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IS IT WRONG TO COMMUTE DEATH ROW? RETRIBUTION, ATONEMENT, AND MERCY

STEPHEN P. GARVEY*

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INTRODUCTION

When Governor George Ryan commuted the death sentences of every inmate on Illinois' death row,¹ the reactions were predictable. Death penalty opponents applauded the Governor's action.² For them, the system of capital punishment in Illinois was broken and sorely in need of repair.³ Indeed, at the time of the Governor's

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1. The Governor commuted the death sentences of three inmates to imprisonment of forty years and 164 inmates to life imprisonment without parole. See Maurice Possley & Steve Mills, *Clemency for All*, CHI. TRIB., Jan. 12, 2003, § 2, at 1. He pardoned four other death-row inmates whom he believed had been wrongfully convicted. See *id.* The largest single grant of clemency prior to Governor Ryan's was that of Governor Richard Celeste, who granted clemency to eight of the 109 inmates on Ohio's death row in 1991. See Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, 298 (1993).

2. See, e.g., Steve Mills & Maurice Possley, *Clemency Adds Fuel to Death Penalty Debate*, CHI. TRIB., Jan. 13, 2003, § 1, at 1 (quoting officials from the Innocence Project, the Center for Death Penalty Litigation, and the NAACP).

3. The claim that Illinois' capital sentencing system was "broken" echoes the title of the recent study by James Liebman and his colleagues analyzing the rate of legal error in capital cases and the sources of such error. See James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995*, at 1 (2000) [hereinafter Liebman et al., *Broken*

commutations, an inmate sentenced to death in Illinois was more likely to be exonerated than executed.⁴ Some predicted the Governor's action might even prompt smaller states to abandon the death penalty.⁵ In an era when granting clemency to any death-row inmate is a rare event,⁶ the Governor showed unusual political courage, albeit on the eve of his departure from office.

Prosecutors and victims' families lamented the Governor's decision.⁷ Although the Governor earlier said he would consider granting clemency to everyone on Illinois' death row,⁸ nine days of emotionally charged hearings with victims' families reportedly pushed him away from the idea.⁹ Thus, far from being courageous, the Governor's final action was seen in some quarters as a betrayal.¹⁰ It would have been one thing to commute some, or perhaps even many, death sentences after a searching inquiry into the facts of each case. But blanket commutation was another thing altogether.¹¹ Some victims said the decision had denied them the closure they sought in execution.¹²

The Illinois Constitution provides that the "Governor may grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper."¹³ A letter from some

System], available at <http://justice.policy.net/cjedfund/jpreport/liebman2.pdf>. Liebman and his colleagues found that capital convictions and sentences are reversed at an average rate of sixty-eight percent. See James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1850 (2000) [hereinafter Liebman et al., *Capital Attrition*].

4. At the time of Governor Ryan's decision, thirteen death-row inmates had been exonerated; twelve had been executed. See Governor George Ryan, Speech at Northwestern University College of Law (Jan. 11, 2003) (on file with the North Carolina Law Review).

5. See, e.g., Mills & Possley, *supra* note 2 (citing expert opinions stating that smaller states may abandon the death penalty in light of the Governor's action).

6. See, e.g., Radelet & Zsembik, *supra* note 1, at 304 (stating that "[c]lemency in a capital case is extremely rare, particularly in light of the high number of inmates whose death row status makes them eligible for such mercy").

7. See John Keilman, *Murder Victims' Families Feel Twice Betrayed by Ryan*, CHI. TRIB., Jan. 12, 2003, § 1, at 17; Mills & Possley, *supra* note 2.

8. See Steve Mills, *Life-or-Death Debate Rages at Hearings*, CHI. TRIB., Oct. 16, 2002, § 1, at 1.

9. See Christi Parsons & Steve Mills, *Ryan Backs Off Blanket Clemency*, CHI. TRIB., Oct. 23, 2002, § 1, at 1.

10. See Keilman, *supra* note 7; Abdon M. Pallasch et al., *Gov. Ryan Empties Death Row of All 167*, CHI. SUN-TIMES, Jan. 12, 2003, at 2.

11. See Keilman, *supra* note 7.

12. See *id.*

13. ILL. CONST. art. V, § 12. For overviews of the rules and procedures governing executive clemency in various jurisdictions, see James R. Acker & Charles S. Lanier, *May God—or the Governor—Have Mercy: Executive Clemency and Executions in Modern*

four hundred law professors assured Governor Ryan that mass commutation was well within his authority.¹⁴ Indeed, no one seriously claims the Governor lacked the legal authority to act as he did.¹⁵ Nor is legal authority the question I wish to pursue here. The question I pursue is that of moral legitimacy.

I should emphasize at the outset that I do not wish to assess the morality of the reasons the Governor himself offered in defense of his action. Nor do I assess the morality of his action *tout court*. My focus is on the morality of mercy, which is the virtue commonly associated with the exercise of clemency. The question I pursue therefore comes down to this: Is it morally legitimate for a governor to use the clemency power to commute the death sentences of everyone on a state's death row in the name of mercy?¹⁶ Or to put it another way, can mercy morally justify blanket commutation?

Mercy is typically defined in relation to retribution. Retribution demands that an offender receive the punishment he deserves, no more and no less. Mercy is understood as the partial or complete remission of deserved punishment. Mercy therefore tempers the demands of retributive justice.¹⁷ I argue below that retribution can

Death-Penalty Systems, 36 CRIM. L. BULL. 200, 216–29 (2000); Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 413, 427–40 (1999).

14. See John McCormick, *Letter Prods Ryan on Clemency*, CHI. TRIB., Dec. 30, 2002, § 2, at 1.

15. The Supreme Court of Illinois recently rejected a challenge to the Governor's action in *People ex rel. Madigan v. Snyder*, 804 N.E.2d 546 (Ill. 2004). The court nonetheless took the occasion to share its view that the clemency power was intended to be used "to prevent miscarriages of justice in individual cases." *Id.* at 560. The court made no mention of mercy.

16. I should also emphasize that my focus is on what role, if any, mercy may legitimately play within a theory of punishment. I do not consider the role mercy may legitimately play within a theory of political morality. I do not, for example, ask if a mass commutation like that of Governor Ryan can be justified on the ground that it might serve as a spark to a healthy democratic debate over the morality of capital punishment or as a way to spur legislative reform of the process through which it is administered. See Mills & Possley, *supra* note 2 (reporting that "death penalty opponents hope that once the immediate fury among supporters of capital punishment fades, Ryan's actions and the many reforms he had urged will prompt a greater debate on one of the nation's most divisive social issues"). Some of Governor Ryan's remarks suggest that spurring reform was at least one of the reasons for his decision. See Possley & Mills, *supra* note 1 ("Asked if he considered that he had saved so many lives, Ryan told a reporter, 'I never thought of that . . . My goal was to improve a broken system in Illinois.'").

17. This way of framing the problem defines mercy in relation to positive retributive justice, according to which the state is obligated to impose on an offender a specific and identifiable punishment that he deserves, no more and no less. Justice and mercy necessarily conflict on this view because justice means giving an offender the punishment

embrace one or both of two distinct theories of mercy.¹⁸ But neither of these theories can justify commuting the sentences of everyone on death row.

If retributive theories of mercy were the only ones available, then decisions like those of Governor Ryan would be difficult to justify in the name of mercy. But they are not the only theories

he deserves, while mercy means giving him less punishment than he deserves. The problem can be framed in at least three other ways.

First, justice is understood here to be non-disjunctive—it requires a specific and identifiable punishment. Others have argued, however, that justice is disjunctive—it specifies a range of deserved punishments, with a high end and a low end. On this view, any punishment less than the maximum justice allows can be characterized as merciful. Moreover, any such punishment is not only merciful, but also just, insofar as it falls within the range of deserved punishments. Accordingly, the conflict between mercy and justice evaporates. See Nathan Brett, *Mercy and Criminal Justice: A Plea for Mercy*, 5 CAN. J.L. & JURIS. 81, 94 (1992); H. Scott Hestevold, *Justice to Mercy*, 46 PHIL. & PHENOMENOLOGICAL RES. 281, 281 (1985). But see Andrew Brien, *Mercy and Desert*, 20 PHIL. PAPERS 193, 196–97 (1991) [hereinafter Brien, *Mercy and Desert*] (rejecting this argument for reconciling mercy and justice because the concept of “disjunctive desert” on which it rests is “incoherent”); George Rainbolt, *Mercy: In Defense of Caprice*, 31 NOÛS 226, 229–30 (1997) (“It seems that one cannot deserve two or four years for a crime. This seems as odd as a student whose work in a class deserves either an A or a C.”).

Second, mercy might be defined in relation to negative retributive justice, according to which the state has the right, but not the obligation, to impose on an offender the punishment he deserves. On this view, mercy and justice do not conflict, because the state does not act unjustly when it shows mercy. It has simply waived a right; it has not violated any duty. See Sterling Harwood, *Is Mercy Inherently Unjust?*, in CRIME AND PUNISHMENT 464, 464–65 (Michael J. Gorr & Sterling Harwood eds., 1995) (defending this view); Jeffrie G. Murphy, *Mercy and Legal Justice*, in JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 162, 175–76 (1988) (defending this view in the context of the “private law paradigm”). However otherwise attractive, this approach would seem vulnerable to all the criticisms directed more generally at the negative retributivism on which it depends. See, e.g., MICHAEL S. MOORE, PLACING BLAME: A THEORY OF CRIMINAL LAW 90–91 (1997) (criticizing negative retributivism).

Third, mercy might be defined not in relation to justice, but in relation to power. Thus one might say that “an act of mercy is an action in a relationship of vulnerability and power in which a powerful person intentionally reduces or removes altogether a threat to or the present suffering of another.” Andrew Brien, *Mercy Within Legal Justice*, 24 SOC. THEORY & PRAC. 83, 85 (1998) [hereinafter Brien, *Mercy Within Legal Justice*]; see also Rainbolt, *supra*, at 228 (“No analysis which defines mercy in terms of the relief of *deserved* suffering can account for all cases of the virtue.”). On this view, too, mercy and justice need not conflict. If a person has the power to reduce another’s suffering, his doing so is an act of mercy. But if justice required him to reduce the other’s suffering, his act is also a just one. A single act can therefore be both just and merciful. But where, as here, the focus is on the role of mercy within the context of law, mercy is better understood in relation to justice, not power. After all, the same act can be both merciful and just only if an actor has the power to act unjustly. Surely, however, the law cannot confess to giving those who act in its name the power to act in an unjust manner, or at least in a manner they know to be unjust.

18. As will become clear below, only one of these theories qualifies as a true theory of mercy. The other is a theory of justice dressed up as mercy. See *infra* Part II.A.

available. On the contrary, I want to suggest yet another theory of mercy, one which comes into view only when we abandon retribution in favor of a different theory of punishment, which I call punishment as atonement. According to this theory, deserved punishment is understood not as an end in itself (as in retribution) but as a necessary step in a process through which an offender makes amends for his wrongdoing and thereby becomes reconciled with those he has wronged. Unlike either of the theories associated with retribution, this alternative theory of mercy can offer a plausible justification for commuting death row.

My argument unfolds in three parts. Part I introduces the concept of mercy.¹⁹ It describes mercy's relationship to retributive

19. The literature on mercy is large and growing. For examples of literature discussing mercy, see generally KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* (1989); Brett, *supra* note 17; Brien, *Mercy and Desert*, *supra* note 17; Andrew Brien, *Mercy, Utilitarianism and Retributivism*, 24 *PHILOSOPHIA* 493 (1995); Brien, *Mercy Within Legal Justice*, *supra* note 17; Claudia Card, *On Mercy*, 81 *PHIL. REV.* 182 (1972); Emiliios A. Christodoulidis, *The Irrationality of Merciful Legal Judgment: Exclusionary Reasoning and the Question of the Particular*, 18 *LAW & PHIL.* 215 (1999); Ross Harrison, *The Equality of Mercy*, in *JURISPRUDENCE: CAMBRIDGE ESSAYS* 107 (Hyman Gross & Ross Harrison eds., 1992); Harwood, *supra* note 17; H. Scott Hestevold, *Disjunctive Desert*, 20 *AM. PHIL. Q.* 357 (1983); Hestevold, *supra* note 17; Carla Ann Hage Johnson, *Entitled to Clemency: Mercy in the Criminal Law*, 10 *LAW & PHIL.* 109 (1991); Carla Johnson, *Seasoning Justice*, 99 *ETHICS* 553 (1989); Stephen Kershnar, *Mercy, Retributivism, and Harsh Punishment*, 14 *INT'L J. APPLIED PHIL.* 209 (2000); John Kleinig, *Mercy and Justice*, 44 *PHIL.* 341 (1969); Jeffrie G. Murphy, *Forgiveness, Mercy, and the Retributive Emotions*, 7 *CRIM. JUST. ETHICS*, Summer/Fall 1988, at 3; Murphy, *supra* note 17; Jeffrie G. Murphy, *Repentance, Punishment, and Mercy*, in *JEFFRIE G. MURPHY, CHARACTER, LIBERTY, AND LAW: KANTIAN ESSAYS IN THEORY AND PRACTICE* 59 (1998) [hereinafter Murphy, *Repentance*]; Martha C. Nussbaum, *Equity and Mercy*, 22 *PHIL. & PUB. AFF.* 83 (1993); A.T. Nuyen, *Straining the Quality of Mercy*, 23 *PHIL. PAPERS* 61 (1994); Lyla O'Driscoll, *The Quality of Mercy*, 21 *S.J. PHIL.* 229 (1983); George Rainbolt, *Mercy: An Independent, Imperfect Virtue*, 27 *AM. PHIL. Q.* 169 (1990) [hereinafter Rainbolt, *An Imperfect Virtue*]; Rainbolt, *supra* note 17; H.R.T. Roberts, *Mercy*, 46 *PHIL.* 352 (1971); Mary Sigler, *The Story of Justice: Retribution, Mercy, and the Role of Emotions in the Capital Sentencing Process*, 19 *LAW & PHIL.* 339 (2000); N.E. Simmonds, *Judgment and Mercy*, 13 *OXFORD J. LEGAL STUD.* 52 (1993); Alwynne Smart, *Mercy*, 43 *PHIL.* 345 (1968); Daniel Statman, *Doing Without Mercy*, 32 *S.J. PHIL.* 331 (1994); James Sterba, *Can a Person Deserve Mercy?*, 10 *J. SOC. PHIL.* 11 (1979); Steven Sverdlik, *Justice and Mercy*, 16 *J. SOC. PHIL.* 36 (1985); P. Twambley, *Mercy and Forgiveness*, 36 *ANALYSIS* 84 (1976); Nigel Walker, *The Quiddity of Mercy*, 70 *PHIL.* 27 (1995); George Rainbolt, *Mercy, Justice and the Death Penalty* (May 19, 2003) [hereinafter Rainbolt, *Mercy and the Death Penalty*] (unpublished manuscript, on file with the North Carolina Law Review).

Jeffrie Murphy deserves much of the credit for the recent interest in mercy among lawyers and legal philosophers. His work draws on that of Alwynne Smart, Claudia Card, and P. Twambley. For critical reviews of Murphy's analysis of mercy, see generally Andrew Brien, *Saving Grace*, 9 *CRIM. JUST. ETHICS*, Winter/Spring 1990, at 52; R.A. Duff, *Justice, Mercy, and Forgiveness*, 9 *CRIM. JUST. ETHICS*, Summer/Fall 1990, at 51;

justice and explains why mercy is reputed to be a problematic and puzzling virtue. Part II presents two accounts of the role of mercy within a theory of retributive punishment, arguing that neither can readily justify commuting death row in mercy's name. Part III presents an account of the role of mercy within a theory of punishment as atonement, arguing that this account, unlike either of the retributivist accounts, can successfully defend a governor's decision to commute death row in mercy's name.

I. MERCY'S DILEMMA

We usually think of mercy as a virtue whose exercise tempers the demands of justice. We also usually think of mercy as a gift or act of grace. But the fact that mercy is supposed to be all these things leads to a dilemma and calls into question mercy's status as a genuine virtue.

First, consider the fact that mercy tempers justice. Retributive justice obligates the state to punish an offender because and to the extent, but only to the extent, he deserves to be punished.²⁰ The punishment an offender deserves is usually thought to be some function of his culpability or of his culpability combined with the harm he has caused.²¹ Either way, the state cannot shirk its obligation to do justice. It must impose on each offender the punishment he deserves. But if the state extends mercy to an offender, it has not punished him to the full extent he deserves to be punished. In order to temper justice, mercy must therefore tamper with it.²² But if that is so, if mercy countenances injustice, then why should we believe mercy is a virtue?²³

Second, consider the fact that mercy is a gift. As such, mercy is

Herbert Morris, *Murphy on Forgiveness*, 7 CRIM. JUST. ETHICS, Summer/Fall 1988, at 15; Joshua Dressler, *Hating Criminals: How Can Something That Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448 (1990) (book review).

20. More precisely, positive retributivists believe the state has an obligation to punish those who deserve to be punished. See R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, in 20 CRIME & JUSTICE: A REVIEW OF RESEARCH 1, 7 (Michael Tonry ed., 1996). Negative retributivists believe the state has a right to punish those who deserve to be punished but it has no obligation to do so. See *id.*

21. Compare Larry Alexander, *Crime and Culpability*, 5 J. CONTEMP. LEGAL ISSUES 1, 30 (1994) (arguing that desert depends on culpability alone), with Michael S. Moore, *The Independent Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237, 280-81 (1994) (arguing that desert depends on culpability and harm).

22. See Murphy, *supra* note 17, at 167 ("Temperings [of justice] are tamperings [with justice].").

23. See Rainbolt, *supra* note 17, at 226 (describing this problem as the "dilemma of mercy").

thought to be free from the demands of equality or equal treatment. Imagine, for example, two defendants similarly situated in all relevant respects. Both have been sentenced to death, which is (let us assume) the punishment each deserves. If a governor elects to show mercy to one, but not to the other, he has treated them unequally. But this unequal treatment provides the unlucky defendant with no grounds for complaint. He has been assigned the punishment he deserves, and so long as we believe mercy is a gift to which no one is entitled, it does not matter that one offender has been treated unequally compared to the other. But if that is so, if mercy countenances unequal treatment, then why, once again, should we believe mercy is a virtue?²⁴

In short, we say that mercy is a virtuous gift that tempers the demands of justice. Yet it turns out that mercy conflicts with justice and equality. But what kind of virtue does *that*? Common intuitions about mercy therefore give rise to a dilemma: on the one hand, we believe mercy is a virtue, but on the other, we are left wondering what kind of virtue mercy can be if it conflicts with justice and equality.

This way of framing the dilemma suggests two ways out of it. First, one could argue that mercy remains a virtue because it does not in fact conflict with justice or equality. Second, one could argue that mercy remains a virtue despite conflicting with justice and equality. These two answers to mercy's dilemma, both of which locate mercy within a retributive theory of punishment, generate what I will call retribution's two theories of mercy.

II. RETRIBUTION'S MERCY

Retribution's first theory of mercy asserts that mercy does not in fact conflict with justice or equality. Its second theory asserts that mercy is a virtue despite conflicting with justice and equality. For reasons given below, I call the first theory *mercy as equity* and the second *mercy as imperfect obligation*. Whatever their intrinsic merits, neither theory can provide a very convincing justification for a governor's decision to commute the sentences of everyone on death row in the name of mercy.

A. *Mercy As Equity*

One approach to the dilemma of mercy sees mercy as a way of remedying instances of injustice inevitably arising within any criminal

24. See *id.* at 227 (describing this problem as the "problem of relevant difference").

justice system. This approach begins from the premise that justice, including retributive justice, is achieved in law through rules. For example, the fair application of the rules for administering the death penalty would ideally separate out the guilty from the innocent and those who deserve death from those who do not. Securing justice is therefore a simple matter of following the rules.

But the idea that justice can be realized through rules has at least two problems. The first is practical. Sometimes the rules are not followed. Sometimes the process designed to separate the guilty from the innocent breaks down, as sometimes does the process intended to separate those who deserve death from those who do not. These breakdowns have many causes. Prosecutors sometimes decide, consciously or unconsciously, to seek the death penalty because of the defendant's or victim's race,²⁵ despite their obligation to seek impartial justice.²⁶ They also sometimes suppress evidence pointing to a suspect's actual or legal innocence,²⁷ despite their constitutional obligation to turn over such evidence.²⁸ Defense lawyers sometimes do a poor job defending their clients,²⁹ despite their obligation to render effective assistance.³⁰ When these failures occur, the right

25. See, e.g., David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 app. B at 1742-44 (1998) (collecting all then-available studies examining the influence of race in capital sentencing). For the latest published work of Baldus and his colleagues examining the influence of race in Nebraska's capital sentencing system, see generally David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999)*, 81 NEB. L. REV. 486 (2002).

26. See ABA STANDARDS FOR CRIMINAL JUSTICE Standard 3-1.2(c) (1993) ("The duty of the prosecutor is to seek justice, not merely convict.").

27. See, e.g., Liebman et al., *Broken System*, *supra* note 3, at 40 (noting that nineteen percent of the reversals of capital convictions or sentences in state court and eighteen percent of those in federal court were due to prosecutorial failure to disclose exculpatory evidence or other forms of prosecutorial misconduct).

28. See, e.g., *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

29. See, e.g., Liebman et al., *Capital Attrition*, *supra* note 3, at 1839-41 (noting that thirty-nine percent of the reversals of capital convictions or sentences in state court and twenty-seven percent of those in federal court were due to incompetent lawyering and ineffective assistance of counsel); see also Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1837 (1994) (describing the "pervasiveness of deficient representation" in capital cases).

30. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (articulating the prevailing standard governing Sixth Amendment claims of ineffective assistance of counsel); ABA STANDARDS FOR CRIMINAL JUSTICE Standard 4-1.2(b) (1993) ("The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the

result might still be reached, albeit through an unfair process; or, the wrong result might be reached. The wrong man might be convicted or the right man unjustly punished.

Appeals give a defendant the chance to show his conviction was obtained, or his sentence determined, in violation of the rules. But appellate judges make mistakes, too. Moreover, the appeals process is concerned not only with fairness to the defendant. It has competing concerns, such as efficiency and federalism.³¹ These competing concerns generate rules of appellate and post-conviction procedure that predictably allow otherwise meritorious appeals to go unheard.³²

The second problem runs deeper, inherent as it is in any system of rules. For even if the rules and the application of them were flawless, justice cannot be achieved through rules alone. Rules are both over-inclusive and under-inclusive with respect to the principles standing behind them.³³ Even if we assume that the rules capital jurors follow to determine a defendant's sentence are designed to produce a retributively just result,³⁴ those rules will inevitably produce unjust results from time to time. Any set of rules will force a juror to ignore facts to which he would otherwise attend if he were

accused's counselor and advocate with courage and devotion and to render effective, quality representation."); *id.* at 4.1-2(c) ("Since the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused.").

31. See 28 U.S.C. § 2254(a) (2000) (stating that federal courts "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court" but "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States"). For an overview of recent developments in the law of habeas corpus, see Larry W. Yackle, *Capital Punishment, Federal Courts, and the Writ of Habeas Corpus*, in *BEYOND REPAIR? AMERICA'S DEATH PENALTY* 58–93 (Stephen P. Garvey ed., 2003).

32. See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 749–50 (1991) (holding that the filing of notice of appeal one day late in state court resulted in a default of underlying claims in both state and federal court).

33. See, e.g., FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 135 (1991) ("Rule-based decision-making . . . entails an inevitable under- and over-inclusiveness, and accepting a regime of rules necessitates tolerating some number of wrong results—results other than those that would have been reached by the direct and correct application of the substantive justifications undergirding the rule.").

34. This assumption is counterfactual because capital jurors are typically free to consider utilitarian factors, most notably a defendant's future dangerousness, as well as retributive factors related to the seriousness of the offense and the culpability of the offender. See, e.g., *Barefoot v. Estelle*, 463 U.S. 880, 896–97 (1983) (recognizing future dangerousness as a constitutionally legitimate aggravating factor in capital sentencing); *People v. Jackson*, 793 N.E.2d 1, 13–14 (Ill. 2001) (recognizing future dangerousness as a legitimate aggravating factor under Illinois law).

simply instructed to impose the sentence justice required. Justice attends to all the relevant facts. Rules do not.

Now, capital sentencing is not an especially rule-bound process. Judges and juries deciding between life and death have broad discretion. They are free to consider a wide range of facts bearing on the circumstances of the offense and the culpability of the offender.³⁵ The rules governing capital sentencing are thus less likely to block access to relevant facts compared, for example, to the rules governing non-capital sentencing under the federal sentencing guidelines.³⁶ Still, insofar as the process of capital sentencing does block access to relevant facts, the resulting sentence may be unjust.

Here is the point at which retribution's first theory of mercy—mercy as equity—comes into play. According to this theory, mercy is a remedial mechanism. When the applicable rules produce injustice, mercy is summoned to correct the problem. It serves to produce the result the rules should have produced in the first place.³⁷ Mercy is thus seen as a form of equity, which is the name justice assumes when unmediated by rules.

On this view, mercy's dilemma disappears. Mercy does not conflict with justice because mercy is not really a virtue separate and distinct from justice at all. Nor does mercy deny equality because mercy, as a form of justice, is no less committed to treating like cases

35. See, e.g., *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (holding that a state cannot preclude a capital sentencing jury from considering "any aspect of a defendant's character or record and any of the circumstances of the offense . . . proffer[ed] as a basis for a sentence less than death"). In fact, insofar as the mitigating facts and circumstances available to a capital jury under *Lockett* encompass facts and circumstances belonging to the domain of mercy as distinct from that of justice, governors may refuse to consider those facts because the sentencing jury has already considered and rejected them. It is unclear, however, whether the authority jurors have to determine a defendant's sentence includes the authority to show mercy. Nor is it clear whether, or to what extent, jurors themselves see their task as an occasion for the exercise of mercy. For thoughts on these and related questions, see generally Stephen P. Garvey, "As the Gentle Rain from Heaven": *Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989 (1996).

36. See Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1957 (1988) (explaining that the federal sentencing guidelines, unlike the guided discretion model of capital sentencing, do not "permit the sentencer to consider the full range of individual characteristics relevant to mitigating the severity of punishment in a particular case").

37. See, e.g., MOORE, *supra* note 19, at 129 ("[P]ardons provide a way of making sure that justice is served."); see also Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 581 (1991) (agreeing with Moore that "the principle of deserts . . . [is] the primary consideration in analyzing the clemency power" but disagreeing "with her ultimate conclusion that the *only* justifiable acts of clemency are those which further justice by meting out what the particular individual deserves").

alike than is justice itself. Thus, far from opposing the demands of retributive justice, mercy serves them. Of course, this answer to mercy's dilemma does come at a price. Because it reduces mercy to a form of justice, this theory cannot explain the widespread intuition that mercy is indeed a virtue separate and distinct from justice. Retribution's first theory of mercy is therefore a theory of justice in disguise.

If one listens to the reasons Governor Ryan gave for his decision to commute the sentences of everyone on Illinois' death row, mercy as equity seems to have been his guiding theory.³⁸ But even setting aside the objection that mercy as equity is really a theory of justice and not mercy, the theory fails on its own terms to justify a governor's decision to commute the sentences of everyone on death row. An act of mercy is justified on this theory if and when justice has not been done, or perhaps when the process designed to secure a just result has miscarried. But mass commutations extend mercy to everyone on death row, not just to those who can credibly claim to have been victims of injustice. One might say that distinguishing those who are victims of injustice from those who are not is an impossible task. Better, one might think, to err on the side of caution and commute everyone's sentence, especially when an uncorrected mistake would mean death for a guilty inmate who did not deserve death, or worse, death for an innocent one.

But is mass commutation the best course of action in the face of this uncertainty? Perhaps. Yet surely some of the inmates on a state's death row, including some of those on Illinois' death row, were fairly convicted of the offense that put them there, and surely some of those deserved the sentence they received, if anyone ever does.³⁹ If so, then why not respond to the problem of uncertainty by shifting the burden of proof to the state? Why not presume, despite the jury's verdict and sentence, that everyone on death row is innocent and not deserving of death? The state would then be forced to rebut those presumptions with proof even stronger than proof beyond a reasonable doubt.

One might insist that the state could never meet such a burden, no matter what the facts of any particular case. But such a response sounds as if it assumes the state can never prove death is a deserved

38. See Ryan, *supra* note 4.

39. It is worth noting that the Illinois Prisoner Review Board, which conducted the dramatic public hearings preceding Governor Ryan's decision, recommended that the Governor commute the death sentences of only ten inmates. See Ray Long, *Clemency Suggested for a Few Prisoners*, CHI. TRIB., Jan. 1, 2003, § 2, at 1.

punishment because death is always an undeserved punishment. Yet if that is true, if death is always an undeserved and therefore unjust punishment, then the relevant question is no longer about the legitimate exercise of a governor's authority to grant mercy through the exercise of clemency. The question is about a governor's obligation to uphold an unjust law.

Governors may find mercy as equity to be the most politically appealing basis on which to grant clemency to a particular death-row inmate,⁴⁰ but mercy as equity offers no clear and convincing justification for a governor's decision to commute the sentences of everyone on death row in the name of mercy. Its power to persuade depends on the assumption that the moral costs of securing justice by taking each case one at a time outweigh the benefits of doing so. Perhaps that assumption can be sustained. If not, then any justification for a governor's decision to commute death row must be found elsewhere.

B. *Mercy As Imperfect Obligation*

Retribution's second theory of mercy, unlike its first, is a genuine theory of mercy, not a theory of justice in disguise. On this theory, mercy is a moral virtue separate and distinct from justice. It also follows a separate and distinct moral logic. Mercy follows the logic of an *imperfect* obligation. Justice follows that of a *perfect* obligation.⁴¹

Retributive justice requires an offender to be punished because and to the extent, but only to the extent, he deserves to be punished. Moreover, as a perfect obligation, retributive justice is subject to the demands of equality. Like cases must be treated alike. Justice and equality therefore work together. If an offender receives the punishment he deserves, and if all those similarly situated receive the punishment they deserve, then each offender will not only have been treated justly, he will also have been treated equally compared to all those similarly situated.

As an imperfect obligation independent of justice, mercy conflicts with both justice and equality. As an *independent* obligation, mercy conflicts with justice. Mercy tempers justice and therefore

40. See Daniel T. Kobil, *How To Grant Clemency in Unforgiving Times*, 31 CAP. U. L. REV. 219, 221–28 (2003).

41. For analyses of mercy as an imperfect obligation, see Kershner, *supra* note 19, at 210–11; Murphy, *supra* note 17, at 181–83; Rainbolt, *An Imperfect Virtue*, *supra* note 19, at 171–72; Rainbolt, *supra* note 17, at 231–39. For a more detailed analysis of the logical distinction between perfect and imperfect obligations, see George Rainbolt, *Perfect and Imperfect Obligations*, 98 PHIL. STUD. 233, 243 (2000).

remits all or part of the punishment on which justice would otherwise insist. As an *imperfect* obligation, mercy conflicts with equality. A perfect obligation must be satisfied whenever it arises. An imperfect obligation need only be satisfied on some occasions. So, if one offender receives mercy because he is remorseful, mercy makes no demand that the next offender, who is equally remorseful, also receive mercy. Insisting on equality of treatment would undermine mercy's gift-like quality. It would transform mercy into something it is not—from an imperfect obligation into a perfect one.

Mercy is often associated with caprice.⁴² But we need to understand the exact nature of mercy's caprice. We rightly expect those empowered to grant mercy to do so for a reason, such as: the offender is remorseful; he is in some sense a different person from the one who committed the crime; he saved the life of a child in the course of committing the crime; and so forth.⁴³ The reasons we give when we grant mercy are typically those that summon our sympathy and compassion.⁴⁴ Philosophers disagree about which reasons properly belong to the domain of mercy and which properly belong to the domain of justice and equity, but the important point here is that mercy and justice both have reasons in support of them. Mercy is capricious, not because it lacks the support of reasons, but because a mercy-giver is not obligated always to act on those reasons. A mercy-giver can, for reasons of his own (including mere political expediency), grant mercy to one offender but deny it to another who is otherwise similarly situated.

In addition, mercy's association with caprice should not be confused with invidious discrimination. The reasons mercy legitimately countenances are those rightly tending to evoke our sympathy and compassion. We can disagree about what those reasons are, but in no event should they include a person's race,

42. See, e.g., Rainbolt, *supra* note 17, at 232 (claiming that imperfect obligations, like the imperfect obligation to show mercy, are not "subject to the principle of sufficient reason").

43. See Walker, *supra* note 19, at 32–35 (canvassing many of the reasons typically offered in support of mercy). It is fairly common to hear that the relevance of an offender's repentance with respect to how harshly he should be punished can be explained only in terms of mercy, not retributive justice. See Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501, 1526 (2000). But see Murphy, *Repentance*, *supra* note 19, at 79–85 (arguing that repentance may be relevant to assessing an offender's deserved sentence whether one adopts what Murphy labels "character retributivism" or "grievance retributivism").

44. See, e.g., Murphy, *supra* note 17, at 166 ("Mercy is often regarded as found where a judge, out of compassion for the plight of a particular offender, imposes upon that offender a hardship less than his just deserts.").

creed, or ethnicity.⁴⁵ A mercy-giver could, if he wanted, flip a coin to decide who among those eligible for mercy will receive it. Mercy can tolerate such caprice. But it should not be understood to tolerate invidious discrimination.

Treating mercy as an *imperfect* obligation frees it from the demands of equality and accounts for mercy's gift-like quality. But treating mercy as an imperfect *obligation* means an act of mercy is not merely an act of supererogation. A supererogatory act is an act above and beyond the call of duty.⁴⁶ Accordingly, a person's failure to perform a genuinely supererogatory act does not leave him vulnerable to moral criticism.⁴⁷ If mercy were genuinely supererogatory, a governor who never granted clemency would be beyond moral criticism. But we call those who never show mercy "merciless," thereby intending to convey criticism. Consequently,

45. The available empirical analyses exploring the influence of race on clemency decision-making in capital cases have not reached uniform conclusions. Compare Margaret Vandiver, *The Quality of Mercy: Race and Clemency in Florida Death Penalty Cases, 1924–1966*, 27 U. RICH. L. REV. 315, 343 (1993) (finding race-of-defendant and race-of-victim effects in pre-*Furman* capital cases in Florida, although acknowledging results are based on "limited available data" and "restricted analysis"), with Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239, 281 (2003) (finding no race-of-defendant effect based on Bureau of Justice Statistics data covering all post-*Furman* cases through 1999, although acknowledging results are based on "data limitations [that] preclude more refined analyses"), and William Alex Pridemore, *An Empirical Examination of Commutations in Post-Furman Capital Cases*, 17 JUST. Q. 159, 175 (2000) (finding no race-of-defendant effect based on Bureau of Justice Statistics data covering capital cases between 1994 and 1995). As a matter of existing constitutional doctrine, a majority of the members of the Supreme Court have found that the way in which governors go about deciding to grant or withhold clemency must meet some minimal level of procedural due process. See *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288 (1998) (plurality opinion); *id.* at 290 (Stevens, J., concurring in part and dissenting in part).

46. This statement reflects what I understand to be the standard analysis of supererogation. See DAVID HEYD, *SUPEREROGATION: ITS STATUS IN ETHICAL THEORY* 115 (1982) (noting that the "omission [of a supererogatory act] is not wrong, and does not deserve sanction or criticism—either formal or informal"); GREGORY MELLEMA, *BEYOND THE CALL OF DUTY: SUPEREROGATION, OBLIGATION, AND OFFENSE* 13 (1991) (noting that the "omission of [a supererogatory act] is not morally blameworthy"). However, it might be more accurate to say that supererogatory acts are acts above the call of deontic duty, but not above the call of aretaic duty. See, e.g., Heidi M. Hurd, *Duties Beyond the Call of Duty*, 6 ANN. REV. LAW & ETHICS 3, 38 (1999) (arguing that supererogatory acts are "aretaic duties" which "go beyond the call of deontic duties" and which "concern virtuous character traits that we are obligated to cultivate, and vicious character traits that we are obligated to suppress, over the course of our lifetimes"); Gregory Trianosky, *Supererogation, Wrongdoing, and Vice: On the Autonomy of the Ethics of Virtue*, 83 J. PHIL. 26, 29 (1986) (arguing that the failure to act supererogatorily can attract no negative deontic judgments but can attract negative aretaic judgments).

47. See Rainbolt, *supra* note 17, at 230.

mercy's status as an obligation means an agent is obligated to show mercy on at least some of the occasions calling for it, but its status as an imperfect obligation means an agent is under no obligation to show mercy on all such occasions.

The fact that mercy is an imperfect obligation, while justice is a perfect one, does not mean justice must always trump mercy when the two conflict. Our obligations can and do sometimes conflict, and when they do we figure out as best we can how to proceed all things considered. A long history of thought lends support to the claim that mercy is a moral good.⁴⁸ Consequently, insisting that justice must always trump mercy is simply to deny mercy's status as a moral good without offering any argument other than pointing to the fact that mercy conflicts with justice. In other words, insisting that justice must always trump mercy simply begs the question against mercy.⁴⁹

Still, even if mercy should sometimes prevail against the demands of justice, some argue that mercy should be confined to the realm of private affairs.⁵⁰ In the realm of public affairs mercy is a vice. It is one thing, according to this argument, to show mercy toward one another in our private dealings and so take less than we are in justice entitled to take. It is another thing altogether for a state actor to show mercy. Private citizens may be obligated to follow the law, but they are not obligated to follow the rule of law. Where the law imposes no obligation on them to act one way or the other, private citizens are free to act as they please. But state actors, one might argue, enjoy no such freedom. The rule of law always binds state actors acting in their official capacities. They may never act on whim. Yet if mercy permits acting on whim, then how can it be reconciled with the rule of law to which state actors owe allegiance?

Some argue mercy and the rule of law cannot be reconciled.⁵¹

48. See, e.g., *id.* at 238 (examining philosophical arguments considering the question of whether mercy is a moral good).

49. For thoughts on *why* mercy is properly considered a moral good, see Brien, *Mercy Within Legal Justice*, *supra* note 17, at 106; Kershnar, *supra* note 19, at 211–15; Nussbaum, *supra* note 19, at 101; Rainbolt, *supra* note 17, at 238; Rainbolt, *Mercy and the Death Penalty*, *supra* note 19, at 14–19.

50. See Murphy, *supra* note 17, at 173–74 (“Judges in criminal cases are obligated to do justice. . . . Let them keep their private sentimentality to themselves for use in their private lives with their families and pets.”). *But cf. id.* at 179–80 (allowing that a “judge or any other official may exercise mercy in a criminal case if . . . it can be shown that such an official is acting, not on his own sentiments, but as a vehicle for all those who have been victimized by the criminal”).

51. See MOORE, *supra* note 19, at 192; Harrison, *supra* note 19, at 118; Dan Markel, *Against Mercy*, 88 MINN. L. REV. (forthcoming 2004) (manuscript at 31, on file with the North Carolina Law Review); Stephen J. Morse, *Justice, Mercy and Crazyiness*, 36 STAN. L.

Accordingly, even if mercy binds us as private actors, it has no place in the exercise of state power. If so, then executive clemency can only legitimately be exercised under the banner of mercy as equity. Others argue that the obligation to show mercy does not stop at the statehouse door.⁵² On this view, state actors, like private actors, remain obligated to show mercy, at least from time to time.

Assuming for now that mercy as an imperfect obligation does bind state actors, can mercy so understood justify a governor's decision to commute death row? I am skeptical. At the outset, can it be true that every inmate on a state's death row has a valid reason supporting his plea for mercy? Maybe. Facing death, one might say, is all the reason mercy needs, and everyone on death row is facing death. Even so, the demands of mercy as an imperfect obligation are limited. Those demands are fully satisfied if mercy is shown on some of the occasions calling for it. It need not be shown on all such occasions. If so, then mercy imposes no obligation on a governor to commute the sentences of everyone on death row. However, one might still argue that a governor is free to commute death row if he or she so wishes.

Perhaps, but I am again skeptical. Keep in mind that the imperfect obligation to show mercy always competes with the perfect obligation to achieve retributive justice. As such, with every act of mercy comes a corresponding denial of justice. At some point, so it would seem, the demands of justice must prevail against those of mercy. Therefore, at some point short of the last commutation, it would be wrong for a governor to commute another death sentence. While mercy may obligate a governor to commute some death sentences, justice obligates him not to commute them all. Consequently, any decision to commute all of death row would be too much of a good thing—too much mercy, too little justice.⁵³

III. ATONEMENT'S MERCY

The two theories of mercy discussed thus far situate mercy within a retributive theory of punishment.⁵⁴ Mercy as equity treats mercy as

REV. 1485, 1509 (1984) (book review).

52. See, e.g., Dressler, *supra* note 19, at 1472 (endorsing state mercy); Rainbolt, Mercy and the Death Penalty, *supra* note 19, at 14–20 (same).

53. See, e.g., Rainbolt, Mercy and the Death Penalty, *supra* note 19, at 20–21 (“[B]ecause mercy is an imperfect virtue, state mercy necessarily involves a certain degree of arbitrariness, of unfairness, of injustice. So too much state mercy would cause too much injustice.”).

54. See *supra* Part II.

a way of achieving retributive justice (and thus reduces mercy to that form of justice called equity).⁵⁵ Mercy as imperfect obligation treats mercy as an independent virtue tempering the demands of retributive justice. Neither theory can, for the reasons I have suggested, easily justify a governor's decision to commute the sentences of everyone on death row in the name of mercy. Another theory of punishment, which I have elsewhere called punishment as atonement,⁵⁶ perhaps can justify such a decision.

A. *Retribution and Atonement*

Retribution holds that punishment is justified because and only because it is deserved, and only to the extent it is deserved.⁵⁷ Retribution therefore has no end beyond itself. Its only end is doing justice, and justice is done when deserved punishment is imposed. The difficult task for retributivists has long been to explain how the mere fact that a person deserves punishment can justify punishing them.⁵⁸ That question deserves a good answer, but for now I will simply assume that retributivists can supply one.⁵⁹

Retribution is usually contrasted with utilitarianism. Utilitarian theories of punishment identify some end toward which punishment is a means, such as the deterrence of future criminal wrongdoing or the rehabilitation of the wrongdoer.⁶⁰ Punishment is then justified if and only if it happens to be the cheapest or most efficient means to that end.⁶¹ Utilitarianism sees the relationship between punishment and its avowed end as contingent.⁶² If a cheaper or more efficient means is available to achieve the same end, then punishment is no longer the best tool for the job and the justification for imposing it vanishes.

55. See *supra* Part II.

56. For a more complete discussion of many of the claims that follow, see generally Stephen P. Garvey, *Punishment as Atonement*, 46 *UCLA L. REV.* 1801 (1999).

57. See, e.g., Michael Moore, *The Moral Worth of Retribution*, in *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS* 179, 179 (Ferdinand Schoeman ed., 1987) ("A retributivist punishes because, and only because, the offender deserves it.").

58. See David Dolinko, *Some Thoughts on Retributivism*, 101 *ETHICS* 537, 545–59 (1991) (pressing this question hard against three recent and prominent theories of retributivism and concluding that none of them provides a persuasive answer).

59. Among the recent efforts to answer this question, I would commend in particular the works of Jean Hampton and Michael Moore. See Jean Hampton, *An Expressive Theory of Retribution*, in *RETRIBUTIVISM AND ITS CRITICS* 1 (Wesley Cragg ed., 1992); Moore, *supra* note 57, at 179–219.

60. See Duff, *supra* note 20, at 4.

61. See *id.* at 4–5.

62. See *id.* at 5.

Atonement is distinct from both retribution and utilitarianism. Unlike retribution, atonement posits an end for punishment beyond punishment itself. It holds that deserved punishment is justified because it forms a necessary part of a larger process through which an offender atones for his offense, a process leading ideally to the reconciliation of the offender and those he wronged. Reconciliation or atonement is the end toward which punishment is a means. Unlike utilitarianism, atonement sees the relationship between punishment and its end as necessary, not merely contingent. Punishment is not simply one among other possible ways of achieving the end in view. It is the only way.

Punishment as atonement presupposes a particular understanding of what it is that makes a crime a crime. A crime is not simply an act that causes another person material injury. While crimes often do cost people money or injure them physically, they also entail a distinctive form of moral injury. This distinctive moral injury manifests itself in symbolic or expressive terms. Simply put, an actor who commits a crime shows contempt for the law and for his victim. This expression of contempt damages the relationship of trust and mutual respect previously presumed to exist between the offender and his victim, thereby damaging the social bond between them, though not to the breaking point.⁶³

Thinking about punishment as an integral part of a process leading to atonement provides a picture of how punishment operates in a genuine community, one in which offender and victim share that degree of trust and respect upon which communal existence depends.⁶⁴ When one member of such a community commits a crime against another, he forfeits his good standing as a member of the community and acquires the burden of guilt. In order to reclaim his good standing and expiate the guilt he has acquired, he must take certain steps to make amends. His first step is to make reparations and thereby make the victim whole in a material sense.

His next step is to make the victim whole in a moral sense. He must pay to repair the moral injury he has caused, and the medium through which he makes this payment is not a check or other mode of material compensation. Instead, he pays for the moral injury of his

63. I realize that not all acts for which a person can be convicted of a crime convey this message of insult or contempt. *See id.* at 37; Stephen P. Garvey, *Two Kinds of Criminal Wrongs*, 5 PUNISHMENT & SOC'Y 279, 281–83 (2003) (distinguishing two kinds of criminal wrongs, only one of which conveys a message of insult or contempt). Nonetheless, crimes punishable by death surely do convey such a message.

64. *See* Garvey, *supra* note 56, at 1810, 1854.

crime through his willing submission to the punishment he deserves. His punishment therefore sheds its character as punishment. It becomes a form of secular penance. Once he makes reparations and serves his penance—once he repairs the material and moral damage he has caused—the offender will at last have succeeded in doing all he can to expiate the guilt of his offense. He will have earned his return ticket back into the community as a member in good standing.

At that point, the burden of atonement shifts to the victim, who in light of the offender's genuine efforts to make amends, must assume a difficult obligation. He must forgive and overcome the anger and resentment he rightly felt toward the offender for the wrong he suffered at the offender's hands.⁶⁵ Or more precisely, he must at least try to forgive.⁶⁶ He must undertake the hard work needed to set the stage for forgiveness. If his efforts succeed, both he and the offender receive the gift of forgiveness,⁶⁷ and with forgiveness the victim's resentment lifts. The circle is complete. Victim and offender are returned to where they were before the crime damaged their relationship.

The theory of punishment as atonement is of course an ideal theory. How many real-life offenders repent and willingly submit to their punishment? How many real-life victims try to forgive? Atonement is often unrealized in the real world. The state can still

65. Here I take a stronger stand on the deontic status of forgiveness toward an offender who has expiated his guilt than I previously expressed, *see* Garvey, *supra* note 56, at 1851; Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH L. REV. 303, 315. I now think a victim would be wrong to forgive an offender who has done nothing at all—not even apologize—to expiate the guilt of his offense. Forgiveness under these circumstances would, it seems, be inconsistent with an adequate sense of self-respect on the part of the victim and would express, or come close to expressing, condonation of the offense. Conversely, it would be wrong (though perhaps excusable) for a victim not to forgive an offender who has done everything he can to expiate the guilt of his offense. Failing to (try to) forgive under these circumstances shows an insufficient concern for the value of community on which the theory of punishment as atonement is premised. In other words, the victim begins with an obligation not to forgive, but that obligation is transformed into its opposite—an obligation to forgive—once an offender accomplishes all that he must in order to expiate his guilt.

I would characterize forgiving an offender who has done some, but not all, of the work needed to expiate his guilt as an act of supererogation, although others have argued or suggested that it should be characterized as an act discharging an imperfect obligation. *See* JORAM GRAF HABER, *FORGIVENESS* 102–03 (1991); Jeffrie Murphy, *Forgiveness and Resentment*, in *FORGIVENESS AND MERCY*, *supra* note 17, at 29–30.

66. The victim's obligation is to *try* to forgive, because while trying to forgive is within a victim's control, forgiveness itself is not. *See* Morris, *supra* note 19, at 19.

67. *See id.* (“Forgiveness is, at once, a gift to the forgiven and to the forgiver,” which “makes understandable why some have seen the hand of God in forgiveness as they have in the grace that allows one to have faith without grounds for belief.”).

legitimately punish an unrepentant offender, but its warrant for doing so comes from retribution, not from atonement. Atonement is nonetheless the standard against which our existing practices of punishment should be measured and the ideal toward which they should aspire. Compared to atonement, retribution is a second-best.

B. Death, Mercy, and Atonement

Having described atonement and its relationship to retribution, let me return to the idea of mercy. What role does mercy play in atonement? Does the role of mercy in atonement differ from its role in retribution? When an offender's deserved punishment is less than death, the answer is no. But when death an offender's deserved punishment is death, the answer is yes. For when an offender's deserved punishment is death, mercy can serve a role above and beyond the roles it can serve in retribution.

First, compare the role of mercy in atonement with its role in retribution when the punishment an offender deserves is something less than death. Begin with retribution's first theory of mercy, mercy as equity. Understood as a form of equity, mercy ensures for retribution that no offender is punished unjustly. Mercy can and should play a similar role for atonement. Like retribution, atonement requires an offender to endure his deserved punishment, but no more than his deserved punishment. Consequently, mercy as equity would advance the cause of atonement in the same way it would advance the cause of retributive justice.

Next, consider retribution's second theory of mercy, mercy as imperfect obligation. Understood as an imperfect obligation independent of retributive justice, the (imperfect) obligation to show mercy inevitably conflicts with the (perfect) obligation to do retributive justice. This conflict presents proponents of retribution with a choice: Should the state occasionally temper justice with mercy, in which case justice will sometimes be denied, or should it never do so, in which case the state becomes merciless? Devout retributivists will side with justice and argue that justice should never be denied. Less devout retributivists will side with mercy and conclude that mercy should sometimes be permitted to temper the demands of justice.

Mercy as an imperfect obligation presents the same choice *mutatis mutandis* to proponents of atonement. Recall that a victim's obligation to forgive arises only when the offender has endured the full measure of his deserved penance. An offender who receives mercy will endure less than his full penance; consequently, his victim

will never bear an obligation to forgive. Yet without forgiveness, there can be no reconciliation. Mercy therefore seems to preclude reconciliation.

But extending mercy to an offender does not necessarily preclude reconciliation. A victim may try to forgive an offender even if the offender has not served his full penance. Yet any such effort would not be undertaken in fulfillment of a duty to forgive. On the contrary, it would be supererogatory. The choice mercy as an imperfect obligation presents to atonement therefore comes down to this: Should the state occasionally temper justice with mercy, in which case atonement will depend on the supererogation of victims, or should it never do so, in which case the state becomes merciless?

In short, when the punishment an offender deserves is something less than death, mercy can perform more or less the same roles in atonement as it can in retribution. But when the punishment an offender deserves is death, the picture changes. Assuming for present purposes that death is indeed the deserved punishment for some horrible crimes, retribution treats death just as it would any other form of deserved punishment.⁶⁸ As such, when death is not in fact the punishment an offender deserves, a governor should commute his death sentence in the name of mercy as equity. A governor should also, from time to time, commute some death sentences in the name of mercy as imperfect obligation, assuming he believes a merciful (though not perfectly just) state is preferable on balance to a merciless (though perfectly just) one.

In contrast, atonement does not treat death just like any other punishment.⁶⁹ Indeed, when the penance an offender must endure to expiate the guilt of his offense is death, the theory of atonement finds itself with a dilemma: if the offender submits to his deserved penance and is executed, then reconciliation between the offender and the

68. Compare Mary E. Gale, *Retribution, Punishment and Death*, 18 U.C. DAVIS L. REV. 973, 1028 (1985) (“[I]f at the instant of the infliction of the punishment the offender is rendered forever unable to appreciate the justness of her punishment, much if not all of its [retributive] moral force is lost.”), with Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1669 (1986) (“Execution . . . is . . . the only fitting retribution for murder I can think of.”).

69. I recognize that life imprisonment also precludes atonement insofar as the victim of an offense deserving of life imprisonment is obligated to (try to) forgive the offender only when the offender fulfills his penance, which he does only at the time of his death. But whereas an offender sentenced to life imprisonment begins serving his penance from the moment he is incarcerated, an offender sentenced to death begins (and ends) his penance only at the moment of his death. Consequently, life imprisonment allows a victim supererogatorily to forgive an offender sentenced to life imprisonment in response to the offender’s partial fulfillment of his penance. Death makes no such allowance.

victim's family becomes impossible. The offender is dead. But if the offender does not submit to his deserved penance, then reconciliation is likewise impossible, unless the victim's family forgives the offender without the offender having served his full penance. Yet such forgiveness is an act of supererogation which neither the offender nor the state has any right to demand.

The argument might be made that this dilemma should be resolved in death's favor for at least two reasons. First, one might argue that death and atonement are not in fact at odds with one another. Perhaps reconciliation between an offender and the victim's family can only occur in the final and dramatic moment just before the defendant's death, and if it does not, then at least justice will have been served. Or, perhaps atonement can only be achieved in some way *through* the offender's death. Either way, atonement is not only compatible with death but actually requires it.

Second, even if one agrees that death and atonement are incompatible, one might argue that the horrific nature of capital crimes makes atonement a goal not worth pursuing in such cases. Perhaps capital crimes make atonement undesirable because such crimes should be seen as unforgivable. Far from being supererogatory, forgiving them would actually be wrong. In other words, capital crimes not only damage the social bond, they break it. Indeed, one might say that breaking the social bond is precisely what makes a crime a capital crime. In any event, if capital crimes make atonement an undesirable goal, then doing justice—and executing the offender—is the only thing left to do.

I find neither of these arguments persuasive. First, atonement should not be understood as aiming at some fleeting reconciliation gained in the moment before the defendant's death, nor at some quasi-theological reconciliation gained thereafter. On the contrary, atonement should be understood as aiming at an enduring and secular form of reconciliation in which offender and victim participate in the here and now. Second, atonement should be understood to insist that no crime, not even a capital one, forever shuts the door to the possibility of reconciliation, however remote it might seem.⁷⁰ Indeed, the families of at least some murder victims have made the supererogatory effort needed to let go of their anger, achieving

70. See R.A. Duff, *Penance, Punishment and the Limits of Community*, 5 PUNISHMENT & SOC'Y 295, 306 (2003) ("I am *fairly* confident that . . . no single deed, however terrible, should put a person beyond civic redemption."); Trudy Govier, *Forgiveness and the Unforgivable*, 36 AM. PHIL. Q. 59, 71 (1999) ("I submit that no one is absolutely unforgivable, whatever he or she may have done in this world.").

forgiveness and thereby a measure of peace and closure perhaps unknowable to those who demand justice.⁷¹

We return then to the dilemma death presents to atonement: reconciliation is impossible if the offender is executed, but it is also impossible if he is not executed, unless of course the victim's family acts beyond the call of duty. Now, what does all this have to do with mercy? The answer is simple: mercy is one response to this dilemma. Extending mercy and remitting an offender's death sentence reflects a choice to preserve the possibility of reconciliation between victim and offender. In other words, extending mercy to death-sentenced offenders can be justified, not simply as a way to achieve equity or to satisfy the demands of an imperfect obligation, but also as a way to preserve the possibility of atonement. Moreover, unlike either of the theories available to retribution, this theory of mercy can explain why a governor's decision to commute the sentences of everyone on death row is a morally defensible one.

For the devout retributivist, the mass commutation of death row is an unmitigated moral disaster. Justice has not been done, and showing mercy does nothing to offset that moral cost. Yet even for retributivists who are prepared to allow mercy to sometimes temper justice, mass commutation is too much of a good thing. Mercy is a virtue, but it always comes at a price. Each act of mercy entails a denial of the justice retribution demands. At some point the moral costs of mercy will begin to outweigh its moral benefits. Mercy must then retreat and allow justice to prevail. Mass commutations ignore this moral calculus and deny justice its due.

The corresponding moral calculus is different for atonement. In the calculus of atonement, each extension of mercy to an offender under a deserved sentence of death still carries a cost, since the offender will not have served his full penance. But for atonement, unlike for retribution, each act of mercy also carries an offsetting benefit—the possibility of reconciliation. Such reconciliation can only be achieved if victims find it within themselves to search for forgiveness even though they have no obligation to do so. The state has no right to expect such supererogatory forgiveness; nonetheless, it should be free to preserve the possibility of such forgiveness and thus the possibility of atonement. Moreover, if the possibility of

71. See, e.g., RACHEL KING, *DON'T KILL IN OUR NAMES: FAMILIES OF MURDER VICTIMS SPEAK OUT AGAINST THE DEATH PENALTY* 1 (2003) (collecting personal accounts of members of Murder Victims' Families for Reconciliation, who "reject the concept of retribution and believe that no one is beyond redemption").

atonement is enough to offset the injustice accruing with each act of mercy, then the primary obstacle to commuting all of death row disappears. For if the possibility of atonement exists for any inmate on death row, it exists for them all.

On this theory a governor's decision to commute all of death row is morally permissible. But it is not morally obligatory. The problem with saying a governor is obligated on this theory to commute all of death row comes out in the following question: Is it better to achieve retributive justice at the expense of atonement, or is it better to preserve some possibility of atonement at the expense of certain justice?

I see no clear-cut answer to that question.⁷² Consequently, no option is foreclosed. A governor could deny mercy to everyone on death row if he or she saw fit to do so.⁷³ Or a governor could commute the death sentences of some, but not of others. Or a governor could do as Governor Ryan did, commuting the sentences of everyone.

CONCLUSION

I began with the following question: Is it morally justified for a governor to commute all of death row in the name of mercy? My answer is yes. Mass commutation is morally permissible. But one can reach that conclusion, I suggest, only if one abandons retribution in favor of atonement.

Neither theory of mercy available to retribution can justify a decision to commute the sentences of every inmate on death row. Mercy as equity might be able to justify a decision to commute the

72. I could be wrong on this score in three different ways. First, I could be wrong because the balance is always in favor of certain justice. If so, then it would be wrong for a governor to commute any death sentence. Second, I could be wrong because the balance is always in favor of preserving the possibility of atonement. If so, then it would be wrong for a governor to refuse to commute any death sentence. Third, I could be wrong because, depending on the facts of the particular case, the balance sometimes favors certain justice and sometimes favors preserving the possibility of atonement. If so, then it would be wrong for a governor to commute all death sentences and wrong to commute none of them. Whether a governor should commute any particular death sentence will depend on the facts and circumstances of the particular case. In any event, if I am wrong, then a governor will be obligated, as the case may be, to commute some death sentences, none of them, or all of them. He will not enjoy the moral freedom to choose among these options. But if that is right, then mercy would lose its gift-like quality, for a governor would, depending on the circumstances, be morally obligated to grant or withhold mercy.

73. Such a governor must nevertheless occasionally commute individual death sentences in order to discharge the imperfect obligation to show mercy, assuming state actors have such an obligation.

sentences of everyone on death row in the name of justice, but not in the name of mercy. Mercy as imperfect obligation can justify a decision to commute the sentences of some on death row in the name of mercy, but not the sentences of them all. With each act of mercy comes a corresponding injustice until at some point the demands of justice must prevail against those of mercy.

The moral logic changes when one switches from retribution to atonement. For atonement, unlike for retribution, deserved punishment is not an end in itself. It is merely a means, although a necessary means, to the end of reconciliation. But when the punishment an offender deserves is death, the means and end of atonement come apart. Death precludes the possibility of atonement, but without death atonement depends on the supererogatory forgiveness of victims. What to do? Commute or not commute?

The answer, I think, is properly delegated to the conscience. A governor is free to do as he or she in good faith sees fit. A governor is free to commute the death sentences of all, some, or none of those on death row in mercy's name. But if a governor chooses to commute the sentences of everyone on death row, such a choice can be understood as a morally permissible act of mercy only if we abandon retribution and embrace atonement.

