

State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty

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In the aftermath of Governor Ryan's decision in 2003 to commute the sentences of each offender on Illinois' death row, various scholars have claimed that Ryan's action was cruel, callous, a "grave injustice," and, from a retributivist perspective, "an unmitigated moral disaster." This Article contests that position, showing not only why a commutation of death row is permitted under principles of retributive justice, but also why it might be required. When properly understood, retributive justice, in its commitment to moral accountability and equal liberty, hinges on modesty and dignity in modes of punishment. In this vein, retributivism opposes the apparently ineluctable slide towards ever-harsher punishments in the name of justice. While the thesis I defend is sited in the particular context of the death penalty, the implications reach more broadly; the argument offered here signals that a commitment to retributivism in no way impedes the realization of humane institutions of criminal justice and a rejection of the benighted, misbegotten, and often brutal status quo we shamefully permit to endure.

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I. Introduction

In early 2003, one of the biggest stories in the history of American criminal justice erupted. After it became clear that Illinois' criminal justice system had erroneously sentenced more inmates to death than it had actually executed, then-Governor George Ryan decided on the eve of his departure from office to do what few other executive branch officials have ever done in so dramatic a way--he cleared out death row.¹ By commuting the sentences of virtually each death row prisoner in Illinois to life imprisonment,² Ryan set off a firestorm of reactions.³ Throngs of citizens and politicians denounced Governor Ryan's action as that of a rogue executive, calling it lawless, unjust, and immoral.⁴ Many viewed the move as a cynical distraction from Ryan's own troubles with the law.⁵ Others saw him as courageous, merciful, and even heroic.⁶

Ryan's decision has instigated some scholarly discussion,⁷ though

¹ Historically, several other governors have issued commutations of death row in America. In 1915, Governor Lee Cruce of Oklahoma pardoned twenty-two offenders as he left office. Fifty-five years later, Governor Winthrop Rockefeller commuted the sentences of fifteen offenders in Arkansas. Governor Toney Anaya commuted the death sentences of each of the five offenders on death row in New Mexico in 1986. Ohio Governor Richard Celeste extended clemency to eight offenders in 1991, but there were others on death row who stayed there. See Beau Breslin & John J. P. Howley, *Defending the Politics of Clemency*, 81 OR. L. REV. 231, 237 (2002); David A. Wallace, *Dead Men Walking — An Abuse of Executive Clemency in Illinois*, 29 U. DAYTON L. REV. 379, 381 (2004).

² To be precise, Governor Ryan commuted three prisoners' sentences to forty years and 164 to life without parole. He also pardoned several offenders whom he believed were erroneously convicted. Stephen P. Garvey, *Is it Wrong To Commute Death Row? Retribution, Atonement, and Mercy*, 82 N.C. L. REV. 1319, 1319 n.1 (2004). Notwithstanding these important pardons, I will nonetheless refer constantly throughout the piece to Governor Ryan's action here as a "blanket commutation."

³ See generally David Firestone, *Absolutely, Positively for Capital Punishment*, N.Y. TIMES, Jan. 19, 2003, Week in Review, at 5 (discussing the political uproar over the pardons); John McCarron, *New Era Trips Up Good Ol' George*, CHI. TRIB., Jan. 17, 2003, at 21 ("How to remember George Ryan? Was he St. George, who had the courage to slay our state's dragon of a death-penalty system? Or a latter-day Lucifer, who sold his previous office to gain the governor's mansion . . . only to lose the respect of history?").

⁴ See, e.g., Brian D. Crecente, *Owens Blasts Death Row Move on TV*, ROCKY MTN. NEWS, Jan. 14, 2003, at 3A (quoting Colorado Governor Bill Owens's characterization of the commutation as "an abuse of power"); Firestone, *supra* note 3 (reporting Senator Joseph Lieberman's characterization of the commutation as "shockingly wrong. . . . It did terrible damage to the credibility of our system of justice, and particularly for the victims. It was obviously not a case-by case review, and that's what our system is all about."); *Ryan Has Right on His Side, But He's About To Go Horribly Wrong*, CHI. SUN-TIMES, Jan. 12, 2003, at 29; Cal Thomas, *Departing Governor Flat-Out Wrong on Capital Punishment*, MILWAUKEE J. SENTINEL, Jan. 14, 2003, at 15A ("Ryan's decision is the type of decree usually associated with dictators."); George F. Will, *Unhealable Wounds*, WASH. POST., Jan. 19, 2003, at B7 (attributing to Governor Ryan a "cavalier laceration of the unhealable wounds of those who mourn the victims of the killers the state of Illinois condemned").

⁵ Ryan was indicted in a "bribes-for-licenses" scandal after he left office but allegations of corruption swirled around him during his last days in office. See *Ex-Illinois governor Ryan indicted*, CNN.COM, Dec. 17, 2003, at <http://www.cnn.com/2003/LAW/12/17/ryan.ap>.

⁶ See, e.g., Marie Cocco, *Hastert Can Help Cut Death Penalty Errors*, NEWSDAY, Jan. 16, 2003, at A35 (calling Governor Ryan "an unlikely oracle of moral wisdom"); Rod Dreher, *Gov. Ryan Did the Right Thing*, NAT'L REV. ONLINE (January, Jan. 13, 2003), at <http://www.nationalreview.com/dreher/dreher011303.asp> ("Ryan might be headed for prison himself he's leaving office today, and is under criminal investigation for possible corruption; but he did the right thing here."); *Nobel Matchup: Bono vs. Ryan*, CHI. TRIB., Feb. 26, 2003, §5 at 1 ("measur[ing] up" 2003 Nobel Peace Prize nominees Bono and Governor Ryan); William Raspberry, *Mugged by the Reality of Injustice*, WASH. POST., Jan. 20, 2003, at A23 ("Add the name of George Ryan to my short, short list of political heroes."); *The Ryan Campaign*, STOP CAPITAL PUNISHMENT NOW!, at <http://www.stopcapitalpunishment.org/ryan.html> (last visited Apr. 9, 2005) (advocating that Gov. Ryan receive the Nobel Peace Prize); cf. Mary Laney, *Time To Change Our Thinking on Capital Punishment*, CHI. SUN-TIMES, Jan. 4, 2003, at 15 (describing Governor Ryan's earlier moratorium on the death penalty as a "brave and just thing").

⁷ See, e.g., *A Colloquium on the Jurisprudence of Mercy: Capital Punishment and Clemency*, 82

surprisingly, not much of that discussion has critically analyzed whether Ryan's action was legitimate or appropriate. There are some notable exceptions.⁸ Professor Stephen Garvey, for instance, has argued that although the blanket commutation is defensible because it preserves the (admittedly remote) possibility of reconciliation between offender and survivors,⁹ it is nonetheless impossible to defend Ryan on retributivist grounds. He writes that “[f]or the devout retributivist, the mass commutation of death row is an unmitigated moral disaster.”¹⁰ Professor Robert Blecker, a retributivist advocate of the death penalty, went even further than Garvey, stating that the commutation, “[a]bove and beyond its cruelty and callousness, . . . was a morally indiscriminate act.”¹¹ Similarly, another scholar has called Ryan's blanket commutation a “grave injustice.”¹²

The point of this Article is to contest that position and to explain why a retributivist not only *can* but *should* accommodate the blanket commutation. This thesis entails two important consequences. First, and most simply and importantly, a retributivist defense of Ryan's commutation of death row augurs a retributivist critique of the death penalty itself.

Second, by exposing a retributivist embrace of both commutation and abolition, one helps alleviate the cramped interpretation of retributive justice that prevails in legal and scholarly discourse. Countless cases in the Supreme Court equate retributivism with revenge or the desire to make criminals suffer or both.¹³ Equally dispiriting, various commentators reflexively embrace this view, especially when trying to characterize their retributivist interlocutors.¹⁴ This, I

N.C. L. REV. 1279 (2004); Austin Sarat & Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life*, 56 STAN. L. REV. 1307 (2004); Robert Weisberg, *Apology, Legislation, and Mercy*, 82 N.C. L. REV. 1415, 1421 (2004).

⁸ But see Robert Blecker, *The Death Penalty: Where Are We Now?* 19 N.Y.L. SCH. J. HUM. RTS. 295, 303 (2003); Garvey, *supra* note 2; Wallace, *supra* note 1, at 379. Sarat & Hussain's piece, *supra* note 7, however, takes pains to call Ryan's actions “neither bold nor lawless” in light of the executive clemency power, but they do not undertake an extended philosophical critique of Ryan's actions or his critics. They instead situate clemency within a cultural practice of “legally sanctioned alegality.” Sarat & Hussein, *supra* note 1, at 1311 - 12.

⁹ Garvey, *supra* note 2, at 1341.

¹⁰ *Id.* (emphasis added). According to Garvey, “retributive justice obligates the state to punish an offender because and to the extent, but only to the extent, that he deserves to be punished. The punishment an offender deserves is in turn usually thought to be some function of his culpability or of his culpability combined with the harm he has caused. Either way, the state cannot shirk its obligation to do justice.” Garvey, *supra* note 2, at 1324 (citation omitted).

¹¹ Blecker, *supra* note 8, at 303.

¹² Wallace, *supra* note 1 at 379.

¹³ See, e.g., *Furman v. Georgia*, 408 U.S. 238, 343 (1972) (Marshall, J., concurring) (“Punishment as retribution has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance.”) (footnote omitted); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 189 (1963) (Brennan, J., concurring) (“To my mind that would be ‘punishment’ in the purest sense; it would be naked vengeance. Such an exaction of retribution would not lose that quality because it was undertaken to maintain morale.”); *Trop v. Dulles*, 356 U.S. 86, 112 (1958) (Brennan, J., concurring) (“But I cannot see that this [punishment] is anything other than forcing retribution from the offender--naked vengeance.”); *Morrisette v. United States*, 342 U.S. 246, 251 (1952) (identifying retribution with “retaliation and vengeance”); *In re Yamashita*, 327 U.S. 1, 41 (1946) (Murphy, J., dissenting) (“[A]n uncurbed spirit of revenge and retribution, masked in formal legal procedure for purposes of dealing with a fallen enemy commander, can do more lasting harm than all of the atrocities giving rise to that spirit.”).

¹⁴ See, e.g., JOHN BRAITHWAITE & PHILIP PETTIT, *NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* 2 - 5 (1990) (observing that from the perspective of utilitarian theorists, retribution is an “unscientific indulgence of revenge”); Douglas N. Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959, 971 - 73 (2000) (arguing that non-criminal wrongs warrant some degree of suffering); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1892 (1991) (“Retributive punishment thus is both an emotional expression of disgust and an exacting of commensurate revenge that is meant to satisfy moral notions about just deserts.”); Andrew Oldequist, *Retribution and the Death Penalty*, 29 U. DAYTON L. REV. 335, 340 (2003) (“We do not take the revenge out of judicial retribution--that cannot be done--but circumscribing and institutionalizing vengeance turns it into a moral

argue, is far too shallow and misleading an account of the meaning of retributive justice.

Properly understood, retributive justice explains, with reference to the political ideals undergirding a liberal democracy, why we *punish* mentally competent offenders for their *crimes*--as opposed to "treat" them or ignore them in search of cheaper measures of harm-reduction. Retributive justice is thus understood as the good achieved by the use of the state's coercive power to communicate certain ideals to an offender convincingly determined to have breached a legitimate legal norm. The social project of retributive justice possesses a good that has its own internal intelligibility and attractiveness, independent of what consequences follow.¹⁵ This view casts retributive justice in a more generous light, reducing the perception that it is part of a ceaseless quest to impose more and harsher punishment in the name of criminal justice. Thus, my task of defending the commutation of death row constitutes a chapter in a larger, unfolding project in which the public, the legislatures, the courts, and the academy come to appreciate the human face of retributive punishment and those who endorse it.¹⁶

Unfortunately, the antagonists to this enterprise are determined and many.¹⁷ But for many of these critics, their anxiety about retributivist theory is born of a virtual non-sequitur--for it is their position that a retributivist who gives a justification for *why* we have institutions of punishment also instructs society *how much* to punish and *what* to punish.¹⁸ But the *why* punish question

category. Justice is the blood descendant of vengeance."); *id.* at 343 ("Our retributive urges may be as universal and as demanding as the sexual urge, but they are also as emotional and non-rational as the sexual urge."); Edward Rubin, *Just Say No To Retribution*, 7 BUFF. CRIM. L. REV. 17, 41 (2003) (stating that philosophical arguments distinguishing retribution and revenge are likely to be ineffective because, in the public realm, "[t]he term retribution smolders with the spirit of revenge"); Antonin Scalia, *God's Justice and Ours*, 123 FIRST THINGS 17, 19 - 20 (2002) (discussing "the authority of a government to exact vengeance"). This tide is partly due to the famous influence of James Fitzjames Stephen's writings in the nineteenth century. See JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY 152 (R. J. White ed., Cambridge Univ. Press 1967) (1873) ("[T]he feeling of hatred and the desire of vengeance . . . are important elements of human nature which ought in such cases to be satisfied in a regular public and legal manner."); J.F. STEPHEN, GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 99 (London, McMillan 1983) (1863) ("The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite."); see also OLIVER WENDELL HOLMES, THE COMMON LAW 41 - 42 (Dover 1991) (1881) ("If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution.").

¹⁵ I explicate further the meaning of this idea, and in particular the justifications for its practice, in Part III. I should add here that pointing out a project's internal intelligibility and attractiveness does not itself obligate the fulfillment of the social project under all instances and circumstances.

¹⁶ Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421 (2004) [hereinafter Markel, *Against Mercy*]; Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157 (2001) [hereinafter Markel, *Are Shaming Punishments Beautifully Retributive?*]; Dan Markel, *The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States*, 49 U. TORONTO L.J. 389 (1999) [hereinafter Markel, *The Justice of Amnesty?*].

¹⁷ See, e.g., LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 294 - 317 (2002) (criticizing retributive thought); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003) [hereinafter WHITMAN, HARSH JUSTICE]; David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623 (1992); Rubin, *supra* note 14, at 20 - 21 (calling retributivism "conceptually incoherent, inconsistent with our basic theory of government" and responsible for "wildly disproportionate sentences and the uncontrolled expansion of the prison population"); Russ Shafer-Landau, *The Failure of Retributivism*, 82 PHIL. STUDIES 289 (1996); James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85 (2003) [hereinafter Whitman, *A Plea Against Retributivism*].

¹⁸ See, e.g., Dolinko, Whitman, Shafer-Landau, *supra* note 17; Rubin, *supra* note 14. To be sure, both Whitman and Dolinko recognize the difference between retributivist philosophers and the discourse of retribution in contemporary politics, but both tend to view the former as having a direct and malignant influence on the latter. See also David Dolinko, *Some Thoughts About Retributivism*, 101 ETHICS 537, 559 (1991) (stating that retributivism as a theory "bolster[s]

is distinct from the *how much* to punish question and there is no retributivist doctrine that states we should punish as much and as harshly as we seem to be doing in America today. This confusion arises because too often retributivists are viewed as adherents to *lex talionis*,¹⁹ which is often thought of as punishment in kind--a principle crudely associated with the Biblical phrase an eye for an eye, a tooth for a tooth.²⁰ But to the extent *lex talionis* is a principle,²¹ it is a sentencing principle of how and how much to punish someone, not a retributivist principle that answers why we punish.²² To be sure, there is some relationship between the questions why we punish and how much we punish and in what manner. Indeed, it would be hard to critique the death penalty from a retributivist perspective if it were otherwise. But to insist, as many critics do,²³ that retributivism must provide a comprehensive answer to what conduct should be prohibited and how much punishment should be imposed is mistaken. Instead, I argue that the relationship between the justification of punishment and the kind and amount of punishment is confined to a limited inquiry: whether our chosen means and quanta of punishment offend or comply with the animating reasons for *why* we punish, and whether the method used to punish has sufficed to discharge the *prima facie* duty to punish. In other words, the nature of the justification for punishment may constrain the range of responses a state may apply to a criminal, but it does not determine the sentencing outcome.

This Article tries to make sense of that limited relationship in the context of the death penalty. The argument thus unfolds in four parts. First, in Part II, I provide an overview of the criticisms of Governor Ryan's action. Specifically, I look at four kinds of allegations against Ryan's action: first, it constituted an unlawful anti-democratic abuse of power; second, it was a wrongful reliance on mercy; third, it demonstrated a callous derogation of the interests and desires of victims and their survivors; and finally, Ryan's action blithely disregarded the offenders' moral desert of capital punishment on account of their heinous crimes.²⁴

capital punishment and . . . encourage[s] an increasing reliance on imprisonment."); Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177 (1981) (characterizing retributivists as pro-death penalty).

¹⁹ E.g., Rubin, *supra* note 14, at 28 (contending that retribution, understood as the notion "that the criminal should be paid back for harm he did . . . inevitably suggests the famous *lex talionis*"); Shafer-Landau, *supra* note 17, at 299 ("The classic accompaniment to retributivism is *lex talionis*. *Lex* requires imposing a harm on a criminal identical to the one he imposed on his victim.").

²⁰ See *Numbers* 35:31; *Exodus* 21:23 - 25 ("And if any mischief follow, then thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe."); *Leviticus* 24:17 - 20 ("And he that killeth any man shall surely be put to death. . . . And if a man cause a blemish in his neighbour; as he hath done, so shall it be done to him. Breach for breach, eye for eye, tooth for tooth . . ."). See also HMMURABI'S LAWS 109 (M.E.J. Richardson trans., Sheffield Academic Press 2000) ("If a builder has built a house for a man and has not made his work strong enough and the house he has made has collapsed and caused the death of the owner of the house, that builder shall be killed. If it has caused the death of the son of the owner of the house, they shall kill that builder's son.").

²¹ As Blackstone famously observed "there are very many crimes, that will in no shape admit of [*lex talionis*] penalties, without manifest absurdity and wickedness. Theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery by adultery, and the like." 4 WILLIAM BLACKSTONE, COMMENTARIES *13. Jeremy Waldron has written the most sophisticated piece I have seen on *lex talionis*. See Jeremy Waldron, *Lex Talionis*, 34 ARIZ. L. REV. 25 (1992). There, Waldron deftly shows that *lex talionis* does not require inflicting the same exact treatment on the offender that the offender inflicted on his victim. Rather, Waldron argues, it requires the imposition of a relevantly similar deprivation. He concludes that *lex talionis* is neither necessarily tied to retribution nor to execution for murderers. *Id.* at 25 - 27.

²² For an example of an attempt to provide a retributivism-inspired theory of the criminal law, see, e.g., MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 88 (1997).

²³ E.g., Shafer-Landau, *supra* note 17, at 289.

²⁴ Of course, these concerns might arise for someone who does not identify as a retributivist, but I think these four concerns are predictable reactions from people who might identify with a retributivist perspective, at least under popular conceptions of what it means to be a retributivist.

Part III furnishes an account of retributive justice that is capable of illuminating its compatibility with a blanket commutation of death row. The account of punishment I offer there is called the Confrontational Conception of Retribution, or CCR. The CCR shows how the practice of punishment is internally intelligible because it instantiates the ideals of moral responsibility, equal liberty under law, and democratic self-defense. I should mention here that although my approach to retributive justice shares some core similarities with prior retributivist accounts, it differs from those accounts too, and thereby avoids some of the challenges brought by retributivism's recent critics.²⁵ For example, my approach does not rely on, and indeed rejects, "retributive hatred," a notion developed by Jeffrie Murphy in *Forgiveness and Mercy*.²⁶ Nor is it based on anger,²⁷ resentment,²⁸ or vengeance.²⁹ Nor does it rely upon the "root idea or metaphor . . . that transgression creates an imbalance that must be restored by the like suffering or privation of the wrongdoer."³⁰ Rather, the CCR is an attempt to locate retributive justice in the ideals of a rule-of-law-guided liberal democracy. Thus, to the extent that the account I offer is coherent and attractive, it frustrates the criticism that punishment qua retribution is merely a current manifestation of some atavistic or primitive impulse.³¹ Instead, we can show that it is bound up with our best understanding of how individuals and communities live well together.

Drawing on this account, I show in Part IV that retributive justice does justify a blanket commutation of death row. Specifically, the first, and most familiar, reason against executions centers on the concern for accuracy in meting

²⁵ I have in mind the recent attacks against retributivism found in Russell L. Christopher, *Detering Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843 (2002); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1225 - 1303 (2001); Rubin, *supra* note 14. See also Dolinko, *supra* note 17; Whitman, *supra* note 17.

²⁶ Jeffrie Murphy, *Hatred: A Qualified Defense*, in JEFFRIE MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 88 (1988).

²⁷ WALTER BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY 152 - 154 (1979) (exalting anger as "the passion that recognizes and cares about justice" because anger, which is central to retribution, "recognizes that only men have the capacity to be moral beings and, in doing so, acknowledges the dignity of human beings"); see also PETER A. FRENCH, THE VIRTUES OF VENGEANCE (2001); JEFFRIE G. MURPHY, GETTING EVEN: FORGIVENESS AND ITS LIMITS 17 - 26 (2003) (giving "two cheers for vindictiveness"); Robert C. Solomon, *Justice v. Vengeance: On Law and the Satisfaction of Emotion*, in THE PASSIONS OF LAW 123 (Susan Bandes ed., 1999); cf. Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER AND THE EMOTIONS 179, 210 (Ferdinand Schoeman ed., 1987) ("Where is that compassionate concern for others that is outraged because another person could have so unnecessarily caused such suffering?"); Roger Wertheimer, *Understanding Retribution*, CRIM. JUST. ETHICS, Summer/Fall 1983, at 19, 23 (observing that "wrongdoing can give us a right . . . to be angry" and "justify feelings of resentment, indignation, outrage, remorse, guilt, and the like").

²⁸ For the best discussion of punishment arising from resentment, or *ressentiment*, see FRIEDRICH WILHELM NIETZSCHE, ON THE GENEALOGY OF MORALS Ch. 11 (Walter Kaufmann & R.J. Hollingdale trans., Vintage Books 1989) (1887).

²⁹ For a defense of vengeance, see ROBERT C. SOLOMON, A PASSION FOR JUSTICE: EMOTIONS AND THE ORIGINS OF THE SOCIAL CONTRACT 41 (1990). *Id.* at 41 ("[Vengeance] is . . . a primal sense of the moral self and its boundaries. By denying the reality or the legitimacy of vengeance we deny this sense of the moral self and moralize away those boundaries of the self without which it makes no sense to talk about dignity or integrity Not to feel vengeance may therefore be not a sign of virtue but a symptom of callousness and withdrawal"); see also FRENCH, *supra* note 27; Solomon, *supra* note 27. A more muted endorsement of revenge can be found in William Ian Miller, *Clint Eastwood and Equity: Popular Culture's Theory of Revenge*, in LAW IN THE DOMAINS OF CULTURE 161 - 202 (Austin Sarat & Thomas R. Kearns eds., 1998).

³⁰ Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501, 1511 (2000).

³¹ I recognize of course that emotions are not always or simply impulses devoid of cognitive content. See generally MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS (2003) (arguing that emotions are forms of evaluative thought that encompass value judgments of the significance of things and persons in our moral lives). Nonetheless, I prefer to couch my account of retributive punishment in terms of relatively emotionally neutral political ideals, as described in greater detail in Part III.

out a punishment that forecloses error-correction. This argument rests upon a familiar retributive anxiety of avoiding the punishment of the innocent. Second, retributivism as a political account of punishment is understandably opposed to the distribution of a penalty imposed on the basis of morally arbitrary facts such as race of victim or intra-state geography. Because Ryan could easily demonstrate that certain offenders were being arbitrarily sentenced to death row, he was permitted to question how the institutions of criminal justice caused such systematic failures. In other words, although the culpability of an offender is decided case-by case, he is still entitled to a system that determines such culpability accurately and fairly.³² Even “if all 171 Illinois death row inmates were, in fact guilty, that did not mean that the broken system’s decision that they should die was one worthy of trust.”³³

Although these reasons are substantial enough to *permit* a blanket commutation, they may seem insufficient on their own, at least compared to the available alternative of searching case-by-case review, to *require* a blanket commutation (or more generally the abolition of execution). That’s because case-by case review could arguably provide a more narrowly tailored solution to reduce if not eliminate these concerns of accuracy and equity in particular cases. I address that criticism at length and then in Part V, I explain how these various arguments, and others, impinge on and counsel against the imposition of the death penalty itself.

The first of these arguments looks at how the death penalty forecloses the opportunity for an offender to internalize the moral ideals that animate retributive justice in the first place. The second argument addresses why retributivism’s concerns for accurate and fair distribution of punishment require a posture of modesty in punishment, and why this posture of modesty crumbles in the face of state execution. I then examine the relationship between retributive justice and human dignity and explain why that relationship ought to curtail any enthusiasm for capital punishment among retributivists.

Taken together, these arguments indicate why a blanket commutation of death row was justified on retributivist grounds and why abolition of capital punishment is appropriate. But prior to the conclusion, I also examine which arguments internal to the retributivist perspective adumbrated in Part III might counsel in favor of the death penalty. Here I tease out the complexities associated with considerations of deterrence and how a retributivist outlook might be required, at least in theory, to accommodate some of those concerns. I then consider the relevance of *lex talionis* and moral desert and how those factors affect the retributivist analysis of the death penalty.

In sum, the principles of retributive justice, as interpreted and developed in this Article, offer a strong justification for Governor Ryan’s decision to commute death row. They also strongly support, if not require, the abolition of the death penalty itself.

Providing a retributivist defense for Governor Ryan’s actions speaks not only to moral truth (as I see it), but also to pragmatic politics. My naive and audacious hope is that this retributivist reasoning may embolden executive office-holders to take the same actions Ryan did because they will be better able to explain their actions to a potentially skeptical or resistant public. It may also help spur more legislative moratoria on the death penalty and more conversations about its proper place in a liberal democracy committed to securing the conditions for human flourishing. In a climate in which politicians often have their fingers to the wind, and their ears to the mouths of their pollsters, it is vital that defenders of anti-death penalty positions have

³² Cf. *Furman v. Georgia*, 408 U.S. 238 (1972) (halting death penalty usage because processes were constitutionally defective).

³³ Lawrence Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 579 (2004).

retributivist arguments on which to rely.³⁴ Although the argument here is not designed to create talking points for abolitionist agendas, I don't want to pretend that the argument could not service such politics. But my more immediate, albeit challenging, goal is to help realize the prospect of putting a human face on retributive punishment.

II. WHAT'S WRONG WITH A BLANKET COMMUTATION OF DEATH ROW?

As I mentioned in the Introduction, there are at least four criticisms one can make against a blanket commutation, each of which might be shared by people who self-identify as retributivist in outlook, although some of these criticisms would be made by people embracing different theories of punishment as well. The first challenge is basically about legal authority--and it argues that the blanket commutation constituted an anti-democratic abuse of power that has the effect of undermining the credibility of the legal system. The second argument contends that Ryan mistakenly relied on mercy in justifying his decision to issue a blanket commutation. The third criticism of Ryan claims that a blanket commutation undermines the state's commitment to the interests and well-being of victims and survivors. Finally, the fourth argument contends that the blanket commutation was wrong because it precluded the opportunity for imposing upon offenders a punishment that they deserve due to the wickedness of their crimes. Each of these criticisms is amplified below, and even more is said about each in Parts IV and V.

A. *An Unlawful Abuse of Power*

After Ryan announced his commutation of death row, Senator Joseph Lieberman called the commutations "an abuse of power" that was "shockingly wrong. . . . It did terrible damage to the credibility of our system of justice, and particularly for the victims. It was obviously not a case-by case review, and that's what our system is all about."³⁵ Various Illinoisans echoed this view. For example, Governor Blagojevich, Ryan's successor, said "there is no one-size fits all approach to this."³⁶ Illinois State Senator William Haine went further, stating that by issuing a blanket commutation Ryan "may have irreparably injured the law itself."³⁷ I understand this critique as being friendly toward a blanket commutation if there had been a determination that each sentence contained some defect. What was unacceptable, from this perspective, was Ryan's conclusion that the sentences should be modified because they were *all* the product of a broken system that caused too many errors.

Related to this claim is the concern that a blanket commutation is "explicitly, even exuberantly, anti democratic."³⁸ This argument can be understood in two ways. First, the death penalty had the imprimatur of the state legislature, whose laws permitted the use of capital punishment. By commuting

³⁴ See, e.g., Garvey, *supra* note 2, at 1330 ("Governors may find mercy as equity to be the most politically appealing and safe basis on which to grant clemency to a particular death-row inmate"); Daniel T. Kobil, *How To Grant Clemency in Unforgiving Times*, 31 CAP. U. L. REV. 219, 221 - 28 (2003).

³⁵ Firestone, *supra* note 3 (reporting Senator Joseph Lieberman's characterization of the commutation).

³⁶ *Reactions to Death Row Commutations*, CNN.COM, Jan. 12, 2003, at <http://www.cnn.com/2003/LAW/01/12/deathrow.quotes>.

³⁷ Steve Whitworth, *Haine Enraged by Governor's Move*, TELEGRAPH (Alton, Ill.), Jan. 12, 2003, at A1, available at <http://www.stopcapitalpunishment.org/coverage/44.html>.

³⁸ Will, *supra* note 4, at B7; see also Sarat & Hussain, *supra* note 7, at 1308 - 09 (listing criticisms of Ryan's clemency, including the undermining of democracy and the undercutting of the law).

all of the death sentences, Ryan subverted the popular sovereign will. Professor Wallace, for instance, claims that Ryan abused his power because he “used the executive clemency power in a manner in which it was never intended to be used: to circumvent the legislative process” that decides “whether the state should have capital punishment.”³⁹ Second, Ryan’s actions could be understood as anti-democratic because they usurped the power of the jury as a democratic voice in the system.⁴⁰ Many, if not all, of the death sentences were predicated on a jury finding that capital punishment was warranted. By thwarting the people’s will to execute, Ryan’s decision, for some, undermined the retributivist commitment to let institutions of popular self-government effectuate an appropriate punishment for each crime.

B. *Improper Reliance upon Mercy*

Commentators like Professor Stephen Garvey have said that, from a retributivist perspective, Ryan improperly relied on mercy to justify his decision.⁴¹ During the speech he gave to defend his decision, Ryan, quoting Abraham Lincoln, said, “‘I have always found that mercy bears richer fruits than strict justice.’ I can only hope . . . that will be so.”⁴² The idea of mercy bearing richer fruits than strict justice is an intriguing one in part because it is somewhat enigmatic. Garvey claims that mercy can be understood in two ways from a retributivist perspective.⁴³ First, for purposes of this discussion, the remission of punishment in mercy’s name can be understood (somewhat crudely) as an *imperfect obligation*, that is, as a virtue to be exercised from time to time on account of compassion for offenders who have some redeeming characteristic unrelated to the offender’s choice to commit the offense.⁴⁴ Alternatively, mercy can be understood as a remission of punishment in whole or in part due to an *equitable* consideration that addresses the offender’s culpability or desert.⁴⁵ Garvey believes that Ryan’s action was incompatible with both conceptions of mercy and was therefore improper from a retributivist perspective.⁴⁶ Let me elaborate.

1. *Mercy as Imperfect Obligation*

One way to view mercy is as a remission of punishment--in this case, the executive grant of clemency--to an offender based on compassion for some trait or action of the offender, such as his remorse during his period of incarceration or his prior heroism in battle. I will, following Garvey, call this kind of compassion-based mercy “mercy as imperfect obligation.” As Garvey explains, not everyone ought to benefit from this kind of mercy. Rather, to be mercy-

³⁹ Wallace, *supra* note 1, at 392.

⁴⁰ See Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311 (2003) (arguing that juries’ voices should be regarded as an instrument of democratic will and given greater powers to sentence directly); Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1776 (1999).

⁴¹ Garvey, *supra* note 2.

⁴² George H. Ryan, Remarks at Northwestern University College of Law (Jan. 11, 2003) (transcript available at <http://www.law.northwestern.edu/news/spring03/ryanspeech.html> and at <http://www.cuadp.org/20030111ryan.html>).

⁴³ Garvey, *supra* note 2, at 1325.

⁴⁴ *Id.* at 1330 - 31.

⁴⁵ *Id.* at 1328 - 29.

⁴⁶ *Id.* at 1335. To be clear, Garvey does not endorse the retributivist critique he constructs of Ryan’s decision. Rather, he argues that retributivist theories of mercy cannot justify Ryan’s actions, and then defends Ryan’s actions on the basis of his “punishment as atonement” thesis. *Id.* at 1335 - 38.

eligible, an offender must possess some feature or have performed some deed of a redeeming nature.⁴⁷ Moreover, according to Garvey and others, compassion-based mercy is an imperfect obligation: it is an obligation we must undertake only from time to time and only for those offenders who are mercy-eligible.⁴⁸ One should therefore not be merciful *all* the time and to *every* offender who is mercy-eligible. To be sure, this conception of mercy does not encompass all the reasons one might extend mercy.⁴⁹ Nonetheless, even when mercy is restricted by the conditions mentioned above, Garvey argues that Ryan cannot rely on this conception of mercy to justify his blanket commutation.

2. *Mercy as Equity*

An alternative way to understand the criticism of Ryan is to think of mercy as “equity.” Mercy as equity is a remission of punishment, in part or in whole, that acts as a “remedial mechanism” to correct unjust results, such that it serves as “justice . . . unmediated by rules.”⁵⁰ Mercy as equity may occur, for example, when the executive grants clemency to an offender because the law of rules has failed to produce the just result.⁵¹ The law of rules may not have reached the just result for one of two reasons: first, the rules themselves tend to be either over-inclusive or under-inclusive, and thus cannot account for the unique aspects of a particular crime and/or a particular offender. Alternatively, the rules were not followed properly, such as when a prosecutor fails to turn over exculpatory material to the defense,⁵² and that becomes known, say, only after all direct and collateral avenues of judicial review have been exhausted. In both cases, mercy as equity is desirable, according to Garvey, because it remedies the apparent injustice caused by both rule-following and rule-flouting.⁵³ For Garvey, the tension between mercy and retributive justice is dissolved when mercy is understood as equity.⁵⁴

3. *The Implications of Mercy for a Blanket Commutation*

With these two definitions of mercy in mind, let me at the outset concede that to the extent Ryan justified his actions by relying on the discourse of mercy as an imperfect obligation, this constituted an improper use of mercy from a retributivist perspective. Ryan’s decision should not be defended on the grounds that mercy is an imperfect obligation. First, it is doubtful that such mercy is conceptually part of the retributivist worldview in the realm of criminal law.⁵⁵

⁴⁷ *Id.* at 1331.

⁴⁸ *Id.*; George Rainbolt, *Mercy: In Defense of Caprice*, 31 *NOÛS* 226, 226-241 (1997); George Rainbolt, *Mercy, Justice and the Death Penalty* (May 19, 2003) (unpublished manuscript, on file with author).

⁴⁹ For example, some sovereigns extend mercy to some or all offenders when the Christmas season or Bastille Day approaches. See WHITMAN, *HARSH JUSTICE*, *supra* note 17, at 93.

⁵⁰ Garvey, *supra* note 2, at 1328.

⁵¹ See generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 *U. Chi. L. Rev.* 1175, 1175 - 76 (1989).

⁵² Garvey, *supra* note 2, at 1326.

⁵³ *Id.* at 1326 - 28.

⁵⁴ *Id.* at 1328 (“[M]ercy’s dilemma disappears.”). In an earlier work, Garvey noted the problem of “treating mercy as if it were simply a species of equity” because doing so “erroneously reduces mercy to justice. Individualization alone . . . is an inadequate account of mercy.” Stephen P. Garvey, “*As the Gentle Rain from Heaven*”: *Mercy in Capital Sentencing*, 81 *CORNELL L. REV.* 989, 1041 (1996).

⁵⁵ Mercy as imperfect obligation is problematic for the reasons set out in, among other places, Markel, *Against Mercy*, *supra* note 16. In that piece I tried to show how the unreviewable sites for mercy that exist within our constitutional structure pose fundamental threats to an underlying commitment to equal liberty under law, thus undermining not only retributivist notions of

Second, even if mercy as an imperfect obligation were something retributivists could accommodate, as Professor Garvey suggests, the blanket commutation by Ryan would be improper for the two reasons Garvey outlines. First, the blanket commutation fails to determine whether an offender is mercy-eligible, i.e., that there was some contrition or heroism or other countervailing feature of the offender that warranted compassion-based mercy.⁵⁶ Second, the blanket commutation causes too much mercy, and therefore too little justice.⁵⁷ For this second argument to work, one has to accept Garvey's claim that mercy as a virtue is to be practiced only from time to time, because it inherently creates friction with notions of equality and justice. If that premise is granted, the blanket commutation is wrong because it erodes the idea that mercy as imperfect obligation should be extended only from time to time and not to all people on death row.⁵⁸

The more challenging question, of course, is whether mercy as equity could justify a blanket commutation of death row. Ryan defended his action by claiming that the "capital system is haunted by the demon of error--error in determining guilt, and error in determining who among the guilty deserves to die."⁵⁹ Garvey says this global grant of clemency is wrong because it "extends to everyone on death row, not just to those who can credibly claim to have been victims of some injustice."⁶⁰ This argument, like Professor Blecker's claim that the commutation was "morally indiscriminate," tracks Senator Lieberman's complaint that the blanket commutation by Ryan was an "abuse of power" that damaged the credibility of our system of justice because such a blanket commutation offends the notion of case-by case review. Garvey concluded that mercy as equity cannot justify blanket commutations of death row from a retributive perspective, and that instead, to justify the blanket commutation, one should turn to his theory of punishment as atonement.⁶¹ In this Article, I am not especially interested in challenging Garvey's defense of the commutation in

justice, but also liberal ones. As a result, I criticized mercy in the public sphere of criminal law, though I also recognized its potential as a separate moral good in the private realm. I offer a more detailed critique of Garvey's particular analysis in Dan Markel, *Prof. Garvey on Mercy and Retribution: A Comment* (April 30, 2005)(unpublished manuscript, on file with author).

⁵⁶ Garvey, *supra* note 2, at 1331.

⁵⁷ *Id.* at 1334.

⁵⁸ Parenthetically, one could imagine framing the blanket commutation of death row as consistent with the "only from time to time" restriction of the imperfect obligation of mercy. If offenders on death row are viewed as merely one site among many in which mercy as an imperfect obligation can be extended, then Ryan did not extend a blanket commutation to all prisoners, but rather just to those on death row. However, even if reframing Ryan's action this way were acceptable, Garvey would still disagree with the blanket commutation because there was no prior determination that someone was mercy-eligible.

⁵⁹ Ryan, *supra* note 42.

⁶⁰ Garvey, *supra* note 2, at 1329.

⁶¹ *Id.* at 1341. As a result of his rejection of retributive notions of mercy, Garvey refers us to his theory of "punishment as atonement," according to which theory the blanket commutation is justified because it preserves the possibility of reconciliation between offender and victim or survivor. For Garvey, this is significant because he places the possibility of reconciliation and right-relation between offender and victim at the heart of his theory of "punishment as atonement." See generally Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801 (1999). Although Garvey doesn't explicitly embrace the language of restorative justice, his theory of punishment as atonement shares some similar commitments about the kind of relationship between offender and victim that punishment should strive to cultivate. On right-relation and restorative justice generally, as well as a powerful critique thereof, see ANNALISE ACORN, *COMPULSORY COMPASSION: A CRITIQUE OF RESTORATIVE JUSTICE* (2004). See also Erik Luna, *Introduction: The Utah Restorative Justice Conference*, 2003 UTAH L. REV. 1; Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 227 - 302; Dan Markel, *The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States*, 49 U. TORONTO L.J. 389 (1999); Paul Robinson, *The Virtues of Restorative Processes, The Vices of "Restorative Justice,"* 2003 UTAH L. REV. 375; Robert Weisberg, *Restorative Justice and the Dangers of "Community,"* 2003 UTAH L. REV. 343 (commenting on the "danger" the restorative justice movement poses).

terms of atonement, although it does raise interesting questions.⁶² Rather the ambition of the Article, at least in part, is to explain why Garvey's predicate--that the language and ideas of retributive justice must be abandoned to justify Ryan's action--is mistaken.

C. *The Significance of Victim Interests*

The next criticism of Governor Ryan to consider is that his blanket commutation made a "mockery of murder victims"⁶³ and impinged on the rights or interests of victims and their survivors.⁶⁴ Richard Devine, the Cook County State's Attorney, characterized Ryan's action as "stunningly disrespectful to the hundreds of families who lost their loved ones to these Death Row murderers."⁶⁵ Ryan, according to Devine, "ripped open the emotional scabs of these grieving families."⁶⁶ This language soon became familiar. George Will wrote that Ryan's actions constituted a "cavalier laceration of the unhealable wounds of those who mourn the victims of the killers the state of Illinois condemned."⁶⁷ On this view, the wounds of victims and their survivors are so stark, their anguish so palpable, that there is no place to question the use of the death penalty. For example, after Ryan had begun hearings on the use of clemency to fix the death penalty, one of the Chicago newspapers published an editorial urging the end of the hearings: the "agony [apparent from the victims' testimony] does not by itself certify a convict's guilt, but it does reiterate why Illinois citizens, through their elected representatives, have enacted and sustained capital punishment."⁶⁸

Austin Sarat describes this phenomenon more generally: "The desire to experience a direct, immediate, passionate connection to the suffering of the criminal fuels the victims' rights movement. Only when victims become agents in the suffering of the people responsible for their own suffering is a kind of social equilibrium reached."⁶⁹ Similarly, William Ian Miller argues that "[t]he notion of paying back . . . makes no sense unless the victim or his representative is there to hit back. Under this paradigm . . . [t]he focus is . . . [on the victim's] obligation to repay the wrong done to him by retaliating against either the wrongdoer or someone closely connected to him."⁷⁰ According to this view,

⁶² I note only that the "punishment as atonement" thesis must somehow deny the relative significance of Garvey's statement that "surely some [offenders] deserve the sentence they received, if anyone ever does." Garvey, *supra* note 2, at 1329. If we understand Garvey to be saying that the death penalty can be deserved, he has to explain how it is preferable to place atonement and the reconciliation of offender and surviving family above desert. (There is also a separate question regarding whether an offender can achieve a measurable amount of atonement and reconciliation while the offender is on death row awaiting execution.) By contrast, Garvey's careful phrasing may lend itself to the suggestion that no one ever deserves the death penalty. But if that were true, why would a retributivist committed to seeing "just deserts" oppose the commutation?

⁶³ Sarat & Hussain, *supra* note 7, at 1309 (describing this criticism).

⁶⁴ See Claire O'Brien, *Ryan: Life over Death: Over Protests of Victims' Families, Governor Commutes All Sentences*, S. ILLINOISAN, Jan. 12, 2003, at 5A, available at <http://www.stopcapitalpunishment.org/coverage/45.html>.

⁶⁵ Maurice Possley & Steve Mills, *Clemency for All*, CHI. TRIB., Jan. 12, 2003, at 1.

⁶⁶ *Id.*

⁶⁷ See Will, *supra* note 4, at B7.

⁶⁸ Editorial, *Halt the Anguish, Gov. Ryan*, CHI. TRIB., Oct. 20, 2002, at 8.

⁶⁹ Austin Sarat, *Putting a Square Peg in a Round Hole: Victims, Retribution and George Ryan's Clemency*, 82 N.C. L. REV. 1345, 1352 (2004).

⁷⁰ William Ian Miller, *Clint Eastwood and Equity: Popular Culture's Theory of Revenge*, in *LAW IN THE DOMAINS OF CULTURE* 161, 167 (Austin Sarat & Thomas R. Kearns eds., 1998); see also WENDY KAMINER, *IT'S ALL THE RAGE: CRIME AND CULTURE* 75 (1995) ("To a victim, the notion that crimes are committed against society, making the community the injured party, can seem both bizarre and insulting; it can make them feel invisible, unavenged, and unprotected."); *Iran Desert Vampire Executed*, BBC NEWS, Mar. 16, 2005, at http://news.bbc.co.uk/1/hi/world/middle_east/4353449.stm (describing public execution of serial

then, by failing to hit back at the murderers with force similar to that used on the victims, the state “let the murderers off the hook.”⁷¹

D. Moral Desert and Capital Punishment

Finally, someone who supports the death penalty (at least for the serious crime of murder) may believe that the death penalty is what some murderers, i.e., the worst of the worst, deserve by dint of their wrongdoing.⁷² Deserved punishment lies at the center of virtually all theories of retribution. Accordingly, courts and commentators commonly justify the death penalty in the language of retributive justice.⁷³ One commentator has said that “[c]apital punishment hardly seems too harsh for someone who brutally murders a woman who is nine-months pregnant and then cuts her unborn baby from her womb and then

murderer in Iran involving slow strangulation, stabbing by family members of victims and repeated flogging).

⁷¹ O’Brien, *supra* note 64, at 5A.

⁷² See generally WALTER BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY 144, 152, 154 (1979); Robert Blecker, *The Death Penalty: Where Are We Now?*, 19 N.Y.L. SCH. J. HUM. RTS. 295, 304 (2003) (describing “retributivist advocates” as “disgusted” by “abolitionists for their moral insensitivity”); Igor Primorac, *On Capital Punishment*, 17 ISR. L. REV. 133, 138 (1982) (arguing the death penalty is the proportionate penalty for murder); Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1669 (1986) (“[Execution] is . . . the only fitting retribution for murder I can think of.”); see also Leon Pearl, *A Case Against the Kantian Retributivist Theory of Punishment*, 11 HOFSTRA L. REV. 273, 301 (1982) (“The death penalty has always been considered a standard example of retributive justice; there is no other punishment that can be inflicted on a murderer that could possibly be proportionate to his crime.”) (citation omitted).

⁷³ This is a presumption articulated frequently (though wrongly, to my mind) by the Supreme Court. See *Roper v. Simmons*, 125 S. Ct. 1183, 1196 (2005) (“[T]here are two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes by prospective offenders.”) (internal quotation marks omitted); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (“We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty.”); *Ring v. Arizona*, 536 U.S. 584, 614 (2002) (Breyer, J., concurring in the judgment) (“I am convinced . . . that retribution provides the main justification for capital punishment”); *Harris v. Alabama*, 513 U.S. 504, 518 (1995) (“[T]he interest that we have identified as the principal justification for the death penalty is retribution: ‘[C]apital punishment is an expression of society’s moral outrage at particularly offensive conduct.’”) (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)); *Gregg v. Georgia*, 428 U.S. 153, 184 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (defining retribution as “an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death”); *State v. Wilson*, 413 S.E.2d 19, 25 (S.C. 1992) (justifying the execution of a mentally ill offender because the “penological goal of retribution is served by this sentence”); see also Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court’s Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1156 (2003) (“Indeed, in the death penalty context, where discussions of retribution are prominent, the tendency to conflate retribution with other justifications for punishment, with which it has historically been associated, has generated considerable confusion.”); Carol Steiker & Jordan Steiker, *Abolition in Our Time*, 1 OHIO ST. J. CRIM. L. 323, 335 (2003) (“The central justification for the death penalty in the modern era has been retribution.”).

Interestingly, in his concurring opinion in *Furman v. Georgia*, Justice Brennan wrote that retribution is not the goal of the death penalty: “As the history of the punishment in this country shows, our society wishes to prevent crime; we have no desire to kill criminals simply to get even with them.” 408 U.S. 238, 305 (1972) (Brennan, J., concurring). Chastising the States, he also wrote that “[a]lthough it is difficult to believe that any State today wishes to proclaim adherence to ‘naked vengeance,’ the States claim . . . that death is the only fit punishment for capital crimes and that this retributive purpose justifies its infliction.” *Id.* at 304 (citations omitted). As Mary Sigler correctly notes, Brennan’s claims are both factually and conceptually problematic. Factually, there is little support for Brennan’s claim that the nation is not interested in vengeance. “More importantly, it mistakenly characterizes retribution as a desire to ‘get even,’ a desire more properly associated with revenge.” Sigler, *supra*, at 1179. As explained below, revenge is a very different animal from retribution. See *infra* text accompanying notes 132 - 134.

murders two-out-of-three of her children so that they can't be witnesses against them."⁷⁴ Hence, according to family members and advocates for victims, by issuing a blanket commutation of the death row inmates Ryan "let murderers off the hook."⁷⁵

This critique finds its modern genesis in the work of Immanuel Kant. Kant advocated the death penalty for murderers and saw the duty to execute every last murderer, even as a society disbands, as a moral obligation.⁷⁶ Kant--in an all-too-familiar passage--wrote that even if "civil society were to be dissolved by the common consent of all its members (e.g., if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining would first have to be executed, so that each has done to him what his deeds deserve"⁷⁷ The obligation to execute the murderer exists so that "blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in this public violation of justice."⁷⁸ That position would appear to counsel against any commutation to life imprisonment.⁷⁹

Looking at these accusations, one can see how commuting all death sentences appears problematic from a retributivist perspective. Ryan's blanket commutation of death row appears to have been an improper extension of mercy that lacked support from both the representative democratic institutions as well as victims in large part because it ruptured the settled intuitions of many people that the appropriate punishment for murderers, or at least the worst of murderers, is execution. Taken together, Ryan's actions seem, at first glance, untenable as a matter of retributive justice. The popular thirst for *lex talionis*, or striking back in kind at the offenders of these heinous crimes, is sometimes thought to be at the heart of retribution. Indeed, as I suggested earlier, various Justices on the Supreme Court have reinforced this view on numerous occasions by lumping together retribution and naked vengeance.⁸⁰ But what they are drawing on proves to be a faulty conception of what retribution is and what it does. For that reason, I want now to explore in further detail what retributive justice is in its most attractive and plausible version so that Parts IV and V can demonstrate why these criticisms of Ryan's actions are misplaced.

III. THE CONFRONTATIONAL CONCEPTION OF RETRIBUTION

Garvey provides a familiar, though problematic, description of retributive justice. Drawing on traditional notions of retribution, Garvey explains that,

⁷⁴ Wallace, *supra* note 1, at 392.

⁷⁵ O'Brien, *supra* note 64, at 5A.

⁷⁶ See, e.g., IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 142 -43 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797).

⁷⁷ *Id.* at 142.

⁷⁸ *Id.* Views of a similar flavor can be found in BERNIS, *supra* note 72, at 164 - 68, and Ernest van den Haag, *supra* note 72, at 1669 ("[Execution] is . . . the only fitting retribution for murder I can think of.").

⁷⁹ Perhaps surprisingly, Kant is not always so categorical on the absolute duty to punish. He writes that executive prerogative would allow the state to waive punishment of a criminal for crimes against the state, such as treason. See, e.g., KANT, *supra* note 76, at 145. And in his other writings, excluding the *RECHTSLEHRE*, or Part I of the *METAPHYSICS OF MORALS*, Kant shows an appreciation for deterrence. See B. Sharon Byrd, *Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution*, 8 *LAW & PHIL.* 151 (1989) (viewing Kant as a mixed theorist); Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 *COLUM. L. REV.* 509, 509, 513 (1987) (cataloguing these inconsistencies and arguing that Kant has authored not a theory of punishment, but a "random (and not entirely consistent) set of remarks--some of them admittedly suggestive--about punishment") (emphasis omitted).

⁸⁰ See authorities cited *supra* note 13.

[r]etributive justice obligates the state to punish an offender because and to the extent, but only to the extent, he deserves to be punished. The punishment an offender deserves is usually thought to be some function of his culpability or of his culpability combined with the harm he has caused. Either way, the state cannot shirk its obligation to do justice.⁸¹

One might fairly quibble with certain aspects of this description of retributive justice,⁸² but this description of retributive justice's features is one that is well-recognized.⁸³ Underlying this standard description is the intuition that imposing punishment for legal offenses is a self-evidently attractive obligation.⁸⁴ Note, however, that it does not explain to a skeptic why one should embrace the project of pursuing retributive justice as a common social endeavor.

That's because this standard account does not unpack the claim that an offender deserves to be punished: by virtue of what can it be said that he deserves this punishment? Imagine offender Jack. Not everyone will agree with the claim that the state should punish Jack because he committed some form of wrongdoing.⁸⁵ Others may not even accept the basic claim that Jack deserves punishment. Instead, they might advocate some form of rehabilitative "treatment."⁸⁶

There is a rich philosophical literature about the nature of desert.⁸⁷ My sense is that moral desert is an inadequate starting point from which one should think about why institutions of punishment in liberal democracies should be created.⁸⁸ As a result, I try to re-assess the idea of desert to explain why a person should be punished by the state for his or her criminal wrongdoing. What is it about Jack's past offense that entails the state's prima facie right and obligation to punish him?

In the past, retribution theorists asserted that "the fact that a person has committed a moral offence provides a sufficient reason for his being made to suffer."⁸⁹ This understanding of retribution as a purely interpersonal moral doctrine has waned over time, though it remains a vital trope in popular incarnations.⁹⁰ Against this claim, one could reasonably argue that just because Jack committed wrongdoing does not permit Jill to punish him.⁹¹ But skeptics

⁸¹ Garvey, *supra* note 2, at 1324 (footnotes omitted).

⁸² For example, some might argue that the obligation to punish is not absolute, but rather is one that is balanced against obligations of other social importance.

⁸³ Michael Moore, for example, has defined retributivism as the "view that punishment is justified by the moral culpability of those who receive it." Moore, *supra* note 27 at 179. For Moore, moral culpability is the same as desert. *Id.* at 181.

⁸⁴ Robert Blecker is one of the retributivists who relies on retributivist intuitionism. *See, e.g.*, Robert Blecker, *Rethinking the Death Penalty: Can We Define Who Deserves Death?*, 24 PACE L. REV. 107, 181 - 82 (2003) (asserting that "the 'worst of the worst' are real and can be known and that we can, and must, identify and execute them as soon as possible").

⁸⁵ *See, e.g.*, Dolinko, *supra* note 17, at 1627.

⁸⁶ *E.g.*, TED HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 81 - 89 (1969); Henry Weihofen, *Punishment and Treatment: Rehabilitation*, in THEORIES OF PUNISHMENT 255, 255 - 61 (Stanley E. Grupp ed., 1971).

⁸⁷ *See, e.g.*, Russ Shafer-Landau, *Retributivism and Desert*, 81 PAC. PHIL. Q. 189, 189 n.1 (2000) (providing citations to the relevant philosophical literature).

⁸⁸ I say more about this literature in Dan Markel, *Ex Ante Retributivism* (April 30, 2005)(manuscript on file with the author). For a useful overview of the literature on desert, and an extensive bibliography on the topic, see Owen McLeod, *Desert*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY, at <http://plato.stanford.edu/entries/desert> (last visited Mar. 29, 2005).

⁸⁹ C.W.K. Mundle, *Punishment and Desert*, 4 PHIL. Q. 216, 221 (1954).

⁹⁰ Consider the academic defenders of revenge such as Robert Solomon and William Ian Miller. *See sources cited supra* note 29. In popular culture, revenge movies are continually popular. *See, e.g.*, IN THE BEDROOM (Miramax Films 2001); UNFAITHFUL (20th Century Fox Film Corp. 2002); MONSTER'S BALL (Lions Gate Films 2001); KILL BILL: VOLUME I (Miramax Films 2003); KILL BILL: VOLUME II (Miramax Films 2004).

⁹¹ Dolinko, *supra* note 17, at 1630; *see also* Kaplow & Shavell, *supra* note 25, at 1233 n.668 ("[I]t does not follow from the fact that the criminal acted wrongly--and, following Kant's view,

of retribution have a harder time rebutting the claim that punishment is warranted when, in a liberal democracy, the state has outlawed certain behavior and the punishing institution is the state (not Jill).⁹² While that contention still needs to be defended (and I offer a defense below), it is less susceptible to the critique that skeptics like David Dolinko make against retributivism as a justification for the institutions of punishment.

A. *The Animating Principles of Retributive Justice*

The account of punishment I offer, which I call the Confrontational Conception of Retribution, or CCR,⁹³ does not rely on moral desert as the rationale for its justification. Rather, it is fidelity to three other principles that have broader acceptance as specifically, though not necessarily only, political ideals: first, moral accountability for unlawful actions; second, equal liberty under law; and third, democratic self-defense.⁹⁴ On this view, punishment is attractive because it effectuates certain ideals that are widely understood and embraced by citizens of complex liberal democracies such as ours.⁹⁵ Conversely, when a liberal democracy fails to create credible institutions of criminal justice, it undermines our commitment to these principles, though not under all circumstances.

What's important to see, however, is that the good achieved by punishment for an offense is not a contingent good, such as general deterrence. Rather, it is bound up in the practice of punishment itself, so that the practice of punishment has an internal good, and the achievement of that good makes the practice internally intelligible and attractive.⁹⁶ Equally important, the account of retributive justice that I offer below explains why the state, rather than the victim or her allies, must be the agent imposing punishment.

1. *Moral Responsibility for Unlawful Behavior*

thereby willed that his maxim be adopted universally—that the state acts rightly, rather than committing a further wrong, in imposing punishment.”).

⁹² Cf. GEORGE SHER, *DESERT* 3 (1987) (stating that if wrongdoers deserve punishment “it is at least permissible for suitably situated persons to punish them”).

⁹³ I explain why this is called the “confrontational” conception of retribution in Section E.Part III.C, *infra*.

⁹⁴ As revealed in the footnotes that follow, the work of Herb Morris, Jean Hampton, and Jeffrie Murphy has contributed substantially to the development of this account. While the account offered here draws on their work, it differs in several significant respects, such as by emphasizing the political and institutional dimension to punishment and by expressly incorporating an *ex ante* viewpoint. That said, it is not my intention here to explain in great detail where this account of retribution draws upon and departs from previous accounts. I save that task for a separate project, Dan Markel, *Ex Ante Retributivism*, *supra* note 88. Rather, I seek here to apply the account I have thus far developed to the question of Ryan’s commutation of death row, and to the death penalty more generally.

⁹⁵ To be sure, our commitment to these principles is bound up in some sense with how we determine an offender’s culpability in particular cases. Two criteria must be satisfied for these commitments to be credible: first, an insistence on *mens rea* and mental competence; and second, attention to whether the action was excused or justified under the particular circumstances. Self-defense, duress, or necessity may have actuated the offense, or provocation may mitigate its severity. See, e.g., MODEL PENAL CODE §§ 2.09, 3.02, 3.04 (1962). Call these the culpability and context criteria, respectively.

⁹⁶ Here I should note that my account doesn’t resolve the “infinite regress” problem because ultimately one could ask why one should embrace equal liberty under law, or moral responsibility, or democratic self-defense. These ideals, I believe, are more deeply held than the view that desert is a self-executing concept, and thus I think it is a more successful strategy to explain the practice of retribution as partaking of those ideals, rather than of desert, which is more problematic.

Retribution for legal wrongdoing is justified in part because it expresses our belief in the dignity of the offender by treating him as a responsible moral agent and communicating that belief to him.⁹⁷ When we credibly attempt to punish an offender who knows, or reasonably should have known, that it was illegal to have stolen, raped, or murdered, we are trying to tell him that his actions matter to this community constituted by shared laws. To illustrate: imagine that I physically attacked my neighbor and that such attacks are illegal. If the state, in its ordinary course of business, knowingly did nothing in the face of my crime, its inaction could be read to express two social facts: first, an indifference to the legal rights of its citizens, particularly to the security of their persons and property; and second, a statement of condescension to me that my actions will not be taken seriously by the state. When the state makes an effort to punish me for my crime, by contrast, it tells me that I will be held accountable for my unlawful actions. In this way, the attempt at punishment communicates the ideal of moral accountability for unlawful actions.⁹⁸ Punishment for a legal wrong is one of the ways society makes clear that one cannot disclaim responsibility for the reasonably foreseeable consequences of one's actions, one of the core notions underlying retributive thought. Put differently, punishment manifests our rejection of fatalism, the notion that some other force--God, stars, butterfly breeding patterns in Chile--control one's conduct.

On this view, retributive punishment is a communicative practice, not merely an expressive one.⁹⁹ Effective communication to the offender is of fundamental importance to the practice of retribution. The practice of retribution would itself not be intelligible, for example, if the offender could not understand the message that the state was sending. The offender must be able to understand the communication, though he need not be persuaded by it. He may proclaim his innocence notwithstanding the evidence to the contrary, but if he cannot understand on what grounds he is being punished, then the punishment is no punishment, but merely a festival of coercive deprivation visited upon the offender.

A thought experiment fleshes out this view. Say the offender sometime after his crime unwittingly swallowed an amnesiac drug that erased his entire prior self-concept, such that he had no memory of the unlawful action, and indeed no memory of his personality-- would punishment make sense in this context? On the view that I am developing, it would not.¹⁰⁰ Relatedly, it would

⁹⁷ I interchangeably use the words "responsible" and "accountable," and by doing so I am referring chiefly to the notion that when an agent has performed (or refrained from) an act, he merits praise or blame. Thus, when I say *A* is responsible (or accountable) for *X*, I do not mean that *A* caused *X*, nor do I mean that *A* is obligated to *X*. I simply mean that *A* is subject to blame (in a legal sense) for *X*.

⁹⁸ Hence the claim from some quarters that the reluctance to punish offenders from disadvantaged backgrounds, who are nonetheless fully responsible moral agents, is "elitist and condescending" because "far from evincing fellow feeling and the allowing of others to participate in our moral life" such reluctance "excludes them as less than persons." Moore, *supra* note 27, at 215 - 16.

⁹⁹ By this distinction, I mean that the state has an interest in communicating a specific message to someone in particular; the expressivist has a larger audience in mind, and conceivably is indifferent to whether the expression reaches a particular person. For example, when I call you at home to tell you "Dad is not coming home tonight," that is a communication. When I write a column in the newspaper, I am expressing my opinion. Communication, as I use it, has a known and particularized target. This differs slightly from the definition used by others. Anderson and Pildes, for example, say that expression requires only the manifestation of a "mental state in speech or action, whereas communication of a mental state requires that one express it with the intent that others recognize that state by recognizing that very communicative intention." Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1508 (2000). Thus, a shoplifter may express her intention to get away with pinching a purse, but often she does not intend to communicate that intention. *Id.*

¹⁰⁰ If the person took that drug before committing the crime, by contrast, he should be punished for the same reason we ought to punish people for the crimes they commit when they knowingly take drugs or alcohol that might impede their judgment. Thus, someone who did not remember

be implausible to assert that a failure to punish the insane would demoralize mentally competent citizens.¹⁰¹ Hence, the first point about retributive justice is that retribution instantiates the ideal of individual responsibility and accountability. Punishment communicates to the offender our commitment to moral responsibility for the choice between lawful and unlawful conduct.

Punishment also possesses an important expressive function. When the state credibly threatens to use coercion through retributive practices, that threat suffices to express the norm that our actions and our interests matter to the state. If we insisted that the state actually achieve complete enforcement and punishment, we would then be placed in the untenable position of spending all of our collective resources on criminal justice.

On the other hand, punishment itself may not be necessary to communicate the value of moral responsibility in particular instances to particular offenders. We might for instance envision an offender who, immediately after committing his crime, came forward, accepted responsibility, and evidenced his awareness of this ideal through his own process of repentance. So something else is at stake when we say that coercion should be used even if some offenders have apparently internalized the significance of the first ideal.¹⁰²

2. *Equal Liberty Under Law*

Retributive punishment is necessary, even against a quickly repentant offender, to effectuate the commitment to the principle of equal liberty under law. In a liberal democracy, punishment serves under equality's flag because we are all equally burdened in our obligation as citizens to obey the law. When someone flouts the law, he actively chooses to untether himself from the common enterprise of living peaceably together under a common law. He is not merely rebelling against a particular law that he may disagree with, but rather he is defecting from an agreement about the basic structures of liberal democracy that he made as a reasonable person in concert with other reasonable people.¹⁰³ By his act, the criminal implicitly says, "I have greater liberty than you, my

the crime because she was blisteringly drunk at the time of commission is a proper object of punishment because she knowingly undertook action that created an unreasonable risk of harm. When someone (absent coercion) becomes so intoxicated that she loses control of her ability to comport herself lawfully, there is no wrong in punishing her for the reasonably foreseeable consequences of that choice to risk losing control of her faculties. At that point she can understand that she is being punished for the crimes resulting from her choice to become intoxicated.

¹⁰¹ That is not to say that no social action is warranted if the person is assessed as requiring therapy or some other form of treatment. But without some inquiry into, and evidence of, the knowing malevolence of the offender, the imposition of "punishment" would be unintelligible.

¹⁰² This insistence on focusing attention on an action by a mentally competent offender highlights one of the ways in which "grievance retributivism" can be usefully distinguished from "character retributivism." Analysis that focuses on the character of the wrongdoer is "character retributivism." In contrast, analysis that focuses on a particular action (by a mentally competent offender) is "grievance retributivism." I harbor doubts about character retributivism and its proper place within a liberal state, but I need not expand upon those doubts here. My account can be viewed as a species of the grievance retributivism genus, since the only grievances I countenance as warranting state-imposed retributive punishment are grievances born of legal violations. See generally MURPHY, *supra* note 27, at 39 - 56 (discussing kinds of retribution); B. Douglas Robbins, *Resurrection from a Death Sentence: Why Capital Sentences Should Be Commuted Upon the Occasion of an Authentic Ethical Transformation*, 149 U. PA. L. REV. 1115, 1123 - 26 (2001) (same).

¹⁰³ Because I view punishment as a fundamentally political institution, I find it difficult to translate the account of punishment I offer to states that are not liberal democracies and do not aspire to be. I have elsewhere adverted to some of the difficulties retributive punishment would encounter in wicked states. See generally Markel, *The Justice of Amnesty?*, *supra* note 16 at 440 - 42.

fellow citizen.”¹⁰⁴ He cuts himself off from the social order for the purpose of imposing a new order by his acts against people who should enjoy equal liberty as guaranteed by the state’s rule of law.¹⁰⁵

Retribution serves as the rejection of this claim and thus effectuates our commitment to equal liberty. Metaphorically, it plants the flag of truth in the fortress of the rebel soul.¹⁰⁶ For when I steal, rape, or murder, I arrogate a license to act in ways officially proscribed by the polity. My act is a claim of superiority: I am a law unto myself, and society’s laws do not bind me.¹⁰⁷ On this view, it does not matter that few people, if given the chance, would seek to steal, rape, or murder.¹⁰⁸ All that matters is that I am defecting from a legal order to which I have good reason to give my allegiance, and I am defecting in such a way that I am taking license to which others are not entitled. If the state

¹⁰⁴ One might think that this is hardly what goes on in the mind of most criminals. Undoubtedly, many criminals are not consciously articulating this maxim as they pick a pocket or steal a car. Indeed, it is true that there might be many maxims to be inferred from a criminal’s behavior. But the question is whether there is plausible evidence to sustain one or several of these interpretations. Part of what makes an interpretation of social fact plausible is that we decide to announce that this is how we will interpret this kind of behavior prospectively. This interpretation is defensible, for when we affirm the moral agency of the offender through retribution, we recognize that he himself might have acted for venal reasons, perhaps nothing quite so grand as political rebellion or insult to fellow citizens. But by holding him accountable for his actions, we treat him better than he treated others, because we respect his capacity for moral decision-making. Of course, there will be certain circumstances when it is fully implausible to infer these maxims from a person’s behavior and when those circumstances attach, retribution would not be sought, or at least, not in the same way or to the same extent. This is what creates room for excuses, justifications and mitigating circumstances, such as necessity, self-defense, and provocation.

¹⁰⁵ The statement of exclusion described in the account here is similar to the parable of the wicked or contrary son who sits at the Passover Seder table and asks: “‘What is the meaning of this service to you?’ Saying ‘you,’ he excludes himself, and because he excludes himself from the group, he denies a basic principle that he too is obligated to abide by the laws and norms.” See THE PASSOVER HAGGADA, available at <http://www.chabad.org/holidays/passover/pesach.asp?AID=1737> (last visited Feb. 24, 2005).

¹⁰⁶ See C.S. LEWIS, THE PROBLEM OF PAIN 95 (1944). Contrary to Lewis, from whom this expression is borrowed, I mean truth in a very local and contingent sense here. The “truth” here refers to the prima facie respect a democratically passed law ought to receive when it conforms with liberal parameters.

¹⁰⁷ Some might argue that the ubiquity of claims of superiority in society undermines the claim that crime, unlike other actions, is a claim of superiority that merits special attention. But this misses the point on several levels. First, some claims of superiority are socially acceptable, e.g., a claim that American Airlines has the best on-time arrival history. More to the point, crime is a species of the genus of claims of superiority, and it gets particular attention because we have agreed, through our democratic institutions, to give it that attention. Professor Husak, for example, suggests that when someone wrongs me in a way that is not criminally sanctioned, she also deserves some punishment, or absent state-imposed punishment, some degree of suffering. See Husak, *supra* note 14, at 971 - 72. This confuses things. There is an array of wrongs, slights, or inconveniences people may impose. Not all of them merit criminal sanctions simply because it might not be feasible to expend scarce social resources upon prosecuting all of them. There are nonlegal but still permissible sanctions that can be inflicted upon people who commit these noncriminal wrongs: for example, reputational retaliation, gossip, avoidance, competition. Some or all of these responses may also communicate the norm of moral accountability, but these responses are not limited, as retribution is, to the ambit of punishing legislatively proscribed behavior. Finally, and with thanks to my friend Chad Flanders for this point, I note that some false claims to superiority may be better addressed through legal, but non-criminal law, mechanisms: e.g., in some places, estate or wealth taxes can be used to deflate or reduce pretensions of high-born superiority, tempering the environment under which such pretensions are typically born.

¹⁰⁸ Thus, we can sidestep the criticisms of the “fair-play” theory of punishment associated with Herb Morris’s famous essay, *Persons and Punishment*, in PUNISHMENT AND REHABILITATION 40, 42 (Jeffrie G. Murphy ed., 1973). Morris thought that retribution is deserved for criminal wrongs because a criminal’s action “renounces a burden which others have voluntarily assumed and thus [he] gains an advantage which others . . . do not possess.” *Id.* Thus, punishment is necessary to end free riding on the political agreement of others. The problem here is that we do not punish in order to end free riding itself, but rather to communicate moral norms to offenders and nonoffenders alike about acceptable conduct. The fact that free riding might terminate by threat of punishment is a consequence of retribution but not its purpose.

establishes no institution that credibly attempts to prosecute and punish me, my claim to superiority over others commands greater plausibility than it would be if the state created such an institution.¹⁰⁹

By making credible the threat to impose some level of punishment, the state is giving its best reasonable efforts to reduce the plausibility of individuals' false claims of superiority.¹¹⁰ The state's coercive measures communicate the norm of equal liberty under the law and they are directed to the person most in need of hearing it: the offender. This theory reveals in part, then, how the practice of punishment is intelligible and attractive, apart from the other beneficial consequences that may contingently arise from its practice.

3. *Democratic Self-Defense*

The reasons mentioned so far--effectuating moral responsibility and equal liberty under law--do not explain why the state should be the institution that punishes. I have explained only why an offender's action deserves punishment for committing a wrong. Why should the state play the central and exclusive role in criminal justice? After all, it is only a modern phenomenon that the state has assumed such a function; clergymen and other communal figures used to play an extensive role in administering punishment. Moreover, today, the state's monopoly on punishment is under attack again. In a provocative article, Professor Dan Kahan has said that it is time "to get over" the kind of thinking about criminal law that permits the state to "monopolize" legitimate force: "Just as air travel and telecommunications have been freed from inefficient forms of centralized control, so punishment is due for a liberating dose of privatization."¹¹¹ Suggesting that inner-city communities insufficiently respect the state's criminal laws, Kahan contends that, in the face of such "enfeebled legitimacy," the answer is to rely on the moral authority of private institutions and actors, such as the "Black church and juveniles," as substitutes for state punishment.¹¹² Kahan, oddly, seems to prefer exacerbating the allegedly enfeebled legitimacy of the state instead of succoring it. To address his argument, I need to answer the question: what justifies the state's role in punishment?

The state plays the role of the exclusive decision maker (at least with respect to punishment) because it, and it alone, has the capacity for legitimacy among all actors in society in a way that various communal institutions in our pluralistic social union of social unions do not.¹¹³ Kahan's empirical claims--that various subcommunities no longer recognize the state's legitimacy--are not

¹⁰⁹ This rationale that I articulate--that punishment is defending equal liberty under law--is inspired in part by Jean Hampton and Georg Wilhelm Friedrich Hegel, but it has developed its own unique features too. Whereas Hampton's work defended a non-political account of retribution that was victim-focused, see Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1659 – 1702 (1992), and Hegel's work is metaphysically encumbered, see GEORG WILHELM FRIEDRICH HEGEL, *PHILOSOPHY OF RIGHT* (H.B. Nisbet trans., Cambridge Univ. Press 1991) (1820), the account I offer here seems more straightforward and is capacious enough to include "victimless" crimes that are legislated as a product of democratic deliberation. By taking a victim-centered approach, Hampton failed, to my mind, to see the social implications of the claim to superiority in criminal actions and missed the institutional dimension of equal liberty under law. Furthermore, her account is ill-equipped to explain why we punish crimes that do not specifically demean a particular victim, such as embezzling from a corporation.

¹¹⁰ The idea of punishment reducing the plausibility of the claim of superiority over the victim is from Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY, *supra* note 26, at 111.

¹¹¹ Dan M. Kahan, *Privatizing Criminal Law: Strategies for Private Norm Enforcement in the Inner City*, 46 UCLA L. REV. 1859, 1860 (1999).

¹¹² *Id.* at 1862.

¹¹³ See generally JOHN RAWLS, *POLITICAL LIBERALISM* (1993). The fact of social pluralism is in part what motivates and justifies reliance upon an impartial agent, such as the state, to administer justice in modern times.

only implausible; they are normatively unacceptable from an ex ante viewpoint. By ex ante, I refer to a perspective where a person internalizes all available information about possible outcomes except the identity of what position she will occupy later. This “ideal observer” status guarantees an element of impartiality that better yields the practices and policies for an attractive society and state.¹¹⁴ The communities of which Kahan speaks may be opposed to the harsh federal or state drug laws that require stiff mandatory minimum sentences. But Kahan marshals no evidence to suggest that they think some other political body has a more legitimate claim to legislate, adjudicate, and punish them in a society with demographics like ours. Moreover, if we are interested in, as we should be, what someone would choose ex ante, that is, not knowing whether she will be black, white, male, female, etc., we would have little reason to be stirred by Kahan’s provocations. Instead, we should embrace the procedural cautions that characterize state action in a liberal constitutional regime.¹¹⁵

But there exists an additional, more fundamental reason for the state’s involvement in retribution. Note that while revenge rarely occurs for acts that are not immediately or transparently victim-oriented, retribution, by contrast, occurs for acts that are either *malum in se* (bad by nature) or *malum prohibitum* (bad because it is prohibited by legal convention). Moreover, some wrongs, such as treason or counterfeiting currency, where the victim is collective and not specifically identifiable, necessitate the state’s involvement.¹¹⁶

Accordingly, the third idea communicated to the offender through a retributive understanding of punishment is the notion of democratic self-defense. Recall the claim of superiority made by an offender’s action against his victim. That claim of superiority, however implicit, is not merely a claim against his victim. Indeed, there may not be a direct victim against whom to make this claim. Rather, the offense is an active rebellion against the political order of equal liberty under law. Each time an offense occurs, the offender tries to shift where the rules of property, liability, and inalienability lie.¹¹⁷ In doing so, the criminal revolts against the constitutionally democratic determinations of where those rules lie. He usurps the sovereign will of the people by challenging their decision-making structure.¹¹⁸

¹¹⁴ We might, following Roderick Firth, say that an “ideal observer” is someone who is omniscient about relevant non-ethical facts; is consistent, disinterested, dispassionate; and otherwise normal. Roderick Firth, *Ethical Absolutism and the Ideal Observer*, 7 PHIL. & PHENOMENOLOGICAL RES. 317, 333 - 45 (1952). The reason we use the ex ante perspective within a retributivist framework is explained *infra* in III.D. In brief, under my framework, I can explain the internal attractiveness of retributive punishment and at the same time show that its animating values require a recognition that retributive justice is merely one attractive moral project competing among others, and therefore balancing of the costs and consequences associated with the project of retributive justice is required. That balancing should be done through the ex ante perspective to assure that the rules and institutions we choose are not the product of bias that inevitably arises when we make choices ex post.

¹¹⁵ That said, we would not necessarily create the Leviathan of Hobbes ex ante because we realize that state power, without proper checks and balances, can be oppressive and abusive, and we might also want to have power-sharing arrangements so that some decision-making about local issues devolves to more local entities, permitting some experimentation and variation. But conduct that the legislature has prohibited is conduct that the community represented by that legislature, not the sub-community, should punish.

¹¹⁶ See JOEL FEINBERG, HARMLESS WRONGDOING 3 - 38 (1988).

¹¹⁷ See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (discussing when entitlement should be protected under property, liability or inalienability rules).

¹¹⁸ See JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW 124 (1990). This justification is sometimes challenged by those who, like Husak, view the criminal law chiefly as an instrument to vindicate the suffering of the victim with the suffering of the offender. See Husak, *supra* note 14, at 973. Thus, victimless crimes are less of a concern and therefore less likely to require punishment. The problem is that such an account provides no reason to discount the rights and interests of collective bodies. Husak’s suffering-focused account also mistakenly concludes by implication, if not directly, that all suffering is the same in quality, even if not in quantity. Surely the hardship one endures from imprisonment is different from the hardship caused by the loss of a child or the pain of a paper cut. Husak’s argument, which was developed

Hence, the offense is not merely against the victim but also against the people and their agent, the state, whose charter mandates the protection, not only of the persons constituting the political order, but also the protection of the decision-making authority of the regime itself. Indeed, as an empirical matter, it is interesting to see how democratic self-defense is a principle embodied in the oath taken by federal officers.¹¹⁹ The substance of that oath is to protect the decision-making structure of the nation. That these officers swear the oath illuminates the idea that the Constitution must be defended against attack by those who shift the rules unlawfully, thus revealing crimes as, to a greater or lesser degree, forms of political rebellion.¹²⁰

Of course, not all crimes look like rebellions, and not all rebellions need be quashed with maximal use of resources.¹²¹ Quite to the contrary, the scarcity of social resources in a society committed to pursuing various projects of moral significance requires a principle of frugal proportionality in punishment--that is, we should expend that quantum of social resources necessary to convey the seriousness of the norms breached by the offender, but not more.¹²² Previous accounts of retributivism have had difficulty explaining what proportionality is and why it is relevant to the justification of punishment. On the account provided here, one can see how concern for the wise allocation of social resources would lead a legislator to endorse sentences commensurate with the severity of the crime (and its concomitant social costs) but neither more nor less under normal circumstances.¹²³

in a more qualified form by KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST 173 (1989), suggests that as long as the suffering is "equivalent," the "intuitions" of retributive justice are satisfied. See Husak, *supra* note 14, at 973. Once one realizes the variegated nature of suffering and its multiple social meanings, one realizes the shortcomings of this claim.

¹¹⁹ American oaths of office typically begin with the phrase: "I, ____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic." *E.g.*, 5 U.S.C. § 3331 (2000).

¹²⁰ The doctrines of duress or necessity might excuse or justify actions that otherwise look criminal. See MODEL PENAL CODE §§ 2.09, 3.02 (1962). And indeed, in some unjust societies, or with respect to some unjust practices, some rebellions should succeed. That critique, however, is basically one against legislation, not punishment. For the ordinary case of *malum in se* crimes, or crimes that are reasonably *malum prohibitum*, one's criminal actions may be seen as an expression of defiance against the decision-making regime and the people who make the decisions developed in presumptively legitimate constitutional regimes. As I mentioned earlier, this may not be one's motive, but it is a reasonable reading of the offender's actions, and its underlying intent to bring about those actions. To the extent that we want to see certain excuses or defenses available in criminal law that mitigate or thwart punishment precisely because we do not believe that under the circumstances they can plausibly be read as rebellions against the political order, we have that opportunity--through democratic action.

¹²¹ And, it should be said, a regime whose decision-making power is illegitimate has less moral claim to punish those without fair and formal access to participate in political matters. See Markel, *The Justice of Amnesty?*, *supra* note 16.

¹²² Cf. Hugo Adam Bedau, *An Abolitionist's Survey of the Death Penalty in America Today*, in DEBATING THE DEATH PENALTY 15, 34 (Hugo Adam Bedau & Paul G. Cassell, eds. 2004) (discussing the principle of Minimum Invasion, which states that societies ought to abolish any lawful practice that imposes more violation of liberty, privacy or autonomy than necessary "when a less invasive practice is available and is sufficient" to satisfy the objective).

¹²³ The account in the text not only limns the often obscured connection between the proportionality principle and retributive justice; it provides, through its linkage with the principle of frugality, see JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION Ch. XV (J.H. Burns & H.L.A. Hart, eds., The Athlone Press 1970) (1789), a well of conceptual resources to draw upon in challenging grossly disproportionate sentences. A legislator alert to this rationale keeps it in mind when drafting or delegating the creation of a sentencing guideline structure. I should add that it is not always the case that increasing the severity of the punishment always increases the amount of social resources deployed; if one viewed amputation of an arm as a more severe punishment than a year in prison, maybe the calculations would change, and call for a different analysis. Finally, the social cost of a crime is not merely the economic cost in dollars. Nor is it something that is "repaid" through punishment: taking offenders out of the labor force and away from their families may often increase certain costs. But when I use the term "social cost," I mean to include a variety of factors, including costs associated with detection, prosecution, and punishment, as well as social

B. Retributive Justice as an Institutional Practice

By explaining how the creation of credible institutions of retributive punishment effectuates moral responsibility, equal liberty under law, and democratic self-defense, the CCR excavates what good inheres in the practice of retributive punishment. Revealing the intrinsic good (or internal intelligibility) achieved by punishment of a guilty offender in turn explains the conceptual linkage between legal guilt and punishment. By contrast, utilitarian justifications for institutions of punishment (e.g., deterrence or rehabilitation) rest on contingent goals being achieved through punishment of offenders, when, in fact there is no need for a person to have committed a crime to pursue those goals.¹²⁴ The utilitarian committed to deterrence, for example, must be open-minded about abandoning punishment if harm reduction can be achieved more easily through LoJacks and architectural design of public space.¹²⁵ Similarly, someone committed to the rehabilitation of persons with anti-social behavior has no need to wait for a crime to occur to justify the intervention of the state upon the offender.¹²⁶ He just needs to see someone who looks like a threat to society to impose some form of preventive detention or other form of treatment. Even restorative justice advocates cannot explain why their program of realizing social equality through sentencing circles has to be linked to the occurrence of a crime, as opposed to an insult or some other tort.¹²⁷ That does not mean that these other theories are wholly inappropriate justifications for institutions of punishment. It just means that they cannot provide a conceptual linkage between legal guilt and punishment for criminal offenses.

Because retribution instantiates the widely accepted and attractive principles of moral accountability for unlawful action, equal liberty under law, and democratic self-defense, the practice of retribution possesses an internally intelligible character. It is a practice that, generally speaking, can be justified apart from the contingent benefits (such as specific or general deterrence) that it might generate.

Moreover, the CCR permits us to see why, without recourse to or reliance upon mere intuitions or emotions of vengeance, resentment, or hatred,¹²⁸ the state should establish institutions of criminal justice that take care to punish only the guilty, and not the innocent. The guilty should be punished to contest their false claims for the reasons mentioned earlier. The innocent should *not* be punished because they have neither made claims of legal superiority through their actions nor have they usurped power from the decision-making structure to which they have good reason to obey *ex ante*.

Nonetheless, there are some internal limits to retributive justice that still need to be articulated. First, as I alluded to earlier, the practice of retribution is only one attractive social practice among many. Every person interested in social planning must realize that, on the margins, resources spent on the project

judgments of severity.

¹²⁴ The utilitarian, it has been said, would scapegoat an innocent person, but the rule utilitarian has a sufficiently good reply to this claim that it does not seem to make sense to drag out the familiar arguments. See John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 13 (1955) (defending “utilitarianism against those objections which have traditionally been made against it in connection with punishment”); Guyora Binder, *Punishment Theory: Moral or Political?*, 5 BUFF. CRIM. L. REV. 321, 347–50 (2002) (same); Mary Ellen Gale, *Retribution, Punishment, and Death*, 18 U.C. DAVIS L. REV. 973, 1005 (1985) (explaining the utilitarian view that punishment of the innocent is counterproductive).

¹²⁵ See Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039 (2002); Neal Kumar Katyal, *Digital Architecture as Crime Control*, 112 YALE L.J. 2261 (2003).

¹²⁶ A related story appears in the Steven Spielberg film, *MINORITY REPORT* (Twentieth Century Fox and Dreamworks 2002)(based on the Philip K. Dick story, *The Minority Report*), where law enforcement officers intervene prior to the commission of the crime based on information gleaned from usually reliable beings with special skills in divining the future.

¹²⁷ On restorative justice, see sources cited *supra* note 61.

¹²⁸ See sources cited *supra* notes 26–30.

of retributive justice are resources not spent on feeding the hungry, housing the homeless, and healing the sick.¹²⁹ Thus, to say that retributive justice justifies punishment under ordinary circumstances does not mean that punishment ought to be imposed under all circumstances such that the ceaseless pursuit of justice consumes our every and last unit of social resources.¹³⁰ This is consistent with retributivism's animating moral ideals because, far from being unconcerned with consequences, retributivists urge on offenders the maxim that one cannot disclaim responsibility for the reasonably foreseeable results of one's actions. That same maxim cannot be ignored when retributivists are designing systems of justice or advocating reforms therein. Relatedly, the practice of retribution poses significant risks of error and abuse by authorities. Hence, it is a practice that can be commended only when all reasonable measures are taken to reduce those risks.

Second, embedded in the account of the CCR is an intent requirement. To insist only on the offender's perception of his defeat, to the exclusion of the potential internalization of correct values that the confrontation encourages, would undermine the justificatory prong first discussed, namely the interest we have in recognizing each other as dignity-bearing moral agents capable of responsible decision making. In order to militate against the corrosive effect punishment may have upon the offender and the public, it is crucial that the denial of the offender's message is explained and carried out in a way that is conducive to the internalization of the values that the retributive encounter is meant to uphold. The encounter need not guarantee the internalization of those values, but it cannot proceed without the desire for that result, and the state ought not take measures that would preclude it. Otherwise, retribution would operate mechanistically, a practice that devalues both the punished and the punishing state. Consequently, the state must have as its hope not just the denial of the offender's claim of superiority, but also his transformation.¹³¹

C. Confrontational Retribution as Distinct from Revenge

If we agree that these principles animate a nobler image of retributive justice, then we can see how retributive justice might usefully be contrasted with revenge, contra the courts and commentators.¹³² To begin with, what induces retributive punishment is the offense against the legal order. Where the law runs out, so must retribution. By contrast, revenge may address slights, injuries, insults, or nonlegal wrongs. The philosopher Robert Nozick identified five other characteristics that tend to distinguish retribution from revenge: (a) retribution ends cycles of violence, whereas revenge fosters them; (b) retribution limits punishment to that which is in proportion to the wrongdoing, whereas revenge is limitless in principle; (c) retribution is impartially administered by the state, whereas revenge is often personal; (d) retributivists seek the equal application of the criminal law, whereas no generality attaches to the avenger's interest; and (e) retribution is cool and unemotional, whereas revenge has a particular emotional tone of taking pleasure in the suffering of another.¹³³

¹²⁹ See Dwight D. Eisenhower, The Chance for Peace, Address before the American Society for Newspaper Editors (Apr. 16, 1953) ("Every gun that is made, every warship launched, every rocket fired, signifies in the final sense a theft from those who hunger and are not fed, those who are cold and are not clothed."), available at <http://www.quotedb.com/speeches/chance-for-peace>.

¹³⁰ If, hypothetically, creating institutions of criminal justice led to more crime or more starvation, then it is even more clear that the invocation of *fiat iustitia, pereat mundus* (Let justice be done even though the world may be destroyed) is wrong-headed. The law exists to secure the conditions of human flourishing, not to destroy them.

¹³¹ Markel, *Are Shaming Punishments Beautifully Retributive?*, *supra* note 16, at 2209 - 10.

¹³² See sources cited *supra* note 13.

¹³³ ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 366 - 68 (1981); cf. *Ezekiel* 33:11 ("I have

A few other important distinctions can be drawn: (f) retribution is always targeted at the offender,¹³⁴ whereas revenge may target an offender's relatives or allies;¹³⁵ (g) retribution is uninterested in making the offender experience generic suffering; rather, and quite distinct from revenge, retribution seeks to use the *state's* power to coerce the offender in particular ways, such that certain ideas can be communicated through that coercion;¹³⁶ (h) retribution is interested in, and speaks to, the moral autonomy and dignity of the offender, whereas revenge may be indifferent to those qualities; such indifference crucially affects whether and what kind of excuses might limit revenge or retribution; (i) and finally, retribution's intent requirement, discussed above, requires that the punishment not preclude the internalization of the "sense of justice" that would allow for an offender to demonstrate his respect for the norms of moral responsibility, equal liberty under law, and democratic self-defense, whereas revenge has no such requirement.¹³⁷

The value of retribution, on this account, is realized when the state makes the attempt to confront the offender and communicate these norms to the offender through its coercive power against him. Thus, at this point, we can begin to see why this is called the *Confrontational* Conception of Retribution.

Let me explain that notion through another thought experiment. Imagine that a person commits a typical crime (e.g., theft), and is then tried fairly, but in secret, so that the public is unaware of the encounter between the state and the criminal.¹³⁸ The trial has familiar evidentiary requirements, the defendant has access to legal counsel, and so on. The accused is convicted. The sentence accords with the idea of proportionality discussed earlier. The thought experiment simply says it is a typical trial and a typical punishment; it is just that the record of this conviction will not be publicly available. Neither public reconciliation nor potential social condemnation is ever achieved because of the secrecy, so the encounter has no socially expressive value and thus has no general deterrence value. This type of proceeding will not satisfy the average person's taste for fairness in a particular case, nor will ignorance of this trial damage the average person's confidence in the legal system.

Is there still value to the secret confrontation? On the account offered here, the answer is yes, and therefore it is to be preferred to a situation where no retribution occurs at all. This is because the confrontational relationship has its own internal goals and goods that are achieved independent of any contingent

no pleasure in the death of the wicked; but that the wicked turn from his way and live.").

¹³⁴ Retribution is targeted exclusively at the offender because it is the offender whose actions implicitly claim superiority against the polity and the victim. By contrast, the offender's family members or allies do not make those claims--unless they aid and abet the offense, in which case they too are making claims of superiority that the state has not sanctioned. While the offender's family may have failed to inculcate proper law-abiding behavior, they bear no culpability as persons under the law for the action that we strongly presume was the product of the offender's free choice.

¹³⁵ Here I do not mean to deny that retribution may impose third-party harms, nor do I suggest that revenge is always targeted at third parties close to the offender. My point is narrow: retribution does not aim to harm third parties, and in some cases, the kind of retribution imposed should take into account innocent third-party harms.

¹³⁶ One can imagine that someone interested in revenge who sees his antagonist experience suffering from some other source, such as disease or extremely bad luck (getting hit by a car), may decline to follow through on the revenge, whereas the state's retributive interest would not be satisfied merely by having an offender suffer. Often, for example, the state puts prison guards on suicide watches to prevent inmates from killing themselves. This practice highlights the normative significance of the distinction between punishment and suffering.

¹³⁷ See Markel, *Are Shaming Punishments Beautifully Retributive?*, *supra* note 16, at 2216 – 17.

¹³⁸ This hypothetical scenario is not so unimaginable. *Cf.* Memorandum from Michael J. Creppy, Chief Immigration Judge of the United States, to Immigration Judges and Court Administrators 1 (Sept. 21, 2001) (instructing immigration judges to close their courtrooms in some situations), at <http://news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf>; Press Release, The White House, President Issues Military Order (Nov. 13, 2001) (establishing by executive order non-public military tribunals), at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>.

good. Some might say that the good brought about is that the offender is brought to justice. My goal has been to elucidate that claim. By its efforts, the state diminishes the plausibility of evidence to a claim of superiority and makes some effort at complying with the charter that gives the state its legitimacy. On this account, secret and fair punishments are better than no punishments at all because the encounter between the state and criminal effectuates the ideal of treating citizens as free, equal, and morally responsible.¹³⁹ In addition, the opportunity for the state to communicate its message and for the offender to internalize it is preserved.

As long as one accepts that some secret and fair punishment is better than no punishment at all, one can grasp the internal intelligibility of retribution. The theorist seeking general deterrence or publicly expressed condemnation cannot see the value of secret punishment,¹⁴⁰ but the retributivist can.¹⁴¹ To be sure, the retributivist might approve of the byproducts of public awareness of punishment (deterrence, denunciation, social self-defense, and possible reconciliation), but the retributive encounter remains valuable independent of those reasons. Indeed, there may be a host of ancillary benefits.¹⁴² But these benefits are of an entirely contingent nature, whereas retribution's intelligibility is perceptible strictly within the relationship between state and offender.

Having explained what is "confrontational" about the CCR, and having provided an account of retributive justice that explains punishment's attractiveness and internally intelligible nature, I now turn to the questions at the heart of this article: whether blanket commutations of death row are compatible with retributive justice, and if so, what implications arise for the death penalty itself.

IV. RETRIBUTIVISM AND RYAN'S BLANKET COMMUTATION

Recall from Part II that there were four criticisms of Governor Ryan's blanket commutation. First, one might call Governor Ryan's commutation an abuse of power that is "morally indiscriminate" in character, and thus one that damages the credibility of our justice system.¹⁴³ Related to this claim is the

¹³⁹ It is fair to resist this idea as a general practice, as I explain in the text. I think our hesitation occurs because we are so accustomed to enjoying the benefits of public transparency with respect to punishment. Our commitment to transparency and accountability, coupled with skepticism of the possibility of fair punishments occurring as a general matter, make it difficult for us to imagine secret punishments as an ongoing social practice. Secret but fair punishment is a suboptimal arrangement. The real question is whether we would prefer it to a state of affairs where there was no punishment at all. I think we would agree that on this account there is some value to secret but fair punishments.

¹⁴⁰ One might argue that the secret punishment could serve the task of specific deterrence, but if we imagine the imposed punishment was a severe fine, in addition to stiff and unpleasant community service, but was still insufficient to guarantee the specific deterrence of the offender, then the value of the secret punishment would still not be apparent to that person advocating the primacy of specific deterrence.

¹⁴¹ I should note that I am not embracing the practice of secret retribution. Indeed, the account I have offered indicates there is an obligation to have some degree of transparency in the administration of criminal justice. The state's concealment of the encounter can be read by citizens as a message of inactivity by the state, which would itself run afoul of the principal-agent relation that motivates the state's participation in the matter. Not meeting the transparency requirement does not itself vitiate the good of the confrontation between state and offender, but it does create its own moral problems that ought to be avoided.

¹⁴² Chief among them is the benefit to society's interest in verifying that the proposition of equal liberty under law is still being vouchsafed by its government. Note, however, that some of these ancillary benefits could be realized without having to visit pain or deprivation of liberty upon each offender. The healing that victims might gain from the knowledge of punishment could be gained through other forms of therapy made available by the state or other bodies within civil society.

¹⁴³ Firestone, *supra* note 3, at 5 (reporting Senator Joseph Lieberman's characterization of the commutation); *see also* Blecker, *supra* note 8, at 303 ("Above and beyond its cruelty and

concern that a blanket commutation is “explicitly, even exuberantly, anti-democratic.”¹⁴⁴ Second, one might regard Ryan’s blanket commutation as an improper act of mercy. Third, one might think that the commutation was improper because it revived or exacerbated the suffering of victims and their survivors. In the words of George Will, Ryan’s action was a “cavalier laceration of the unhealable wounds of those who mourn the victims of the killers the state of Illinois condemned.”¹⁴⁵ Finally, many people presume that retributivists support the death penalty (at least for murderers) and that retribution theory justifies the death penalty.¹⁴⁶ Hence, by issuing a blanket commutation of the death row inmates, Ryan “let murderers off the hook.”¹⁴⁷

As I examine these various arguments from the perspective of the CCR, keep in mind that these criticisms (and my responses) may differ in their applicability to a blanket commutation of death row as distinct from the use of the death penalty more generally. In this Part, I focus on the blanket commutation; in the next Part, I consider the retributivist critique of the death penalty writ large.

A. *Abuse of Power Reconsidered*

As we saw earlier, various critics of Ryan—including scholars, commentators, and politicians—claimed his actions were unlawful, anti-democratic and an abuse of power. In this section I will argue that these charges are inaccurate and that Ryan acted completely within his legal rights conferred upon him by and within a constitutional democratic regime. Nonetheless, the fact that Ryan’s blanket commutation was *lawful* does not by itself mean the action should bear the stamp of *moral legitimacy*; demonstrating moral legitimacy requires additional argumentation that I provide in the sections following this one.¹⁴⁸

Some retributivists have indicated that case-by case review is required in assessing who should be executed. Most notably, Professor Robert Blecker, an avowed retributivist who often appears in the media, criticized Ryan’s commutation because it was “morally indiscriminate,” and thus allowed some of the “worst of the worst” offenders to enjoy a reprieve that they did not deserve.¹⁴⁹ Similarly, although not in the specific context of the Ryan commutation, philosopher Kathleen Dean Moore developed a retributivist account of the pardon and articulated the need for case-by case review therein.¹⁵⁰ She wrote that “the only good and sufficient reason for pardoning a

callousness, [Ryan’s commutation] was a morally indiscriminate act.”)

¹⁴⁴ Will, *supra* note 4, at B7; cf. Robert Blecker, *Among Killers, Searching For the Worst of the Worst*, WASH. POST, Jan. 3, 2000, at B1 (“A great majority of the American people support the death penalty for those who deserve it.”).

¹⁴⁵ See Will, *supra* note 4, at B7.

¹⁴⁶ See sources cited *supra* note 73.

¹⁴⁷ Sarat, *supra* note 69, at 1347; O’Brien, *supra* note 64, at 5A.

¹⁴⁸ Even some of Ryan’s critics acknowledge that Ryan did not violate “the letter of the law;” instead they state that he “certainly violated the spirit of it by usurping the power of the Illinois Legislature and courts.” Wallace, *supra* note 1, at 394; see also Garvey, *supra* note 2, at 1325.

¹⁴⁹ Blecker, *supra* note 8, at 303.

¹⁵⁰ MOORE, *supra* note 118, at 167 - 68. To determine if a pardon would be warranted on retributivist grounds, Moore would ask whether any one of the following conditions applied: (a) whether an offender’s crime was justified because it was conscientiously performed and morally justified; (b) whether the crime was excusable because the offender gained nothing from the crime for one or more of several reasons: the offender acted unintentionally and made full reparations, he was the only victim of his crime, his crime repaired rather than created an injustice, or the crime was coerced; (c) whether an offender suffers what he deserves (or more) as a result of the crime, say by killing his own child through reckless driving; (d) whether a terminal illness afflicts the offender in prison, making the offender suffer more by the punishment because he has to die in prison; (e) whether the punishment is disproportionate to the offense; and (f) whether the lingering effects of the crime add unwarranted punishment—for

felon is that justice is better served by pardoning than by punishing in that *particular case*.”¹⁵¹ Thus, it is highly probable that Moore, like Kant and Professors Blecker and Garvey, would conclude that commuting death row sentences would violate retributive justice.

Against these views, it is important to explain how a retributivist could (and should) embrace Governor Ryan’s action, especially when the laws permitting the death penalty express the popular view in favor of this punishment. In this section, then, I begin that task, locating the argument specifically in the context of whether Ryan’s blanket commutation of death row sentences was an abuse of power and anti-democratic.

1. Ryan’s Commutation as Anti-Legislature

Ryan has been criticized for “abusing his clemency power . . . [because] he completely undermined the legislature and its law-making function.”¹⁵² To the extent this criticism suggests that Ryan acted unlawfully (in violation of the separation of powers doctrine), it is clearly wrong. Ryan’s action fell squarely within his constitutional discretion, as the Illinois Supreme Court subsequently affirmed.¹⁵³ Article V, section 12, of the Illinois Constitution of 1970 provides that “[t]he Governor may grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper.” Had Ryan exercised that power in a way that evidenced some form of ethnic or religious prejudice, the charge of abuse would stick, because both state and federal constitutional guarantees of due process and equal protection would cabin executive discretion.¹⁵⁴ However, since Ryan did not exercise his discretion to favor a person with some morally arbitrary characteristic, his decision could be characterized as neutral across persons.¹⁵⁵ Indeed, notwithstanding the Illinois

example, when an ex-offender cannot get a job even though he has served his time and the conviction occurred long ago. *Id.* at 11. I have elsewhere explained the shortcomings of Moore’s argument, *see* Markel, *Against Mercy*, *supra* note 16, at 1428 n.22, but here Moore’s explanation of justice-enhancing pardons is helpful to show at least the *prima facie* retributivist case against a blanket commutation of death row. Unless Moore were to argue that the death penalty is always too severe for the offense, none of her conditions would be satisfied in the exercise of a blanket commutation of death row.

¹⁵¹ Kathleen Dean Moore, *Pardon for Good and Sufficient Reasons*, 27 U. RICH. L. REV. 281, 281 (1993) (emphasis added).

¹⁵² Wallace, *supra* note 1, at 394.

¹⁵³ *People ex rel. Madigan v. Snyder*, 804 N.E.2d 546 (Ill. 2004).

¹⁵⁴ *See, e.g., Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 292 (1998) (Stevens, J., concurring in part and dissenting in part) (“[N]o one would contend that a governor could ignore the commands of the Equal Protection Clause and use race, religion, or political affiliation as a standard for granting or denying clemency.”). The holding in *Woodard* is thin gruel. Chief Justice Rehnquist’s opinion for the plurality gave legs to the traditional and illiberal conception of clemency as grace, stating that the “executive’s authority would cease to be a matter of grace committed to the executive authority if it were constrained by the sort of procedural requirements that respondent urges.” *Id.* at 280 – 81 (Rehnquist, J.) (plurality opinion). Extending this uncanalized discretion falls far short of the demands of instantiating a robust conception of equal liberty under law. *See* Markel, *Against Mercy*, *supra* note 16, at 1425.

¹⁵⁵ The unreviewable clemency power Ryan possessed is quite similar in scope to the virtually unfettered discretion available to prosecutors in determining whether to decline or prosecute a case. *See generally* *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review.”); *United States v. Goodwin*, 457 U.S. 368, 380 (1982) (“For just as a prosecutor may forgo legitimate charges already brought in an effort to save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded.”); *United States v. Brock*, 782 F.2d 1442, 1444 (7th Cir. 1985) (“The United States Attorney, of necessity, enjoys broad discretion in setting prosecutorial priorities.”); *Massey v. Smith*, 555 F.2d 1355, 1356 (8th Cir. 1977) (“The authority to decide against whom federal indictments shall be sought lies almost exclusively with the United States Attorneys or the Justice Department, and their decisions in this regard are not generally subject to judicial review.”); *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir.

Supreme Court's opinion encouraging future governors to "use the clemency power in its intended manner--to prevent miscarriages of justice in individual cases,"¹⁵⁶ Ryan's exercise of clemency stood on constitutional terra firma.¹⁵⁷

Highlighting Ryan's broad legal discretion also helps deflect the charge that his decision was anti-democratic. To be sure, if democracy is viewed as putting every decision to a plebiscite, then Ryan's actions would not only be anti-democratic but also unlawful.¹⁵⁸ But that is not the nature of Illinois' *constitutional* democracy. The people ratified the distribution of the sweeping pardon power to the governor through the political process of creating and preserving a constitution. And although the state legislature, reflecting the peoples' will, authorized the death penalty in certain cases, the pardon power was vested in the executive through the rough and tumble of constitutional politics, and the legislature has always retained the opportunity to amend the constitution. The legislative silence in the face of that delegation of power is properly understood as a form of democratic action too. Consequently, the fact that the death penalty has a democratic authorization is not a sufficient reason to impose it if the people of Illinois also conferred upon Governor Ryan the right to commute or pardon as he deems fit.

2. Ryan's Commutation as Anti-Jury

The second charge alleging the decision was anti-democratic is predicated upon the jury having found that capital punishment was warranted. Ryan's actions, from this perspective, effectively squelched this popular voice.¹⁵⁹

There is no point in denying that Ryan's action overturned a jury verdict.¹⁶⁰ Moreover, this derogation of the jury's role arguably runs afoul of the historically venerated role that the jury occupies in the dispensation of criminal justice in America, a point made especially salient by the Supreme Court in its *Apprendi-Blakely* jurisprudence.¹⁶¹

In response, then, let me show how the very arguments provocatively advanced by Professors David Hoffman and Kaimi Wenger in defense of "nullificatory juries" -- juries that refuse to convict when the facts show the

1967) ("Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.").

¹⁵⁶ *Madigan*, 804 N.E.2d at 560. That dictum by the Court was unsupported by any authority from Illinois that would have constrained Ryan's actions.

¹⁵⁷ See Sarat & Hussain, *supra* note 7, at 1312 (explaining the historical ambiguity but ultimate legality of sweeping uses of the clemency power).

¹⁵⁸ Interestingly, however, polls in Illinois after Ryan's action showed that Ryan's decision was supported by about the same number as those who opposed it. See DEATH PENALTY INFO. CTR., SUMMARIES OF RECENT POLL FINDINGS (describing February 2003 Zogby International poll that shows Illinois residents as evenly divided), at <http://www.deathpenaltyinfo.org/article.php?scid=23&did=210#Illinois> (last visited Mar. 16, 2005).

¹⁵⁹ Cf. David Hoffman & Kaimi Wenger, *Nullificatory Juries*, 2003 WIS. L. REV. 1115, 1119 (defending the prominent role juries have in nullifying criminal cases or in imposing measures of punitive damages that go beyond the achievement of optimal deterrence because juries can serve protective, equitable, and participatory roles).

¹⁶⁰ There may have been some offenders who waived a jury trial and allowed the judge to sentence them to death, but then the anti-democratic nature of the criticism against Ryan would not attach in the first instance. For background on Illinois' death sentencing regime, see COMM'N ON CAPITAL PUNISHMENT, REPORT 3 – 4 (2002), at <http://www.idoc.state.il.us/ccp/ccp/reports/index.html>.

¹⁶¹ *Blakely v. Washington*, 124 S. Ct. 2531 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). These cases stand for the proposition that a trial judge violates a defendant's right to a jury trial by imposing a heightened sentence based on facts that were neither found by a jury beyond a reasonable doubt nor admitted to by the defendant.

defendant is guilty beyond a reasonable doubt --work as a defense for Ryan's actions. According to Hoffman and Wenger, nullificatory juries operate as an important safety valve in criminal justice because they can serve a role *protective* of defendants against an imperial government or an unwise law, as well as an *equitable* role, providing justice unmediated by rules that are too harsh in a particular situation.¹⁶² They also see nullificatory juries as an important *participatory* voice in the creation and maintenance of social policies against industry or interest group capture of legislatures.¹⁶³

Without endorsing the presence or growth of the nullificatory jury, I want to suggest that Ryan's blanket commutation also served these three purposes, first by protecting defendants from being executed within a system that acted erratically (as discussed *infra* at Section B) and unreliably on the most fundamental matters. The commutation also allowed Ryan to interpolate his own sense of equitable fairness into this matter by acting on behalf of all the defendants on death row whom he had a shot at saving, and to do so in a manner that would not simultaneously endanger society. After all, Ryan's action relegated all but a handful of the offenders to spend the rest of their lives in prison.¹⁶⁴ Finally, Ryan's sweeping use of his clemency power served as his opportunity to signal to the legislature his conviction that the system is profoundly broken and that until procedures are in place to assure greater reliability and accuracy, he would use his authority as a state-wide official to stand against the interest groups (whether they are survivors or others) that use their political power to impose unjustifiable sentencing policies.

Moreover, even if one does not embrace the value of the nullificatory jury in the context of petit juries, it bears mentioning that the source of Ryan's power to extend clemency--the fact that he was elected to state-wide office--was arguably more representative of democratic politics than a decision by an unelected group of people to convict an offender. Although juries provide a popular voice in criminal justice, and some would say, an important one, they are not strictly speaking a democratic body, nor are they truly an effective cross-section of the political community that passes the laws in their names. If we wanted juries to be representative of the relevant political community that passed the laws, then jurors would be drawn in state cases from around the state, rather than from a local county or political subdivision. In addition, there is no popular consent to the service rendered by any particular juror in a particular case, and jurors have no accountability to each other or to citizens around them for how they deliberate and vote. Taken together, these points undermine the view that the jury's decision to execute an offender should be sacrosanct simply because that decision represents the voice of the people.

Notwithstanding the preceding defense of Ryan's actions on legal grounds, I should emphasize that the CCR is not a purely positivist account of legal punishment. As mentioned at the outset of this section, while the lawfulness of Ryan's actions may be assessed with reference to his constitutional powers, evaluating the moral praiseworthiness of those actions requires recourse to something other than law. As made plain earlier, the CCR is not wedded to a belief that punishment in any form for any reason is always justified solely as a result of the democratic imprimatur of legislation.¹⁶⁵ For the reasons articulated below, opposition to the death penalty stands as one instance where the CCR's commitment to democracy is outweighed by its fidelity to a certain understanding of liberalism, a liberalism that is simultaneously firm and

¹⁶² Hoffman & Wenger, *supra* note 159, at 1119.

¹⁶³ *Id.* at 1153.

¹⁶⁴ Indeed, some death row offenders were not asking for clemency, perhaps because they preferred the finality of execution over life without parole. I address the significance of this *infra* note 250.

¹⁶⁵ Thus, not all legislatively denominated crimes may be punished on this account. The laws must also conform to liberal principles. For example, outlawing gay sex is worse in this regard than outlawing the consumption of peanut butter on public transit.

modest in its confrontations with criminal offenders.

Indeed, standing alone, mere reference to Ryan's capacious legal powers or the democratic source of that power sweeps too broadly to constitute an effective retributivist response to the abuse of power challenge. Had Ryan used his executive power to commute the sentence of every murderer, not just those on death row, to a single day in prison, there would be solid retributivist grounds to view that decision as an abuse of power, even if the commutation did not violate constitutional constraints. This hypothetical reveals that some reliance on an extra-legal principle is implicit even in the retributivist account I sketched in Part III.

The extra-legal principle at play here animates the CCR: a concern that the state should make adequate efforts to effectuate the ideal of equal liberty under law. If the state, acting through the governor, commutes the sentence of every murderer, regardless of the severity of the offense, to one day in prison, then the state, by its failure to mete out punishment that is commensurate with the severity of the crime, lends plausibility to the offender's claim of superiority over society and his victim. Punishing insufficiently does not render the state complicit in the same wrong the offender committed, but it does aid the offender's claim of superiority, all other things being equal, by undermining the state's earlier effort to contest the false message of superiority that the offender projected through his crime.¹⁶⁶

This hypothetical merely reveals a continuum of social judgments regarding punishment. Imagine a line that, at the far left, represents a state of affairs in which the government makes no attempt to punish any murderers, and, at the far right, represents a state of affairs in which the state spends virtually all social resources to effectuate retributive justice. When grounded in good reasons, as discussed below, Ryan's blanket commutation of death row stands closer to the right end than to the left end of the line. By contrast, a blanket commutation to one day in prison for all murderers stands closer to the left end of the line. This hypothetical requires us to ask whether there were good reasons for a blanket commutation of death row that could be given, and whether the alternative of case-by case review would have sufficed in its stead.

B. Error and Arbitrariness

As we saw in Part II.B, Ryan defended his actions in part by using the discourse of mercy.¹⁶⁷ There, I conceded that reliance on the notion of mercy as an imperfect obligation could not justify Ryan's actions. But what about when

¹⁶⁶ The argument in the text is subject to the caveat that the obligation to contest that false message is defeasible when there are compelling reasons that ought to supervene, e.g., if the threat of destruction by an attack against the society requires that all able-bodied persons to fight as soldiers. Absent exigent circumstances, however, the state's blanket grant of remission of punishment to one day in prison looks too much like a grant of impunity.

The potential difficulties the CCR faces here are twofold: first, the content of the law may be illiberal (e.g., a prohibition on consensual sexual relations between men); or second, the sentence assigned by the legislature may seem disproportionate to the offense, i.e., extremely lenient or excessive. As to the first problem, the CCR is first and foremost a theory of punishment for liberal democracies, and thus it makes no pretense to permit punishment for the violation of illiberal laws. The proper object of critique in this situation is not the judges who apply the laws but the legislature that creates them. The same can be said for punishments that are disproportionate, unless the constitution has vested in judges or other state actors the ability to strike down practices that are cruel or excessive. In that situation, the judges should simply apply their considered judgment, and then if the judges are viewed as being egregiously wrong, the people can amend the constitution to "fix" the mistake. Letting philosophers or mullahs pronounce their distate for a particular practice is an insufficient and unacceptable alternative to the ardors of democracy.

¹⁶⁷ Quoting Lincoln, Ryan said: "I have always found that mercy bears richer fruits than strict justice.' I can only hope with God's help that will be so." See Ryan, *supra* note 42.

mercy is merely understood as equity, that is to say, what about when mercy is understood simply as the perfection of justice?

Through the lens of mercy as equity, the true thrust of Ryan's articulated defense of his actions becomes visible: it was based on concerns central to the retributive project: specifically, accuracy in adjudication and equal justice under law.¹⁶⁸ Ryan had imposed a moratorium in Illinois prior to his commutations in response to a finding that Illinois had erroneously sentenced to death thirteen of its death row inmates, which was quite striking considering that only twelve others had been executed.¹⁶⁹ Moreover, he found that a murder committed in one county in Illinois could lead to a likelihood of receiving the death penalty five times what it would be for the same crime in another county.¹⁷⁰ Inveighing against this arbitrary distribution in the death penalty, the frequency of error in its imposition, and the finality associated with the punishment, Ryan thought it was not unreasonable to take all steps possible to avoid inflicting penalties that preclude the possibility of correcting wrongful convictions before it is impossible to do so. Far from finding that Illinois was "drowning in due process for offenders,"¹⁷¹ Ryan's blue ribbon commission found evidence the system was in dire need of repair.¹⁷² Indeed, Ryan's insistence upon a reliable process of guilt-determination conveys, rather than disparages, retribution's ambition.

Moreover, because the evidence indicated gross disparities in the distribution of the death penalty based on morally arbitrary characteristics such as race or intrastate geography,¹⁷³ there was strong reason to think that the

¹⁶⁸ Note that a concern for equality in punishment can be expressed in at least two ways. First, by creating institutions of criminal justice to punish persons for offenses against the law, we effectuate the commitment to equal liberty under law, as explained in Part III.A, *supra*, by showing that the offender does not possess greater liberty than his fellow citizens. Second, by administering the institutions of criminal justice in a fair and even-handed way, we show that concern for equality by treating like cases alike, and unlike cases differently. A system of justice whose procedures failed to treat similarly situated offenders similarly would erode the very principle of equality under which punishment is legitimately imposed. For example, the state would fail to vindicate equal liberty under law if it refused to prosecute crimes committed on Tuesdays, or crimes by people who make more than \$50,000 a year. Thus, the commitment to equal liberty under law entails an equally vigorous commitment to the fair and impartial application of the criminal laws themselves.

¹⁶⁹ *See id.* ("In Illinois last year we had about 1000 murders, only 2 percent of that 1000 were sentenced to death. Where is the fairness and equality in that? The death penalty in Illinois is not imposed fairly or uniformly because of the absence of standards for the 102 Illinois State Attorneys, who must decide whether to request the death sentence. Should geography be a factor in determining who gets the death sentence? I don't think so but in Illinois it makes a difference. You are 5 times more likely to get a death sentence for first-degree murder in the rural area of Illinois than you are in Cook County. Where is the justice and fairness in that? Where is the proportionality?").

¹⁷⁰ *See id.*

¹⁷¹ *See* Wallace, *supra* note 1, at 395.

¹⁷² The Commission made eighty-five recommendations to fix the death penalty scheme in Illinois, including the following:

Videotaping of all interrogations of capital suspects conducted in a police facility. . . . Forbidding capital punishment in cases where the conviction is based solely on the testimony of a single eyewitness. Barring capital punishment in cases where the defendant is mentally retarded. Establishing a state-wide commission--comprised of the Attorney General, three prosecutors, and a retired judge--to confirm a local state's attorney's decision to seek the death penalty. Intensifying the scrutiny of testimony provided by in-custody informants during a pre-trial hearing to determine the reliability of the testimony before it is received in a capital trial. Requiring a trial judge to concur with a jury's determination that a death sentence is appropriate; or, if not, sentence the defendant to natural life.

Press Release, Illinois Commission on Capital Punishment, Illinois Commission Announces Nation's Most Comprehensive Death Penalty Review, Recommends Sweeping Changes to Protect Innocent, Ensure Fairness (Apr. 15, 2002), *available at* <http://deathpenaltyinfo.org/article.php?scid=1&did=382>.

¹⁷³ *See generally* David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*,

state's death penalty regime was undermining, rather than promoting, the retributivist commitment to equal liberty under law.¹⁷⁴ Senator Lieberman rightly noted that the credibility of the justice system is crucial, but, as I've observed earlier, we cannot disclaim responsibility for the prevailing reality that death sentences in Illinois (and elsewhere) are distributed quite arbitrarily, influenced unduly by factors like geography and the race of the victim.¹⁷⁵ Far from widening the credibility gap, Ryan's commutations helped reduce the sense that the state is blind to how arbitrary factors affect the distribution of capital punishment.¹⁷⁶

One might respond as Garvey did, and argue that the remedy of the blanket commutation of death row was not the only appropriate retributivist response to the credibility gap.¹⁷⁷ One could also choose to reduce that credibility gap by executing more of the offenders in the "geographically privileged" districts or more of the offenders whose victims were black.¹⁷⁸ This alternative remedy is not so easily administered, however, so long as the recommendations to execute are made by decision makers from around the state whose views about the propriety of capital punishment vary by race and geography. Moreover, in light of the Supreme Court's prohibition on mandatory capital punishment for certain classes of offenders,¹⁷⁹ the leveling down of punishment, instead of the leveling up, may have been the only effective way to respond to the disparities associated with the administration of the death penalty.

Still, a critic might say, had a case-by case review been undertaken, Ryan's office could have explored whether geographical or racial issues played

83 CORNELL L. REV. 1638 (1998); Wayne A. Logan, *Casting New Light on an Old Subject: Death Penalty Abolitionism for a New Millennium*, 100 MICH. L. REV. 1336, 1337 n.8 (2002) (collecting sources on "gross geographic variations in death sentence imposition rates both between and within death penalty jurisdictions").

¹⁷⁴ One might say that disparities based on geographic reasons are not completely arbitrary. Geography, after all, can track the bounds of communities that have reached different agreements on the severity of punishments and crimes. Two issues arise in response to this argument. First, what is the relevant political community? In the context of assessing the state's imposition of capital punishment, as opposed to Cook County's municipal rules and laws, it is fair to say that state laws should be applied in an even-handed manner across the state. Second, some might say that racial or ethnic differences also track the boundaries of communities. If blacks in Cook County do not want to impose the death penalty against other blacks, notwithstanding that the race of the victim was black too, should that matter? To my mind, when assessing the legitimacy of a particular law or legal practice, one has to look at where that law comes from and assess its problems in light of the reach that that law is supposed to have. If the State of Illinois has the death penalty, and if it is important that we have a popular voice in the form of a jury that decides whether that penalty is imposed, then, at least in the most serious cases, the jury should be drawn from a statewide pool, rather than a local one.

¹⁷⁵ Another significant problem in capital cases is that defendants in capital cases often have inadequate legal representation. See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

¹⁷⁶ To be sure, the "credibility" gap in the criminal justice system persists primarily as a consequence of the disparities in legal resources available to members of different socio-economic classes. Nonetheless, some might argue that the unequal distribution of a penalty does not speak to its being unjust or immoral. See Ernest van den Haag, *supra* note 72, at 1663 ("[I]f the death penalty were imposed on guilty blacks, but not on guilty whites, or, if it were imposed by a lottery among the guilty, this irrationally discriminatory or capricious distribution would neither make the penalty unjust, nor cause anyone to be unjustly punished, despite the undue impunity bestowed on others."). This claim is untenable once we have situated the practice of punishment in political society. Van den Haag's argument is inconsistent with thinking about punishment as a political and legal institution faithful to liberalism's requirements, which include particularly a commitment to equal justice under law. Van den Haag's problem is that he fails to see the fundamental relationship between justice and equality described in Part III, *supra*.

¹⁷⁷ See Garvey, *supra* note 2 *passim*.

¹⁷⁸ Ironically, this could, given the empirical reality that blacks kill blacks more than whites kill blacks, cause more blacks to be executed, not fewer. See Randall L. Kennedy, McClesky v. Kemp: *Race, Capital Punishment and the Supreme Court*, 101 HARV. L. REV. 1388, 1394 (1988).

¹⁷⁹ *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

a possible role in the decision to execute each particular offender. Case-by case review might have revealed at least one white death row offender whose victim was black and who was tried and sentenced to death in an “anti-death penalty” county. In such a situation, the credibility gap problem could not arise (unless for other reasons aside from race or geography). Executing that offender (or that class of offenders) would not be wrong, at least based on the arbitrariness critique. Or would it? If it appeared that the imposition of the death penalty was confined to such narrow conditions, then it would look--somewhat perversely--as though the state “values” the loss of black lives to murder more than it does the loss of non-black lives to murder. That too would appear morally arbitrary across persons.

What about the accuracy objections? Presumably, one could also try to ameliorate the anxieties about accuracy through case-by case review, under an evidentiary standard of moral certainty, as opposed to “merely” beyond a reasonable doubt.¹⁸⁰ This route seems tempting as a criticism of the blanket commutation, but it should be resisted. For often, what seems morally certain will depend upon facts as we know them at a given time. These facts sometimes turn out to be quite shaky.¹⁸¹

A recent news item illustrates the problem in its full depth. A police laboratory in Houston, which sits in Harris County, was recently accused of having provided false DNA evidence about thousands of crimes over the last twenty-five years.¹⁸² What is more, over seventy people have been executed for crimes in Harris County since the death penalty was reinstated in Texas in 1976.¹⁸³ We do not yet know how many people have been wrongfully convicted as a result of the incompetence or malfeasance in this lab. But what might have seemed a moral certainty to a scrupulous and searching jury during these last twenty-five years could easily change if the factual predicate for that certainty is faulty. The problem with the police lab in Harris County is especially disconcerting because DNA evidence lends an appearance of scientific certainty to convictions obtained through its use.

A blanket commutation of death row recognizes the intractable fallibility of our institutions in a way in which case-by case review cannot.¹⁸⁴ For although the culpability of an offender is decided case-by case, he is still entitled to a system that determines that culpability accurately and fairly.¹⁸⁵ In other words, even “if all 171 Illinois death row inmates were, in fact guilty, that did not mean that the broken system’s decision that they should die was one worthy of trust.”¹⁸⁶

Moreover, a defense of case-by case review cannot gain traction by

¹⁸⁰ See Tim Petrowich, *Garnati Pleads with Senate to Vote Down Death Penalty Bill*, MARION DAILY REPUBLICAN, Mar. 19, 2005, available at http://www.mariondaily.com/articles/2005/03/19/local_news/news01.txt (discussing new bill in Illinois that would change the standard of proof to “without any doubt” from “beyond a reasonable doubt”) (last visited Mar. 21, 2005).

¹⁸¹ See JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000); Marshall, *supra* note 33, at 574 - 75 (“When DNA teaches us lessons about the incidence of eyewitness error or false confessions, those lessons are not limited to DNA cases. The lessons apply with equal force to cases that are not susceptible to forensic testing.”).

¹⁸² Adam Liptak & Ralph Blumenthal, *New Doubt Cast on Crime Testing in Houston Cases*, N.Y. TIMES, Aug. 5, 2004, at A19.

¹⁸³ *Id.*

¹⁸⁴ Cf. Michael Rowan, *Minding Our Skepticism: A Conservative Approach to Capital Punishment*, 31 FLA. ST. U.L. REV. 377, 405 - 407 (2003) (articulating the paradox that while conservatives favor limited and small government out of skepticism of government’s capabilities, many nonetheless support the death penalty notwithstanding the significance and finality of that decision).

¹⁸⁵ Of course, this recognition of fallibility affects all other punishments, which is why the state should punish in such a way as to create possible avenues for the state to apologize and compensate those convicted erroneously.

¹⁸⁶ See Marshall, *supra* note 33, at 579.

pointing to the DNA exonerations prior to Ryan's blanket commutation as proof that the system works. That is because, as Professor Marshall explains, we

are not able to inspect all convictions in the same manner that we can inspect convictions susceptible to DNA corroboration or refutation. Instead, we must treat the DNA cases as the equivalent of a random sampling of convictions and recognize that the error rate this sampling reveals, and the nature of errors it reveals, replicates the general error rate and sources of error among all cases.¹⁸⁷

The evidence before Ryan indicated that there was no basis to conclude that the state was reliably imposing death sentences on the right people for the right reasons. Hence, until the problems of sorting errors could be ameliorated, it was not unreasonable to prevent the state from making future sorting errors. Garvey's retort is that case-by case review would reveal whether someone might not have committed the crime.¹⁸⁸ What the evidence shows, however, is that epistemic certainty will not be ours so long as human beings mistakenly remember, falsely testify, or incompetently handle DNA evidence in those few cases where DNA evidence exists. We cannot forget that the people who were exonerated on death row were already proven guilty beyond a reasonable doubt. In some of the cases, the courts had pronounced that the evidence implicating the defendant was overwhelming. And then they were exonerated.¹⁸⁹ Assuming *arguendo* that some people do deserve execution for their crimes, Garvey's contention that case-by case review would be the solution more consonant with mercy as equity misses the point.

What the experience in Illinois reveals is that all criminal prosecutions potentially leave us wondering whether we might plausibly have missed something. As I explain below, that does not mean we abandon all punishment, but it does entail that we punish with modesty about our capabilities, and that we punish, to the extent possible, in ways that permit social contrition for wrongs the state commits against the erroneously convicted.

This does not end the inquiry of course, because some people might say that even with an error rate greater than zero, the death penalty's benefits outweigh its not insubstantial costs. A purist might say that a risk of error is too much to bear. But, as I explain below, a retributivist has to consider the possibility that the death penalty may *reduce* incidents where we punish the innocent by mistake. Second, we have to consider what impact, if any, our saving innocent lives should have on our punishment choices. The merits of these contentions I take up in Part V. But before doing so, I want to address the notion that Ryan's actions were wrong from a retributivist perspective because they showed disrespect to the interests of victims.

C. *How Victims Matter, and How They Do Not*

The third challenge to the blanket commutation of death row was predicated on the allegedly grievous injury that Ryan's actions imposed on victims or survivors. Without appearing insensitive, I want to stress that, from the perspective of retributive theory, and specifically the vantage point of the

¹⁸⁷ *Id.* at 578.

¹⁸⁸ See Garvey, *supra* note 2, at 1329.

¹⁸⁹ See Marshall, *supra* note 33, at 578 (“[I]t turned out--often through a series of miracles that never could have been anticipated by examining the paper record--that the defendant was innocent. To be sure, proponents of the commutations agreed, most of those on death row were guilty, but it was equally certain that some were innocent. Some were still waiting for their miracle to come. The problem was identifying which were which, and given the impossibility of doing that accurately, death sentences should be taken off the table.”).

CCR, this injury has little to do with the demands of retributive justice properly understood.

Victims have a place in retributive theory because their status as victims of a norm violation helps explain why in fact we punish offenders.¹⁹⁰ But what justifies retributive punishment is the existence of a norm violation, not the existence of a specific victim.¹⁹¹ It is both common and commendable that institutions of retributive justice impose punishment for crimes that do not harm specific victims.¹⁹²

What role then do victims play in determining sentencing outcomes in a retributivist scheme? The short answer is none. This is hardly a popular answer. Because of the exalted position victims and survivors have come to occupy in contemporary American culture,¹⁹³ there appears to be a political hesitation to discount their preferences.¹⁹⁴ No one wants to be deemed callous to the pain of victims or their survivors.¹⁹⁵ But over-sensitivity to their rage or grief qua victims creates the risk of losing the distinction between retribution and revenge.¹⁹⁶ To the extent this is true, we must be careful because the claims of victims *as victims* are of little retributive significance. As I highlighted in Part III, retribution does not speak in the name of victims alone; rather it speaks in the name of victims, among others, as citizens. On this point, retributivists share an affinity with the great punishment theorist, Cesare Beccaria, who centuries ago wrote, “the right to inflict punishment is a right not of an individual, but of all citizens, or of their sovereign.”¹⁹⁷ Or, as Robert Nozick wrote, a “victim occupies the unhappy special position of victim and is owed

¹⁹⁰ By “victims” I also include their survivors.

¹⁹¹ See Michael S. Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 69 (1999).

¹⁹² Think of self-exculpatory perjury by a defendant on trial for a minor regulatory crime, such as eating food on the subway. The perjury has no specific victim, but it is wrong nonetheless; eating food on the subway may not be offensive but it can impose harms that one may reasonably aim to reduce through criminal sanction, such as injuries sustained by persons who slip on banana peels or increased costs of maintenance. The CCR permits conduct of this sort to be sanctioned.

This is one of the areas where my account of punishment may differ from retributivists like Michael Moore, who argues that the “norms of any criminal code that could satisfy the demands of retributive punishment have to match closely in content the central norms of morality. If there is no such match, then there is no point to punishment, for a retributivist.” See *id.* at 69; see also Mundle, *supra* note 89, at 227 (“Punishment of a person by the State is morally justifiable, if and only if he has done something which is both a legal and moral offence . . .”). By contrast, I am prepared to give a mite more breathing space to the legislature to develop strange (though not illiberal) laws.

¹⁹³ See Jonathan Simon, *Fearless Speech in the Killing State: The Power of Capital Crime Victim Speech*, 82 N.C. L. REV. 1377 (2004) (describing the political power of victim organizations and victim speech).

¹⁹⁴ Of course these preferences are not hegemonically uniform either. As Professor Bandes notes, “different victims have different needs” and these needs change over time and place. Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance, and the Role of the Government*, 27 FORDHAM URB. L.J. 1599, 1602 - 03 (2000). Thus, the death penalty may not be the appropriate way to satisfy all victims’ preferences.

¹⁹⁵ See, e.g., Marshall, *supra* note 33, at 582 (“No caring person can be unmoved by the plight of murder victims’ families.”).

¹⁹⁶ See Sarat, *supra* note 69 at 1350 - 55 (contrasting retributive theories with victim-centered understandings of punishment); Simon, *supra* note 193, at 1381 (“Victim speech also pushes the capital sentencing process away from classical and modern goals of criminal law like deterrence and retribution, and toward an embrace of vengeance.”); see also Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 365 (1996) (arguing that victim impact statements should be suppressed because they “appeal to hatred, the desire for undifferentiated vengeance, and even bigotry”); Elizabeth E. Joh, *Narrating Pain: The Problem with Victim Impact Statements*, 10 S. CAL. INTERDISC. L.J. 17, 18 (2000). On the topic of victim rights generally, see MARKUS DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS’ RIGHTS (2002); GEORGE FLETCHER, WITH JUSTICE FOR SOME: VICTIMS’ RIGHTS IN CRIMINAL TRIALS (1995).

¹⁹⁷ CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 58 (Henry Paolucci trans., Bobbs-Merrill 1963) (1764).

compensation, [but] he is not owed punishment.”¹⁹⁸

That said, let me add a series of qualifications. First, there is nothing improper about the retributive state’s solicitousness toward victim interests where there is no conflict with principles of retributive justice.¹⁹⁹ Indeed, the participation of victims or their allies is often necessary to obtain a conviction. For that reason, there is nothing wrong with conferring upon victims a right to be informed about the timing of important criminal justice proceedings involving the prosecution of the offender. Similarly, a victim should have the option of being present at those proceedings, with few exceptions.²⁰⁰ Indeed, victims of crime may, under certain circumstances, be due some form of social insurance to help them recover from their crimes, not to mention some form of restitution from the offender when available and appropriate.

Still, the state need not and ought not be so solicitous to victims that it sacrifices its commitment to equal justice under law.²⁰¹ A balance must be struck here. The most difficult issue concerns not the right to be informed, or the right to be present, but the right to be heard. As former victims’ advocate, and now District Court Judge, Paul Cassell has observed, a victim’s input into a decision for release or bail often proves vital to the imposition of correct release conditions.²⁰² Similarly, when a judge makes her decision whether to reject a plea agreement because it is not in the interest of justice, she should be able to consider facts or issues raised by the victim, since prosecutors often engage in the practices of fact and charge bargaining.²⁰³ But the defendant should be able to respond and/or object to any statements of facts that the victim may seek to introduce if the effect is to increase the sentence.²⁰⁴ This process promotes greater truth-telling in criminal adjudications, which is vital because prosecutors and defendants sometimes have motivations that are not aligned with the interests of the court or society.²⁰⁵

¹⁹⁸ ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 138 (1974).

¹⁹⁹ One can easily imagine that some survivors and victims are untingered by vengeance. They simply but urgently want to see impartial retributive justice done to the offenders. And for those victims, there are calm and deliberative ways of advancing their interests in the criminal justice system without debasing the quality of justice meted out. *See generally* Paul G. Cassell, *Balancing the Scales of Justice: The Case For and the Effects of Utah’s Victim Rights Amendment*, 1994 UTAH L. REV. 1373 (outlining such methods).

²⁰⁰ Obviously, if a victim is disruptive to the trial, then exclusion is warranted. The more difficult situation arises when the victim is also a witness. Generally, witnesses may not, absent the consent of both parties, sit through a trial and hear testimony of other witnesses, out of fear that the other testimony will unduly influence the testimony of the witness in question. Even if both parties consent, the court may on its own motion exclude the witness from presence at the trial. *See* FED. R. EVID. 615. One way to deal with this problem is to require victim-witnesses who wish to stay for the whole trial to testify first, and to exclude them from the courtroom during the opening statements. Compare that idea with Cassell, *supra* note 199, at 1392 (defending amendments to Federal Rule of Evidence 615 giving victims an “absolute right to attend trial, provided that the prosecutor agrees”).

²⁰¹ *Cf.* John Finnis, *Retribution: Punishment’s Formative Aim* 44 AM. J. JURIS. 91, 102 - 03 (1999) (“Any practice of giving victims some role in criminal proceedings other than as witnesses, amongst other witnesses, to the fact of the offense must be highly questionable.”); Moore, *supra* note 191, at 67 (taking the extreme position that victims “should and must be ignored if you are claiming to be doing retributive theory”). Moore goes too far, and, to a degree, so does Finnis; as I explain in the text, paying attention to victims in some instances may be necessary for proper retribution to be imposed.

²⁰² Cassell, *supra* note 199, at 1394.

²⁰³ *See, e.g.,* United States v. Green, 346 F. Supp. 2d 259, 272, 278 - 79 (D. Mass. 2004) (Young, C.J.).

²⁰⁴ *Cf.* Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004). *Blakely* prohibits judges from finding facts that would increase a defendant’s sentence above the sentence he would receive based on the facts proven to a jury beyond a reasonable doubt, unless the defendant admitted those facts or the fact was a prior conviction.

²⁰⁵ While the interests of victims may not be aligned with the interests of the court, the increased availability of information makes it more likely that a court can come to a wise decision. *See Green*, 346 F. Supp. 2d at 265 (identifying the ways in which the prevailing criminal justice system, in particular its over-reliance on plea bargains, distorts incentives to tell the truth about what happened).

Notwithstanding the aforementioned role, most retributivists would demur at lending victims a direct role in sentencing, say, by permitting a victim impact statement to be read prior to sentencing.²⁰⁶ The concern is that the judge or jury would be swayed to harshness or leniency as a result,²⁰⁷ and the problem with that, from a retributive perspective, is the disruption of the equality norm. Specifically, if victims or their survivors have a role that directly influences sentences, then the sentence that an offender receives may hinge on whether the jury finds the victim or his allies persuasive or sympathetic.²⁰⁸ Just as one victim's family may urge especial harshness against an offender, another victim may be surpassingly compassionate, in which case the offender may receive an unwarranted request for no punishment or unusually lenient punishment. This advantages him as compared to similarly situated offenders who committed the same offense.²⁰⁹

Again, I don't want to overstate the irrelevance of victims to an attractive system of criminal justice. Indeed, in some ways we could better effectuate the CCR's moral accountability norm through victim participation. For instance, victims or survivors could read to the court--after the sentence is imposed--an appropriate statement about how the crime has affected their lives.²¹⁰ This would be especially appropriate in the vast majority of cases where offenders "accept responsibility" and enter a plea agreement.²¹¹ How effective such a statement would be when an offender adamantly insists upon his innocence is a different matter. But post-sentencing victim statements could help achieve

²⁰⁶ Judge Cassell, for example, believes that victims have a right to be heard at sentencing. See Cassell, *supra* note 199, at 1394. As I explain in the text, this proposal goes too far, for some of the reasons sketched out by, among others, Jeffrie Murphy. See JEFFRIE G. MURPHY, *supra* note 27, at 30. Elsewhere, Murphy sought to give victims a greater role in sentencing determinations. See generally Jeffrie G. Murphy, *Getting Even: The Role of the Victim*, 7 SOC. PHIL. & POL'Y 209 (1990). This was rejected as being inconsistent with retributivism by both Fletcher and Moore. See George P. Fletcher, *The Place for Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51 (1999); Moore, *supra* note 191, at 67.

²⁰⁷ See MURPHY, *supra* note 27 at 30 (seeing danger in allowing victim impact statements to play a legal role); Moore, *supra* note 191, at 67. The Supreme Court initially blocked the use of victim impact statements in *Booth v. Maryland*, 482 U.S. 496 (1987), but four years later reversed course in *Payne v. Tennessee*, 501 U.S. 808 (1991).

²⁰⁸ These persuasion skills can be subtle, and perhaps even unintentional. If a victim has a different background from that of the offender, but shares a racial background with members of the jury or the judge, feelings of ethnic "solidarity" may influence the outcome. There is much that has been written on these disparities and the bizarre results that may follow. See generally Wayne A. Logan, *Opining on Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C. L. REV. 517 (2000); Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143 (1999) [hereinafter Logan, *Through the Past Darkly*].

²⁰⁹ It is true that there are other factors in play, such as the prosecutor's wide discretion to seek the death penalty. However, that discretion can be constrained in large measure because the prosecutor is a repeat player subject to carrots and sticks; jurors or victims are usually one-off players, and are therefore less susceptible to having their discretion canalized along some principled basis. See Markel, *Against Mercy*, *supra* note 16, at 1428.

²¹⁰ I am grateful to David Hoffman for a conversation that spurred this idea. It turns out that post-sentence allocutions have been used sparingly in the past. As of 1995, only Texas allowed post-sentence victim allocutions. See TEX. CODE CRIM. PROC. ANN. art. 42.03, § 1(b) (Vernon 1995) (detailing requirements for post-sentence victim allocation). According to one commentator, the results of post-sentence victim allocutions do not invariably comport with the norms of an attractive justice system; in some cases, post-sentence statements have simply been opportunities for the families of victims to pile insult and invective on the offender. See Keith D. Nicholson, Comment, *Would You Like More Salt with That Wound? Post-Sentence Victim Allocation in Texas*, 26 ST. MARY'S L.J. 1103 (1995). Nicholson wisely observes that judges should be empowered to hold in contempt those survivors whose statements violate the decorum of the courtroom. *Id.* at 1143.

²¹¹ Defendants in the federal criminal system can be awarded a minor reduction in their sentence for "accepting responsibility" under the United States Sentencing Guidelines. Prior to the Court's recent decision in *United States v. Booker*, 125 S. Ct. 738 (2005), which rendered the Federal Sentencing Guidelines advisory, this reduction had been granted primarily to defendants who pleaded guilty. Whether courts will grant more frequent or sharper reductions for accepting responsibility after *Booker* remains to be seen..

greater incidence of contrition or remorse.²¹²

In the context of the death penalty, the fear of victim influence on sentencing looms even more menacingly. Thus, George Will's critique--that Ryan's actions were unjustifiable as a laceration of victim wounds--is off the mark at least as a *retributivist* critique because Will and those who share his views unduly privilege the victims or their families over the potentially wrongly executed.²¹³ Ex ante--that is, knowing only the relevant risks and information, but not one's possible identity as offender, victim, taxpayer, bystander, etc.--reasonable persons should sooner authorize the elimination of the risk of being wrongly executed than the risk of being wrongly denied whatever closure that might be gained from the death of the offender.²¹⁴

Undoubtedly, it is better that victims or survivors not be re-traumatized and that they find the psychological healing they need. A good state and the rich panoply of societal institutions within it should make this therapy available to the extent possible.²¹⁵ But it is purely speculative--if not illusory--to assert that the death or cruel punishment of the offender will necessarily achieve that healing, or that other means will not provide the closure victims seek.²¹⁶ Indeed, there "is no evidence that families of murder victims in non-death states such as Michigan or Wisconsin endure more lasting pain than families of murder victims in death states such as Texas or Ohio."²¹⁷ In other words, the death penalty is not a means narrowly tailored to satisfy the state's legitimate end of healing the wounds of crime victims. Moreover, to the extent that victims participate in the decision to impose the death penalty, and to the extent the death penalty is imposed because of the positive personal characteristics of the victim or the economic and social dislocations caused by a particular victim's death, then the imposition of death will be distributed on the basis of morally immaterial features of the victim or her family.²¹⁸ Thus, the use of victim

²¹² On remorse and apology in criminal procedure, see Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85 (2004).

²¹³ See Will, *supra* note 4, at B7.

²¹⁴ I explained the relationship between ex ante decision-making and retributivist thought in Part III.D and note 114, *supra*. The decision-making theory I have in mind does not call for aggregating utilities (through revealed preferences) from the ex ante position, but rather choosing the rule or practice that will most likely conduce to human flourishing from the perspective of a wise, liberal "ideal observer."

²¹⁵ Indeed, in a speech delivered before he left office, Governor Ryan called for better deployment of social resources to provide counsel and help to victims and their families. See Ryan, *supra* note 42.

²¹⁶ Indeed, notwithstanding the number of surviving families upset by Ryan's commutations, many members of victims' groups, such as Parents of Murdered Children, are banding together to express their opposition to the death penalty. One website reports that victims' families often feel that no sentence can ever "equate to the loss of your child's life and the horrors of murder." THE RELIGIOUS ACTION CTR. FOR REFORM JUDAISM, DEATH PENALTY, at <http://rac.org/advocacy/issues/issued> (last visited Mar. 29, 2005). Frequently, victims' families recognize that the death penalty will inflict the same pain they have felt on the accused's family. As one mother replied when asked at the funeral of her murdered son whether she wanted the death penalty: "No, there's been enough killing." *Id.* See also MURDER VICTIMS' FAMILIES FOR RECONCILIATION, ABOUT MVFR, at <http://www.mvfr.org/AboutMVFR.htm> (last visited Mar. 29, 2005).

²¹⁷ Marshall, *supra* note 33, at 582. Marshall also astutely observes:

[O]nly two percent of all murders are punished with the death penalty, even in death penalty states. If we really believed that executions were essential to the well-being of victims' families, how could we betray these other ninety-eight percent of families by depriving them of healing? Not one study of which I am aware has ever found that the psychological health of families in cases in which executions have been imposed is better than in cases in which life sentences are imposed.

Id. at 582 - 83. Similarly, I have seen no evidence that shows that the families of victims from nations where the death penalty is imposed heal at a greater rate than those who live in places that do not utilize capital punishment.

²¹⁸ I am grateful to Wayne Logan for highlighting this point to me. Logan expands on this point

impact evidence undercuts the retributivist commitment to the fair and equal application of criminal sanctions.

In sum, from the perspective of the CCR (and other leading accounts of retributivism), the preferences of victims or their survivors should not enjoy special consideration in determining the death (or life) of the offender. Thus the lack of consultation by Governor Ryan to the victims and/or their families before the commutation is of little weight, at least from a retributivist perspective.²¹⁹

V. RETRIBUTION AND THE DEATH PENALTY

In this Part, I explore how and whether the arguments already discussed in Part IV create or shape a broader argument against the death penalty-- one that goes beyond the institutional questions of the legitimacy of Ryan's commutation of death row. In this Part, I aim beyond the commutation itself, and elaborate instead upon the general claim that retributivism and the death penalty are incompatible.

My goal here is to dispel the notion that retributivists must support the death penalty.²²⁰ In what follows, I offer and examine various arguments that militate against the death penalty from a retributivist perspective and then I explore what objections can be made to those arguments. I conclude that there are no compelling retributivist defenses of execution, several compelling arguments against execution, and no evidence of a compelling deterrence-based justification to change course.²²¹

In this respect, I move beyond a justification of the commutation of death row, and map out the topography of what I see as the retributivist case against the death penalty. The concerns arising from the institutional application of the death penalty, from the perspective of the CCR, can be sorted into roughly two categories--contingent objections and conceptual objections.

A. *Contingent Retributivist Objections to Executions*

As seen earlier, a concern with accuracy and the desire to avoid arbitrariness in the distribution of the death penalty are core commitments of a liberal legal conception of retributivism. If the death penalty is distributed arbitrarily, as was the case in Illinois, the agents who impose it act without legitimacy, for they transgress the bounded use of power that itself permits their use of coercion over others. As the report from the Governor's Commission on Capital Punishment showed, many offenders sentenced to death row were there because morally irrelevant factors such as race and intrastate geography played a

in Logan, *Through The Past Darkly*, *supra* note 208, at 159.

²¹⁹ The claim that Ryan was callous towards victims seems untrue for at least two reasons. First, Ryan's rhetorical defense of his actions recognized the significance of victims and their interests. More importantly, he held hearings about what to do regarding the death penalty at which victims were given an opportunity to come forward and be heard. *See* Sarat, *supra* note 69 at 1367; Simon, *supra* note 193, at 1380.

²²⁰ Kant and Professors Berns and Blecker are supporters of executions by virtue of their ostensibly retributivist commitments. *See* Berns, *supra* note 27; Blecker, *supra* note 72 Even today, the Supreme Court continues to rely upon ideas of retribution to permit the imposition of the death penalty. *See* sources cited *supra* note 73. Furthermore, considering the particularly heinous crimes of which many of the offenders on Illinois' death row were convicted, many people believe firmly that these "worst of the worst" deserve execution.

²²¹ Of course, there is an ongoing debate about the death penalty's deterrent power, but there has been little proof of a marginal deterrent effect. *See* Marshall, *supra* note 33, at 582; Bedau, *supra* note 122, at 39.

major part in their sentencing.²²² That objection, it seems, does not itself call for an end to the death penalty--only a more even-handed imposition of it. As a legal matter, however, the Supreme Court's jurisprudence on the death penalty may preclude a more even-handed imposition of it, in which case the leveling down of punishment is the only route available.²²³

A more powerful objection to the imposition of the death penalty is the problem of inaccuracy, as discussed above. Various empirical studies have shown that there is a high error rate associated with death-penalty eligible cases.²²⁴ Some of these errors are uncovered prior to the execution of the offender.²²⁵ Some, lamentably, are not.²²⁶

These arguments may not quell the concerns of Blecker and Garvey, among others, who suggest that case-by case review could have shown that at least one of the people on death row did in fact commit the crime he was convicted of and was not arbitrarily sentenced to death on the basis of the race of the victim or the county in which he was prosecuted.²²⁷ My answer, perhaps unsatisfactory to some, is to deny, at the level of institutional decision-making, Garvey's premise that we could achieve the certainty we need to make the decision to kill someone. Because of the finality of a sorting error, one is properly wary of inflicting the death penalty before it is too late to correct the error.

Other reasons may also warrant consideration. For instance, as stated before, the retributivist social planner cannot deny responsibility for the predictable (if unintended) deleterious effects of their actions. Hence, there is an obligation to consider the well-being of the citizens who serve as the state's executioners. Many of these executioners, and the teams that assist them, suffer from extensive psychological traumas and associated medical difficulties.²²⁸

²²² Cf. COMM'N ON CAPITAL PUNISHMENT, *supra* note 160 at

http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_01.pdf.

²²³ See *Sumner v. Shuman*, 483 U.S. 66 (1987) (holding mandatory death penalty scheme for individuals convicted of capital crimes while already serving life sentences unconstitutional); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (striking down a mandatory death penalty scheme).

²²⁴ See JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973 - 1995*, at 1 (2000), available at

<http://justiceccjr.policy.net/cjedfund/jpreport/liebman2.pdf.finrep.pdf>. Strikingly, Liebman's study found that courts reverse capital convictions and/or sentences at an average rate of sixty-eight percent. See James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973 - 1995*, 78 TEX. L. REV. 1839, 1850 (2000).

²²⁵ As Garvey noted, at the time of Ryan's decision, thirteen offenders on death row in Illinois had been exonerated, while twelve had been executed. See Garvey, *supra* note 2, at 1320 n.4. Many others have been exonerated prior to their execution. According to the Death Penalty Information Center, 119 people in twenty-five states have been released from death row since 1973, due to evidence of their innocence. See DEATH PENALTY INFO. CTR., INNOCENCE AND THE DEATH PENALTY, at <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6?> (last visited Mar. 16, 2005). The latest exoneration was Derrick Jamison of Ohio on February 28, 2005. *Id.* In light of the shoddy laboratory work allegedly conducted in Harris County, Texas, however, the number of wrongly executed may go up, pending the results of the investigation. See Liptack & Blumenthal, *supra* note 182, at A19.

²²⁶ To date, much research has explored how many offenders have been wrongfully executed. One study by the Equal Justice Institute USA has found evidence that, by 2000, at least sixteen people were executed for crimes they did not commit. See GRASSROOTS INVESTIGATION PROJECT, EQUAL JUSTICE USA, REASONABLE DOUBTS: IS THE U.S. EXECUTING INNOCENT PEOPLE? (Oct. 26, 2000), at

<http://www.quixote.org/ej/grip/reasonabledoubt/reasonabledoubt.pdf>. In addition to the possibility that wrongful execution may not be that uncommon, one must also consider that the lack of information on this subject is created by the fact that there exists little incentive for people to investigate the innocence of people who are already dead. As between the choice to spend time clearing the name of someone who has not yet been executed and that of someone who has been executed, people will tend to choose the former.

²²⁷ Blecker, *supra* note 8, at 304 (condemning the morally indiscriminate process); Garvey, *supra* note 2, at 1322; see also Louis P. Pojman, *Why the Death Penalty Is Morally Permissible*, in *DEBATING THE DEATH PENALTY*, *supra* note 122, at 72.

²²⁸ See Bob Herbert, *Inside the Death House*, N.Y. TIMES, Oct. 9, 2000, at A21 (describing the trauma of the Texan executioners in dealing with their jobs on the "tie-down" team); *Witness to*

That problem, coupled with the fact that many executions are botched,²²⁹ counsels restraint.

Together or on their own, these three criticisms of the death penalty provide a justification for a blanket commutation of death row sentences on retributivist grounds--at least temporarily. Arguably, however, these criticisms lose their force over time as the administration of justice is rationalized and improved.²³⁰

The interesting question, then, is what happens if these practical problems disappear: are there any *conceptual* objections to the death penalty from a retributive standpoint? I think the answer is yes for several reasons.

B. Conceptual Retributivist Objections to Executions

1. Executions Prevent Internalization of CCR's Animating Values

By inflicting death on an offender, one violates the intent requirement of the CCR because one necessarily forecloses the opportunity to see the norms of retribution effectuated in the person's behavior during and after the confrontational encounter.²³¹ After the execution, the offender cannot conduct himself in a manner that affirms notions of moral responsibility or equal liberty under law; in other words, he is precluded from participating in the goods animating retributive justice.

Here, it bears mentioning that retribution remains distinct from the rehabilitation of the individual offender. Rehabilitation has traditionally, though not exclusively, been deemed a form of treatment, viewing criminality as a sickness, rather than as the product of a deliberate choice to undertake conduct that has been prohibited by the polity. By viewing criminality as the product of

an Execution, (NPR radio broadcast, Oct. 20, 2000) (detailing the traumas of the execution teams in Texas) (transcript available at http://www.soundportraits.org/on-air/witness_to_an_execution/transcript.php3). One might argue that those working for the state in this capacity assume the risk of trauma. However, even if these workers knew that their jobs involved grave tasks, it is not clear what, if any, risk premium these workers receive and if whether any of them were put on notice that these particular traumas comprised were a risk associated with the job, even if they knew that their job involved grave tasks.. Even if there were an assumption of risk that satisfied included these conditions, the fact of such apparent consent does not work an automatic defense on behalf of the government. There are some bargains the state may not strike, just as there are certain bargains an offender may not make. An offender is not permitted to murder someone even if he is willing to pay the assigned "damages" of his own life in exchange. Similarly, the state may not give offenders the choice to amputate one of their limbs to forego prison or a chance to purchase their way out of a sentence imposed for raping someone. See generally MICHAEL TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* (1993).

²²⁹ See Julian Davis Mortenson, *Earning the Right To Be Retributive: Execution Methods, Culpability Theory, and the Cruel and Unusual Punishment Clause*, 88 IOWA L. REV. 1099, 1104 (2003) (detailing the horrors of botched executions leading to predictable and excruciating instances of pain inflicted on the offender and noting that about seven percent of executions are botched in any given year); see also Christopher Q. Cutler, *Nothing Less Than the Dignity of Man: Evolving Standards, Botched Executions and Utah's Controversial Use of the Firing Squad*, 50 CLEV. ST. L. REV. 335 (2002 - 2003).

²³⁰ One might argue that the death penalty may traumatize executioners even if it is fairly and painlessly applied. But a willing state could quite plausibly evade this difficulty by, say, automating executions to absolve attendants of any overtly active responsibilities. One might also note that the "pesthole" of the American prison, to use Jeffrie Murphy's term, is hardly conducive to the spiritual well-being of prison guards. Jeffrie Murphy, *Repentance, Punishment and Mercy*, in REPENTANCE 143, 152 (Amitai Etzioni, ed., 1997); see generally TED CONOVER, *NEWJACK: GUARDING SING SING* (2000) (a memoir of a journalist who became a prison guard). I take this point as an argument for the dramatic need to reform and improve our current system of imprisonment. In the conclusion of this Article, I suggest how these concerns impinge upon punishment in the non-capital context.

²³¹ See Gale, *supra* note 124, at 1032.

sickness rather than of free choice, a rehabilitative perspective arguably violates a person's right to be punished for the choices he made as a dignity-bearing morally autonomous agent. By contrast, retribution, as Professor Herbert Morris observed, respects a person's right to be punished as an autonomous agent.²³²

Similarly, the goal of internalization is not, as Garvey would urge, the reconciliation between the offender and the victim--although such an event is not to be avoided or prevented.²³³ Rather, through its use of coercive confrontation, retributive punishment communicates certain fundamental norms. And the communication is itself insufficient if the confrontational encounter fails to leave a chance for the offender to internalize and live by the ideals animating retribution (even if in a prison) during or after the encounter.²³⁴

With respect to this point, I acknowledge that there may be many offenders for whom internalization of these ideals holds no attraction. Nonetheless, the reason for this restriction on the mode of punishment is to avoid pointlessness. In the way that an insult shouted to an offender in a language she does not understand is a pointless exercise, a punishment that leaves no opportunity for internalization grimly forecloses the reconstruction of the offender's self as moral agent and as citizen. To be sure, this goal would be of little concern to someone concerned solely with revenge. However, revenge and retribution are different in salient ways, and this, I believe, is one of them.

I recognize that the long period of time that often elapses between the conviction of an offender and the time of his eventual execution may weaken this argument.²³⁵ Offenders arguably have the time and opportunity to internalize the values animating the CCR while waiting on death row. After all, as Samuel Johnson said, nothing concentrates the mind so wonderfully as the sight of the hanging gallows.²³⁶ But this reasoning is perverse, no? Executions,

²³² See Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475, 486 (1968) ("A person has a right to institutions that respect his choices. Our punishment system does; our therapy system does not."); see also HEGEL, *supra* note 109, at 126 ("The injury. . . which is inflicted on the criminal is not only just in itself (and since it is just, it is. . . his right); it is also a right for the criminal himself. . . . For it is implicit in his action, as that of a rational being, that it is universal in character, and that, by performing it, he has set up a law which he has recognized for himself in his action, and under which he may therefore be subsumed as under his right.") (original emphasis omitted). Two other points bear mentioning about the distinction between rehabilitation and retribution. First, rehabilitation, unlike retribution, could be sought in the absence of an actual offense. See *supra* text accompanying note 126. By contrast, to knowingly punish someone who has not committed an offense does not constitute punishment anymore. It defies our sense of what that word means and requires the invention of another word, what Rawls called "telishment." See Rawls, *supra* note 124, at 11 Second, a salient distinction between rehabilitation and retribution relates to who has a stronger claim to scarce social resources. In a society where the expenditure of resources are always balanced against competing attractive social projects, one can see why the person who has not broken the social contract has a stronger moral claim to those scarce social resources than someone who has violated that public trust and covenant. Of course, in considering prisoner re-entry to society, the polity may reasonably decide that investing in the skills of offenders is a worthwhile endeavor to reduce the social cost of recidivism and to undertake a form of democratic self-defense and social self-protection. That decision is made less for the benefit of the offender than it is for the good of society.

²³³ In this respect, Garvey's "punishment as atonement" thesis can in large measure be accommodated by the CCR.

²³⁴ In conversation, my friend Matt Price cannily argued that the state may indeed communicate its reprobation of the offender at the point of execution, gesturing in the way that Kafka's Harrow needle would inscribe upon the flesh the reason for the execution of a condemned prisoner as he was dying. See Franz Kafka, *In the Penal Colony*, in *THE METAMORPHOSIS, IN THE PENAL COLONY, AND OTHER STORIES* 189 (Joachim Neugroschel trans., Scribner Paperback Fiction 1st ed. 1995) (1919). Furthermore, because the execution takes time to occur, the offender understands the reprobation both prior to and during his execution. To my mind, this objection fails for the reasons I state in the text.

²³⁵ For executions that occurred in 2003, the average amount of time spent on death row between sentence and execution was 131 months. See Thomas B. Bonczar & Tracy L. Snell, *Capital Punishment, 2003*, BUREAU OF JUST. STAT. BULL., Nov. 2004, at 11 (Table 11), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp03.pdf>.

²³⁶ See *Mortality Quotes*, THE SAMUEL JOHNSON SOUND BITE PAGE ("Depend upon it, sir, when

more likely than not, preclude opportunities for these moral norms to take root. During the time an offender is on death row, he constantly fears that today is the day death comes knocking, making it hard for him to actually lend much thought to the values animating retributive justice.²³⁷ It's no wonder that W.C. Fields, in a movie where he played a wag about to be executed, quipped to his hangman that his execution will "sure be a lesson to me."²³⁸

2. Executions Immodestly Prevent the State from Meaningfully Taking Responsibility for Its Mistaken or Wrongful Actions

The ultimately immodest nature of the imposition of the death penalty comprises a second conceptual difficulty for retributivists. It flouts the retributivists' desire to see the practice of punishment as a dignified use of coercion, a practice designed to communicate the ideals discussed in Part III. On this view, punishment has a moral aesthetic, and thus it must be meted out with the correct posture, a posture of modesty. Accordingly, a posture of overweening confidence, which the death penalty necessarily entails because it acts with such finality,²³⁹ is inappropriate. It is improper -- at the very least -- because of our fears about the possibility of the inaccurate infliction of the death penalty, discussed above. Although retributivists affirm the significance of communicating the norm of moral responsibility through punishment, the continued anxiety about trying to avoid punishment of the innocent entails the view that one cannot fully comprehend all that surrounds us. In other words, the concern for accuracy in distribution of punishment is fundamentally a retributivist concern that renders the death penalty deeply problematic as an institutional practice (even if in some cases we are not anxious about the accuracy because we really "know" we have the right person).²⁴⁰

This persistent uncertainty is vitally important because with most other forms of punishment the state itself can communicate and make plain its contrition for wrongs due to error or abuse, and it can do so in a way that can at least be appreciated by the person wrongly convicted. When the guillotine drops, this opportunity is forfeited, for, at that point, the state cannot demonstrate its own sense of remorse to the offender, even if it could make some amends to the surviving family.²⁴¹ A posture of modesty should thus be

a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully.") (quoting JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON*), at <http://www.samueljohnson.com/mortalit.html#383> (last visited Mar. 16, 2005).

²³⁷ Over a century ago, the Supreme Court stated that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley*, 134 U.S. 160, 172 (1890); see also *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., mem. respecting denial of cert.); Gale, *supra* note 124, at 1032.

²³⁸ See Stephen C. Hicks, *The Only Argument for Capital Punishment in Principle--A Frank Appraisal*, 18 AM. J. CRIM. L. 333, 333 (1991) ("At the end of 'My Little Chickadee,' W. C. Fields' character is about to be hanged. He says, 'it'll sure be a lesson to me.'").

²³⁹ Strikingly, the issue of humility and hubris came up repeatedly in comments made by some death penalty supporters. See, e.g., Sarat, *supra* note 69, at 1348 (reporting how State Senator Haine criticized Ryan's actions as a "breathtaking act of arrogance"); Simon, *supra* note 193, at 1404 - 08 (listing examples of victim reactions).

²⁴⁰ See Rawls, *supra* note 124, at 3 (distinguishing between the justification of a practice and the justification of a particular action falling under that practice).

²⁴¹ See *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) ("The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability."); Weisberg, *supra* note 7, at 1425 - 40; see also *Ring v. Arizona*, 536 U.S. 584, 605 - 06 (2002); *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991); *Gardner v. Florida*, 430 U.S. 349, 357 (1977) (Stevens, J.) (plurality opinion). I note, however, that the focus here on the death penalty's faults should not be taken to imply that other forms of punishment are trouble-free. The abusive and arbitrary use of coercive force in prisons and the misguided exercise of civil or criminal forfeiture or civil commitment are susceptible to critique, but they

implicit in all retributive punishments because quite simply, we may be wrong for reasons we cannot or will not discern until much later.²⁴²

One might try to bolster this argument further by insisting that the posture required to impose the death penalty is not merely one of immodesty. Rather, the cultural practice of executions has become, on many occasions, a ritual that devolves into a preening form of sanctimony such as those associated with shaming punishments, the same parade of resentment properly excoriated by Nietzsche.²⁴³

This extension of the aesthetic critique, however, cannot survive a claim that the improper posture is a conceptual necessity. Notwithstanding historical experience to the contrary, an execution need not be a spectacle or an opportunity to lord oneself over the offender in self-righteousness. It can be motivated by legitimate concerns about social self-protection and accompanied by rituals that convey a sense of hesitant hope that this really is the best thing to do, all things considered. Still, as long as humans remain fallible and the specter of inaccuracy haunts our institutions, the earlier claim--that executions require an improper posture of immodesty because they prevent the state from apologizing to the offender for its wrongful treatment--persists as a justification for abolishing the death penalty at the institutional level.²⁴⁴

3. *Executions Offend Human Dignity*

Might it nonetheless make sense to preserve the death penalty for special cases? Consider Jack, our offender from Part III. Say Jack has committed a murder revealing unmitigated wickedness. However, he has confessed to the crime, taken responsibility for his actions, apologized to his victim's family, and feels guilty unto death, so much so that he would prefer to die at the hands of the state (rather than by his own hand) because he does not want to deprive the state of any deterrent benefits that might flow from his execution. Under such an unusual scenario, what retributivist reasons remain not to execute him? There is no necessary posture of immodesty or preening sanctimony because Jack has himself recognized his wrongdoing and told the state of his guilt. Ex hypothesi, he has spent two years on death row, where he has focused on internalizing the meaning of moral accountability, equal liberty under law, and democratic self-defense. Moreover, technology has made Jack's execution possible without causing pain to Jack or psychological harm to his executioners.

Under these circumstances, what retributivist reasons, if any, forbid the execution of Jack? There are two possible answers. The first has to do with the

all brook the possibility that the state can reverse course, compensate, and apologize. *See also* AUSTIN SARAT, *WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION* 16 (2001) (the finality of death penalty is at odds with the "spirit of openness, of reversibility, of revision" necessary for democratic politics); Logan, *supra* note 173, at 1347.

²⁴² It is for that reason, although not that reason alone, that retributivism voices opposition to shaming punishments as well. *See generally* Markel, *Are Shaming Punishments Beautifully Retributive?*, *supra* note 16.

²⁴³ *See* NIETZSCHE, *supra* note 28. Lately, this form of sanctimonious stigmatization has recrudesced in America. *See, e.g.*, *United States v. Gementera*, 379 F.3d 596 (9th Cir. 2004) (permitting shaming punishment as "rehabilitation").

²⁴⁴ One could respond and say that if the metric of punishment (P) is the product of responsibility (R) and the gravity of the wrongdoing (W), *see* NOZICK, *supra* note 133, at 366 - 68, then perhaps this discussion simply calls for raising the standard of proof needed to execute someone to beyond all doubt (C for certitude) and not just beyond a reasonable doubt. Hence $P = R * W * C$. Arguably, the C factor is built into our assessments of a person's responsibility. In any case, my friend Matt Price believes that this illustrates that perhaps retributivism is compatible with the death penalty in theory but not in practice because of our fallibility. This argument, however, assumes that some people deserve death for their crimes and that the state should impose that death sentence. These propositions are problematic, as I explain in the text. Moreover, implementing the death penalty necessarily undermines the opportunity for the offender's internalization of the values animating retributive justice.

institutional level at which the CCR operates; at that level, it is permissible for the legislature to assume that an offender like Jack probably does not exist. But that answer may seem unsatisfying to critics like Professor Blecker or Senator Lieberman, who prefer case-by case review, because the legislature can always create a law that gives discretion to a more “local” decision-maker to determine whether Jack exists in a specific case. Hence, an appeal to the institutional nature of the CCR only permits a determination that retributivism would allow the abolition of execution. It does not (yet) demonstrate that the abolition of execution is required under all circumstances.

The reason justice requires the categorical abolition of executions is because of the relationship between the CCR and the enduring, albeit enigmatic, concept of human dignity.²⁴⁵ That dignity is the exalted moral status that all human life possesses by virtue of human existence itself. At least with respect to punishment, it is fair to define dignity as the value that attaches to human existence by virtue of the distinctly human capability for acting in accordance with autonomy and reason.²⁴⁶ Dignity plays at least three roles in criminal law: it helps explain what we punish, why we punish, and how we punish. In terms of what we punish, we rely on dignity, in part, to explain that offenders should be punished for crimes even where the victims are unaware that they are victims. For example, if a gynecologist puts his patient in an unconscious state and rapes her, the gynecologist should still be liable for punishment even if the victim does not know she is a victim.²⁴⁷ In terms of why we punish, we do so out of respect for the dignity of an offender by regarding, under the right conditions, his actions as the product of autonomous moral choice.²⁴⁸ But sometimes autonomy

²⁴⁵ *Furman v. Georgia*, 408 U.S. 238, 305 (1972) (Brennan, J., concurring) (“[D]eath stands condemned as fatally offensive to human dignity.”).

²⁴⁶ I note here my own trouble with the meaning of dignity outside the context of punishment. Some thinkers embrace the (Kantian) view that human dignity is coextensive with a respect for autonomous personhood, which is itself interlaced with the human capacity for rationality. See, e.g., JEFFRIE G. MURPHY, *Cruel and Unusual Punishments*, in *RETRIBUTION, JUSTICE AND THERAPY: ESSAYS IN THE PHILOSOPHY OF LAW* 223, 227 (1979) (characterizing the Kantian view of dignity as a value “we respect when we address ourselves to [persons] in terms of their unique characters and acts (i.e. what those characters and acts *deserve*)”) (emphasis in original); Robert A. Pugsley, *A Retributivist Argument Against Capital Punishment*, 9 *HOFSTRA L. REV.* 1501, 1510 (1981) (citing IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 55 - 113). Analytically, one can distinguish autonomy from rationality. What’s interesting is whether one can distinguish dignity from rational autonomy. The foregoing description of dignity as requiring respect for rational autonomy seems to work fine in the context of punishment, but it poses a problem more generally because it seems too narrow. With the Kantian view of dignity described above, one faces the puzzle of whether very young children and/or severely disabled persons possess human dignity and the protection it would afford. In other words, to predicate dignity upon rational autonomy seems insufficient because we might reasonably insist that dignity attaches even to those humans whose capacity for rational thought has either not developed or been extinguished. Cf. *Timothy W. v. Rochester, N.H.*, Sch. Dist., 875 F.2d 954 (1st Cir. 1989) (addressing educational obligations to a young person who is multiply handicapped and profoundly mentally retarded, someone who suffers from complex developmental disabilities, spastic quadriplegia, cerebral palsy, seizure disorder and cortical blindness). That person enjoys and possesses human dignity even though she or he is bereft of the capacity for rational thought or “the sense of justice” that John Rawls relied upon in describing the fount of human obligations of justice. See John Rawls, *The Sense of Justice*, 72 *PHIL. REV.* 281, 284 (1963) (“What qualifies a person as holding an original position so that in one’s dealings with him one is required to conduct oneself in accordance with principles that could be acknowledged by everyone from an initial position of equality? The answer to this question . . . is that it is necessary and sufficient that he be capable, to a certain minimum degree, of a sense of justice.”). In any event, tethering dignity to rational autonomy is not (normatively) problematic in the context of punishment because retributive punishment could never permissibly be imposed on someone lacking that “sense of justice.” To punish someone who could not understand that he was being punished for something he did violates the retributivist criterion that offenders be competent throughout the confrontational encounter with the state.

²⁴⁷ See Meir Dan-Cohen, *Basic Values and the Victim’s State of Mind*, 88 *CAL. L. REV.* 759, 764 (2000).

²⁴⁸ Here I am using dignity in the “troubled” sense I alluded to earlier, *supra* note 246, that is the concern for “autonomous human personhood” that Murphy isolates.

and dignity diverge. For instance, we ought not respect a person's autonomous choice to become a slave, not because the choice can never be autonomous, but because the result of the choice is an affront to human dignity.²⁴⁹ Jack's wish to be executed is an instance of that phenomenon. Dignity is what we uphold when we say we do not let offender (and, in some cases, victim) preferences control.²⁵⁰ Because those preferences don't control, it is worth thinking about the proposition that we ought to forbear from executions because we want to protect the dignity of the offender as well as that of the polity in whose name the punishment is imposed.²⁵¹

That thinking about dignity places limits on how we punish. For example, consider why we ought not torture offenders for even the most brutal crimes. As Murphy trenchantly observes, "[s]ending painful voltage through a man's testicles to which electrodes have been attached, or boiling him in oil . . . are not human ways of relating to another person. [The offender] could not be expected to understand this while it goes on, have a view about it, enter into discourse about it, or conduct any other characteristically human activities during the process – a process whose very point is to reduce him to a terrified, defecating, urinating, screaming animal."²⁵² The reason torture is wrong helps explain why executions are wrong: it removes the possibility that punishment will comport with the respect for dignity qua autonomous personhood that animates (at least in part) retributive punishment.

That failure of respect for human dignity degrades the offender and the punishing agent. Thinking about the relationship between dignity and retribution this way helps explain retributive hostility to Abu Ghraib or to shaming punishments.²⁵³ Indeed the fact of a collective dignity explains why

²⁴⁹ *Id.* at 771 - 72. That's why we abhor activities such as consensual dwarf-tossing. See *U.N. Backs 'Dwarf-Tossing' Ban*, CNN.COM, Sept. 27, 2002, at <http://archives.cnn.com/2002/WORLD/europe/09/27/dwarf.throwing>. And that's why we properly recoil from needless cruelty. It is possible that some would place dwarf-tossing in the category of sado-masochistic "play" among private parties, in which case the problem of dignity violations occurs when the state gets involved in matters that would be permissible if left in private hands. Kent Greenawalt illustrates this nicely by distinguishing between a situation where a sex-crime offender is refused the punishment of castration in the name of protecting dignity and a situation where a person with perverse sexual urges preemptively seeks out castration to minimize his chances of undertaking sex crimes. See Kent Greenawalt, *Dignity and Victimhood*, 88 CAL. L. REV. 779, 787 (2000).

²⁵⁰ Of course, if our current prison system, and its attending brutalization, is the baseline against which we measure the cruelty of our punishments, one might fairly ask whether an offender should be permitted to choose between death and life without parole (or even forty years) in a supermax facility. Consider Timothy McVeigh, who tired of appealing his conviction for involvement in the Oklahoma City bombing, and chose to waive appeals regarding his execution. See *McVeigh Execution: A 'Completion of Justice'*, CNN.COM, June 11, 2001, at <http://archives.cnn.com/2001/LAW/06/11/mcveigh.02>. The response to this question is that offenders' wishes regarding their punishments do not carry weight. After all, most would prefer not to be punished at all. The point of the CCR is that it is the experience of some substantial coercion that communicates the underlying values to the offender. The more difficult question is how we create prisons that comport with the notion of human dignity. Jim Whitman's work on comparative criminal justice suggests some possible measures. See WHITMAN, *HARSH JUSTICE*, *supra* note 17.

²⁵¹ Murphy has criticized the suggestion that the dignity of the collective is diminished, arguing that the affront to human dignity, say from torture, arises because torture is an independent wrong upon a person, not because it disgraces the torturer or the public in whose name torture occurs. MURPHY, *supra* note 246. If there were no disgrace involved however, why would executioners in some traditions be hooded? More basically, we can imagine certain practices that we might view as degrading of the public (e.g., eating dead ancestors who consent to having their corpses eaten) even though no person is specifically wronged by such actions. In such a situation, one can offer the judgment that human dignity has been violated even though no independent wrong has been committed.

²⁵² MURPHY, *supra* note 246, at 233.

²⁵³ See *United States v. Gementera*, 379 F.3d 596, 612 (9th Cir. 2004) (Hawkins, J., dissenting) (arguing that "public humiliation" has "no proper place in our system of justice"); MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: SHAME, DISGUST AND THE LAW* (2004); Markel, *Are Shaming Punishments Beautifully Retributive?*, *supra* note 16 Abu Ghraib remains problematic

executioners (and often the executed) wear hoods--there is a horror and a disgrace involved. Moreover, although not uniquely a democratic value, the idea of human dignity undergirds liberal democracy--the system of government in which political coercion can only be justified and exercised when consistent with respect for the free and equal nature of all human persons. That notion of limited government is disturbed by the choice to conduct executions when less final, less irrevocable alternatives exist. Indeed, as Austin Sarat observes, when democracies execute, and render its citizens complicit in capital punishment, that complicity "contradicts and diminishes the respect for the worth or dignity of all persons that is the enlivening value of democratic politics."²⁵⁴ Because retributive justice, as I've sketched it out, is part of that democratic politics, so too is its rejection of the death penalty.

Opposition to the death penalty arises, then, not only because of our fundamental commitment to respect the basic dignity of the offender, notwithstanding his past offense,²⁵⁵ but also our own dignity. The forgoing discussion illuminates how human dignity is a value whose strength in the moral life is more vividly experienced the more vigilant we are in protecting and nurturing it.²⁵⁶

C. *Objections Considered*

At this point, I want to raise and consider a series of objections and related responses to my arguments. First, to the extent that my arguments against the death penalty rely upon the fact that executions differ from other punishments, it is useful to note the limitations of those differences. For example, if someone is imprisoned for life without parole, and the state only discovers later, after he dies in prison, that he was factually innocent, then the opportunity for the state's apology and reparation is also lost. Indeed, someone innocent could be indicted, and then during his trial, he could die, never having cleared his name. This situation presents a clear line-drawing problem.²⁵⁷

One could draw the line elsewhere, of course, and simply give up on punishment altogether. Retributivists (as much as anyone else) have to recognize that a system that is bound to err will predictably create conditions where some innocent persons will be swept up in the dragnet of the criminal justice system in pursuit of the goal of punishing the guilty. The question then is where it makes sense to draw the line. Due to the reasons I have already discussed above, it does not seem unreasonable to draw it at the death penalty. By precluding executions, at least there is a chance for error to be recognized, apologized for, and, in some cases, recompensed appropriately.²⁵⁸

not simply for what was done to humiliate the detainees, but also because of the denial of due process to ensure that only hostile enemies were detained.

²⁵⁴ SARAT, *supra* note 241, at 16 - 17.

²⁵⁵ See Pugsley, *supra* note 246, at 1510 - 16 (arguing from Kantian perspective that concern for dignity of offenders is difficult to reconcile with executions).

²⁵⁶ I recognize that not everybody agrees that human dignity is necessarily degraded through execution. Van den Haag, for example, observed that some philosophers, such as Kant and Hegel, might think "execution, when deserved, is required for the sake of the convict's dignity." Van den Haag, *supra* note 72, at 1669. Nonetheless, one can insist that the claim that executions degrade human dignity is self-evident, while also acknowledging that its self-evidence is not apparent to everyone. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 32, 73 (1982) (explaining that a basic human good need not be universally recognized in order to be self-evident).

²⁵⁷ These problems abound. Indeed, offenders who were on death row when Ryan was governor got a better deal (assuming life imprisonment without parole is better than execution) than those who were executed prior to or after his blanket commutation.

²⁵⁸ Thus, the critique that "any time spent in prison . . . can never be returned to the prisoner," Note, *The Rhetoric of Difference and the Legitimacy of Capital Punishment*, 114 HARV. L. REV. 1599, 1621 (2001), seems off-mark as a reason not to distinguish death from other onerous

Still, one might think my condemnation of the death penalty as an institutional practice is too hasty, for two kinds of reasons. The first kind of reason has to do with deterrence issues, and the second has to do with possible retributivist reasons in favor of the death penalty, specifically those addressing moral desert, a topic that I have not yet adequately addressed.

1. *Death and Deterrence*

Deterrence arguments may be of concern for retributivists for at least three reasons: preventing false accusations, ensuring inmate and officer safety, and saving innocent lives.

Let's begin with erroneous convictions. On the account of retributivism I have provided, I have emphasized the importance of avoiding the state's erroneous conviction of innocent individuals. But what if the presence of the death penalty actually reduced the number of falsely accused persons who are mistakenly punished? As I said before, in a system where error is inevitable, retributivists have to be mindful of the fact that they ineluctably "trade the welfare of the innocents who are punished by mistake for the . . . punishment of the guilty."²⁵⁹ The death penalty debate highlights that problem because it is possible that if the death penalty exists, then fewer people are inclined to murder, which means that, on the margins, and assuming a constant rate of legal error, there would be fewer innocent people wrongfully swept up in the dragnet of law enforcement, prosecution, and punishment than if the death penalty did not exist.²⁶⁰ Creating the threat of execution in that situation could protect innocent people from punishment.

I am prepared to accept this argument as a countervailing consideration internal to the account of retribution that I have provided.²⁶¹ It would be improper for the state to obviously choose punishment methods that increased the risk of erroneous convictions. That choice would run afoul of the core maxim that the state cannot disclaim responsibility for the reasonably foreseeable consequences of its actions, and that in the modern regulatory state the act/omission distinction is of virtually no moral significance.²⁶² I should add, however, that I have seen no evidence that the numbers of erroneous

punishments. . . It is true that lost time cannot itself be restored, but that does not preclude civil plaintiffs from obtaining a remedy in tort for harms endured on account of false imprisonment, nor does it mean that a victim of false imprisonment, or her allies and survivors, would not appreciate the expression of apology and recompense from the state.

²⁵⁹ George Schedler, *Can Retributivists Support Legal Punishment?*, 63 *MONIST* 185, 189 (1980); see also Dolinko, *supra* note 17, at 1633 (citing *id* Schedler, *supra*.). The response to Schedler's challenge is not to deny it but to accept it and to move away from the claim that institutions of retributive justice, in contrast to deterrence theories, never "use" persons as means toward social goals. Rather, people are not being used as merely means to social goals, to use Kant's more precise language, because a reasonable person would authorize ex ante such institutions of criminal justice. The rules these institutions follow would have to be ones that people would authorize not knowing whether they will be offenders, victims, taxpayers, or the mistakenly punished.

²⁶⁰ The assumption here is that if there are more murders, then more social resources are expended on investigating, prosecuting, and punishing these crimes. Assuming the error rate stays constant, the more murder cases we try to solve, the more innocent people, in absolute, if not relative, terms, are mistakenly punished.

²⁶¹ This argument should be relevant even to those who embrace retributivism in a more straightforward, deontological manner than I do.

²⁶² This point is developed nicely in CASS R. SUNSTEIN & ADRIAN VERMEULE, *IS CAPITAL PUNISHMENT MORALLY REQUIRED? THE RELEVANCE OF LIFE-LIFE TRADEOFFS* 14–20 (AEI-Brookings Joint Center, Working Paper 05-06, 2005) available at <http://aei-brookings.org/publications/abstract.php?pid=922> (last visited Mar. 24, 2005). In a separate manuscript I explain at greater length how retributivism properly understood accommodates most welfarist (deterrence-oriented) critiques through the ex ante institutionalist perspective that the CCR affords. See Markel, *Ex Ante Retributivism*, *supra* note 88.

convictions decrease in death penalty states compared to those states without the death penalty. The reason is probably related to the supposition that most people inclined to consider committing capital crimes are not marginally deterred by death as against life imprisonment. As Professor Marshall observes, “any deterrence that criminal penalties are capable of achieving is most assuredly accomplished by [the threat of life imprisonment] alone. Those who commit murders despite that threat almost always either (a) believe that they will not be identified or (b) do not care at the moment of the murder what might happen to them.”²⁶³

In addition, were we to countenance execution as a means to reduce erroneous convictions, we then invite the risk that innocent individuals would be executed, a harm at least as worrisome as false imprisonment in gravity, if not frequency. Perhaps if executions were limited to offenders like Jack (discussed above), who confess their culpability (and the evidence independently proves that culpability), then executions would seem less problematic. But there is still the persistent dignity argument. How persuasive would the dignity argument become if the punishment that prevented the false accusations were floggings, castration, and torture instead of execution? I leave this as a question because of my own sense that, under exigent circumstances or supreme emergencies,²⁶⁴ these atrocities would be morally permitted, even though I can see no institution of law fairly requiring this treatment under typical circumstances.

Similar thinking would attach to the concern for the well-being of prison guards and inmates who are threatened by an absence of execution. Earlier I adverted to how executions predictably, if not uniformly, cause trauma to prison guards, and that such concern was important to retributivism and therefore a reason to forbear from executing offenders. But what if the prison guards’ safety would be increased by executions because they would no longer face prisoners who are otherwise undeterrable because of prior sentences of lengthy or permanent confinement? Various commentators suggest that it is only the threat of death that keeps these convicts from killing prison guards or other prisoners.²⁶⁵ Executing these prisoners arguably reduces risks that they will murder, rape, or assault others in prison, or outside should they escape (or be released early).²⁶⁶ One answer here is that the advent of the supermax security prison creates the capability to detain offenders and dramatically reduce if not eliminate the corresponding threat to prison guards or other inmates. In that environment, the prisoner can live his entire existence isolated from human contact.²⁶⁷

²⁶³ Marshall, *supra* note 33, at 582. Marshall is wrong, however, to the extent that certain prisoners may require a deterrent threat that is different than the one that has already been visited upon them.

²⁶⁴ On supreme emergencies, see MICHAEL WALZER, *JUST AND UNJUST WARS* 251 - 268 (1977).

²⁶⁵ See H. A. Bedau, *Prison Homicides, Recidivist Murder, and Life Imprisonment*, in *THE DEATH PENALTY IN AMERICA* 176 (Hugo Adam Bedau ed., 1997) (citing Norman A. Carlson, Director of the Bureau of Prisons, who maintained the need for the death penalty in these circumstances); Ernest van den Haag, *The Death Penalty Once More*, in *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 445, 450 (Hugo Adam Bedau ed., 1997). (“[S]urely the death penalty is the only penalty that could deter prisoners already serving a life sentence and tempted to kill a guard. . . .”). As Mary Sigler judiciously points out, “Bedau cites data to suggest that, like the deterrence argument more generally, the data do not establish the need for the death penalty to prevent prison homicide.” Sigler, *supra* note 73, at 1157 n.32 (citing Bedau, *supra*, at 176 - 77).

²⁶⁶ See Paul G. Cassell, *We’re Not Executing the Innocent*, *WALL ST. J.*, June 16, 2000, at A14 (claiming that some 800 murderers who were convicted murdered again after they were released). Of course, in considering this statistic, one must also bear in mind that some number of those murderers may not have committed murders that were “death-eligible.” Bedau, *supra* note 122, at 36. Even so, Cassell’s point is simply that the death penalty is more likely to save innocent lives than abolition would, especially since abolitionists have not successfully shown that factually innocent people have been executed, even though there have been some credible close calls. Paul G. Cassell, *In Defense of the Death Penalty*, in *DEBATING THE DEATH PENALTY*, *supra* note 122, at 183, 206 - 08.

²⁶⁷ See Marshall, *supra* note 33, at 581. I assume that life in these prisons can be improved. At

That said, I recognize that the well-being and security of prison guards and inmates is a concern intrinsic to the CCR project, and that it too should be weighed against the preceding (and, to my mind, more overwhelming) arguments against the death penalty already adumbrated.

Does the logic of my argument require me to acknowledge that the state must consider the further costs and consequences of its inaction, its choice not to execute? If it turned out that not executing someone predictably led to hundreds of innocent lives being lost, couldn't a fair-minded critic state that, on my account, the retributivist social planner has no more reason to privilege the wrongfully executed innocent life than the innocent life snuffed out by a murder that could have been prevented or deterred by the state?²⁶⁸

I think the answer here is no, and this may also partially address the problem of prison guard safety, but not entirely. It is reasonable to insist that there is a difference between the possibility of an innocent life being taken by some unknown future offender and the possibility of an innocent life being taken by the state. The significance is that the state acts in all our names, whereas the undeterred future offender's guilt is personal to her. Some people may reasonably wish to preserve their integrity by not sharing in the responsibility that arises when the state kills an innocent person, even if it means that on balance they increase the risk that their own lives are endangered by a failure to deter.

Personally, I am reluctant to accept this integrity-based argument, at least at the level of the state. That's because ex ante one might value one's life or the lives of one's children over partial encroachments upon one's integrity if there were conclusive proof that deterrence would be achieved, because the line between actual and statistical lives disappears under a veil of ignorance, where we are all statistical lives.²⁶⁹ In other words, we are all statistical lives ex ante, and if there is compelling evidence that innocent life can be saved, we do well to consider that evidence alongside our fears of any risk of error or abuse that the state may make when we determine the proper trade-off.

Thus, with respect to the task of saving innocent lives (aside from the erroneously executed), it seems to me that there is no retributivist argument available in favor of executions. That does not mean there could never be a reason to undertake an execution for the purpose of saving innocent lives. It just means we should not call that execution "punishment." And so long as we are trading some innocent lives now for more innocent lives later, we should note that the deterrence argument (for the purpose of saving lives) does not and need not conceptually presuppose any effort to make sure we execute a guilty offender. It is simply a risk regulation problem, in the same way that immunizations, air-bag regulations, and conscripted armies are.²⁷⁰ But whereas with those examples, we can say with substantial certainty that we will save lives, we have no information leading us to believe that we will do so in the death penalty context of deterrence arguments.

To summarize this point, opting for execution as a measure to reduce erroneous convictions would theoretically be permissible as a retributivist

present, reasonable challenges to conditions of confinement are regularly issued against these so-called "prisons of the future." See generally Robert M. Ferrier, Note, "An Atypical and Significant Hardship: The Supermax Confinement of Death Row Prisoners Based Purely on Status—A Plea for Procedural Due Process," 46 ARIZ. L. REV. 291, 293 - 96, n.27 - 28 (2004) (providing background on supermaxes and citations to litigation involving supermax prisons).

²⁶⁸ Just before this paper went to the publisher, Sunstein and Vermeule's paper, *supra* note 262, became available, and raised this precise issue.

²⁶⁹ JOHN RAWLS, A THEORY OF JUSTICE 118 - 23 (rev. ed. 1999). The literature on veils of ignorance rules is helpfully discussed in Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L. J. 399, 399 - 401 (2001).

²⁷⁰ There is a vast literature on risk regulation and risk-risk tradeoffs. For a good introduction, see CASS R. SUNSTEIN, RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT (2002). As I mentioned earlier, *supra* note 268, Sunstein and Vermeule develop the relevance of the life-life tradeoff into an argument in support of the thesis that capital punishment is morally required.

consideration, assuming the empirics could make conclusive sense, although it would be balanced against the other retributivist anti-death penalty arguments advanced thus far. This is because the CCR only gives reasons to punish the guilty, not the innocent. However, executions occurring for the purpose of saving innocent lives would not be permitted under a retributivist framework because no account of retribution purports to justify punishment for that purpose. That is not to say saving lives could not be used to justify an execution (even of an innocent); it merely means that we should not call that execution “punishment.” At that point, we are interested in saving innocent lives and society frequently requires the sacrifice of some innocent lives for the preservation of many when there is conclusive evidence that this will be the net effect.

While the deterrence concerns are good theoretical arguments (and I recognize that some retributivists may not be willing to countenance these concerns because they are prospective in nature,) I believe these concerns ultimately pose a limited challenge. First, as I highlighted above, there is no conclusive data proving that the death penalty is an effective deterrent.²⁷¹ Some studies indicate that the homicide rates are higher in death penalty states.²⁷² New scholarship has tried to emerge with pristine conclusions to the contrary,²⁷³ but with little apparent success.²⁷⁴ As an empirical matter, prosecutors may be correct when they state that the energy and time spent on death penalty cases draw scarce resources away from the prosecutions of other serious crimes, which also threaten the security of innocent persons.²⁷⁵ Indeed, some scholars

²⁷¹ See *Furman v. Georgia*, 408 U.S. 238, 302 (1972) (Brennan, J., concurring) (“[T]here is no reason to believe that . . . the punishment of death is necessary to deter the commission of capital crimes.”); NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 53 (2004) (“Though long debated and frequently studied, the fundamentally important empirical question of whether the death penalty deters remains unresolved.”); William C. Bailey & Ruth D. Peterson, *Murder, Capital Punishment, and Deterrence: A Review of the Literature*, in *THE DEATH PENALTY IN AMERICA*, *supra* note 265, at 135, 154 (arguing that the evidence does not support the contention that capital punishment is an effective deterrent). Sigler, however, notes the complexity of these conclusions from a methodological standpoint:

A simple comparison of murder rates before and after an execution (or a series of them) cannot control for the multitude of variables that affect a murderer’s decision/impulse to kill. Further, the slow and uncertain process of apprehending, convicting, and executing an offender . . . presumably blunts whatever deterrent effect a more efficient system might deliver. Finally, it is not clear, as a practical matter, that it would ever be possible to measure potential offenders’ reasons, including the threat of capital punishment, for their *failure* to kill. What population sample would this include? How are deterred murderers to be identified? Moreover, despite the familiar anti-death penalty argument that an individual is not likely to be thinking in terms of the relative severity of punishments at the time he commits murder, one who grows up in a society that consistently imposes severe penalties for criminal wrongdoing may be more likely to internalize a fear of harsh punishment and be deterred from offending. Deterrent effects may thus be subtler than critics have supposed.

Sigler, *supra* note 73, at 1158 n.37.

²⁷² See Raymond Bonner & Ford Fessenden, *States With No Death Penalty Share Lower Homicide Rates*, N.Y. TIMES, Sept. 22, 2000, at A1 (describing study).

²⁷³ Sunstein & Vermeule, *supra* note 262 (citing Hashem Dezhbakhsh, et al. *Does Capital Punishment Have a Deterrent Effect? New Evidence from Post-moratorium Panel Data*, 5 AM. L. & EC. REV. 344 (2003)).

²⁷⁴ See Richard Berk, *New Claims about Executions and General Deterrence: Déjà Vu All Over Again?*, J. EMP. L. STUD. (forthcoming 2005), available at <http://preprints.stat.ucla.edu/396/JELS.pap.pdf> (casting doubt on the studies of the econometricians who have been urging the death penalty’s deterrent effect); Ted Goertzel, *Capital Punishment and Homicide: Sociological Realities and Econometric Illusions: Does Executing Murderers Cut the Homicide Rate or Not?*, SKEPTICAL INQUIRER, July - August 2004, available at http://www.findarticles.com/p/articles/mi_m2843/is_4_28/ai_n6145278/pg_1.

²⁷⁵ See *United States v. Navarro-Vargas*, 367 F.3d 896, 901 (9th Cir. 2004) (Kozinski, J., dissenting) (discussing Robert Morgenthau’s policy as Manhattan District Attorney to avoid

have found that murder rates go up in states after the authorization of the death penalty, either because of a general brutalizing effect on the polity, or because of the added incentive for offenders to kill all possible witnesses to cover up their crimes to avoid execution.²⁷⁶

In sum, it appears that good and sufficient reasons exist for retributivists to counsel against the death penalty (at the very least provisionally) in light of the lack of good information, the human costs of attaining better information through controlled experiments, and the normatively unattractive conceptual difficulties highlighted earlier.

2. Retribution, Moral Desert and Death

Not so fast though. We must also ask what, if any, good and sufficient retributivist reasons stand in *favor* of the death penalty. Putting aside the speculative empirical reasons discussed above that have a tangential relation to retributivism, *i.e.*, that capital punishment may prevent fewer innocent people from being wrongfully convicted, I cannot deny that various people believe that some crimes are so bad that the offenders deserve to die and that the execution of these people is proportionate to the heinousness of their crimes.²⁷⁷ But what is the reasoned basis for this belief and what makes that reasoned basis a retributivist basis?

Let us suppose that some offender commits truly wicked crimes. Retributivism's commitment to setting the severity of punishment according to the severity of the crime would require that this offender receive the most severe punishment the state imposes. But nothing intrinsic to retributivism says that the most severe punishment the state must impose is the death penalty. Indeed, if we thought of the most severe punishments we could imagine, they might have to do with extended periods of immiseration and torture, or the forced spectacle of watching one's loved ones be immiserated and tortured for extended periods of time. Nothing about the retributivist answer to *why* we punish requires that the death penalty be one of the options in *how much* we punish.²⁷⁸

The reason people think retributivism requires execution of murderers is because of the confusion that associates retribution's proportionality principle-- that severe crimes be punished severely-- with the separate notion of *lex*

seeking the death penalty), *reh'g en banc granted by* 382 F.3d 920 (9th Cir. 2004). In fact, Morgenthau authored an op-ed declaring that the death penalty "actually hinders the fight against crime" because it is time-consuming and expensive. Robert M. Morgenthau, *What Prosecutors Won't Tell You*, N.Y. TIMES, Feb. 7, 1995, at A25; *see also* E. Michael McCann, *Opposing Capital Punishment: A Prosecutor's Perspective*, 79 MARQ. L. REV. 649 (1996) (elaborating upon prosecutors' aversion to the high costs of seeking the death penalty). According to some estimates, the "average cost per execution in the United States ranges from \$2 million to \$3 million." Wallace, *supra* note 1, at 396.

²⁷⁶ See CLAIRE FINKELSTEIN, AN A PRIORI ARGUMENT AGAINST THE DEATH PENALTY 9 (Univ. of Pa. Law Sch., Pub. L. & Legal Theory Res. Paper Series, Res. Paper No. 15, 2002) (finding that on average homicides increased after executions) (citing WILLIAM J. BOWERS, LEGAL HOMICIDE 106 - 14 (1984)), *available at* http://ssrn.com/abstract_id=347323.

²⁷⁷ *See, e.g.*, BERNIS, *supra* note 27; Blecker, *supra* note 144, at B1 ("I believe that some people kill so viciously, with an attitude so callous or cruel, that they deserve to die--and society has an obligation to execute them."); Pearl, *supra* note 72 at 301 ("The death penalty has always been considered a standard example of retributive justice; there is no other punishment that can be inflicted on a murderer that could possibly be proportionate to his crime.") (citation omitted); Wallace, *supra* note 1.

²⁷⁸ Though the concession seems to me to be of little significance, I readily note that retributivism cannot determine which range of punishments is commensurate with a given offense. Retributivism, after all, need not purport to be a comprehensive theory of criminal justice, and thus should not be expected to dictate whether driving under the influence should be penalized by a sentence of a suspended driver's license or twenty years imprisonment.

talionis.²⁷⁹ Lex talionis is not itself a justification for institutions of punishment nor does it provide a basis for understanding why someone should be punished “in-kind.”²⁸⁰ It is merely a notion that says someone should suffer in a way that mirrors the suffering that person imposed on another person.²⁸¹ To the extent it is a principle, it is a principle that imposes a limit or ceiling on the severity of punishment.²⁸² In any case, one need not be a retributivist to embrace lex talionis, and an embrace of retributivism need not entail a commitment to lex talionis.²⁸³

Moreover, even if lex talionis were necessarily conjoined to retributivism, it does not follow that execution is the only way of “repaying” a murderer.²⁸⁴ As Jeremy Waldron has written, “a defense of LT [lex talionis] (even for murderers) is consistent with a rejection of capital punishment in cases of homicide.”²⁸⁵ On this view, murder is wrong not because it ends life as such, but because it involves the intentional and radical disruption of an “autonomous life. Very well, then let us radically disrupt the autonomous life of the offender. Does this mean we have to kill him? It depends on whether or not we have available some other punishment that shares this abstract feature with acts of killing.”²⁸⁶

Furthermore, even if an offender may morally deserve death for his

²⁷⁹ That retributivists endorse a principle of proportionality between crime and punishment does not require the conclusion that what was once a crime is always a crime or that what was once a fitting punishment will immutably remain a fitting punishment. These decisions have their own social meaning to be mediated through the legislatures of the particular society, and the retributivist should support these decisions so long as they fall broadly within liberal parameters. See Markel, *Are Shaming Punishments Beautifully Retributive?*, *supra* note 16, at 2206 - 09.

²⁸⁰ The problems with lex are well-known: in addition to the fact that it may require the state’s agents to undertake morally odious actions, and that it cannot be applied where the harm or victim is diffuse, e.g., counterfeiting or tax fraud, lex cannot be applied in a manner that easily takes into account varying mens rea, even though the kind of mens rea is part of the basic analysis of culpability. See Shafer-Landau, *supra* note 87, at 193. *But see* Waldron, *supra* note 21 (trying to overcome these difficulties).

²⁸¹ See Shafer-Landau, *supra* note 17, at 299. But as Waldron notes, even as strict an adherent to lex talionis as Kant rejected punishments strictly in kind for crimes like rape or bestiality. Waldron, *supra* note 21, at 38 n.27. As Kant wrote:

But how can this principle be applied to punishments that do not allow reciprocation because they are either impossible in themselves or would themselves be punishable crimes against humanity in general. Rape, pederasty, and bestiality are examples of the latter. For rape and pederasty, [the punishment is] castration (after the manner of either a white or a black eunuch in the sultan’s seraglio), and for bestiality [expulsion forever from human society, because the individual has made himself unworthy of human relations.] *Per quod quis peccat, per idem punitur et idem.*

Id. (citing IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 132 (John Ladd trans., 1965)) (alterations in original).

²⁸² This has always been the traditional Jewish understanding of the “eye for an eye” language in the Torah. See, e.g., Irene Merker Rosenberg & Yale Rosenberg, *Lone Star Liberal Musing on “Eye for Eye” and the Death Penalty*, 1998 UTAH L. REV. 505, 510 - 15 (explaining why the biblical verse “eye for eye” does not reflect lex talionis). Indeed, notwithstanding the various capital offenses mentioned in the Torah, there was an incredible reluctance among the rabbinic sages to mete out the death penalty, and many impediments to its imposition were devised. See Irene Merker Rosenberg & Yale L. Rosenberg, *Of God’s Mercy and the Four Biblical Methods of Capital Punishment*, 78 TUL. L. REV. 1169, 1180 - 82 (2004) (discussing the obstacles to a capital conviction under Jewish law).

²⁸³ See Waldron, *supra* note 21, at 25 (“[S]ince LT is a principle about what counts as an appropriate punishment, it is compatible with a variety of theories about the point or justification of punishment, including utilitarian theories.”).

²⁸⁴ I place “repaying” in quotes because my theory of retribution does not view the offender’s wrong as a debt he has incurred that he must pay back. This metaphor is inaccurate for a host of reasons. See Markel, *Are Shaming Punishments Beautifully Retributive?*, *supra* note 16, at 2214 n.255.

²⁸⁵ Waldron, *supra* note 21 at 25.

²⁸⁶ *Id.* at 42. Waldron’s argument only shows that LT does not *require* the death penalty for murders; it does not show that LT precludes the death penalty for murders.

actions, it does not follow that the state should be the one inflicting death on him for the same reasons that it would be wrong for the state to torture a sadistic torturer. We could be wrong about the identity of the offender, it requires immodesty, it traumatizes the souls of the punishing agents of the state, and it offends dignity.²⁸⁷ In addition, death forecloses the opportunity to internalize the ideals animating retribution. To be sure, some crimes are heinous, and severe punishment is warranted for those crimes, and the CCR explains why that is so. But justice prohibits the execution of an offender when other forms of punishment are available to communicate to the offender (and the polity) the very norms that give rise to the project of retributive justice.²⁸⁸

For a retributivist to insist upon capital punishment is to move away from the question of why punishment is justified to the questions of how much punishment is deserved and how much punishment the state should impose. This move can only be made, I submit, if the retributivist can point to how the particular punishment is consistent with the underlying justification of the retributivist account of punishment. Under the CCR, there is a capacious range of punishments that a state may impose after democratic and reasoned deliberation, but the death penalty falls out of that range for the reasons articulated earlier.²⁸⁹

Will the overarching argument throughout this article sway inveterate believers in the death penalty? My naïve and audacious hope is that it will. But less naïve and less audacious is the hope that these arguments will at least make the arguments of each side in this debate more nuanced. And even if these arguments cannot persuade the universal adoption of an abolitionist perspective on the death penalty, they can at least furnish a solid foundation to those who use their constitutional powers to extend blanket commutations in the name of justice.

CONCLUSION

In the course of deflecting criticism of Ryan's actions--that Ryan abused his power, improperly relied upon mercy, and disregarded the interests of victims and the desert of offenders--several arguments against the death penalty (some contingent and some conceptual) emerged.

I began with the narrow question of whether Ryan's blanket commutation was permissible on retributivist grounds, focusing in particular on the serious concern that the reliability and accuracy of the criminal justice system, in particular in cases where the penalties are most severe, remain in

²⁸⁷ While some of these criticisms might be made about locking a dangerous offender up in a prison, these problems are not irrevocable and irremediable. *Ex ante*, we would authorize the state to act decisively against offenders, even though it must also develop procedures to reduce and correct errors.

²⁸⁸ In this respect, one sees that my account of justice goes beyond a simple principle of enforcing all bargains. A theorist like van den Haag states that there is no injustice in visiting upon an offender a punishment he knows he may face as a result of his crime. *See* van den Haag, *supra* note 72, at 1668 (“[T]he criminal volunteered to assume the risk of receiving a legal punishment that he could have avoided by not committing the crime. The punishment he suffers is the punishment he voluntarily risked suffering and, therefore, it is no more unjust to him than any other event for which one knowingly volunteers to assume the risk.”). On this view, execution for overtime parking is permissible so long as the offender was on notice of the punishment. Van den Haag's position strips away the notion that retributive justice requires a matching of severity between crime and punishment—unless overtime parking were deemed the most serious offense on the books by a society.

²⁸⁹ The broad range of punishment choices may seem noxious to some, like Shafer-Landau, *supra* note 17, who want to see retributivism provide determinate, or at least more guided, sentencing options. I think that asks too much of retributivism since it need not purport to be a comprehensive theory of criminal justice in order for it to explain why we punish offenders for the past legal wrongdoing for which they are responsible, and why that punishment must suffice as a credible repudiation of the claims of false value made by the offender's action.

question. Related to this problem of inaccuracy is the system's freakish imposition of the death penalty, under which arbitrary factors, such as intra-state geography and the race of victim, play a heightened and unjustified role.²⁹⁰

After explaining why it would be virtually impossible to ameliorate these problems through case-by-case review without leaving lingering doubts or creating new problems, I considered various other objections one could make in the name of the CCR to the larger question of the death penalty itself. I explained the CCR's underlying maxim, the notion that we require persons to bear responsibility for the reasonably foreseeable consequences of their actions. In the context of the death penalty, this means the polity cannot disclaim its responsibility for the trauma that predictably arises among the tie-down teams of executions, nor can it blithely disregard the frequency of botched executions that wreak unbearable pain on the body of the offender. However, I acknowledged that some of these concerns could dissipate over time with improvements in the criminal justice system. Thus, I began to explore three related conceptual arguments.

The first argued that the state has an obligation to preserve, to the extent possible, an opportunity for the offender to internalize the correct values that underlie the confrontational encounter between the state and him. The implication is that the internal intelligibility of the practice of retribution would be ruptured if the punishments carried out in its name did not permit an opportunity for the message of the punishment to take.

The second argument posits that the state's execution of an offender requires an immodest posture of overweening confidence that is improper for a state to exhibit. This requirement of modesty in punishment arises in conjunction with the concern about accuracy and innocence. The anxiety about punishing or executing the wrong person means that the state must leave itself avenues in which it can undertake its own reparations and apologies to persons it has mistakenly punished. The hubris and finality associated with an execution forecloses the state's opportunity to take those steps toward rectifying the injustice it has caused.

Finally, I appealed to the notion that embedded within the CCR is a commitment to respecting the dignity of every person, a dignity we affirm by punishing offenders for the consequences of their freely chosen and autonomous actions. Such respect for human dignity entails obligations to the offender as well as to ourselves, and among those is the obligation not to punish in a way that erodes human dignity. Capital punishment degrades dignity, on this view, because it unnecessarily extinguishes human life in the presence of viable alternatives.

Taken together, these reasons counsel in favor not only of a blanket commutation, but also the abolition of the death penalty itself. Nonetheless, there are countervailing concerns that make the argument more complex and polyphonic. First, I considered those consequentialist reasons for the death penalty that resonate within the CCR's framework. The most pressing concerns I identified were the possibilities (although they seem entirely speculative on the evidence currently available) that the marginal deterrent threat of execution could conceivably reduce the number of false convictions, as well as the number of prison guards (or inmates) injured or killed by other offenders. These concerns, however, do not remove or reduce the risk of wrongful executions.

I also explained why the retributivist framework tolerates no argument in favor of the death penalty for the purpose of saving innocent lives. That goal, I said, should be treated like any risk-risk tradeoff that the modern administrative state undertakes when it risks trading some innocent lives for the purpose of saving more innocent lives. At the point that saving future lives becomes the

²⁹⁰ See *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.").

justification for executions, however, we should cease to call that practice “punishment” since there is no conceptual need for legal guilt to be the trigger for the execution.

Finally, I considered the difficulty of asserting a connection between moral desert and the state’s execution of murderers. I found no inherent reason for supposing that retributivists should support the death penalty for any particular crime, including the “worst of the worst” crimes.

* * *

Demonstrating why Governor Ryan’s blanket commutation is not morally disastrous from a devout retributivist’s perspective serves important purposes beyond achieving conceptual clarity. It illustrates the availability of a discourse in opposition to the death penalty that is also politically salient in these times of “harsh justice.”²⁹¹ Retributivism, understood as the CCR, furnishes a discourse that, in its commitment to moral accountability and equal liberty, resonates broadly within our public political culture, but it is also a discourse that hinges upon modesty in modes of punishment and dignity in motivation and effect. In that respect, such arguments are capable of opposing the apparently ineluctable slide towards ever-harsher punishments in the name of criminal justice. To realize that potential, however, we must reappropriate the language of retribution from those who have hijacked it in the name of making offenders suffer endlessly.²⁹² I do not doubt that savvy politicians can do so by deploying a rhetoric of responsibility that speaks in both individual and collective terms.²⁹³

To go down that path in the context of the death penalty, however, requires that we not recoil from the implications of the underlying thesis beyond the realm of capital punishment. Though the task of elaborating that point in great detail is better left for another day, it should be clear that the argument offered here signals that, far from being indifferent to the interests of offenders, retributivism is sensitive to, and indeed obsessed with, concerns of equity, accuracy, and moral dignity in criminal justice.²⁹⁴ Thus, a commitment to

²⁹¹ WHITMAN, HARSH JUSTICE, *supra* note 17.

²⁹² The denunciation of retributivist defenses of punishment often occurs in the name of denouncing “harsh justice.” See WHITMAN, HARSH JUSTICE, *supra* note 17; Whitman, *A Plea Against Retributivism*, *supra* note 17; Dolinko, *supra* note 17 at 1650 (stating that retributivists use language like “respect for persons” to “cloak[] a desire to inflict suffering on criminals with a clear conscience and a minimum of concern with their background and capacities”).

²⁹³ For example, the goal of achieving impartiality through an *ex ante* perspective can be imperfectly translated into colloquial political discourse by adopting a tone of personal decision-making. That is, in contemplating the death penalty, politicians in favor of abolition can ask: What if that alleged offender is my child or my sister? Has the process of guilt determination been one I could support with unflinching steadfastness? Could I ask my child or my sister to stand in the shoes of the executioner? Could I believe that my child or my sister who may have committed an unspeakable crime is so bereft of human dignity that her bare presence alone in a prison is an assault on our shared conceptions of justice? These questions bring home the notion of being responsible as individuals, on our own behalf and for each other. This set of tropes helps render attractive and compatible the complex relationship among responsibility, retribution, modesty and dignity.

²⁹⁴ The problems of inaccuracy and maldistribution of punishment revealed by study of the death penalty no doubt also beleaguer the system by which we mete out non-capital punishment. Moreover, alternatives to incarceration--such as shaming punishments--that aim at the degradation of offenders are improper because they involve the same immodesty, sanctimony, and assault on dignity that are improperly associated with the killing state. See Markel, *Are Shaming Punishments Beautifully Retributive?*, *supra* note 16. What’s more, to occlude those degradations by simply placing them out of the public eye and in the prison system is obviously no satisfactory response. Our prisons are too often teeming and fetid pestholes and we rely on prisons as our solution for too many crimes, too many people, and too much time. See, e.g., ABA JUSTICE KENNEDY COMMISSION, RECOMMENDATION ON PRISON CONDITIONS AND PRISONER REENTRY (2004), available at <http://www.abanews.org/kencomm/rep121d.pdf>; ABA JUSTICE KENNEDY COMMISSION, RECOMMENDATION ON PUNISHMENT, INCARCERATION, AND SENTENCING (2004), available at <http://www.abanews.org/kencomm/rep121a.pdf>. Nonetheless,

retributive punishment impedes neither the realization of humane institutions of criminal justice nor a revolt against the benighted, misbegotten, and often brutal status quo we continue to tolerate to our shame.

prisons are an important part of the punitive archipelago and we need to find ways that make the experiences of offenders within prisons more conducive to the possibility that the values animating retributive justice can be effectively communicated to, and internalized by, offenders. Boot camps, mandatory drug treatment, guilt punishments, and fundamentally decent prisons are not beyond our ken.