

DIVINE FORGIVENESS AND LEGAL PARDON

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Although Christian salvation comprises significantly more than forgiveness of sins—one thinks, for example, of the imputation of righteousness, regeneration by the Holy Spirit, bestowal of eternal life, and so on—, still an essential and central element of Christian salvation is God’s forgiving us our sins. In this paper I wish to explore the analogy between divine forgiveness and legal pardon.

Biblical Data on Divine Forgiveness

The Levitical system of sacrificial offerings in the Tabernacle and Temple, offerings which New Testament writers took to prefigure Christ’s own death as the ultimate sacrificial offering (Rom 3:21-26; 8.3; Eph 5:2; Heb 9.6-14; 10.1-18), aimed, not merely at the cleansing of consecrated objects from impurity, but more fundamentally at the expiation of the sins of the people and their forgiveness.¹ Again and again the promise is given, “the priest shall make atonement on your behalf for the sin that you have committed, and you shall be forgiven” (Lev 4.35; *cf.* 4.20, 26, 31; 5.10, 13, 16, 18; *etc.*). At the heart of the new covenant prophesied by Jeremiah lay the forgiveness of sins: “No longer shall they teach one another, or say to each other, ‘Know the Lord,’ for they shall all know me, from the least of them to the greatest, says the Lord; for I will forgive their iniquity, and remember their sin no more” (Jer 31.34; *cf.* 33.8). Christians considered Jesus, by his sacrificial death, to have inaugurated that new covenant (Mt 26.28; Mk 14:22-24). Hence, “repentance and forgiveness of sins is to be proclaimed in his name to all nations” (Lk 24.47). So in the Acts of the Apostles the consistent apostolic proclamation is that “everyone who believes in him receives forgiveness of sins through his name” (Acts 10.43; *cf.* 2.38; 5.31; 13.38; 26.18). In short, in Christ “we have redemption, the forgiveness of sins” (Col 1.14; *cf.* Eph 1.7).

¹ Jacob Milgrom, *Leviticus 1-16*, The Anchor Bible (New York: Doubleday, 1991), p. 377.

It is noteworthy that the object of divine forgiveness is just as often said to be sins as sinners. Not only are people forgiven for their sins, but their sins are forgiven. This fact makes it evident that divine forgiveness is not (merely) a change of attitude on God's part toward sinners.² The word *aphiēmi* carries the connotation of nullifying or canceling and can be used of the remission of debts. Divine forgiveness has as its effect, not (merely) God's laying aside feelings of resentment or bitterness or anger (or what have you, according to one's favorite analysis of forgiveness), but rather the removal of the liability to punishment that attends sin. As a result of divine forgiveness, a person who formerly deserved punishment now no longer does so. Quoting Psalm 32, Paul says,

'Blessed are those whose iniquities are forgiven,

and whose sins are covered;

blessed is the one against whom the Lord will not reckon sin' (Rom 4.7-8).

Because of the forgiveness that is to be found in Christ, one is no longer held accountable for one's sins.

"There is therefore now no condemnation for those who are in Christ Jesus" (Rom 8.1).

Atonement Theories and Divine Forgiveness

Among the Church Fathers the dominant view of Christ's death was that of a sacrificial offering whereby the forgiveness of sins was procured. Eusebius, for example, wrote,

² We encounter here the debate over whether the Levitical sacrifices and Christ's sacrificial death served to propitiate God, to change His attitude toward sinners from wrath to acceptance. It has become conventional wisdom among contemporary theologians that because the New Testament authors use *katalassō* ("reconcile") and its cognates only with respect to human beings, not God, God does not need to be reconciled to humanity, but only humanity to a welcoming God. I leave aside whether such an argument from silence is cogent. But if God does not need to be reconciled to sinners, that fact shows all the more that divine forgiveness is not a change of attitude on God's part, in the way that forgiveness is usually understood by contemporary philosophers analyzing human relationships.

the Lamb of God . . . was chastised on our behalf, and suffered a penalty He did not owe, but which we owed because of the multitude of our sins; and so He became the cause of the forgiveness of our sins, because He received death for us, and transferred to Himself the scourging, the insults, and the dishonour, which were due to us, and drew down on Himself the apportioned curse, being made a curse for us (*Demonstration of the Gospel* 10.1).

Noteworthy in Eusebius' statement is the emphasis on the satisfaction of divine justice on Christ's part, as a result of which the forgiveness of sins is available. This element became the centerpiece of St. Anselm's satisfaction theory of the atonement and of the Protestant Reformers' penal substitutionary theories.

In Anselm's thinking God cannot simply forgive sin because it would be unjust to do so. "Truly such compassion on the part of God is wholly contrary to the Divine justice, which allows nothing but punishment as the recompense of sin" (*Why God Became Man* I.24). Anselm evidently holds to a (positive) retributive theory of divine justice, according to which the guilty deserve punishment.³ Anselm allows, in fact, two ways of satisfying the demands of God's justice: punishment or compensation (I.12). Anselm thus presents the atonement theorist with a choice: since the demands of divine justice must be satisfied, there must be either punishment of or compensation for sin. Anselm chose the second

³ Theories of justice may be classified as broadly retributive or consequentialist. Retributive theories of justice hold that punishment is justified because the guilty deserve to be punished. Consequentialist theories of justice hold that punishment is justified because of the extrinsic goods that may be realized thereby, such as deterrence of crime, sequestration of dangerous persons, and reformation of wrong-doers. Retributivism may be either positive ("the guilty deserve punishment") or negative ("the innocent ought not to be punished"). There has been over the last half-century or so a renaissance of theories of retributive justice, accompanied by a fading of consequentialist theories (Mark D. White, ed., *Retributivism: Essays on Theory and Policy* [Oxford: Oxford University Press, 2011]; Michael Tonry, ed., *Retributivism Has a Past; Has It a Future?* Studies in Penal Theory and Philosophy [Oxford: Oxford University Press, 2011]). Ironically, some theologians, unaware of this sea change, denounce in the strongest terms a God of retributive justice (Steven Finlan, *Options on Atonement in Christian Thought* [Collegeville, Minn.: Liturgical Press, 2007], pp. 97-8), not realizing that their objection to the justice of penal substitution depends on a view of divine justice as retributive, lest God punish the innocent on consequentialist grounds.

alternative, since he assumed that punishment would result in mankind's eternal damnation. By contrast the later Protestant Reformers chose the first alternative, holding that Christ bore the punishment for sin that we deserved. Anselm and the Reformers are therefore very much on the same footing: in order for salvation to be possible, divine justice must in some way be satisfied.

The Anselmian and Reformation theories of the atonement came under withering attack by the Unitarian theologian Faustus Socinus in his *On Jesus Christ our Savior* (1578). In part III of that work, he presents philosophical objections to such theories. I want to focus on one particular objection of Socinus that receives scant attention today: his claim that divine forgiveness is incompatible with the satisfaction of divine justice. Socinus not only disputes the contention that satisfaction of divine justice is a necessary condition of the remission of sins (III.1), but argues further that satisfaction is actually logically incompatible with the remission of sins (III.2). For remission, by definition, entails that the creditor forgoes satisfaction of the debt owed him and that the debtor is forgiven of his obligation. If, on the other hand, the debt is fully paid, then there remains nothing to remit and so nothing to forgive. "There is no need for remission—indeed, remission is an impossibility—where the debt no longer exists" (III.2). So it is an impossibility that our debt be simultaneously both satisfied by Christ and remitted by God.

If the satisfaction theorist answers that satisfaction of the debt can be made by one person and remission be given to another, Socinus will reply that because satisfaction has been made, nothing is remitted to the debtor. Suppose someone says that our debt is transferred over to Christ, so that we are released from the debt, and that he then pays the debt. Socinus insists that in such a transfer, there is no true remission, for remission of a debt requires more than simply releasing the debtor. "Remission requires that the obligation be abolished completely through the sheer kindness of the creditor. In that case, neither the debtor nor another substituted in his place owe the creditor anything." Socinus has so defined "remission" that it entails that (i) the debtor "is forgiven of the obligation," and (ii) the creditor "willingly forgoes satisfaction of the debt."

Suppose we say that “God first gave us Christ, whom in a sense we paid back to God for the satisfaction of our debts.” Socinus admits that such an act would be “exceedingly gracious” on God’s part; nevertheless, “remission of a debt, to be true remission, thoroughly excludes all payment.” If the creditor himself pays the debt owed to him, there is no genuine remission of the debt. Moreover, no creditor would take such a “useless, roundabout way” of satisfying the debt, unless there were “no other way of accomplishing the same effect.” If we could have been freed from our debt apart from Christ’s dying, then God’s gift of Christ to make satisfaction to Himself “should be called an act of sheer cruelty and violence rather than generosity.” But Socinus believes himself to have shown in III.1 that satisfaction was not necessary.

As I say, Socinus’ claim that satisfaction of divine justice is incompatible with divine forgiveness of sin is not an objection raised by many contemporary critics. An exception is Eleonore Stump, who in her recent book *At-Onement* presses several Socinian objections, including this one, to atonement theories featuring Christ’s satisfaction of divine justice.⁴ Stump presents a number of “Internal Problems” for such theories, the first of which is that such theories, despite their asseverations to the contrary, “do not in fact seem to present God as forgiving human sin.”⁵ She argues, “For someone to forgive a debt or to forego a penalty or a penance is for him to fail to exact all that in justice is owed him. But, on interpretations of the Anselmian kind, God does exact every bit of what is owed him by human beings; he allows none of it to go unpaid.”⁶ “Suppose that Daniel owes Susan \$1000 and cannot pay it, but Susan’s daughter Maggie, who is Daniel’s good friend, does pay Susan the whole \$1000 on Daniel’s behalf. Is there any sense in which Susan can be said to forgive the debt?”⁷ It “is hard to see what constitutes forgiveness on this

⁴ Stump does not, however, evince any firsthand acquaintance with Socinus’ *De Jesu Christo servatore* (1578).

⁵ Stump, *At-Onement*, p. 19.

⁶ Ibid.

⁷ Eleonore Stump, “Atonement according to Aquinas,” in *Philosophy and the Christian Faith*, ed. Thomas V. Morris, University of Notre Dame Studies in the Philosophy of Religion 5 [Notre Dame, Ind.: University of Notre Dame Press, 1988], p. 62.

claim.”⁸ Therefore, “the penal substitution theory of the atonement does not, in fact, present God as forgiving human sin.”⁹

Divine Forgiveness as Legal Pardon

In his classic *A Defence of the Catholic Faith concerning the Satisfaction of Christ, against Faustus Socinus* (1617) the famed international jurist Hugo Grotius identified as “the fundamental error” of Socinus’ critique of satisfaction his assumption that God is to be construed on the model of an offended party in a personal dispute, such as between a creditor and a debtor (II). For such a private person has no right to punish another. Certainly, God is offended by sin, but He does not act as merely the offended party in punishing it. Rather God should be considered to act as a Ruler. “For to inflict punishment, or to liberate any one from punishment . . . is only the prerogative of the ruler as such, primarily and *per se*; as, for example, of a father in a family, of a king in a state, of God in the universe” (II). God as Supreme Ruler is responsible for the administration of justice in the universe and so has the right of punishing and the right of forgiving wrongdoing. Grotius thinks it would be unjust of God to let certain sins go unpunished, such as sins of the unrepentant. Therefore, it would be inconsistent with the justice of God that He should remit all punishment whatsoever.

On the contemporary scene legal philosopher Jeffrie Murphy has made a similar distinction between the private and public spheres in an effort to carve out conceptual space for exercises of mercy consistent with the demands of retributive justice. Distinguishing between a judge in a criminal case and a creditor in a civil lawsuit, Murphy maintains that as a litigant in a civil lawsuit, the creditor occupies a “private role” and so does not have “an antecedent obligation, required by the rules of justice, to impose

⁸ Ibid.

⁹ Stump, “Atonement according to Aquinas,” p. 57.

harsh treatment” by demanding repayment of the debt owed.¹⁰ He is therefore free to show mercy without prejudice to justice. By contrast a judge in a criminal case, “has an *obligation* to do justice—which means, at a minimum, an obligation to uphold the rule of law. Thus if he is moved, even by love or compassion, to act contrary to the rule of law—to the rules of justice—he acts wrongly.”¹¹ Murphy thinks that the judge *qua* judge cannot, like the creditor, act mercifully without prejudice to the demands of justice. Like Grotius he thinks that the executive power can exercise mercy but only within the limits of individualized justice.¹²

The overriding lesson is that God should not be thought of merely as a private party to a personal dispute but as Judge and Ruler of the world and therefore responsible for administering justice. Indeed, the Bible portrays God as Lawgiver and Judge and Ruler. In contrast to Western systems of government, God embodies in one individual the legislative, judicial, and executive functions of government.¹³ He is clearly not a merely private party to a personal dispute. He is a public person responsible for the administration of justice in the world.

¹⁰ Jeffrie Murphy, “Mercy and Legal Justice,” in *Forgiveness and Mercy*, ed. Jeffrie G. Murphy and Jean Hampton (Cambridge: Cambridge University Press, 1988), pp. 175-6.

¹¹ Ibid., p. 175. See also H. R. T. Roberts, “Mercy,” *Philosophy*, 46/178 (1971): 352-353, in response to Alwynne Smart, “Mercy,” *Philosophy* 43/166 (1968): 345-359. Roberts criticizes Smart for confining her attention to the courtroom, which leaves her unable to provide any examples of genuine mercy. That is because cases of so-called judicial mercy are really cases of determining that exaction of the full penalty allowed by law would not be just. “Whereas in ordinary life a person could weigh every relevant factor and yet properly say, ‘In all justice x owes me A, but it is *mine* to exact and I choose not to,’ a judge, though perhaps required to decide on a debt due to an individual, “is never required to pronounce on one due to himself and so can never exercise real mercy” (Ibid., p. 353).

¹² See comments by Samuel T. Morison, “The Politics of Grace: On the Moral Justification of Executive Clemency,” *Buffalo Criminal Law Review* 9/1 (2005): 89-90.

¹³ Compare the U.S. separation of powers, according to which Congress defines crimes and their punishments, the judiciary interprets and applies those laws and punishments, and the executive holds the power of pardon (Jeffrey Crouch, *The Presidential Pardon Power* [Lawrence, Kan.: University Press of Kansas, 2009], p. 14).

Our brief review above of the biblical material on divine forgiveness already pointed to decisive differences between God's forgiveness of sins and the forgiveness that is exhibited in interpersonal human relationships. The philosophical literature typically treats forgiveness as a subjective change of attitude on the part of the person wronged, a determination to put away feelings of resentment, bitterness, or anger, a relinquishing of the desire for revenge or *Schadenfreude*.¹⁴ But God's forgiveness accomplishes much more than a change of attitude toward sinners on God's part. God's forgiving sins removes our liability to punishment and thus obviates the demands of retributive justice: the just desert of our sins is gone. It is evident then that divine forgiveness is much more akin to legal pardon than forgiveness as typically understood.¹⁵ Kathleen Moore has made the point forcefully by observing that when people ask God to forgive their sins, they are clearly hoping that God will not inflict the full measure of punishment they know they deserve. "These people would discover the seriousness of their conceptual confusion if God forgave their sins and punished them nevertheless—which is always an option for God."¹⁶

¹⁷ Samuel Morison, an Attorney-Advisor in the Office of Pardon Attorney, has therefore appropriately

¹⁴ *Stanford Encyclopedia of Philosophy*, s.v. "Forgiveness," by Paul M. Hughes, §1, Dec. 23, 2014, <https://plato.stanford.edu/entries/forgiveness/>. Hughes proceeds in §3.1 to differentiate legal pardon from forgiveness, concluding that "despite some similarities, pardon and forgiveness are significantly different notions." See also discussion in Kathleen Dean Moore, *Pardons: Justice, Mercy, and the Public Interest* (Oxford: Oxford University Press, 1989), chap. 16.

¹⁵ For a helpful survey of the literature on the nature of divine forgiveness as either change of emotions or forbearance of punishment see Brandon Warmke, "Divine Forgiveness I: Emotion and Punishment-Forbearance Theories," *Philosophy Compass* (forthcoming).. Obviously, these alternatives are not mutually exclusive. Warmke's characterization of pardon as mere punishment-forbearance is inadequate, however, since an executive power could choose to forswear punishment without pardoning the lawbreaker. Cf. note 54 below. *N.B.* that if we take the nature of divine forgiveness to be pardon, then what Warmke calls the "standing question" and the "normativity question" simply evaporate, since God as chief executive has the standing to pardon crimes and the right to pardon third parties.

¹⁶ Moore, *Pardons*, p. 184. Significantly, punishment and forgiveness are not incompatible with each other. One may forgive without pardoning and pardon without forgiving.

¹⁷ The nature of divine forgiveness as legal pardon would be all the more obvious if some theorists were right in arguing that it is logically impossible for God to forgive sins, in the usual sense of the word (H. J. N. Horsbrugh, "Forgiveness," *Canadian Journal of Philosophy* 4/2 [1974]: 269-282; Anne C. Minas, "God and Forgiveness," *Philosophical Quarterly* 25/99 [1975]: 138-150; "Forgiveness," by Paul M. Hughes, §7; cf. the contrary view expressed by Meirllys Lewis, "On Forgiveness," *Philosophical Quarterly* 30/120 [1980]: 236-245). For the proffered arguments against God's forgiving sins are admittedly inapplicable to His legally pardoning sins.

For better or worse, however, the arguments for the claim that it is logically impossible for God to

called the practice of executive clemency “the secular institutional expression of the traditional religious conception of reconciliation.”¹⁸

Forensic terminology and motifs abound in both the Old and New Testament with respect to God, especially in Paul’s teaching on justification. Observing that “The imagery of the law court predominates through the language of justification” in Romans, New Testament scholar Andrew Lincoln comments,

In restating his solution in 3:21-26, the apostle stays with his picture of the law court from 3:19 not only through his mention of righteousness with its forensic connotations but also through his assertion that, although righteousness cannot come through the law, both the law and the prophets act as *witnesses* to the righteousness of God which comes through faith in Jesus Christ. . . . God's righteousness is the power by which those unable to be justified on the criterion of works are set right with him and being set in a right relationship with God involves his judicial verdict of pardon.¹⁹

Legal pardon is, technically, not a judicial verdict, but a prerogative of the executive power, such as the King, President, or Governor. But Lincoln’s fundamental point remains: justification is a legal notion

forgive sins are scarcely plausible. God’s attitude toward sinners could obviously go from wrath to acceptance, which is sufficient for forgiveness in the usual sense of the word. The fact that God, being omnipotent, cannot be harmed by sinners’ wrongdoing does not entail that He be indifferent to their wrongdoing rather than incensed by it, as His holiness and love of the victims of sin demand. Moreover, if God is wronged, if not harmed, by sin, then His forgiveness is not a case of third party forgiveness, which many theorists claim to be impossible. As St. Anselm understood, sinners’ failure to give God His due in honor and obedience is a gross wrong committed against God. *Pace* Hughes, God’s interests in establishing His Kingdom among mankind can be obviously set back, despite His omnipotence, through the free rebellion of creatures, as discussions of theodicy have made plain.

¹⁸ Morison, “Politics of Grace,” p. 137. Recall that biblically reconciliation is atonement. See also Mark W. Osler, “A Biblical Value in the Constitution: Mercy, Clemency, Faith and History,” *University of St. Thomas Law Journal* 9/3 (2012): 769-82.

¹⁹ Andrew T. Lincoln, “From Wrath to Justification. Tradition, Gospel, and Audience in the Theology of Romans 1:18-4:25,” in *Pauline Theology*, vol. 3: *Romans*, ed. David M. Hay and E. Elizabeth Johnson (Minneapolis: Fortress, 1995), pp. 146-8.

involving the pardoning of condemned wrongdoers for their sins. Though justly condemned before the bar of divine justice, God issues them a pardon.

The work of contemporary Christian philosophers on the doctrine of the atonement exhibits a discouraging Socinian tendency to think of God in terms of a private person involved in a personal dispute, so that they miss the legal character of divine forgiveness as pardon. For example, Stump's approach to the doctrine of the atonement is based entirely on construing God on the analogy of a private person engaged in various personal relationships rather than as a Judge and Ruler. She frequently compares God and human persons with two friends Paula and Jerome, who have to deal with wrongs committed by one against the other. Stump neglects legal analogies of the atonement and turns instead to private, personal relationships to motivate or criticize theories of the atonement, thereby overlooking God's status as Ruler and Judge.²⁰

Nowhere is this shortcoming more evident than in her sharp criticism of Anselm's satisfaction theory:

On the Anselmian approach to satisfaction, if Jerome has done Paula a grave injury or injustice, satisfaction is needed if Paula is to forgive Jerome appropriately. . . .

So, on the Anselmian approach, a wronged person Paula can appropriately forgive the wrongdoer Jerome only if Jerome has made satisfaction to Paula. . . .

At least as regards forgiveness and reconciliation between human beings, . . . on the Anselmian approach to satisfaction, one person can do evil to others which is serious enough that no one can appropriately forgive him or be reconciled with him on the basis of his own attempts at

²⁰ In general, Stump's treatment neglects legal aspects of the atonement and ignores forensic motifs in the New Testament. Her doctrine of justification, for example, is non-forensic, being a matter of God's infused righteousness into the believer, not the legal verdict of acquittal by the righteous Judge or pardon by the Ruler.

satisfaction. That this is so on the Anselmian approach to satisfaction underlines what seems to me the central and devastating objection to the Anselmian kind of interpretation of the doctrine of the atonement. On the Anselmian approach to satisfaction, a person's ability to love is dependent on a wrongdoer's actions – more precisely, on his act of making satisfaction. On the Anselmian approach, unless Jerome has made a suitable satisfaction to someone Paula whom he has hurt, Paula cannot forgive Jerome; and so she cannot love Jerome either. That is, Paula cannot so much as desire the good for Jerome and union with Jerome unless and until Jerome manages to bring Paula some appealing present as compensation for his injustice against her. . . .

But this is a *reductio* of the Anselmian approach to satisfaction and so also of the Anselmian kind of interpretation of the atonement. The ethical status of any person . . . cannot be a function of the status of her victimizer.

And, of course, this problem for the Anselmian interpretation is only exacerbated when God is the one who is the offended party. . . . if God's love or forgiveness were conditional on satisfaction, then until satisfaction had been made, God would not be God.²¹

Where does Stump get the idea that Anselm's satisfaction theory is supposed to be the model for human friendships? She has confounded Anselm of Canterbury with Richard Swinburne!²² She takes God to be like the offended party in a personal dispute and so extends Anselm's insistence on our need to satisfy the demands of God's justice (whether by compensation or punishment) to two private parties in a personal friendship. This sort of extension is illegitimate, both for Anselm and for the Reformers, who see us as sinners who have violated God's law and so stand condemned before the bar of His justice.

Focused as she is on private interpersonal relationships, Stump overlooks entirely the character of divine forgiveness as legal pardon. On Stump's view love involves both (i) a desire for the good of the

²¹ Stump, *At-Onement*, pp. 71-73.

²² Some of the elided material in the quotation above are citations from Swinburne's work.

beloved and (ii) a desire for union with him. Just as a person can love unrequitedly, so he can forgive unilaterally, despite the wrongdoer's rejection of that forgiveness. So, Stump says, "God can forgive a wrongdoer unilaterally, in the sense that, even without any repentance on the wrongdoer's part, God can still desire the good for her and union with her."²³ She later elucidates, "If God is perfectly loving, then for any human person Jerome, God desires the good for Jerome and union with Jerome. If it turns out that Jerome is a perpetrator of moral evil, then what more could be wanted by way of forgiveness of Jerome than for someone affected by his evil to want what is good for him and to want union with him? On anyone's account of what forgiveness comes to, these conditions are sufficient for forgiveness."²⁴ Stump even goes so far as to argue that an attitude of hatred and aversion toward the wrongdoer, as well as anger with the wrongdoer, are compatible with love and forgiveness, so long as one's ultimate desire remains for the good of the wrongdoer.²⁵ So long as one would not be disappointed and grieved if the wrongdoer were to repent and change for the better, then hatred and anger toward the wrongdoer are compatible with love.

Stump's characterization of forgiveness implies that the exercise of God's retributive justice in punishing sinners is compatible with His also forgiving those sinners. He both forgives their sins and punishes them for those sins, thereby realizing the nightmarish scenario envisioned by Moore above.

²³ Stump, *At-Onement*, p. 62.

²⁴ *Ibid.*, p. 76.

²⁵ *Ibid.*, p. 62. She later explains,

"Like human persons, God can forgive a wrongdoer unilaterally, in the sense that, even without any repentance on the wrongdoer's part, God can still desire the good for the wrongdoer and union with him. The anger and hatred towards some people attributed to God in the biblical texts are the kind that is compatible with love. They co-exist in God with a desire for union with those people, and they come with a continual offer of grace that would produce goodness and closeness to God in those people if only they did not reject the grace. What God ultimately desires for every person, even those with whom he is angry or those whom he hates, is union with them" (*Ibid.*, p. 81).

Pace Stump, these affirmations are wholly compatible with accounts of the atonement which require satisfaction of divine justice as a precondition of the remission of sins..

Stump thinks that retributive justice can be seen as a good for the person punished, in which case God in punishing wrongdoers still wills their good and desires union with them, that is to say, He forgives them.²⁶ So on her account of love and forgiveness, she concludes, “it is possible to hold that imposing retributive punishment on a wrongdoer is sometimes required by justice, and still to maintain that love and forgiveness are obligatory even for wholly unrepentant wrongdoers.”²⁷

This analysis of divine forgiveness is fine in so far as forgiveness is usually understood in human relationships. It is perfectly possible for a judge to love and forgive someone brought before his bar, even as he declares him guilty and sentences him to severe punishment. The President or Governor can refuse to pardon a personal friend whom he loves and has personally forgiven for the wrong he has done. Similarly, God can personally will the good of sinners and desire their union with Him without waiving the demands of retributive justice. On the Anselmian/Reformation theories of the atonement, God’s personal love and forgiveness are not conditioned by the satisfaction of divine justice, even if His pardoning sinners for their wrongdoing is so conditioned. By ignoring pardon, Stump misconstrues God’s personal love and forgiveness to be conditional on satisfaction according to Anselm and the Reformers.

My point is that progress is more apt to be made in understanding the atonement by conceiving of God along Grotian lines as Ruler (as well as Lawmaker and Judge) than along Socinian lines as an offended party in a private dispute. Now, of course, there will be significant disanalogies between divine pardon and the pardoning power as it exists in Anglo-American systems of justice—for example, a President may issue pardons for personal political advantage²⁸—but, still, given the similarities, we may

²⁶ Stump, *At-Onement*, pp. 65-67.

²⁷ *Ibid.*, p. 67.

²⁸ Noah Messing lists seven motivations underlying presidential pardons: (1) Justice: correcting excessive or improper punishments; (2) Mercy: exercising compassion; (3) Cronyism: extending favors to political loyalists and the wealthy; (4) Military strategy: helping to win and end military conflicts; (5) Legislative overreach: countering illegal or immoral legislation; (6) Inter-administration consistency: lessening the punishments meted out during an overly harsh prior administration; (7) Economic efficiency: offering relief from laws that harm economic growth (Noah A. Messing, “A New Power?: Civil Offenses

expect to gain a good deal of insight into divine pardon by exploring the pardoning power vested in heads of government.

Pardon and Its Effects

From ancient times, including the New Testament era, heads of state have exercised the power to pardon crimes.²⁹ So when the framers of the U.S. Constitution met in Philadelphia in 1787 they naturally included in the Constitution the pardoning power. Article II, section 2 of the U.S. Constitution grants to the President “Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.” Since this power is not defined in the Constitution, U.S. courts have interpreted the presidential power to pardon on the model of the pardoning power of English monarchs, which the framers doubtless presupposed.³⁰ The power of English monarchs to pardon was, in turn, understood as a divine right, an act of grace reflecting God’s ability to pardon sins.³¹ William Blackstone

and Presidential Clemency,” *Buffalo Law Review* 64 [2016]: 732-8). Most of these motivations are obviously inapplicable to divine pardon.

²⁹ It is intriguing that much of the New Testament was written by a man who near the end of his life became embroiled in a legal dispute within the Roman justice system. When Paul appealed to the Roman Emperor to try his case, he was not asking the Emperor to pardon him, though that lay within Caesar’s power. Nor was Paul appealing the verdict in his case, since Paul had never been tried and convicted. Rather, as a Roman citizen, Paul was exercising his right to be tried within the Roman system of justice rather than within the Jewish justice system and, moreover, asking for a change of venue for his case from Jerusalem to Rome, since Jewish pressures made it impossible for him to get a fair trial even before Roman officials resident in Palestine.

³⁰ Helpful surveys of the history of the pardon power may be found in Crouch, *Presidential Pardon Power*; W. H. Humbert, *The Pardoning Power of the President*, with a foreword by W. W. Willoughby (Washington, D.C. : American Council on Public Affairs, 1941), and Moore, *Pardons*.

³¹ In Moore’s pithy conclusion, “Presidents used pardons as they chose, having been given a pardoning power patterned after that of the English Kings, which was patterned after God’s” (Moore, *Pardons*, p. 51). She says that the pardoning power of English monarchs “was analogous in theory and practice to divine grace. Like grace. . . a royal pardon was thought of as a personal gift. Therefore, it required no justification and was not subject to criticism” (Kathleen Moore, “Pardon for Good and Sufficient Reasons,” *University of Richmond Law Review* 27 [1993]: 282). So “Pardon has historically been understood as an act of grace, a gift freely given from a God-like monarch to a subject” (Moore, *Pardons*, p. 9). Crouch suggests that in ancient cultures where the law was synonymous with justice, there would be no need to create exceptions to the law in order to further justice. The law was by definition just, so if an exception to the law was granted, it had to be for reasons unrelated to rectifying

characterizes the granting of “the king’s most gracious pardon” as “the most amiable prerogative of the Crown.”³² So it is not surprising that the power of the executive to pardon strongly resembles divine pardon.

The U.S. Supreme Court has interpreted the pardon clause to comprise not only full pardons but by implication lesser acts of clemency, including commutations of sentence, reprieves, remissions of fines and penalties, and amnesties. Commutations are reductions of sentence for crimes of which the criminal is guilty. A reprieve is a temporary delay in the carrying out of a sentence. Remission of fines and penalties is the cancelation of such monetary obligations owed to the federal government for wrongdoing. Amnesties are similar to pardons but concern not individuals but classes of people.

In a landmark decision, Chief Justice John Marshall describes a pardon as follows:

A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed (*United States v. Wilson*, 32 U.S. 150 (1833)).

Marshall’s description was later cited by the Supreme Court as a correct characterization in *Burdick v. United States*, 236 U.S. 79, 89 (1915). According to this characterization a pardon is an act of mercy,

injustices. Ancient Judaism would seem to be a good example, for the Torah was God-given and therefore infallible. If an exception was granted, it could only be by an act of divine grace. While corrupt or incompetent judges might make the pardoning power of the king necessary in order to correct injustices, in God’s case injustices are impossible, and so divine pardons could only be acts of mercy.

³² William Blackstone, *Commentaries on the Laws of England in Four Books*, 2nd ed. rev., vol. 4 (1879), p. 395. Interestingly, Blackstone opined that the power to pardon could never subsist in a republic, since then the power of judging and the power of pardoning would be vested in the same person, forcing him to undo his own pronouncements. The U.S. framers solved this problem by separating the judicial and executive branches of government and vesting the power to pardon solely in the latter. As observed above, in God’s case the legislative, judicial, and executive functions of government are all rolled into one, but since God is both omniscient and morally perfect, injustice in His government of the world is logically impossible.

coming from person(s) possessing the power of the executive, which removes a criminal's liability to punishment for a specific crime he has committed.

Marshall's description seems an apt characterization of a divine pardon as well. God is the power Who executes His divine *torah*, and His pardon is an act of grace by which He exempts elect sinners, who have violated His law, from the punishment they deserve. Every element of Marshall's definition finds a theological analogue. No wonder Daniel Kobil characterizes Marshall's vision of a pardon as "something akin to divine forgiveness"³³

There are very few limitations on the presidential pardoning power: (i) the President may pardon only federal offenses ("Offences against the United States") and so is powerless to grant clemency in state criminal or civil cases; (ii) the Constitution expressly prohibits the President from granting pardons "in Cases of Impeachment;" (iii) the President may not pardon a crime before it occurs; and (iv) the President may not pardon someone held in contempt in a case between private parties.³⁴ Only the third of these limitations is theologically interesting. Plausibly, God cannot pardon sins before they are committed, since at that time the person has not yet done anything wrong (and may not yet even exist!) and so cannot be guilty.³⁵ Hence, there is nothing to be pardoned. Pardon must take place after the sins have been committed.

³³ Daniel T. Kobil, "The Quality of Mercy Strained: Wresting the Pardoning Power from the King," *Texas Law Review* 69 (1991): 594.

³⁴ Messing, "A New Power?," pp. 668-9.

³⁵ Thus, the great post-Reformation Swiss theologian François Turretin argues that prior to a person's birth his sins cannot be said to have been remitted because non-entities have no properties and, hence, no sin and guilt to be remitted (Francis Turretin, *Institutes of Elenctic Theology*, 3 vols., trans. George Musgrave Giger, ed. James T. Dennison [Phillipsburg, N. J.: Presbyterian and Reformed, 1992], II.16.5). Such a person is not yet in union with Christ and so not yet justified. For Turretin, justification, though eternally decreed, takes place in this life in the moment of God's effectual calling, by which the sinner is transferred from a state of sin to a state of grace and is united to Christ, his head, by faith.

One of the remarkable features of a presidential pardon is its absoluteness. It is not subject to either judicial review or to legislative restrictions. Even future presidents do not have the power to reverse a pardon. The President has the power to pardon whomever he wants for any reason he wants, and his pardon is irrevocable. The analogy to divine pardon is obvious. God as the Supreme Ruler has absolute power to pardon sinners, and no one can gainsay His action. "Who will bring any charge against God's elect? It is God justifies. Who is to condemn?" (Rom 8.33-4).

What are the effects of a pardon? Marshall says that it exempts the individual from the punishment prescribed by the law for his crime. This much is uncontroversial.³⁶ But pardons do much more than merely exempt a convicted criminal from punishment for his crime. A pardon removes *all* the legal consequences of the criminal's conviction. A pardon thus restores to a person any civil rights which were restricted as a result of his conviction, such as the right to vote, to serve on a jury, or to obtain a business license. In *Knote v. United States*, the Supreme Court analyzed the effect of a pardon on its recipient:

A pardon is an act of grace by which an offender is released from the consequences of his offence, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offense, and restores to him all his civil rights. In contemplation of law, it so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives him new credit and capacity, and rehabilitates him to that extent in his former position (*Knote v. United States* 95 U.S. 153 (1877)).

We shall return to the effect of a pardon in restoring a person's civil rights, a feature of pardons which is

³⁶ "Most jurists and scholars who have discussed this issue accept Chief Justice Marshall's dictum that '[a] pardon. . . exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a *crime* he has committed'" (Messing, "A New Power?," p. 678).

also uncontroversial, even if in some cases difficult to adjudicate.

The truly controversial question is whether a pardon serves to remove the criminal's guilt. Following the English model, the U.S. courts were at first emphatic as to the effect of a pardon in expiating guilt.³⁷ In *Ex parte Garland*³⁸ the Supreme Court famously declared:

. . . the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity (*Ex parte Garland*, 71 U.S. 333, 380-1 (1866)).

Like Marshall's description of a pardon, this characterization of the effects of a full pardon is a marvelous description of a divine pardon. "If any one is in Christ, he is a new creation; the old has passed away, behold, the new has come" (II Cor 5.17). The pardoned sinner's guilt is expiated, so that he is legally innocent before God.

³⁷ See Samuel Williston, "Does a Pardon Blot Out Guilt?" *Harvard Law Review* 28/7 (1915): 648-52.

³⁸ A.H. Garland, a former member of the Confederate Senate, received a full presidential pardon in July 1865 but was barred from practicing law due to an oath enacted by Congress as a prerequisite to appearing before a federal court. One had to swear that one had never supported, aided, or served in office in the Confederacy. Unable to take this oath, Garland sued to set aside this congressional prerequisite. The Supreme Court ruled that the oath was an improper legislative encroachment on the President's pardoning power.

But as a description of the effects of human pardons, *Garland's* sweeping assertions have been eroded by subsequent court decisions.³⁹ In the *Harvard Law Review* of 1915 Samuel Williston published what has been called a “seminal” and “landmark” article, “Does a Pardon Blot Out Guilt?,” in which he criticized *Garland* and its judicial progeny and which has been frequently cited by the courts.⁴⁰ Williston complained, “Everybody . . . knows that the vast majority of pardoned convicts were in fact guilty; and when it is said that in the eye of the law they are as innocent as if they have never committed an offense, the natural rejoinder is, then the eyesight of the law is very bad.”⁴¹ The truth, says Williston, is rather as Lord Coke wrote: *Poena mori potest, culpa perennis erit*.⁴² A moment’s reflection suggests that Williston must understand by “guilt” simply the property or fact of having committed the crime. On this understanding, to be guilty of a crime is just to have committed the crime.

That this is how Williston understands guilt is evident from the remainder of his article. He blames the verdict of the English Court in *Cuddington v. Wilkins* (80 Eng. Rep. 231 (K.B. 1615)) as laying the main foundation for the view that after a pardon the law could not see the criminal’s guilt. Cuddington had brought an action against Wilkins for calling him a thief. Wilkins justified his appellation because Cuddington had once been convicted of theft. But Cuddington replied that he had been pardoned by the king for the alleged felony. The Court decided for Cuddington, “for the whole court were of opinion that though he was a thief once, yet when the pardon came it took away, not only *poenam*, but *reatum*.”⁴³

Williston disagrees. According to Williston,

³⁹ For a thorough review of the relevant judicial decisions see *In re Sang Man Shin*, 125 Nev. 100, 104-9 (2009); *Robertson v. Shinseki*, 26 Vet. App. 169, 176-9 (2013).

⁴⁰ E.g., *Robertson v. Shinseki*, 26 Vet. App. 169, 177 (2013).

⁴¹ Williston, “Does a Pardon Blot Out Guilt?,” p. 648.

⁴² “Punishment may expire, but guilt will last forever.”

⁴³ Hob. 67, 81, cited by Williston, “Does a Pardon Blot Out Guilt?,” p. 651.

The true line of distinction seems to be this: The pardon removes all legal punishment for the offense. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of the crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him anymore eligible.⁴⁴

The point is this: a pardon removes the legal disqualifications (abridgement of civil rights) resulting from the fact of conviction; but a pardon does not affect any disqualifications resulting from the commission of the crime.⁴⁵ The fact that a crime has been committed cannot be erased. It is this fact that Williston identifies as guilt. Though pardoned, the person still stole or lied or acted recklessly and so remains guilty of the crime he committed. As such he may, despite his pardon, be disqualified from certain activities, such as giving testimony or practicing law.

For example, Williston blasts the New York Court of Appeals for the following “unpardonable reasoning” in a case involving disbarment of a pardonee:

The pardon does reach the offence for which he was convicted, and does blot it out, so that he may not now be looked upon as guilty of it. But it cannot wipe out the act that he did, which was

⁴⁴ Williston, “Does a Pardon Blot Out Guilt?,” p. 653.

⁴⁵ Among the effects of a pardon Morison includes preventing deportation, easing foreign travel restrictions, restoring firearms rights, and facilitating the acquisition of a wide variety of valuable goods, such as naturalized citizenship, welfare, veterans and other government benefits, military enlistment, government contracts, various business and professional licenses, and employment in many regulated industries. But a pardon does not create the fiction that the offense never occurred or entitle the recipient to an expungement of his criminal record (Morison, “The Politics of Grace,” pp. 32-4).

adjudged an offence. It was done, and will remain in effect for all time (*In the Matter of _____, an Attorney*, 86 N.Y. 563, 569 (1881).

Williston marvels, “How a man who ‘may not now be looked upon as guilty’ of a crime, nevertheless did the act which was a crime and must now be disbarred for it, it is difficult to imagine.”⁴⁶ Henry Weihofen in a later review, citing Williston’s criticism of the court’s opinion in this case, complains of “the mischief that results when a court applies literally the unfounded dictum of *Ex parte Garland* that a pardon ‘blots out’ guilt, and makes the offender a ‘new man’, etc.”⁴⁷ The effect of a pardon (other than on grounds of innocence) is “to absolve from further punishment and restore civil rights, but *not to undo what is past or blot out of existence a fact*, namely, that *the person has committed a crime and been sentenced and punished* for it.”⁴⁸

An examination of various district, state, and appellate court cases walking back the assertions of *Garland* reveals that the courts in such cases tend to presuppose this same understanding of guilt as the property of having committed a crime. Consider the following examples:

It is petitioner's contention that these pardons under Texas law wiped out the convictions as thoroughly as though they had never occurred, and that, therefore, giving full faith and credit to the law, no fact as to prior convictions existed. . . . It may be true (we do not so hold) that the Texas pardon law goes all the way and prohibits the Texas courts from giving any consideration to a pardoned offense. Yet such a law could not turn back the hand of time long enough to delete an actuality from its long course. It still remains true that petitioner was the subject of two prior

⁴⁶ *Ibid.*, p. 656.

⁴⁷ Henry Weihofen, “The Effect of a Pardon,” *University of Pennsylvania Law Review* 88 (1939): 181; *cf.* 189-90.

⁴⁸ *Ibid.* (my emphasis).

final convictions when the law of California overtook him in the commission of another felony. Notwithstanding the Texas pardons, the stubborn fact remains that the *habit* of crime was upon him (*Groseclose v. Plummer* 106 F.2d 311, 313 (9th Cir.1939)).

the offender's past conduct, including the commission of an offense against another sovereign, may be taken into account even though the offender has been pardoned by such other sovereign. The Constitution, which confers upon the President the power to pardon, does not confer upon him power to wipe out guilt (*People ex rel. Prisament v. Brophy* 287 N.Y. 132, 137-8 (1941)).

If *Garland* ever had the broad impact on post-pardon proceedings which the sweep of its language implies, a century of judicial sculpturing has left more form than substance to the opinion. It can no longer be seriously contended, for example, that a pardon erases an offender's past, making it 'as if he had never committed the offense.' . . . While a pardon removes all legal punishments and disabilities attached to a conviction, we hold that it cannot erase the *fact* that the offender was convicted of an infamous crime and it is the fact of conviction alone, not its continuing viability, which renders the offender ineligible to hold public office. . . . As this Court said in *Grant*, 133 A. at 791: '[A pardon] . . . removes the disability, but does not change the common-law principle that the conviction of an infamous offense is evidence of bad character for truth' (*State Ex Rel. Wier v. Peterson*, 369 A.2d.1076, 1080, 1081 (Del.1976)).

The undisputed legal effect of a pardon is to restore the civil rights to an ex-felon (suffrage, jury service, and the chance to seek public office). However, the Governor cannot overrule the judgment of a court of law. He has no 'appellate' jurisdiction. There can be no doubt but that a final judgment was entered against the ex-felon. Regardless of the post-judgment procedural maneuvering, a final conviction does not disappear. A pardon implies guilt. Texas Courts may forgive, but they do not forget. The fact is not obliterated and there is no 'wash.' Moreover, the granting of a pardon does not in any way indicate a defect in the process. It may remove some

disabilities, but does not change the common-law principle that a conviction of an infamous offense is evidence of bad character (*Dixon v. McMullen* 527 F. Supp. 711, 717-18 (N.D.Tex.1981)).

although the presidential pardon set aside Abrams' convictions, as well as the consequences which the law attaches to those convictions, it could not and did not require the court to close its eyes to the fact that Abrams did what he did. . . . According to Abrams, the quoted language requires this court, in effect, to pretend that his pardoned wrongdoing never happened. . . . The implications of Abrams' position are troubling to say the least. Let us consider an apt analogy. Suppose that an alcoholic surgeon performs an operation while intoxicated. He botches the surgery. The patient dies. The surgeon is convicted of manslaughter and is sentenced to imprisonment. The President grants him a full and unconditional pardon. According to Abrams, the surgeon now has the right, as a result of the pardon, to continue to operate on other patients, without any interference from the medical licensing authorities. . . . The presidential pardon would undoubtedly have precluded a sanction based on Abrams' conviction. . . . Instead, the proceeding was brought to discipline Abrams for engaging in *conduct* which, according to Bar Counsel, violated the Code of Professional Responsibility (*In re Abrams*, 689 A.2d 6, 7, 10-11 (D.C. 1997)).

Pursuant to the current expunction statute, a person will only qualify for a certificate of eligibility if he '[h]as not been adjudicated guilty of, or adjudicated delinquent for committing, any of the acts stemming from the arrest or alleged criminal activity to which the petition to expunge pertains.' § 943.0585(2)(e), Fla. Stat. (2002). . . . While a pardon removes the legal consequences of a crime, it does not remove the historical fact that the conviction occurred; a pardon does not mean that the conviction is gone. If a pardon had the effect of allowing an individual to declare that he had not been adjudicated guilty of a crime, the end result would be that all pardoned individuals would be eligible for expungement of their criminal history records. Today, we hold that a pardon does not have the effect of erasing guilt so that a conviction is treated as though it had never occurred

(*R.J.L. v. State*, 887 So.2d 1268, 1280-81(Fla.2004)).

To summarize: the legal effect of a presidential pardon is to preclude further punishment for the crime, but not to wipe out the fact of conviction. The CFTC did not violate the pardon clause by considering the conduct underlying Hirschberg's conviction in determining whether he was qualified to do business as a floor trader, because its decision was grounded in protection of the public rather than in punishing Hirschberg as a convicted felon. . . . The effect of a pardon is not to prohibit all *consequences* of a pardoned conviction, but rather to preclude future *punishment* for the conviction. . . . In cases where governmental action has been held to violate the pardon clause, . . . the pardoned individual is stripped of his rights based not on the conduct underlying the conviction, but on the fact of conviction alone. . . . evidence of the CFTC's non-punitive purpose in denying Hirschberg's application is the fact that the conduct underlying Hirschberg's mail fraud conviction would be cause for denial even if he had not been criminally convicted for it (*Hirschberg v. Commodity Futures Trading Com'n*, 414 F.3d 679, 682, 683 (2005)).

A pardon does not prevent any and all consequences of the pardoned offense: collateral consequences of the offense may still follow. For example, an attorney who has been pardoned for the offense of forgery may not be punished for that crime, but may be disbarred as a result of that offense. Our predecessor court also recognized that a gubernatorial pardon does not restore the character of the witness/pardonee, so that he or she could still be impeached as a felon. Thus, while a pardon will foreclose punishment of the offense itself, it does not erase the fact that the offense occurred, and that fact may later be used to the pardonee's detriment (*Fletcher v. Graham*, 192 S.W.3d 350, 362-363 (Ky.2006)).

The authorities cited are in accord: expunction is not a civil right. Based upon these well-reasoned authorities, we hereby retreat from our prior decisions. . . to the extent that they imply that a pardon blots out guilt and erases the historical fact of the underlying conviction. . . .

Because we conclude that the effect of the pardon does not erase the historical fact of the conviction, we hold that there is nothing in the Nevada Constitution that creates a civil right to an expunction of the record of a criminal conviction (*In re Sang Man Shin*, 125 Nev. 100, 110 (2009)).

the Court is bound by the Supreme Court's eventual adoption of Professor's Williston's view of the effect of a Presidential pardon—namely, that a Presidential pardon relieves the pardonee of the legal disabilities incident to a conviction of an offense (in this case, the legal punishment of a general court-martial conviction), but does not eliminate the consideration of the conduct (being AWOL for 313 days) that led to that conviction. . . . Therefore, Mr. Robertson's argument, that his Presidential pardon “blots out” the conduct that led to his discharge and prohibits VA from considering that conduct as a bar to benefits, must fail (*Robertson v. Shinseki*, 26 Vet. App. 169, 179 (2013)).

These cases have typically to do with whether a pardon serves to expunge one’s criminal record or to remove a particular disqualification (such as disbarment, banishment from the trading floor, or denial of veteran’s benefits) suffered by the pardonee as a consequence of his being convicted of the crime for which he received a pardon. In holding that *Garland* overstepped in asserting that a pardon blots out guilt because a pardon does not blot out the past conduct leading to the conviction, these courts equate guilt with having carried out the conduct which led to the conviction.⁴⁹

⁴⁹ So also Ashley M. Steiner, “Remission of Guilt or Removal of Punishment? The Effects of a Presidential Pardon,” *Emory Law Journal* 46 (1997): 996-7, who, without ever defining “guilt,” claims that it is “illogical to assert that the pardon ‘blots out of existence the guilt’ of the offender,” since “the acts leading to the conviction, whether or not they are punished, remain.” She observes that after Williston's article, courts generally adopted one of three views regarding the effects of a presidential pardon: (i) a pardon obliterates both the conviction and the guilt; (ii) a pardon obliterates the conviction but not the guilt (which she inexplicably identifies as Williston’s view); or (iii) a pardon obliterates neither the conviction nor the guilt (Williston’s actual view). She takes no cognizance of a fourth alternative staring us in the face, namely, (iv) a pardon obliterates the guilt but not the conviction. Alternative (ii) is incoherent, since in the absence of a conviction, *legal* (as opposed to moral) guilt cannot exist. Moreover, given a retributive theory of justice, both (ii) and (iii) are incoherent, as explained below, since—a criminal being forever after guilty—a pardon could not obviate punishment. Although some courts have affirmed (i) in stating that not

While such an understanding of the word “guilt” may accord with much of ordinary language, a little reflection reveals that such a conception of guilt is bizarre. For on this view a person’s guilt could never be expunged, whether by pardon or punishment. Even if a person has served his full sentence and so satisfied the demands of justice, he remains guilty, since it will be ineradicably and forever the case that once upon a time he did commit the crime. But then on standard theories of retributive justice, he still deserves punishment! For it is an axiom of retributive theories of justice that the guilty deserve punishment. Such an understanding of guilt would thus, in effect, sentence everyone to hell, even for the most minor of crimes, since guilt could never be eradicated and, hence, the demands of justice satisfied. Indeed, even a divine pardon would not serve to remove guilt and save us from punishment, since even God cannot change the past. But such a conclusion is incoherent, since it is the function of pardon to cancel one’s liability to punishment. Therefore, this understanding of guilt is incompatible with standard theories of retributive justice. I take this consequence to be a *reductio ad absurdum* of this understanding of guilt.

The *Garland* court and its progeny should not be thought to consider a pardon to be a sort of judicial time machine, capable of erasing the past. It is logically incoherent to bring it about that an event which has occurred has not occurred, and it would ungracious to attribute to our courts the absurd opinion that a pardon can erase from the past a person’s wrongdoing or conviction for a crime. Rather what the *Garland* court was doing, and what its detractors have failed to do, is what contemporary philosophers of time call “taking tense seriously.” When the Supreme Court declared that a pardon “blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence,” it takes seriously the tenses of the verbs involved. It recognizes that the offender *was* guilty, but as a result of his pardon he *is now* innocent in the law’s eyes. It is precisely for that reason that in the

simply the guilt of the offender but the offense itself is blotted out, *Garland* does not affirm that a pardon blots out the offense. Accordingly, *Garland* and its progeny are best interpreted as affirming (iv).

court's opinion Congress' attempt to prescribe further punishment for Mr. Garland was illegitimate: as a result of the pardon he is no longer guilty.⁵⁰ Moreover, the counterfactual conditional "as if . . ." reveals that the law is not blind to his offense. The law can see his offense, but as a result of the pardon the offender is now as innocent as he would have been if he had never committed the offense.

From the beginning courts which held that a pardon expunges a person's guilt recognized the importance of tense. In *Cuddington v. Wilkins*, for example, the court opined that while Cuddington was once rightly called a thief, as a result of the king's pardon he should no longer be called a thief. In Hobart's report on the case, we read, "It was said, that he could no more call him thief, in the present tense, than to say a man hath the pox, or is a villain after he be cured or manumised, but that he had been a thief or villain he might say."⁵¹ The court's decision turns upon taking tense seriously. Similarly, the reasoning of the New York Court of Appeals, which Williston found unpardonable, emphasizes that though the pardonee was once guilty of the offense, "he may not now be looked upon as guilty of it." The opinion is admittedly sloppy in saying that it is the offense rather than the guilt that is blotted out by a pardon, but in view of the court's insistence that the criminal act cannot be "wipe[d] out," its intention to agree with *Garland* is evident. Moreover, contrary to the opinions of several lower courts,⁵² *Garland* is wholly consistent with the Supreme Court's opinion in *Burdick v. U.S.* that the pardon of an accused person, if accepted, actually implies his guilt (otherwise there would be nothing to be pardoned), for

⁵⁰ See discussion by Samuel E. Schoenburg, "Clemency, War Powers, and Guantánamo," *New York University Law Review* 91 (2016): 930-1.

⁵¹ Hob. 81, 82 (1615), cited in Williston, "Does a Pardon Blot Out Guilt?," p. 652. Williston notes that "The principal case was followed in *Leyman v. Latimer*, 3 Ex. D. 15 (1877), on very similar facts, and the court upheld the validity of the distinction taken in *Cuddington v. Wilkins*, between the legality of using the present and the past tense" and yet fails himself to appreciate the importance of this distinction.

⁵² For example, the opinion of the Supreme Court of Nevada, which stated, "In *Burdick*, the Court implicitly acknowledged that the mere act of accepting a preconviction pardon carried an unremovable social stigma, an acknowledgement that is inconsistent with a position that a pardon blots out all existence of guilt" (*In re Sang Man Shin*, 125 Nev. 100, 105 (2009)). A pardon can take away the guilt that it implies, and enduring social stigma is definitely not guilt.

Garland has no interest in denying that the offender was guilty, so that the pardon, in taking away his guilt, implies that he was guilty. A pardon does not have an “appellate” function, as the courts have recognized, in that it does not imply a miscarriage of justice; the correctness of the guilty verdict rendered is not undermined.⁵³ But now the person is pardoned, and so the effect of that verdict is canceled: though once guilty, the pardonee no longer is.⁵⁴

The opinion in *Garland* was properly explicated in *In re Spenser* (1878) as follows:

This is probably as strong and unqualified a statement of the scope and efficacy of a pardon as can be found in the books. And yet I do not suppose the opinion is to be understood as going the length of holding that while the party is to be deemed innocent of the crime by reason of the pardon from and after the taking effect thereof, that it is also to be deemed that he never did commit the crime or was convicted of it. The effect of the pardon is prospective and not retrospective. It removes the guilt and restores the party to a state of innocence. But it does not change the past and cannot annihilate the established fact that he was guilty of the offence (*In re Spenser*, 22 F. Cas. 921, 922 (1878)).

The opinion in *Garland* is thus fully in accord with the prevailing view that a pardon has no effect upon the

⁵³ The Supreme Court of Indiana was in accord with *Garland* when it wrote, “An innocent man suffering from an illegal sentence, procured by fraud or extorted by violence, may desire a trial and an acquittal which shall remove from his character the stain of guilt, and this the exercise of the pardoning power cannot do” (*Sanders v. State*, 85 Ind. 318, 322 (1882)). A pardon cannot remove the stain of past guilt, even if it renders the pardonee no longer guilty.

⁵⁴ A number of scholars have noted that pardons differ from other forms of executive clemency in that the latter, unlike pardons, do not negate the criminal’s conviction but leave intact the judgement of guilt. For example, President Carter, in proclaiming an amnesty for Vietnam War draft-dodgers, said poignantly that their crimes have been forgotten, not forgiven. Similarly, recipients of commutations and reprieves remain guilty (Kobil, “Quality of Mercy Strained,” p. 577; Stacy Caplow, “Governors! Seize the Law: A Call to Expand the Use of Pardons to Provide Relief from Deportation,” *Boston University Public Interest Law Journal* 22 [2013]: 299; Messing, “A New Power?,” p. 672; Schoenburg, “Clemency, War Powers, and Guantánamo,” p. 924). This distinction seems to make sense only if a pardon annuls the guilt of the offender.

criminal conduct and conviction of the person pardoned.

Not only so, the opinion in *Garland* is also consistent with the view that some things (for example, having one's criminal records sealed) may be prohibited to a pardonee because there is no civil right that may be restored in such cases; in other cases a pardon has no effect upon the susceptibility of the pardonee to certain actions because the actions involve private lawsuits. *Garland* is thus in accord with the prevailing opinion that a pardon serves to release a person from all the legal consequences of his conviction, including punishment, taken in abstraction from the wrongdoing itself.

It is obvious that the *Garland* court has a very different conception of guilt than lower courts which see themselves as departing from *Garland*. Rather than assume the incoherent understanding which equates guilt with the facticity of a past event, *Garland* assumes that guilt is a property which can be temporarily exemplified and then lost through pardon or appropriate punishment. So what is this property? It seems to me that the most perspicuous understanding of guilt is that it is *liability to punishment*. Guilty verdicts in cases of strict liability (in which there may be neither wrongdoing nor culpability) show that guilt cannot be equated merely with culpable wrongdoing.⁵⁵ Rather a verdict of "Guilty" is plausibly a declaration that the person is liable to punishment. To be guilty of a crime is to be liable to punishment for that crime. Such an understanding of guilt makes it perspicuous why punishment or pardon serves to expiate guilt. A person who has served his sentence has "paid his debt to society" and so is now no longer guilty, that is to say, no longer liable to punishment. Similarly, a person who has been pardoned is by all accounts no longer liable to punishment for the crime he committed.

To return, then, to the concerns of theology, it seems to me that *Garland's* statement of the effects of a pardon is a marvelous description of the effects of a divine pardon of a person's sins. By

⁵⁵ On strict liability see L. H. Leigh, *Strict and Vicarious Liability: A Study in Administrative Criminal Law*, Modern Legal Studies (London: Sweet and Maxwell, 1982); David Ormerod, *Smith and Hogan's Criminal Law*, 13th ed. (Oxford: Oxford University Press, 2011), chap.7.

taking tense seriously, we understand how a person who was once guilty may, in virtue of a pardon, be no longer guilty, despite the ineradicable fact that he did commit the sin for which he was condemned. The decisions of certain lower U.S. courts do not compromise *Garland*, for they are assuming a different understanding of guilt which equates guilt with the facticity of the past offense, which *Garland* would not think to deny. Like punishment, pardon expiates a person's guilt, so that he is no longer condemned and liable to punishment.

Finally, these debates over the effects of a pardon provide insight into the nature of divine justification. In contrast to Catholic theologians, who saw justification as involving only infused righteousness, the Protestant Reformers recaptured the Pauline doctrine of imputed righteousness. Not that the Reformers denied that God infuses righteousness into us, that is to say, makes us righteous by a moral transformation of our character. They affirmed such an infused righteousness but saw it as belonging properly to sanctification, that gradual transformation of character into conformity with Christ's image by the power of the indwelling Holy Spirit (II Cor 3.18).⁵⁶ Justification in Paul's view is a forensic notion, God's legal declaration that we are righteous. While justification may involve more than divine pardon of our sins, at the heart of forensic justification lies divine pardon. By God's pardon we are freed of our liability to punishment, so that legally we are innocent before the bar of His justice.

Our legal pardon by God no more transforms our character and makes us virtuous people than does a human pardon a convicted criminal. Again and again, the courts have insisted that a person may suffer various disabilities, despite his pardon, because of the flawed character that led to his conviction. The conviction alone, now pardoned, may not serve as grounds of disability, but it may serve as evidence

⁵⁶ For example, Turretin emphasizes that imputation is a purely forensic notion and does not involve an infusion of Christ's righteousness into us (Turretin, *Institutes of Elenctic Theology*, II.14.16). While agreeing that by the grace of Christ righteousness is infused into us, Turretin insists that it plays no role in justification: "For the righteousness of Christ alone imputed to us is the foundation and meritorious cause upon which our absolutary sentence rests, so that for no other reason does God bestow the pardon of sin and the right to life than on account of the most perfect righteousness of Christ imputed to us and apprehended by faith" (Ibid., II.16.1).

of a corrupt character and conduct that are disabling. So, for example, in the case *In re Abrams* Elliott Abrams was deemed unfit to practice law despite his pardon because a pardon did nothing to restore the moral character necessary for him to continue to practice law. Although the District of Columbia Court of Appeals agreed with Abrams that his pardon set aside his convictions and the legal consequences thereof, still his pardon “could not and did not require the court to close its eyes to the fact that Abrams did what he did” (*In re Abrams*, 689 A.2d 6, 7 (D.C. 1997)). Similarly, in *Hirschberg v. Commodity Futures Trading Commission*, the Seventh Circuit U.S. Court of Appeals found that “the conduct underlying Hirschberg’s mail fraud conviction would be cause for denial even if he had not been criminally convicted for it. . . . The CFTC appropriately considered the conviction as evidence of Hirschberg’s inability to work as an ethical floor broker” (*Hirschberg v. Commodity Futures Trading Commission*, 414 F. 3d 679, 683, 684 (2005)). These cases nicely illustrate Williston’s point that “while pardon dispenses with punishment, it cannot change character, and where character is a qualification for an office, a pardoned offence as much as an unpardoned offence is evidence of a lack of the necessary qualification.”⁵⁷

Similarly, while a divine pardon makes us legally innocent before God, free of liability to punishment, it is powerless of itself to effect moral transformation of character. To that end we need regeneration through the Holy Spirit and His sanctifying influence to make us over time into the men and women that God wants us to be.⁵⁸ Sanctification is not a forensic transaction but a moral transformation of character and is not therefore wrought by divine pardon alone.

The Justification of a Pardon

⁵⁷ Williston, “Does a Pardon Blot Out Guilt?,” p. 657.

⁵⁸ Emphasis upon the work of the Holy Spirit in achieving what she calls “at-Onement” with God is the principal merit of Eleonore Stump’s recent study of the atonement. Unfortunately, she knows nothing of imputed righteousness but only infused righteousness and has no place in her theory for satisfaction of divine justice.

Another controversial question, one which has seemingly divided the courts, is whether pardons are acts of mercy, and if so, what justifies such an act of clemency. H. R. T. Roberts provides a rough working explication of acting mercifully: “In all justice I am entitled to A from x, but it is *mine* to exact and I choose not to.”⁵⁹ Alwynne Smart would add that the choice is made “solely through benevolence,” and not, for example, out of constraint, self-interest, or ulterior motives.⁶⁰ Morison makes the application to executive pardons:

The institutional expression of mercy through executive clemency means . . . the partial or complete mitigation of justly imposed punishment (including the removal of the collateral consequences attendant upon a felony conviction) by the chief executive on *non-retributive* grounds, that is to say, for reasons which do not necessarily have anything to do with what a criminal justly deserves as punishment for the commission of a particular offense.⁶¹

The central question to be answered here, in Moore’s words, is this: given a retributivist theory of justice and of the role of the state, under what conditions is a pardon justified and under what conditions is it not justified?⁶² I hope to show that this question has profound theological significance.

As we have seen, early Supreme Court opinions, following English precedent, considered pardons to be acts of mercy on the part of the executive power. The landmark decision in this respect was *United States v. Wilson* (1833), in which Chief Justice Marshall wrote:

The constitution gives to the president, in general terms, ‘the power to grant reprieves

⁵⁹ H. R. T. Roberts, “Mercy,” *Philosophy* 46/178 (1971): 353.

⁶⁰ Alwynne Smart, “Mercy,” *Philosophy* 43/166 (1968): 359.

⁶¹ Morison, “Politics of Grace,” pp. 18-19.

⁶² Moore, *Pardons*, p. 9.

and pardons for offences against the United States.’ As this power had been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.

A pardon is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official, act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court (*U.S. v. Wilson*, 32 U.S. 150, 160-1(1833)).

In this opinion we see clearly the reliance on English precedent, the subsequent characterization of a pardon as an act of grace, and the interesting characterization of a pardon as a private, though official, transaction between the executive and the criminal. We shall have more to say of this last element in the sequel; for now we focus on the description of a pardon as an act of grace.

According to Humbert, “In virtue of the stress which Marshall placed upon the grace and upon the private character of the presidential act, mercy or grace became, in strict legal theory, the reason for a pardon.”⁶³ In 1927 a case came before the Supreme Court involving President Taft’s commutation of a criminal’s death sentence to life imprisonment, a commutation which the criminal, in a complex legal maneuver, claimed was invalid because he had not accepted it. Chief Justice Oliver Wendell Holmes wrote curtly,

We will not go into history, but we will say a word about the principles of pardons in the law of the United States. A pardon in our days is not a private act of grace from an individual

⁶³ Humbert, *Pardoning Power of the President*, p. 22.

happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed (*Biddle v. Perovich*, 274 U.S. 480, 486 (1927)).

In this opinion, Holmes brushes aside English precedent and appears to repudiate in no uncertain terms Marshall's characterization of a pardon as an act of grace, and his opinion has been so interpreted.⁶⁴ In fact, however, appearances are misleading: what the *Biddle* court rejects is not that a pardon is an act of grace but that it is a private transaction between the person in office and the criminal. It is the privacy of the act of grace to which Holmes objects.

Holmes' opinion was carefully explicated by the Oregon Supreme Court in 2013 in a case involving a criminal's rejection of the Governor's reprieve of his death sentence:

to the extent that this court's cases indicate that acts of clemency are ineffective if rejected, the cases suggest that the recipient has that right of rejection because grants of clemency are acts of grace. A grant of clemency may be an act of grace in some cases, but, as the Court stated in *Biddle*, under our constitutional scheme, a grant of clemency is not a '*private* act of grace from an individual *happening* to possess power,' (emphases added) (*Haugen v. Kitzhaber*, 353 Or. 715, 736 (2013)).

The Oregon court emphasizes that while pardons may be acts of grace, they are not, according to *Biddle*, private acts of grace. The court goes on to recognize that "historically, governors and presidents have granted clemency for a wide range of reasons, including reasons that may be political, personal, or 'private'. . . . Nonetheless, . . . the Governor's clemency power is far from private: It is an important part of

⁶⁴ For example, Humbert asserts that in *Biddle v. Perovich* the Supreme Court "rejected the elements of grace and of the private character of the act of pardon" (Humbert, *Pardoning Power of the President*, p. 22). In fact, only the second element was rejected.

the constitutional scheme envisioned by the framers (Ibid., 742).

On the basis of the above Supreme Court decisions, Jeffery Crouch concludes that the presidential clemency power has two equally valid rationales: “the idea that a pardon is an act of grace shown by the president to the offender and the diametrically opposed view that clemency should be granted as part of the constitutional scheme—that is, for the good of the public rather than for the benefit of the individual offender.”⁶⁵ Crouch errs in seeing these rationales as opposed rather than complementary. Pardons can be granted for either reason—perhaps even for both. Two unanimous Supreme Court decisions have established these rationales, and *Wilson* was never overruled. Noting that the former U.S. Pardon Attorney Roger Adams has referred to pardon decision-making as “all a matter of grace,” Crouch concludes that both rationales remain valid law today.⁶⁶

Pure retributivists like Kathleen Moore have, however, sharply challenged the validity of pardons issued solely on grounds of mercy.⁶⁷ These theorists argue that pardons given for any other reason than furthering justice is of necessity unjust and therefore immoral, even if legal. In particular, pardons given out of mercy violate the principles of (positive) retributive justice because in such cases the guilty do not

⁶⁵ Crouch, *Presidential Pardon Power*, pp. 28-9.

⁶⁶ Ibid. The President’s pardoning power is administered by the Office of Pardon Attorney. Samuel Morison, who works in that office, observes, “the court itself evidently does not see any inconsistency between Holmes’s dictum and the traditional view of clemency as an act of mercy, because cases decided after *Biddle* continue to describe clemency in precisely those terms” (Morison, “Politics of Grace,” p. 113). Citing a number of examples, Morison concludes, “Consequently, there is no authority for the proposition that the Supreme Court has formally rejected the conception of clemency as an act of mercy” (Ibid.).

⁶⁷ Morison, “Politics of Grace,” provides this useful bibliography***: Dan Markel, “Against Mercy,” *Minnesota Law Review* 88 (2004): 1421; Emiliios A. Christodoulis, “The Irrationality of Merciful Legal Judgment,” *Law & Philosophy* 18 (1999): 215; Daniel Statman, “Doing without Mercy,” *Southern Journal of Philosophy* 32 (1994): 331; Ross Harrison, “The Equality of Mercy,” in *Jurisprudence*, ed. Hyman Gross and Ross Harrison (*** 1992), pp. 107-25; Daniel T. Kobil, “The Quality of Mercy Strained: Wresting the Pardon Power from the King,” *Texas Law Review* 69 (1991): 569; Kathleen Dean Moore, *Pardons: Justice, Mercy, and the Public Interest* (Oxford: Oxford University Press, 1989); Jeffrie G. Murphy, “Mercy and Legal Justice,” in *Forgiveness and Mercy*, ed. Jean Hampton and Jeffrie Murphy (***1988); H.R.T. Roberts, “Mercy,” *Philosophy* 46 (1971): 352-3.

receive their just desert. On retributive theories of justice it is axiomatic that the guilty deserve punishment. To pardon someone out of mercy is therefore to subvert justice and so to act unjustly. Moreover, if pardons are acts of mercy, they may be given out arbitrarily, subverting the principle of equal treatment under the law.

Moore argues that the major shift from consequentialism to retributivism which has occurred among legal philosophers with respect to the justification of punishment needs to be accompanied by a similar shift with respect to the justification of pardon. In Moore's view retributivism *requires* pardons when there is no legal liability to punishment, and it *permits* pardons when there is liability without moral culpability. With respect to a pardon two questions control: (1) Is the offender legally liable to punishment (a lawbreaker)? If not, then he should be pardoned if convicted. (2) Is the offender morally deserving of punishment (without excuse or justification for his lawbreaking)? If he is, then punishment is obligatory; if not, the offender may be pardoned.⁶⁸ So pardons are appropriate on retributive grounds only in cases of innocence, excusable crime, justified crime, and prevention of undeserved suffering.

The claim of the pure retributivists has enormous theological implications for divine pardon.⁶⁹ For God is portrayed in the Bible as acting mercifully toward us and His pardoning our sins as an act of grace.

⁶⁸ Moore, *Pardons*, p. 125. She also permits adjustment to sentences to prevent undeserved suffering (*e.g.*, legal disabilities and shame which are not properly punishments) or to prevent an unwarranted, cruel punishment. Moore's conception of legal liability seems excessively narrow, for if a person has justification or excuse for his lawbreaking, then he is counted not guilty in our justice system and so not legally liable to punishment. In that case, pardons are required just in case a person has been mistakenly found by some court to be legally liable, that is to say, they are required to rectify injustices.

⁶⁹ See Morison's poignant observation:

"The theoretical controversy surrounding the exercise of executive clemency really only arises when . . . the president acts for reasons unrelated to the offender's just deserts. The interesting philosophical question is whether *this* sort of leniency constitutes a serious injustice of some kind. Understood in this way, the practice of executive clemency for reasons unrelated to the offender's just deserts does seem to give rise to a real dilemma, because it apparently permits a departure from the demands of justice, which, according to some theorists, renders the dispensation of mercy in a legal context inherently immoral. But this result is at least puzzling, since mercy has occupied a central place in the philosophical tradition, not merely as chief among the human virtues, but indeed as an attribute of divine perfection" (Morison, "Politics of Grace," p. 27).

“For by grace you have been saved through faith, and this is not your own doing; it is the gift of God—not the result of works, so that no one may boast” (Eph 2.8-9). “So it depends not upon man’s will or exertion, but upon God’s mercy” (Rom 9.16). Although we deserve condemnation and death, having neither excuse nor justification for our breaking of His law (Rom 1.32; 2.1-3; 3.20), God out of His great mercy has pardoned our sins and graciously reckoned us righteous. Thus, a divine pardon is, indeed, in Marshall’s words, “an act of grace.”

At the same time, the Bible portrays God as a positive retributivist with respect to justice (Exod 34.7). God’s judgement is described in the Bible as ultimately eschatological. The ungodly are “storing up wrath” for themselves for God’s final day of judgement (Rom. 2.5). Punishment imposed at that point could seemingly serve no other purpose than retribution. God, in effect, carries out what Kant deemed to be necessary for a just society about to dissolve: to execute any prisoners condemned to death.⁷⁰ In any case, the biblical view is that the wicked deserve punishment—“those who do such things deserve to die” (Rom 1.32; cf. Heb 10.29)—, so that retributive justice belongs to God’s character.

Indeed, it is plausible, I think, that retributive justice belongs essentially to God. Brian Leftow observes that “the more central and prominent an attribute is in the Biblical picture of God, the stronger the case for taking it to be necessary to being God, *ceteris paribus*: this is the only reason philosophers usually treat being omniscient or omnipotent as thus necessary.”⁷¹ It is hard to think of an attribute more

For a theological version of the argument of the pure retributivists see David Londey, “Can God Forgive Us Our Trespasses?” *Sophia* 25/1 (1986): 4–10; along with responses by Andrew Brien, “Can God Forgive Us our Trespasses?” *Sophia* 28/2 (1989): 35-42; Dean Geuras, “In Defense of Divine Forgiveness: A Response to David Londey,” *Sophia* 31/1-2 (1992): 65-77.

⁷⁰ Immanuel Kant, *The Metaphysical Elements of Justice* (New York: Bobbs-Merrill, 1965), p. 102.***

⁷¹ Brian Leftow, *God and Necessity* (Oxford: Oxford University Press, 2012), p. 412.

central and prominent in the biblical picture of God than His righteousness or justice.⁷² “Shall not the Judge of all the earth do right?” (Gen 18.25). “Is there injustice (*adikia*) on God’s part? By no means!” (Rom 9.14). It would have been inconceivable to the biblical authors that God might act unjustly.

But then God faces “the dilemma of the merciful judge:”⁷³ when a judge tries to treat an offender mercifully, either the offender *is* given the penalty he deserves (in which case he is being shown justice, not mercy) or the offender is *not* given the penalty he deserves (in which case the judge acts unjustly). Thus, a judge in his official capacity cannot exercise either pseudo-mercy or real mercy; his choice is between being just or unjust. God in His capacity of Judge acts in conformity with the strict demands of justice, so that we sinners find ourselves condemned before His bar (Rom 3.19-20).

The official remission of punishment can be justified only through pardon by the executive. Since God is both Ruler and Judge, He is as Ruler in the rather odd situation described by Blackstone of undoing His own verdict as Judge. Not that He second guesses the Judge’s determination of guilt, for He as Judge is infallible in His determination of justice. Justification should not, contrary to careless statements by some New Testament scholars, be thought to be a verdict of acquittal. The guilty verdict stands. But as Ruler God pardons us, so that whereas we were once guilty, we are now innocent before Him. God as Ruler thus does not contradict what He as Judge has determined.

But now God faces a similar dilemma to the one above: if the pardon is given by the executive to rectify some injustice, then the pardon is not an act of grace given out of mercy but is an expression of justice; but if it is given out of mercy, then the executive violates the principles of retributive justice and so is unjust. Clearly, God cannot give pardons to rectify some injustice, since His judicial condemnation of

⁷² See John Owen, *A Dissertation on Divine Justice: or, the Claims of Vindictory Justice Asserted* [1653] (London: L. J. Higham, [n.d.]).

⁷³ Moore, *Pardons*, p. 192; cf. Murphy, “Mercy and Legal Justice,” pp. ***; Roberts, “Mercy,” pp. 352-3; Smart, “Mercy,” 349-53.

sinner is perfectly just. If He pardons, it must be out of mercy. But then He would seem to be acting unjustly. But given that retributive justice belongs to God's character, it is impossible that He so act. He must give people what they deserve, on pain of acting contrary to His own nature.

Critics of the pure retributivists have argued that the demands of retributive justice can be overridden by other considerations, so that the executive who pardons out of sheer mercy is not immoral. In a recent, lengthy review of the question Samuel Morison argues that sometimes leniency is morally justified when satisfying the *prima facie* demands of retributive justice is immoral or practically impossible. He criticizes Moore's "moral rigorism," commenting,

The implications are, to put it mildly, fairly drastic. For if Moore is correct, it would seem to invalidate not only the merciful exercise of the clemency power, but also the relevant portions of the Bill of Rights, which presuppose precisely the opposite moral principle, namely that it is more important to protect the rights and liberties of innocent citizens than it is to punish even those who are likely to be guilty, and that some level of unrequited justice is thus the price worth paying for the promotion of these other, equally important social values.⁷⁴

What is striking about Morison's concerns is that they are inapplicable in God's case, since God's administration of eschatological justice will in no way infringe upon the rights and liberties of innocent citizens, so that divine justice is never unrequited, even if deferred (Matt 13.24-30; *cf.* Gen 18.22-33). Morison raises other concerns to show that the *prima facie* duty to punish retributively may not be an *ultima facie* duty. It is evident, however, that none of these concerns, such as protecting people against self-incrimination, unreasonable searches and seizures, and so on, is remotely relevant to the case of

⁷⁴ Morison, "Politics of Grace," pp. 77-8. *Cf.* Leo Zaibert's denunciation of Michael Moore's "legal moralism," which would require the state to punish every moral wrong, an impossible task which would drive one crazy (Leo Zaibert, *Punishment and Retribution* [Aldershot, Hants: Ashgate, 2006], pp. 183-5). Of course, such a task is only humanly impossible.

God's administration of justice. An omniscient deity need not rely on self-incrimination or searches and seizures to convict the guilty. Morison actually admits that "such protections are merely a concession to the contingent imperfections of human nature" but thinks that "this is not an adequate reply to the foregoing objection, because it implicitly concedes that giving the guilty what they deserve is not, after all, of greater moral worth than avoiding the punishment of the innocent."⁷⁵ But the theist need not play off the demands of positive and negative retributive justice against each other; God can be equally committed to both so far as human beings are concerned, delaying the full satisfaction of positive retributive justice while satisfying the demands of negative retributive justice in the meantime.

Morison also complains that

Moore's extravagant claim about the imposition of deserved punishment also betrays a certain air of unreality, which fails to adequately grasp the actual complexity of events encountered by practitioners in the criminal justice system. For in the practical world of 'retail' justice, a conscientious prosecutor is routinely confronted by a dizzying array of conflicting and not wholly commensurable moral demands, depending upon the nature of the particular case under consideration and the context in which it arises.⁷⁶

Again, since God does not inhabit the world of retail justice, such worries are irrelevant to His administration of justice.

Noting that it is a ubiquitous feature of the criminal justice system that for both pragmatic and ethical reasons the large majority of persons accused of a crime do *not* receive the full measure of punishment that they arguably deserve based on retributive considerations alone, Morison warns that

⁷⁵ Morison, "Politics of Grace," p. 78.

⁷⁶ *Ibid.*, p. 80.

the myopic insistence that it is a mandatory obligation to give each offender the full measure of deserved punishment would render the practice of resolving criminal charges by mutual agreement morally intolerable in most cases, except in the relatively rare instance in which a defendant pleads guilty without any expectation of receiving a reduced sentence.⁷⁷

Since God neither needs nor offers plea bargains, this limitation of divine retributive justice also falls to the side.

Turning from practical considerations to normative political theory, Morison contends that “it is also difficult to conceive any rational warrant for believing that it is the proper business of a liberal state to pursue the sort of moral objectives Moore envisions through the practice of punishment.”⁷⁸ Obviously, this concern is irrelevant to divine justice. In fact, it is telling when Morison quotes approvingly Jeffrie Murphy’s declamation, “The liberal tradition would thus view it as silly (and perhaps impious) to make God’s ultimate justice the model for the state’s legal justice; and thus any attempt to identify *criminal* with *sinner* is to be avoided.”⁷⁹ In fact, Morison states plainly, “the pursuit of the legitimate interest in securing social peace via state- sponsored legal punishment (as distinguished from divine retribution) does not entail any *prima facie* obligation to exact the full measure of morally justified punitive suffering merely because the offender deserves it.”⁸⁰ Morison thus recognizes God’s obligation to exact the full measure of morally justified punitive suffering.

Perhaps I have belabored the point unnecessarily; but Morison’s defense of pardons on grounds

⁷⁷ Ibid., p. 82.

⁷⁸ Ibid., p. 83.

⁷⁹ ***Jeffrie G. Murphy, “Retributivism, Moral Education, and the Liberal State,” 4 *Crim. Just. Ethics* 3, 6 (1985), cited by Morison, “Politics of Grace,” p. 84. Morison adds, “Murphy is surely correct that we are never in a position to play God.”

⁸⁰ Morison, “Politics of Grace,” p. 86.

of mercy is the fullest I have encountered in the literature, and yet it is stunningly irrelevant, as he recognizes, to the case of divine pardon.⁸¹ In the end Morison rejects “the implicit conflation of morality and justice, which assumes that the legitimate exercise of mercy always must be consistent with the demands of justice.”⁸² He cites George Rainbolt: “The fact that mercy counsels unjust acts on occasion does not imply that it is a vice. It only reflects the unfortunate fact that mercy and justice can conflict.”⁸³ But that is precisely the problem for the Christian theist: God’s justice and mercy are both essential to Him and so neither can be sacrificed. We can agree with Morison “that the moral basis for the merciful extension of clemency is thus whatever ‘is right and good as judged against *all* moral considerations, rather than only those of justice. *Any* pertinent moral consideration may be taken into account.”⁸⁴ One should not, indeed, simply identify morality with justice. But none of the considerations that Morison has adduced for tempering justice with mercy in the case of the state applies to God. So how can God legitimately exercise mercy if doing so is inconsistent with the demands of His justice? Morison admits that that “there is no tidy conceptual solution to the problem of reconciling justice and mercy in the abstract.”⁸⁵ He concludes that “the practice of punishment is informed by a plurality of values that may not

⁸¹ Cf. Daniel Kobil’s reservations about the view of the pure retributivists:

“Retributive concerns alone, however, do not sufficiently describe the goals of punishment. The . . . problem with the strict approach to clemency that Moore and other Kantian philosophers advocate is its presumption that retributive principles are the only justification for punishment and must be the sole guideposts in clemency decisions. The better view. . . is that deserts provide only a starting point, with utilitarian and other societal concerns establishing secondary limits on the remission of punishment generally, and in individual cases. Once a determination as to deserts has been made, other considerations such as general or specific deterrence of crime may limit both the imposition and remission of punishment” (Kobil, “Quality of Mercy Strained,” pp. 581-2).

Such concerns arise only on a human level, so that they do not serve to qualify the *prima facie* demands of divine retributive justice.

⁸² Morison, “Politics of Grace,” p. 100.

⁸³ George W. Rainbolt, “Mercy: An Independent, Imperfect Virtue,” *American Philosophical Quarterly* 27 (1990): 192, cited by *ibid.*, p. 101.

⁸⁴ Morison, “Politics of Grace,” citing Andrew Brien, “Mercy within Legal Justice,” *Social Theory & Practice* 24 (1998): 91, with emphasis added.

⁸⁵ *Ibid.*, p. 102.

be ultimately commensurable.”⁸⁶

If none of the reasons that go to justify pardons based on mercy rather than on justice apply in the case of divine pardon, then it is difficult to see how God can mercifully pardon sins; indeed, it is difficult to see how divine pardon is possible at all, since neither can it be justified on grounds of justice. What seems to be needed is a way of reconciling divine mercy and justice which justifies a pardon without sacrificing the demands of either virtue.

In fact, we seem to have backed into a persuasive argument for the conviction of Anselm and the Reformers that the satisfaction of divine justice is a necessary condition of salvation. Theologians have long debated the question of whether God could have simply pardoned our sin without Christ’s atoning death or, more broadly, the satisfaction of divine justice. Thomas Aquinas followed most of the early Church Fathers in thinking that this is possible, although less suitable for God’s purposes. Following the rise of Socinianism, most Protestant theologians, with the notable exception of Hugo Grotius, followed Anselm’s lead in holding that divine justice had to be satisfied if salvation from sin were to be possible. Our inquiry suggests the following argument in support of the necessitarian perspective:

1. Necessarily (Retributive justice is essential to God).
2. Necessarily (If retributive justice is essential to God, then God justly punishes every sin).
3. Necessarily (If God justly punishes every sin, then divine justice is satisfied).
4. ∴ Necessarily (Divine justice is satisfied.)
5. ∴ Necessarily (If some human beings are saved, divine justice satisfied).

Let me say a word about each of the premises.

⁸⁶ Ibid.

In support of (1) we have seen that the centrality and prominence of divine retributive justice in the biblical scheme supports its being essential to God. Moreover, to mention an *ad hominem* consideration, neo-Socinian opponents of penal substitution need (1) if they are to argue successfully for the injustice of penal substitution, for otherwise God may determine that it is not unjust to punish a substitute in our place. Given that there is no higher law to which God must conform, He will be bound only by His own nature in determining what is just or unjust.

The support for (2) lies in the absence of any apparent justification for pardons of sheer mercy on God's part. It is difficult to see what would justify waiving the demands of retributive justice essential God's nature. We say "justly punishes" to ensure the truth of (3), since only proportionate punishment of sins committed will satisfy the demands of retributive justice.

From the three premises, (4) follows. Divine justice is satisfied so long as no sin goes unpunished. This will be the case whether there are no human beings and, hence, no sin, or whether there are in fact sinners. (5) in turn follows, since any proposition implies a necessary truth. It also follows that if divine justice is not satisfied, then no human beings are saved; indeed, that it is impossible that any human beings are saved.

If this is right, then God's pardoning us for our sins demands the satisfaction of God's justice. This is exactly what the atonement theories of Anselm and the Reformers offer. On the Reformers' view Christ as our substitute and representative bears the punishment due for every sin, so that the demands of divine retributive justice are fully met. The demands of divine justice thus satisfied, God can in turn pardon us of our sins. God's pardon is thus predicated on Christ's satisfying for us the demands of divine retributive justice. Indeed, in a sense, such a divine pardon meets the requirements of even the pure retributivists, for given Christ's satisfaction of divine retributive justice on our behalf, nothing more is due from us. God's pardon of us is therefore required by justice. On the other hand, God's provision of Christ as our penal substitute is an active expression of God's mercy and grace, giving us what we did not deserve. The whole scheme is motivated by and justified by God's grace: "For by grace you have been

saved through faith, and this is not your own doing; it is the gift of God—not the result of works, so that no one may boast” (Eph. 2.8-9). In this passage “this,” being masculine in the Greek, does not take “faith,” which is feminine, as its antecedent; rather the antecedent is the whole salvific arrangement of salvation by grace through faith. This atoning arrangement is a gift of God to us, not based on human merit. In this sense God’s pardon of us, while consistent with divine justice, is a pardon grounded ultimately in mercy.

Can a Pardon Be Refused?

A final issue of theological significance that remains to be addressed is whether a pardon, in order to be effective, must be accepted by the criminal who is the intended beneficiary of the pardon. Courts and legal theorists have tended to answer this question based on whether a pardon is considered a private communication of the executive to the criminal or a public proclamation of the executive which is known to the court. Again, *U.S. v. Wilson* is the seminal case here.⁸⁷ Drawing upon English precedent, Chief Justice Marshall held that a presidential pardon

is the private, though official, act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court. It is a constituent part of the judicial system, that the judge sees only with judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially. A private deed, not communicated to him, whatever may be its character, whether a pardon or release, is totally unknown, and cannot be acted on (*U.S. v. Wilson*, 32 U.S. 150, 161 (1833)).

The idea here is that something that is not brought officially before the court must be treated as though it were non-existent. A pardon is just such an item, since it is not communicated by the executive to the

⁸⁷ Background: Having been convicted of robbing the mail and endangering the carrier’s life, George Wilson was pardoned by President Jackson. Facing further charges, Wilson was asked by the court whether he wished to avail himself of the pardon in order to avoid sentencing in the particular case. Wilson answered that he did not wish to avail himself of the pardon referred to.

court, but to the accused, and so remains, in effect, unknown until the accused introduces it into court. By contrast, “The reason why a court must *ex officio* take notice of pardon by act of parliament, is that it is considered as a public law; having the same effect on the case, as if the general law punishing the offence had been repealed or annulled” (Ibid., p. 163). So in the case at hand, “This court is of opinion, that the pardon in the proceedings mentioned, not having been brought judicially before the court, by plea, motion or otherwise, cannot be noticed by the judges” (Ibid.).

But Marshall went further than this. Wilson had already accepted the pardon; otherwise, he would have been executed. He was simply declining to bring the existence of the pardon to the attention of the court in another trial.⁸⁸ But Marshall held not merely that a pardon may be rendered judicially invisible by the pardonee’s refusing to plead it; he held that a pardon may be rendered ineffectual by one’s refusing to accept it. “A pardon is a deed, to the validity of which, delivery is essential, and delivery is not complete, without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him” (Ibid., p. 161).⁸⁹ Marshall cites English precedent for this opinion:

Hawkins says, § 64, ‘it will be error to allow a man the benefit of such a pardon, unless it be pleaded.’ In § 65, he says, ‘he who pleads such a pardon must produce it *sub pede sigilli*, though it be a plea in bar, because it is presumed to be in his custody, and the property of it belongs to him. Comyn, in his Digest, tit. Pardon, H, says, ‘if a man has a charter of pardon from the king, he ought to plead it, in bar of the indictment; and if he pleads not guilty, he waives his pardon.’ The

⁸⁸ See Mark Strasser, “The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution,” *Brandeis Law Journal* 41 (2002): 110-11.

⁸⁹ When is a pardon delivered? Humbert relates that In *In re DePuy*, Fed. Case No. 3,814, 7 Fed. Cas. 506 (1869), the President granted a pardon to one Moses DePuy but then rescinded it before the Marshall could delivered it to the prison warden. DePuy obtained a writ of habeas corpus and demanded release. But the federal court held that the prisoner should not be discharged because the pardon had not been delivered. In order to be delivered, the pardon had to be placed in the hands of the warden (Humbert, *Pardoning Power of the President*, pp. 67-8; cf. p. 72).

same law is laid down in Bacon's Abridgment, title Pardon; and is confirmed by the cases these authors quote.

On this view, then, failure to bring one's pardon to the attention of the court is to waive it; it becomes ineffectual.

Marshall's opinion was ratified in *Burdick v. U.S.* (1915).⁹⁰ In answer to the question, "Is the acceptance of a pardon necessary?" the court followed *U.S. v. Wilson* to the tee, since "all of the principles upon which its solution depends were there considered" (*Burdick v. U.S.*, 236 U.S. 79, 88 (1915)). Citing Marshall's words, the court declared,

That a pardon by its mere issue has automatic effect resistless by him to whom it is tendered, forcing upon him by mere executive power whatever consequences it may have or however he may regard it. . . was rejected by the court with particularity and emphasis. The decision is unmistakable. A pardon was denominated as the 'private' act, the 'private deed,' of the executive magistrate, and the denomination was advisedly selected to mark the incompleteness of the act or deed without its acceptance (*Ibid.*, p. 90).

Here a pardon is called private in order to signal "its functional deficiency if not accepted by him to whom it is tendered" (*Ibid.*).

⁹⁰ Background: In 1913 George Burdick, the city editor of the *New York Tribune*, refused to testify before a grand jury concerning his sources of information for certain stories in the *Tribune* on alleged custom frauds, on the grounds that his answers might tend to incriminate him. In order to secure Burdick's testimony, President Wilson issued "a full and unconditional pardon for all offenses against the United States" which Burdick may have committed in the matter, "thereby absolving him from the consequences of every such criminal act" (*Burdick v. U.S.*, 236 U.S. 79, 86 (1915)). Burdick remained adamant and refused to accept the pardon, so that a New York District Court found him to be in contempt. When Burdick's case was brought before the Supreme Court the following year, the Solicitor General argued that acceptance of a pardon is not a necessary condition of its efficacy.

Like the *Wilson* opinion, the *Burdick* opinion considered a pardon to be an act of grace. But the court took a realistic view:

the grace of a pardon, though good its intention, may be only in pretense or seeming; in pretense, as having purpose not moving from the individual to whom it is offered; in seeming, as involving consequences of even greater disgrace than those from which it purports to relieve.

Circumstances may be made to bring innocence under the penalties of the law. If so brought, escape by confession of guilt implied in the acceptance of a pardon may be rejected, —preferring to be the victim of the law rather than its acknowledged transgressor, — preferring death even to such certain infamy (*Ibid.*, pp. 90-1).

The pardon in *Burdick*'s case was really intended to wrest testimony from him, not to benefit him personally, and so might be thought of as a pretense; and in accepting the pardon *Burdick* would be implicitly admitting his guilt, so that his pardon, in bringing this shame upon him, might only seem to relieve his predicament. As the court notes, an innocent man might well reject the pardon and suffer the consequences rather than implicitly confess to being guilty of a crime he did not commit. All this goes to undergird the right of the accused to refuse a pardon proffered him.

In 1927, the Supreme Court considered the case of a convicted criminal who, in order to claim wrongful imprisonment, was disputing the commutation of his death sentence to life imprisonment. As we have seen, Chief Justice Holmes curtly declared, "A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed" (*Biddle v. Perovich*, 274 U.S. 480, 486 (1927)). Marshall would, of course, have agreed with Holmes that a pardon is part of our constitutional scheme. So wherein lies their disagreement?

Holmes seems to think that pardons are granted solely out of consideration for the public welfare.

He repeatedly returns to this theme in the opinion:

Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent determines what shall be done.

The opposite answer . . . would deprive him [the President] of the power in the most important cases and require him to permit an execution which he had decided ought not to take place unless the change is agreed to by one who on no sound principle ought to have any voice in what the law should do for the welfare of the whole (*Ibid.*, pp. 486, 487).

The idea that pardons are granted always for the public welfare is, however, is patently false. While some pardons are granted for the sake of the public welfare, such as President Ford's pardon of Richard Nixon, other pardons have notoriously been granted for considerations wholly apart from the public good.⁹¹ Moreover, as a number of legal theorists have remarked, the fact that a pardon has been granted for the public welfare is irrelevant to whether it requires acceptance in order to be efficacious.⁹²

⁹¹ Crouch draws attention to President Clinton's notorious pardons of members of the Puerto Rican nationalist group FALN in order to curry favor with Puerto Rican voters in New York City for his wife's senate campaign and of Marc Rich, whose ex-wife had donated a half million dollars to Clinton's presidential library (Crouch, *Presidential Pardon Power*, pp. 3-4). Crouch says that since Watergate presidents been more willing to use their pardoning power, not merely as an act of grace or for the public welfare, as the framers of the Constitution intended, but also as a political weapon to close investigations of their allies or to reward political contributors. See also Kobil, "Quality of Mercy Strained," p. 610, for many other examples.

⁹² See, *e.g.*, Strasser, "Limits of the Clemency Power," p. 110, who comments on the *Wilson* opinion,

"Although the Court's analysis of when a pardon becomes effective was offered in a context in which the pardon was viewed as an act of grace, the same analysis might have been offered had the Court instead suggested that pardons are to promote the public good—the Court might still have maintained that the pardonee would have to bring the pardon to the attention of the court in order for it to be effective."

Holmes does give some additional argument for why a commutation of sentence ought not to be refusable by the convicted criminal:

No one doubts that a reduction of the term of an imprisonment or the amount of a fine would limit the sentence effectively on the one side and on the other would leave the reduced term or fine valid and to be enforced, and that the convict's consent [*sic*] is not required.

When we come to the commutation of death to imprisonment for life it is hard to see how consent has any more to do with it than it has in the cases first put (*Ibid.*, pp. 486-7).

The claim here is that if the original sentence was justified and enforced without the criminal's consent, then the reduced sentence is automatically implicit in it and therefore requires no consent from the criminal. This argument, however persuasive for commutations and reprieves, does not apply *pari passu* to pardons. From the fact that a man deserves imprisonment of, say, 30 years, it does not follow that he deserves no imprisonment.⁹³ On the contrary, from the fact that he deserves an imprisonment of 30 years, it follows that he deserves some imprisonment. Therefore, pardons are not implicit in sentences issued. Moreover, pardons may be issued prior to conviction and sentencing (not to mention after sentence has been served) and in such cases are independent of criminal sentences.⁹⁴ It is noteworthy that the court in *Biddle* did not overturn *Burdick* but concluded merely that the reasoning of *Burdick* "is not

By the same token, even if a pardon is an act of grace, "there is nothing inherent in the concept of private grace which suggests that the individual benefited must voluntarily accept that grace in order for it to be effective" (*Ibid.*)

⁹³ To illustrate: from the fact that there are seven apples on the table, it follows that there are three apples on the table. But it does not follow that there are no apples on the table; quite the opposite, in fact. Since a pardon involves no punishment, it cannot be implied in any punishment to be meted out.

⁹⁴ Caplow comments on the *Burdick* opinion: "Noting that a retrospective pardon might eradicate guilt, the Court recognized that a pardon accepted without any adjudication may effectively constitute a confession of guilt and thus no one could be forced to accept one" (Caplow, "Governors! Seize the Law," p. 303, note 40).

to be extended to the present case” (Ibid., p. 488).⁹⁵

The key phrase in Holmes’ opinion seems to be “the determination of the ultimate authority.” Holmes sees a pardon as a unilateral determination of the sovereign authority which cannot be gainsaid. Similarly, the Oregon Supreme Court said,

We recognize that, historically, governors and presidents have granted clemency for a wide range of reasons, including reasons that may be political, personal, or ‘private,’ and that many such decisions—such as Governor Kitzhaber’s decision here—may be animated by both public and private concerns. Nonetheless, the executive power to grant clemency flows from the constitution and is one of the Governor’s only checks on another branch of government. As part of the system of checks and balances, the Governor’s clemency power is far from private: It is an important part of the constitutional scheme envisioned by the framers (*Haugen v. Kitzhaber*, 353 Or. 715, 742 (2013)).

Here the concern with public welfare recedes; rather the concern is with the executive’s power in checking the courts. Again, this concern is not always relevant to pardons, however, since pardons may be and have been issued prior to conviction and sentencing. Moreover, the person on whom a pardon is bestowed tends to get run over by the government in this scenario. The worries raised in *Burdick* are just ignored. A potential pardonee who believes himself innocent may want his day in court, rather than to be summarily pardoned, whether or not accepting a pardon is thought to imply guilt.⁹⁶

⁹⁵ Humbert comments, “The decision . . . does not overrule the decision in the *Burdick* case to the effect that a full pardon must be accepted, but the later decision limits the doctrine of the earlier case by holding that commutations do not require acceptance” (Humbert, *Pardoning Power of the President*, p. 69). Similarly, in *Haugen v. Kitzhaber* the Oregon Supreme Court limited its opinion to reprieves, stating, “We need not--and do not--decide whether a *pardon* must be accepted to be valid. We note only that none of the definitions of ‘reprieve’ contains a similar notion of acceptance” (*Haugen v. Kitzhaber*, 353 Or. 715, 724 (2013)).

⁹⁶ It is interesting that prior to his pardon of Richard Nixon, President Ford, cognizant of *Burdick*’s ruling, sent a secret emissary to Nixon to ensure that he was willing to accept both the pardon and the guilt implied by it. Nixon said that he was so willing.

In any case, the courts remain unclear on whether a pardon requires acceptance in order to be efficacious.⁹⁷ Fortunately, or perhaps unfortunately, this question is unlikely to come before the Supreme Court today, since pardons are virtually always given in response to applicants to the Office of Pardon Attorney for a pardon and not bestowed upon unwitting criminals. People who receive pardons are those who want them.

The theological analogue to this question is whether a divine pardon must be accepted in order to be efficacious. Taking divine pardons to be acts of grace does not serve to resolve this question, since theologians have differed on whether grace is intrinsically efficacious and so irresistible by him upon whom it is bestowed or whether grace is extrinsically efficacious and so requires the free consent of the creaturely will in order to produce its effect. The concern with checks and balance is hardly appropriate to the divine government, since God is both Supreme Judge and Executive. Divine pardons are never bestowed in order to rectify judicial injustices but must be acts of grace motivated by mercy and love. Given God's love for those He pardons, God's pardons are intensely personal and in this sense private. Though official acts, they are motivated out of concern for the individual and not just for the general welfare. Whether a divine pardon requires acceptance by the person to whom it is granted is going to depend more on theological considerations such as freedom of the will and the nature of divine grace than upon the nature of a pardon.

In any case, what we have not mentioned thus far is that pardons may be conditional, in which case they undisputedly depend for their effect upon the pardonee's agreeing to the conditions of the

⁹⁷ The situation remains the same as when Humbert concluded that the President "cannot under existing law make a full pardon effective without the consent of the prisoner. The latter must be willing to receive and accept a full pardon before it can be put into effect" (Humbert, *Pardoning Power of the President*, p. 135).

proffered pardon.⁹⁸ While the President may not demand just any condition for a pardon—for example, to vote forever after for the President’s political party—, nevertheless the conditions which the President may lay down for a pardon are endless. In fact, no federal court has ever held any condition invalid.⁹⁹ A divine pardon, then, can be granted on the conditions of repentance and faith.¹⁰⁰ If God desires people to come freely into His Kingdom, then He may offer His pardon to everyone who will freely accept it. Anyone who refuses a divine pardon therefore remains guilty before God’s bar and so liable to punishment.

Concluding Remarks

We return, at length, to the Socinian objection to penal substitutionary atonement theories. Is the satisfaction of divine justice incompatible with God’s forgiveness of our sins? We have seen that Socinus and contemporary neo-Socinian thinkers err in thinking of God as a party to a personal dispute, such as a creditor to whom a debt is due, and neglecting God’s role as Judge and Ruler. Given God’s role(s) in the government of the world as described in the New Testament, divine forgiveness is much more akin to a legal pardon than to remission of a debt or the forgiveness of an offense. So can God pardon us of our sins if Christ has satisfied divine justice by being vicariously punished for those sins?

Pardons granted on grounds of innocence and wrongful conviction already show that a pardon is

⁹⁸ *Ex parte Wells*, 59 U.S. 307, 314 (1855). See comment by Humbert, *Pardoning Power of the President*, p. 72: “before conditional pardons or conditional commutations go into effect, physical delivery takes place and actual acceptance has been and is required by providing for the signature of the prisoner and by obtaining it on a form of acceptance which is embodied in the warrant of clemency;” cf. pp. 23-4.

⁹⁹ Schoenburg, “Clemency, War Powers, and Guantánamo,” p. 928.

¹⁰⁰ Humbert, *Pardoning Power of the President*, pp. 74-5, explains that in a conditional pardon the conditions can be either precedent or subsequent. If the conditions are precedent, the pardon becomes operative when the recipient has fulfilled the conditions, but not until then. If the conditions are subsequent, the pardon takes effect upon delivery and acceptance but becomes void upon the violation of the specified conditions. Both precedent and subsequent conditions have theological analogues with respect to justification and perseverance.

wholly compatible with the demands of justice being satisfied.¹⁰¹ Pardons to achieve remedial justice do not imply the guilt of the person involved and his failure to satisfy the demands of justice. Indeed, quite the opposite is the case. Moreover, the vast majority of pardons are granted *after* the criminal's sentence has been fully paid. The U.S. Office of Pardon Attorney will not even permit applications for a presidential pardon until at least five years have elapsed since the sentence of the criminal has been fully satisfied. A pardon in such a case does not imply that the pardonee has failed to satisfy justice's demands. Even though the convicted person is no longer liable to punishment, a pardon serves to restore to him all his civil rights voided by his conviction. Similarly, a divine pardon serves to bestow upon us the full rights and privileges of a child of God, such as adoption into God's family (Eph 1.5), an inheritance in the heaven (I Pet 1.4), citizenship in God's Kingdom (Phil 3.20), access to the Father (Rom. 5.2), and so on (all, interestingly, legal notions). Indeed, we have seen that precisely because Christ has borne the punishment for our sins, God can be both just and the justifier of him who has faith in Jesus (Rom 3.26). Because God's justice has been fully satisfied, God can pardon us on the basis of Christ's sacrifice without prejudice to His justice. Paul says, "when you were dead in trespasses. . . , God made you alive together with him, when he forgave us all our trespasses, erasing the record that stood against us with its legal demands. He set this aside, nailing it to the cross" (Col 2.13-14). Forgiveness in this legal sense is based on the fact that the penalty has been fully paid and therefore we may be pardoned.

Because it is Christ and not we who has discharged the sentence for our sins, our guilt is not expiated unless and until we receive God's pardon. In contrast to the criminal who has fulfilled his sentence, we remain in our state of judicial condemnation until we accept the pardon offered us by God. If anyone refuses the pardon offered by God, then Christ's sacrifice avails him nothing, for he has rejected the satisfaction of God's justice wrought by Christ. The necessity of accepting God's pardon is especially evident if it is conditional on repentance and faith, for apart from fulfillment of its conditions the pardon is ineffectual.

¹⁰¹ See discussion by Weihofen, "The Effect of a Pardon," pp. 178-9.

A divine pardon is rooted in God's grace, for it is by His mercy that God determines to supply a satisfaction of His justice that we might in turn be pardoned. Stump realizes that the penal substitution theorist will insist that "God's justice precludes his overlooking the debt and that therefore he has shown mercy and forgiveness. . . by he himself paying the debt owed him."¹⁰² Her response falters at this point; rather than showing that such an act does not count as mercy and forgiveness, Stump instead turns to a different Socinian objection, namely, that it would be unjust for God to punish an innocent person like Christ. She thereby fails to sustain her objection that God's legally pardoning us on the basis of Christ's payment does not plausibly count as mercy and forgiveness of sins. As for the justice of God's punishing a substitute in our place, that is a discussion for another day.¹⁰³¹⁰⁴

¹⁰² Ibid.

¹⁰³ See my *Elements of the Atonement*, Cambridge Elements of Philosophy of Religion (Cambridge: Cambridge University Press, forthcoming).

¹⁰⁴ I am grateful to Dr. E. Descheemaeker of the University of Edinburgh School of Law for helping to direct me to legal literature on pardon and to Shaun McNaughton at Brown & Streza, LLP for help in obtaining court opinions.