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RETRIBUTION AND REDEMPTION IN THE OPERATION OF EXECUTIVE CLEMENCY

ELIZABETH RAPAPORT*

No matter how firm a stand he may appear to take, no matter what he may think and argue to the contrary, no man with a heart that pulses rich red blood, no man of real human sympathies can be thrown in direct contact with an unfortunate brother in his hour of distress without responding to those noble instincts which centuries of Christian teachings have implanted in his breast.

—Governor West of Oregon¹

In pardoning a criminal, the official . . . is not forgiving his own debtor, one who has trespassed against him, but a public debtor whose trespass has impaired or endangered the happiness of the whole community If I were conscious that I had ever advised the president to exercise clemency for no better reason than because I felt sorry for the prisoner or those interested in him, I should feel that my conduct had differed, indeed, in degree, but not in kind, from what it would have been had I given such advice for a bribe in money.

—U.S. Attorney General Bonaparte²

Make a long-time man feel bad

—Refrain from a traditional chain-gang song

INTRODUCTION

The power to grant clemency, to remit punishment and pardon offenses, is ancient and recognized today in almost every nation.³ In the United States, the clemency power is vested by state and federal

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1. James D. Barnett, *The Grounds of Pardon*, 17 J. CRIM. L. & CRIMINOLOGY 490, 494 (1927) (quoting Governor West of Oregon).

2. *Id.* at 493-94 (quoting U.S. Attorney General Bonaparte).

3. See Leslie Sebba, *The Pardoning Power—A World Survey*, 68 J. CRIM. L. & CRIMINOLOGY 83, 85-110 (1977); see also KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* (1989); Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569 (1991).

constitutions in the executive.⁴ It is a discretionary power, almost entirely unreviewable by courts, and subject, typically, only to such standards or procedures as the state or national executive chooses to impose upon itself.

The institution of clemency has attracted the critical attention of retributivists who advocate the reform of clemency in keeping with that criminal justice philosophy which has so thoroughly triumphed over the rehabilitation model in the past quarter of a century. Contemporary retributivists, “neo-retributivists”⁵ as I shall call them, argue in support of replacing executive discretion with substantive standards that would establish entitlement to clemency in those prisoners who satisfied the appropriate normative standards. They argue that the clemency power should be used only to rectify unjust punishment, to free the innocent or those of uncertain guilt, and those whose sentences are excessive when measured against their offenses and culpability. Neo-retributivists would deprive executives of discretion in order to avoid arbitrary or corrupt decisions, whether motivated by venality or misplaced compassion.

In this Article, my goal is to raise doubts about the adequacy of the neo-retributive theory of clemency and stimulate reappraisal and development of what I will call the “redemptive” perspective. To this end I will present an exposition and critique of neo-retributive theory of clemency. The retributivist view of clemency and of criminal justice generally is reductionist or monodimensional: Punishment’s justification, its mete and measure, is just desert, which is due each duly convicted offender. No other goals, including utilitarian goals of deterrence, entitle the state to impose punishment nor to increase or decrease its magnitude—although the accomplishment of these social objectives is endorsed by retributivists, provided justice is not compromised to achieve them. A richer account of clemency, more respectful of and grounded in history and tradition, recognizes that criminal justice has a complex set of goals. These prominently

4. The most recent study of executive clemency procedures in the 50 states and at the federal level is Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 413 (1999); see also NATIONAL GOVERNORS’ ASS’N CTR. FOR POLICY RESEARCH, GUIDE TO EXECUTIVE CLEMENCY AMONG THE AMERICAN STATES (1988) (containing information about the practice of clemency and clemency procedures as well as an earlier study of clemency procedures) [hereinafter NATIONAL GOVERNORS’ ASS’N]; NATIONAL CTR. FOR THE STATE COURTS, CLEMENCY: LEGAL AUTHORITY, PROCEDURE, AND STRUCTURE (Samuel P. Stafford ed., 1977).

5. For a discussion of neo-retributivism, see *infra* Part II. The neo-retributivist theory of executive clemency has been advanced by MOORE, *supra* note 3, and Kobil, *supra* note 3.

include both retribution and social utility—general and specific deterrence and the efficient use of public resources—but are not exhausted by either or both. There are also what I will call “redemptive” goals of criminal justice: rehabilitation and reconciliation of the offender, victim, and community. Thus, while there is clearly a sense in which justice and clemency-as-retributively-undeserved-lenity are antithetical, a richer account of criminal justice, rich enough to reflect our traditions and practices prior to the neo-retributive retreat, finds a place for clemency-as-lenity.

The concept of clemency is as contested as the appropriate use of the power of clemency. Attending to the meaning of the term “clemency,” and the cognate terms “mercy” and “forgiveness,” provides a starting point for examination of the claims of neo-retributivism. It will help clarify the subject matter under discussion, but will not decide the issue between retributive and redemptive theories of clemency. “Clemency,” like “mercy,” characterizes a judgment or action when a person with the power to exact punishment or payment declines to exact all or some of what he or she is entitled to exact.⁶ No wrongdoer or debtor has a right to such lenity—where a right to demand relief exists, clemency or mercy is neither asked nor can be granted. While the two terms have overlapping meanings, it is helpful to use the term clemency to denote only relief granted *after* the punishment is initially determined. I will restrict my use of the term “clemency” to instances where an official with the power to remit punishment exercises discretion to exact less than the full measure of punishment from someone who has no legal means of resisting the severity of the sentence or the denial of relief. If retributivism is accepted, then clemency as here defined, clemency-as-lenity, is never justified. Retributivists repudiate the ordinary meaning of clemency in favor of clemency-as-remedial-retributive-justice.

“Mercy” characterizes any act or judgment, private or official, whether an initial determination or remedial, where less is exacted than is owed or deserved. Retributivists deny that it is compatible with public justice for a judge or governor in his or her official capacity to be merciful, to be lenient rather than impose the retributively deserved sentence.⁷ Mercy, retributivists contend, can

6. Carla Ann Hage Johnson, *Entitled to Clemency: Mercy in the Criminal Law*, 10 L. & PHIL. 109 (1991), has made this conceptual point with special clarity.

7. See MOORE, *supra* note 3, at 188-92; see also Jeffrie Murphy, *Mercy and Legal Justice*, in FORGIVENESS AND MERCY 162, 162 (1994).

only be shown by someone who has himself been wronged, or to whom a debt is owed in his private capacity. If such an individual chooses to fully or partly release his wrongdoer or debtor out of compassion, that act is merciful and virtuous. Retributivists need not deny the value of compassion (although some retributivists defend the value of retributive hatred), but they do deny that compassion has any legitimate role in criminal sentencing. The justly punished have not merely injured any immediate victim but have transgressed the criminal law, thereby offending the state (if not a more fundamental moral authority, whether divine, cosmic, or communal). Public actors can neither forgive on behalf of the immediate victim nor absolve the offender from his debt of retribution to the state.⁸ As we shall see, compassion on the part of public actors as grounds for lenity is not alien to the redemptive perspective.

The term “forgiveness,” while sometimes used as a synonym for “mercy” or “clemency,” is usefully distinguished: “forgiveness” may describe an attitude, a lack of resentment or a willingness to cease resentment, towards someone who has done one an injury. Forgiveness, like mercy, is the province of the person injured. Only the person who has been injured or wronged has standing to forgive.⁹ Others may relinquish resentment-in-solidarity with the victim, but they cannot provide the particular absolution of forgiveness that the victim may give. A judge or governor, then, lacks standing to forgive a criminal for the crime committed, while the person against whom the crime has been committed has such standing. Retributivists point out that forgiveness is compatible with the exaction of full restitution or punishment. One can cease to resent, and even wish one’s injurer well, without offering mercy or advocating clemency; one can welcome or insist that just punishment or restitution be exacted and yet forgive.

Some retributivists endorse cultivating forgiveness while others insist on the value of retributive resentment.¹⁰ Alien to the spirit of retributivism but not that of redemption is the notion that we are obliged to forgive those who transgress against us, at least those who

8. See MOORE, *supra* note 3, at 184; Murphy, *supra* note 7.

9. See MOORE, *supra* note 3.

10. For retributivist proponents of the virtue of forgiveness, see MOORE, *supra* note 3, at 187, and Jean Hampton, *Forgiveness, Resentment and Hatred*, in FORGIVENESS AND MERCY, *supra* note 7, at 35. For the defense of retributive hatred, see Jeffrie Murphy, *Hatred: A Qualified Defense*, in FORGIVENESS AND MERCY, *supra* note 7, at 88, 88, and Robert Solomon, *Justice v. Vengeance*, in THE PASSIONS OF LAW 123 (Susan A. Bandes ed., 1999).

are contrite, and do penance or make restitution. While some find it morally objectionable or psychologically impossible to quell hatred of one who has injured them, both the Jewish and Christian religions teach that it is possible and salutary. From the redemptive perspective, unyielding hatred of the repentant transgressor is an obstacle to fulfilling the purposes of criminal justice.

I will defend the legitimacy of redemptive clemency against the neo-retributive program of eliminating all grounds of clemency—save rectification of excessive sentences and actual innocence or uncertain guilt. In so doing, I am aligning myself with practices which neo-retributivists deem archaic survivals of a time when monarchs wielded clemency for any purpose or on a whim. For retributivists there is little to choose between the sale of pardons and yielding to compassion for a prisoner suffering just punishment. I will also defend the discretionary character of clemency against the call for bureaucratization.

My concern in this Article is with a particular kind of clemency or legal mercy, commutation, or reduction of sentence—whether the reduction of a term of years, the reduction of a life sentence to a term of years, the removal of ineligibility for parole affixed to a life sentence, or commutation of capital punishment to a term of years—by operation of the power of the executive, state or federal, to grant such relief. Commutation is not the only form of clemency that executives can provide. Such relief spans a gamut from pardon for offenses that may have been committed but have never been prosecuted, to restoration of rights after the penal sentence has been completed. A pardon may be conditional or unconditional, and may affect a whole class of persons (an amnesty). The clemency power also encompasses reprieve, which postpones the execution of sentence and remission of fines and forfeits.¹¹

The president enjoys all these powers of clemency in federal cases, limited only by a bar against clemency in cases of impeachment.¹² The majority of governors have clemency powers as broad as those of the president and enjoy the same comprehensive discretion in cases in their respective states.¹³ The states exhibit a

11. See MOORE, *supra* note 3, at 4-6; Dorne & Gewerth, *supra* note 4, at 439; Kobil, *supra* note 3, at 8-21.

12. See U.S. CONST. art. II, § 2.

13. A majority of states exclude only cases of treason and impeachment from executive clemency, while five states exclude other types of offenses from the reach of executive clemency. See Dorne & Gewerth, *supra* note 4, at 433.

variety of clemency structures, but the majority of states vest the governor with sole authority, or final authority subject to the nonbinding recommendations of a clemency board.¹⁴ Because the governor is the decisive voice in a large majority of states, despite variations in specific formats, I refer below to the clemency power in the states as a power of governors, although the generalization masks some varieties of form and practice among the states. I am concerned here with commutation because it is this dimension of clemency that has the greatest actual and potential impact on what might be called "ordinary criminal justice," as opposed to uses of clemency for reasons of state and of policy. These later uses are exemplified by President Ford's pardon of Richard Nixon or President Carter's amnesty of those who fled the United States rather than serve in the armed forces during the Vietnam War.

Before examining the neo-retributive theory of clemency, it may be helpful to present at least a brief sketch of the practice of clemency, currently and during the course of the twentieth century. The retributive and redemptive views of clemency have competed throughout the century. Governors, citizens, and philosophers throughout the century have been found in both camps. During the last quarter of a century, the period in which retributivism has dominated criminal justice policy in the United States, the institution of clemency has atrophied. Despite sharp disagreement as to what would constitute appropriate or principled use of the clemency power, both retributive and redemptive theorists advocate greater use of clemency than is currently employed.

Despite a few well-publicized exceptions, most state executives and the national executive are cautious compared with their predecessors earlier in the century in making use of the clemency power. Moreover, it appears that this caution is correlated with a shift in the last quarter of the twentieth century from the predominance of redemptive rhetoric and justifications for the use of the power to the rhetorical predominance of retributivism. Some of the greater reluctance to use of the power can be attributed to recognition of the improved position of criminal defendants to protect their rights in the courts, due to such reforms as the right of indigents to counsel and the enhanced ability to seek review of

14. States have a variety of procedures for the appointment or electing of clemency boards, typically vesting the power to appoint in the governor; five states vest the clemency power in a board rather than the governor, while some states allow clemency only with the approval of both the board and governor. *See id.* at 427-29.

sentences in appellate courts. These reforms do not alter the bleak prospects for sentencing relief under the current criminal justice dispensation nor fully account for the timorous executive.

From the beginning of the century through the 1960s, a redemptive rhetoric of claiming responsibility for the final decision to execute or commute, to confine or release, came naturally to governors.¹⁵ The governor of today is more likely to portray himself as bound to respect the decision of a jury, to respect the due process of trial and appellate courts, and to heed obdurate victims. Here, for example, is Governor Terry Sanford of North Carolina, claiming his authority to exercise clemency under a redemptive justification:

The courts of our state and nation exercise in the name of the people the powers of administration of justice. The Executive is charged with the exercise in the name of the people of an equally important attitude of a healthy society—that of mercy beyond the strict framework of the law.

The use of executive clemency is not a criticism of the courts, either express or implied. I have no criticism of any court or any judge. Executive clemency does not involve the changing of any judicial determination. It does not eliminate punishment; it does consider rehabilitation.

To decide when and where such mercy should be extended is a decision which must be made by the Executive. It cannot be delegated even in part to anyone else, and thus the decision is a lonely one.

It falls to the Governor to blend mercy with justice, as best he can, involving human as well as legal considerations, in the light of all circumstances after the passage of time, but before justice is allowed to overrun mercy in the name of the power of the state.

I fully realize that reasonable men hold strong feelings on both sides of every case where executive clemency is indicated. I accepted the responsibility of being Governor, however, and I will not shy away from the responsibility of exercising the power of executive clemency.¹⁶

Here is Governor George W. Bush of Texas disclaiming a role for himself as governor in capital cases except in cases of actual innocence and employing the retributivist rhetoric:

I believe decisions about the death penalty are primarily the responsibility of the judicial branch. . . . The executive branch is

15. For a discussion of clemency in the early twentieth century, see SUSAN DUFFEY CAMPBELL, *EXECUTIVE CLEMENCY IN NORTH CAROLINA* (1984); Barnett, *supra* note 1.

16. TERRY SANFORD, *On Executive Clemency*, in *MESSAGES, ADDRESSES AND PUBLIC PAPERS OF GOVERNOR TERRY SANFORD 1961-1965*, at 552, 552 (Memory F. Mitchell ed., 1966).

much more limited. I view it as a failsafe, one last review to make sure that there is no doubt the individual is guilty and that he or she has had the due process granted by our Constitution and laws and I don't believe my role is to replace the verdict of the jury. . . .¹⁷

The diminishing frequency of clemency in the neo-retributive era has been well documented in the arena of capital punishment and at the federal level.¹⁸ Capital clemency today is a rare event, while earlier in the century clemency was as common as execution in the practice of many governors and many states.¹⁹ The percentage of federal clemency applications granted has declined steadily and steeply from the Kennedy administration to the Clinton administration, falling from 40.9% to 3.4%.²⁰ President Kennedy used his clemency power to release more than a hundred drug offenders serving long mandatory sentences.²¹ President Clinton had released only three federal prisoners prior to his freeing of the eleven Puerto Rican nationalists in the fall of 1999.²²

Changing practices in the states are not well documented, although it is clear that there remains a good deal of variation in practice from state to state and from administration to administration.²³ Several states including Ohio and Florida have instituted comprehensive reviews and releases for women prisoners who killed batterers but were unable to offer battering defenses under the law of their states at the time of trial.²⁴ Occasionally, a governor garners national attention by vigorously exercising his

17. GEORGE W. BUSH, A CHARGE TO KEEP 148 (1999). There certainly were governors who took this conservative position earlier in the century. For example, Governor Pierce of Oregon stated in 1924 that it is not his function to usurp the role of the judge and jury and that trial decisions will stand "unless there is unusual showing of irregularity or error in the trial." Barnett, *supra* note 1, at 500 (quoting Governor Pierce of Oregon). It would appear, though, that Governor Bush has a lot more company today among fellow governors than did Governor Barnett earlier in the century.

18. See Kobil, *supra* note 3, app. at 640; see also MOORE, *supra* note 3.

19. See Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, 290 (1993); Elkan Abramowitz & David Paget, Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136 (1964).

20. According to Justice Department statistics regarding the percentage of federal clemency applications granted, Kennedy granted 40.9%, Ford 31.2%, Carter 21.6%, Reagan, 12.6%, Bush, 4.2%, and Clinton 3.4%. See Stuart Taylor, *All the President's Pardons: The Real Scandal*, NAT'L J., Oct. 30, 1999, at 316, 316.

21. See *id.*

22. See *id.*

23. See NATIONAL GOVERNORS' ASS'N, *supra* note 4.

24. See Linda L. Ammons, *Discretionary Justice: A Legal and Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 J.L. & POL'Y 1, 3-4 (1994); see also Bill Thompson, *Chiles-Backed Program Loses Financial Support*, TAMPA TRIB., Oct. 17, 1999, at 6 (reporting that, at the time Florida enacted its program, Maryland, Ohio, and Texas had approved or were establishing such programs).

clemency powers. Governor Toney Anaya of New Mexico cleared his state's death row out of religious opposition to the death penalty.²⁵ Governor Celeste of Ohio has been exceptionally willing to use his clemency power, not only on behalf of battered women, but also in capital cases, and in cases where there is evidence of racial disparity in sentences.²⁶ Few contemporary governors possess such appetites. Consider the recent history in New York, where it was the practice of Governor Lehman in the 1930s to commute the death sentence whenever a judge on the Court of Appeals issued a dissent in a capital case in which the death penalty was upheld.²⁷ Despite a prison population swollen by the introduction in 1973 of the so-called Rockefeller drug laws, which mandate a minimum of fifteen years for minor possessory offenses, Governor Pataki granted only seventeen early releases during his five years in office thus far, while his predecessor Mario Cuomo released thirty-five persons in his twelve years as governor.²⁸

As we shall see, while both neo-retributivists and those advocating redemptive clemency regret the atrophy of clemency, their diagnosis of the causes of the condition differ. Neo-retributivists look to the reform of clemency, the last bastion of discretion in criminal punishment, to reinvigorate the institution. From the redemptive perspective, the grip of retribution on the American social imagination is the principle cause of the decline of clemency.

I. CLEMENCY IN A RETRIBUTIVIST CRIMINAL JUSTICE SYSTEM

A. *The Reemergence of Retribution*

In 1970, every American state, as well as the federal system, had an indeterminate sentencing scheme in which judges had wide initial

25. In 1986, Governor Toney Anaya commuted the sentences of all five men on New Mexico's death row. See Death Penalty Info. Ctr., *Facts About Clemency* (visited May 25, 2000) <<http://www.essential.org/dpic/clemency.html>>; see also Toney Anaya, *Statement by Toney Anaya on Capital Punishment*, 27 U. RICH. L. REV. 177 (1993).

26. See Kobil, *supra* note 3, at 629.

27. See Henry Weinstein, *Issue of Clemency Is Davis' Most Difficult as Governor; Death Row: He Must Choose Whether to Spare an Inmate Set to Die on Tuesday. Such Requests Are Now Rarely Granted*, L.A. TIMES, Feb. 6, 1999, at A1.

28. See Richard Perez-Pena, *4 First-Time Drug Offenders Granted Clemency by Pataki*, N.Y. TIMES, LATE ED., Dec. 24, 1999, at B4. In the same article, the *N.Y. Times* reports that "[New York] state's prisons now hold 72,000 inmates, up from 12,000 in 1973. As recently as 1980, 11 percent of the people sent to state prisons were drug offenders, now they are just under half the total." *Id.*

sentencing discretion and in which parole boards would decide, usually after a prisoner served a third of his sentence, whether and when to release.²⁹ Twenty-five years later, all states had enacted mandatory minimum sentencing provisions which require, for some offenses, decades-long prison terms that in some states include mandatory life without the possibility of parole as part of their sentencing schemes.³⁰ Fifteen states and the federal government have also introduced guideline sentencing that requires judges to sentence within relatively narrow ranges. At least forty states eliminated or severely restricted parole to insure that prisoners, or certain classes of prisoners, serve a large proportion of their sentences—typically eighty-five percent.³¹ These trends are likely to intensify in response to Congress's authorization in 1994 of billions of dollars in incentive grants for states that adopt such anti-discretion measures as guideline sentencing and parole abolition.³²

The rehabilitative approach, which had been preeminent from early in the century, was rapidly overtaken by the retributive revival of the 1970s.³³ Judicial and parole discretion were the hallmark policies of the rehabilitation era, which saw treatment tailored to the individual offender as the most efficient crime control strategy and the humane alternative to the imposition of retributive punishment. The philosophy was well expressed at mid-century by Justice Black, writing for the United States Supreme Court in *Williams v. New York*—an opinion which perhaps ironically upheld the discretion of a sentencing judge to impose a death penalty over a jury recommendation for life imprisonment. Justice Black wrote:

New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. . . . The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. . . . Indeterminate sentences, the ultimate termination of which are sometimes decided by non judicial agencies have to a large extent taken the place of the old rigidly fixed punishments. The practice of probation which relies heavily on non judicial implementation has been accepted as a wise policy. . . . Retribution

29. See MICHEAL TONRY, SENTENCING MATTERS 6 (1996).

30. See *id.* at 7.

31. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, TRUTH IN SENTENCING 1 (1999).

32. See *id.*; TONRY, *supra* note 29, at 6.

33. See TONRY, *supra* note 29, at 6-7; FRANCIS A. ALLEN, DECLINE OF THE REHABILITATIVE IDEAL (1981).

is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence. . . .

. . . [I]ndeterminate sentences and probation have resulted in an increase in the discretionary powers exercised in fixing punishments. In general, these modern changes have not resulted in making the lot of offenders harder. On the contrary a strong motivating force for the changes has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship. This belief to a large extent has been justified.³⁴

At century's end, the rehabilitation model of criminal justice has collapsed under the weight of public responses to escalating crime rates and incisive neo-retributive criticism.³⁵ The critique was first mounted in the late 1960s, popularized and distorted by anticrime political rhetoric in the 1970s and 1980s, and remains ascendant.

Retributivism denotes a family of philosophies, versions of which were embraced by Greek and Roman thinkers as well as by the Jewish and Christian traditions. It is sufficient for my purposes merely to locate contemporary neo-retributivism as a mansion in the house of retributivism. The root idea or metaphor of retributivism is that transgression creates an imbalance that must be restored by the like suffering or privation of the wrongdoer. The idea was found in cosmological form in the pre-Socratics, and was fundamental in classical Greek and stoic ethics.³⁶ The role of retribution, divine and civil, in Jewish and Christian traditions is undeniable, although crosscut and permeated with the redemptive themes of the imperfection and unity of human nature in all subjects and roles—transgressor and victim, offender and judge. Jews and Christians are exhorted to cultivate humility, forgiveness, and compassion. The Jewish tradition places great emphasis on atonement and the primacy of recognizing and addressing one's own failings, while the Christian tradition emphasizes God-emulating, unconditional love.³⁷ Kant, the modern philosopher most relied upon by contemporary neo-retributivists, understood retributive punishment as a stringent

34. *Williams v. New York*, 337 U.S. 241, 247-49 (1949).

35. While it is true that "tough-on-crime" policies proceeded unabated through a decade of falling crime rates in the 1990s, crime rates remain high when measured against the benchmark of mid-century rates.

36. See Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 86 (1993).

37. See David A. Hoekema, *Punishment, the Criminal Law and Christian Social Ethics*, CRIM. JUST. ETHICS Summer/Fall 1986, at 31, 33 (1986).

obligation, famously pronouncing that a doomed community was obliged to execute the last murderer in prison before itself suffering extinction.³⁸ Hegel insisted that punishment was both a right of the criminal and a duty of the state.³⁹

Contemporary neo-retributivism is likewise a family of views. It has a father in Andrew von Hirsch, whose influential book *Doing Justice* gained a wide audience for neo-retributive criminal justice philosophy.⁴⁰ The following account of neo-retributivism relies on von Hirsch's work.

Part of the success of neo-retributivism lies in the fact that while the view appealed to conservatives, the neo-retributivist critique of rehabilitation shared considerable common ground with liberal critiques. Rehabilitation was discredited by social scientific criticism regarding its failure to lower crime rates or prevent recidivism.⁴¹ Even worse, from the liberal point of view, indeterminate sentencing outcomes evinced racial and class biases.⁴² Rehabilitation was a failure in its own terms, in that it did not cure and was subject to the most damning social critique, that of systematically discriminating against minority defendants.

Three core principles animate von Hirsch's work. I present them below in an effort to understand what neo-retributivists mean by the slogan "just desert," or as von Hirsch prefers, "commensurate desert."⁴³

1. Logical or Semantic Principle

Only persons adjudicated guilty by courts, operating in accordance with due process, under the authority of legitimate governments, can be punished. While other forms of suffering and

38. IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 102 (1965).

39. GEORG HEGEL, *PHILOSOPHY OF RIGHT* 100-01 (1952).

40. See ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 47 (1976). The work was commissioned by two liberal foundations and was, like the influential AMERICAN FRIENDS SERV. COMM., *STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA* (1971), highly critical of the rehabilitation model. The only other proponent of neo-retributivism whose views are apparently as universally cited as von Hirsch is Herbert Morris, whose social contractarian justification of retributivism is widely accepted by retributivist theorists, including von Hirsch, who is quite catholic in his approach to the support of retributivism. See Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475 (1968).

41. See TONRY, *supra* note 29.

42. See AMERICAN FRIENDS SERV. COMM., *supra* note 40, at 172, which was an important document charging race and class discrimination in rehabilitation era sentencing.

43. The mansion of contemporary neo-retributivism contains much that I will not explore, including the exploration of the retributive emotions and their significance for moral and social theory. See FORGIVENESS AND MERCY, *supra* note 7; Solomon, *supra* note 10.

privation can be inflicted on persons deserving and undeserving of punishment by agents of the state and others, such suffering and privation cannot be punishment.

The logical thesis is the fruit of several generations of criticism of utilitarian philosophy and is now widely accepted by utilitarians and nonutilitarians alike. Almost all utilitarians regard satisfying this principle as a requisite for any adequate theory of punishment.⁴⁴ The seminal mid-century rendition of this position was that of John Rawls.⁴⁵ Rawls argued that while utilitarianism might justify the practice of punishment, adjudicated guilt was a requirement for punishment *within* the institution of criminal justice; thus it was a “practice rule” that nothing could count as punishment absent such adjudication. From this semantic vantage point, retributivists argue that it is absurd, as well as frightening, to attempt to justify punishment as rehabilitative treatment:⁴⁶ The cachement of persons who could be improved by treatment—assuming that the science and art of such treatment exists—is indefinitely large, and probably co-extensive with the population under the jurisdiction of their potential benefactors.

2. Deontological or Justificatory Principle

The commission of crime justifies the infliction of punishment. Crime deserves punishment.

The root idea here again is anti-utilitarian. The justification of punishment is “retrospective.”⁴⁷ Punishment redresses the imbalance and restores equilibrium created by the past wrong.⁴⁸ Social utility could never alone justify the pain and opprobrium of punishment. Retributivists differ as to whether crime is a sufficient justification of punishment or merely a necessary condition. Unlike some retributivists, von Hirsch does not follow Kant and Hegel in arguing that the fact of crime requires punishment. Overcoming humanitarian objections to the deliberate infliction of suffering requires that punishment be further justified by its deterrent value.⁴⁹

44. See RICHARD B. BRANDT, *ETHICAL THEORY: THE PROBLEMS OF NORMATIVE AND CRITICAL ETHICS* (1959).

45. See John Rawls, *Two Concepts of Rules* (1955), reprinted in *THE PHILOSOPHY OF PUNISHMENT* (H. B. Acton ed., 1969). The thesis was first developed as a criticism of utilitarianism by the early twentieth century British intuitionists.

46. See Morris, *supra* note 40.

47. See VON HIRSCH, *supra* note 40.

48. See *id.* at 47-48.

49. See *id.* at 55.

3. Principle of Just Deserts

The measure of punishment is the seriousness of the offense and the culpability of the offender.

Seriousness, for von Hirsch, has two components: (1) the seriousness of the harm done or risked; and (2) the degree of culpability, as understood by reference to traditional criminal law analysis—importantly mens rea categories and including a prior criminal record.⁵⁰ The neo-retributivist is thus able to co-opt the rehabilitation era's norm that the offender's punishment ought to be individualized rather than subjecting all offenders of a certain kind to the same penalty. Punishments should be tailored; however, the just measure is not progress in treatment but the gravity of the offense and the extent of culpability. The insistence that there are two dimensions of offense seriousness, the gravity of harm and the moral culpability of the offender, modernizes retributive ideas and aligns them with contemporary thinking about the salience of gradations of culpability in criminal law. I use the term "neo-retributivism" to mark this successful adaptation of the retributivist philosophy.

The most devastating neo-retributive critique of rehabilitation criminal justice was aimed at the lack of horizontal and vertical equity in the sentencing outcomes it produced. Offenders who had committed offenses of similar gravity and were similarly culpable could be subject to incarceration or not, and, if incarcerated, serve sentences of widely varying length. Offenders who had committed trivial offenses might be incarcerated for much longer periods of time than those whose offenses were grave. Excessive discretion on the part of judges and parole boards, and the curative goal, had allowed the criminal justice system to become fundamentally unjust. Just or commensurate deserts would both calibrate penalties fairly and eliminate what von Hirsch called "class justice:"⁵¹

[T]he middle-class person is put on probation and the ghetto youth jailed for the same infraction, on the theory that the former's sensitivities are greater. More drastic measures thus come to be imposed chiefly on those of lower status who are deemed to have "less to lose"—but only because they have lost so much already through their deprived social situation.⁵²

Retributivists, who like von Hirsch advocate that each offender

50. *See id.* at 79.

51. *Id.* at 90.

52. *Id.*

be punished no more but no less than he or she deserves, must confront the apparently insuperable problem of determining what punishment each offense deserves. Some crimes, like rape, defy any civilized retributivist to call for a like punishment. The project of calculating the price of crime, the equivalent in months or years of incarceration, is daunting if not delusional.⁵³ Von Hirsch met the challenge of the implausibility of determining punishment in absolute terms with the notion of proportionate punishments.

Von Hirsch argued that commensurate or just deserts should be understood as demanding proportionate punishment. All severe crimes should be punished severely. No trivial offenses should be punished severely. More severe offenses should always be punished more than less severe. These strictures could be satisfied by a sentencing scheme that maintained an appropriate scale of relative severity. As for the magnitudes of punishment, von Hirsch candidly relied upon intuition to support the notions that incarceration was a severe punishment to be reserved for serious crimes like the infliction of serious bodily damage, and that no petty crimes, like minor thefts, should not be punished as serious crimes. He believed that both research and common sense supported the notion that a scheme of perhaps five or six offense levels could be devised into which offenses could be sorted. There was no need to develop a metaphysics of equivalent suffering, or to resort to the kind of pseudoscience of elaborate distinctions expressed in the federal sentencing guidelines that went into effect in 1987.⁵⁴ In other respects the scheme he envisioned was like guideline sentencing, envisioning a range of penalties attached to each offense level, and variations within the range for a given offense at any level to depend on culpability factors.

Von Hirsch advocated what are today called “truth in sentencing” measures of curtailed judicial discretion and abolition of parole, but he opposed draconian sentencing. He favored a penology of least confinement and least restrictive conditions of confinement on humanitarian grounds. He imagined that five or ten years would be the likely top of the range for an incarcerative penalty in a retributively just scheme for all offenses except the most aggravated murders.⁵⁵

53. See Mary Ellen Gale, *Retribution Punishment and Death*, 18 U.C. DAVIS L. REV. 973, 1004-05, for a critique of this aspect of the retributivist program. See generally Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY, *supra* note 7, at 111.

54. See TONRY, *supra* note 29, at 72-99.

55. VON HIRSCH, *supra* note 40, at 93, 107-23.

Much of the neo-retributivist program of reform has been adopted since the publication of *Doing Justice* in 1976. The results have sharply deviated from those advocated by von Hirsch in the enthusiastic recourse to incarceration and in the draconian length of sentences.⁵⁶ After a quarter century of retributivist reform, the magnitude of the incarcerated population and the length of sentences they are serving render clemency a critical issue for retributivists and nonretributivists alike.

B. *The Neo-Retributivist Theory of Clemency*

Kathleen Dean Moore has taken the lead in developing a neo-retributivist theory of clemency.⁵⁷ Building on her work in moral philosophy, Richard Kobil has argued for a reformed clemency system in which prisoners are entitled to clemency review in accordance with fair procedures and explicit retributively-justified standards for release.⁵⁸ Both neo-retributivist authors argue that much more frequent use of the clemency power than is now made by executives is justified within a retributive system.

Moore offers a plausible diagnosis of the hesitancy of contemporary executives to use their clemency powers. She sees it as an archaic institution which ill comports with modern notions of sovereignty. The notion of clemency as a free gift from a sovereign, an expression of his puissance and benevolence requiring no other justification, ill suits a governor or president in a democratic republic. Moore is grudgingly tolerant of the discretionary use of clemency for reasons of state or policy at the federal level for such hallowed purposes as healing divisions after war or rebellion. Political uses of the clemency power were clearly envisioned by the constitutional founders; these uses are marginal to her concern with ordinary criminal justice. The clemency power has fallen into disuse and forfeited public acceptance because it has not been brought into line with contemporary criminal justice norms: These demand due process rather than wide discretion and the application of neo-retributivists substantive norms.⁵⁹

56. North Carolina's recent sentencing reforms track von Hirsch's policy notions, at least with respect to nonviolent crimes and first time offenders, and may be a bellwether of a counter-trend away from heavy use of incarcerative penalties. See generally NORTH CAROLINA SENTENCING AND POLICY COMM'N, STRUCTURED SENTENCING FOR FELONIES (1998).

57. MOORE, *supra* note 3.

58. Kobil, *supra* note 3, at 611-38.

59. See MOORE, *supra* note 3.

This account has plausibility. It appears that modern executives are inhibited in the use of clemency. With the exception of a spate of clemencies for battered women who killed their tormentors, there have been few well-publicized uses of the clemency power. The use of clemency in capital cases, perhaps as good an index as any of executive willingness to use clemency, has fallen off dramatically.⁶⁰ If public support for clemency has fallen away, it is not because this power has historically been greatly abused. Clemency in the United States has been largely, although not entirely, untainted by scandal. In 1920, Governor J. C. Walton of Oklahoma, who did a brisk business in the sale of pardons, became the only American governor impeached and removed from office for abusing the clemency power.⁶¹ While never impeached, Governor Blanton of Tennessee was also implicated in a pardon selling scandal.⁶² Despite such blemishes, the explanation for the reticence of the contemporary executive is not a tarnished past.

I cannot agree that proponents of greater use of clemency should pin their hopes on the coming of a day when retributivism disciplines and rationalizes the use of clemency. There is no doubt that a very considerable scope for expansion exists for the use of the clemency power on retributivist grounds and for insight in the expectation that the public could support such grants of clemency. But governors have other cultural resources to draw upon in the storehouse of traditional nonretributivist justifications for clemency to gain acceptance for greater use of the power. Governors may have to sense the receding of the retributivist tide before they are willing to grant more clemency.

The neo-retributivist embraces all grants of clemency that are justified by just deserts and repudiates all others. The neo-retributivist further advocates assimilating clemency to judicial proceedings governed by due process norms and substantive norms of entitlement.

1. Clemency Principle

Executive clemency is justified if and only if employed to reduce a sentence, which is incommensurate with just deserts.

60. See Radelet & Zsembik, *supra* note 19; Abramowitz & Paget, *supra* note 19.

61. See MOORE, *supra* note 3, at 202-03.

62. Several members of his administration pled guilty to federal charges in the 1980s. See PETER MAAS, MARIE: A TRUE STORY 415 (1983); Kobil, *supra* note 3, at 607.

2. Juridization Principle

Procedures and substantive norms which express the grounds for relief ought to be developed; where clemency is warranted on grounds of justice, the executive ought to grant it.

The position taken by Moore is that clemency as heretofore practiced has issued, if we put aside the properly political uses of clemency, either remedial retributive justice or injustice. The former is not lenity at all but strict justice. All lenity in the sense in which I have defined clemency, discretionary lenity, is a derogation from justice.⁶³ Clemency is either remedial justice or it is unjustified and ought not to be granted.

The retributive argument against clemency-as-lenity has been put forward with great force by Jeffrie Murphy.⁶⁴ Murphy has argued that legal mercy is not "an autonomous virtue." Either the relief sought is deserved, in which case the recipient demands a right, or the grantor lapses, deviating from strict justice. Murphy is addressing discretionary lenity on the part of judges, parole boards, and prosecutors; but his account of mercy could equally be addressed to governors and presidents. Mercy is either a requirement of justice or a deviation from justice. There thus simply is no room for mercy as an autonomous virtue with which their justice should be tempered. Let them keep their sentimentality to themselves for use in their private lives with their families and pets.⁶⁵

This is a harsh view and certainly it is asserted in a harsh idiom. But it is nonetheless the view adopted by Moore and Kobil. It is in fact required by the Deontological Principle. Just punishment is determined retrospectively. All information relevant to just desert is at least in principle available at the time of sentencing. While errors that were not avoided at the time of sentencing ought later to be corrected, nothing the offender does after sentencing is relevant to a clemency decision. The measure of just punishment remains for any authority reviewing a sentence—just deserts, the criminal harm caused or risked, and the culpability of the offender. The Clemency Principle confirms the retributivist commitment to a single dimension to measure the appropriate dose of punishment—commensurability

63. See MOORE, *supra* note 3, at 192.

64. See generally FORGIVENESS AND MERCY, *supra* note 7; Jeffrie Murphy, *Mercy and Legal Justice*, in FORGIVENESS AND MERCY, *supra* note 7, at 162; Alwynne Smart, *Mercy*, in THE PHILOSOPHY OF PUNISHMENT 212 (H. B. Anton ed., 1969); Claudia Card, *Mercy*, 81 PHIL. REV. 182 (1972); Nussbaum, *supra* note 36.

65. See Murphy, *supra* note 64, at 174.

with the severity of offense: There are no other considerations of justice when initial sentence is pronounced nor at any time thereafter.

The neo-retributivist reduces clemency to a type of remedial justice. Persons unjustly convicted or persons whose punishments exceed their just deserts are fit objects of clemency—but no others. But clemency as it has heretofore been practiced differs from other institutional methods of rectifying miscarriages of justice in one important respect: under current clemency regimes, the petitioner is asking for something to which he or she has no legally recognized right, but rather lies in the discretion of the clemency authority. If neo-retributivist reforms were adopted, clemency proceedings would become more like judicial courts of last resort. A petition will not ask for a discretionary boon, but seek to vindicate a right. As with any court of last resort, if the petition is denied there would be no further recourse however just the cause.

II. EASY AND HARD CASES FOR A NEO-RETRIBUTIVE THEORY OF CLEMENCY

There is substantial common ground between neo-retributivists and the more expansive redemptive view of clemency; both camps acknowledge the legitimacy of remission of punishment on grounds of actual innocence or uncertain guilt, or excessive punishment measured against retributive standards. These are easy cases to justify, although it may take considerable political fortitude on the part of a governor to grant release. The hard cases for the retributivist are those in which the grounds for clemency lie in postconviction transformations or contributions. These cases are hard because the retributivist must advocate against appealing instances of rehabilitation and heroism, which have long histories of moving clemency authorities.

A. *Easy Cases*

1. Innocence or Uncertain Guilt

Cases where actual innocence can be conclusively established, or where there are doubts about guilt, have always been thought to merit clemency, which offers an expedient method of redress.⁶⁶

66. See Radelet & Zsembik, *supra* note 19, at 290-92, which identifies expediency as the basis for capital clemency in the majority of the 70 post-*Furman* capital cases (i.e., clemency to

A case which illustrates willingness to grant clemency in the face of doubts about guilt is North Carolina Governor Jim Martin's commutation of the death sentence of Anson Maynard Avery in 1991.⁶⁷ Avery was convicted of first-degree murder and sentenced to die for the 1981 murder of Stephen Henry. The state's theory was that Avery feared Henry would be a witness in a prosecution against him for leading a larceny ring.⁶⁸ Governor Martin commuted Avery's death sentence upon being presented with evidence that Avery may well have helped to dispose of the body under duress but may not have participated in the murder. The murder may have been committed by a supposed accomplice of Avery's who made a deal for immunity with prosecutors—a deal tainted with corruption.⁶⁹ Clemency on grounds of actual innocence or uncertain guilt is immediately justified on retributivist grounds; innocence is an easy case on any theory of clemency.

2. Infirmity/Mitigation of Culpability

Under this rubric would come relief for prisoners whose sentences reflected an unjust severity relative to their moral culpability. The largest class of such cases results from the failure of the law to adequately calibrate criminal responsibility where an offender is mentally ill or mentally retarded.

In *Penry v. Lynaugh*, the Supreme Court held that the mentally retarded were not categorically exempt from capital punishment on Eighth Amendment grounds, that such punishment would be cruel or unusual.⁷⁰ It would clearly not offend neo-retributivism, however, if the governor of Texas commuted Michael Penry's sentence. Penry was sentenced to die for a brutal rape-murder committed shortly after his release on parole after conviction for another rape. Penry's case for mitigation is that he had a mental age of 6 1/2 and an emotional age of nine or ten, due in whole or in part to organic brain damage.⁷¹

The use of clemency to express refinements in culpability

save the time and expense of likely judicial resentencing proceedings).

67. See *North Carolina v. Maynard*, 316 S.E.2d 197 (N.C. 1984).

68. See generally *id.*

69. Malcolm Ray Hunter, Jr., State of North Carolina Appellate Defender, who represented Avery in his successful petition for clemency, recounted the case to the Fall 1999 Clemency Seminar at Duke Law School. This clemency is one of only two granted by North Carolina governors in a capital case in the post-*Furman* era. See *Death Penalty Info. Ctr.*, *supra* note 25.

70. 492 U.S. 302 (1989).

71. See *id.* at 307-08.

analysis in anticipation of legal reform is venerable.⁷² The neo-retributive emphasis on sensitive and accurate culpability assessment as a measure of punishment allows governors to justify commutation in a case like Penry's on the grounds of retributive justice.

3. Considerations of Horizontal or Vertical Equity

Clemency granted to an offender who has been sentenced more severely than accomplices equally or more culpable of the same offense, or than others under sentence for similar offenses, is easily justifiable on neo-retributive grounds. Such clemencies aim at achieving horizontal sentencing equity, which is a critical goal for retributive punishment. Equally, vertical equity justifies on retributive grounds giving relief to a whole class of offenders who are overpunished relative to perpetrators of more severe offenses.

In 1999, Governor Pataki of New York reduced the sentences of four prisoners serving long sentences under the so-called Rockefeller drug laws, which mandate terms in excess of fifteen years for possessory drug offenses.⁷³ Prior to obtaining clemency, these prisoners had already served more time for nonviolent possessory offenses than New York has imposed for such violent offenses as rape and homicide.⁷⁴ These releases, and indeed a much more aggressive approach to the release of nonviolent drug offenders, are easy to justify on retributive grounds as a corrective, equitable adjustment.

4. Einsteinian Cases: The Relativity of Time

Moore argues that imminent death, whether from illness or old age, may merit clemency on retributivists grounds.⁷⁵ It is a terribly painful thing to die in prison and therefore add a quantum of suffering above the norm anticipated by the sentencer (save for life terms). If the quantum of suffering inflicted on a prisoner is enlarged by the prospect of death in prison, or through an illness which greatly enhances suffering when endured in prison conditions, then medical clemency may be in order. To grant clemency in such circumstances forestalls the injustice of overpunishment relative to desert, and the disturbance of equity that would occur, if the sentence were allowed

72. Twelve out of 40 capital punishment states forbid execution of the mentally retarded. See Death Penalty Info. Ctr., *supra* note 25; Sebba, *supra* note 3.

73. See Perez-Pena, *supra* note 28, at B4.

74. See *id.*

75. MOORE, *supra* note 3.

to run its course.

Medical clemency is hardly unknown. Governor Mario Cuomo of New York granted clemency to a dying AIDS patient after he had failed to persuade the state legislature to adopt a comprehensive program of medical parole.⁷⁶ Examples of governors offering clemency to the infirm, the aged, and the dying are not rare, and some states systematically practice medical clemency or medical parole.⁷⁷

Unlike the earlier types of cases considered, the acknowledgement of medical clemency has the potential to disrupt the retributive account of clemency. That death in confinement enhances suffering may be something that most people can understand and agree upon, yet it is not categorically different from many other ways in which the suffering of one prisoner may be significantly enhanced beyond that of another by reason of temperament, mental and physical condition, experience, and circumstances. For example, a prisoner whose spouse is dying, or whose children are suffering for want of support, or who is tormented by the cruelties of fellow prisoners or guards, or who is fearful and anxious by nature, or who is subject to intense remorse, or who is troubled by the fear of damnation, may suffer more than other prisoners. Any of these variations on the manner and intensity in which prisoners may suffer may disturb horizontal and vertical equity. The sick and dying prisoner has the special appeal of recognized common human experience and the special authority of suffering that is hard to feign, but is not otherwise distinctly or uniquely situated as one who suffers above the norm.

Could it be that the retributive theory is in danger of dissolving into a theory of compassion? For what is compassion if not sympathy for the suffering of another compounded by the recognition that he is like us in his suffering and we are like him in his vulnerability? If clemency were justified in any degree in fellow feeling and the impulse to put an end to suffering, then the retributivist theory of clemency would be refuted, at least with respect to its reductionist claim to provide the sole measure of just punishment.

Medical or compassionate clemencies may not comprise easy cases for neo-retributivists after all: These cases undermine both the notion of the univocal scale of measuring punishment, in months or

76. See Edward A. Adams, *Cuomo Faces Annual Ritual of Deciding on Clemency*, N.Y. L.J., Dec. 28, 1992, at 3, 3.

77. See Barnett, *supra* note 1, at 518-19.

years of confinement, and the moral and psychic distance between prisoner and free citizen.

B. *Hard Cases*

For the neo-retributivist there can be no cases of legitimate clemency based on the postconviction achievements of prisoners. Thus, neither rehabilitation nor service could earn a prisoner clemency since no postconviction action can influence or diminish the debt of suffering owed for crime. From the redemptive perspective it is possible to describe post-conviction achievements as grounds for clemency. Redemptive clemency may be deserved in the sense that it is *earned* but not *owed*, merited by actions that create no retributively-justified entitlement. There are at least two types of cases that exemplify post-conviction merit, rehabilitation and heroic service. I will focus most attention on the former, because rehabilitation cases are more common. However, heroic service provides an important test of the adequacy of neo-retributive theory because even one case of legitimate clemency on other than retributive justice grounds would refute the reductivist claim that clemency can never be based on post-conviction achievements.

1. Heroism: the Doctor Who Fought the Epidemic in Prison

Moore recounts the story of Dr. Samuel Mudd,⁷⁸ who unsuspectingly set the leg of a man he later learned was John Wilkes Booth, while in flight after the assassination of President Lincoln. Dr. Mudd was sentenced to life in prison for conspiring to assassinate the president. Four years later, he distinguished himself by fighting a yellow fever epidemic in prison. He was pardoned for his heroism; the pardon was not based in any part on Mudd's innocence, the injustices that had been heaped upon him, or the travesty of justice that was his trial.

Moore argues, consistent with her neo-retributive position, that while Dr. Mudd deserved a pardon of innocence, heroic service rendered after conviction, like any other merit acquired after conviction, is neither relevant to the justness of punishment nor a ground for its recalibration.⁷⁹ Her analysis, although logically impeccable, is dogmatic because it blocks examination of why a

78. See MOORE, *supra* note 3, at 197.

79. See *id.* at 204, 210.

conspirator-doctor who performs heroic service may be said to have earned consideration of early release. Such heroism may simply be a display of prowess. But let us suppose a guilty Dr. Mudd who has come to believe that assassination was unjustified, that he has made a terrible mistake in judgment.

Let us suppose a Dr. Mudd, whose willingness to risk death is borne of the desire to expiate the crime committed and of recommitment to the humane mission of medicine. There would in such a case be no further need to incapacitate the doctor. Several features of the hypothetical Dr. Mudd's case may appear relevant to granting some remission of punishment. These include: (1) Mudd's moral transformation, his acknowledgement of his wrong, and his desire to expiate through sacrifice; (2) the risk of his own life; and (3) the recommitment to medicine, i.e., a choice for social altruism. I am not suggesting that every right-thinking executive must release the doctor in light of these features of his case. It would be morally coherent to assign him to the prison hospital and allow him to pursue his calling and expiation in prison. My quarrel with retributivism is that it must treat these factors as *irrelevant*, as having no possible weight or place in consideration of a clemency petition from Dr. Mudd. The intuitive force of these features as weighing in favor of clemency for the doctor is grounded in a redemptive conception of criminal justice. Aspects of that perspective will be canvassed below, although a full account of so large and varied a family of views is beyond the scope of this Article.

2. Rehabilitation: The Case of Precious Bedell⁸⁰

From time to time, inmates rehabilitate themselves in prison. Such was the case with Precious Bedell, who was sentenced to twenty-five years to life for the second-degree murder of her toddler daughter LaShonda in 1979.⁸¹ LaShonda had been fussy and uncooperative during a dinner at Valle's Steakhouse in Syracuse. Precious took the child to the restroom, struck her, and beat her while the child was perched on a sink ledge. The child fell and her skull

80. In addition to the cases cited, my account of the Bedell case is based upon: Editorial, *Precious Bedell Amid Lingering Frustration, Freedom at Last*, POST-STANDARD, Nov. 23, 1999, at A12, Jennifer Gonnerman, *Campaigning for Clemency*, VILLAGE VOICE, Dec. 22, 1998, at 40, and Jon R. Sorensen, *Give Con Clemency, Says Celeb*, DAILY NEWS, Dec. 30, 1999. Also, my account is based upon interviews with Bedell's attorney, Nancy Hollender, in Albuquerque, New Mexico, in Fall of 1998.

81. See *People v. Bedell*, 464 N.Y.S.2d 613 (N.Y. App. Div. 1983).

shattered on the tile floor. Precious had not been habitually abusive to LaShonda nor her two older children. Yet she deliberately struck her small, vulnerable daughter in anger, and the child died.

Bedell went into prison at age twenty-six as a drug-abusing, petty criminal with an abrasive, chip-on-the-shoulder personality. In prison she became a different person. She took advantage of therapy programs. She converted to Catholicism because of the welcome and support of the Catholic community. She became a model prisoner. She accepted responsibility for LaShonda's death and knew remorse. She cultivated good relationships with her surviving children. She educated herself, completing high school, acquiring a bachelor's and a master's degree, and beginning work on her Ph.D. She devoted herself to gaining an intellectual understanding of mothers at risk of harming their children—her college and graduate school work—and to developing programs in prison to help women avoid these perils and be good parents—her work in prison. It has been her ambition for some time to do the same kind of work on the outside as she has done in prison.

Precious Bedell was denied clemency by Governor Cuomo, and denied again by Governor Pataki in 1998. In 1999, Judge Fahey of the County Court of Onondaga, New York, vacated her conviction, based on irregularities at her trial. She pled guilty to second-degree manslaughter, was sentenced to time served, and released in late November of that year.⁸² Precious Bedell was given a heavy sentence for the kind of crime she committed; she did not intend to inflict a life-threatening injury on LaShonda. However, such severity is within the normal range of outcomes in cases of this type. Whatever degree of culpability, she had a case for clemency based on rehabilitation. She was no longer the person who had been sentenced. Starting with acceptance of responsibility for her daughter's death, she sought to transform herself into someone who could spare other children and

82. *See id.* The case was vacated by order of Justice Fahey on November 16, 1999. The People joined Bedell's motion to vacate. The District Attorney of Onondaga County, William J. Fitzpatrick, strongly supported the failed clemency bid made by Bedell. Bedell had dedicated and visible supporters, including her attorney Nancy Hollander, who fought for her release for over a dozen years, and the actress Glenn Close, who met Bedell while working on a project at Bedell Hills Prison.

The Village Voice ran an illuminating if disheartening article on the eve of Bedell's second denial of clemency. *See* Gonnerman, *supra* note 80, at 2. From the article, we learn something about the strain and competition each year among inmates with good clemency prospects. *See id.* One inmate who was successful explained, "You have to separate yourself from the others because there are so many people who are fully rehabilitated and ready to reenter society. My art is how I separated myself from the crowd." *Id.*

their mothers' from the very harm she herself had caused. She designed, organized, and implemented such help for other women while in prison. Her work at Bedford Hills Women's Prison has been influential in establishing standards and guidelines for the rehabilitation of incarcerated parents and for the improvement of their children's lives in New York and across the country. She progressed from a wiseacre to a morally serious and productive person. Her spiritual progress in the twenty years she was incarcerated exceeds mine, and likely exceeds yours, my reader, and that of anyone who sat as judge, juror, or clemency authority in her case. From a retributivist point of view, Precious' progress is irrelevant to the issue of her clemency, and she was properly denied clemency by both governors: If Judge Fahey was moved by anything other than constitutional defects in her original trial, his action was improper, clouded perhaps by sympathy, admiration, or humility that ought not to have influenced his judgment.

3. Rehabilitation as a Grounds of Clemency in the Bedell Case

Could a governor justifiably have granted clemency to Precious Bedell? Surely not on retributive grounds, unless her sentence was excessive relative to her offense and her culpability. Justifiable clemency for Bedell, then, would require the augmentation of the objectives of criminal justice to include such goals as the rehabilitation of offenders and their reconciliation with and reintegration into society. It would also require treating the retributively-justified sentence as an upper limit of punishment, the completion of which might be overborne by other criminal justice considerations. The willingness to diminish sentences below the retributively just requirement is the sharpest point of disagreement between retributive and redemptive perspectives.

The deliberate infliction of suffering on anyone, including the deserving prisoner, troubles some retributivists, but not all. The deliberate infliction of further suffering on the fully rehabilitated is particularly difficult to justify. Von Hirsch believes that were it not for the societal need for deterrence, the infliction of punishment, although deserved, could not be fully justified.⁸³ However, many retributivists are satisfied by the deontic answer that punishment neither can have, nor needs, any justification other than the offense. Some retributivists appeal to the satisfaction of the passions of hatred

83. VON HIRSCH, *supra* note 40, at 54-55.

and vengeance on the part of victims and of society generally, and of the catharsis and moral recommitment provided to both victims and society in so doing.⁸⁴

Ordinary victims and ordinary citizens, as well as philosophers, sometimes find that they cannot or do not choose to forgive or reconcile with those who have committed grave offenses.⁸⁵ Surely for some the failure of the state to exact the full measure of retributive punishment from an offender would render reconciliation more difficult to attain. Yet victims of crimes sometimes want contrition from perpetrators, recognition of their undeserved suffering and acknowledgement of responsibility, as much or more than they want to see punishment exacted.⁸⁶ There may be an unbridgeable gap of moral judgment dividing those victims and citizens who demand the full exaction of retributive justice, those who would prefer reconciliation to retribution, and those who desire both full retribution and reconciliation.⁸⁷ The gap surely closes when we imagine the psychological and moral response of victims to the repentant rather than the gloating, the aggrieved, or the indifferent. Both the Jewish and Christian religions repudiate unyielding hatred and ostracism of a transgressor. Jews are obliged to forgive the repentant transgressor who makes reparations, and Christians are

84. See FORGIVENESS AND MERCY, *supra* note 7; see also Jeffrie Murphy, *Moral Epistemology, the Retributive Emotions and the Clumsy Moral Philosophy of Jesus Christ*, in THE PASSIONS OF LAW, *supra* note 10, at 149 (in which Murphy partly recants his earlier work); Solomon, *supra* note 10.

85. See, e.g., Josh White, *Supreme Court Stays Execution; Man Killed Va. Trooper in 1993*, WASHINGTON POST, Sept. 2, 1999, at B1 (reporting that the victim's widow supported execution, but his two adult children wrote to Governor Gilmore asking for clemency). Simon Wiesenthaler recounts the improbable but true autobiographical story of a dying young soldier summoning the author, a death camp inmate on work detail, to ask forgiveness for his murder of other Jews. See SIMON WIESENTHALER, *THE SUNFLOWER* 7 (1998). A number of notables contribute short essays to the volume on what they think they would have done in Simon's place. See *id.* The entire volume is a powerful meditation on the ethics of forgiveness. See *id.*; see also SISTER HELEN PREJEAN, *DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES* (1993) (in which the author discusses her experiences ministering to the survivors of murder victims and survivors who sought the death of the killer sometimes hoped for surcease and closure that the execution failed to bring them).

86. See John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian*, 46 UCLA L. REV. 1727 (1999). Braithwaite discusses this theme in indigenous Maori and Native American restorative justice practices. See *id.* He writes that what "we learned from indigenous practice was that material reparation was much less important than emotional or symbolic reparation. Victims often wanted an apology more than compensation." *Id.* at 1728; see also PREJEAN, *supra* note 85.

87. See Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice*, in TRUTH VERSUS JUSTICE (Robert Rotberg & Dennis Thomson eds., 2000).

exhorted to the harder task of loving the transgressor.⁸⁸ In addition to the theological bases of the redemptive orientation of Jewish and Christian thought, the orientation surely implies recognition of the social and psychological costs that a purely retributive approach imposes on victims and society.

It would be a mistake, a fallacy of sorts, to infer the adequacy of retributivism as a criminal justice philosophy from the existence of the retributive emotions or the authenticity of the retributive judgments of some victims and citizens. The cultural material at hand, from which we may fashion theories and practices of criminal justice, comprehends not only retributive principles and impulses, but also the possibility of redemption and the value of reconciliation. After twenty-five years of retributivism, there may be renewed openness to redemption in the United States. An argument has been made, and acted upon, in South Africa and other nations torn by internecine strife, that reconciliation is the more pragmatic strategy.⁸⁹

Perhaps a bridge between retributivist and redemptive views of clemency lies in the redemptive notion that punishment can be, at least for someone who rehabilitates like Precious Bedell, not merely suffering endured, but also dynamic and transformative.⁹⁰ Few can comprehend the quality and intensity of the suffering experienced by Bedell in owning responsibility for the death of her child, the privations of her surviving children, and her own imprisonment. It may be that, like the suffering of the sick and the dying, redemptive suffering takes the prisoner out of the norm for her class of offenders and enhances or accelerates suffering.

One respect in which the redemptive perspective differs from that of retribution is that punishment is seen as part of a dynamic process, at least potentially, of transformation. While retributive punishment may be justified regardless of whether transformation takes place, the most desirable and complete outcome is redemption and social reintegration. That outcome having been achieved, as in the case of Precious Bedell, remitting further penal confinement does

88. See generally Hoekema, *supra* note 37; see also L. GREGORY JONES, *EMBODYING FORGIVENESS* (1995).

89. In his contribution to *THE SUNFLOWER*, Desmond Tutu writes, "It is clear that if we look only to retributive justice, we might as well close up shop. Forgiveness is not some nebulous thing. It is practical politics. Without forgiveness, there is no future." WIESENTHALER, *supra* note 85, at 268.

90. See Steven P. Garvey, *Punishment as Atonement*, 46 *UCLA L. REV.* 1801 (1999), for an exploration of redemptive punishment drawing on religious sources rather than the dubious science and paternalism of the older rehabilitation model.

not frustrate any fundamental moral requirement.

A second respect in which the redemptive perspective differs from the retributive perspective is the view taken of the relationship between the transgressor and his society. Retributivism, especially as politically mobilized in the last twenty-five years, has painted a picture of transgressors as vicious predators or despicable weaklings. Two stock characters are Willie Horton and the crack-addicted mother. Willie Horton, who terrorized a Maryland couple while on furlough from a Massachusetts prison, became the poster boy for conservative criminal justice policies during and after his rhetorical dominance of the Bush/Dukakis presidential race in 1988.⁹¹ Horton, like addicted mothers who endanger and neglect their children (including those helplessly gestating in the womb) is not at all like us. We are the righteous and the vulnerable. People like Horton are vicious and depraved. Even intellectual expressions of retributivism tend to shrink the area of commonality of transgressors and law-abiding citizens to one dimension. Following Kant, retributivists emphasize a kind of moral democracy: that the moral capacity to choose responsibly is a characteristic shared by transgressor and good citizen.

The redemptive perspective, which draws on the common storehouse of Judeo-Christian norms and expectations, rejects the Manichean division of people into good and evil. Consider again Precious Bedell. Prior to her conviction, she was no worse if no better a mother or father than legions of free citizens. In a few fateful seconds, she demonstrated how badly an ordinary, responsible human being—not a monster, not a defeated and hopeless addict—can fail. From the redemptive perspective, free citizens are also mean, weak, selfish, and takers of bad risks. And transgressors, like the rest of us, have the potential for morally adequate lives and lives of high moral achievement.

The redemptive view of the relationship between transgressor and society also differs from the retributive perspective in its interest in reconciliation.⁹² From the redemptive perspective, the transgressor

91. Willie Horton repeatedly raped the wife while holding the couple hostage in their home. See DAVID C. ANDERSON, *CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE* (1995); see also Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right to Privacy*, 104 HARV. L. REV. 1419 (1991).

92. See Garvey, *supra* note 90, at 1830-34 (making the acute point in discussing theories of punishment that retributivists neglect reconciliation in their focus on punishment, while advocates of restorative justice neglect retributive punishment in their focus on reintegration).

is missed, the rehabilitated offender is needed. The redemptive perspective, with its emphasis on community, may in some ways so little resemble any modern nation-state, much less a vast and heterogeneous country like the contemporary United States, as to appear irrelevant. We are not today, like the founding generations, a republic of hardy but interdependent yeoman farmers. Much less are we like ancient Israel, a covenanted community whose God and law require us to foster communal bonds. Nonetheless, there are demonstrable ways in which reconciliation is a meaningful criminal justice goal in contemporary circumstances. The reabsorption of rehabilitated offenders, if achieved, would reduce crime rates, recidivism rates, and crime control costs. At the community level, especially in black and other poor minority communities where the rates of incarceration are catastrophic,⁹³ the absent are needed to cope with the ordinary, essential, economic, and social tasks of life.

At the political level, the transformation and restoration to society of Precious Bedell has the potential to rival the impact of the story of Willie Horton. Precious Bedell is a symbol of redemption just as Horton is the poster boy for retribution. Horton, a black man, was used to confirm and magnify fear of black criminality. The story of Bedell, a black woman, her ordeal and her stature, undermines facile assumptions. She represents the capacities of bad mothers, thieves, and drug abusers to be good people—even heroes. As such, her example carries a powerful healing message for people of all races and classes.

Hope is also a redemptive criminal justice value: the example of clemency for Precious Bedell would foster hope for release and reconciliation among those willing to take on the rigors of self-transformation.⁹⁴ It is a fair question to ask the proponent of clemency on grounds of rehabilitation whether the redemptive view does not undermine equity in criminal punishment; concern for equity united the many stripes of critics of the rehabilitation era of criminal justice and remains a fundamental concern today. In a redemptive system, a Precious Bedell and others with extraordinary resources

However, it is possible to adopt, as does Garvey himself, a redemptive orientation without denying the role of punishment. I am presently agnostic about the role of state-inflicted penitential suffering in redemptive criminal justice.

93. At year's end 1997, blacks were at least six times more likely than whites to be in state or federal prison, and there were more black than white males in prison. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 1998 (1999).

94. Warden Duffy of San Quentin was a proponent of the penology of hope. WARDEN DUFFY, 88 MEN AND 2 WOMEN (1962).

may receive lenity not accorded the less remarkable, but no more reprehensible, felon. Of course, one answer to equity concerns would be that the heart of the problem is not the discretionary use of the executive power to grant clemency but the abolition of parole release as a means of responding to cases of rehabilitation. Even more fundamentally, no criteria for early release can possibly cure all the abuses created by a system dedicated to locking away so many people and for such long terms. Despite these considerations, equity deserves fuller discussion. There is undeniably a tension between the goal of equitable treatment and grants of clemency on grounds of redemption. Redemptive clemency can best be defended against criticism for derogating from equity by examining the functions of the institution of clemency. Clemency has always been conceived, and rightly so, as an extraordinary measure, a failsafe to redress system failure and extraordinary cases. My defense of redemptive clemency involves the rejection of proposals to bureaucratize clemency; I speak against the seductions of enlarging due process and entitlements and for executive discretion.

III. IN PRAISE OF UNRULY DISCRETION

Richard Kobil has proposed a radical constitutional reform of clemency. Kobil distinguishes between “justice-enhancing” and “justice-neutral” uses of the clemency power.⁹⁵ Justice-enhancing clemency seeks to correct retributively unjust sentences, to free the innocent and those suffering excessive punishment. Taking up a proposal of former Illinois Governor Mike DiSalle,⁹⁶ Kobil proposes that justice-enhancing clemency be placed under the authority of commissions, buffered from the political process. Commissioners would be selected by the executive, with the advice and consent of either the judiciary or the legislature, and have life tenure.⁹⁷ Justice-neutral clemency pursues political objectives, as exemplified by President Ford’s pardon of Richard Nixon or President Carter’s amnesty of Vietnam era draft dodgers. The justice-neutral use of clemency would remain a discretionary power of the executive. Thus, the clemency power would be bifurcated: Ordinary criminal cases would go to commissions, and the executive would remain responsible for the political uses of the power.

95. Kobil, *supra* note 3, at 582-83.

96. *See id.* at 623.

97. *See id.* at 622-24.

A clemency commission would develop and employ a set of neo-retributive standards for the award of clemency. Applicants who met the standards would be entitled to clemency and would be protected by due process.

Kobil urges this scheme both out of commitment to neo-retributivism and because he believes that if such commissions were instituted, meritorious cases would more frequently be awarded clemency and deserving prisoners would be offered relief. Prisoners who could clear themselves through DNA evidence, for example, or otherwise establish their innocence, would have greatly improved chances under a clemency commission of gaining a fair and expeditious hearing for their claims.⁹⁸ A commission would also develop systematic information that allows meaningful relief for prisoners whose sentences are excessively severe relative to norms for their category of offenses or even relative to crimes of greater offense severity.

It is plausible to suppose that the bureaucratization of the clemency power would more reliably vindicate retributive values in clemency decisions. Equally, it is plausible that an agency insulated from politics and able to justify its decisions as applications of impartial standards would grant more clemency than do contemporary governors. Indeed, a governor interested in granting more clemency might find political cover and achieve greater consistency of practice by adopting some of the machinery of the commission approach under the shelter of his or her discretion. There are, however, several good reasons to resist the commission proposal.⁹⁹

A clemency commission appears to be envisioned as a hybrid sentencing commission/legislature/appellate court designed to mitigate the failure of twenty-five years of retributive policies of overincarceration. The number of prisoners in American prisons is fast approaching 1.5 million.¹⁰⁰ The proportion of prisoners serving

98. See JIM DWYER ET AL., *ACTUAL INNOCENCE* (2000).

99. Some conversations with Sara S. Beale were very helpful to me in clarifying my thinking about the status of clemency in contemporary criminal justice.

100. There were 1,302,019 persons in federal and state prisons at years end 1998; 1,825,000 persons were incarcerated if those in jail are tallied as well. The average annual rate of increase in the prison population during the decade of the 1990s was 6.7%, and the increase in total prison population during the 1990s exceeded 40%. See BUREAU OF JUSTICE STATISTICS, *supra* note 93, at 1. Prison populations grew even faster during the decade of the 1980s. See U.S. DEP'T OF JUSTICE, *SOURCEBOOK OF CRIMINAL STATISTICS 1997* (1997). See David Dolinko, *The Future of Punishment*, 46 *UCLA L. REV.* 1719 (1999), for a concise review of the incarceration crisis.

long and life terms increases annually.¹⁰¹ I am unpersuaded that the blurring of legislative functions with the corrective, case-oriented function of clemency would be a sound way of addressing the overincarceration crisis. Nor am I persuaded that the evasion of public and political reassessment of present policies is desirable. The better way of addressing retributively-unjustified sentencing schemes would be to reform sentencing law so that it more closely resembled von Hirsch's least-incarceration approach. Until or unless legislatures reverse present policies, it appears that the commissions would be working at cross-purposes with legislatures.¹⁰²

Historically, clemency has served at least two important functions in ordinary criminal cases, both of which are best served by preserving executive discretion. The last resort function is not distinctly lodged in the executive—courts also fulfill this purpose. Indeed, the overlap or redundancy is some indication of the importance of the remediation function of clemency. The executive performs the last resort function under a distinctive rationale or political justification. When legislators, prosecutors, and courts have failed to prevent injustice, the executive may intervene as an incidence of sovereignty, as the representative of the people. Clemency in these cases expresses the residual power of the sovereign to prevent injustice otherwise suffered due to the ineffectualness, indifference, malfeasance, or lack of imagination of other bearers of public power, or due to gaps in jurisdiction in the system of formal justice. It is an antibureaucratic and anti-institutional power. For this reason, citizens may well disagree with a particular grant of clemency because it does not comport with their normative views, and yet endorse the power of the executive to intervene. In extraordinary cases where institutionalized public power has failed to respond, there is another avenue of redress: A direct appeal may be made to the executive to examine the facts and the equities in a particular case.

The second historic function of clemency has been to facilitate reform in standards of criminal liability.¹⁰³ Novel claims of mitigation not yet well enough developed to command integration into the criminal law, in areas such as mental illness, have gained a foothold, currency, and public attention through executive clemency. While it is conceivable that a commission could also serve this function, a

101. See BUREAU OF JUSTICE STATISTICS, *supra* note 31, at 1.

102. Kobil's proposal is presented as a brief sketch, not a detailed plan; the extent of the power of the commission to contravene legislation is not discussed.

103. See Kobil, *supra* note 3.

bureaucratic agency whose legitimacy rests on its fidelity to accepted criminal justice norms is not well-positioned to respond to emergent justice claims, or to justify innovation. The traditional discretionary power to respond to the facts and equities in an individual case, without committing the criminal justice system to full articulation and defense of a new standard, is better suited to this role.

Kobil's commission model apparently normalizes clemency—rather than being an extraordinary remedy, clemency becomes accessible to any prisoner with a retributively-based claim. Commissions could, in effect, overrule legislation that lacks retributive justification. Executive clemency is ill suited to be a means to overcome wholesale legislative failures. Clemency granted in exemplary cases of rehabilitation, such as the Bedell case, may however, play a role in reopening the channels of politics to systemic reform.

We come now to the question of the threat posed to horizontal and vertical equity by any discretionary authority, and certainly the traditional discretion of the executive in clemency determinations. Should we seek to eliminate the executive's discretion to grant clemency in recognition of redemption in order to preserve fairness to those who are serving out full terms for similar offenses? The answer to this question hinges at least in part on whether rehabilitation and allied claims are legitimate grounds for clemency at all. Let us suppose for the sake of pursuing the argument that redemptive claims are legitimate and integral to a just punishment regime. The only way to fully vindicate the neo-retributive Principle of Just Deserts, that severity of the offense and the culpability of the offender are the sole measures of just punishment, would be to frustrate the redemptive component of justice in every case based on a rehabilitative claim. The alternative is to recognize that, at least some of the time, considerations of horizontal and vertical equity would have to give way to redemptive values.

Because we value equity, and because we are mistrustful of discretion, we resist giving up the retributive model of standards-not-discretion for deciding cases. However, it is hardly surprising to find that legitimate values in a complex institution like criminal justice conflict, and that core values cannot always be simultaneously vindicated in deciding a particular case. Making decisions in a clemency case where rehabilitation is taken into account involves weighing incommensurables—weighing, for example, equity against rehabilitation through some process of judgment employing

standards, intuition, precedents, experience, and background knowledge. The use of discretion in clemency decisions and in other complex judgments can only be denied at the cost of creating a fiction that standards and their nearly mechanical application alone govern, or through the exclusion of legitimate considerations in the service of a reductionist program like retributivism. When we seek to banish discretion, we impoverish justice and consort with comforting fictions. The discretion of the executive to disturb retributive sentencing uniformity in extraordinary cases should be retained.

As a proponent of executive clemency, discretionary and multifactored, I support the requirement that most states place upon their governors to make an annual public report accounting for their use of the clemency power.¹⁰⁴ Governors are required to explain the reasons for each grant and denial. Discretion can give a better or worse account of itself, and the body of cases and reasons ought to exercise significant control over future practice. Such a record provides a basis for criticism and even political repudiation of an executive.

Discretion provides an opportunity for conscientious efforts to do justice from a novel angle of vision or to protect a value that has gotten short shrift in the reigning dispensation. Governors should be encouraged to use this power rather than allow it to atrophy. Despite the apprehension of abuse and the risks to the governors themselves if they cannot make a case to the public for their actions, it is the discretionary character of clemency that accounts for its importance as an antibureaucratic source of redress and a means of innovation.

104. The majority of states have such requirements and also have various provisions for notification of the public, victims, and criminal justice officials about a clemency application. See Dorne & Gewerth, *supra* note 4, at 436-38.

