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Elizabeth Rapaport

University of New Mexico - Main Campus

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STRAIGHT IS THE GATE: CAPITAL CLEMENCY IN THE UNITED STATES FROM *GREGG* TO *ATKINS*

ELIZABETH RAPAPORT*

straight is the gate, and narrow is the way, which leadeth unto life, and few there be that find it.

Matthew 7:14 (King James)

This Article will examine executive clemency decisions in capital cases, from 1977, the year of the first execution after the Supreme Court sanctioned the resumption of executions in *Gregg v. Georgia*,¹ until June of 2002, when *Atkins v. Virginia*² was decided.³ The power of the executive to grant clemency to a capital defendant can be viewed as a gateway—one last chance to be spared capital punishment. The gateway to clemency has been exceedingly narrow in this quarter century era of capital punishment. Perhaps surprisingly, it has been very narrow indeed for the three classes of capital prisoners who are the focus of this *Beyond Atkins Symposium*,⁴ and who might be expected to be particularly suitable candidates for clemency, *i.e.*, juveniles,⁵ the mentally retarded, and the mentally ill. Clemency decisions are of course fraught for those at the threshold of execution, but they are also fraught for governors and Presidents charged with deciding clemency. This Article will also explore the narrow path the decision makers walk as they confront the moral and political risks the clemency power entails.

* Professor of Law, University of New Mexico. Portions of this paper were presented at the *Northern California Socio-Legal Speaker Series of the Center for Law and Society*, School of Law, University of California, Berkeley, September 30, 2002, and at the *Beyond Atkins Symposium* sponsored by the *New Mexico Law Review*, October 19, 2002. I am grateful to the participants at both occasions for their enlightening comments. This article was written during my tenure as a visiting scholar at the Center for Law and Society, School of Law, University of California, Berkeley. I would like to thank the law library staff of the New Mexico School of Law, and especially Lorraine Lester, for prodigious assistance. I am extremely grateful to Michael Radelet for his generosity in sharing his extensive file of capital clemency materials. Bill Dials and Jennifer Wernersbach provided able research assistance.

1. 428 U.S. 152 (1976).

2. 536 U.S. 304 (2002).

3. This Article was completed several weeks before Governor George Ryan granted clemency to every person then on death row in Illinois, commuting 164 sentences to life in prison and granting four pardons of innocence. Maurice Possley & Steve Mills, *Clemency for All: Ryan Commutes 164 Death Sentences to Life in Prison Without Parole*, CHI. TRIB., Jan. 12, 2003, at 1. At this writing the shock waves initiated by Governor Ryan's mass capital clemency have barely begun to radiate their influence on capital punishment and capital clemency in the United States. Although there have been previous blanket grants of capital clemency by governors who opposed capital punishment, action on this scale was all but inconceivable until Governor Ryan's historic grants in January of 2003. The Governor Ryan clemencies are outside the scope of this Article, with the exception of some remarks based on Governor Ryan's activities prior to his decision, some footnotes, and a brief postscript added before sending it to press.

4. THE NEW MEXICO LAW REVIEW'S Symposium, *Beyond Atkins: A Symposium on the Implications of Atkins v. Virginia*, was held on October 19, 2002, in Albuquerque, New Mexico.

5. Throughout this article, "juvenile" refers to a prisoner who was less than eighteen years old when the crime for which capital sentence was imposed was committed.

I. THE GATE: A BRIEF EXAMINATION OF THE SCOPE AND HISTORY OF THE EXECUTIVE CLEMENCY POWER

A. *The Constitutional Power*

The power to grant clemency, *i.e.*, to remit or delay punishment and to pardon offenses, is recognized in almost every nation.⁶ In the United States, the clemency power is vested by state and federal constitutions in the executive. Although there are considerable variations in the clemency procedures of the states, the majority of states follow the federal model, vesting clemency power in the governor.⁷ The clemency power is all but plenary, “rarely, if ever,”⁸ subject to review by courts. In 1998, the Supreme Court held that in capital cases *only*, executive clemency decisions were subject to review by courts to insure that minimum due process had been accorded clemency petitioners.⁹ Thus, clemency can be granted for a good reason, a bad reason, or no reason at all.¹⁰ Institutional constraints upon the governor or other clemency authority are all but nonexistent. The history of capital clemency, however, reveals that from 1977 to 2002 political prudence imposed stringent constraints.

In capital cases two forms of clemency are available. The first is commutation of a death sentence to life imprisonment, with or without the possibility of parole. The second is “pardon,” which is an ambiguous term. One meaning of the term implies exoneration, but the clemency authority may pardon, *i.e.*, set free, a prisoner, capital or otherwise, without questioning the factual basis for conviction.¹¹ For example, heroic service during a prison epidemic or riot might earn a pardon. A pardon granted in recognition of mistake as to factual guilt is sometimes called a “pardon of innocence,” because it removes the stigma of guilt rather than merely excusing the prisoner from further punishment.¹² Practically speaking, a capital prisoner in the contemporary death penalty era will be pardoned only when the clemency authority is satisfied that he is actually innocent of the crime for which he was convicted and sentenced to die.

6. See Leslie Sebba, *The Pardoning Power—A World Survey*, 68 J. CRIM. L. & CRIMINOLOGY 83 (1977).

7. For a recent survey of clemency procedures, see 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 (1999). In some states the governor shares the clemency power with an executive agency, styled a “board.” In a handful of states, the clemency authority is assigned to a board that is independent of the governor, neither appointed by the governor nor purely advisory in function. Because governors dominate the clemency process in most states, this Article focuses on the role of the governor in clemency.

8. Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981).

9. Ohio Adult Authority v. Woodard, 532 U.S. 272 (1998). The process due, however, is minimal indeed. Justice O’Connor gave two examples of procedures that would fail to comport with Fourteenth Amendment requirements in her concurrence—“Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.” *Id.* at 289.

10. *Ex parte Grossman*, 267 U.S. 87, 120-21 (1925).

11. See W.H. HUMBERT, *THE PARDONING POWER OF THE PRESIDENT* tpls. V & VI (Am. Council on Public Affairs 1941) (supplying insight for the range of reasons for pardons drawing on the actions of Presidents from 1885 to 1931).

12. Henry Weihofen, *The Effect of a Pardon*, 88 U. PA. L. REV. 177, 178 (1939).

B. The Historical Roots of the Executive Clemency Power

The Framers of the U.S. Constitution modeled the clemency power of the President on the English Crown's prerogative of mercy.¹³ The Framers' choice of the executive as sole repository for the clemency power did not result from imperfect liberation from monarchical habits of thought or the lack of ability to conceive of other arrangements. In fact, the majority of the original thirteen states had adopted constitutions that lodged clemency power in the legislature or required the governor to share the power with legislative counsels.¹⁴ The states adopted the English or federal model only *after* ratification of the U.S. Constitution.¹⁵

Alexander Hamilton was a principal proponent of lodging plenary discretion in the hands of the executive. In *Federalist No. 74*, Hamilton argued that "one man" was more likely "than a body of men" to be conscientious in identifying and acting upon cases that deserved mercy and to be steadfast in resisting cases where the rigor of the law should be allowed to take its course.¹⁶ Hamilton's reasoning is a bit obscure and not entirely persuasive. One could with equal plausibility advance the merits of "a body of men," each of whom would have the advantage of colleagues in deliberation and of group solidarity.

Perhaps a more plausible basis for the assignment of plenary power to the executive is that it best serves one of the three purposes of the executive clemency power identified below. It gives the President the power to override criminal law when in his estimation grave reasons of state so require. The need for decisive action in such emergencies does suggest the institutional superiority of the executive as the repository for the power.

C. The Three Functions of Clemency

The Framers assigned plenary clemency power to the executive to achieve three objectives. The first objective was to allow the executive to moderate, heal, and avert social conflict by preventing punitive treatment of dissidents and rebels and to accomplish other state purposes that might require overriding the criminal justice apparatus.¹⁷ An example of the use of the clemency power early in the history of the republic was President Washington's pardon of participants in the Pennsylvania Whiskey Rebellion in 1795.¹⁸ A prominent twentieth century example is President Carter's amnesty of Vietnam War draft evaders. Other types of *realpolitik* employments of the clemency power are the release or exchange of spies and the shielding of a President's agents from the legal consequences of their illegal service, as done by President George H.W. Bush for several figures in the Iran-Contra affair.

13. Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 589 (1991).

14. James R. Acker & Charles S. Lanier, *May God—or the Governor—Have Mercy: Executive Clemency and Executions in Modern Death-Penalty Systems*, 36 CRIM. L. BULL. 200, 216 (2000).

15. *See id.*

16. *Id.* (citing THE FEDERALIST NO. 74 (Alexander Hamilton)).

17. *See* KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST 26-27 (1989). A well-known twentieth century example includes President Ford's pardon of Richard Nixon.

18. *Id.* at 27; Kobil, *supra* note 13, at 592.

The second function of the clemency power is to correct miscarriages of justice in what could be called "ordinary criminal cases," to distinguish them from cases where *raison d'état* are in play. However, the label "ordinary criminal cases," while useful, suggests a separation of criminal law from politics that is not ultimately tenable. Politics and the criminal law interact at many levels. For example, a governor may support capital punishment to project a "tough-on-crime" image regarded as essential for electoral success. In the context of clemency, "ordinary criminal cases" raise questions about whether justice has been served rather than whether its claims should be overridden for reasons of state.¹⁹ The paramount concern of the Framers with regard to ordinary criminal cases appears to have been cases of injustice arising from the impossibility of drafting criminal laws that would incorporate every possible legitimate exception, leading to what Alexander Hamilton called cases of "unfortunate guilt."²⁰ These are cases where the strict application of the law has led to the punishment or excessive punishment of someone who lacks the requisite degree of moral culpability, at least in the eyes of the clemency authority. The danger that the mechanical application of law will pervert justice if not leavened with discretion has been appreciated at least since the time of Aristotle.²¹ Necessarily general law cannot contain an exhaustive catalog of exceptions. Thus, clemency is a means of introducing exceptions not explicit in extant law, of gaining some purchase for emerging norms of justice not yet well articulated or fully accepted, and as a hedge against sclerotic law.

The third function of the clemency power also addresses miscarriages of justice, namely, the correction of the malfeasance and misfeasance of other actors in the criminal justice system. Thus, the clemency power can be used to correct the misfeasance or malfeasance of judges, prosecutors, defense attorneys, and law enforcement officers. Such correction was part of the clemency practice of the English Crown.²² A contemporary example of this practice is the recent pardons granted by Governor George Ryan to death row inmates in Illinois who were coerced by the police into giving false confessions.²³

The latter two functions, those of correcting miscarriages of justice, are shared with the coordinate branches of government. This redundancy is desirable in order to mitigate and diminish the inevitable and frequent harm done by imperfect laws and officials. While clemency allows the executive to act as a check on lawmakers and judges, the other branches are not permitted in turn to check the clemency decisions of the executive.²⁴ In this respect, clemency decisions are like a jury

19. This Article does not broach many of the more profound relationships between politics and criminal justice. Pertinent for its purposes are (1) the executive power to trump criminal justice values in the interests of statecraft and (2) the tension between pragmatic politics and the vindication of criminal justice values through the uses of clemency. *See infra* part IV.

20. THE FEDERALIST NO. 74 (Alexander Hamilton).

21. *See* ARISTOTLE, NICOMACHEAN ETHICS (350 B.C.), reprinted in BASIC WORKS OF ARISTOTLE, at 1019-20 (Richard McKeon ed., W.D. Ross trans., 1941).

22. *See generally Ex Parte Wells*, 59 U.S. 307 (1885) (describing English clemency practices); *United States v. Wilson*, 32 U.S. 150 (1833) (early application of these practices).

23. Rob Warden, *On this Day...30 Years of the Death Penalty*, CHI. TRIB., Jan. 12, 2003, at 1.

24. The clemency power is not subject to legislative control. *See Schick v. Reed*, 419 U.S. 256, 267 (1974). Furthermore, the power is "rarely" subject to judicial review. *Ohio Adult Authority v. Woodard*, 532 U.S. 272, 280 (1998).

acquittal in that they are immune from review; however, unlike a jury, which dissolves upon rendering a verdict, the executive is politically accountable for his actions. The political controls to which the executive is subject are the normal hazards of politics and the possibility of impeachment.

II. THE NARROWING PATH: CAPITAL CLEMENCY FROM *GREGG V. GEORGIA* TO *ATKINS V. VIRGINIA*

A. *The Decreased Rate of Capital Clemency from 1977 to 2002*

The rate of clemency in capital cases is substantially lower in the period from 1977 to 2002 than it was earlier in the twentieth century. It can be conservatively estimated that from the beginning of the twentieth century until the moratorium,²⁵ twenty to twenty-five percent of death row prisoners were beneficiaries of executive commutation of sentence.²⁶ Since the moratorium, a smaller percentage of the condemned have been executed, but the great bulk of these reductions of sentence have been judicial.²⁷ Since 1976, in capital cases that have progressed to the point at which clemency is decided, typically when execution is otherwise imminent, clemency has been granted in less than six percent of the cases.²⁸

From the first execution of the contemporary era in 1977 until the Supreme Court handed down its decision in *Atkins*, 784 executions²⁹ have been carried out while only ninety clemencies³⁰ have been granted. Of these ninety clemencies, forty-eight were granted to achieve justice or bestow mercy, the two broad rubrics under which the traditional grounds for clemency fall. The other forty-two were granted for administrative or instrumental purposes, *i.e.*, to prevent the loss of convictions and to conserve judicial resources.³¹

25. In the years 1967 through 1976, the so-called "moratorium period," there were no executions in the United States. During the moratorium, the legal and penal systems awaited clarification of the constitutional status of the death penalty from the Supreme Court. In 1972, the Court held all extant capital punishment statutes invalid in *Furman v. Georgia*, 408 U.S. 238, 256-57 (1972). In 1976, in *Gregg v. Georgia*, 428 U.S. 153, 195 (1976), the Court began approving efforts to craft acceptable statutes. The first post-moratorium execution took place in 1977.

26. Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 262 (1990-91); WILLIAM J. BOWERS, EXECUTIONS IN AMERICA 76 n.b (1974).

27. James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-95*, The Justice Project, at <http://justice.policy.net/jpreport/finrep.PDF> (last visited Apr. 1, 2003); see also TRACY L. SNELL, U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, CAPITAL PUNISHMENT 2000, at 10, tbls. 10 & 13, App. tbl. 1 (Dec. 2001).

28. There were 832 cases resolved by execution or clemency from 1977 to June of 2002—784 by execution and forty-eight by clemency, if the forty-two administrative clemencies, granted to avert retrial, rather than to do justice or show mercy, are excluded. Death Penalty Info. Center (DPIC), *Executions*, at <http://www.deathpenaltyinfo.org> (last visited Apr. 1, 2003) (784 executions) [hereinafter DPIC]; DPIC, *Clemency* (forty-eight clemencies on humanitarian grounds).

29. DPIC, *Executions*, *supra* note 28.

30. See DPIC, *Clemency*, *supra* note 28.

31. The administratively motivated clemencies occurred in Texas and Virginia, where retrials would otherwise have been required as the result of Supreme Court invalidation of capital statutes in those states. Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, 293 (1993).

Of the forty-eight capital clemencies granted in the interest of justice or mercy,³² only nine have been granted to juveniles, the mentally retarded, or the mentally ill because they fell into one (or more than one) of these three categories. Twenty-one juveniles³³ and at least thirty-four mentally retarded persons have been executed since 1976.³⁴ Estimates of the number of mentally ill who have been executed are more speculative, but available estimates suggest that the number of mentally ill who have been executed may exceed the number of mentally retarded.³⁵ Estimating the numerical strength of both the mentally ill and the mentally retarded in the capital system is rendered more difficult because they themselves may be unaware of their condition or may not be disposed to acknowledge it.³⁶ In the case of the mentally ill, illness may manifest or worsen after sentence, raising the question of competency to be executed although the defendant may have been in better mental fettle when the crime was committed or tried.³⁷ Thus, the number of juveniles, mentally retarded, and mentally ill persons who have progressed to the point of a

32. On the role of justice and mercy in the theory and practice of clemency, see MOORE, *supra* note 17, and Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI. KENT L. REV. 1501 (2000).

33. DPIC, *Executions of Juv. Offenders*, *supra* note 28.

34. The conservative estimate that at least thirty-four mentally retarded persons have been executed was arrived at by paring the list of forty-four executed mentally retarded compiled by Denis Keyes, William Edwards, and Robert Perske, in order to exclude marginal or dubious cases that may not satisfy the definition of mental retardation in currency among states that have legislated to forbid the execution of the mentally retarded. Denis Keyes, William Edwards & Robert Perske, *People with Mental Retardation Are Dying, Legally: At Least 44 Have Been Executed*, 40 MENTAL RETARDATION 243, 243-44 (2002). Thirty-four of those listed in the article by Keyes, et al., have IQs of 70 or less, or are listed as mildly retarded, a designation that excludes persons with IQs above 70. See AM. PSYCHIATRIC ASS'N: DIAGNOSTIC AND STAT. MANUAL OF MENTAL DISORDERS 42-43 (4th ed., text rev. 2000). As Justice Stevens notes in *Atkins*, "an IQ between 70 and 75 or lower...is typically considered the cutoff score for the intellectual functioning prong of the mental retardation definition." 536 U.S. at 307. In addition to intellectual deficit, the widely followed American Association of Mental Retardation (AAMR) definition of "mental retardation" requires related limitations in adaptive skills and manifestation of mental retardation before the age of eighteen. *Id.* n.3. Typically, jurisdictions that prohibit the execution of the mentally retarded accept a cutoff IQ qualification of 70. For example, N.M. STAT. ANN. § 31-20A-2.1(A) (1978), states, "An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation." Additionally, Ricky Ray Rector was removed from the list because he suffered an injury creating disability after age eighteen and therefore did not qualify under the standard definition as a result of the age at which he became disabled.

35. Two clinical studies suggest the magnitude of the issue. See Dorothy Otnow Lewis, M.D., et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 145 (1988); Dorothy Otnow Lewis, M.D., et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838 (1986).

36. For a discussion on the difficulties mentally retarded defendants face in the criminal justice system, see James W. Ellis & Ruth Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414 (1985). The mentally retarded face a greater likelihood of a death sentence because they are more likely to confess falsely out of a desire to please, are less able to assist in their own defense, make poor witnesses, and may be read as lacking remorse when their demeanor is misunderstood by juries. Justice Stevens notes that this defenselessness of the mentally retarded provides a "second justification" for precluding their execution. *Atkins*, 536 U.S. at 313. The same factors that hinder the ability of the mentally retarded to effectively defend themselves from capital sentences probably contribute to the underestimation of their numbers on death row.

37. In *Ford v. Wainwright*, 477 U.S. 399, 417-18 (1986), the Supreme Court adopted as a constitutional doctrine the common law rule forbidding the execution of a prisoner unable to appreciate why he was being punished or that he was being executed. Although this holding is expressly limited to the insane, some mentally retarded persons exhibit a similar lack of comprehension.

clemency decision, and then been denied, exceeds by multiples the number of death row inmates in these categories (nine) who have received clemency.

*B. Reasons and Rhetoric: The Forty-Eight Grants of Capital Clemency from Gregg to Atkins*³⁸

Despite the highly discretionary nature of the clemency power, conservative reasons were invoked in support of a large majority of grants. In thirty of the forty-eight cases, the governor or other clemency authority enacted the “fail-safe” role, justifying grants of clemency as rectifying legal system failures. Eighteen of these “fail-safe” grants were made to vindicate the legal values of factual accuracy and due process. The other twelve “fail-safe” grants were made to achieve sentencing equity. Adducing these reasons, governors strove to position themselves rhetorically as acting to prevent anomalous outcomes distressing to legal system values.

The remaining eighteen grants were made for reasons critical, in varying degrees, of the contemporary capital punishment regime or at least its results in particular cases. These governors claimed the traditional authority to grant clemency in the name of ideals of justice and mercy not captured by legal justice. Among the beneficiaries of grants seeking to refine and temper rather than satisfy statutory justice were the nine prisoners whose death sentences were commuted because they were mentally retarded, mentally ill, or juvenile. One governor, Richard Celeste of Ohio, was responsible for six of these nine grants. Additionally, nine other cases involved a variety of merciful grounds. Another governor, Toney Anaya of New Mexico, accounted for five of these nine grants. In the quarter-century period bounded by the *Gregg* and *Atkins* decisions, only six governors, augmented by two such grants by the Georgia Board of Pardons and Parole, have granted capital clemency for reasons that venture beyond the “legalistic.”

Table 1 presents the types of reasons for granting capital clemency in the *Gregg* to *Atkins* period as well as the frequency with which each type is encountered. The Appendix presents the record of the 48 capital clemency grants made to enhance justice or mercy.

**Table 1: Types of Reasons for Grants of Capital Clemency
1977–2002**

Reason for Grant	Number of Grants
“Legalistic”—Doubts about trial accuracy or procedure	18
“Legalistic”—Sentencing equity	12
Extra-legal—Justice or Mercy (of which nine were mentally retarded, mentally ill, or juveniles)	18
Total	48

38. The forty-eight cases comprise all grants from 1977 to June of 2002 that were made to achieve justice or bestow mercy. Radelet & Zsembik, *supra* note 31, document forty-two grants made for administrative reasons.

1. "Legalistic" Grants—Doubts about Procedure and Accuracy

"Legalistic" grants are apparently easier to make and defend than "extra-legal" grants, since the governor positions himself as shoring up rather than overriding the legal order. Table 1 shows that there were eighteen grants on grounds of doubts about the accuracy or procedural integrity of the capital trial. One such grant was made to Earl Washington in Virginia, a mentally retarded man convicted of rape/murder. Washington's death sentence was commuted to life in prison in 1994 because DNA evidence led Governor Wilder to entertain doubts about his guilt.³⁹ Some six years later, in 2000, the growing prestige of DNA evidence allowed Governor Gilmore to grant Washington a pardon of innocence.⁴⁰

Some governors have insisted that the standard for execution exceeds that required for lesser penalties. For example, in 1989, Governor Buddy Roemer of Louisiana commuted the death sentence of another mentally retarded petitioner, Ronald Monroe, because of doubts about guilt provoked by learning that the police had withheld evidence implicating another suspect.⁴¹ Governor Roemer expressed a rationale that other governors have relied upon in capital commutations—he believed the test for guilt ("beyond a reasonable doubt") was met, but not the test for execution: "[M]y test is if there is any doubt, I cannot make a mistake on the side of execution...in an execution in this country the test ought not to be reasonable doubt. The test ought to be is there any doubt..."⁴²

President George W. Bush, who during his eight years as governor of Texas presided over no less than 140 executions,⁴³ was also pledged to the "fail-safe" or legalistic model of clemency.⁴⁴ He adhered to this position when he granted commutation to the notorious self-confessed mass murderer Henry Lee Lucas.⁴⁵ Bush was put in doubt that Lucas was responsible for the particular murder for which he was sentenced to die in Texas.⁴⁶ Evidence had been developed that Lucas gilded the lily of his murderous career by confessing to crimes he had not committed.⁴⁷ Bush positioned himself in explanation of his clemency as a champion of due process by stating, "I take this action so that all Texans can continue to trust the integrity and fairness of our criminal justice system."⁴⁸

The Donald Paradis case was also one in which the withholding of evidence from the defense eroded the governor's confidence in the trial result.⁴⁹ In 1996, Governor

39. Frank Green, *Washington's Death Sentence Commuted: New Trial Could Occur If State Law Is Changed*, RICH. TIMES-DISPATCH, Jan. 15, 1994, at A1.

40. Francis X. Clines, *Pardoned Inmate's Lawyers Attack Virginia Evidence Law*, N.Y. TIMES, Oct. 4, 2000, at A22.

41. Jack Wardlaw & James Hodge, *Execution Halted by Roemer*, TIMES-PICAYUNE (New Orleans), Aug. 17, 1989, at A-1.

42. *Id.*

43. DPIC, *Number of Executions by State*, *supra* note 28.

44. Bruce Tomaso & David McLemore, *Bush Sparer Lucas from Death Penalty; Governor Commutes Sentence to Life, Cites Doubt over Guilt*, DALLAS MORNING NEWS, June 27, 1998, at 1A.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Bob Herbert, *In America: Death Row Survivor*, N.Y. TIMES, Apr. 12, 2001, at A29; *see generally* Alec

Phil Batt of Idaho commuted Paradis's death sentence.⁵⁰ Weak trial representation also played a role in this and other cases. Paradis was represented by a lawyer six months out of law school who had never before tried a felony case.⁵¹ In 2001, an Idaho court overturned Paradis's conviction and freed him.⁵²

While grounds for commutation such as withheld evidence and substandard legal representation recurred among the legalistic grants, there were also unique legalistic grounds. For example, Governor Huckabee of Arkansas granted commutation to Bobby Ray Fretwell in 1999 at the urging of a juror in the Fretwell trial.⁵³ The juror came forward after years of soul searching because he had voted for the capital sentence against his conscience out of fear of ostracism in the small community in which the killing had occurred.⁵⁴ No doubt was raised about Fretwell's guilt, but the juror who came forward criticized the poor performance of Fretwell's attorneys during the penalty phase of the trial.⁵⁵

Despite the long history of challenges to capital punishment on the grounds of racial bias, the issue of race was prominent in only one of these due process salvaging grants. In 2001, Governor Mike Easley of North Carolina commuted the sentence of Robert Bacon, Jr.⁵⁶ While Easley was extremely circumspect in explaining his decision, there were published allegations that Bacon, a black man who had killed his white girlfriend's estranged husband at her urging, was sentenced by a jury influenced by racism.⁵⁷

In sum, the defense of due process values saves the criminal justice system from its own failures and thus constitutes the most conservatively positioned assertion of the clemency power. It is therefore unsurprising that due process values figure prominently in the justification of capital clemency.

2. Legalistic Grants—Sentencing Equity

Granting clemency in order to achieve sentencing equity is a more aggressive deployment of the power than those defending due process, in that the governor may well be vindicating a claim that juries and appellate courts performing proportionality review have rejected. The values protected are nevertheless entrenched in capital punishment law and the governor's action is positioned rhetorically as preventing an anomalous result discordant with established capital justice.

Wilkinson, *A Night at the Beast House*, NEW YORKER, Feb. 13, 1995, at 52.

50. Bill Hall, *Batt Decides the Paradis Case with Dignity and Care*, LEWISTON MORNING TRIB., May 29, 1996, at 10A.

51. Marty Trillhaase, *Consider the Paradis Legacy*, IDAHO FALLS POST REG., Jan. 16, 1997, at C6.

52. Herbert, *supra* note 49.

53. Rachel O'Neal & Doug Peters, *Juror's Anguish Leads Huckabee to Halt Execution*, ARK. DEM. GAZETTE, Feb. 6, 1999, at A1.

54. *Id.*

55. *Id.*

56. Although Easley was unforthcoming about the reasons for his decision, there were press reports that some jurors had expressed hostility towards Bacon, a black man, because he was romantically involved with a white woman. *See, e.g., Easley Imposes Fair Punishment*, MORNING STAR (Wilmington, N.C.), Oct. 5, 2001, at 10A. Concerns about race were also prominent in the Ohio clemencies granted by Governor Celeste. *See infra* part IV(D). Governor Celeste's concern was with systemic racism in Ohio, not with charges of bias raised in specific cases. *Id.*

57. *See Easley Imposes Fair Punishment*, *supra* note 56.

Sentencing equity requires both “horizontal” and “vertical” equity.⁵⁸ Horizontal equity is achieved when persons convicted of crimes of similar severity and evincing similar levels of culpability receive similar sentences.⁵⁹ Vertical equity is achieved when punishments are meted out in such fashion that more serious crimes are always punished more severely than lesser crimes.⁶⁰

Twelve commutations were granted on sentencing equity grounds. Most of these were granted to achieve horizontal equity. Wendell Flowers, for example, was sentenced to die for the death of a fellow inmate killed as a result of an inmate plot. Governor Jim Hunt of North Carolina commuted the death sentence of Flowers in 1994 because two co-defendants received life sentences.⁶¹ Governor Hunt made the following statement: “[S]everal inmates were involved in this murder. From the testimony of the eyewitness it is not exactly clear what role Wendell Flowers carried out. But it is clear as a bell that Flowers did not kill Rufus Watson alone.”⁶²

One particularly controversial case was granted for reasons of vertical equity. In 1996, Governor Jim Edgar of Illinois, a Republican and death penalty proponent, commuted the death sentence of Guinevere Garcia.⁶³ Garcia shot her ex-husband in a robbery attempt that went awry.⁶⁴ She had previously served a term for murder of her infant daughter.⁶⁵ Governor Edgar compared her case to that of John Wayne Gacy, who was executed for killing thirty-one victims.⁶⁶ He also compared her case to that of a man who kidnapped a woman, raped her repeatedly, kept her prisoner in the trunk of his car for two days, and then shot her.⁶⁷ Finally, he compared her to two hundred other convicted multiple murderers in Illinois prisons not under sentence of death.⁶⁸ In granting commutation to Garcia, Governor Edgar explained his decision in these words: “There is going to be a lot of criticism of this. This is not going to be politically popular. [Garcia] is not the kind of case that I had in mind when I voted as a legislator to restore the death penalty.... Executions are for the worst of the worst.”⁶⁹

58. See Rapaport, *supra* note 32.

59. *Id.*

60. Clemency for the mentally retarded and the mentally ill could also be justified on grounds of vertical equity as remedial retributive justice. The mentally retarded and seriously mentally ill lack the “the highest level of adult culpability” that should be requisite for the most extreme penalty. Before *Atkins*, many jurisdictions permitted the capital punishment of the mentally retarded. The mentally ill and juveniles have yet to receive categorical protection in every capital jurisdiction. Clemency for members of these classes therefore requires a willingness to assert extra-legal values of justice or mercy that the law has not been pledged to vindicate.

61. Andrea Weigl, *Hunt Commutes Sentence*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 22, 2000, at A1.

62. *Id.*

63. Rick Pearson, *Despite Criticism on Garcia, Edgar Says He Was Right*, CHI. TRIB., Jan. 20, 1996, § 1, at 5.

64. Don Terry, *After a Life of Desperation, A Female Inmate Asks to Die*, N.Y. TIMES, Jan. 8, 1996, at 8. Garcia, herself the victim of appalling childhood abuse, claimed to have killed her daughter to spare her from abuse from the same family member abuser. *Id.*

65. *Id.*

66. Emily Wilkerson, *Edgar Ignores Political Considerations in Clemency*, STATE J.-REG. (Springfield, Ill.), Jan. 22, 1996, at 5.

67. *Id.*

68. *Id.*

69. Pearson, *supra* note 63, at 5; Eric Felten, *Rule of Law: The Death Penalty's Glass Ceiling*, WALL ST. J., Jan. 24, 1996, at A13.

3. Extra-Legal Grants of Clemency for Juveniles, the Mentally Retarded, and the Mentally Ill

Nine of the forty-eight clemencies granted in capital cases since the resumption of executions in 1977 were granted because of youth, mental retardation, or mental illness. In these few cases, the executive authority was willing to stand on the ground later taken in *Atkins*, at least with respect to the mentally retarded. These clemencies were the result of the recognition that the immature and the disabled “do not act with the level of moral culpability that characterizes the most serious adult criminal.”⁷⁰

Three governors and the Georgia Board of Pardons and Parole have made grants of this type. Governor Richard Celeste of Ohio made eight capital clemency grants in total, of which six were made to persons who were mentally retarded, mentally ill, or both.⁷¹ Governor Celeste had multiple bases for each of his grants, including concern that racism prevailed in the capital punishment system in Ohio.⁷² However, he was influenced by mental deficits and mental illness, among other factors, in six of the eight cases.⁷³ Governors Mel Carnahan of Missouri⁷⁴ and James Gilmore of Virginia⁷⁵ and the Georgia Board of Pardons and Parole each granted clemency to one inmate who was mentally ill. Only one grant took age at time of crime into account. However, that grantee, Alexander Williams, who was commuted in Georgia in 2002, is also severely mentally ill.⁷⁶ At least three additional mentally retarded death row inmates are among the forty-eight, but these grants were not made because of their mental retardation but because of doubts about their guilt.⁷⁷

70. *Atkins*, 536 U.S. at 306.

71. See *Celeste Spares 8 Sentenced to Die in Chair*, THE BLADE (Toledo, Ohio), Jan. 11, 1991, at 1 (reporting that three of the six commuted have IQs below 70 and three were diagnosed as mentally ill). Debra Brown, Elizabeth Green, and Leonard Jenkins are mentally retarded. Dick Kimmins & William A. Weathers, *Celeste Spares Eight Killers from Death Row*, CIN. ENQUIRER, Jan. 11, 1991, at A1; Mary Beth Lane, *Celeste Commutes Eight Death Sentences*, PLAIN DEALER (Cleveland, Ohio), Jan. 11, 1991, at 1-A.; *At End of Term, Ohio's Governor Commutes Death Sentences for 8*, N.Y. TIMES, Jan. 12, 1991, at 12. Willie Jester, Donald Mauer, and Lee Seiber are mentally ill. Lane, *supra*; *Stark Killer's Sentence Commuted by Celeste*, BEACON J. (Akron, Ohio), Jan. 11, 1991, at A1; Mary Yost, *Convicted Killer Was Ready for the Electric Chair*, COLUMBUS DISPATCH, Jan. 11, 1991, at 5B.

72. Kobil, *supra* note 13, at 630; Daniel T. Kobil, *Do the Paperwork or Die: Clemency, Ohio Style?*, 52 OHIO ST. L.J. 655, 679-80 (1991) (stating that Celeste explicitly invoked mental health and mental disability as among the criteria he employed in reaching his decisions and also linked his concern about racial bias to the inclusion of six blacks among those spared); John Quigley, *Racism in Death Penalty*, COLUMBUS FREE PRESS, Feb. 1991, at 5.

73. *Celeste Spares 8 Sentenced to Die in Chair*, *supra* note 71.

74. Carnahan concluded that Bobbie Shaw's death sentence “may be fundamentally unfair,” because the jury was not told of his brain damage and schizophrenia. Alan Bavley & Lynn Horsley, *Carnahan Reduces Inmate's Sentence: Mental Health Advocates Applaud Decision*, KAN. CITY STAR, June 3, 1993, at A1.

75. Calvin Swann had a long history of schizophrenia, which ultimately led Governor Gilmore to commute his sentence. Frank Green, *Gilmore Grants Swann Clemency: Sentence Commuted to Life Without Parole*, RICH. TIMES-DISPATCH, May 13, 1999, at A1.

76. Williams was diagnosed as a paranoid schizophrenic while in prison. Sue Anne Pressley, *Ga. Inmate's Death Sentence Commuted*, WASH. POST, Feb. 26, 2002, at A2.

77. Learie Alford, Ronald Monroe, and Earl Washington are described as mentally retarded. All three were granted commutation because of gubernatorial doubts about guilt. See Deborah L. Ibert, *Two Get Decision on Mercy*, TALLAHASSEE DEM., June 20, 1979, at 1A (Learie Alford); Jack Wardlaw & James Hodge, *Execution Halted by Roemer*, TIMES-PICAYUNE (New Orleans, La.), Aug. 17, 1989, at A-1 (Ronald Monroe); Francis X. Clines, *Pardoned Inmate's Lawyers Attack Virginia Evidence Law*, N.Y. TIMES, Oct. 4, 2000, at A22 (Earl Washington). A fourth man, Darrell Edwin Hoy, whose Florida death sentence was commuted in 1980 by Governor Graham, was

More frequently governors refused to open what could well turn out to be a Pandora's Box of deserving death row petitions in cases of youth, the mentally retarded, or the mentally ill. Governors routinely, if not ritualistically, defer to the jurisdiction and the competence of the judiciary. Typical is the response of Governor James Gilmore of Virginia. In 1998, Gilmore denied the petition of Dwayne Allen Wright.⁷⁸ Wright had killed an Ethiopian immigrant mother of three during an attempted rape, which culminated a five-day shooting spree.⁷⁹ Wright was seventeen-years-old at the time of this horrific crime.⁸⁰ His clemency lawyers alleged low intelligence, mental illness, and woefully substandard legal representation at trial as grounds for clemency.⁸¹ Denying Wright's clemency petition, Governor Gilmore explained that "today [Wright] is 26. He is not a child, nor is he a model prisoner."⁸² Governor Gilmore concluded, "Questions regarding Wright's mental deficiencies were thoroughly investigated, presented to the jury, and ultimately resolved at trial."⁸³

The small number of juveniles, mentally retarded, or mentally ill who have had their death sentences reduced, relative to the number in these three categories of persons who have been executed,⁸⁴ raises questions about the health of the clemency system. Clemency is a multi-purpose institution.⁸⁵ One of its least controversial uses, common to many political traditions,⁸⁶ is prevention of excessive punishment in what Alexander Hamilton called cases of "unfortunate guilt," *i.e.*, cases in which the severity of the sentence imposed exceeds moral culpability.⁸⁷ Another of the traditional functions of clemency has been to be a bellwether of emerging criminal justice norms, leading society in the direction of needed reform.⁸⁸ In *Atkins v. Virginia*, the Supreme Court categorically prohibited the execution of the mentally retarded, because by virtue of "their disabilities in areas of reasoning, judgment, and control of their impulses...they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct" and are so regarded by their fellow Americans.⁸⁹ Parallel arguments can be made about the level of moral culpability of seriously mentally ill⁹⁰ and juvenile⁹¹ capital prisoners. If the majority

described as "slow" and "partially retarded." Memorandum from Patrick D. Doherty, Hoy's Attorney, to Governor Graham (Dec. 12, 1979) (on file with author); *see also* Robert Driver, Editorial, *Of Convictions and Clemency*, CLEARWATER SUN (Fla.), Jan. 2, 1980, at 8A. (reporting that Hoy's sentence was commuted to achieve sentencing equity).

78. Craig Timberg, *Virginia Executes Inmate Who Killed Woman at 17*, N.Y. TIMES, Oct. 15, 1998, at A19.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *See supra* part II(A).

85. *See supra* part I(C).

86. Sebba, *supra* note 6.

87. THE FEDERALIST NO. 74 (Alexander Hamilton).

88. Kobil, *supra* note 13, at 611.

89. *Atkins*, 536 U.S. at 306.

90. Mental illness is a statutory mitigating factor weighing against the imposition of the death penalty in the majority of capital punishment states. *See* Ellen F. Berkman, Note, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291, 296-97 (1989).

91. The Supreme Court has held that no person below the age of sixteen at the time of their crime may be executed and no person below the age of eighteen can be executed absent explicit statutory authorization of the

correctly portrayed American values, many governors have been unwilling or unable to grant commutation to capital prisoners whose ineligibility for capital punishment, from the moral point of view, was shimmering on the border of general recognition.

4. Extra Legal Grants of Clemency Based on Opposition to the Death Penalty or Mercy

Avowedly anti-capital punishment governors have taken a variety of approaches to the use of their clemency powers in capital cases. For example, pre-moratorium Governor Pat Brown of California would only grant clemency when there were grounds other than his standing moral and religious demurrals.⁹² Governor Winthrop Rockefeller cleared the fifteen-member death row of Arkansas by commutation just as he left office early in 1970.⁹³ Governor Rockefeller took positions rarely heard from a governor in a capital punishment state in recent years, both in deploring capital punishment and in his adherence to the possibility of rehabilitation for capital prisoners. Governor Rockefeller wrote, "many individuals now on death row—albeit guilty of crimes of violence—are demonstrably capable of rehabilitation."⁹⁴

More recently, only one post-moratorium governor has chosen to rest commutation squarely on opposition to capital punishment. Governor Toney Anaya commuted the death sentences of all five men on New Mexico's death row in 1986.⁹⁵ Governor Anaya premised his grants explicitly on religious opposition to capital punishment.⁹⁶

In the post-moratorium period, only one governor and the Georgia Board of Pardons and Parole have granted commutations on grounds that included recognition of rehabilitation. Governor Ted Schwinden of Montana commuted the death sentence of David Cameron Keith in 1988.⁹⁷ In addition to factual questions about Keith's level of culpability for the murder he committed, he was injured during his arrest and as a result blind and in need of a wheel chair.⁹⁸ He was also, as are so many who are not granted clemency, remorseful and religious.⁹⁹ In 1990, the Georgia Board of Pardon and Paroles granted the second and last commutation on the grounds of rehabilitation to William Moore.¹⁰⁰ In addition to his rehabilitation in prison, the Board was affected by the steadfast opposition to Moore's execution from the victim's family.¹⁰¹

practice. *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988); *Stanford v. Kentucky*, 492 U.S. 361 (1989). Five of the thirty-eight capital punishment states permit the execution of sixteen-year-olds and an additional seventeen states allow execution of seventeen-year-olds. See DPIC, *Minimum Death Penalty Ages by State*, *supra* note 28.

92. See EDMUND G. (PAT) BROWN & DICK ADLER, *PUBLIC JUSTICE, PRIVATE MERCY* 121-22 (1989).

93. Winthrop Rockefeller, *Executive Clemency and the Death Penalty*, 21 CATH. U. L. REV. 94 (1971).

94. *Id.* at 101.

95. Radelet & Zsembik, *supra* note 31, at 298.

96. *Id.*

97. Bob Anez, *David Keith Spared*, MONT. STANDARD, Dec. 30, 1988, at 1.

98. *Id.*

99. *Id.*

100. *Id.*

101. The Georgia Board of Pardons and Parole was influenced by several other factors as well, including that Moore pleaded guilty in 1974, when the requirements of the death penalty were uncertain. But remorse and rehabilitation clearly influenced the Board, as did the request for mercy from the victim's family. Holly Morris, *Board Spares Murderer*, ATL. CONST., Aug. 21, 1990, at A1.

Darrell Mease was the beneficiary of a controversial grant made by Governor Mel Carnahan of Missouri.¹⁰² In 1999, Mease's death sentence was commuted because Pope John Paul II asked Governor Carnahan not to allow the execution, which was scheduled to occur while the Pope was in St. Louis.¹⁰³ The Pope approached Governor Carnahan personally to make the request. Governor Carnahan explained the impact of Pope John Paul's request as follows: "then he stopped and talked to me...and asked me to show mercy... This was a very unusual circumstance, having a papal visit.... And the Pope, during his time there, to show particular interest in this individual, to seek me out to discuss that, moved me very greatly."¹⁰⁴

Governor Fob James of Alabama refused to give a public explanation of any kind for commuting the death sentence of Judith Ann Neelley.¹⁰⁵ Acting on his last day in office, Governor James never made himself available to the press; however, the press speculated that Neelley's gender and the efforts on her behalf by leading churchmen were responsible for the decision of the deeply religious governor.¹⁰⁶ Neelley herself had become deeply religious in prison and was supported in her petition for clemency by prominent Alabama churchmen.¹⁰⁷

III. WHY THE STRAIGHT GATE?

There are two plausible explanations for the reduced rate of capital clemency in the era from *Gregg* to *Atkins*. The first explanation is that under contemporary capital punishment law, defendants undeserving of capital punishment are less likely to be capitally sentenced. Furthermore, if those undeserving are capitally sentenced, then errors, whether of procedure, accuracy, or proportionality of sentence to crime, are more likely to be discovered and corrected in the appellate and post-conviction phases of cases. The second explanation is that the contemporary politics of crime inhibit governors and other clemency authorities from granting clemency. Both explanations are valid.

The Eighth Amendment has been interpreted to forbid capital punishment except in cases of the worst crimes and the worst criminals.¹⁰⁸ Many capital jurisdictions have further narrowed the reach of capital punishment, excluding more classes of crime and criminals from its reach than Supreme Court mandates would require. Such exclusions have restricted the imposition of capital punishment upon the population that is the particular concern of this *Beyond Atkins Symposium*.

102. Gustav Niebuhr, *Governor Grants Pope's Plea for Life of a Missouri Inmate*, N.Y. TIMES, Jan. 29, 1999, at A1.

103. *Id.*

104. *Id.*

105. There were abundant reasons for granting clemency in her case, as in many others that have been denied. She was an eighteen-year-old savagely abused wife married to a twenty-nine-year-old sadist when she killed two young girls at the direction of her husband. The girls were kidnapped by the couple and raped by Neelley's husband. Alvin Neelley, the husband, was sentenced to life in prison. At her trial the jury recommended life but the judge overrode and sentenced her to death.

106. Tom Gordon, *Spokesman: James Partly Heeded Jury in Neelley Sentence*, BIRMINGHAM NEWS, Jan. 29, 1999, at 5C.

107. *Id.*

108. *Atkins*, 536 U.S. at 311.

Eighteen of the thirty-eight capital punishment states and the federal jurisdiction already prohibited execution of the mentally retarded before the *Atkins* decision.¹⁰⁹ Sixteen capital punishment states and the federal government treat eighteen years of age at the time of a crime as the minimum age for eligibility for capital punishment.¹¹⁰ A further narrowing of the reach of capital punishment is achieved in the contemporary era because capital jurisdictions treat mental illness as a factor in mitigation that weighs in favor of life rather than death.¹¹¹ In addition, there is a substantially higher rate of judicial relief in the contemporary era that also reduces the number of doubtful cases on death row that would previously have survived to the point where clemency petitions are lodged.¹¹² Yet, despite statutory filters and the increased rate of judicial reversal of capital sentences, governors have allowed the execution of dozens of juveniles, the mentally retarded, and the mentally ill since 1976.

Governors have failed to grant clemency in cases in which it is reasonable to suppose they themselves believed clemency was warranted but nevertheless chose not to grant because they believed the political price would prove too high. A well-documented example illustrates this phenomenon. Then Governor of Arkansas Bill Clinton interrupted his campaign for the Democratic presidential nomination in 1992 to return to Arkansas to deny clemency to Ricky Ray Rector.¹¹³ Rector had shot and killed a policeman and then immediately attempted suicide with a shot to his own head.¹¹⁴ He survived but was severely and permanently brain damaged as a result of the wound.¹¹⁵ His subsequent intellectual functioning was so compromised that Rector saved the pecan pie dessert from his last meal for an after-execution snack.¹¹⁶ Clinton had been denied a second term as governor of Arkansas the first time he sought re-election in part because he was regarded as soft on crime.¹¹⁷ Thereafter, he was staunch in his support for capital punishment. Whatever his views on the trial and execution of competent murderers, in the *Rector* case Clinton was obliged to decide whether or not to allow the execution of a man who was lobotomized.¹¹⁸ Similar scenarios may have been enacted, perhaps dozens of times, in statehouses in the capital punishment states with similar results since 1976.

109. *Atkins*, 536 U.S. at 314.

110. DPIC, *Age Minimums by State*, at <http://www.deathpenaltyinfo.org/article.php?did=205&scid=27> (last visited Apr. 1, 2003).

111. See Berkman, *supra* note 90.

112. Liebman, *supra* note 26; George A. Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97 (1979) (discussing the enhanced role of appellate review in death penalty cases in the post-*Gregg* capital punishment regime).

113. Sam Howe Verhovek, *The Nation: Halt the Execution? Are You Crazy?*, N.Y. TIMES, Apr. 26, 1998, § 4, at 4. Rector was not mentally retarded under the standard definition accepted by the Supreme Court in *Atkins* because the condition did not manifest before the age of eighteen. *Atkins*, 536 U.S. at 309 n.3.

114. Verhovek, *supra* note 113.

115. *Id.*

116. *Id.*

117. Peter Applebome, *Arkansas Execution Raises Questions on Governor's Politics*, N.Y. TIMES, Jan. 25, 1992, at 8. Clinton never granted capital clemency when he was the governor of Arkansas. He was liberal in granting non-capital clemency in his first term as governor but not in subsequent terms. *Id.* As President, he commuted the federal death sentence of David Chandler in 2001. DPIC, *Clemency*, *supra* note 28.

118. The press speculated that Clinton overcame his personal inclinations in the *Rector* case for political reasons. See, e.g., Marshall Frady, *Death in Arkansas*, NEW YORKER, Feb. 22, 1993, at 117; Anthony Lewis, *Abroad at Home: The Two Clintons*, N.Y. TIMES, Feb. 22, 1993, at A17.

Granting clemency in high visibility cases, among which capital cases surely fall, has always carried political risk. Several factors jointly explain why governors face graver risks in the post-*Gregg* era than earlier in the twentieth century:

(1) *Rising crime rates*—Crime rates climbed from 1960 through the 1980s, breeding increased fear and anger in the alarmed public.¹¹⁹

(2) *Collapse of the rehabilitative model of punishment*—Rehabilitation, the preeminent criminal justice philosophy guiding professionals and policy makers earlier in the twentieth century, was discredited. Faith in the curative model crumbled in the face of rising crime rates, lack of demonstrable results in curbing recidivism, and the criticism that the black and the poor were serving more prison time under indeterminate sentencing regimes than higher status whites for similar crimes.¹²⁰

(3) *Rise of the neo-retributivist model of punishment*—Retributivism re-emerged as the dominant criminal justice philosophy. Neo-retributivism, disencumbered of primitive vengefulness, emerged as the penal philosophy committed to the equal treatment of similarly situated offenders.¹²¹ The measure of punishment, neo-retributivists argued, should be “just desert.”¹²² Desert and therefore punishment should be proportional to the severity of the offense and the level of culpability of the offender.¹²³ Punishment should not be determined by the pseudo-science of cure, the caprice of parole boards, or skin color or wealth.¹²⁴ Theorists who popularized the return to retributivism were not advocates of Draconian punishment, nor did they necessarily endorse capital punishment, but rather they argued that severity of punishment should consistently reflect severity of offense and degree of culpability of the offender.¹²⁵

(4) *The politicization of crime control policies*—By the 1970s, crime control policies had become salient issues in electoral politics. A poisonous interaction occurred between the public’s fear of crime and the prominence of crime control as a political issue. As refracted through the electoral politics, retributivism took on harsh aspects that the initial academic revival of the doctrine had lacked. Politicians found it increasingly difficult to resist enacting or endorsing policies that resulted in longer prison terms, larger prison populations, and more death sentences and executions. An outgrowth of this dynamic that is particularly evident in the arena of capital clemency is the enhanced, and increasingly institutionalized, role for victims and the survivors of victims.¹²⁶ The political price of clemency rises with

119. Crime rates declined in the 1990s, but have not returned to 1960 levels. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE 304 (Kathleen Maguire & Ann L. Pastore eds., 2000).

120. See generally FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL (1981); MICHAEL TONRY, SENTENCING MATTERS (1996); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001).

121. For a lucid and influential statement of the neo-retributivist position, see ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976).

122. *Id.* at 66-76 (discussing the principle of commensurate deserts).

123. See *id.* at 27-32 (noting the potential evils of broad discretion in the sentencing decision).

124. See *id.* at 66-76.

125. See Rapaport, *supra* note 32, at 1515.

126. For an illuminating account of the history of the victim’s rights movement, see Lynne Henderson, *Coopting Compassion: The Federal Victim’s Rights Amendment*, 10 ST. THOMAS L. REV. 579 (1998).

every actual or anticipated press report of the anguish of survivors of victims of heinous crimes.¹²⁷

(5) *Enhanced judicial protections*—The Warren Court due process reforms and post-1976 capital constitutional jurisprudence have led to the public perception that the courts can now adequately protect the rights of defendants charged with capital crimes. Many layers of appeal stand between the condemned and their death. By the end of the year 2000, only ten percent¹²⁸ of the condemned had been executed after an average length of stay on death row that had reached the ten-year mark.¹²⁹ Half of those capital prisoners whose cases have advanced at least through the stage of direct appeal have had their sentences judicially reduced.¹³⁰

Governors not disposed to offer clemency frequently adopt the stance that, except in extraordinary circumstances of late discovery of evidence of actual innocence, there is little need for executive clemency in the contemporary capital system. In a statement that typifies the abstemious perspective, then-Governor George W. Bush of Texas explained his position:

[D]ecisions about the death penalty are primarily the responsibility of the judicial branch....The executive branch is far more limited. I view it as a failsafe, one last review to make sure that there is no doubt the individual is guilty and that he or she has had the due process guaranteed by our Constitution and laws....I don't believe my role is to replace the verdict of the jury with my own....¹³¹

Estimates of the health and utility of the institution of executive clemency, and of its efficacy within the contemporary capital punishment system, vary widely. Sanguine observers find that the post-*Gregg* capital punishment system's so-called "super due process"¹³² protections for capital defendants at both trial and in later judicial review reduces the need for clemency to that of a "fail-safe" for rare cases of later discovered evidence of actual innocence.¹³³

Others are persuaded that vulnerable defendants, prominently the mentally retarded, the mentally ill, and prisoners with actual innocence claims, are not adequately protected within the legal system and are routinely denied clemency when other avenues are exhausted.¹³⁴ Some commentators have suggested that

127. See GARLAND, *supra* note 120. Governor George Ryan is at this writing contemplating the clemency petitions of more than 160 Illinois death row prisoners. The anguish expressed by the survivors of victims has shaken supporters of clemency and perhaps Governor Ryan as well. While defense attorneys sought to focus public attention on law enforcement corruption and brutality and the mental retardation or illness of their clients, distraught victims became the cynosure of press and public attention. See John Keilman, *Families Direct Anger at Ryan: Governor Blamed for Stirring Grief at Clemency Bids*, CHI. TRIB., Oct. 18, 2002, at 1.

128. A few states execute at rates far in excess of the national average. See Elizabeth Rapaport, *Staying Alive: Executive Clemency, Equal Protection, and the Politics of Gender in Women's Capital Cases*, 4 BUFF. CRIM. L. REV. 967 app. tbl. 1 (2001).

129. SNELL, *supra* note 27.

130. Liebman, et al. *supra* note 27.

131. GEORGE W. BUSH, A CHARGE TO KEEP 148 (1999).

132. Margaret Jane Radin coined this phrase. See Margaret Jane Radin, *Her Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1149 (1980).

133. For example, in *Herrera v. Collins*, 506 U.S. 390, 391 (1993), Chief Justice Rehnquist describes clemency as the "fail-safe" method of preventing the execution of the innocent.

134. See Acker & Lanier, *supra* note 14; Kobil, *supra* note 13; Victoria J. Palacios, *Faith in Fantasy: The*

clemency should be transformed to become the province of a bureaucratic agency within the executive and that this agency's decisions should be subject to robust judicial review.¹³⁵ From time to time, other critics have called for the abolition of the power of clemency in order to protect the democratically enacted popular will and the decisions of juries.¹³⁶

Whatever view one takes of this ancient institution's contemporary vitality, it should be acknowledged that of the hundreds of governors in thirty-eight execution states during the last quarter century, only nineteen governors, the Georgia Board of Pardons and Paroles, and a single President have been willing to grant capital clemency at least once.¹³⁷ Tumbrils rolled past statehouses 805 times.

IV. GOVERNOR AT THE GATE: MORALITY AND POLITICS IN THE EXERCISE OF THE CLEMENCY POWER

A. *Contemporary Morality and the Ascendancy of Retributivism*¹³⁸

Every criminal justice philosophy with purchase in current debates in the United States provides ample justification for substantially greater use of the clemency power than the typical executive has been willing to risk. Looking only to moral considerations, abstracting for the moment from political considerations, governors across a wide spectrum of moral orientations could readily find justification for expanded use of the clemency power. Retributivism, the ascendant philosophy influencing sentencing policy, is also the most restrictive in its criteria for legitimate uses of the clemency power. If this most restrictive philosophy supports expanded use of the clemency power, then *a fortiori*, moral outlooks that recognize a wider range of grounds for clemency will do so as well.

On a strict retributivist view, each duly convicted offender should without fail or favor suffer the full measure of deserved punishment, neither more nor less.¹³⁹ Retributivism is distinguishable from "redemptive" views of criminal justice and punishment in that retributivists regard rehabilitation or social contribution after the criminal offense as having no possible moral weight in argument for mitigation of punishment.¹⁴⁰ The only legitimate grounds for reduction of sentence, whether judicially or by a clemency authority, would be to redress wrongful conviction or remediate an excessive sentence.

Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases, 49 VAND. L. REV. 311 (1996); Alyson Dinsmore, Comment, *Clemency in Capital Cases: The Need to Ensure Meaningful Review*, 49 UCLA L. REV. 1825 (2002).

135. See Kobil, *supra* note 13, at 622.

136. Opponents of Governor Fob James's 1999 commutation of Judith Ann Neelley proposed a constitutional amendment to strip the governor of clemency power in capital cases. See, e.g., Mike Cason, *Bill Would Remove Power to Commute*, MONTGOMERY ADVERTISER, Jan. 20, 1999, at 1A.

137. Thus far in the short history of the revived federal death penalty, there has been one grant of clemency, by President Clinton, and two executions in 2001. See DPIC, *Executions of Federal Prisoners*, *supra* note 28.

138. The following discussion will be limited to the operation of clemency in what I have called "ordinary criminal cases"; no effort will be made either to generalize or treat separately cases where the executive overrides the operation of the criminal justice system in order to protect the nation from factional division or to conduct foreign policy.

139. See MOORE, *supra* note 17, for a detailed discussion of the retributive approach to clemency.

140. See Rapaport, *supra* note 32.

Contemporary retributivists, however, unlike those of earlier periods, view each offender as entitled to a sentence that does *individual justice*—punishment should reflect the degree of culpability of the offender as well as the seriousness of the offense.¹⁴¹ Retributivists of earlier periods, including no less a luminary than Immanuel Kant, did not systematically distinguish degrees of culpability as bearing on just deserts. Indeed, Kant argued for the death penalty for a wide class of murderers.¹⁴²

Contemporary retributivists differ about the characteristics that define the class of murderers who should be subject to capital punishment;¹⁴³ however, persons with the mental and emotional resources of young children or chronic paranoid schizophrenics are unlikely to be regarded as sufficiently culpable to merit execution by neo-retributivists. What has been said of governors' moral outlooks could equally well be said of citizens, whose moral values many governors believe they ought to honor, or at least weigh, in the making of clemency decisions.

Indeed, the *Atkins* opinion relies both on the contemporary or neo-retributive theory of criminal sentencing and on widespread public acceptance of neo-retributivism in holding that the Eighth Amendment forbids the execution of the mentally retarded.¹⁴⁴ Justice Stevens has produced a morally coherent justification that draws on widely shared beliefs. While retributivism does not necessarily exhaust or fully characterize the criminal justice values of contemporary Americans, it would be difficult to deny that retributivism has a prominent place in the contemporary constellation of criminal justice values. In the event that a governor should develop the desire to venture forth as a leader in the dangerous shoals of criminal law reform, through exemplary clemency decisions or other devices, Justice Stevens in *Atkins* has provided grist for the rhetorical mill.

B. Opening the Gate: Atkins v. Virginia and the Evolution of Retributivism

As problematic as the politics of clemency may be, the jurisprudence of excluding the mentally retarded from the reach of capital punishment was easy work for Justice Stevens in *Atkins*, save for one knotty dimension of justification—the matter of public support for the exclusion. Established Eighth Amendment death penalty jurisprudence requires objective evidence of a social consensus in support of contracting the scope of capital punishment in order to exclude a class of criminals.¹⁴⁵ Eighth Amendment principles deliver the exclusion of the mentally retarded almost mechanically once the evidence for consensus is secured. The *Atkins* decision itself provides ample jurisprudential justification, *mutatis mutandis*, for the exclusion of juveniles and the mentally ill as well as the mentally retarded from

141. The principle or slogan "individual justice" was long associated with the rehabilitation school of criminal justice. See *Williams v. N.Y.*, 337 U.S. 241, 247-49 (1949), for what is perhaps the classic judicial embrace of individual justice within the framework of rehabilitation penology. The particular achievement of late twentieth century retributivists was to reinterpret retributivism as requiring the tailoring of penalties to each individual criminal's degrees of moral culpability. See VON HIRSCH, *supra* note 121; Rapaport, *supra* note 32.

142. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 139 (John Ladd trans., 2d ed. 1999) (1797).

143. Not all contemporary retributivists endorse capital punishment. See, e.g., Jeffrie G. Murphy, *RETRIBUTION, JUSTICE, AND THERAPY* 244 (Wilfred Sellars & Keith Lehrer eds., 1979).

144. *Atkins*, 536 U.S. at 321.

145. *Id.* at 311-12.

capital prosecution—except in so far as the Court’s methodology requires objective evidence of a social consensus repudiating such executions.¹⁴⁶

In *Atkins*, Justice Stevens’ analysis begins with the proposition that since the inception of the contemporary death penalty era, retribution and deterrence have been the accepted social purposes of capital punishment.¹⁴⁷ Justice Stevens dismisses the relevance of deterrence in cases of mentally retarded murderers because their cognitive and behavioral impairments deprive them of the ability to calculate risks sufficiently to be deterred.¹⁴⁸ The Supreme Court in *Atkins* relies upon a retributive theory of punishment, as it has throughout the history of Eighth Amendment capital jurisprudence since 1976. The Court treats this theory of punishment as (1) capturing important and pervasive social values of our society and (2) itself evolving, and indeed progressing or maturing, along with the society that supports it.¹⁴⁹

Retribution is served when “the criminal gets his just deserts.”¹⁵⁰ Since the *Gregg* decision the Supreme Court has adhered to what Stevens calls a “narrowing jurisprudence,”¹⁵¹ in accordance with which only the most serious crimes and the most culpable criminals have been deemed to deserve death. Thus, in *Coker v. Georgia*, the Supreme Court held that the rape of an adult woman, and non-lethal crime in general, cannot be punished by death.¹⁵² The Court likewise held in *Enmunds v. Florida* that an accomplice who neither caused nor intended to cause death is not eligible for capital punishment.¹⁵³ Since *Gregg*, the Eighth Amendment has been interpreted to forbid capital punishment unless culpability rises above the level of “the average murderer.”¹⁵⁴ Justice Stevens concludes, “the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.”¹⁵⁵

The *Atkins* majority relies upon clinical psychology and psychiatry for an account of the deficits that establish the lesser culpability of the mentally retarded murderer.¹⁵⁶ However, to establish that the Eighth Amendment no longer tolerates the execution of the mentally retarded, Justice Stevens relies on the development of a social consensus against the practice. The “clearest and most reliable objective evidence”¹⁵⁷ of the emergence of that consensus is the large number of execution states that have in recent years legislatively prohibited the execution of the mentally retarded.¹⁵⁸ Relying primarily on the strength of this evidence, Justice Stevens

146. The Supreme Court refused to revisit the question of the execution of juveniles within months of its decision in *Atkins*. *In re Stanford*, 123 S.Ct. 472 (2002) (mem.).

147. *Atkins*, 536 U.S. at 319 (citing *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

148. *Id.* at 318 (“[T]here is abundant evidence that [the mentally retarded] often act on impulse rather than pursuant to a premeditated plan.”).

149. *Id.* at 304 (quoting *Trop v. Dulles*, 356 U.S. 86 (1958)) (“The Eight Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”).

150. *Id.* (quoting *Enmunds v. Florida*, 458 U.S. 782, 801 (1982)).

151. *Id.* at 319.

152. *Coker v. Georgia*, 433 U.S. 584, 593-96 (1977).

153. *Enmunds v. Florida*, 458 U.S. 782, 789-93 (1982).

154. *Atkins*, 536 U.S. at 319.

155. *Id.*

156. *See id.*

157. *Id.* at 312 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

158. Eighteen states and the federal jurisdiction forbid the execution of the mentally retarded. In 1989, the Supreme Court declined to protect the mentally retarded, citing the fact that only two states excluded the mentally

concludes, "today our society views mentally retarded offenders as categorically less culpable than the average criminal."¹⁵⁹

A governor, however, might pause before relying on public acceptance of the mature retributivism of the *Atkins* majority, even if he or she were confident that these evolved values were widely held. Governors must worry about vocal and appealing critics, such as the victims of crime, whose outcry may overwhelm more measured and less strident sections of public opinion. Few governors have been willing to invest scarce political capital in offering relief to the retributively excessively punished or in using clemency as a means of addressing wider issues of criminal law reform. Nevertheless, nineteen governors, one President, and the Georgia Board of Pardons and Paroles have awarded capital clemency during the period from 1977 to 2002. Several have made multiple grants and a few have attempted to use the power to inspire capital punishment law reform.

C. *Politics at the Gate of Heaven*

An unknown number of governors whose moral outlook justifies commutation of sentence for the mentally retarded, the seriously mentally ill, juvenile murderers, and other death row petitioners have refused commutation. Does it follow, without more, that these executives have acted immorally in withholding commutation? Consider a capital clemency case that arose during the governorship of Pat Brown.

Governor Pat Brown of California (1959–1967) recounts a story in his memoir that illustrates the distinctive moral challenges that confront the executive who wields the power of clemency.¹⁶⁰ In capital cases the power is no less than discretion as to life or death. Governor Brown opposed the death penalty.¹⁶¹ He was presented with a clemency petition for capital prisoner Richard Lindsey, a brain damaged man who pleaded guilty to the murder of a child.¹⁶² Governor Brown was disposed to grant the petition; however, he was informed that the legislator possessing the swing vote on a bill giving farm laborers a living wage would vote against the bill if Governor Brown commuted Lindsey's death sentence.¹⁶³ Governor Brown was fully committed to the bill.¹⁶⁴ He allowed the execution to take place, and the farm labor legislation passed in due course. Brown reports that he has never made peace with his decision.¹⁶⁵

Governor Brown's choice was tragic, but it was not immoral. His decision in the *Lindsey* case, as he recounts it, was prompted by a dramatic choice. He could spare one tormented soul or relieve the suffering of an exploited and powerless section of

retarded from the reach of capital punishment. *Penry v. Lynaugh*, 492 U.S. 302 (1989). Justice Stevens notes in *Atkins* that the "consistency of the direction of change is more telling than the number of states who have spoken on this issue." 536 U.S. at 315. He also appeals to other evidence for consensus, including religious opinion. *Id.* at 316 n.21. Justice Stevens further reminds us that the judgment of the Justices themselves is "brought to bear" on the issue. *Id.* at 319.

159. *Atkins*, 536 U.S. at 316.

160. BROWN & ADLER, *supra* note 92, at 72-80.

161. *Id.* at 153-63.

162. *Id.* at 74.

163. *Id.* at 75.

164. *Id.*

165. *Id.* at 84.

the state's working population. The latter choice, he hoped, would help effect a permanent change in the status of farm laborers. The *Lindsey* clemency case is an example of circumstances where the realization of the Governor's criminal justice values, the belief that capital punishment is wrong and that Lindsey was undeserving of capital punishment because of his mental disabilities, are weighed by the executive against the achievement of an important political goal. It is to his credit that Governor Brown was never easy in his conscience about his role in the execution of Lindsey; however, it ought not be inferred from his troubled conscience either that Governor Brown believed his decision was morally wrong or indeed that it was morally wrong. A governor's discretion reflects both the structure of the moral duty to exercise clemency and the tensions between that duty and his full array of role duties.

The governor as clemency authority has discretion akin to that of any moral agent in private life who finds himself, *e.g.*, asked to forgive a debt or a breach of friendship, or to give money or other aid to someone in need to whom he owes no assistance. Mercy and charity are what moral philosophers call "duties of imperfect obligation," in contrast to duties of "perfect obligation." When a duty of the latter sort arises, *e.g.*, a duty to return money borrowed on the strength of a promise to return it, the promise creates an obligation to return the money and creates a correlative right of the lender to have the obligation satisfied. In the case of a duty of imperfect obligation, such as charity or mercy, no particular person who is desirous of the benefit has a right to it. However, the person who is uniformly unforthcoming, who never finds opportunities to be merciful, fails in her duty to be merciful. A governor's clemency role is similar in that granting and refusing are likewise discretionary. The role is dissimilar in that the governor also represents the disposition of the citizens to be merciful. Should she fail to make proper use of the power, the governor's failure taints the citizens as well.

Further, the governor's political role requires discretionary decisions about husbanding and investing scarce political capital in order to accomplish diverse public tasks and objectives. Governor Pat Brown made such a calculation when he determined not to spare the life of Lindsey.¹⁶⁶ He gave up an opportunity to protect a vulnerable individual from morally excessive punishment for what he deemed to be a sufficiently important objective otherwise unobtainable. The institution of clemency as constitutionally configured compels such calculations but does not ordain their outcomes. To conclude that Governor Brown's adherence to the farm workers justified his decision in the *Lindsey* case is not to say that any invocation of the costs of a grant of clemency to either the governor's agenda or his "political viability"¹⁶⁷ automatically relieves a governor of moral censure for failure to grant clemency. Governors are subject to criticism for failure to muster courage, display leadership, and absorb political costs in the execution of their clemency duty as in all other role responsibilities.

166. *See id.*

167. The phrase came into the national political lexicon with Bill Clinton, who, even as a student opposed to the war in Vietnam, was circumspect in order to protect his future "viability." *See* DAVID MARANISS, *FIRST IN HIS CLASS: A BIOGRAPHY OF BILL CLINTON* (1996).

Nothing here stated should be understood to deny that the moral claims of a capital petitioner with serious mental illness for commutation of sentence are compelling. Rather, the point is that the institution of clemency does not function as a guarantor against inhumane and unjust treatment. It is a hard saying, but to possess a moral or human right does not necessarily imply that any extant authority is obliged to vindicate that right.¹⁶⁸ Clemency is one of several bulwarks designed jointly to reduce error, injustice, and inhumane treatment of persons caught in the coils of the criminal justice system. Indeed, unlike governors exercising clemency authority, prosecutors and courts have stringent duties to both the public and defendants to serve justice in every case.¹⁶⁹ These actors inevitably fail on some occasions, as do other actors in the system, such as defense attorneys who are unable or unwilling to measure up to the responsibility of adequately representing a capital defendant. Sentencing statutes and practices are also inevitably flawed. The institution of clemency exists to provide another opportunity for a just or humane response. Governors legitimately weigh clemency against such objectives as passage of a minimum wage bill when the two fall into practical competition. Clemency is rarely “free” from the executive’s point of view.¹⁷⁰ Exercise of the clemency power may put a governor in peril of being perceived as usurping the authority of the legislative or judicial branches, of defying the popular will, and of receiving debilitating criticism from press and opponents.

However, there is at least one circumstance in which a governor ought to grant clemency without regard to political cost. When a petition is based upon a claim of actual innocence and the governor believes that exoneration has been established, a pardon of innocence ought to issue. Clemency encompasses both the power to reduce penalties—either to redress an unjustly harsh penalty or to be lenient for any other reason—and to acknowledge and void a wrongful conviction. In a case where actual innocence has been discovered, the moral duty of the only remaining possible dispenser of justice is stringent. Execution or completion of any other sentence against an innocent person defies the virtually universally accepted rule of law that actual guilt is a requisite for punishment.¹⁷¹ A governor who failed to vindicate so fundamental a principle would do mortal damage to his own legitimacy and grave damage to that of the state. A grant under these circumstances should not, in any likely event, expose a governor to politically damaging criticism because the governor would be responding to a circumstance in which the ground for action is generally well understood and respected. The practical costs of a pardon of innocence should be minimal for a governor with even the most modest political and rhetorical skills. No grieving survivor will be deprived of justice, solace, or closure by sparing a prisoner who did not murder a father or daughter.¹⁷²

168. Thus, when a governor grants a clemency petition grounded in, for example, rehabilitation, he may frustrate the right claimed by a victim’s survivors or by citizens for strict retribution.

169. *Berger v. United States*, 295 U.S. 78, 88 (1935) (stating that the duty of the prosecutor is “not that it shall win a case, but that justice shall be done....”).

170. Denying clemency may also have costs, as was reported by Governor Pat Brown in the *Lindsey* case. See *supra* part IV(C).

171. See, e.g., John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

172. The sentencing of John Walker Lindh, the so-called “American Taliban,” produced an interesting vignette in which the principle of no punishment without proven guilt was invoked by the judge to quell the call

In sum, the discretionary structure of the clemency authority reflects the practical limitations on the governor's resources to ameliorate criminal justice and to accomplish other goals. Yet, when a governor confronts a petition from a capital prisoner whom he believes is categorically less culpable than the average adult criminal, the moral pressure to grant clemency increases with the extent to which practical costs of granting are manageable or can be rendered manageable through reasonable effort. More harshly, the continued "political viability" of a number of governors, purchased at the cost of allowing the execution of those less culpable than the average adult criminal, was probably not justified from the social point of view. Not all pragmatic decisions partake of the tragedy of the limitations that thwart those charged with the use of public power in the public interest; rather, some reflect merely the attachment to office on the part of incumbents.

D. Clemency and Opposition to Capital Punishment

Although clemency is most commonly regarded as a means of redressing unjust results and responding to the equities in individual cases, it has also played a role in the history of law reform.¹⁷³ Clemency has been an incubator and laboratory for defenses and mitigation not yet developed to the point of being accepted legal doctrines.¹⁷⁴ For example, before the law recognized self-defense or insanity as defenses, the only appeal was to the clemency of the Crown.¹⁷⁵

Despite the general record of circumspection compiled by contemporary executives, several modern governors have tried to use their clemency power to exercise moral leadership in the movement to abolish capital punishment. Governor Toney Anaya of New Mexico cleared his state's small, five-man, death row. Governor Anaya was bitterly disappointed by the lack of public support from religious leaders in the state, whose support he thought critical in achieving abolition and whom he expected to join him in garnering support for abolition.¹⁷⁶ Additionally, moratorium-era Arkansas Governor Winthrop Rockefeller cleared his state's small, fifteen-man death row fifteen years earlier.¹⁷⁷

Governor Richard Celeste of Ohio commuted eight capital sentences in 1991. Governor Celeste did not attempt to commute the sentences of all persons on Ohio's much larger death row. At least a hundred prisoners remained on death row at the end of Celeste's term of office. Governor Celeste, a public opponent of capital punishment, attempted to use his clemency power to raise the issue of racial bias in Ohio's administration of the death penalty.¹⁷⁸ Six of the eight commutations were

for the blood of a pariah. Judge T.S. Ellis III felt called upon to invoke the principle in the face of ardent protests that the vilified Lindh deserved more than his twenty-year sentence. The judge was taken to task by the father of CIA agent Mike Spann, who died in the armed melee during which Lindh was discovered by American authorities to be among captured Taliban soldiers. Spann wanted Lindh punished for the murder of his son. Judge Ellis remarked that "[o]f all the things [Mike Spann] fought for, one of them is that we don't convict people in the absence of proof beyond a reasonable doubt." Jane Mayer, *Lost in the Jihad*, NEW YORKER, Mar. 10, 2003, at 59.

173. MOORE, *supra* note 17, at 84.

174. Kobil, *supra* note 13, at 572; Acker & Lanier, *supra* note 14, at 206.

175. MOORE, *supra* note 17, at 18.

176. Toney Anaya, *Statement by Toney Anaya on Capital Punishment*, 27 U. RICH. L. REV. 177, 179 (1993).

177. Rockefeller, *supra* note 93, at 94.

178. Mary Beth Lane, *Group Cites Race Mix of Nine Death Rows*, PLAIN DEALER (Cleveland, Ohio), Jan. 12,

granted to blacks.¹⁷⁹ Governor Celeste explained his actions as a response to the racism in Ohio's capital punishment system.¹⁸⁰ He noted that Ohio's death row had a much higher percentage of black inmates than states with larger percentages of black residents.¹⁸¹ Four of the grants to blacks were to black women. There were no white women on death row. Governor Celeste interpreted the absence of white women on Ohio's death row as additional evidence of racism.¹⁸² Ultimately, though, Governor Celeste's reform message was obscured and pre-empted by the ensuing public and legal challenge to his authority to issue the commutations, which like Governor Anaya's were issued on the eve of his departure from office.¹⁸³

At this writing, Governor George Ryan of Illinois is poised on the brink of what is likely to be a substantially larger mass commutation of death row inmates. Governor Ryan has publicly contemplated the possibility of granting mass clemency to the approximately 160 capital prisoners who have sought clemency.¹⁸⁴ The reception of Ryan's action should prove quite instructive in assessing the didactic and law reform potential of clemency action. Governor Ryan has avoided two mistakes made by Governors Celeste and Anaya, who waited until the very last days of their terms both to commute and to make their case for commutation to the public. As a consequence, no public dialogue about capital punishment or clemency ensued while the governor enjoyed the platform of incumbency. Additionally, the public and supporters of capital punishment were deprived of the opportunity to dissuade or remonstrate with a sitting governor. In contrast, Governor Ryan has laid the groundwork for his anticipated clemencies.

Governor Ryan has created as well as seized opportunities to explain and persuade. He instituted a moratorium on capital punishment in 2000 in response to the circumstance that Illinois had compiled a post-moratorium record of twelve executions and thirteen exonerations.¹⁸⁵ He subsequently established a commission to study the death penalty in Illinois and has made comprehensive recommendations

1991, at 1-A; Quigley, *supra* note 72.

179. Lane, *supra* note 178.

180. *Id.*

181. *Id.*

182. *Id.*

183. Alan Johnson, *Voinovich Wants Clemencies Undone*, COLUMBUS DISPATCH, Jan. 19, 1991, at B1. Governor Celeste's successor, Governor George Voinovich, made an unsuccessful effort to void the commutations in Ohio courts. The Ohio Supreme Court affirmed the denial of a writ of prohibition, acknowledging the plenary authority of the executive to commute sentences. *State ex rel. Maurer v. Sheward*, 644 N.E.2d 366, 373 (1994).

184. Governor Ryan granted commutation or pardon to the entirety of Illinois' 164-person death row. Possley & Mills, *supra* note 3.

185. Ken Armstrong & Steve Mills, *Ryan "Until I Can Be Sure": Illinois Is First State to Suspend Death Penalty*, CHI. TRIB., Feb. 1, 2000, at 1. Governor Ryan stated that the moratorium was spurred on by a *Chicago Tribune* five-part investigative series, "The Failure of the Death Penalty in Illinois." *Id.* This five-part series includes the following articles: Ken Armstrong & Steve Mills, *Death Row Justice Derailed: Bias, Errors, and Incompetence in Capital Cases Have Turned Illinois' Harshes Punishment into Its Least Credible*, CHI. TRIB., Nov. 14, 1999, at 1 (first of a five-part series); Ken Armstrong & Steve Mills, *Inept Defenses Cloud Verdicts: With Their Lives at Stake, Defendants in Illinois Capital Trials Need the Best Attorneys Available, but They Often Get the Worst*, CHI. TRIB., Nov. 15, 1999, at 1 (second of a five-part series); Steve Mills & Ken Armstrong, *The Inside Informant*, Nov. 16, 1999, at 1 (third of a five-part series); Steve Mills & Ken Armstrong, *A Tortured Path to Death Row*, Nov. 17, 1999, at 1 (fourth of a five-part series); Steve Mills & Ken Armstrong, *Convicted by Hair*, Nov. 18, 1999, at 1 (last of a five-part series).

for law reform based on its findings.¹⁸⁶ In the months leading up to the end of his term, he has joined in speculation as to whether he will commute Illinois' entire death row, or only certain categories of persons, such as the mentally retarded, and those convicted on jailhouse informer or accomplice testimony, the unreliability of which he has criticized.¹⁸⁷ Such testimony played a prominent role in the convictions of some of those later exonerated in the thirteen highly publicized cases of exoneration.¹⁸⁸ The lesson to be drawn from this recent history is that a governor who wishes to have an impact on public opinion and catalyze law reform must invest in the leadership role, as with any other issue of public policy, and risk exposure to public criticism while in office.¹⁸⁹

A further lesson is that in the present climate of public opinion, in which concern for the conviction of the innocent has played a wedge role in softening public support for capital punishment, a courageous executive willing to invest the political capital could actually find political advantage in a principled stand.¹⁹⁰ The present climate of concern about conviction of the innocent imparts a reformist edge even to the most conservative due process oriented clemencies and renders such grants, as well as clemency on other grounds, a bit less daunting. The *Atkins* decision itself may encourage governors to explore the possibility that the public may be receptive to clemency in cases of severely mentally ill capital prisoners.

The history of capital clemency in the United States from the *Gregg* decision to the *Atkins* decision inevitably focuses on the abundance of political caution the record discloses. Despite the seductions of prudence, there have been and there will be, chief executives who are unable to ignore the responsibility that comes with the clemency power. This reckoning brought liberal abolitionist and Democrat Richard Celeste of Ohio to step forward and state, "The decision to grant or withhold executive clemency is probably the most awesome responsibility that comes with being governor. It was a responsibility I accept, and one which I could not in good conscience leave unexercised as I reach the end of my term in office."¹⁹¹

186. *Report of the Former Governor's Commission on Capital Punishment* (Apr. 2002), at www.idoc.state.il.us/ccp/ccp/reports/index.html (last visited Apr. 1, 2003).

187. There has been a steady flow of publicity about Ryan's intentions. See, e.g., Jodi Wilgoren, *G.O.P. Death-Penalty Feud Sinks to First-Name Calling*, N.Y. TIMES, Sept. 25, 2002, at A1.

188. Armstrong & Mills, *Ryan "Until I Can Be Sure": Illinois Is First State to Suspend Death Penalty*, *supra* note 185.

189. An avalanche of adverse publicity has recently poured down upon Governor Ryan and his pending capital clemency decisions. The decision that the Prison Review Board would hold public hearings for the approximately 160 death row inmates seeking clemency has proved a disappointment for death penalty opponents and attorneys representing the capital petitioners. The hearings have not been the forum for educating the public about the flaws of the Illinois capital punishment system that critics of the system have sought. The hearings and press coverage of them have been dominated by the anguish and anger of the families of the murder victims. See, e.g., Keilman, *supra* note 127; Dave McKinney, *Ryan Fails to Win Over Families of Victims*, CHI. SUN-TIMES, Dec. 7, 2002, (News Spec. Ed.), at 5.

190. Governor Ryan has been both lionized and excoriated for his capital clemency initiative. Scandalous revelations about the Department of Motor Vehicles when he held the post of Secretary of State in a previous gubernatorial administration have also hurt him politically. Dirk Johnson & Elizabeth Austin, *A Leap of Faith: A Governor's Controversial Last Hurrah Clears Out Illinois' Crowded Death Row*, NEWSWEEK, Jan. 20, 2003, at 34. He has been described as "positioned halfway between a Nobel Peace Prize and federal indictment." Alan Ehrenhalt, *The Paradox of Corrupt Yet Effective Leadership*, N.Y. TIMES, Sept. 30, 2002, at A1.

191. Kimmins & Weathers, *supra* note 71.

Republican Michael Huckabee of Arkansas won reelection as Governor of Arkansas in 2002 despite willingness to grant clemency, including commutation of one capital sentence.¹⁹² Owning his decisions, Governor Huckabee joined earlier governors in characterizing his responsibilities as religious duties, fulfillment of which requires rising above expediency to foster reform of criminal justice and justice in individual cases. He has stated, "If one acts by pure raw political instinct and a pure Machiavellian approach to public office...you'll never, ever, ever, ever grant clemency."¹⁹³ Furthermore, when asked whether there was any one clemency decision he would change, Governor Huckabee refused to be baited and responded that he made his decisions guided by religious ethics and the hope of his own salvation. He said,

Ultimately, my life will not be judged by voters who can be swayed by 30 seconds of television...The ultimate evaluation of my life will be made by a God who will look at every breath I took from birth to death, and I want him (sic) to evaluate my life by the totality of it not by any one moment.¹⁹⁴

Governors who have sensed that their mettle and their public service are tested by clemency decisions in a manner more enduring than the current political season have understood something that has eluded their brothers and sisters in office.

GOVERNOR GEORGE RYAN OF ILLINOIS: A SPECULATIVE POSTSCRIPT

In granting blanket clemency, Governor Ryan stopped just short of embracing the complete abolition of capital punishment. He declared that absent sweeping reform in Illinois and other death penalty states the capital punishment system was "broken," too error-prone to condone.¹⁹⁵ Governor Ryan announced, "Because the Illinois death penalty system is arbitrary and capricious and therefore immoral, I shall no longer tinker with the machinery of death...." The Governor noted that in total seventeen death row inmates had been exonerated in Illinois and defended his blanket grants as the only means available to him of preventing further "catastrophic failure."¹⁹⁶

It is much too early to assess what the impact of Governor Ryan's mass capital clemency will have on the future of clemency and the history of capital punishment in the United States. The first wave of reaction, in progress at this writing, is dominated by angry criticism. Governors and other close students of the Illinois capital clemencies will long remember the powerful media invocations of the sense of justice denied and betrayed on the part of the survivors of the victims of those granted clemency. There is, however, even in the angriest reactions, an implicit

192. O'Neal & Peters, *supra* note 53.

193. Michael R. Wickline, *Answer to God on Clemencies, Huckabee Says*, ARK. DEMOCRAT-GAZETTE, Dec. 6, 2002, at A1.

194. *Id.*

195. Possley & Mills, *supra* note 3.

196. *Id.* While Governor Ryan has continued to advocate the reform of capital punishment, he chose to justify his clemency grants with the very words used by Justice Blackmun in his famous dissent in *Callins v. Collins*, 510 U.S. 1141, 1144 (1994), to announce his enlistment in the abolitionist ranks, "From this day forward, I shall no longer tinker with the machinery of death."

homage to Governor Ryan. He has broken a virtual taboo on the scope of the use of the clemency power. He has created space for debate and action where none had previously existed.

APPENDIX

Reasons for individual capital clemency grants, 1977-2002

State	Date	Name	Governor	Reason
Georgia	1977	Charles Hill	Pardons & Parole Bd.	Sentencing Equity ^a
Florida	1979	Learie Alford	Graham	Accuracy/Fairness ^b
Florida	1979	Clifford Hallman	Graham	Sentencing Equity ^c
Florida	1980	Darrell Hoy	Graham	Sentencing Equity ^d
Florida	1980	Richard Gibson	Graham	Sentencing Equity ^e
Florida	1981	Michael Salvatore	Graham	Sentencing Equity ^f
Florida	1983	Jesse Rutledge	Graham	Accuracy/Fairness ^g
New Mexico	1986	David Cheadle	Anaya	Mercy ^h
New Mexico	1986	Joel Compton	Anaya	Mercy ⁱ
New Mexico	1986	Richard Garcia	Anaya	Mercy ^j
New Mexico	1986	William Gilbert	Anaya	Mercy ^k
New Mexico	1986	Michael Guzman	Anaya	Mercy ^l
Maryland	1987	Doris Foster	Hughes	Accuracy/Fairness ^m
Georgia	1988	Freddie Davis	Pardons & Parole Bd.	Sentencing Equity ⁿ
Montana	1988	David Keith	Schwinden	Mercy ^o
Louisiana	1989	Ronald Monroe	Roemer	Accuracy/Fairness ^p
Georgia	1990	William Moore	Pardons & Parole Bd.	Mercy ^q
Ohio	1991	Debra Brown	Celeste	Mercy ^r
Ohio	1991	Rosalie Grant	Celeste	Accuracy/Fairness ^s
Ohio	1991	Elizabeth Green	Celeste	Mercy ^t
Ohio	1991	Leonard Jenkins	Celeste	Mercy ^u
Ohio	1991	Willie Jester	Celeste	Mercy ^v
Ohio	1991	Beatrice Lampkin	Celeste	Sentencing Equity ^w
Ohio	1991	Donald Maurer	Celeste	Mercy ^x
Ohio	1991	Lee Seiber	Celeste	Mercy ^y
Virginia	1991	Joseph Giarratano	Wilder	Accuracy/Fairness ^z
Georgia	1991	Harold Williams	Pardons & Parole Bd.	Sentencing Equity ^{aa}
Virginia	1992	Henry Bassette	Wilder	Accuracy/Fairness ^{bb}
North Carolina	1992	Anson Maynard	Martin	Accuracy/Fairness ^{cc}
Missouri	1993	Bobby Shaw	Carnahan	Mercy ^{dd}
Virginia	1994	Earl Washington	Wilder	Accuracy/Fairness ^{ee}
Illinois	1996	Guinevere Garcia	Edgar	Sentencing Equity ^{ff}
Virginia	1996	Joseph Payne	Allen	Accuracy/Fairness ^{gg}
Idaho	1996	Donald Paradis	Batt	Accuracy/Fairness ^{hh}
Virginia	1997	William Saunders	Allen	Mercy ⁱⁱ
Texas	1998	Henry Lee Lucas	Bush	Accuracy/Fairness ^{jj}

Alabama	1999	Judith Ann Neelley	James	Sentencing Equity ^{kk}
Missouri	1999	Darrell Mease	Carnahan	Mercy ^{ll}
Arkansas	1999	Bobby Ray Fretwell	Huckabee	Accuracy/Fairness ^{mm}
Virginia	1999	Calvin Swann	Gilmore	Mercy ⁿⁿ
North Carolina	1999	Wendell Flowers	Hunt	Sentencing Equity ^{oo}
Maryland	2000	Eugene Colvin	Glendening	Accuracy/Fairness ^{pp}
North Carolina	2000	Marcus Carter	Hunt	Accuracy/Fairness ^{qq}
Federal	2001	David Chandler	President Clinton	Accuracy/Fairness ^{rr}
Oklahoma	2001	Phillip Dewitt Smith	Keating	Accuracy/Fairness ^{ss}
North Carolina	2001	Robert Bacon, Jr.	Easley	Sentencing Equity ^{tt}
North Carolina	2002	Charlie Mason Alston	Easley	Accuracy/Fairness ^{uu}
Georgia	2002	Alexander Williams	Pardons & Parole Bd.	Mercy ^{vv}

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- v. *Id.*
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