I, Too, Sing America: Presidential Pardon Power and the Perception of Good Character

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Presidential pardon power is among the most expansive, unencumbered, and suspicion-evoking of executive powers. Generally speaking, Americans hold negative views of presidential pardons. In recent poll responses, Americans report concern that Presidents may conceal their own misdeeds when pardoning others, especially when those pardoned are high-profile individuals. Such disquietude...
tude persists even today. As Special Counsel Robert Mueller secures indictments of members of President Trump's inner circle and news continues to cycle of Trump's alleged criminal involvement, Americans are fretful that Trump may abuse presidential power by pardoning those implicated in the investigation, including family and inner-circle members. This apprehension is not without merit. Unlike other Presidents who have typically waited to exercise expansive pardon power until the waning days of their administration, Trump has already issued high-level, controversial pardons with no hint of restraint and without typical Department of Justice oversight. Shockingly, he has even publicly alluded to pardoning his associates who have been indicted as a result of the Mueller investigation. Such a move is dangerous and would erode public confidence in the Trump administration, an administration that is unique in its struggle to secure and maintain public trust in the integrity of the American system of government.

President Donald Trump’s tenure in the White House has left throngs of Americans feeling increasingly isolated from America's dreams. The blatant racism, misogyny, xenophobia, and overall contempt for any semblance of Americanism that is remotely misaligned with overarching notions of white male heterogeneity labels those who are neither white nor male as “misfits” who can never enjoy the full and free benefits of America’s bounteous promises. Many Americans feel abandoned by an Executive who refuses to recognize, that, we, too “sing America.”


7. See Dina Smeltz, A New Survey Shows That the Republican Party is Not the Party of Trump, WASH. POST (Oct. 2, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/10/02/no-the-republican-party-is-not-the-party-of-trump-this-new-survey-finds/. See also generally Eric Levitz, America Will Only Remain 'Majority White' If Blacks Remain an Underclass, INTELLIGENCER (May 3, 2018), http://nymag.com/intelligencer/2018/05/for-america-to-be-white-blacks-must-be-an-underclass.html (explaining the fear of many white Americans that a diverse, non-white majority United States could lead to whites becoming a racial minority and “suffer[ing] the same indignities that nonwhites were made to suffer in this country”).

policies, programs, and proposals, including the border wall national emergency declaration, travel ban executive order, tax breaks for the wealthiest citizens, anti-transgender military stance, and revival of unconstitutional stop and frisk tactics, typify his administration’s inherent culture of exclusion, disdain for legal history and tradition, and utter defiance of constitutional precedent. Even many of the faithful who originally supported Trump’s presidency, critically question his commitment to fair governance and the rule of law. The foreseeable consequence of his scorn of our system of government is the utter disillusionment of the governed. Disillusionment, however, proves detrimental to democracy.

The American system of democracy is unique in that it demands belief among those it would govern, in its utility, power, and benefits. “[P]ublic satisfaction . . . is the key goal of democratic governance,” as the United States ultimately “derives its powers from the consent of the governed.” Scholars agree the American political system can only perform effectively with the “support of the governed, and that such support will only occur if a system is perceived

13. Id.
as fair and just.”¹⁵ The very balance of our esteemed democracy, then, is weakened when the governed cease to believe that government works. In this way, perception is reality. While scores of initiatives fuel the aforementioned disenchantment, presidential pardon power triggers incredible skepticism at this specific moment in history.¹⁶

Relying on the premise that effective democracy requires a certain measure of public satisfaction, this Article argues that presidential pardon power must be reformed and limited immediately, in order to begin restoring public confidence in our Chief Executive and in our overall system of government. In so offering, this Article borrows from the retributive criminal justice tenet that perceptions of fairness are integral to an effective administration of criminal justice, and incorporates that principle in advocating for a novel model of presidential pardon power. Following this Introduction, Part I of this work provides a brief history of the original concept of presidential pardon power, including its underlying assumption that the President will always be a person of the highest character. Part II explores the concept of perception as reality in the context of the criminal justice system, and advises that retributive punishment theory may be informative in constructing a novel model of presidential power. Finally, Part III provides guidance in crafting a reformed model of presidential pardon power that, in the absence of the strong character envisioned by the Framers, will assist in reestablishing public trust in presidential pardon power, the Chief Executive, and our American democracy.

I. THE SCOPE OF PRESIDENTIAL POWER AND THE CONTENT OF CHARACTER

The scope of presidential pardon power remains the subject of robust debate. Scholars note that:

[T]he very factors that make the pardoning authority unique--its ancient history, its oddly dual nature as a gift or a political tool, its existence outside the normal system of checks and balances of democratic government, and the way it resonates to

¹⁶. See Amanda Shanor, No, President Trump, You Are Not Above the Law, ACLU (June 18, 2018, 12:30 PM), https://www.aclu.org/blog/executive-branch/no-president-trump-you-are-not-above-law (noting that while the Constitution provides Presidents with a broad pardoning power, President Trump’s recent claims of an even more far-reaching executive power to pardon could potentially “undermine the democratic safeguards enshrined” in the Constitution).
the distant thunderclap of absolute power—are the same factors that make its existence and exercise controversial.\textsuperscript{17}

Throughout the years, the Supreme Court has grown to support an expanding and broad interpretation of presidential pardon authority, evolving from initially viewing it as a gift to considering it as an almost exclusively unchecked grant of public welfare.\textsuperscript{18} Though supported by the Court, modern-day application of this seemingly unfettered power circumvents and frustrates the administration of criminal justice, a system that is secured by constitutional protections and safeguards. The lack of legislatively-appointed guiding principles and the absence of judicial review are among the traditional checks that are missing from the presidential pardon power rubric, further boosting its controversial nature. Scholars opine that:

[T]heir [presidential pardons] use typically involves marked departures from the procedural regularities that swathe the criminal justice process. . . . [T]hey represent a mechanism by which the executive can override not only the authority of the judiciary to impose a criminal conviction and sentence, but in a larger sense, prevent the general aims of punishment . . . . [E]xecutive pardons effectively circumvent the criminal adjudications occurring in the judiciary. Such adjudications ideally and symbolically represent extraordinarily formal due process . . . .\textsuperscript{19}

There remains a fear that the President will abuse this extraordinarily sweeping power, resulting in sustaining dialogues concerning whether the power should be more limited, and if so, in what specific ways. In contemplating a novel presidential pardon power model, reformers consult the Framers and constitutional history.

Seeking guidance from the Framers of the Constitution does little to settle the presidential pardon power controversy, but may be instructive in generating reform proposals. At a time when the threat of revolution was a tangible prospect, the Framers initially justified the grant of presidential pardon power as a means of suppressing potential rebellions.\textsuperscript{20} The hope was that offering the olive branch

\textsuperscript{18}. Biddle v. Perovich, 274 U.S. 480, 486 (1915); Ex parte Garland, 71 U.S. 333, 351 (1866); 59 AM. JUR. 2D Pardon and Parole § 13 (2019).
\textsuperscript{19}. Dorne & Gewerth, supra note 17, at 414.
\textsuperscript{20}. \textit{THE FEDERALIST NO. 74} (Alexander Hamilton).
of a “well-timed offer of pardon” to would-be insurgents might “re-
store the tranquility of the commonwealth.”21 The power was to be 
broad and its usage left to the discretion of the Executive. The his-
torical data suggests that the Constitutional Convention delegates 
intended for presidential pardon powers to mirror the expansive 
royal entitlement exercised by the English Crown.22 It therefore 
lacks the checks, balances, and limited democracy characteristics of 
other constitutionally enumerated governmental powers. This orig-
inal model, however, was not without critics. Detractors earnestly 
complained of the potential for future abuse.23

In response, some Framers found solace in the image they had 
carefully crafted of the President and his powers. The original, as-
pirational view was that the President would act as a “political eu-
nuch, with the duty of only assuring that laws passed by Congress, 
which is where the political action would occur, be faithfully exe-
cuted.”24 While the grant of pardon power was to be extensive, the 
President himself was to occupy a much more limited role. Further, 
the Framers earnestly believed that the President would be of such 
exceptional character that he would never violate the law, nor 
would he ever consider abusing this broad grant of power.25 In the 
words of Framer Alexander Hamilton,

Humanity and good policy conspire to dictate, that the benign 
prerogative of pardoning should be as little as possible fettered 
or embarrassed. . . . [I]t may be inferred that a single man 
would be . . . least apt to yield to considerations which were 
calculated to shelter a fit object of its vengeance. The reflection 
that the fate of a fellow-creature depended on his sole fiat, 
would naturally inspire scrupulousness and caution; the dread 
of being accused of weakness or connivance, would beget equal 
circumspection, though of a different kind.26

History, however, recounts a distinctly contrasted narrative. Far 
from a “political eunuch,” the President “has been transformed into 
the most powerful official in American politics and has been de-
scribed as the nation’s Chief of State, Chief Executive, Commander-
in-Chief, Chief Diplomat, Chief Legislator, Chief of Political Party,

21. Id.
22. 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 626-27 (Max 
Farrand ed., Yale University Press 1911).
23. Id.
24. Johnson, supra note 5, at 303.
25. Id. at 290.
26. THE FEDERALIST, supra note 20 (emphasis added).
as well as several other important titles.” 27 The record is also clear that American Presidents have, in fact, exercised the pardon power beyond its originally envisioned reach, even perhaps crossing the boundary into seemingly potential abuse. Included in some controversial pardons are President Ford’s pardon of Richard Nixon in the nascent years of his tenure, President Bush’s pardon of six key figures involved in the Iran Contra affair (and the possible concealment of his own misdeeds in the process), and President Trump’s recent pardon of Arizona Sheriff Joe Arpaio. 28 Additionally, President Trump actively speaks of and expresses interest in granting pardons to his relatives and close associates. 29 American Presidents do not always abide by the code of conduct contemplated by the Framers that justified such an expansive grant of presidential pardon power. 30 They are not always of the highest character. Nevertheless, presidential pardon power remains nearly unchecked. The time has come to reconsider the scope of presidential pardon power. Democracy requires it.

II. PERCEPTION IS REALITY

American democracy demands active participation by the governed. The exceptional nature of the American system of democracy insists that the governed maintain confidence in the system’s utility, power, benefits, and fairness because “public satisfaction . . . is the key goal of democratic governance,” 31 and because the United States ultimately “derives its powers from the consent of the governed.” 32 Actual fairness, however, is not required to earn the public’s confidence. Rather, the governed must have the impression that the system that governs them is operating equitably. 33 Perceptions of credibility lead to increased compliance with the law, while

27. Johnson, supra note 5, at 303.
31. Hibbing & Theiss-Morse, supra note 12.
lack of public trust may have serious consequences.\textsuperscript{34} Scholars assert that the perception of justice is as important as its attainment.\textsuperscript{35} In this way, perception is reality.

As in the case of our esteemed democracy, the criminal justice system is also rendered impotent when people become less convinced of its efficacy.\textsuperscript{36} As with all governmental systems, the criminal justice system must be mindful of public perceptions of fairness and justice.\textsuperscript{37} Studies demonstrate that perceptions of criminal law's legitimacy give rise to "higher levels of cooperation and lower rates of recidivism."\textsuperscript{38} Further, "people are less likely to comply with laws they perceive to be unjust" or "with the law generally when they perceive the criminal justice system as tolerating such injustice."\textsuperscript{39} In this way, lessons gleaned from the criminal justice system are instructive to presidential pardon power reform efforts.

According to scholars, "a criminal justice system derives practical value by generating societal perceptions of fair enforcement and adjudication."\textsuperscript{40} Professors Josh Bowers and Paul H. Robinson reduce this notion of "societal perceptions of fair enforcement and adjudication" into two distinct types: 1) legitimacy and 2) moral credibility.\textsuperscript{41} Under this model, the legitimacy class of societal perceptions focuses on criminal justice processes, and requires that they are fairly, accurately, and uniformly executed.\textsuperscript{42} The moral credibility category concerns the concept of justice, demanding that the criminal justice system produce equitable outcomes, thereby maintaining its "reputation for moral credibility with its community."\textsuperscript{43} Though their internal operations vary significantly, the concepts of legitimacy and moral credibility possess the same ultimate goal. The aim of both is that people come to believe that the criminal justice system works, and, for that reason, choose to behave lawfully.\textsuperscript{44} The criminal justice system simply cannot function effectively if the general population refuses to believe in it and conform to its laws.


\textsuperscript{35} Flowers, \textsuperscript{supra} note 15, at 699.

\textsuperscript{36} Bowers & Robinson, \textsuperscript{supra} note 34, at 212.


\textsuperscript{38} Bowers & Robinson, \textsuperscript{supra} note 34, at 253.

\textsuperscript{39} \textit{Id.} at 262.

\textsuperscript{40} \textit{Id.} at 211.

\textsuperscript{41} \textit{Id.} at 211-12.

\textsuperscript{42} \textit{Id.} at 215.

\textsuperscript{43} \textit{Id.} at 218.

\textsuperscript{44} \textit{See generally id.} at 211-18.
The legitimacy theory suggests that people adapt their behavior to a system of criminal laws, policies, and programs because they believe that the process is fair.\textsuperscript{45} According to Bowers and Robinson, “procedure is legitimacy’s starting point.”\textsuperscript{46} In their words, “[p]eople come to obey the law and cooperate with legal authorities because they perceive their institutions to operate fairly,” such that “perceptions of procedural fairness facilitate a kind of normative, as opposed to purely instrumental, crime control.”\textsuperscript{47} The perception of fair process induces a commitment to fully participate in the system by adjusting one’s conduct to comport with the system’s requirements. In the words of Bowers and Robinson:

[C]itizens of a procedurally just state comport their behavior to the substantive dictates of the law not because the state exercises coercive power . . . but because they feel a normative commitment to the state. . . . an individual . . . complies with the law not because he rationally calculates that it is in his best interest to do so but because he sees himself as a moral actor who divines that it is right to defer to legitimate authority.\textsuperscript{48}

Fair process, then, leads to increased compliance with and belief in the law. The perception of justice does as well.

The moral credibility aspect of fair enforcement and adjudication contends that “doing justice may be the most effective means of fighting crime.”\textsuperscript{49} While legitimacy contemplates the process aspect of criminal justice, moral credibility ponders the punishment facet of criminal justice.\textsuperscript{50} Per moral credibility, the criminal justice system is rendered legitimate if it appeals to a community’s shared intuitions of justice, but succumbs to invalidity if it does not.\textsuperscript{51} Of the many virtues of law, morality appears, arguably, to be among the strongest, with people tempering their behaviors to fit the law because “they believe the laws to be just.”\textsuperscript{52} In this way, moral credibility is steeped in retributivist theory. In the words of Bowers and Robinson:

\textsuperscript{45} Id. at 214.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id. at 216.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Gregory M. Gilchrist, Plea Bargains, Convictions and Legitimacy, 48 AM. CRIM. L. REV. 143, 162 (2011).
Some of the system’s power to gain compliance derives from its potential to stigmatize . . . Yet a criminal law can stigmatize only if it has earned moral credibility with the community it governs. That is, for conviction to trigger community stigmatization, the law must have earned a reputation with the community for accurately reflecting the community’s views on what deserves moral condemnation. A criminal law with liability and punishment rules that conflict with a community’s shared intuitions of justice will undermine its moral credibility.53

However, like legitimacy, moral credibility only requires the perception of justice to function appropriately. In other words, “legitimacy . . . does not actually demand that procedures be fair, only that they appear to be,” and “moral credibility . . . does not actually require that substantive rules produce just results . . . only that they reflect people’s shared moral intuitions.”54

Together, legitimacy and moral credibility explain if, why, and when our criminal justice system works. Both, too, rely, rather soundly, upon public perception; perhaps even more decidedly than actual truth. The pair attempts to legitimize the criminal justice system by rendering it fair, just, and therefore effective in the minds of the people.55 Perception is the tie that binds them. This may be recognized most readily when considering how the principles of legitimacy and moral credibility achieve their imagined ends even when the system is, in truth, neither procedurally fair nor appropriately aligned with empirical desert. Genuine procedural fairness and empirical desert command a type of uniformity that must be aspired to, but is nearly impossible to realize fully. In the case of legitimacy:

legitimacy advocates must reconcile themselves to the fact that a system premised even partially on legitimacy may come to adopt procedural rules and standards that may vary from place to place, community to community, and time to time—a scenario that some may find especially problematic when it comes to purportedly nationally applicable standards and rules.56

Studies suggest that even defendants who are unsuccessful in court will refrain from “denigrat[ing] the judge or the system so long

54. Id. at 246.
55. See id.
56. Id. at 234.
as they believe their outcomes were reached by fair procedures.”

In the case of moral credibility, “studies make clear that current
criminal law regularly deviates from the community’s justice judg-
ments,” thereby “risk[ing] [and] undermining its moral credibility
with the community.” The public confidence that is “essential to
the law’s democratic legitimacy, moral force, and popular obedience” may be harnessed through perception.

Both the capability “of courts to influence the structure of law and
the ability of the police and other government officials to enforce the
law depend upon public satisfaction with, confidence in, and trust
of legal authorities.” In reimagining presidential pardon power
and reestablishing confidence therein, the criminal justice system
model provides impactful, effective instruction concerning the per-
ception of fairness, the positive benefits of its presence, and the det-
rimental effects of its privation. Further, remodeling presidential
pardon power is at least one simple step in rebranding the criminal
justice system. Many scholars have suggested limiting presidential
pardon power, with limits on its exercise to convictions only and
detailing specific charges, emerging as primary recommendations.
While those are helpful proposals, a more radical approach is war-
ranted.

III. A NEW MODEL OF PRESIDENTIAL PARDON POWER

Presidential pardon power must be limited in order to launch the
process of restoring public confidence in American government, par-
ticularly in the executive branch. To commence this undertaking,
presidential pardon power must no longer be viewed as boundless.
Professors Clifford Dorne and Kenneth Gewerth acknowledge that
pardons should be “both justifiable according to some theoretical
scheme or framework and justified under the circumstances of the
individual case.”

Pardons, then, must be “justified by reasons hav-
ing to do with what is just[,]” and must be supported by a “sym-
metry between the justifications of punishment and a theory that
would justify pardon.”

Relying upon Moore’s theory, Dorne and Gewerth advocate for a pardon model that entails pardoning only

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57. Flowers, supra note 15, at 701 (quoting Tom R. Tyler, The Role of Perceived Injustice in Defendants’ Evaluations of Their Courtroom Experience, 18 L. & SOC’y Rev. 51, 70 (1984)).
59. Bibas, supra note 37, at 1387.
60. Flowers, supra note 15, at 700 (quoting Tyler, supra note 57, at 51).
61. Johnson, supra note 5, at 322-23.
62. Dorne & Gewerth, supra note 17, at 420 (emphasis added).
63. Id. at 421.
those who do not deserve to be punished. They argue that this model is necessary because of the "unreviewable and absolute nature of the pardon power." Following this model, a board, guided by specific, stated, measurable standards, could be empaneled and empowered to approve "justice-enhancing" pardon decisions.

Dorne and Gewerth offer that criteria for determining whether an offender is eligible for pardon would include wrongful convictions, diagnosis of an extremely debilitating medical condition, issuance of a grossly disproportionate sentence, amnesty considerations, age, heroic acts of service, and whether a pardon is "strongly and unequivocally supported by [the] victim, [their] family, and/or [the affected] community." This proposed model relies, almost exclusively, on the retributive theory of punishment, which purports to extend an amount and quality of punishment that is proportional to an offender’s moral blameworthiness. Retribution’s core justification is proportionality, and retribution’s assurance is that punishment will always be proportional, and therefore, fair. Relying upon Dorne and Gewerth’s proposal, the guiding principle for both punishment and pardon would be retribution. It must be clearly noted, however, that any reformed model of presidential pardon power must limit pardon offerings solely to those who have been convicted of a crime.

A. The Problem with Desert and Punishment

This author has regularly criticized the use of retribution as a fundamental punishment principle because of the inability to precisely measure moral blameworthiness in determining periods of incapacitation. Nevertheless, desert theory proves useful in con-
Templating the potential for release. Retributive punishment theory falls into two separate categories: desert pragmatism and desert moralism.\textsuperscript{72} Desert pragmatism or empirical desert adopts the “community’s shared principles of justice” in assigning liability and, ultimately, punishment, while desert moralism or deontological desert relies upon “abstract principles of moral right and goodness.”\textsuperscript{73} Together, they work to ensure overall justice so that “each offender receives the punishment deserved, no more, no less.”\textsuperscript{74} Scholars agree that empirical desert punishment principles may help inform presidential pardon power reform.\textsuperscript{75} In this regard, a more thorough review of desert’s underlying principles is informative.

Proportionality is the foundation of retributive punishment theory.\textsuperscript{76} For criminal sentencers, proportionality requires a thorough appraisal of the degree of an offender’s moral blameworthiness, followed by an evaluation of whether any proposed sentence is aligned therewith.\textsuperscript{77} It has proven difficult, however, to measure proportionality accurately. Just as “it is difficult to know or control which particular details of an offender or offense inform a decisionmaker’s assessment of desert,”\textsuperscript{78} it is also nearly impossible to measure how much punishment is enough.\textsuperscript{79} For desert to function fairly, however, proportionality must be measurable—retribution requires punishment no more and no less than what is deserved, “solely because the offender deserves it.”\textsuperscript{80} The basic premise underlying desert is that what is “deserved” is identifiable and quantifiable. In its current form, retribution cannot be gauged and translated into precise prison terms.\textsuperscript{81} It can, however, be helpful

\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} See Dorne \& Gewerth, supra note 17, at 421.
\textsuperscript{78} Alice Ristroph, Desert, Democracy, and Sentencing Reform, 96 J. CRIM. L. \& CRIMINOLOGY 1293, 1296 (2006) (“Racial bias, fear, [and] disgust . . . can shape desert assessments, but . . . do so under cover of a seemingly legitimate moral judgment.”).
\textsuperscript{79} See generally Robinson \& Cahill, supra note 72, at 36-37; Jefferson-Bullock, How Much Punishment, supra note 71, at 398.
\textsuperscript{81} Jefferson-Bullock, How Much Punishment, supra note 71.
in determining parameters for early release, discharge of a sentence, or pardoning of an offense, generally.

B. Problem Solved—Retribution as a Guiding Principle in Granting Presidential Pardons

Though our criminal justice system relies heavily on retributive theory in distributing punishment, lawmakers have struggled to pinpoint precisely how much punishment retribution requires.\textsuperscript{82} This is incredibly problematic because retribution expects meticulous particularity. The Comprehensive Crime Control Act of 1984, which birthed our current sentencing regime, severely limited judges’ previously unfettered discretion in sentencing.\textsuperscript{83} Rendering mandatory minimum sentences advisory in later years did little to empower sentencing judges to reduce the excessive lengths of incarceration imposed by the Comprehensive Crime Control Act’s Sentencing Commission.\textsuperscript{84} Even modern-day legislative efforts have accomplished mere miniscule improvements in aligning punishment with blameworthiness.\textsuperscript{85} However, a fragment of discretion remains in judges’ hands, and is expressed in 18 U.S.C. § 3582(c), which states, in part:

The Court may not modify a term of imprisonment once it has been imposed except that--(1) in any case--(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment . . . after considering the factors set forth in §3553(a) to the extent that they are applicable, if it finds that--(i) extraordinary and compelling reasons warrant such a reduction; or (ii) the defendant is at least 70 years of age [and] has served at least 30 years in prison . . . ; and (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.\textsuperscript{86}

This power to correct an arguably unjust punishment retroactively is retribution’s saving grace and should be how retributive

\textsuperscript{82} Id.
\textsuperscript{83} Jordan Baker et al., A Solution to Prison Overcrowding and Recidivism: Global Positioning System Location of Parolees and Probationers 42 (2002).
\textsuperscript{86} 18 U.S.C. § 3582(c) (2019).
theory is practically utilized. Presidential pardon power reform is a natural point of departure for such an experiment.

There is historical support for this proposal. Alexander Hamilton’s view of presidential pardon power is grounded in the type of reassessment of justice post-conviction that only retribution can provide. In his words, “[t]he criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.”

Additionally, the majority of Framers believed that, in the interest of justice, mercy should be meted out by one individual of good character: the President.

While a presidential pardon power model based upon retributive justice is a good start, presidential discretion in this area still must be limited. Following the practice of several states, a federal pardon board should be implemented. Board membership must not be limited to appointees chosen by the President and the reigning political party, but must include a term-limited, bi-partisan mix of individuals who are chosen, perhaps, at the state level. This group should provide input to the President, based on statutory guidelines steeped in retributive principles. While the President would retain final decision-making power, the board’s recommendation would be part of the public record. Such a practice would work to restore public confidence in the presidential pardon system by involving and informing the public in the deliberative process.

IV. CONCLUSION

Public assurance is not only a paramount virtue of American democracy, it is an integral component. For our government to function effectively, the governed must perceive that the system is fair and worthy. More specifically, public perception is an essential component of presidential power as well. The President of the United States is charged with “tak[ing] Care that the Laws be faithfully executed” and upon assuming office, vows that (s)he “will faithfully execute the Office of President of the United States, and will to the best of [his or her] Ability, preserve, protect[,] and defend

87. THE FEDERALIST, supra note 20.
88. Id.
89. States that have a pardon board include Alabama, see ALA. CODE § 15-22-20 (2003); Connecticut, see CONN. GEN. STAT. § 54-124a (2015); Georgia, see GA. CODE ANN. § 42-9-2 (1999); Idaho, see IDAHO CODE § 20-210 (2017); South Carolina, see S.C. CODE ANN. § 24-21-10 (2012); and Utah, see UTAH CODE ANN. § 77-27-2 (2011).
90. See Barkow & George, supra note 34, at 983-84; see also Bowers & Robinson, supra note 34.
Despite broad presidential authority in a number of areas, the president’s authority is not limitless and must not be viewed as such. Today, the American electorate is actively questioning President Trump’s authority, intentions, and temperament in a manner that has been unprecedented in modern American history. There are many reasons for this growing distrust, but one that is on the minds of many Americans at this moment in time is potential presidential pardon power abuse.

The most obvious remedy to the quandary of seemingly abusive presidential pardons provides no cognizable relief. Theorists opine that the public may exercise its prerogative through voting, and may simply vote an unruly president out of office. While this is true, a more expedient, dependable, and manageable remedy is needed. Crafting of a presidential pardon power guided by retributive theory will assist in restoring public trust in the American presidency by helping to destroy the perception of abuse. Such a schema is closely aligned with the original concept of presidential pardon power. More importantly, it will facilitate the restoration of public confidence in presidential pardon power and in our overall system of government, so that, even in the absence of a Chief Executive of the highest character, we all may, with pride, “sing America.”

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91. U.S. CONST. art. II §§ 1, 3.
93. See Barkow & George, supra note 34, at 986.
94. Hughes, supra note 8.