

IN DEFENSE OF PARDONS

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Abstract

Pardons by the past two U.S. presidents—one Democratic and one Republican—have caused some to question the wisdom of executive clemency. American criminal justice is imperfect, such critics of course recognize, but here the cure might be worse than the disease. If pardons have become the playthings of would-be monarchs and tyrants, perhaps it is time to let them go. As a strong proponent of role-reversible criminal justice, I am sympathetic to this view—even in mercy, why is the decision of the single elite supplanting the will of the people?

Still, I write in pardons’ defense. Not only are pardons an important lever of mercy in our current, woefully non-role-reversible systems of criminal justice, but given the human tendency to anger, they might be a critical mercy lever even in a truly robust system. Looking to the eighth century BCE parable of Jonah, and to the first century CE Roman stoic Seneca, I make the case for pardons, human-ugly though their implementations will be. Ultimately, there may be no more important symbol than an elected representative of the people with the power to nullify and lessen every criminal conviction and sentence; it is an enduring, nationwide commitment to the merciful inclination.

“Speak when you are angry—and you’ll make the best speech you’ll ever regret.”

– Various[†]

* Judge Haskell A. Holloman Professor of Law, The University of Oklahoma. I thank Professor Chad Flanders for his interesting work on pardons (and on much else besides), I thank my wife Hilary for her continued interest in the Stoics and Seneca (which interest maintains my own), and I thank my children for always improving my work (and my life).

† Although this quote is often attributed online to *The Peter Principle’s* Laurence J. Peter, it may have been earlier spoken by Groucho Marx, or it may have been someone else. See *Laurence J. Peter*, BRAINYQUOTE, https://www.brainyquote.com/quotes/laurence_j_peter_138443 [https://perma.cc/89JT-7BM2] (visited May 27, 2025) (attributing the quote to Peter); *Laurence J Peter*, BRITANNICA, <https://www.britannica.com/biography/Laurence-J-Peter> [https://perma.cc/CH32-A59N] (visited May 27, 2025) (providing a brief biography); *Quote Origin: Speak When You’re Angry and You’ll Make the Best Speech You’ll Ever Regret*, QUOTE INVESTIGATOR, <https://quoteinvestigator.com/2014/05/17/angry-speech/> [https://perma.cc/N3MY-JLLS] (visited May 27, 2025) (discussing proper attribution). Surely the expressed wisdom, if not the precise wording, predates all such moderns.

“Doest thou well to be angry?”
 – Jonah 4:4 (King James Version)

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INTRODUCTION

Presidents Biden and Trump successfully brought people together... in dislike of executive pardons. “The outgoing and incoming presidents both abused their pardon powers,” opined the Editorial Board of the ‘liberal’ *Washington Post*, “undermining the rule of law and setting dangerous precedents that perpetuate America’s divisions.”¹ The Editorial Board of the ‘conservative’ *Wall Street Journal* could only agree, lambasting the pardons’ “rotten message.”²

And so it is that Chad Flanders, an eminent philosopher, legal scholar, and past (cautious) pardons defender, has turned the page, (cautiously) calling for pardons’ demise.³ When

1. *Pardons from Biden and Trump Flout the Rule of Law*, WASH. POST (Jan. 21, 2025, 6:21 PM), <https://www.washingtonpost.com/opinions/2025/01/21/pardons-trump-biden-preemptive/> [<https://perma.cc/YY59-YA2Q>].

2. *Trump Pardons the Jan. 6 Cop Beaters*, WALL ST. J. (Jan. 21, 2025), <https://www.wsj.com/opinion/donald-trump-pardons-jan-6-capitol-rioters-police-gop-258a4a6e> [<https://perma.cc/AA5V-FBRG>]; see also *Pardon Me, Dad: The Hunter Biden Story*, WALL ST. J. (Dec. 2, 2024, 5:49 PM), <https://www.wsj.com/opinion/joe-biden-pardons-hunter-biden-white-house-david-weiss-donald-trump-71e5fdde> [<https://perma.cc/ME2D-WTHD>] (discussing the Biden pardon of his son Hunter and in anticipation of the Trump pardons relating to January 6, 2021).

3. See generally Chad Flanders, *Get Rid of Pardons*, 77 FLA. L. REV. F. 41 (2025); Chad Flanders, *Further Reflections on the Pardoning Power: Reply to Hoskins and Drinan*, 65 FLA. L. REV. F. 51 (2014) (hereinafter Flanders, *Pardons II*); Chad Flanders, *Pardons and the Theory of the “Second-Best”*, 65 FLA. L. REV. 1559 (2013) (hereinafter Flanders, *Pardons I*). I note Flanders’s caution because it is well reflected in all three works. His initial argument was “that pardons were, in theory, compatible with rule of law values,” albeit potentially problematic, including because of concerns for fairness as equality. Flanders, *Get Rid of Pardons*, *supra*, at 41; see also Flanders, *Pardons II*, *supra*, at 52–53. His most recent argument expresses “serious doubts about” his previous conclusion. Flanders, *Get Rid of Pardons*, *supra*,

American Presidents pardon “friends [and] allies regardless of the underlying justice or fairness of th[ose] convictions,” argues Flanders, “the pardoning power is being used as . . . a kind of kingly supremacy.”⁴ “This way of looking at pardons . . . is a kingly view. The king gets to decide who the law applies to and who it doesn’t apply to. . . . [W]hat matters is the true power of the king—that is the true source of the law.”⁵ Pardons thus become “playthings for autocrats,”⁶ not merely wrong in their individual implementation, but becoming “symbols that are antithetical to law and justice.”⁷

That is powerful critique. And since I believe it is role-reversibility that critically democratizes and thereby legitimizes criminal justice judgments,⁸ and since any sort of kingly role is anathema to that norm, it is critique to which I am very sympathetic. Nonetheless, I write in defense of the

at 42. I commend such caution in moral argument. As a matter of terminology, I follow Flanders in sometimes generically using the term “pardon” to broadly refer to both executive pardon and commutation. *See id.* at n.3.

4. Flanders, *Get Rid of Pardons*, *supra* note 3 at 41.

5. *Id.* at 44.

6. *Id.* at 46.

7. *Id.* at 47 (emphasis in original). One might contrast the thoughts of Blackstone, who was quite taken by a monarch’s ability to pardon: “If neither pregnancy, insanity, non-identity, nor other plea will avail to avoid the judgment and stay the execution consequent thereupon, the last and surest resort is in the king’s most gracious *pardon*; the granting of which is the most amiable prerogative of the crown. Law (says an able writer) cannot be framed on principles of compassion to guilt; yet justice, by the constitution of England, is bound to be administered in mercy: this is promised by the king in his coronation-oath, and it is that act of his government which is the most personal and most entirely his own. The king himself condemns no man; that rugged task he leaves to his courts of justice: the great operation of his sceptre is mercy. . . . [N]o other person hath power to pardon or remit any treason or felonies whatsoever: but that the king hath the whole and sole power thereof, united and knit to the imperial crown of this realm. This is indeed one of the great advantages of monarchy in general above any other form of government: that there is a magistrate who has it in his power to extend mercy wherever he thinks it is deserved; holding a court of equity in his own breast to soften the rigour of the general law in such criminal cases as merit an exemption from punishment. 4 WILLIAM BLACKSTONE, COMMENTARIES *396–97.

8. *See generally* Kiel Brennan-Marquez & Stephen E. Henderson, *Artificial Intelligence and Role-Reversible Judgment*, 109 J. CRIM. L. & CRIMINOLOGY 137 (2019) (hereinafter Brennan-Marquez & Henderson, *Role-Reversibility I*); Kiel Brennan-Marquez & Stephen E. Henderson, *Role-Reversibility, AI, and Equitable Justice—Or: Why Mercy Cannot Be Automated*, 114 J. CRIM. L. & CRIMINOLOGY ONLINE 1 (2023) (hereinafter Brennan-Marquez & Henderson, *Role-Reversibility II*). Role-reversibility, as I will explain herein, refers to a system in which there are few situational ‘hops’ between judging party and judged.

pardon power, both in our actual systems of criminal justice as well as in better, more role-reversible ones.

And since this Essay is brief, I will get right to it. First, in Part I, I will quickly review role-reversibility, explain why I believe it central to criminal justice, point out that we pretty much don't have it, and argue that—in such a world—we ought to have the pardon mercy lever, no matter how ugly implementations may be. For, as Seneca taught, an inclination to mercy is a moral good fundamental to humanity. Then, in Part II, I will consider the harder, hypothetical case of a genuinely role-reversible system of criminal justice. If, say, each criminal conviction occurs because a role-reversible jury meaningfully decides guilt and punishment, and thus in a manner naturally inclined to Senecan mercy, could such a system rightly be capped by a kingly-in-practice power to pardon? Despite the incongruence, I believe pardons can retain their place, and here I turn for inspiration—by which I mean non-theistic, or at least non-denominationally theistic, inspiration—to the biblical parable of Jonah. If, like Jonah, we have no good cause to be angry when others receive undeserved relief, then we may wish a second-stage mercy-only lever, given the very strong human tendency to anger. Indeed, there may be no better symbol, or lodestar, than the rather incredible power of a single elected person to nullify *any* conviction and punishment.

I. OUR CURRENT CRIMINAL JUSTICE AND PARDONS

Role-reversibility, developed by me and Kiel Brennan-Marquez in 2019, claims that what is intrinsically important about certain human judgments, including criminal justice judgments, is that they are made in the 'but for the grace of god (or fortune) there go I' construct, which occurs when there are relatively few—the fewer the better—situational hops between the judging party and the judged.⁹ This critically democratizes such judgments, making them morally better, we believe, in the same sense that a political democracy is morally better than a monarchy—results be damned. While the American jury has become legally more role-reversible with time (removing, for example, legal impediments to service based upon race, sex, and income), it next to never convenes.¹⁰ Thus, Kiel and I joined

9. Brennan-Marquez & Henderson, *Role-Reversibility I*, *supra* note 8, at 149–54.

10. *Id.* at 156–63. Despite a 'jury of your peers' fiction, one might say, we live in a 'prosecutor-and-judge-do-it-all' reality.

with Darryl Brown to argue for systems of criminal trial lottery,¹¹ and I have argued for systems of jury veto even over plea-bargained outcomes.¹² Critically, Kiel and I believe role-reversibility is central to the morality of criminal justice judgments, and that we have it in theory, but not in practice.

Although that democratic defense can stand on its own, Kiel and I have also developed how role-reversibility inclines a judging party to Senecan mercy—as opposed to Anaximanderian recalibration or Aristotelian equity—and, because we think Seneca basically right about the moral dangers of judgment, we think this solidifies the case.¹³ Here, then, is an initial reason to desire the power of executive pardon: if Senecan mercy is critical to the morality of criminal justice judgments, and if we lack role-reversible judgments naturally inclined to such mercy, we ought to welcome an *ex post* mercy lever.¹⁴ The question, therefore, is why Seneca believed mercy so critical.

Lucius Annaeus Seneca, like any Stoic, held one thing—and one thing only—to be of intrinsic moral worth: the inherent dignity of every person based upon a godly capacity to reason.¹⁵ The Stoic goal, therefore, was—and is—to detach from all externals so that reasoning might be fully exercised,¹⁶ a feat only the rare sage or guru can fully achieve. Seneca himself believed it might be achieved on the order of a couple of times a millennium, with lesser enlightenment naturally being much

11. See generally Kiel Brennan-Marquez, Darryl K. Brown, & Stephen E. Henderson, *The Trial Lottery*, 56 WAKE FOREST L. REV. 1 (2021).

12. See generally Stephen E. Henderson, *The Jury Veto*, 40 YALE L. & POL'Y REV. 488 (2022); Stephen E. Henderson, Vanessa A. Edkins, & Matthew L. Jensen, *An Empirical Exploration of a Jury Veto*, 27 N.Y.U. J. LEGIS. & PUB. POL'Y 721. I have also tentatively considered what role-reversibility means for the potential of artificially intelligent prosecutors and defense attorneys. See generally Stephen E. Henderson, *Should Robots Prosecute and Defend?*, 72 OKLA. L. REV. 1 (2019).

13. See generally Brennan-Marquez & Henderson, *Role-Reversibility II*, *supra* note 8.

14. At the least, our lack-of-role-reversibility reality removes what would otherwise be a potential pardons critique: it is harder to criticize pardons for *lacking* in role-reversibility when nearly every underlying criminal conviction lacks the same. I will take up the harder case of pardons in a role-reversible system in Part II, *infra*. I should also note that there is nothing inherently in conflict between the power of executive clemency and role-reversibility. One considering the 'but for the grace of fortune there go I' lens would realize that she would wish such a mercy lever.

15. Elizabeth Asmis et al., *Seneca and His World*, in LUCIUS ANNAEUS SENECA: ANGER, MERCY, REVENGE vii–xi (Robert A. Kaster & Martha C. Nussbaum trans., 2010).

16. *Id.*

more common.¹⁷ In other words, for the Stoic it is wise (skillful) to consciously eliminate attachment to all externals, where ‘externals’ range from broadly considered ‘worldly’ things such as wealth, honor, and position, to more dear things such as health, friends, passions, and family.¹⁸ Only through detachment from *all* externals, say the Stoics, can one find the goodness inside herself and the true joy in reasoned contemplation of, and perhaps thus communion with, the reasoning god.¹⁹

In such a system, where all persons are equally worthy because they equally possess rational capacity to choose (to select and reject),²⁰ anything that intentionally interferes with a person’s capacity of choice seems morally problematic, and criminal punishment fits that bill—if nothing else, it risks disrespecting the inherent moral dignity of that person. Moreover, and critically, to the extent criminal punishment results from emotion, whether anger, grief, fear, or hope, this is moral flaw *in the judging party*. In other words, when it comes to punishment, there is moral risk for the judging party, not for the judged; for the latter, punishment is a mere external, however unpleasant. But, again, there is great moral risk for the judge. As expressed by Seneca in the initial paragraph of his *On Clemency* (or *On Mercy*—two translations for the same work and thus for the same moral principle²¹), the goal is something like this:

I decided to write about clemency [or mercy], Nero

17. *Id.* at xviii.

18. *Id.* at xii; Robert A. Kaster, *Introduction*, in LUCIUS ANNAEUS SENECA: ANGER, MERCY, REVENGE 3 (Robert A. Kaster & Martha C. Nussbaum trans., 2010) (hereinafter Kaster, *On Anger–Introduction*).

19. Asmis, *supra* note 15, at xix; Kaster, *On Anger–Introduction*, *supra* note 18, at 4–5. To be clear, it is the *detachment* from externals that is key, not necessarily the elimination thereof; Seneca himself was wealthy and did not, despite contemporary criticism, view his wealth as problematic. See Asmis, *supra* note 15, at ix.

20. Asmis, *supra* note 15, at xi.

21. See, e.g., Seneca, BRITANNICA, <https://www.britannica.com/biography/Lucius-Annaeus-Seneca-Roman-philosopher-and-statesman> [<https://perma.cc/2Z96-P3HR>] (visited June 6, 2025) (“The *De clementia* (*On Mercy*), an exhortatory address to Nero, commends mercy as the sovereign quality for a Roman emperor.”). I will tend to favor the word “mercy” for the generic moral good, meaning when not tied to an executive power like a president, but “mercy” and “clemency” can be used as synonyms in the Senecan sense.

Caesar, that I might serve, so to speak, as a mirror for you, to show you to yourself [I]t's nice to get a fully rounded view of your own good conscience . . . and say to oneself . . . : When I have such vast [power] at my disposal, anger does not drive me to impose unjust punishments—no, nor does youth's impulsiveness nor people's rash defiance, which often wrests forbearance from even the most placid hearts, nor the sort of glory—dreadful, but common in high commands—that depends on using terror to display one's power. My sword is sheathed, or rather bound fast. I am utterly sparing of even the meanest blood; no one fails to win my favor [merely] by virtue of being human, if he has nothing else to commend him. . . . I have strictness in reserve but keep clemency at the ready; I hold a watch over myself as though I might be obliged to render an account. . . . I have been moved because one man is just starting life, another coming to its end. I spared one man for the sake of his high standing, another because he is lowly. Whenever I've found no reason for pity, I am clement for my own sake. Should the immortal gods call me to account today, I am prepared to give a reckoning²²

From these beliefs, two things flow. One, we morally do better with role-reversible criminal judgments, for, as I have argued elsewhere,²³ such judgments are naturally inclined to self-judgment, and that naturally inclines to mercy.²⁴ Mercy

22. Lucius Annaeus Seneca, *On Clemency*, in LUCIUS ANNAEUS SENECA: ANGER, MERCY, REVENGE, 146, 146–47 (Robert A. Kaster & Martha C. Nussbaum trans., 2010) (hereinafter Seneca, *On Clemency*). Seneca was writing a panegyric to Emperor Nero, and so like Machiavelli's famous work that would follow many centuries later, the work thus had clear political aims. See Robert A. Kaster, *Introduction*, in LUCIUS ANNAEUS SENECA: ANGER, MERCY, REVENGE 133, 134, 143 (Robert A. Kaster & Martha C. Nussbaum trans., 2010) (hereinafter Kaster, *On Clemency–Introduction*). Those political aims, however, do not diminish the core Stoic values that Seneca was pushing and regaling, and the work is the best source of Seneca's philosophy of mercy. See, e.g., Seneca, *On Clemency*, *supra*, at 150–51 (explaining that while mercy is according to nature in *all* humans, its presence or absence in a supreme ruler naturally has the greatest societal consequence, including because that person naturally has the most occasion to exercise it).

23. See generally Brennan-Marquez & Henderson, *Role-Reversibility I*, *supra* note 8; Brennan-Marquez & Henderson, *Role-Reversibility II*, *supra* note 8.

24. Seneca defines mercy (or “clemency”) in several mutually reinforcing ways:

Clemency is ‘the mind’s moderation when it has the power to take revenge,’ or ‘mildness in a superior toward an inferior in determining punishment.’ It’s safer to advance several definitions, lest a single

“exercises freedom of judgment,” says Seneca, in that “it makes its determinations not according to a set formula but according to what is fair and good; it is free to acquit, and to assess the value of a suit at the amount it wishes. It does all of these things, not as though it were doing less than what is just, but as though the determination it reaches is the most just.”²⁵ Juries with broad discretion—including nullification—could so do. However, since in practice we instead have prosecutor- and judge-dominated systems that are *not* role-reversible and thus *not* so inclined to mercy, we have moral reason to favor *ex post* mercy levers in compensation.

definition fall short of covering the matter and, so to speak, forfeit the case. Thus it can also be termed ‘the mind’s inclination toward mildness in exacting punishment.’ The following definition will not cover every case, but it most closely approximates the truth, to wit: ‘Clemency is moderation that diminishes a due and deserved punishment to some degree.’

Seneca, *On Clemency*, *supra* note 22, at 171–72. Seneca’s inclusion of “mildness in a superior toward an inferior” as one example should *not* be read as limiting mercy to such positional application. *See supra* note 22 (explaining the panegyric form); *see also* Kaster, *On Clemency–Introduction*, *supra* note 22, at 140.

25. Seneca, *On Clemency*, *supra* note 22, at 175. As a Stoic value, mercy is of course a virtue of *logic*, not of *emotion*. *See id.* at 172–74. And simply ignoring law (forgiving all crime) would not be skillful mercy, but invitation to chaos. *See id.* at 148. For fans of *Les Misérables* (like me), I’d say mercy is to “be as patient as you can.” Schönberg, Claude-Michel, et al., *At the End of the Day*, *Les Misérables: A Musical* (1998) (the advice of factory owner Jean Valjean then tragically ignored by the foreman).

This is as good a place as any to address one confusing (and unfortunate) passage in Seneca’s work. *See* Seneca, *On Clemency*, *supra* note 22, at 174–76. Near its abrupt end, Seneca quickly speaks against the “forgiveness” of “pardon,” because he there uses those terms for not following through on right, pronounced punishment, as opposed to the virtue of mercy in setting such punishment. “Forgiveness is granted to one who ought to be punished,” asserts Seneca, “a wise man, however, neither does anything he ought not do nor forgoes doing anything he ought to do. Accordingly, he does not remit a punishment that he ought to exact.” *Id.* at 175. Now, this is jarring since, just pages earlier, Seneca exuberantly—indeed nearly bizarrely in its effusion—praises Nero for not wanting to follow through on decided punishment. *See id.* at 170. But Seneca then sorts things out: “[W]hat you want to gain from a pardon the wise man will grant you by a more honorable path . . .; he’ll do what he’d do were he forgiving you, but he’ll not forgive you, because someone who forgives acknowledges that he has omitted to do something that ought to be done.” *Id.* at 175. In other words, as to this passage, it is merely semantics: “In my opinion,” concludes Seneca, “the controversy involves a question of terminology, whereas the substance is surely a matter of agreement.” *Id.* Critically, this entire discussion of “pardon” occurs right before the work suddenly stops, obviously unfinished. *See* Kaster, *On Clemency–Introduction*, *supra* note 22, at 133. Thus, the passage ought not detract from Seneca’s extended discussions on the virtues of mercy.

But in this, then, is a naturally harder case: if we *did* have role-reversible criminal judgments, ought we to *follow* them with quite a non-role-reversible executive mercy lever? In Classical Athens, say, where there was a high degree of role-reversible criminal justice for citizens in both conviction and punishment,²⁶ ought the judgment and death penalty of Socrates have been followed by the potential for a king's mercy? In other words, should a morally-just-because-it-is-role-reversible system rightly be capped by a kingly-in-practice power to pardon?²⁷

Despite the incongruence, I believe the answer is 'yes,' and I will turn to the roughly eighth century BCE story of Jonah to try and make the case.²⁸

II. ROLE-REVERSIBLE CRIMINAL JUSTICE AND PARDONS

Jonah, I submit, is a beautiful story, no matter whether one is a particular theist, a general theist, an agnostic, or an atheist. The story goes like this: Jonah is called by the Hebrew god Yahweh to warn the city of Nineveh of his imminent wrath, and so Jonah boards a ship... heading in the *opposite* direction, and destined for as far in that opposite direction as possible, a city called Tarshish.²⁹ Jonah, we learn, 'says no' with gusto. In response, Yahweh sends a storm to buffet, and nearly break, that ship:

But the Lord sent out a great wind into the sea, and there was a mighty tempest in the sea, so that the ship was like to be broken. Then the mariners were afraid, and cried every man unto his god, and cast forth the wares that were in the ship into the sea, to lighten it of them.³⁰

26. See Henderson, *The Jury Veto*, *supra* note 12, at 500–01.

27. Seneca posits a ruler "thinking to himself: 'Anyone can break the law by taking a life, but only I can do so by saving one?'" Seneca, *On Clemency*, *supra* note 22, at 151. Executive clemency 'breaks' what law otherwise demands, "grant[ing] life and a decent social standing to defendants who deserve to lose life and standing." *Id.*

28. As is typical, we have no precise date for the events described in the biblical book of Jonah, and of course also debate on whether those events ever occurred. See, e.g., *Jonah*, BRITANNICA, <https://www.britannica.com/biography/Jonah-biblical-figure> [<https://perma.cc/Z54B-SXQE>] (visited June 3, 2025); *Jonah Introduction*, NIV STUDY BIBLE 1356, 1357 (10th ed. 1995).

29. Jonah 1:1–3. The Jonah story is, naturally, nearly identical in most any biblical translation, so I will designate a particular translation only for direct quotations.

30. *Id.* 1:4–5 (King James Version) [hereinafter KJV].

So, the sailors fear for their lives and sacrifice their material cargo. But what of Jonah? “Jonah was gone down into the sides of the ship; and he lay, and was fast asleep.”³¹ *Priceless*.

When the sailors then draw lots to see who is responsible for the storm coming upon them, the now-awoken Jonah draws the short lot, and he fesses up to being the cause: “Take me up, and cast me forth into the sea,” Jonah directs, “so shall the sea be calm unto you: for I know that for my sake this great tempest is upon you.”³² Now, these sailors don’t know paying-passenger, slothful-in-peril Jonah from Adam, and they don’t share his culture or his religion.³³ But they don’t give up on any person that easily. “Instead, the men did their best to row back to land. But they could not, for the sea grew even wilder than before.”³⁴ So, desperate and out of options, they do as Jonah directs, casting him overboard, and the sea indeed becomes calm.³⁵

For his part, Jonah is of course saved by a “great fish,”³⁶ and once again commanded to go to Nineveh.³⁷ This time, Jonah obeys, proclaiming the city’s destruction in forty days.³⁸ But the Ninevites listen, and Yahweh decides to be merciful and not destroy them.³⁹ And that last bit—the mercy—“displeased Jonah exceedingly, and he was very angry.”⁴⁰ Indeed, Jonah let Yahweh have it:

[I]s this not what I said when I was still at home? Th[is] is why I was so quick to flee to Tarshish. I knew that you are a gracious and compassionate God, slow to anger and abounding in love, a God who relents from sending calamity. Now, O Lord, take away my life, for it is better for me to die than to live.⁴¹

31. *Id.* 1:5 (KJV).

32. *Id.* 1:12 (KJV).

33. *See id.* 1:3, 5, 8–9. For those who ‘like their bible,’ the sailors’ concern for the Hebrew Jonah is direct contrast to Jonah’s non-concern for the Gentile Ninevites.

34. *Id.* 1:13 (New International Version) [hereinafter NIV].

35. *Id.* 1:14–15. “We beseech thee, O Lord, we beseech thee,” pled the sailors, “let us not perish for this man’s life, and lay not upon us innocent blood: for thou, O Lord, hast done as it pleased thee.” *Id.* 1:14 (KJV). Only when it becomes clear there seem two choices only—either they all die or solely Jonah dies—do they give in to that lesser loss of life. Legally speaking, it is a ‘choice of evils’ some would excuse.

36. *Id.* 1:17 (here the KJV and NIV use the identical phrase).

37. *Id.* 3:1–2.

38. *Id.* 3:3–4.

39. *Id.* 3:5–10.

40. *Id.* 4:1 (KJV).

41. *Id.* 4:2–3 (NIV).

It is better for me to die than to live. Jonah wants to *die* because Yahweh chose to be merciful to others, and, perhaps, because Yahweh made him, Jonah, ‘play the fool,’ proclaiming a message that didn’t turn out as Jonah promised it would. And how about Yahweh? How does he respond when this Jonah character—whom he bothered sending a storm to prod and a fish to save—gets upset, and so upset as wishing to die, all because Yahweh mercifully saved others? It goes like this (and this is the part most critical for our purpose):

Then said the Lord, Doest thou well to be angry?⁴²

Never was the Stoic approach to anger better stated. But Jonah? *Totally unconvinced.* Jonah takes up a vantage point beyond—after all, it is possible Nineveh might still be destroyed.⁴³ So, Yahweh grows a gourd to give Jonah shade (Jonah “was exceedingly glad”⁴⁴), only to then kill the plant, putting Jonah right back to the rant: “And God said to Jonah, Doest thou well to be angry for the gourd? And [Jonah] said, I do well be to angry, even unto death.”⁴⁵ And thus concludes the parable of mercy:

Then said the Lord, Thou hast had pity on the gourd, for the which thou has not laboured, neither madest it grow; which came up in a night, and perished in a night: And should not I spare Nineveh, that great city, wherein are more than sixscore thousand persons that cannot discern between their right hand and their left . . . ?⁴⁶

That’s the story of Jonah and, thus equipped, we can return to the case of pardons in a strongly role-reversible system of criminal judgment and punishment. If, like Jonah, we have no cause to be angry when others receive undeserved relief—and why would we, really?⁴⁷—and if, like for Jonah, it does us harm when we choose to be so angry, then perhaps a second-stage, mercy-only ratchet remains the right way to go. After all, while role-reversible judging is *inclined* to Senecan mercy through its ‘self-interest’ self-judgment posture, it will nonetheless fall

42. *Id.* 4:4 (KJV). In the NIV, it is “Have you any right to be angry?” *Id.* (NIV).

43. *See id.* at 4:5.

44. *Id.* at 4:6 (KJV).

45. *Id.* at 4:9 (KJV).

46. *Id.* at 4:10–11 (KJV).

47. Set aside for a moment that pardon recipients could be going-forward dangerous; I will address that shortly.

short in that regard given the human tendencies to anger and fear. Thus, even a role-reversible criminal justice system could benefit from an *ex post* even-perhaps-quite-ugly-in-implementation mercy-only lever, for as I read Jonah and Seneca, and as I experience this life, the human tendency to anger, shame, and other such morally dangerous emotions is far more dangerous than any tendency to overly-extreme mercy. So, a legal commitment to potentially boundless mercy—practically hedged by political reality—seems worthwhile.

It is worth pausing here to note how truly exceptional is not only the pardon power, but also the role-reversible judgments I wish to precede its exercise. It is remarkable—but beautifully so, I believe—to turn criminal judgments over to groups of ordinary, untrained members of our communities.⁴⁸ They will not be experts in law, let alone in the terribly complicated realities of psychology, neurology, sociology, and every other branch of knowledge that critically impacts the human life. Yet they will have final say... subject to a single (elected) person's power to mercifully nullify every such choice to punish.⁴⁹ Both moves 'sing' to me: role-reversibility in judgments, and the opportunity for executive pardon that follows such judgments. And both moves sit comfortably in the role-reversible 'but for the grace of fortune there go I' mold; in the words of Seneca, "There is no one so deeply complacent about his own innocence that he does not rejoice to see clemency stand ready for human failings."⁵⁰ Indeed.

Before concluding, let me anticipate one objection, and then use it to hopefully strengthen my argument. 'I am not against pardons out of any anger or other un-reasoning emotion,' a critic might express, 'I am concerned that pardon recipients will

48. My tentative tendency is to have those groups be significantly larger than our norm of twelve, but that is topic for another day.

49. Depending upon the power of the juries, there is also defense-friendly judicial backstop; for example, in our American systems it is fundamentally unfair, violating the federal Constitution's Due Process Clause, for a jury to convict upon evidence so thin that no reasonable juror could find proof beyond a reasonable doubt, a claim of so-called 'insufficient evidence.' See generally *Jackson v. Virginia*, 443 U.S. 307 (1979). And that makes this as good a place as any to recognize that of course the pardon power could also be limited in countless ways, taking the power away from the single, unitary executive and placing it in some larger body, requiring it undergo some particular process, etcetera. While states can (subject to their respective constitutions) choose to do just that, for purposes of this Essay, I focus on a unitary executive pardon.

50. Seneca, *On Clemency*, *supra* note 22, at 148.

be dangerous—violent, say—and that they will then prey on new innocents.’ Perhaps such objection expresses the non-Stoic *fear*, albeit not anger or envy. Critically, either way, as ugly as many find recent executive pardons, such fear is not the criticism generally felt or expressed. If a president or governor were to begin pardoning still-dangerous murderers and rapists, then future criminality could—I would think—rather quickly outweigh what I see as pardon’s normative moral benefit.⁵¹ Whether that would be cause for impeachment, or for eliminating pardon, or for some *tertium quid*, however, I leave to another day.

Think of it like this: Imagine a world in which an ugly, biased system chose people to cure of terminal cancer—others would die; those chosen would live. I see no persuasive reason to shut down the system because its choices are ugly; I would rather some receive this health mercy, rather than none. Now, if we can make the system choose better, let’s do so, and the same for pardons—nobody is arguing we ought not elect better leaders, and then politically pressure those leaders to exercise better mercy. And if the system, in exchange for every health mercy *gave a new person cancer*, well, again, that is different, and the same for pardons—nobody is excusing a system (without more) that causes future criminality. I am merely arguing we ought not shut down a mercy lever because its application is human-ugly.

If you are not with me, then maybe there is this: even if you would shut down a system of mercy cancer cure because it in fact chooses only those of western European descent, say—ugly to be sure—would you shut it down merely because it gave an elected human the *power* to choose to be so ugly? I would not, and the same goes for pardons.

CONCLUSION

There is a great deal this Essay does not set out to accomplish, from responding to any number of alternative theories of pardon, to grappling with all aspects and work relating to Chad Flanders’ theory,⁵² to integrating other work

51. This may have been what Seneca was trying to get at in the end of his work. See *supra* note 25.

52. See, e.g., Zachary Hoskins, *Problematic Pardoning Patterns: Response to Chad Flanders, Pardons and the Theory of the “Second-Best”*, 65 FLA. L. REV. F. 17, 18–19 (2013) (pondering a distinction between “mandatory” and “permissible” pardons).

on pardons and mercy.⁵³ My aim is modest: to continue the conversation through a first, brief consideration of pardons in a theory of role-reversibility, and thus in a theory of Senecan mercy, where executive clemency has a legitimate—indeed critical—role. “In [our] community,” commented Seneca, “where crowds in ceaseless motion on the broadest streets get jammed whenever an obstacle slows their torrential flow, where seats are in demand in three theaters at the same time, where all the produce of farms throughout the world is consumed—imagine what a great and lonely desolation there would be if there remained only the fraction a strict judge might acquit.”⁵⁴ So it would be in our day, in our cities and towns. Thus, I argue, executive clemency has the same legitimate, important role even in a genuinely role-reversible system (unlike our own, and unlike Seneca’s own), and even when actual implementations will be as human-ugly as Professor Flanders and others find recent presidential pardons to be.

To hazard a particular example (ever wary that any particular example might not be good representative), Flanders—like many others—finds fault with President Biden pardoning members of his own family.⁵⁵ Such criticism is understandable. Yet Seneca *celebrated* a historic occasion that seems not very different:

53. See, e.g., Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1334–35 (2008) (developing how general suspicion of unchecked discretion pours over onto executive clemency); Flanders, *Pardons I*, *supra* note 3, at 1562 n.13 (citing two key sources).

54. Seneca, *On Clemency*, *supra* note 22, at 152. Seneca’s next words are tremendous, as are so many in his work: “How rare is the presiding judge who would not be held liable under the very law that guides his inquiry? How rare is the blameless accuser? And probably no one is more resistant when it comes to granting pardon than one who has too often deserved to seek it. We have all done wrong, some in more serious ways, others more trivially, some from set purpose, others acting on random impulse or led astray by another’s wickedness; some of us have stood by our good intentions with too little steadfastness and have lost our innocence unwillingly and reluctantly. And not only have we fallen short, but we will continue to fall short to the end of our days. Even if someone has so thoroughly cleared his conscience that nothing can distract and deceive him henceforth, he still has arrived at innocence by doing wrong.” *Id.* In other words, even the sage or guru only achieved that greatness through a life of moral wrong.

For those who prefer a relatively more contemporary source—in this case December of 1960—Andy Griffith made much the same point as Seneca in the first season of his eponymous series: “Barney, if I was to run everybody out of town that acted a little bit strange, I’d wind up emptying the whole town. Might have to reach around and get a good hold on the seat of my own britches.” THE ANDY GRIFFITH SHOW: *Stranger in Town* (CBS television broadcast, aired Dec. 26, 1960).

55. See Flanders, *Get Rid of Pardons*, *supra* note 3, at 44–45.

When [Consul Lucius] Tarius discovered that his son was planning to kill him and [so] condemned [his son] in a trial held in his own household, everyone looked up to him because he was content to sentence the young man to exile—and a pampered exile at that, in Massilia, where he provided him with the same annual allowance he used to give him before his disgrace. Because of this generous gesture, everyone in Rome . . . believed that the young man had been justly condemned, seeing that a father incapable of hating him had been able to condemn him. . . . [H]e decreed neither [execution] nor a prison cell but made plain that a father should be content with the mildest punishment in the case of a young son driven to a crime in which he had shown himself, by his timid conduct, only one step removed from innocence: he should be removed from the city and from his father's sight.⁵⁶

That is not exactly a pardon, but then (1) “sentencing” Hunter Biden to a life of leisure in a wealthy city was not an option available to President Joe Biden, and (2) Hunter was not being prosecuted for the very serious crime of attempted murder for which the penalty, because of the familial victim, was “a particularly gruesome form of execution.”⁵⁷ So, again, nor is it all that different.

The crux is that in a Senecan lens—or at least in *my* Senecan lens—mercy is not a “safety valve” of second best,⁵⁸ but rather *the* critical ingredient in moral punishment. “Among all the virtues none better suits a human being,” asserts Seneca, “because none is more humane. . . . [Mercy] loves peace and causes us to keep our hands to ourselves.”⁵⁹ For the *judged*, punishment can of course make life less pleasant—very much

56. Seneca, *On Clemency*, *supra* note 22, at 161–62. One can only imagine how many criminal defendants would joy to hear that ‘timidity’ in criminal actions is “only one step removed from innocence”!

57. Kaster, *On Clemency—Introduction*, *supra* note 22, at 139. Seneca also relates Augustus forgiving a would-be traitorous killer. See Seneca, *On Clemency*, *supra* note 22, at 155–56. Poignantly, because Seneca could certainly fall prey to the genderizing of his day, see *id.* at 151 (“Raging in anger is womanish . . .”), it was Augustus’ wife Livia who here provided the wise counsel to dispense mercy, see *id.* at 155.

58. See Flanders, *Pardons I*, *supra* note 3, at 1559; *cf. id.* at 1564 (“In ideal or near-ideal circumstances sentences are for the most part just, and the criminal justice system works by and large in a fair manner. In an ideal society, there is virtually no need for pardons.”).

59. Seneca, *On Clemency*, *supra* note 22, at 149.

so. But that unpleasantness is a morally-neutral *external*, just like positive externals such as money, sex, power, and friends act on the flip side. But for the *judging* party, punishing is moral risk. And with humans so prone to fear, anger, envy, and other passions, criminal judging entails extreme moral risk. So, we ought to do all that we can to minimize this moral risk, inclining our systems to Senecan mercy. The layperson jury does so by encouraging the 'but for the grace of fortune' dynamic, the presidential pardon does so as symbol to our entire nation, and the gubernatorial pardon does so (or ought to do so) as symbol in each state.

In short, with human criminal judgments being ever morally harrowing, I am wary of sacrificing any of its levers of mercy, and perhaps especially one as symbolically strong as that of a single individual empowered 'by the people' to eliminate or mitigate every such conviction. Ugly many pardons may be... but ugly mercy remains mercy still.