

**Pardons in perspective:
The role of forgiveness in criminal justice**
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Introduction

'Pardon' is generally regarded in contemporary legal and criminological literature as a somewhat peripheral aspect of criminal justice. The most careful recent American scholars make cogent arguments for rationalizing and curbing pardons, making them fit into a retributive and equitable system of distributing justice to offenders (Murphy & Hampton 1988; Moore 1989). 'Pardon' is conceived narrowly by these authors to refer to the actions of the executive in modifying or overturning judicial decisions. In their view, pardon should be used rarely and only to redress manifestly unjust verdicts or outcomes. Anything further than such technical corrections would constitute constitutional impropriety: one branch of government dabbling in the proper sphere of another.

This paper proposes a different approach, drawing mostly on European sources. It argues that pardon, clemency and forgiveness - like punishment -- are found right throughout the criminal justice system, not just with one branch of government. Punishment and pardon are intimate partners in the exercise of state authority over the bodies of subjects and citizens. The policy issue that arises is how to distribute the powers to punish or pardon most appropriately between juries, judges, constitutional courts, legislatures and the executive. Prosecutors sometimes decide not to prosecute (or to reduce charges), juries not infrequently acquit defendants despite strong evidence against them, and judges in many cases minimize punitiveness in imposing sentence. Meanwhile Parliaments decriminalize offenses such as public drunkenness or homosexual

activities, while constitutional courts may overturn harsh laws or punitive executive actions.

Focusing narrowly on executive pardons of individuals also misses part of the crucial political significance of such acts (Muyot 1994). Pardons, like punishments, may play an important role in asserting the power of the sovereign (or the people), reaffirming the violent basis of the social contract and reminding us of the fragility of the social order (Garapon, 1997). By depriving the subject of liberty, property or even life, the state shows the violence implicit in its exercise of power. By providing forgiveness, the state shows both its strength and its weakness: its authority extends to moderating or preventing violence, but its own survival depends in part on the selective withholding of force rather than its routine deployment. Amnesties in particular, as Muyot points out, have very little to do with providing individual justice and much to do with restoring political order.

Like punishment, pardon, mercy and forgiveness tap into the visceral, subliminal and non-rational side of public policy. They provide ways of responding to popular sentiments (such as sympathy for those guilty of infanticide), recognizing political injustices (such as invasion and its consequences for indigenous peoples) and re-affirming fundamental social values of tolerance and co-existence. Just as moral outrage finds its outlet in punishment, so compassion finds its expression in pardon.

It may be possible to domesticate pardon, just as sentencing guidelines appeared to have curbed judicial discretion. But the one-dimensional justice that results may ignore the deeper symbolic purposes of punishment and pardon, and the pervasiveness of both dimensions of justice throughout the criminal justice system. This point can best be illustrated by way of a story of two apparently similar murder trials in France and Canada, illustrating two constitutional settings of pardon. But first a general historical overview and some definitions.

Pardons and punishment: a brief history

The linking of punishment and pardon are at least as old as the Code of Hammurabi, where the prescription of harsh penalties was balanced by rules to limit vengeance and specify mitigating circumstances (King 2000). Royal authority to take life was matched by executive prerogatives to exercise mercy (Rolph, 1978). Most famously, the execution of Jesus was accompanied by executive clemency for Barrabas. In Roman times the Triumph gave the returning war hero the status of Dictator for a day, with a right both to slaughter war captives and to pardon them. Coronations and national holidays provided suitable occasions for monarchs to proclaim their generosity (Rolph 1978). The two sides of justice were displayed most clearly in the extensive use of amnesties by Han emperors in China (McKnight 1981). 'Great acts of grace' were used regularly to clear the dockets of the over-stretched legal system, sometimes timed to coincide with particular astrological events. Additional 'special amnesties' were used to get workforces for drought relief or provide soldiers. 'The ruler', McKnight points out, 'held two handles, rewards and punishment, the power to cleanse or to chastise. He could not hope to govern well without employing both.' (119).

One contemporary understanding of pardon is that it is an executive intervention to thwart justice. This is the view of those who regard presidential pardons as unfortunate interference in the business of the judicial arm of government. It was also the view of the French revolutionaries who abolished executive clemency altogether as part of a dismantling of the *ancien régime*. Royal clemency had worked in a capricious and arbitrary way, privileging the aristocracy and imposing suffering on the rest of the population. The new written codes would allow the sovereign people through their legislative representatives to fix clear and consistent penalties. This rational rulebook, that became the Napoleonic Code, would transform judges from agents of royal despotism to bureaucrats applying rules in a consistent and transparent way.

The abolition of executive clemency did not last long, as the new First Consul began to re-gather some of the old royal powers in his move towards an imperial role. However, more importantly, the separation of powers that had been introduced as part of the Revolution had also divided up the royal powers of pardon. The new judicial borrowing from England, the jury, allowed the sovereign people to exercise

direct democracy as part of the judicial arm of government. In the early days, this mostly consisted of deciding who to send to the guillotine. But increasingly the role of the jury was to decide when mercy should be exercised. Gruel's classic history of the French jury is titled simply *Pardons et Châtiments*, forgiveness/pardon and punishment (1991). Juries were the sovereign power in relation to acquittal, later determining which mitigating or aggravating factors were present, and later still (after 1941) ruling on penalty.

Were juries particularly indulgent with offenders charged with infanticide, abortion, or crimes of passion? Prosecutors certainly felt this was the case. One important consequence of the perceived tendency of juries to acquit so many defendants was the *correctionalisation* of justice, reducing the charges to the less serious matters heard in correctional courts by judges without juries. Sometimes this was done by the prosecutors, part of the executive branch of government. Sometimes it involved the legislature changing the definitions of offences or penalty ranges to facilitate this process. But for serious cases, particularly murder or other major crimes against the person, the jury had responsibility.

In a sense the institution of the jury was the complete opposite of the rationality implicit in the *Code Civile*. It was based on the feelings of lay people, on their *intime convictions*, their gut feelings, not on the dispassionate reasoning of professionals. The courtroom encounter therefore represented the contest between two sources of authority, the legislature represented by the written code laid down by the Assembly, and the judiciary represented (at least in part) by the jury (Taylor, 1996). Both, it should be noted, derived their legitimacy from popular authority. One exemplified representative authority, the other direct democracy.

This story of curbing of executive pardoning powers has a parallel in the Common Law world. Danby, the chief minister of Charles II, was about to be impeached by Parliament, but the king stepped in with a royal pardon (Rolph, 21). As part of the establishment of constitutional monarchy that followed the departure of the Stuarts, it was prescribed that the royal pardon could never again be used to block impeachment (Kobil 587). By 1830 it was clear that the king had lost the rest of his pardoning power. In that year

George IV ordered the Lord-Lieutenant to commute a death sentence, perhaps responding to a request from one of his mistresses (Rolph, 28). Peel, the Home Secretary, after consulting with Wellington, the Prime Minister, refused. After that it was the elected representatives of the people that managed the royal prerogative. Even then pardon was to be given only for legal reasons, such as an unsafe verdict (Rolph, 29). This practice of 'royal' pardons exercised by officials was transferred to the colonies, including New Zealand (Burnett, 1977) and Canada (Strange, 1996).

The United States, in developing a system of government with popular accountability for both the executive and legislature, could re-think the powers accorded each sphere. So the President was given far more extensive powers to pardon than the British monarch had generally enjoyed, while the Congress acquired widespread powers to grant amnesties. Lincoln made extensive use of this power, once dispatching a rider to halt a military execution with the handwritten message, 'Colonel Mulligan - if you haven't shot Barney D. - yet - don't. A. Lincoln' (Clark 1917). All but two states gave some pardoning powers to their governors, but most of them were more limited than the federal powers (Rolph 115).

Former California Governor Pat Brown (as recounted by Kobil) reported the political context of one unsuccessful applicant (Kobil 1991, 608). The case involved the killer of a six-year-old girl. Brown was convinced that the condemned murderer was mentally defective because of an injury *he had* suffered as a child. He believed that executing this criminal would amount to an act of societal vengeance rather than justice. However, while *he* was deciding whether to commute the sentence to life imprisonment, Brown learned that a legislator with the swing vote on an important piece of legislation for migrant workers was strongly in favor of *the* execution and would withhold his support if Brown granted clemency. The commutation was denied.

The real growth in executive involvement in managing mercy in the U.S. was not after sentence; it was in prosecutorial decisions, made in the context of plea bargains and mandatory sentencing.

Meanwhile juries in the Common Law world developed in parallel to French juries, with juries considered overly sympathetic to defendants being replaced by judge-only

courts, or in England and Wales and the colonies, **by** lay magistrates. What was different about the French jury system after 1941 was its authority to evaluate level of culpability, consider aspects of mitigation and aggravation, and determine sentence. The 'clemency movement' in North America, protecting the interests of women who had killed battering husbands, argue for juries to provide clemency through nullification (Ayyildiz 1995). For the most part (and this leads onto the later comparison) Common Law juries did not have the broad responsibility of French juries, and the opportunity to craft sentences to the situation.

Defining the terms

The terms 'forgiveness', 'pardon', 'mercy', 'clemency', 'indemnity' and 'amnesty' provide a fluid and largely overlapping set of terms to mark out an approach to transgression or deviance that stays the hand of vengeance.

A suspect could be declared immune from prosecution for certain offences, before guilt was formally established. Such a 'pardon' was granted to former U.S. President Nixon by his successor (Sirica, 1979), while at least 16 'amnesties' were offered Filipinos who had taken up arms against their governments since the last days of Spanish rule (Muyot 16). The South African Truth and Reconciliation Commission offered an 'amnesty' to those who were found to have provided a complete and truthful account of their involvement in political violence in the apartheid years (Tutu 1999), while in several Latin American countries, amnesty was one of the procedures used to allow military rulers to evade justice, at least for a while (Minow 1998). A classical definition of amnesty sees it as 'a sovereign act of forgiveness' for past crimes (Black 1991), though some reserve the word 'forgiveness' for a personal act of reconciliation that only the victim can provide, in which hostility is set aside (Wiesenthal, 1997).

In nineteenth century America, presidential pardons were almost routine for federal prisoners: in 1869, Moore reveals, there were '64 acts of pardon for every 100 federal prisoners' (Moore, 53). Prison 'amnesties' are regular features in many countries for certain categories of offenders in Turkey, Thailand and the Philippines (Muyot 1994). Gun 'amnesties' have been used in Australia to

reduce the number of high-powered weapons in the community, while immigration 'amnesties' have been used by several nations to regularize the status of illegal immigrants (Storer and Faulkner, 1977). 'Indemnities' from prosecution may be used to allow some suspects to testify against others, while one of the first acts of Charles II on the restoration of the monarchy in 1660 was to declare a 'free and general pardon, indemnity and oblivion' (12 Car.II.c.11.)

Pardons were not always 'free'. Charles II himself sometimes sold pardons for two shillings (Hewitt, 1978). Papal indulgences and letters of remission were other famous revenue-generating measures; the one attacked by Luther and his Reformers, the other by leaders of the Enlightenment. Pardon brokers were active in the Lincoln White House organizing pardons for former Confederate sympathizers, getting paid up to \$300 for a successful pardon (Dorris 147). J. C. Walton sold hundreds of pardons during his term as Governor of Oklahoma (Kobil 607). Two British nurses facing flogging or beheading for murder in Saudi Arabia had their fate linked to negotiations over blood money to be paid to relatives of the victim (O'Donnell, 1999).

'Mercy killing' and the compassionate jury: a comparison of two trials

Two rather similar trials, one on the Côte-d'Armor in France, the other in Battleford, Saskatchewan, dealt with 'mercy' in a double sense. They involved reportedly loving parents ending the suffering of severely disabled children -- called 'mercy killings'-- and courts being asked to show clemency to the perpetrators of these acts. Yet the cases produced radically different outcomes, illustrating quite different constitutional arrangements for the exercise of pardon.

Anne Pasquiou had three children (Le Monde, 5 March 2001; Internet Revue de Presse, 5 March 2001). One of them, Pierre, aged 10, had a particularly severe form of autism; he required constant supervision as his condition continued to worsen. So she took him to the end of a pier one winter morning and pushed him into the water. A three-day trial took place before a jury at the local *cour d'assises*. In his final address to the jury, Madame Pasquiou's advocate denounced the failure of French society to provide adequately for parents with children like Pierre. The

prosecutor, part of the executive arm of government, acknowledged that the defendant was 'driven by love', but urged the jury to convict her to avoid the impression that 'death should be preferred to life'. The penalty, he submitted, should be sufficient to emphasize society's disapproval of murder, while reflecting goodwill and mercy to the defendant. He suggested a suspended sentence might be acceptable.

The jury - nine citizens selected randomly, the presiding judge and two assistant judges - retired to work out decisions for all the issues of the case - guilt, level of culpability, aspects of mitigation or aggravation, and sentence. They returned with a verdict of guilty, and a sentence of three years prison, wholly suspended. The presiding judge turned to the accused. The court, he reported, did not have the power to forgive her (*pardonner*), but she could put her life back together again only if she began by forgiving herself. The jury exercised its sovereign authority to impose punishment on a fellow citizen by crafting a sentence that combined a strong symbolic statement about the value of life with an avoidance of future pain. Pardon was requested, clemency was given, forgiveness was foreshadowed. A statement was made, but it was made through ritual and language, rather than on the body of the offender.

The Canadian case involved Robert Latimer, whose 12 year old daughter, Tracy, had a severe form of cerebral palsy (Supreme Court of Canada, 2001). She was quadriplegic, could not walk, talk or feed herself, was in constant pain and was subjected to repeated surgical interventions. When yet another operation (considered by Mr Latimer and his wife as mutilation) was planned, he placed Tracy in the cab of his Chevy truck and connected a hose from the exhaust to the cab. He had confessed the deed to the police and re-enacted it, so there was no question it met the formal criteria for murder - deliberate killing of another, with at least some evidence of planning. The Canadian Parliament had decided that murder should carry a mandatory life sentence. The jury at his 1994 trial duly found he was guilty of second degree murder and the judge passed the required life sentence, with parole possible after 10 years. The verdict was overturned in 1996 by the Supreme Court when it was found that the police had tampered with the jury. At the second trial in 1997, the jury again convicted, but the judge sought their advice on sentence. They recommended one

year prison and an additional year home detention. The judge imposed that sentence, using the protection offered by the Charter of Rights and Freedoms against 'cruel and unusual punishment.'

The nine year ordeal made its way up again to the Supreme Court, which in January 2001 decided to re-impose the mandatory life sentence, saying it was not grossly disproportionate to the offence. The court commented that it was not for it to 'comment on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed' (77). Further while the court recognized that Mr. Latimer had undergone seven years of legal action involving 'publicity and consequential agony for him and his family', the court could provide no redress for that agony. The answer had to come from the executive: 'the royal prerogative of mercy' they concluded was 'the only potential remedy' (89) for people in Mr. Latimer's situation. This was a rather hollow suggestion: remissions of sentence were not available under the royal prerogative where this would merely substitute 'the discretion of the Governor General, or the Governor in Council, for that of the courts'.

But the courts, the Supreme Court ruled, did not have discretion anyway in this situation. The policy manual for the use of pardons goes on that 'there must exist clear and strong evidence of an error in law, of excessive hardship and/or inequity, beyond that which could have been foreseen at the time of the conviction and sentencing' (National Parole Board, s. 4). The hardship and inequity had been identified at the time of original sentence, which was why the mandatory sentence had not been passed at the time of trial. Within a U.S. constitutional framework, with equally balanced branches of government, this might appear to be the Supreme Court taking a conservative stance, refusing to examine whether the legislature had erred. Within a Westminster-style system, this was merely the court recognizing the traditional supremacy of Parliament; 'separation of powers' simply means preserving the independence of the judiciary not assigning them the same authority as Parliament. The reference to the Charter (as to the European Convention of Human Rights in Britain or other signatory countries) illustrates however the way Parliamentary sovereignty was increasingly becoming open to challenge.

While these two cases cannot be considered 'typical' of murder trials, let alone the style of justice, in the two jurisdictions, they do illustrate nicely different constitutional opportunities for pardon in the two systems. In the French case, full authority is exercised by the sovereign people, exercising direct democracy, sitting in judgment on the life and liberty of a fellow citizen. The jury is entrusted with power to weigh up all the evidence about social conditions, mitigating circumstances, extent of culpability, and then to determine sentence. Pardon was in the gift of the citizens acting through the institution of the jury. The institution closest to the evidence and the parties, and in the best position to form an *intime conviction*, was given the task of making that decision.

Executive clemency had been available in France in the last resort, and was extensively used in the post-war years. Indeed one of the reasons the guillotine had been abolished was that juries were passing too many death penalties, although the long campaign of civil liberties group also helped (Badinter, 2000). An appeal system was also introduced against the decision of a jury in 2001, but to a 12-person jury (plus three judges) rather than the normal 9-person jury. Despite these controls, the jury was nevertheless was able to make authoritative decisions on the exercise of mercy.

In the Canadian case, the conclusions of the jury in the second trial was not dissimilar to that of the French trial. A relatively minor sentence should be imposed, they believed, certainly far less than the mandatory minimum. Their view was shared by the other independent person who had heard the evidence and was formally required to pass sentence, the judge. The difference between the two cases lay in the lack of authority given the jury (and indeed the judge) to weigh up and settle the issues. The identity of the killer was not an issue, but was the death (to use the Canadian sentencing judge's words) a 'compassionate homicide', and if so, what sentence would be appropriate in the circumstances? The jury were not empowered to decide this; they were told only to determine guilt or innocence, in other words ignore the only matter that was really at issue. So the choice for them was to nullify, by ignoring the overwhelming evidence of the defendant's guilt, or convict, producing what in their view would be a grave miscarriage of justice. Despite the attempt of the judge to

produce a creative solution by relying on Charter rights, the Supreme Court ruled that neither the judge nor the jury had the power to make the relevant decisions about Mr. Latimer's future. The decision had already been made, in 1976, by Parliament, as part of a deal to abolish the death penalty.

Conclusions

Pardoning was the prerogative of the executive before the days of constitutional government, but so too was appointing and controlling the judiciary, and frequently summoning and dismissing legislative bodies. With a separation of powers came the possibility of providing an independent source of authority that could make its own decisions about the life and liberties of individuals. One key judicial decision is exercising clemency. Yet in many situations, the executive still clings to this apparently judicial power. Most commentators see better regulation of this power as the most appropriate policy option. This paper suggests that a greater sharing of that power is another option to be considered.

The difference illustrated in the case comparison involved the power of the jury to make binding adjudications on sentence. But it raises the more fundamental constitutional question of *where* pardon should be exercised. The first option (as in the Cote d'Armor) is to leave the decision about penalty and pardon in the hands of those who live in the community, hear the evidence, see the faces and gestures of witnesses, and hear both sides of the argument. The second option is to have clear written guidelines prescribed by the legislature, whether in the form of the Napoleonic Code or sentencing rules. This would ensure consistency and fairness between cases. The third option (to correct the defects of the second) is to rely on executive clemency to overturn unduly excessive sentences. So the issue comes down to the extent and form of popular sovereignty in the justice process. Is direct democracy (in the jury) the best way of achieving a just outcome in a criminal matter, is it fairer to rely on representative democracy (through the Parliament), and what role should the executive play in regulating the actions of the other two branches of government?

France, at least for major criminal trials, has selected the direct democracy route. This follows what Nils Christie

refers to as local, intimate justice, in which punishment - and pardon --is 'applied between equals standing close to one another' (1981, 104). The Common Law world, on the other hand, has tended to choose the practices of 'distant democracy' run by representatives, either in the legislature or the executive. Whichever approach is preferred, it is important to recognize the choices that are made in locating powers of pardon in the hands of presidents, parliaments or juries.

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