sovereign. The sovereign acts through the Governor, but it is none the less the act of the sovereign, and not the personal act of the Governor. . . . When a proper application is presented to the Governor, he is under duty to consider it; he has power to consider it; and while no authority other than his judgment and conscience can determine whether it is proper to grant or refuse the pardon, still his duty is to act upon the matter, to bring his mind and conscience to bear upon it, and to reach a determination in reference thereto. After so doing, if the application is meritorious, he grants the pardon; if it is otherwise, he refuses it.

*Id.* at 114 (emphasis added). Nonetheless, the majority appeared to focus upon the *Montgomery* court's articulation that the pardon power rests within the province of the executive branch in order to bolster the majority's position that the power to pardon was something entirely vested with the governor and could be exercised at his absolute discretion. *See also* *Pope v. Wiggins*, 69 So. 2d 913, 915 (Miss. 1954) ("Under Section 124 of the Constitution of 1890, the power to grant pardons and to otherwise extend clemency, after the judicial process, whereby one has been convicted of a crime has come to an end, is vested in the governor alone.").

<sup>269</sup> In evaluating the pardon publication requirement, the majority engaged in a detailed exegesis of the opinion *Ex parte Wren*, 63 Miss. 512 (Miss. 1886). In *Wren*, an out-of-state travelling salesman challenged whether he could be subject to a sales tax under a specific law, alleging that the law was invalid based on the faulty processes by which the law was passed. *Id.* at 512-13. The

the publication requirement somehow established in Mississippi citizens the right to petition their government, or some other form of a procedural due process right.<sup>270</sup> To the extent the publication requirement created a right in anyone, the majority determined the right was “of the governor to receive complete information before granting a pardon.”<sup>271</sup> In a concurring opinion, Presiding Justice Chandler roundly rejected any suggestion that the publication requirement embodied the people’s right to petition the government. He interpreted Section 124 of the Mississippi Constitution as having the purpose to “gather information for the governor, who all agree is vested with the sole discretion to decide whether to pardon a certain individual.”<sup>272</sup> He went on to emphasize that even if the publication requirement did represent a reservation by the people of notice of a pardon, “the notion of such a right dissolves when considered in light of the fact that noticing the public has absolutely no impact on the governor’s decision to pardon. All agree that the governor is fully empowered to ignore all protests and grant a pardon in his unfettered discretion.”<sup>273</sup> Therefore, to the extent a right might exist, it promised very little.<sup>274</sup>

Here, the justice missed a prime opportunity to infuse procedural justice principles into an otherwise discretionary process. Of course, within most pardon systems, the final decision is left to the sole discretion of a single actor. Hence, in stating that the “public has absolutely no impact on the governor’s decision to pardon,”<sup>275</sup> the justice seemed to be asking, “What’s the point in asking for feedback? The governor can do whatever he wants.” But in asking “what’s the

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Mississippi Supreme Court declined to honor the salesman’s request, asserting that under a separation of powers theory, it had the power to review whether the law’s content violated the state constitution, but that such a duty begins only with a completed act of the legislative branch. The court would not look behind the final passed version of the law to evaluate the internal machinations of the legislature and how it went about passing the law. *Id.* at 533–34. In discussing the *Wren* decision, the *In re Hooker* majority strongly indicated that when a challenge was raised against the processes and procedures belonging to another branch of government, whether that process was a pardon publication requirement, or whether the bill signed by the governor was exactly that which had passed both the state house and senate, the judiciary should be very careful about second guessing the internal process of its co-equal branches of government. 83 So. 3d at 406–12.

<sup>270</sup> *In re Hooker*, 83 So 3d at 411–12; *id.* at 417–18 (Chandler, J., concurring).

<sup>271</sup> *Id.* at 411 (majority opinion). *See also id.* at 418 (Chandler, J., concurring) (discussing historical record accompanying the passage of § 124 to Mississippi Constitution and asserting that record supports proposition that publication requirement was for the governor’s benefit).

<sup>272</sup> *Id.* at 417.

<sup>273</sup> *Id.* at 418.

<sup>274</sup> Justice Chandler’s reasoning echoes that of the U.S. Supreme Court in *District Attorney’s Office for the Third Judicial District v. Osborne*, 557 U.S. 52 (2009). In *Osborne*, the Court rejected a prisoner’s challenge regarding pardon, noting the entirely discretionary and gift-giving nature of the practice. *Id.* at 67–68 (“We have held that noncapital defendants do not have a liberty interest in traditional state executive clemency, to which no particular claimant is *entitled* as a matter of state law.”).

<sup>275</sup> *In re Hooker*, 87 So. 3d at 418–19 (Chandler, J., concurring).

point,” the justice missed the point. If within a decision making process, the decision maker is viewed to have listened and treated with respect all relevant voices to the discussion, the final decision, even if to the displeasure of some, will be more likely accepted, deemed legitimate, and honored.

Finally, the Mississippi court suggested that even if the publication provision did create some sort of right of notice and hearing on the public, the right only conferred benefits to “the public in general, and not to any particular private person.”<sup>276</sup> Without directly referring to the justiciable issue of standing, the court ruled that without a particular individual before it asserting the violation of an individual right, there were no grounds to hear the matter before it. The court went on to note,

We are mindful that the victims and their families are entitled to be interested in the subject matter of this case, and they are undoubtedly—and understandably—concerned with its outcome. But no party stands before this court claiming a violation of his or her personal or private property rights. The attorney general brings this claim on behalf of the state of Mississippi, and no particular individual.<sup>277</sup>

Nowhere else in the court’s opinion did it acknowledge or reference how its decision might impact those who were the victims of the pardoned individual’s crimes, except to obliquely suggest that victim voices might muddy their decision-making process.<sup>278</sup> Moreover, even the dissenting justices spoke of the publication requirement as a right that belonged to the people of the state of Mississippi, without specific reference to the victims who had suffered at the hands of the pardoned parties.<sup>279</sup>

It was only after the Mississippi Supreme Court issued its opinion that the state Attorney General, in a motion for reconsideration, explicitly contended that by virtue of the state’s victims’ rights laws, specific individuals, i.e., the victims of the pardoned parties’ crimes, had personal rights that were violated by the governor’s failure to comply with the state constitution publication provisions.<sup>280</sup> Relying on the state constitution’s Victims’ Rights Amendment,<sup>281</sup> and

<sup>276</sup> *Id.* at 411 (majority opinion).

<sup>277</sup> *Id.*

<sup>278</sup> In a concurring opinion, one of the justices stated that it was important to “calmly and unemotionally consider” the issues before it. *Id.* at 416–17 (Carlson, P.J., concurring).

<sup>279</sup> *Id.* at 421, 426 (Randolph, J., dissenting); *id.* at 441 (Pierce, J. dissenting).

<sup>280</sup> Attorney General Jim Hood’s Motion for Reconsideration at 1–2, *In re Hooker*, 87 So. 3d 401 (Miss. 2012) (No. 2012-IA-00166-SCT).

<sup>281</sup> MISS. CONST. art. III, § 26A(1) (“Victims of crime, as defined by law, shall have the right to be treated with fairness, dignity and respect throughout the criminal justice process; and to be informed, to be present and to be heard, when authorized by law, during public hearings.”).

accompanying legislation,<sup>282</sup> the Attorney General claimed that by failing to comply with the pardon publication provision, the Governor had violated victims' rights to have notice and be heard when parole or pardon was considered for a defendant. According to the Attorney General, state law vested within the victims of the pardoned individuals the right to have notice and to be heard in regard to the governor's decision to pardon the convicts. In supporting this argument, he pointed to one portion of the state's crime victim legislation commanding that "the victim shall have the right to be notified and allowed to submit a written or recorded statement when parole or *pardon is considered*."<sup>283</sup> Because the pardons were not properly published and the victims were denied the opportunity to provide information to the governor regarding his pending pardon decisions, the victims' personal rights to notice and a hearing were violated, and thus the court had jurisdiction to hear the case. The Attorney General further asserted that the pardon publication requirement detailed in Section 124 of the state constitution and the notice and hearing requirements listed in the state's victims' rights laws mirrored one another. Therefore, "the notice required under Section 124 of the Constitution falls within the ambit of the Crime Victims' Bill of Rights" and associated state legislation.<sup>284</sup>

Finally, the Attorney General argued that the pardon process was an inherent part of the criminal justice system and therefore warranted judicial review. So doing, the Attorney General appeared to be signaling that pardons, and the information victims might be able to provide to the decision maker, existed to serve justice and ensure that government sanctions, or reprieve thereof, was fair. Because the state's victims' rights legislation included a provision regarding a victim's right to notice and to be heard in respect to a convict's pardon or parole, the Attorney General argued that the Mississippi Legislature had signaled that the pardon process should fall within the ambit of judicial review. Regardless of the state attorney's arguments, the state supreme court rejected the motion for reconsideration.<sup>285</sup>

The court's rejection is not entirely surprising. The type of property interests normally honored by courts tend to be more tangible in nature.<sup>286</sup> Likewise, the Supreme Court has been equally clear that processes, like the right to receive notice or be heard by a court, cannot in and of themselves be deemed substantive rights.<sup>287</sup> However, the judicial reluctance to recognize and provide enforceable substance to statutorily and constitutionally created victims' rights adds to victim

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<sup>282</sup> See MISS. CODE ANN. §§ 99-43-1 to -49 (2014).

<sup>283</sup> MISS. CODE ANN. § 99-43-43(2) (2014) (emphasis added).

<sup>284</sup> Attorney General Jim Hood's Motion for Reconsideration at 4, *In re Hooker*, 87 So. 3d 401 (Miss. 2012) (No. 2012-IA-00166-SCT).

<sup>285</sup> See *In re Hooker*, 87 So. 3d 401, *rehearing denied*, No. 2012-IA-00166 (May 17, 2012).

<sup>286</sup> See *supra* notes 186–190 and accompanying text.

<sup>287</sup> See *supra* note 185 and accompanying text.

rights advocates' ongoing frustration in trying to gain a solid foothold in criminal procedure.

The *In re Hooker* opinion provides a textbook example of the challenges surrounding the fluid history and nature of pardon practice and how that ever-shifting practice does not create an immediately hospitable place for crime victims. The predominately discretionary nature of the practice tends to prompt the judiciary to take a "hands-off" approach to reviewing pardon decisions, whether for victims or offenders. However, in following suit, the *In re Hooker* court missed out on the opportunity to emphasize how procedural justice principles could enhance and legitimize pardon practice.

## VII. CONCLUSION

There is no easy way to fit crime victims into existing pardon practice. Because the theory and practice of pardon shuttles between the concepts of justice and mercy, it is difficult for victims to establish a foothold in a landscape that is inconsistent. To the extent that pardons exist to serve justice, the focus tends to be on whether the defendant was fairly punished, rather than whether the defendant's sentence fairly considers the victim's harm. Conversely, to the extent that pardons exist as a manifestation of grace, that mercy tends to be directed to alleviate defendant rather than victim suffering. Hence, victims are regularly shut out of either construct. However, procedural justice principles can go a great distance to create space in the intersection where victim interests and executive pardons meet and find the appropriate balance between justice and grace. By ensuring that all parties in a pardon decision are treated fairly and that the processes used to read the pardon decision are fair and even-handed, the state and federal criminal justice systems can promote a pardon practice that extends measured mercy to all involved.

