

Mercy, Clemency, and the Case of Karla Faye Tucker

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In 1998, Karla Faye Tucker became the first woman executed in Texas since the Civil War. Tucker's case was extraordinary both because of the extreme brutality of her crime and the dramatic religious conversion she experienced on death row. Her rehabilitation led to calls for mercy and clemency from an unlikely collection of supporters, including conservative religious figures not otherwise opposed to the death penalty. Tucker's supporters argued that she had become a "new person" who was no longer deserving of the ultimate punishment; that she was no longer eligible for the death penalty because she did not pose a danger to society; and that her execution represented a waste of a life that could still make a positive contribution to society. When then-Governor George W. Bush denied Tucker clemency, her supporters concluded that he lacked mercy.

Without taking a position on whether Tucker's life should have been taken or spared, this essay explores the grounds for mercy and clemency raised in her case and calls into question many of the claims and conclusions of her supporters. The author argues that, on the most plausible account of American criminal law, Tucker's post-offense rehabilitation has little bearing on the punishment she deserves. The "new person" claim, and the strong empirical claims that depend on it, is similarly unavailing. Taken literally, it seems to lead to the counterintuitive result that a rehabilitated offender deserves no punishment; it also renders incoherent various principles and doctrines that structure American legal institutions. Finally, the author examines the institution of executive clemency, suggesting that its exercise as an expression of traditional mercy—an act of princely grace—is problematic in a liberal democratic society. Although a merciful disposition is an appropriate posture for any public official, the executive clemency power is a poor proxy for the virtue of mercy.

"We hand folks over to God's mercy and show none ourselves."
George Eliot¹

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¹ GEORGE ELIOT, ADAM BEDE 430–31 (Stephen Gill ed., 1985) (1859).

I. INTRODUCTION

It has been almost ten years since the State of Texas executed Karla Faye Tucker. Tucker's case, which began with a brutal double murder, garnered international attention for several reasons. First, Tucker's crimes were especially grisly. She and her boyfriend hacked and hammered to death a defenseless couple lying in bed; Tucker later bragged that she experienced multiple orgasms while delivering the deadly blows with an ax. In addition, because Tucker was a woman, the prospect of her execution seemed to tap our collective squeamishness about putting a woman to death. Although Texas leads the nation in the number of executions it carries out, it had not (until Tucker) executed a female capital offender since 1863.² But the primary reason Tucker's case gained worldwide attention was her complete—and apparently sincere—conversion to Christianity during the course of her trial and sentencing. Within four months of her arrest, Tucker professed to have found the “power of forgiveness;”³ to have repented of her crimes; and to have begun a profound transformation culminating in the claim, by herself and others, that she had become a “new person.”⁴

Tucker's conversion led to calls for mercy, clemency, and the invalidation of her sentence. The legal argument was that Tucker's rehabilitation rendered the death penalty inappropriate in her case because she no longer posed a danger to society.⁵ More generally, her supporters argued that Tucker was, in some important respect, no longer the individual who committed the crimes and was thus no longer deserving of the ultimate punishment. Moreover, because of the good works she had begun to perform from her prison cell—counseling inmates and other troubled souls—her execution would represent the waste of a life that could still make a positive contribution to society.⁶

Despite these appeals, Tucker was executed on February 3, 1998. In a 2005 essay, Sister Helen Prejean, author of *Dead Man Walking* and a Tucker confidante,

² Kathy Walt, *Tucker Dies After Apologizing; Despite Legal Blitz, Woman Executed for Pickax Slayings*, HOUSTON CHRON., Feb. 4, 1998, at A1.

³ See LINDA STROM, KARLA FAYE TUCKER SET FREE 45–65 (2000).

⁴ See, e.g., Orville Scott, *An Execution Cost Us a Living Testimony to the Grace of God*, DALLAS MORNING NEWS, Feb. 7, 1998, at 4G (noting that reporters and others who encountered Tucker after her conversion regarded her as a “new person”); Tunku Varadarajan, *America Split as Execution Looms for Convert, Murderer*, TIMES (U.K.), Jan. 31, 1998, at 15 (quoting Tucker's claim that she “became a new person . . . [I]t was as if God opened me up and took the evil out, and then poured himself into me.”); Eric Zorn, *Death Row Beauty Shows Execution Is Always Unfair*, CHI. TRIB., Jan. 22, 1998, at 1 (“Executing this new person would be an abomination; pure symbolism that accomplishes nothing and brutalizes our society.”); see also discussion *infra* Part III.A.

⁵ Application/Petition for Post-Conviction Writ of Habeas Corpus, *Ex parte Tucker*, 973 S.W.2d 950 (1998) (Tex. Crim. App. 1998) (No. 038842801010) [hereinafter Tucker Brief].

⁶ See, e.g., Walter C. Long, *Karla Faye Tucker: A Case for Restorative Justice*, 27 AM. J. CRIM. L. 117, 121–22 (1999) (describing Tucker's record of good works).

revived the debate over her case in moral, political, and religious terms.⁷ According to Prejean, over the course of Tucker's case then-Governor George W. Bush revealed himself to be a callous hypocrite and a liar:

When I heard Bush say, "God bless Karla Faye Tucker," I had to struggle to keep a vow I made to reverence every person, even those with whom I disagree most vehemently. Inside my soul I raged at Bush's hypocrisy "It's interesting to see that Governor Bush is now invoking God, asking God to bless Karla Faye Tucker, when he certainly didn't use the power in his own hands to bless her. He just had her killed."⁸

Stripped of the anti-Bush sentiment, Prejean's charge is a familiar one. Among the most compelling themes in literature, scripture, and the philosophical tradition are mercy, repentance, and redemption: Only the coldest heart is unmoved by sincere repentance; no person or people wishes to be merciless; no human being is beyond redemption; it is wrong, if not also unjust, to withhold mercy from an individual who has, against all odds, rehabilitated himself. What good is achieved by extinguishing such a life?

Prompted by Sister Prejean's resurrection of Tucker's case, I shall explore the contours and limitations of mercy and clemency in the criminal law. Enough time has passed since her execution that it should be possible to get a fresh perspective on this high profile case. At the same time, the facts of Tucker's case implicate a range of considerations that are persistently controversial and perennially salient in judgments of mercy and clemency. Is Eliot (and Prejean) right that there's a kind of hypocrisy in our invocation of God's mercy when we decline to dispense our own? Does mercy *require* clemency?

After briefly setting forth the details of Tucker's case, I review the legal, moral, and political arguments raised on her behalf. Dominating these arguments was the claim that Tucker's conversion and rehabilitation rendered her a new person "ineligible"⁹ for the death penalty. How much, if at all, are we justified in punishing a truly repentant wrongdoer? Next I review the various justifications for punishment that animate American criminal law, focusing particular attention on competing versions of retributivism and their implications for questions of mercy and clemency. Despite the appeal of certain aspects of "character retributivism," I argue that "choice retributivism" better captures both the practices and principles of the criminal law. I then examine the grounds for mercy and clemency raised in Tucker's case and evaluate them in terms of the retributive justification for punishment. None leads inexorably to the conclusion that Tucker's life should have been spared.

⁷ Sister Helen Prejean, *Death in Texas*, N.Y. REV. BOOKS, Jan. 13, 2005.

⁸ *Id.* at 4, 5 (quoting herself). Prejean also maintains that Bush's "callous indifference to human suffering" sets him apart from other governors who have denied appeals for clemency and that Bush lied about his emotional reaction to Tucker's execution, "claiming humane feelings he never felt." *Id.* at 6.

⁹ Tucker Brief, *supra* note 5, at 17.

Apart from the dubious arguments for clemency raised in Tucker's case, the power of executive clemency itself merits closer scrutiny. Hailed by some as the "last vestige of the divine right of kings,"¹⁰ the power of clemency is at best problematic in a liberal democratic society. Despite its virtues as a fail safe, the power is grounded in discredited political rationales and prone to abuse. Finally, because the question of clemency is distinct from the question of mercy, we should be especially circumspect in our judgments about those who grant or withhold them. Although the wholesale rejection of mercy signals a flawed character, the rejection of clemency in particular cases does not. A merciful disposition, like the invocation of God's mercy, does not entail any particular judgment about clemency. Regardless of whether Tucker's life should have been taken or spared, it is a mistake to confuse God's justice with our own.

A. Background

1. Crime, Trial, and Conversion¹¹

At the age of twenty-three, Karla Faye Tucker was a drug addict and a veteran prostitute. On the night of the murders, she and her friends had been partying for three days, consuming large quantities of alcohol, pills, cocaine, and speed. At some point during the weekend, Tucker's close friend Shawn arrived at the party with a broken nose and a fat lip from her estranged husband, Jerry Dean. Tucker already hated Dean, who had once parked his motorcycle in her living room. On one occasion Tucker had punched Dean in the face, shattering his glasses and sending him to the hospital for treatment. Over the course of the weekend, Tucker, her boyfriend Daniel Garrett, and another friend, Jimmy Leibrant, began plotting revenge against Dean.

On the night of the murders, as the party wound down, Tucker and Leibrant drove Garrett to work. When they picked him up at two o'clock in the morning, they settled on a plan to get even with Jerry Dean by stealing his beloved motorcycle. According to Tucker, the trio had no intention of killing Dean when they set out for his apartment in the middle of the night.¹² But once inside the apartment, their plan changed when Dean woke up. Garrett armed himself with a hammer from Dean's toolbox and attacked him in the bedroom. Tucker followed with a pick ax. She struck both Dean and his companion, Deborah Thornton, repeatedly with the ax. When the

¹⁰ Prejean, *supra* note 7, at 4.

¹¹ This account of events is taken from BEVERLY LOWRY, *CROSSED OVER: A MURDER, A MEMOIR* (1992); Joseph Geringer, *Karla Faye Tucker: Texas' Controversial Ax Murderess*, at http://www.crimelibrary.com/notorious_murders/women/tucker/1.html (last visited June 12, 2006); *Karla Faye Tucker #437*, at <http://www.clarkprosecutor.org/html/death/US/tucker437.htm> (last visited June 12, 2006) (compiling official press releases and news accounts of Tucker's case).

¹² See Beverly Lowry, *The Good Bad Girl*, *THE NEW YORKER*, Feb. 9, 1998, at 47 (reporting her conversations with Tucker).

bodies were discovered later that morning, each had been struck more than twenty times with the ax, which was left embedded in Thornton's chest.

In the days that followed, Tucker and Garrett bragged about the murders to family and friends. Investigators eventually linked Tucker and Garrett to the murders, assisted by Garrett's brother, who taped the two discussing their crimes. Tucker is heard on the tape claiming to have experienced a sexual thrill with each swing of the ax. In separate trials in 1984, both Tucker and Garrett were convicted of murder in the course of an armed robbery and sentenced to death.¹³

By the time of her trial and sentencing, Tucker had converted to Christianity. According to Tucker, her conversion began about three months after her arrest when a Christian ministry visited the jail where she was being held. At her trial, Tucker admitted her responsibility for the murders; she later testified against Garrett. By the time she arrived on death row, Tucker had become a counselor to other inmates, reportedly offering them psychological support and assisting their families through prison ministry work. In 1995, she married Dana Brown, a prison minister.

2. Legal Context

On direct appeal, Tucker unsuccessfully challenged numerous aspects of her conviction and sentencing, arguing, among other things, that she lacked the culpability for capital murder; that she was denied a fair trial based on certain evidentiary rulings; and that the jury was improperly instructed regarding mitigating evidence that might have resulted in a sentence less than death.¹⁴ In subsequent proceedings, Tucker unsuccessfully sought state and federal habeas relief; moved for a new trial based on a claim of ineffective assistance of counsel; and challenged Texas clemency procedures as a violation of due process.¹⁵

Once Tucker had exhausted these avenues of legal recourse, some fourteen years after the murders, her only possibility of avoiding the death penalty was executive clemency. At that time, Texas had executed 144 offenders since the reinstatement of the death penalty in 1976, but "not a single death sentence ha[d] been commuted solely by request of the condemned."¹⁶ As governor, George W. Bush's stated clemency policy limited consideration to two issues: whether there was doubt about a defendant's guilt, and whether a defendant had "fair access to the courts on all outstanding legal issues."¹⁷ Although Bush later commuted the sentence of an inmate

¹³ Garrett died of natural causes in 1993. See Kathy Fair & Carol Rust, *Death Row Inmate Dies of Natural Causes; 10 Years after Conviction in Pickax Murders, Prisoner Was to Receive New Trial*, HOUS. CHRON., June 16, 1993, at A21.

¹⁴ See *Tucker v. State*, 771 S.W.2d 523 (Tex. Crim. App. 1988).

¹⁵ See *Tucker v. Johnson*, 115 F.3d 276 (5th Cir. 1997); *Ex parte Tucker*, 973 S.W.2d 950 (1998) (Tex. Crim. App. 1998).

¹⁶ *Ex parte Tucker*, 973 S.W.2d at 954 (Baird, J., dissenting).

¹⁷ Stephanie Asin & Kathy Walt, *Execution of Tucker Scheduled for Feb. 3*, HOUS. CHRON., Dec. 19, 1997, at A1 (quoting Bush spokesperson Karen Hughes).

due to doubts about his guilt,¹⁸ he had not, at the time of the Tucker case, ever commuted a death sentence.

B. *The Case for Clemency*

As the legal challenges mounted, and the prospect of her execution loomed, Tucker became a media sensation.¹⁹ Among the most outspoken—and unexpected—of her supporters was the Reverend Pat Robertson of the Christian Broadcasting Network. Robertson’s account of Tucker’s conversion sounded the theme that came to dominate the case for clemency:

During that period [of trial and appeals], she had a profound conversion experience, and when we sent a reporter down to talk to her [in 1992], we didn’t find some wild-eyed hippie, we found the most beautiful Christian woman we had ever encountered . . . sublime, if I can use that term, a lovely spirit. The person who had committed those crimes really wasn’t there anymore. She was like a different person, and when we interviewed her and showed her testimony on television, and others did the same thing, they found a person who was absolutely radiant. It was so impressive, actually, that during her time of incarceration, she married the assistant chaplain of the prison. Even though they couldn’t have physical contact with each other, they got married anyhow, because there was a bond of love between them.²⁰

Robertson’s various appeals focused on Tucker’s transformation from a drug-addicted prostitute to a “beautiful Christian woman.” As early as 1992, Robertson’s program *The 700 Club* featured the transformed Tucker describing her conversion experience; in subsequent appearances, she spoke of her wish to avoid the death penalty, but reiterated her faith in God’s plan for her, come what may.²¹

All of Tucker’s supporters, including Tucker herself, emphasized that her conversion rendered her a “new person.” A member of the jury that voted to execute her also noted the transformation: “I’m not saying that at the time it was wrong to give

¹⁸ Bruce Tomaso & David McLemore, *Bush Spares Lucas from Death Penalty: Governor Commutes Sentence to Life, Cites Doubts over Guilt*, DALLAS MORNING NEWS, June 27, 1998, at 1A.

¹⁹ Over the course of her incarceration, Tucker’s case generated two separate rounds of media and public attention. Shortly after she was first scheduled for execution in 1992, she appeared in a taped interview for *The 700 Club* on the Christian Broadcasting Network. The appearance, and related media coverage, resulted in a massive letter-writing campaign to then-Governor Ann Richards, urging clemency for Tucker. As her 1998 execution date approached, a deluge of letters and public appeals again inundated the Governor’s office. See Mike Ward, *In Eye of Controversy, A Woman’s Execution*, AUSTIN AM.-STATESMEN, Dec. 6, 1997, at A1.

²⁰ Pat Robertson, *Transcript of Speech on Religion’s Role in the Administration of the Death Penalty*, 9 WM. & MARY BILL. RTS. J. 215, 217 (2000).

²¹ *The 700 Club* (CBN television broadcast, Feb. 4, 1998) (Karla Faye Tucker, guest).

her the death penalty; she did deserve it at that time. But things have changed. She has changed.”²² An attorney involved in the prosecution of Daniel Garrett agreed: “The Karla Tucker who killed Jerry Dean and Deborah Thornton *cannot* be executed by the State of Texas because that person no longer exists. The Karla Tucker who remains on death row is a completely different person who, in my opinion, is not capable of those atrocities.”²³ Finally, according to Tucker herself, “[t]he other Karla”—the one who murdered two people—“no longer exists.”²⁴ In a brief filed in the Texas Court of Criminal Appeals, her attorneys pressed the point in the strongest possible terms: “The fact that someone, in society’s view, may have ‘deserved’ to die for the offense does not support the execution of [Tucker] if she truly is no longer the same moral entity alleged to have committed the offense.”²⁵

A corollary of the “new person” claim was that because of her transformation, Tucker no longer posed a danger to society. Thus, according to her supporters, the imposition of the death penalty could serve no legitimate purpose and instead amounted to the needless infliction of suffering. Indeed, under Texas law, as a basis for a death sentence a jury must find “a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.”²⁶ Whatever the case at the time of trial and sentencing, after fourteen years on death row, supporters argued, Tucker was no longer capable of violence.²⁷ According to one attorney’s submission in support of her commutation: “I am comfortable enough in this belief [that Tucker is no longer dangerous] that, if possible, I would welcome Karla into my house to meet my family.”²⁸ Several prison guards echoed this view.²⁹

A further basis for clemency, according to Tucker’s supporters, was her capacity to make a positive contribution to society. During her many years of incarceration, Tucker befriended and counseled other inmates, reached out to troubled young people, and actively participated in prison ministry activities. According to one of her attorneys, Tucker “offer[ed] herself to anyone who needed a compassionate and wise listener” and “actively counseled scores of people struggling with their own issues of sin and forgiveness.”³⁰ In a letter to Governor Bush, Tucker vowed that if her sentence were commuted, she would “continue for the rest of [her] life in this earth to

²² *60 Minutes: Inmate 777* (CBS television broadcast, Dec. 7, 1997) [hereinafter *60 Minutes*] (Paul Ward, guest).

²³ Long, *supra* note 6, at 121 (quoting Assistant Harris County District Attorney Charley Davidson); *see also 60 Minutes, supra* note 22 (Texas Detective J.C. Mosier, guest, stating “[S]he is certainly not the woman she was when I arrested her.”).

²⁴ *60 Minutes, supra* note 22 (Karla Faye Tucker, guest); *see also Prejean, supra* note 7, at 5 (reporting Tucker’s claim that, in following Christ, she had become a “new creation”).

²⁵ Tucker Brief, *supra* note 5, at 17.

²⁶ TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 2006).

²⁷ Long, *supra* note 6, at 121.

²⁸ *Id.* (quoting Davidson).

²⁹ *Id.*

³⁰ *Id.* at 126.

reach out to others to make a positive difference in their lives.”³¹ In this small way, she hoped “to pay society back by helping others.”³² Sister Prejean lamented that, but for her execution, Tucker “would have been a source of healing love to guards and prisoners as long as she lived.”³³

Although the case for clemency was generally cast in terms of Tucker’s rehabilitation, several other factors seemed to play a supporting role. References to Tucker, by her supporters and the media, invariably mentioned her appearance, especially her gender and good looks, as well as her Christian faith.³⁴ Pat Robertson gushed that Tucker was “absolutely radiant,” “the most beautiful Christian woman we had encountered . . . sublime.”³⁵ Sister Prejean observed that “[o]n television screens across America, people saw Karla Faye Tucker’s beautiful face as she talked about reading the Bible in her prison cell . . . and discovering Jesus.”³⁶ News accounts noted her “sometimes-angelic smiling face and twinkling eyes,”³⁷ her “‘girl-next-door’ attractiveness,”³⁸ and her “highly sexual charm.”³⁹ At least one Tucker supporter—Reverend Jerry Falwell—admitted that he objected to Tucker’s execution partly because she was a woman.⁴⁰

As a “beautiful Christian woman,” Tucker seemed to garner more sympathy than the average death row inmate. “She was a woman, white, attractive, articulate and a Christian,” one commentator noted. “A lot of people on death row have three of those characteristics; some have four. But very few have all five”⁴¹ Even other

³¹ *Excerpts from Karla Faye Tucker’s Letter to Governor Bush*, HOUS. CHRON., Jan. 21, 1998, at A25 [hereinafter *Tucker’s Letter*].

³² *Id.*

³³ Prejean, *supra* note 7, at 5.

³⁴ See, e.g., S.C. Gwynne Austin, *Karla Faye Tucker: Why So Many Want to Save Her*, TIME, Jan. 19, 1998 (describing the “attractive, sweet-natured, born-again Christian”); Scott, *supra* note 4 (calling Tucker “one of God’s loveliest saints”); Sam Howe Verhovek, *Divisive Case of a Killer of Two Ends as Texas Executes Tucker: First Woman Put to Death There Since Civil War*, N.Y. TIMES, Feb. 4, 1998, at A1 (noting Tucker’s “doe-eyed good looks”); Walt, *supra* note 2 (noting that Tucker “charmed television audiences worldwide with her coquettish smile and talk of Jesus”); Zorn, *supra* note 4 (discussing “the beauteous Karla Faye Tucker”).

³⁵ Robertson, *supra* note 20, at 217.

³⁶ Prejean, *supra* note 7, at 5.

³⁷ Walt, *supra* note 2.

³⁸ Court TV Online, *Texas v. Karla Faye Tucker: A Question of Mercy*, <http://www.courtTV.com/archive/casfiles/tucker/background.html> (last visited Aug. 15, 2006).

³⁹ Lowry, *supra* note 12, at 60, 61.

⁴⁰ *Crossfire: Has Execution of Karla Faye Tucker Changed America’s Death Penalty Debate?* (CNN television broadcast, Feb. 4, 1988) (Jerry Falwell, guest, stating “I have to be honest about it, [her] being a woman did make a difference to me.”); see also *id.* (“I still look on women differently than I do men.”).

⁴¹ Sam Howe Verhovek, *Karla Tucker Is Now Gone, but Several Debates Still Linger*, N.Y. TIMES, Feb. 5, 1998, at A12 (quoting University of Houston Law Professor David R. Dow).

women on death row at the same time as Tucker, including those with dramatic conversion stories, did not receive the same level of public attention and support.⁴²

Although Tucker's bid to avoid execution was unsuccessful, she and her supporters mounted an impassioned case for clemency. In the wake of her execution, Tucker supporters hardened into Bush critics, who charged that the Governor, and by extension, the State of Texas, altogether lacked mercy. Before evaluating this claim, I will attempt to step back from the emotionally charged atmosphere of this controversial execution and consider the broader philosophical context it implicates, including the justifications for punishment in American criminal law as well as the grounds for mercy.

II. PUNISHMENT AND MERCY

The traditional justifications for punishment generally fall into two categories: utilitarian⁴³ and retributive.⁴⁴ The principal utilitarian justifications—incapacitation,⁴⁵ deterrence,⁴⁶ and rehabilitation,⁴⁷—are defended in terms of the positive consequences

⁴² In Texas, Erica Sheppard, a twenty-four year-old black mother of three, was convicted of stabbing and bludgeoning a woman in order to steal her car. Having waived her appeals, Sheppard was originally scheduled for execution shortly after Tucker. Following a religious experience, Sheppard changed her mind and remains on death row appealing her sentence. Michael Graczyk, *Jesse Jackson Visits Woman on Death Row*, DALLAS MORNING NEWS, Apr. 9, 1998, at 18A. One month after Tucker was executed, Florida electrocuted Judi Buenoano, the first woman executed in the State since 1857. Buenoano was convicted of murdering her husband and disabled son in separate incidents. Like Tucker, she became a devout Christian and led a productive existence on death row. As one of Buenoano's relatives noted, "[Judi] may not have been as photogenic, as young or as pretty as Karla, but she was just as good a Christian." *Judias V. Buenoano 450*, at <http://www.clarkprosecutor.org/html/death/US/buenoano450.htm> (last visited July 26, 2006) (compiling official press releases and news accounts of Buenoano's case). Similarly, with her close-cropped hair and black skin, Sheppard seemed to lack Tucker's broad appeal.

⁴³ Utilitarianism is the most prominent form of consequentialism, the view that actions should be evaluated in terms of their consequences. For the utilitarian, the consequence to be maximized is happiness—or utility.

⁴⁴ See MICHAEL MOORE, *PLACING BLAME* 92 (1997) [hereinafter MOORE, *PLACING BLAME*] (identifying "two sorts of prima facie justifications of punishment—effecting a net social gain (utilitarian), and giving just deserts (retributivist)").

⁴⁵ Incapacitation involves disabling an offender from engaging in further criminal conduct. The most obvious forms of incapacitation are imprisonment and execution; in both cases, offenders are physically prevented from offending again. See, e.g., Jeremy Bentham, *Panopticon Versus New South Wales*, in 4 THE WORKS OF JEREMY BENTHAM 183 (John Browning ed., Russell & Russell, Inc. 1962) (1838) ("This contrivance [incapacitation] was as firmly laid in school-logic as could be wished. Mischievously or otherwise, for a *body to act in a place*, it must be there.").

⁴⁶ Deterrence may be either "general" or "specific." General deterrence concerns the "prevention of similar offenses on the part of individuals at large, viz. by the repulsive influence exercised on the minds of bystanders by the apprehension of similar suffering in case of similar delinquency." Specific deterrence is "prevention of similar offenses on the part of the *particular individual* punished in each instance, viz. by curing him of the *will* to do like in the future." See *id.* at 174.

they are believed to bring about. In the case of deterrence, for example, its viability as a justification for punishment is measured in terms of its efficacy in achieving the goal of crime prevention by means of the threat of punishment. Retributivism, by contrast, is centrally concerned with the imposition of suffering in proportion to an offender's moral desert.⁴⁸ On this view, punishment of the deserving is intrinsically good; its justification does not depend on any further positive consequences that punishment might be expected to produce. Thus, a "retributivist punish[es] because, and only because, offenders deserve it."⁴⁹

In the death penalty context, the dominant justifications for punishment are deterrence and retribution. Although deterrence figures prominently in the Supreme Court's capital sentencing jurisprudence⁵⁰ and in public support for the death penalty,⁵¹ it remains controversial whether the death penalty actually deters would-be murderers.⁵² Moreover, deterrence alone does not seem fully to account for people's intuitions about justice. In principle, deterrence might justify punishment of the innocent if it would yield sufficient deterrent effects. By the same token, a singular concern for deterrence might result in a decision to forgo punishment of the guilty in cases where punishment would not achieve deterrence.

Retribution, by contrast, has a strong intuitive appeal—that the deserving should be punished is practically a tautology. It is less obvious what desert consists in, however, and how precisely to measure it. Indeed, in the absence of an independent metric for gauging proportionality, we are left to rely largely on intuition and

⁴⁷ Rehabilitation concerns the attempt to reform a wrongdoer, either in Bentham's sense—by "curing" the offender of the impulse to engage in wrongdoing—or by otherwise reforming an "offender's character, habits, or behavior patterns so as to diminish his criminal propensities." ANDREW VON HIRSCH, *DOING JUSTICE* 11 (1976).

⁴⁸ See MOORE, *PLACING BLAME*, *supra* note 44, at 105.

⁴⁹ Michael S. Moore, *The Moral Worth of Retribution*, in *PUNISHMENT AND REHABILITATION* 94, 94 (Jeffrie G. Murphy ed., 1995) [hereinafter Moore, *The Moral Worth of Retribution*].

⁵⁰ See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (identifying retribution and deterrence as the principal justifications for capital punishment); *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion) (same).

⁵¹ See B. Douglas Robbins, *Resurrection from a Death Sentence: Why Capital Sentences Should Be Commuted upon the Occasion of an Authentic Ethical Transformation*, 149 U. PA. L. REV. 1115, 1131 n.87 (2001). Robbins notes that while a majority of survey respondents identified deterrence as the "most important element in their reasoning to support or oppose the death penalty," they also indicated that conclusive proof—for or against the efficacy of capital punishment—would not alter their support or opposition to the death penalty. *Id.* (citing sources).

⁵² See, e.g., William C. Bailey & Ruth D. Peterson, *Murder, Capital Punishment, and Deterrence: A Review of the Literature*, in *THE DEATH PENALTY IN AMERICA* 135, 136 (Hugo Adam Bedau ed., 1997) (evaluating studies); Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmortality Panel Data*, 5 AM. L. & ECON. REV. 344, 344 (2003) (reporting study results which suggest that an execution may prevent as many as eighteen murders); Jon Sorenson et al., *Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas*, 45 CRIME & DELINQ. 481, 481 (1999) (finding no evidence of deterrent effect).

convention.⁵³ These serve well enough at the margins—few would deny that death is a disproportionate punishment for shoplifting or that a letter of reprimand is an insufficient penalty for a brutal rape. It is more difficult to determine whether death is the appropriate punishment for murder, however, or if some murderers deserve more punishment than others.

Setting this difficulty aside, the more basic question for retributivists is the conceptual one—What is the nature of moral desert? From the rich literature devoted to the question, two leading contenders emerge. The first, character retributivism, focuses on an individual's deep character, the sort of person he is in general. On this view, "the primary object of our responsibility is our own character, and responsibility for wrongful action is derivative of this primary responsibility, our actions being proxies for the characters such action express."⁵⁴ Alternatively, the choice conception of desert holds that an individual is responsible for the wrongs he freely chooses to do, but not for wrongs he lacked the freedom to avoid doing.⁵⁵ Thus, determining "whether an action expresses the agent's character requires a longer, more complete narration of what sort of person, in general, he is; whereas to see whether an action is freely chosen by an agent seemingly requires a more limited enquiry into his capacities and opportunities at the moment of acting."⁵⁶

The question of clemency, and the commitment to mercy that lies behind it,⁵⁷ depends to a considerable degree on whether one subscribes to choice or character retributivism. For the character retributivist, an offender's post-offense conduct will have a direct and profound bearing on whether he is a good candidate for mercy. That is, in taking the measure of a person, one would have to consider the whole life, including the full range of individual attributes and dispositions exhibited over the course of a lifetime. For the choice retributivist, an offender's post-offense conduct will be far less relevant, if at all, because an offender's desert is "fully congealed at the time of the crime."⁵⁸

Certain features of American criminal law indeed reflect a character-retributivist rationale. For example, in the context of criminal sentencing, some aspects of an offender's character can have an effect on the severity of his sentence, including his

⁵³ Of course, the question of how much to punish is separate from the question of why to punish. See, e.g., MOORE, PLACING BLAME, *supra* note 44, at 88. The two are related, however, in that a retributivist is committed to punishment that is proportional. *Id.*; see also Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1444 (2004) ("Any time a justification for punishment is offered, it will always have at least some implications for the quantum as well as the kind of punishment inflicted on an offender.").

⁵⁴ MOORE, PLACING BLAME, *supra* note 44, at 577.

⁵⁵ *Id.*; see also VON HIRSCH, *supra* note 47, at 127 ("[An offender's] desert depends on his choice—on his having chosen to act (and having acted) wrongfully[.]").

⁵⁶ MOORE, PLACING BLAME *supra* note 44, at 577.

⁵⁷ Although I intend to draw and rely on various distinctions between mercy and clemency, see discussion *infra* Part III, these distinctions are not significant in the present context.

⁵⁸ Stephen P. Garvey, "As the Gentle Rain from Heaven": *Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 1030 (1996); cf. Prejean, *supra* note 7, at 5 (objecting that Governor Bush and Alberto Gonzales "freeze-framed Karla Faye Tucker in the worst act of her life").

willingness to accept responsibility for his wrongful actions.⁵⁹ In the capital sentencing context, many statutes include some reference to character, especially in the many versions of the aggravating factor “heinous, atrocious, and cruel.”⁶⁰ And in its capital sentencing jurisprudence, the Supreme Court has held that “the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the offender . . . as a constitutionally indispensable part of the process of inflicting the penalty of death.”⁶¹ Moreover, this approach accords with our general intuition that an offender who has lived an exemplary life both before and after a (possibly anomalous) transgression generally deserves a less severe punishment than an unrepentant offender whose life has been dominated by corruption and vice.

But these concessions to character generally operate at the margins of a broader domain of choice-retributive principles and institutions.⁶² Most notably, we

⁵⁹ U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2005) (providing for a reduction in mandatory sentencing range for offenders who accept responsibility for their offenses).

⁶⁰ See, e.g., MODEL PENAL CODE § 210.6(3)(h) (“The murder was especially heinous, atrocious and cruel, manifesting exceptional depravity.”); see also James R. Acker & Charles S. Lanier, “*Parsing the Lexicon of Death*”: *Aggravating Factors in Capital Sentencing Statutes*, 30 CRIM. L. BULL. 107, 112 (1994) (listing variations in state statutes). Some have suggested that various aspects of the mens rea analysis in the criminal law concern deep character as well. See, e.g., Jeffrie G. Murphy, *Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 73, 79 (1995); Robbins, *supra* note 51, at 1123 (citing Murphy). However, the references to a “depraved heart,” “wickedness of heart or cruelty,” and “extreme indifference to the value of human life” in formulations of the mens rea standard pertain not to character, but to an offender’s mental state. In such cases, an actor is taken to have possessed the requisite guilty mind because his conduct is so risky that he is presumed to have perceived the risk and disregarded it. The colorful common law language of depravity does not transform this into a judgment about deep character.

⁶¹ *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); see also *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (“[A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant’s character and record . . . proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.”). But see Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 20 (2005) (“[T]he background ‘circumstances of the crime’ that are relevant to a moral judgment about the gravity of the offense, and hence to the proper amount of punishment the defendant deserves, are limited to ‘those facts about the crime itself or the criminal not technically elements of the crime . . . but still somehow closely connected.’”) (quoting Michael Davis, *Sentencing: Must Justice Be Even-Handed?*, 1 LAW & PHIL. 77, 86 (1982)).

⁶² See, e.g., MOORE, PLACING BLAME, *supra* note 44, at 38; Morison, *supra* note 61, at 19 (“From a retributive perspective, the level of an offender’s desert is . . . determined . . . exclusively by an assessment of the morally relevant past and present facts about the criminal transaction under consideration and the offender’s culpability for his actions at the time the punishment is imposed.”). At least one commentator disagrees. See Robbins, *supra* note 51, at 1128–29. Robbins contends that our rejection of capital punishment for insane offenders reflects a character retributivist rationale, but this is surely mistaken. We do not hold the insane, the retarded, or the very young fully morally responsible for their conduct because they lack the capacity to fully appreciate its wrongfulness and to conform their actions to the law. See *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (noting that the insane suffer from “incapacities” that render them not responsible for their actions and not amenable to punishment); *Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (noting the “cognitive and behavioral impairments” render the

criminalize bad conduct, not bad character. Even the most vicious character—no matter how cruel, greedy, or depraved—has nothing to fear from the criminal law unless, and to the degree that, he engages in criminal *conduct*.⁶³ And it is the conduct itself that generally provides the basis for an inference about the offender's mental state—whether he acted culpably and to what degree.⁶⁴ Thus, to the extent that the criminal law is a retributive enterprise, “only the choice theory captures” the relevant kind of moral responsibility.⁶⁵

To the extent that considerations of character play a role in the criminal law, they seem to accord with our shared intuitions about justice. At the same time, the limited role for such considerations suggests that deep character cannot bear the weight that character retributivists would place on it in making the case for mercy. Before defending this claim, I briefly examine the concepts of mercy and clemency in order to highlight their distinctive attributes and spheres of operation.

mentally retarded “less morally culpable” based on “the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses.”); *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (detailing the lesser capacity of juvenile offenders based on their relative lack of maturity). The judgments in these cases are based on capacity, not character. Robbins's other example—three strikes law—seems similarly unavailing. See *Lockyer v. Andrade*, 538 U.S. 63, 80 (2003) (Souter, J., dissenting) (“Although the State alludes in passing to retribution or deterrence . . . , its only serious justification for the 25-year minimum treats the sentence as a way to incapacitate a given defendant from further crime; the underlying theory is the need to protect the public from a danger demonstrated by the prior record of violent and serious crime.”) (internal citations omitted).

This distinction—between mental states and character—suggests a further problem with the claim that character retributivism predominates in the criminal law. Responding to the argument that the character inquiry is unrealistically demanding, Robbins contends that ascertaining character is no more epistemologically challenging than ascertaining mental states. Robbins, *supra* note 51, at 1166. In fact, however, because *mens rea* is explicitly linked with conduct—the *actus reus*—it focuses on the actor's mental state *at the moment of acting*. Character, by contrast, cannot be inferred from a single action. See MOORE, *PLACING BLAME*, *supra* note 44, at 564; see also discussion *infra* Part III.

⁶³ See Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses, and the Model Penal Code*, 19 RUTGERS L.J. 671, 694–98 (1988) (arguing that bad character is not sufficient for criminal punishment). Of course there are other reasons why we do not punish for thoughts—because it would be too intrusive of liberty and privacy, for example—but these do not affect the assessment of moral desert. See MOORE, *PLACING BLAME*, *supra* note 44, at 585.

⁶⁴ See, e.g., Joshua Dressler, *Some Brief Thoughts (Mostly Negative) About “Bad Samaritan” Laws*, 40 SANTA CLARA L. REV. 971, 982 (2000) (noting the problems of trying to infer intent in the absence of conduct).

⁶⁵ MOORE, *PLACING BLAME*, *supra* note 44, at 549. This conclusion is confirmed by the limited admissibility of character evidence in the criminal law. Under the Federal Rules of Evidence, for example, “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” FED. R. EVID. 404(b). As Moore notes, the alternative—making character the touchstone of criminal liability—would yield unacceptable results. For example, we would be bound to punish an individual with a disposition for bad acts despite the fact that he has not chosen to act on his disposition, and bound to refrain from punishing an actor who chooses to do wrong, but for whom the action is out of character. MOORE, *PLACING BLAME*, *supra* note 44, at 578.

III. MERCY AND CLEMENCY

As a general matter, “mercy” refers to situations in which an agent has the power to harm someone who is vulnerable to that power and elects not to exercise it, or refrains from exercising it to the full extent.⁶⁶ In the context of criminal punishment, the primary institutional expression of mercy is “clemency,” the remission or mitigation of the length or severity of a sentence by a president or governor.⁶⁷ Executive clemency can take a number of forms, including pardon,⁶⁸ reprieve,⁶⁹ and commutation.⁷⁰ Although clemency may be granted for almost any reason—doubts about guilt, dramatic rehabilitation, judicial or political expediency⁷¹—the “traditional” view is that clemency is a merciful act that reflects a humanitarian motivation.⁷²

But mercy itself need not reflect such a motivation. As Andrew Brien has observed, talk of mercy is conventional in a variety of circumstances.⁷³ In some contexts, mercy may refer simply to an act of forbearance performed in the context of a particular power relationship—an “act of mercy” that does not depend on any particular motive or intention.⁷⁴ More commonly, mercy refers to actions performed in a certain spirit—“acting mercifully”—from compassion or benevolence toward someone in circumstances dominated by reasons to act otherwise.⁷⁵ Finally, we sometimes speak of a “merciful person,” one who possesses a more or less stable

⁶⁶ Andrew Brien, *Mercy Within Legal Justice*, 24 SOC. THEORY & PRAC. 83, 84 (1998).

⁶⁷ See, e.g., Morison, *supra* note 61, at 12; Beau Breslin & John J.P. Howley, *Defending the Politics of Clemency*, 81 OR. L. REV. 231, 232 (2002). Sentencing judges and juries also have some opportunity to exercise mercy, especially in the capital sentencing context. See, e.g., Penry v. Lynaugh, 492 U.S. 302, 319 (1989); Eddings v. Oklahoma, 455 U.S. 104, 114 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

⁶⁸ A pardon is an invalidation of the offender’s guilt and punishment. Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, 289 (1993).

⁶⁹ A reprieve is the temporary postponement of execution. *Id.*

⁷⁰ A commutation is the reduction in the severity of punishment. *Id.*

⁷¹ Cases of “judicial expediency” are those in which “commutations were given by the executive because courts had vacated, or were likely to vacate, the death sentence, and a commutation would save the time and expense of going through a new sentencing proceeding.” Radelet & Zsembik, *supra* note 68, at 292. Political expediency is discussed below. See discussion *infra* Part IV.A.

⁷² Morison, *supra* note 61, at 27; Stephen P. Garvey, *Is It Wrong to Commute Death Row? Retribution, Atonement, and Mercy*, 82 N.C. L. REV. 1319, 1331 (2004); Elizabeth Rappaport, *Staying Alive: Executive Clemency, Equal Protection, and the Politics of Gender in Women’s Capital Cases*, 4 BUFF. CRIM. L. REV. 967, 987 (2001).

⁷³ Brien, *supra* note 66, at 87.

⁷⁴ *Id.* To illustrate, Brien gives the example of the “victorious duelist who, having his enemy in his control, throws down his sword and walks away,” giving no indication of his motives or character. *Id.*

⁷⁵ *Id.*

disposition to be merciful.⁷⁶ Such a person has an “inclination of mind” to perform merciful actions in appropriate cases.⁷⁷

The merciful person, possessed of the virtue of mercy, has reason to act mercifully on at least some appropriate occasions.⁷⁸ By its nature, however, a virtue cannot simply be identified with an agent’s conduct. That is, we cannot conclude on the basis of a single action, or even a series of actions, that a person is, for example, merciful. For one’s actions only reflect one’s character; they do not constitute it.⁷⁹ By the same token, the failure to show mercy (or grant clemency) on a particular occasion is not, without more, an adequate basis for judging a person merciless.

With this in mind, I turn to the arguments for clemency in Tucker’s case. Although Tucker and her supporters presumably would have welcomed clemency on any basis, their appeals were generally cast in terms of traditional mercy, that is, the compassionate remission of a harsh sentence.⁸⁰ When their arguments were unsuccessful, they concluded that Governor Bush lacked mercy.⁸¹

The arguments for leniency in Tucker’s case fell into a few broad categories. The central claim was that at some point during the course of her incarceration, Tucker became a new person who was no longer eligible for the death penalty. Indeed, because of her conversion and rehabilitation, the Tucker who brutally murdered two people was no longer *available* to be executed. Second, because of her dramatic transformation, Tucker no longer posed a danger to society. Finally, because

⁷⁶ *Id.*

⁷⁷ *Id.* (quoting Seneca).

⁷⁸ The obligation is generally understood to be *imperfect*. Unlike perfect obligations, imperfect obligations do not correspond to the rights of others. See generally IMMANUEL KANT, THE DOCTRINE OF VIRTUE 115–22 (Mary J. Gregor trans., Harper Torchbooks 1964); see also Garvey, *supra* note 72, at 1331 (characterizing mercy as an imperfect obligation, which “need only be satisfied on some occasions”); Morison, *supra* note 61, at 4.

⁷⁹ See, e.g., ARISTOTLE, THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS 97 (J.A.K. Thomson trans., Penguin Books 1976) (n.d.) (specifying that for an act to be virtuous it must spring from a “fixed and permanent disposition”); Julia Annas, *Virtue Ethics*, in OXFORD HANDBOOK OF ETHICAL THEORY 515, 516 (David Copp ed., 2006) (“A virtue, unlike a mere habit, is a disposition to act *for reasons*, and so a disposition which is exercised through the agent’s practical reasoning; it is built up by making choices and exercised in the making of further choices.”); Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 SETON HALL L. REV. 288, 307 (1993) (“Mercy is not an action at all; rather it is an attitude that influences and guides the action that the sentencer ultimately takes.”).

⁸⁰ Some of the arguments made by Tucker supporters reflected appeals to equity—particularized consideration of the facts and circumstances of an individual case. See Brien, *supra* note 66, at 90. For example, supporters pointed to Tucker’s troubled childhood and her drug addiction as grounds for mercy. See, e.g., Prejean, *supra* note 7, at 4. The relationship between mercy and equity is considered more fully below. See discussion *infra* Part IV.A.

⁸¹ See, e.g., Prejean, *supra* note 7, at 6 (“What is clear is that [Governor Bush] had no quality of mercy.”); Jordan Smith, *No Mercy*, AUSTIN CHRON., Aug. 20, 2004 (quoting Jeanette Popp of Murder Victims’ Families for Reconciliation: “They [in Texas] have no idea how to temper justice with mercy.”); Walt, *supra* note 2 (quoting Pat Robertson’s claim that if Bush “lets this sweet woman of God die, he’s a man who shows no mercy”).

the rehabilitated Tucker was ideally suited to counsel others, executing her would represent the waste of a life, needlessly depriving society of her future contributions.⁸²

A. “New Person”

The “new person” claim figures prominently in offenders’ bids for clemency. The basic idea is an intuitive one; most people know someone who has experienced a physical transformation or a personality change so dramatic that we hardly recognize them. In Tucker’s case, those who first encountered her after her conversion found it almost impossible to conceive of her as the drug-addicted prostitute who wielded the deadly ax. In such a case, it is tempting to believe that the new self has displaced the old self, that the “old Karla” no longer exists.

But what does it mean to say that Tucker, or anyone, is actually a new person? One possibility is that some organic disruption has altered the brain of an individual so that he no longer remembers or appreciates the existence or character of his past actions.⁸³ From the retributive perspective, such a person is no longer a responsible moral agent. In such a case, we are likely to forgo punishment (though not treatment or incapacitation) because the person responsible for the offense is no longer morally accountable.⁸⁴ Under these circumstances, the remission of punishment is based, not on mercy, but on the basic demands of retributive justice itself. For punishing a

⁸² A further argument typically surfaces in support of mercy and clemency—that we should never rule out the possibility of redemption by executing offenders. Because execution eliminates the possibility that an offender will come to see and reject the (moral) error of his ways, we should forgo capital punishment altogether. See, e.g., Garvey, *supra* note 72, at 1340 (defending executive clemency based on “atonement,” which “should be understood to insist that no crime, not even a capital one, forever shuts the door to the possibility of reconciliation, however remote it might seem”); Dan Markel, *State Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 461 (2005) [hereinafter Markel, *State Be Not Proud*] (observing that punishment’s function of communicating “certain fundamental norms” is thwarted if it “fails to leave a chance for the offender to internalize and live by the ideals animating retribution . . . after the encounter”). This concern for redemption of offenders is less an argument for clemency in particular cases than an argument against the death penalty in all cases. After all, those who hold this view do not argue that once an offender adopts correct moral values it would then be acceptable to execute them. See, e.g., Markel, *supra* note 53, at 1462 (arguing that it would be “perverse” to encourage offenders to internalize correct moral values, then execute them once they have done so). In any event, because of Tucker’s early redemption, this rationale did not apply in her case, so I set it aside.

⁸³ See John Tasioulas, *Punishment and Repentance*, 81 PHIL. 279, 318 (2006) (noting the possibility of “severe psychological disorder” or “brainwashing” as grounds for concluding that an offender is no longer a responsible moral agent). A good illustration of the “new person” phenomenon in this sense is the case of Ricky Ray Rector. Rector murdered a police officer in 1981, then shot himself in the head in a suicide attempt. Although Rector survived, he had effectively lobotomized himself and was left with the mental capacity of a young child. When he was taken from his cell to the execution chamber, he reportedly saved “for later” the pecan pie from his last meal. See Marshall Frady, *Death in Arkansas*, THE NEW YORKER, Feb. 22, 1993, at 105, 128.

⁸⁴ See Tasioulas, *supra* note 83, at 318.

person who lacks responsibility is like “punishing” a wild animal: justified as a means of protecting against future attacks, but unrelated to moral desert.

Proponents of the new-person claim have something else in mind. On this view, nothing so radical as brain damage is required. Instead, a rehabilitated offender who experiences sincere remorse and repentance is “ontologically different from the wrongdoer who committed the original crime.”⁸⁵ In such a case, the present (transformed) self is “no longer the same moral entity” as the one convicted of the crime.⁸⁶ As a result, the deserving offender no longer exists to receive the punishment.⁸⁷

This strong—almost literal—conception of the new person claim raises a host of difficult metaphysical and moral questions.⁸⁸ Even without exploring these in detail, we have reason to doubt this account of personal identity in the context of the criminal law. First, if we were to take seriously the notion that identity (as opposed to character or personality) changes over time, we would have to abandon a range of legal and moral doctrines that presuppose the unity of the self.⁸⁹ For example, what would it mean for property ownership or creditor-debtor relationships?⁹⁰

A further problem with the new person claim involves the question of punishment for rehabilitated offenders. According to proponents of new-person clemency, “to the extent that the new man really is a different person, he should not be punished, *in full*, for the bad acts of the person he once was.”⁹¹ In the context of capital punishment, the measure of residual desert for the new person seems to be a

⁸⁵ Robbins, *supra* note 51, at 1158–59, 1179.

⁸⁶ Tucker Brief, *supra* note 5, at 17.

⁸⁷ See Long, *supra* note 6, at 121.

⁸⁸ See generally JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (London, William Tegg & Co. 1853) (1689); THOMAS NAGEL, MORTAL QUESTIONS (1979); ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS (1981); BERNARD WILLIAMS, PROBLEMS OF THE SELF (1973); Derek Parfit, *Personal Identity*, 80 PHIL. REV. 3 (1971); Eric T. Olson, *Personal Identity*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/identity-personal/> (last visited June 22, 2006). In certain religious contexts, the notion that an individual has been “born again” may be intended literally, but outside that context it is, at most, a metaphor. *But see* Robbins, *supra* note 51, at 1160 (arguing that the “strong language” characteristic of new person claims cannot “be simply dismissed as hyperbole”).

⁸⁹ See MOORE, PLACING BLAME, *supra* note 44, at 580–81 (“This allowance of the possibility that many persons can inhabit one body—either over time or even at one time—raises havoc with some basic . . . legal ideas that are difficult to imagine giving up.”). In an early defense of the unity of the self over time, John Locke linked unity with persistent consciousness. According to Locke, “personality extends itself beyond present existence to what is past, only by consciousness;—whereby it becomes concerned and accountable, owns and imputes to itself past actions, just upon the same ground and for the same reason as it does the present.” As a result, “a sentence shall be justified by the consciousness all persons shall have, that they themselves, in what bodies soever they appear, or what substances soever that consciousness adheres to, are the same that committed those actions, and deserve that punishment for them.” LOCKE, *supra* note 88, at 230–31 (Ch. XXVII, § 26).

⁹⁰ For a discussion of such questions, see MICHAEL S. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 149–52 (1984) [hereinafter MOORE, LAW AND PSYCHIATRY].

⁹¹ Robbins, *supra* note 51, at 1162 (emphasis added).

sentence of life rather than death.⁹² But why this much? And if an offender is transformed by remorse and repentance into a new person, why does he deserve any punishment at all?⁹³

At a minimum, there are serious questions about what it might mean to be a “new person” and thus no longer deserving of punishment. Proponents of the new person ground for mercy would have to spell out in much greater detail the nature and implications of the claim if it is to bear the weight they wish to rest on it. If, as seems likely, “not the same person” actually means “not the same *kind* of person,”⁹⁴ they must provide a different account of why the offender does not deserve punishment since it cannot be that the old person—the bad person—no longer exists.⁹⁵

B. Lack of Future Dangerousness

To a considerable degree, the claim that an offender is no longer dangerous is premised on the new person claim. In Tucker’s case, for example, one supporter declared that “[t]he Karla Tucker who remains on death row is a completely different person who, in my opinion, is not capable of those atrocities.”⁹⁶ Thus, regardless of

⁹² See, e.g., Michael A. Simons, *Born Again on Death Row: Retribution, Remorse, and Religion*, 43 CATH. LAW. 311, 332 (2004). This assumption also seemed to prevail among Tucker’s supporters. See, e.g., Prejean, *supra* note 7, at 5 (arguing that Tucker could have lived out her life in prison helping others); *Hannity & Colmes: Execution of Karla Faye Tucker* (FOX News Network broadcast, Feb. 3, 1998) (Jerry Falwell, guest, stating “[T]here are persons who . . . truly have something positive to offer for whom life imprisonment without any hope of release is a better alternative.”).

⁹³ According to at least one proponent of the new person view, it is in principle possible that an offender could experience a transformation so dramatic that he should escape punishment altogether. Robbins, *supra* note 51, at 1167. But, according to Robbins, “this sort of radical transformation is eminently rare.” *Id.* It is hard to know what to make of this empirical claim. First, it is premised on an inscrutable metaphysical claim; that is, we have yet to learn what it actually means for someone to be a “new person.” Additionally, the insistence that the ethical transformation that wrongdoers like Tucker experience is just exactly enough to reduce their desert from death to life—but no more—is simply dogmatic.

⁹⁴ MOORE, LAW AND PSYCHIATRY, *supra* note 90, at 399.

⁹⁵ One possibility is that a rehabilitated offender simply deserves less punishment for having transformed himself. See, e.g., Robbins, *supra* note 51, at 1155. In addition, an execution “carried out in the face of clear evidence of radical character transformation and associated penance is evidence of a society that does not expect, seek, nor [sic] value such a response from its wrongdoers.” *Id.* Indeed, executing such an offender “will serve as a deterrent to striving for redemption.” Smith, *supra* note 81. Like the redemption argument, the rehabilitation argument amounts to a *per se* bar to capital punishment unless we are willing to set a time limit within which offenders must become rehabilitated. See, e.g., Robbins, *supra* note 51, at 1165 (arguing that rehabilitation is a “significant moral event” that should not be governed by the “somewhat arbitrary time framework within which” the criminal justice system operates). To argue that we cannot execute offenders because we must allow for redemption, and that we cannot execute the redeemed because they now embrace correct moral values, is just another way of rejecting the death penalty. Indeed, these may be good reasons to reject it, but they are best raised in the context of that debate rather than this one.

⁹⁶ Long, *supra* note 6, at 121 (quoting Davidson).

whether she *deserved* punishment, Tucker did not *require* punishment to prevent her from re-offending. Indeed, Tucker's dramatic rehabilitation, which began shortly after her arrest, seemed to progress uninterrupted until her death fourteen years later. Many observers pointed to the longevity of her new persona as evidence of its sincerity and staying power.⁹⁷

As an initial matter, a concern for future dangerousness is out of place in a discussion of the retributive rationale for capital punishment. From the retributive perspective, predictions about an offender's future conduct are irrelevant to determinations of desert.⁹⁸ However, under Texas law, retribution is not the only value that operates in the context of capital punishment.⁹⁹ Controversial judgments must also be made about an offender's future dangerousness.

Tucker and her supporters attempted to highlight her rehabilitation and its implications for her future conduct as a basis for clemency. In addition to the prosecutor who said he would welcome Tucker into his home, several prison guards supported her bid for clemency, "asserting that she no longer posed any risk of danger to others."¹⁰⁰ Sister Prejean noted that the jurors who sentenced Tucker were "deprived of foresight" regarding her future dangerousness—"the potential for good in her character that would later make her such an exemplary prisoner."¹⁰¹ Tucker herself observed that her time in the "pressure cooker" of death row established that she no longer posed a danger to society: "If I was going to do anything, it would have happened by now. But it hasn't."¹⁰² According to a brief filed on Tucker's behalf, she was "completely reformed" and "totally rehabilitated."¹⁰³

To be sure, Tucker's transformation from a violent junkie to a model prisoner was nothing short of remarkable. Under the circumstances, it is tempting to conclude

⁹⁷ See, e.g., Florence King, *Misanthrope's Corner*, NATIONALREVIEW.COM, Mar. 9, 1998, <http://www.nationalreview.com> ("I believe Karla Faye's conversion was sincere, in part because the Born Again stance is so exhausting that no one could fake it for very long."); *Talk of the Nation: Women and the Death Penalty* (NPR broadcast Feb. 3, 1998) (Rusty Hardin, guest, noting "just . . . how long-standing this conversion" was); *Hannity & Colmes*, *supra* note 92 (Dana Brown, guest, denying that Tucker's final words of prayer were staged, noting that she had sustained her religious commitment for 14 years); *60 Minutes*, *supra* note 22 (Peggy Kurtz, guest, stating "I know it's not a game she's playing. Nobody can pretend to be saved. You just can't do that. You know that it's genuine"). Of course the longevity of one's professed faith is not a perfect proxy for sincerity or commitment.

⁹⁸ Such behavior would, of course, be relevant to a character retributivist. See, e.g., Robbins, *supra* note 51.

⁹⁹ See TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 2006) (requiring a capital jury to find "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" before imposing a death sentence); see also *Jurek v. Texas*, 428 U.S. 262, 275 (1976) ("[A]ny sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose.").

¹⁰⁰ Long, *supra* note 6, at 121.

¹⁰¹ Prejean, *supra* note 7, at 4.

¹⁰² *Larry King Live: Live From Death Row* (CNN television broadcast Jan. 14, 1998) (Karla Faye Tucker, guest).

¹⁰³ Tucker Brief, *supra* note 5.

that the sentencing jury was mistaken in its prediction that Tucker posed a continuing threat to society. However, the future dangerousness inquiry pertains not only to an offender's future behavior in prison, but to her behavior in any future environment in which she might find herself. As it is, we simply do not know how Tucker might have behaved if she had been released from death row.¹⁰⁴ One detail conspicuously absent¹⁰⁵ from the various arguments for clemency raised on her behalf might at least give us pause. Had her bid for clemency been successful, Tucker would have been eligible for parole in 2003—at the age of forty-two.¹⁰⁶

One need not be a hopeless cynic to raise concerns about backsliding in these circumstances. Sister Prejean has noted that being on death row is “almost like becoming a monk,” far removed from “the chaotic circumstances” of inmates’ former lives.¹⁰⁷ Another sympathetic commentator observed that “the regularity of prison life” represented “the first normal routine [Tucker] had ever known.”¹⁰⁸ Indeed, she was in “a totally controlled environment; she didn’t have access to drugs; she was told what to do and when to do it.”¹⁰⁹ An opponent of Tucker’s clemency bid, victims’ rights advocate Dudley Sharp, pointed to the trial testimony of a defense psychiatrist who “testified to the fact that [Tucker] would be a continuing threat to society if she ever had access to drugs again.”¹¹⁰ Sharp noted that “she [would] have access to drugs in the general population, and certainly on the outside.”¹¹¹ Finally, a deep and sincere religious commitment, even one of long duration, is no guarantee against sin and transgression.¹¹² Weakness of will is a fact of the human condition.¹¹³

¹⁰⁴ This is true not only in the obvious sense that we can never know the future or how any of us will behave in it. Rather, in the case of a person who has committed two brutal murders, our baseline presumption—that most people will not murder—no longer seems warranted. Whatever the vagaries of predicting human behavior, we are justified in regarding the person who has not committed murder as a better risk, all other things equal, than one with a demonstrated capacity for extreme violence.

¹⁰⁵ Some Tucker supporters seemed to believe that she would remain in prison for life if her sentence were commuted. See, e.g., *CNN Special: The Fate of Karla Faye Tucker* (CNN television broadcast, Feb. 3, 1998) (Jerry Falwell, guest, suggesting that Tucker could help others “if she were incarcerated without any chance of release—the rest of her life, obviously”). Others seemed to gloss over the fact that she would soon be eligible for parole. When Tucker appeared on *Larry King Live* the month before her execution, she was asked whether she would be eligible for parole. She responded: “Eventually, not right away.” In fact, she would have been eligible within five years. See *Larry King Live*, *supra* note 102 (Karla Faye Tucker, guest); see also Tucker Brief, *supra* note 5, at 17 (noting that the goal of “incapacitation clearly would be served as well by a life sentence, or parole, in [Tucker’s] case”) (emphasis added).

¹⁰⁶ See Sam Howe Verhovek, *Texas, in First Time in 135 Years, is Set to Execute Woman*, N.Y. TIMES, Feb. 3, 1998, at A1.

¹⁰⁷ *Talk of the Nation*, *supra* note 97 (Sister Helen Prejean, guest).

¹⁰⁸ King, *supra* note 97.

¹⁰⁹ *Talk of the Nation*, *supra* note 97 (Dudley Sharp, Vice President, Justice for All, guest).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² One need only think of Jim Bakker and Jimmy Swaggart, disgraced former ministers whose life work was Christian ministry. Both were undone by sex scandals during the 1980s.

C. *Waste of a Life*

The argument for clemency based on an offender's potential to make a positive contribution to society is also related to the new person claim. In Tucker's case, having been transformed by faith into a good person, she was brimming with energy to help others. In Tucker's appeal to Governor Bush, she expressed her commitment to making a difference:

If you commute my sentence to life, I will continue for the rest of my life in this earth to reach out to others to make a positive difference in their lives I can reach out to [troubled] girls and try and help them change before they walk out of this place and hurt someone else. . . . I am seeking you to commute my sentence and allow me to pay society back by helping others I can, if I am allowed, help save lives.¹¹⁴

Tucker's commitment was evident as well during her incarceration. She reportedly sought to "reach beyond her barred prison cell to warn youngsters of the dangers of her former lifestyle,"¹¹⁵ provided "a spiritual lift to other prisoners [on death row], who found her upbeat attitude a light in the dark,"¹¹⁶ and "literally reached thousands of people for Jesus Christ."¹¹⁷ During the course of her appeal for clemency, various people "submitted letters describing the kind of person she was and the kind of work that she had done while on death row, to heal rifts in families outside the walls of the prison and the psychological and spiritual pain of individuals."¹¹⁸ Reverend Falwell lamented that, but for her execution, "for the rest of her life incarcerated she could have had a great ministry to young offenders, a message to give."¹¹⁹ In view of these aspirations and accomplishments, critics of Tucker's execution argued that her death was a "horrible waste,"¹²⁰ a "wanton and arbitrary waste of a life."¹²¹

Like the future dangerousness argument, the "waste of a life" argument cannot be readily accommodated within a retributive framework. As much as we might admire

¹¹³ Indeed, this insight is central to the Christian worldview, which holds that the "spirit is willing, but the flesh is weak." *Matthew* 36:41.

¹¹⁴ *Tucker's Letter*, *supra* note 31; see also *Larry King Live*, *supra* note 102 (Karla Faye Tucker, guest, stating "I can witness to people who have been on drugs or into prostitution . . . and they'll listen to me because they know I understand and can relate to them.").

¹¹⁵ Walt, *supra* note 2.

¹¹⁶ Joseph Geringer, *Karla Faye Tucker: Texas' Controversial Murderess*, COURT TV CRIME LIBRARY, Nov. 11, 2006, http://www.crimelibrary.com/notorious_murders/celebrity/jack_abbott/index.html.

¹¹⁷ Walt, *supra* note 2 (quoting Dana Brown).

¹¹⁸ Long, *supra* note 6, at 122.

¹¹⁹ *CNN Crossfire*, *supra* note 40 (Jerry Falwell, guest).

¹²⁰ Smith, *supra* note 81.

¹²¹ Tucker Brief, *supra* note 5, at 38.

Tucker's determination to help others, it is not obviously relevant to whether her punishment should be remitted. Indeed, we generally do not countenance trade-offs of this sort—between retributive desert and social consequences—especially in cases of capital murder.¹²² To focus on net social welfare in this way is to miss the retributive point.¹²³ Moreover, precisely because there is honor in such work—ministering to others, spreading the Word of God—it probably should not offset her criminal sentence.¹²⁴ Finally, like Tucker's lack of future dangerousness, her capacity for future contributions to society was contingent on her maintaining her new persona outside the restrictive environment of death row.¹²⁵

¹²² This is easy enough to see even in non-capital cases. In *State v. Chaney*, a member of the active-duty military was convicted of beating, raping, and robbing a young woman. 477 P.2d 441 (Alaska 1970). The trial judge, who conceded that he did not believe the defendant's story that the sex was consensual, sentenced the defendant to one year in prison and urged parole as soon as possible: "[I]f the Parole Board should decide 10 days from now that you're eligible for parole and parole you, it's entirely satisfactory with the court." *Id.* at 446 (quoting the trial judge). The trial judge also noted the defendant's promising military career and expressed regret that military regulations prevented the defendant from remaining in the service, which the judge regarded as "a better setup for everybody concerned than putting him in the penitentiary." *Id.* In such a case, the idea that an offender's capacity to make a valuable social contribution—by serving in the military, for example—should offset his punishment seems morally offensive.

¹²³ See MOORE, LAW AND PSYCHIATRY, *supra* note 90, at 155. This is not to say that we never take account of the social consequences of punishing, or refraining from punishing, particular offenders. As Moore notes, a commitment to retributivism does not entail a categorical commitment to punishing every guilty offender commensurate with their desert. *Id.* at 156–58 (describing a "consequentialist-retributivist" and adducing the example of plea bargaining as a means to maximize the punishment of the guilty by convicting the most deserving offenders even if it means forgoing the deserved punishment of others). Moore also notes that retributivism, even in its more familiar deontological form, can accommodate some trade-offs based on social welfare, but only if the stakes are sufficiently high. *Id.* at 158 (describing "threshold deontology," which permits violation of categorical moral norms only in extreme cases).

¹²⁴ See, e.g., *United States v. Bergman*, 416 F. Supp. 496, 500–01 (S.D.N.Y. 1976) (rejecting proposed community service as an insufficient criminal sanction because it involved "work of an honorific nature").

¹²⁵ The waste-of-a-life argument, and the confident assurances about the good character of a convicted murderer, call to mind the case of Jack Henry Abbott and his patron Norman Mailer. Mailer discovered Abbott's literary talent while the latter was serving a prison sentence for murder. Mailer was so taken with Abbott that he found him a publisher and worked diligently for his release from prison. Shortly after he was paroled, Abbott killed a man in New York. Various celebrities and literary figures supported him throughout his trial; actress Susan Sarandon named her son after him. When Abbott was convicted of manslaughter, Mailer told reporters that he was "willing to gamble with certain elements in society to save this man's talent!" Mark Gado, *Jack Abbott: From the Belly of the Beast*, COURT TV CRIME LIBRARY, Aug. 27, 2006, http://www.crimelibrary.com/notorious_murders/celebrity/jack_abbott/index.html. Abbott's case is different from Tucker's in many ways—most notably, prison officials strongly opposed his bid for parole because they regarded him as dangerous. However, Abbott's case illustrates the danger of the trade-off mentality in the context of criminal punishment. Mailer's willingness "to gamble" with public safety based on Abbott's talent strikes most of us, I think, as morally repugnant. I thank Jeff Murphy for reminding me of this case.

IV. CLEMENCY: PROBLEMS AND LIMITATIONS

The case for clemency in Tucker's case rested on a number of dubious moral and empirical claims. In the context of the retributive justification for punishment that provides the primary rationale for the death penalty, these claims were especially unpersuasive. But the problems with clemency are not confined to the retributive context. Indeed, the institution of criminal punishment, including capital punishment, depends upon a plurality of values, including mercy, crime prevention, and the communication of justified censure.¹²⁶ This broader perspective exposes still further shortcomings associated with the power of executive clemency and the form of "mercy" said to underwrite it.

A. *Practical and Equitable Considerations*

Executive clemency, in its common law formulation, dates from medieval England,¹²⁷ though the official dispensation of mercy is at least as old as the Code of Hammurabi.¹²⁸ In its earliest applications, the power of executive clemency operated either as a grant of mercy (in the traditional sense) or as a political measure designed to curry favor with particular constituencies.¹²⁹ William Blackstone praised the clemency power vested in the sovereign on the grounds that it allowed for more flexible application of otherwise rigid legal rules and because it provided an effective tool for the sovereign to garner and maintain political support.¹³⁰ Similarly, in defending the American incarnation of the pardoning power,¹³¹ Alexander Hamilton argued that the "severity" of a legal code would render justice "too sanguinary and cruel" in the absence of executive clemency.¹³² For Hamilton, however, "the principal argument for reposing the power of pardoning . . . to the Chief Magistrate is this: in seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth."¹³³

Although these early rationales for executive clemency are not without contemporary resonance, at least some aspects of the justification seem largely out of

¹²⁶ See Tasioulas, *supra* note 83, at 285; see also Markel, *supra* note 53, at 1442; Morison, *supra* note 61, at 86.

¹²⁷ See *Herrera v. Collins*, 506 U.S. 390, 412 (1993); 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, 205–06 (2000).

¹²⁸ See Morison, *supra* note 61, at 1.

¹²⁹ See Breslin & Howley, *supra* note 67, at 246.

¹³⁰ *Id.*

¹³¹ U.S. CONST. art. II, § 2 ("The President shall . . . have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.").

¹³² THE FEDERALIST NO. 74 (Alexander Hamilton).

¹³³ *Id.*

date. As an initial matter, the rigid law that Blackstone and Hamilton worried about has been softened in a variety of ways to permit more particularized judgments about criminal liability. It is no surprise that the heyday of executive clemency came at a time when most felonies were capital offenses.¹³⁴ In such an environment, the power to remit punishment through commutation seems especially important. In addition, because the common law did not initially recognize various defenses to criminal liability, the power of clemency was the only means of tailoring punishment to culpability in cases of insanity, self-defense, or provocation.¹³⁵ Finally, in the capital sentencing context, many of the most obvious forms of injustice have been reduced, if not eliminated altogether. The invalidation of the mandatory death penalty,¹³⁶ the use of aggravating and mitigating factors to guide sentencing discretion,¹³⁷ and automatic appellate review of death sentences¹³⁸ provide at least a measure of protection against the routine and arbitrary imposition of capital punishment. With the advent of the modern criminal code, including the elaborate grading of punishment, the addition of excuses and justifications, and the incorporation of mercy into capital sentencing, early worries about the law's "severity" and "rigour" lose much of their force.¹³⁹

More problematic than the equity rationale is the political expediency rationale. However real a monarch's need to curry favor with his subjects or a president's need to quell lingering rebellion in some contexts, this justification for the exercise of clemency seems out of place in contemporary politics. Although we can point to circumstances—such as the resignation of Richard Nixon or the aftermath of Vietnam¹⁴⁰—when the exercise of executive clemency might be justified to counteract significant national unrest, these are far removed from the ordinary murder cases that are the stuff of death row clemency bids. In the latter cases, clemency seems less like

¹³⁴ See Acker & Lanier, *supra* note 127, at 211 ("Historically, executive clemency was dispensed regularly in capital cases in order to help offset harsh laws that automatically required punishment by death on conviction for crimes."); see also Radelet & Zsembik, *supra* note 68, at 289–90 (documenting the decline in the use of the clemency power in capital cases since 1972).

¹³⁵ See Acker & Lanier, *supra* note 127, at 206.

¹³⁶ See *Woodson v. North Carolina*, 428 U.S. 280 (1976).

¹³⁷ *Gregg v. Georgia*, 428 U.S. 153 (1976).

¹³⁸ *Id.*

¹³⁹ This is not to suggest that the various reforms have eliminated the possibility of error or injustice. See *supra* text accompanying notes 134–38.

¹⁴⁰ In 1974, President Gerald Ford granted an unconditional pardon to former President Richard Nixon in the wake of the Watergate scandal. Ford, who became president after Nixon's resignation, defended his action as a means to insure "domestic tranquility." See KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 80–81 (1989). In 1977, shortly after taking office, President Jimmy Carter followed through on a campaign pledge to grant amnesty (a kind of blanket pardon) to men who had evaded the Vietnam-era draft to heal the rifts created by the unpopular and unsuccessful war. *Id.* at 81.

a decisive response to a national crisis, and more like the routine substitution of executive judgment for that of legislatures and juries.¹⁴¹

Contemporary justifications for executive clemency tend to focus more on the need for a “fail safe” to correct perceived injustices not otherwise amenable to legal remedy.¹⁴² Even when all actors in the system are operating in good faith, injustice may occur as a result of human error¹⁴³ or because rules of general applicability fail to capture the relevant particulars of an individual case.¹⁴⁴ In these circumstances, executive clemency operates as a tool of equity—achieving justice through particularized consideration (or reconsideration) of an individual case.¹⁴⁵ To the extent that clemency serves the ends of justice in this way, its role seems unobjectionable. The potential for justice to miscarry in a variety of ways—by punishing the innocent, for example—is reason enough to preserve at least some form of executive clemency.¹⁴⁶

B. *Traditional Mercy*

To this point, I have had relatively little to say about the more traditional conception of mercy—an act of grace bestowed out of compassion or concern for the recipient’s well being—and its role in clemency decisions. In part this is because traditional mercy provides the least compelling argument for clemency. That is, a *case* for clemency is generally based on *reasons*—avoiding injustice, rewarding rehabilitation, and so forth. By contrast, the act of grace that constitutes traditional

¹⁴¹ Some commentators reject the characterization of clemency as the substitution of executive judgment for that of other decision makers. *See, e.g.*, Markel, *State Be Not Proud*, *supra* note 82, at 443–44. Markel argues that because a governor possesses broad discretion whether to grant clemency, he can abuse his power only by running afoul of some other constitutional provision, such as the prohibition on racial prejudice. *Id.* (observing that Governor George Ryan’s blanket commutation of all death sentences in Illinois “stood on constitutional terra firma.”). But the question of abuse of power is not simply whether the power was exercised *lawfully*. As Markel acknowledges, if an executive used his power “to commute the sentence of every murderer . . . to a single day in prison, there would be solid retributivist grounds to view that decision as an abuse of power, even if the commutation did not violate constitutional restraints.” *Id.* at 446. Markel’s hypothetical illustration establishes that discretion, even in its strongest form, does not insulate a decision maker from criticism of this sort. *See* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 33 (1977) (“An official’s discretion means not that he is free to decide without recourse to sense and fairness, but only that his decision is not controlled by a standard furnished by the particular [relevant] authority.”) In a democratic society, presumably the citizens are the relevant authority. *See also* Daniel T. Kobil, *How to Grant Clemency in Unforgiving Times*, 31 *CAP. U. L. REV.* 219, 224–25 (2003). According to Kobil, executives who are reluctant to “substitute their judgment for that of judge or jury” are expressing a “classic retributive concern.” *Id.* at 225. In fact, the concern is democratic, not (primarily) retributive.

¹⁴² *Herrera v. Collins*, 506 U.S. 390, 415 (1993) (quoting MOORE, *supra* note 140, at 131).

¹⁴³ *Id.*

¹⁴⁴ *See, e.g.*, Brien, *supra* note 66, at 90.

¹⁴⁵ *Id.* at 90–91.

¹⁴⁶ *See Herrera*, 506 U.S. at 411–12.

mercy may be undertaken (or not) without regard to such considerations, or at least without the systematic articulation of reasons that animate an executive's decision.¹⁴⁷ Because mercy operates independently from justice, it cannot, strictly speaking, be deserved; it must be pleaded for, not claimed.¹⁴⁸

The appeal of mercy in this form is obvious. In Shakespeare's classic formulation, it is "twice blest"—for giver and recipient alike.¹⁴⁹ For one with the power to dispense mercy, its exercise manifests the *virtue* of mercy.¹⁵⁰ For the recipient, mercy is a free gift, an unearned second chance. Thus conceived, mercy is a kind of all-things-considered judgment¹⁵¹ that reflects the best impulses of our nature.

But in the criminal law setting, mercy is also in tension with justice.¹⁵² For mercy is not only selective by nature; the grounds of decision are, by definition, not susceptible of articulation, codification, or review.¹⁵³ Because it is idiosyncratic, discretionary, and often subjective, the application of traditional mercy abjures the principle of treating like cases alike.¹⁵⁴ Precisely for these reasons, it is prone to abuse.

To the extent that traditional mercy is the basis for clemency, its historical exercise has often been arbitrary. Consider the case of Darrell Mease, who committed a brutal triple murder in rural Missouri in 1988.¹⁵⁵ Mease's scheduled execution and

¹⁴⁷ I do not mean to suggest that mercy is inherently *unreasonable*, only that grants of mercy do not correlate systematically with whatever set of reasons might inspire it on particular occasions. This suggests that, at least in principle, the existence of good reasons may be a necessary but not sufficient condition for its exercise. Historically, however, the exercise of mercy by various sovereigns appears to fail even this minimal condition, as do some recent high-profile grants of mercy in the United States. See discussion *infra* text accompanying notes 154–56.

¹⁴⁸ See Tasioulas, *supra* note 83, at 312; Garvey, *supra* note 72, at 1330–31.

¹⁴⁹ WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1.

¹⁵⁰ At least it does so when undertaken with a stable disposition to be merciful. See discussion *supra* Part III.

¹⁵¹ Brien *supra* note 66, at 91 (endorsing Seneca's view that "the moral basis of mercy is what is *right* and *good* as judged against all moral considerations, rather than only those of justice"); Tasioulas, *supra* note 83, at 312–13.

¹⁵² See Garvey, *supra* note 72, at 1331 ("As an independent obligation, mercy conflicts with justice."); Jeffrie G. Murphy, *Mercy and Legal Justice*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 162, 175 (1988) (distinguishing the "private law paradigm" of *The Merchant of Venice* with the "criminal law paradigm" of *Measure for Measure*); Tasioulas, *supra* note 83, at 313 (noting that the "reason to grant mercy is always confronted by an opposing, typically duty-generating reason, grounded in retributive justice, to impose the deserved punishment").

¹⁵³ See MOORE, *supra* note 140, at 82–89; Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardon Power from the King*, 69 TEX. L. REV. 569, 573–74 (1991); Rappaport, *supra* note 72, at 969. *But see* Morison, *supra* note 61, at 48–52 (defending the federal pardoning power against the charge that it is "intrinsically arbitrary and idiosyncratic").

¹⁵⁴ See Theodore Eisenberg & Stephen P. Garvey, *The Merciful Capital Juror*, 2 OHIO ST. J. CRIM. L. 165, 170 (2004); Rappaport, *supra* note 72, at 974.

¹⁵⁵ Mease lay in wait for an elderly couple and their paraplegic grandson. After firing a shotgun at them from a distance, Mease approached each one and shot them directly in the face. See Pam Belluck, *Clemency for Killer Surprises Many Who Followed Case*, N.Y. TIMES, Jan. 31, 1999, at 12. According to

last-minute bid for clemency coincided with a visit by Pope John Paul II to Missouri in 1999. Although Governor Mel Carnahan had denied twenty-six previous applications for clemency from death row, he granted clemency to Mease after a brief conversation with the Pontiff, who pleaded for mercy on Mease's behalf. According to Carnahan, his interaction with the Pope "was a very . . . emotional event" by which he was deeply moved.¹⁵⁶ Carnahan added that his decision to grant Mease clemency did not signal a change in his pro-death penalty position; it was, rather, "a tribute to the Pope."¹⁵⁷

Under very different circumstances, outgoing-Governor Tony Anaya commuted the death sentences of all five men on New Mexico's death row.¹⁵⁸ Anaya's decision was based not on any particular characteristics of the offenders¹⁵⁹—their rehabilitation, for example, or doubts about guilt—but on his own personal opposition to the death penalty. In commuting the five sentences, Anaya declared that capital punishment is "inhumane, immoral, and anti-God."¹⁶⁰ Anaya's opposition to capital punishment was certainly no secret—he campaigned for governor as an abolitionist—but he vowed that he would use his executive power merely to *stay* executions during his term in office.¹⁶¹ In granting clemency to all death row inmates, Anaya not only betrayed this promise; he also defied the will of the large majority of New Mexico voters who supported the death penalty.¹⁶² Although few denied that Anaya had the power to do what he did, at least one official objected that his "action was [not] good

one of Mease's own attorneys, "this case was probably one of the weaker clemency cases." *Id.* He noted that many other offenders on Missouri's death row were much more sympathetic candidates. *Id.*

¹⁵⁶ Gustav Neibuhr, *Governor Grants Pope's Plea for Life of a Missouri Man*, N.Y. TIMES, Jan. 29, 1999, at A1 (quoting Carnahan).

¹⁵⁷ *Id.*

¹⁵⁸ Robert Reinhold, *Outgoing Governor in New Mexico Bars the Execution of 5*, N.Y. TIMES, Nov. 27, 1986, at A1.

¹⁵⁹ One of the beneficiaries of Anaya's largesse was William Gilbert. Gilbert is a quadruple murderer, who accosted a young couple in their home. "Holding both at gunpoint, . . . he forced Noel to abuse herself sexually while Kenn [her husband] stood by in bonds. [He] then raped the woman while her husband watched. Then he tried to rape Kenn while Noel watched. He shot both to death execution-style." James Coates, *A Governor's Fit of Conscience over an Unconscionable Crime*, CHI. TRIB., Dec. 7, 1986, at 3.

¹⁶⁰ Reinhold, *supra* note 158 (quoting Governor Anaya).

¹⁶¹ Coates, *supra* note 159. A "stay" temporarily delays an execution; it does not prevent future executives from signing a death warrant.

¹⁶² See Hard E. Meyer, *Governor Calls Practice "Anti-God;" Anaya Sparing All Inmates on New Mexico Death Row*, L.A. TIMES, Nov. 27, 1986, at 1 (reporting poll results showing that seventy-five percent of New Mexico voters support capital punishment).

for the criminal justice system of New Mexico.”¹⁶³ Anaya left office one month later with a twelve percent approval rating.¹⁶⁴

The problem in these cases is not that the arbitrary dispensation of (institutional) mercy denies anyone their due. Other offenders, even those with more sympathetic stories, have no basis to claim an entitlement to the gift of mercy in any event. But we should all be troubled by the arbitrary exercise of power that these cases seem to represent.¹⁶⁵ The issue is not whether their conduct is lawful; few would deny that it is. The question is whether it is justified. To the extent that it is based on dubious reasons, or personal reasons, or no reason at all, it smacks of an abuse of power—more befitting a hereditary monarch than an elected official.¹⁶⁶

Even more troubling than the arbitrary dispensation of mercy is the potential for discrimination. In 1991, outgoing-Governor Richard Celeste commuted the sentences of eight death row inmates to life, including all four women on Ohio’s death row. Although his stated reasons for granting clemency focused on the inmates’ various mental impairments, some have claimed that Celeste was actually motivated by his particular compassion for female offenders.¹⁶⁷ Indeed, the previous year Celeste granted clemency to twenty-five women on the grounds that their victims had all been the women’s own abusive partners.¹⁶⁸ At a minimum, this pattern suggests that perhaps the “sheer unusualness” of extreme violence by women “lends their cases visibility and attention denied the rank and file cases on death row.”¹⁶⁹

¹⁶³ Reinhold, *supra* note 158. In these cases, the governors at least provided reasons for their decision, however random or idiosyncratic they seemed to be. In many cases, however, no explanation is forthcoming. In Florida, for example, a governor is not required to state his reasons for granting clemency and generally does not. *See, e.g.*, Radelet & Zsembik, *supra* note 68, at 299; *see also id.* at 306–14 (reporting reasons for clemency in all cases between 1972 and 1991 and speculating about the reasons in cases where none was provided).

¹⁶⁴ This is not to say that Anaya’s dismal poll numbers are attributable solely to his clemency decisions. *See, e.g.*, Coates, *supra* note 159 (noting that Anaya attributed part of his unpopularity to the clemency decision, but also his “liberal progressive policies” more generally).

¹⁶⁵ One recent exercise of the executive clemency power that I do not include in this category is Governor George Ryan’s blanket commutation of Illinois’s death row. Although Ryan’s decision, like Anaya’s, was not based on the particular characteristics of individual offenders, it was based broadly on grave concerns about the capital sentencing process in the State of Illinois, which included well-documented instances of innocent men on death row, among other problems. *See* Jodi Wilgoren, *Citing Issues of Fairness, Governor Clears out Death Row in Illinois*, N.Y. TIMES, Jan. 12, 2003, at L1; *see also* Garvey, *supra* note 72; (discussing the legitimacy of Ryan’s blanket commutation); Markel, *State Be Not Proud*, *supra* note 82 (same).

¹⁶⁶ Blackstone seemed to recognize this, observing that “in democracies . . . this power of pardon can never subsist.” 5 WILLIAM BLACKSTONE, COMMENTARIES *396.

¹⁶⁷ *See, e.g.*, Breslin & Howley, *supra* note 67, at 237.

¹⁶⁸ *See 7 Taken Off Death Row Are Returned There*, N.Y. TIMES, Feb. 16, 1992, at 33.

¹⁶⁹ Rappaport, *supra* note 72, at 979. Even if Celeste was motivated by concern for victims of domestic violence, rather than women as such, the “battered woman syndrome” is itself gender-patterned and, according to some critics, sexist. *See, e.g.*, Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 5 (1994) (“[T]he defense is objectionable because it relieves the accused woman of the stigma and pain

Which brings us back to the case of Karla Faye Tucker. Tucker's race, gender, good looks, and Christian faith seemed to bring unprecedented attention to her plight. Although her case for clemency was based on her remarkable rehabilitation, those with comparable transformation stories did not enjoy the support of politicians, evangelical ministers, and celebrities, nor did they have a chance to make their cases on CNN.¹⁷⁰ By itself, this tells us nothing about whether Tucker was a good candidate for clemency, or whether Governor Bush should have granted it. It does raise grave concerns about the "essentially lawless"¹⁷¹ process according to which an offender's personal magnetism, a governor's religious faith, or the Pope's travel schedule can play so decisive a role in the decision to take or spare a life.

V. CONCLUSION

Tucker, of course, was not spared. Despite intense political pressure, international condemnation, and the pleas of his coreligionists,¹⁷² Governor Bush did not grant Tucker clemency. In his official denial statement, he claimed to have "sought guidance through prayer," concluding that "judgments about the heart and soul of an individual on death row are best left to a higher authority."¹⁷³ He also reiterated his belief that, absent doubts about her guilt or the operation of the legal process in her case, he was bound by the jury's verdict.

Sister Prejean rejects as disingenuous every aspect of Bush's account of his decision making process.¹⁷⁴ Moreover, she denies that his decision can be explained,

of criminal punishment only if she embraces another kind of stigma and pain: she must advance an interpretation of her own activity that labels it the irrational product of a 'mental health disorder.'").

¹⁷⁰ In addition to these forms of attention, Tucker was also immortalized in songs, plays, and commemorative stamps. See Eric Berger, *Two Stamps Memorialize Tucker*, HOUS. CHRON., Mar. 6, 1998, at 15.

¹⁷¹ Austin Sarat, *Mercy, Clemency, and Capital Punishment: Two Accounts*, 3 OHIO ST. J. CRIM. L. 273, 275 (2005).

¹⁷² That is, born-again Christians. Of course, not all Christians of this or other descriptions supported clemency for Tucker. See, e.g., Kathy Walt, *Execution May Haunt Texas*, HOUS. CHRON., Dec. 14, 1997, at A1 (quoting Texas Christian Coalition President Dick Weinholt: "The consequences of her crime call for her death. I don't believe the compassion side should overrule the consequences in this case.").

¹⁷³ Verhovek, *supra* note 41 (quoting Governor Bush's official statement).

¹⁷⁴ See Prejean, *supra* note 7. Prejean characterizes Bush as someone who "claimed to be 'born again'" and who claimed "to experience humane feelings he never felt." *Id.* at 5, 6. She purports to know Bush's "true feelings" as a result of his apparent mocking of Tucker's plight to journalist Tucker Carlson. *Id.* at 5. Although I do not know Bush's true feelings, and am not particularly inclined to give him the benefit of the doubt, Prejean's stridency here is curious. For someone who has "taken a vow to reverence every person, even those with whom [she] most vehemently disagrees," she seems quick to challenge the sincerity of her opponents' religious commitments and to ascribe to them the basest motivations. See also *id.* ("For Holmes [Tucker's prosecutor], Karla Faye Tucker's death sentence was just one more political trophy" for him to "brag" about."); SISTER HELEN PREJEAN, *THE DEATH OF INNOCENTS: AN EYEWITNESS ACCOUNT OF WRONGFUL EXECUTIONS 189-223* (2005) (questioning Justice

as some have suggested, by “election year pressure from pro-death penalty forces.”¹⁷⁵ She notes that he “was receiving thousands of messages urging clemency for Tucker, including one from one of his daughters,” in addition to the appeals from conservative evangelical ministers and politicians.¹⁷⁶ Although “Bush claimed to leave the judgment of Karla Faye Tucker to God, in reality he exercised his own political judgment and authorized her death.”¹⁷⁷ Worse, he hypocritically sought God’s blessing for Tucker even as he failed to “use the power in his own hands to bless her.”¹⁷⁸

Although it is impossible to know for certain the basis for Bush’s decision, Sister’s Prejean’s critique does little to illuminate the grounds for executive clemency in Tucker’s case.¹⁷⁹ Short of outright prejudice, it is hard to imagine a less compelling basis for such a momentous official act than crass political calculation or the personal appeal of one’s teen-age daughter. Had Bush based his decision on either of these grounds, it surely would have been an egregious abuse of the clemency power.¹⁸⁰

In addition, Bush’s invocation of God’s mercy, far from evidencing hypocrisy, may reflect a humble recognition that God’s justice is not our own. Indeed, throughout history, judges have invoked God’s mercy even as they sentenced people to death¹⁸¹—an overt acknowledgement that the human soul lies outside their

Antonin Scalia’s Catholicism, especially his elitist adherence to pre-Vatican II traditions which she compares unfavorably to her own authentic people-centered faith).

¹⁷⁵ Prejean, *supra* note 7, at 5 (quoting Tucker’s interpretation of Bush’s reluctance to grant her clemency).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 6.

¹⁷⁹ Or anyone else’s, for that matter. Among other problems, Prejean fails to recognize that clemency might be controversial in a case like Tucker’s in a way that it is not in the case of an actually innocent defendant. She adduces the case of Henry Lee Lucas, whose sentence Bush commuted when it was established that he could not have committed the murder for which he was sentenced to death. See Prejean, *supra* note 7, at 4. Such a case sheds no light on whether Tucker, or other unquestionably guilty defendants, should have received clemency.

¹⁸⁰ See discussion *supra* Part IV. But see Breslin & Howley, *supra* note 67 (arguing that clemency decision making should be more, not less, political). Prejean’s claim that Bush’s decision in Tucker’s case was “political” is an odd charge when coupled with her claim that Bush defied popular sentiment when he declined to grant clemency. Prejean, *supra* note 7, at 5. Presumably she means that his decision was based on political expediency or ambition, rather than popular opinion. But even this charge is dubious. At the time of Tucker’s execution, Bush was a leading contender for the Republican presidential nomination. Presiding over the country’s most active death chamber, Bush could afford to show a little mercy without fear of being painted soft-on-crime. In this way, he had an advantage over Governor Bill Clinton, who resisted calls for clemency even in the most sympathetic cases, having learned the lessons of Governor Michael Dukakis in 1988. See Frady, *supra* note 83, at 117–18. Moreover, Tucker’s support among some of the most visible members of the Republican base—Robertson, Falwell, and Gingrich—probably would have provided ample political cover for granting clemency. Under these circumstances, it is far from clear what was the “political” thing to do.

¹⁸¹ See, e.g., ROBERT BOLT, A MAN FOR ALL SEASONS 160 (1990) (recounting on the execution of St. Thomas More: “The sentence of the Court is that you shall be taken from this Court to the Tower,

jurisdiction. Prejean's cynicism notwithstanding, such expressions are probably best interpreted as an *affirmation* of faith, not a betrayal of it.

Finally, the decision whether to grant clemency in a particular case does not by itself tell us very much about whether a decision maker is merciful.¹⁸² Clemency may be granted for any reason or no reason at all; judgments about a decision maker's character must await further evidence. By the same token, because the merciful stance does not entail wholesale leniency, the denial of clemency in a particular case does not establish that a decision maker lacks mercy.¹⁸³

Mercy, at least in its traditional form, is like a leap of faith—hopeful, ennobling, and inscrutable. But the exercise of the clemency power should be more grounded than that. In a liberal democratic society governed by the rule of law, official decisions regarding life and death are not the province of kings and princes, but elected officials; we should expect them to act on the basis of publicly accessible reasons. If electoral pressure prevents them from doing so, we should consider various alternatives. One possibility is to entrust clemency decisions to an independent panel of decision makers, governed by due process, and subject to judicial-like review.¹⁸⁴

Perhaps this conception of the clemency power is too cramped. After all, due process is only a means to an end, and retributive justice is not the only end we value; we also aspire to be humane and compassionate. But at least in the context of the most serious offenses and penalties, considerations of justice should not be lightly set aside. Mercy's grand gesture—in literature, scripture, and history—is largely the prerogative of monarchs who claim for themselves the mantle of divine right.

thence to the place of execution, and there your head shall be stricken from your body, and may God have mercy on your soul.”). At least one prominent attorney shared Sister Prejean's skepticism about the sincerity of such pronouncements. See CLARENCE DARROW, CLOSING ARGUMENTS 156 (S.T. Joshi ed., 2005) (“When judges blithely and sonorously add to the sentence: ‘And may God have mercy on your soul,’ they have their fingers crossed.”).

¹⁸² Indeed, we have some reason to avoid hasty judgments in this context. Eric Muller points to the example of Portia in *The Merchant of Venice*, cautioning that, despite her “moving speech” on behalf of mercy, “Portia's resolution of the dispute between Shylock and Antonio tells us something far deeper and more complex about the nature of mercy, and indeed about the nature of moral virtue, than her words alone suggest.” Muller, *supra* note 79, at 308. Muller concludes that the “only way we can know whether an action is truly merciful is to ignore its appearance, and identify the reasons and emotions that motivate it.” *Id.* at 311.

¹⁸³ In the case of Governor Bush, Prejean offers more evidence to establish his lack of mercy than the decision in Tucker's case. See Prejean, *supra* note 7. She notes that Bush never granted clemency on humanitarian grounds as governor and that he (apparently) mocked Tucker when recounting her appeal for clemency. *Id.* It is thus possible that Prejean is right about Bush; my objection is that much of her evidence is inapposite.

¹⁸⁴ See, e.g., Acker & Lanier, *supra* note 127, at 228 (summarizing various reform proposals and concluding: “The paramount concern should be to secure a decision-maker who will grant or deny clemency based on the merits of a case; who will not be constrained from doing what is right by potential political fallout or other extrinsic considerations unrelated to mercy, justice, or another meritorious objective.”).

It is an odd power to confer on elected officials, especially without limit or qualification.

Despite these concerns, I do not presume to know whether Karla Faye Tucker's life should have been taken or spared. Although the arguments for clemency in her case do not withstand scrutiny, the grounds for *mercy* cannot be so easily dismissed. What is most striking about the confident assertions of Tucker's supporters is that they evince none of the humility or doubt one might expect in the face of such difficult judgments.¹⁸⁵ We can perhaps be confident that a merciful attitude is morally appropriate and politically justifiable in any humane polity; that a person who lacks the virtue of mercy has a flawed, possibly corrupt, character. But the merciful stance does not require that we spare any particular offender, nor does it require us to abandon our faith that God will.

¹⁸⁵ The most pronounced examples of this were Sister Prejean and Pat Robertson. Robertson, in a *60 Minutes* interview declared that if Bush "lets this sweet woman of God die, he's a man who shows no mercy." See Walt, *supra* note 2 (quoting Robertson). He later asserted that the death penalty for Tucker "was not justice; it was vengeance." Robertson, *supra* note 20, at 217. Finally, although Tucker's attorney, Walter Long, would not be doing his job if he failed to be zealous in making the case for clemency in the strongest possible terms, his claims became even more extravagant after her death. See, e.g., Long, *supra* note 6, at 126 ("Karla had a saintly character."). The one person who consistently avoided making such certain pronouncements was Tucker herself. Although she hoped for clemency based on her rehabilitation, she never denied that she was deserving of the harshest punishment. See, e.g., *Tucker's Letter*, *supra* note 31 ("If my execution is the only thing, the final act that can fulfill the demand for restitution and justice, then I accept that . . . I will pay the price for what I did in any way our law demands it.").