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Against Mercy

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Article

Against Mercy

Dan Markel^{*}

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INTRODUCTION

Just about every week, some newspaper headline presents us with a story involving the tension between mercy and re-

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tributive justice.¹ If it is not the Supreme Court ruling on three-strikes sentencing policy,² then it is a decision about whether sex offender notification statutes like so-called Megan's Laws are unduly punitive restraints on those who have already been punished for their crimes,³ or whether the mentally retarded should be executed,⁴ or whether minors like D.C. sniper John Lee Malvo should be tried in death penalty-eligible jurisdictions. Even beyond the news, this leitmotif pervades our movies,⁵ literature,⁶ musicals,⁷ and other facets of our popular

1. In this Article, "mercy" refers primarily to leniency afforded to criminal offenders on the basis of characteristics that evoke compassion or sympathy but that are morally unrelated to the offender's competence and ability to choose to engage in criminal conduct. More controversially, I also use "mercy" to encompass leniency that is motivated by bias, corruption, or caprice—even though I recognize that such a definition encompasses more types of leniency than colloquially used. As Jim Whitman points out, mercy, historically, has been associated with leniency afforded for reasons of bias, caprice, or venal self-interest. See JAMES Q. WHITMAN, *HARSH JUSTICE* 184–85 (2003) (detailing the tradition of pardons extended to anti-black offenders in America); *id.* at 93 (discussing the contemporary tradition of European amnesties granted to offenders on Christmas day in Germany or Bastille Day in France); *id.* at 67 (discussing the furor over Clinton's pardon of Marc Rich). One might be tempted to call mercy based on compassion "popular mercy" and mercy based on corruption, caprice, or bias "unpopular mercy." (Though as Whitman's examples illustrate, there may be a deeply popular flavor to blanket use of the pardons on religious holidays or to offenders who reinforce majority norms of discrimination.) The point I develop later in the text is that both popular and unpopular mercy are equally problematic from the viewpoint of liberalism and retributivism, and so together they are "mercy" and thus the unified object of this Article's critique. Retributive justice refers to the justice achieved by the state's infliction of commensurate punishment upon offenders of legitimate and democratically authorized criminal laws. This Article examines the specific sanction of the criminal law. I leave aside the civil system's imposition of punitive damages, which I address in a separate article entitled *Retributive Damages* (manuscript in progress).

2. *Ewing v. California*, 538 U.S. 11 (2003) (upholding California's recidivism sentencing policy against constitutional challenge).

3. *Smith v. Doe*, 538 U.S. 84 (2003).

4. *Atkins v. Virginia*, 536 U.S. 304 (2002).

5. Some relatively recent and thoughtful cinematic treatments of this tension include *IN THE BEDROOM* (Miramax Films 2001), *UNFAITHFUL* (20th Century Fox Film Corp. 2002), and *MONSTER'S BALL* (Lions Gate Films 2001).

6. See WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* act 2, sc. 2.

Why, all the souls that were were forfeit once, and He that might the vantage best have took found out the remedy. How would you be, if He, which is the top of judgement, should but judge you as you are? O, think on that, and mercy then will breathe within your lips, like man new-made.

Id.; see also WILLIAM SHAKESPEARE, *MERCHANT OF VENICE* act 4, sc. 1.

7. Perhaps one of the most well-known versions of this meme is spotted

culture.⁸

In a speech presented at the August 2003 meeting of the American Bar Association, Justice Anthony Kennedy entered this fray, catching many unawares. Known for joining or authoring many of the Supreme Court's ostensibly harsh decisions on matters of criminal justice,⁹ Justice Kennedy surprised the nation—and no doubt the Ashcroft Department of Justice—with his calls both to Congress and to the executive branch for reform of the criminal justice system. Specifically, Kennedy asked Congress to give more discretion to judges in sentencing and to eliminate mandatory minimum sentences. Kennedy further stated that the executive branch should “reinvigorate the pardon process at the state and federal levels. The pardon process, of late, seems to have been drained of its moral force. Pardons have become infrequent. A people confident in its laws and institutions should not be ashamed of mercy.”¹⁰

Kennedy's words attracted significant attention; shortly after the speech, the ABA announced it would establish a commission to study the issues brought to the fore by Justice Kennedy and to make recommendations. But few news stories touched the nerve quite like that of former Illinois Governor

in the relationship between Javert and Valjean in *Les Misérables*, the novel by Victor Hugo that was transformed into a musical. Valjean, sentenced to hard labor for stealing bread to feed his sister's child, escapes prison and the ever-watchful eye of Javert, Valjean's prosecutor. Years pass, during which Valjean's political and economic fortunes rise while he lives as a fugitive under a different identity. Eventually, his secret is exposed to Javert, who has been tirelessly pursuing his quarry all these years. Naturally, the audience embraces the protagonist Valjean. One is inexorably drawn to his charisma and kindness, sympathetic to his great “redemption,” and mindful of the petty charges that caused his initial immiseration anyway. But what of Javert? He dies ignominiously and defeated, the law that he represents mocked. VICTOR HUGO, *LES MISÉRABLES* (Charles E. Wilbour trans., Random House 1992) (1862).

8. See William Ian Miller, *Clint Eastwood and Equity: Popular Culture's Theory of Revenge*, in *LAW IN THE DOMAINS OF CULTURE* 161 (Austin Sarat & Thomas R. Kearns eds., 1998).

9. See, e.g., *Ewing v. California*, 538 U.S. 11 (2003); *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Smith v. Doe*, 538 U.S. 84 (2003). But see *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

10. Justice Anthony M. Kennedy, Speech at the ABA Annual Meeting 4 (Aug. 9, 2003) (transcript available at Supreme Court Press Office); see also Bob Egelko, *High Court Justice Crusades for Mercy: He Calls Sentences Too Severe, Too Long*, S.F. CHRON., Aug. 10, 2003, available at <http://sfgate.com/cgi-bin/article.cgi?file=chronicle/archive/2003/08/10/MN245049.DTL> (“I can accept neither the wisdom, the justice nor the necessity of mandatory minimums,” Kennedy said. “In all too many cases, they are unjust.”).

George Ryan's decision to commute the sentences of each death row prisoner in Illinois.¹¹ After half of the death row inmates were exonerated due to various forms of legal error, Governor Ryan decided on the eve of his departure from office to render a blanket commutation. Immediately thereafter, throngs of citizens and politicians denounced Governor Ryan's action as the product of a rogue executive, calling it lawless, unjust, and immoral.¹² Others saw him as courageous, merciful, and even heroic.¹³

11. More precisely, 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. See Stephen P. Garvey, *Is It Wrong To Commute Death Row? Retribution, Atonement and Mercy*, 82 N.C. L. REV. (forthcoming Apr. 2004), available at <http://ssrn.com/abstract=463101>; 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.").

12. See, e.g., Brian D. Crecente, *Owens Blasts Death Row Move on TV*, ROCKY MTN. NEWS (Denver), Jan. 14, 2003, at 3A (quoting Colorado Governor Bill Owens's characterization of the commutation as "an abuse of power"); Firestone, *supra* note 11 (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."); Editorial, *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").

13. 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"); *Nobel Matchup: Bono vs. Ryan*, CHI. TRIB., Feb. 26, 2003, at 1 (comparing 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."); Rod Dreher, *Gov. Ryan Did the Right Thing*, NAT'L REV. ONLINE (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."); STOP CAPITAL PUNISHMENT NOW!, THE NOBEL PEACE PRIZE FOR GOVERNOR GEORGE H. RYAN COMMITTEE, <http://www.stopcapitalpunishment.org/ryan.html> (last visited March 31, 2004) (advocating that Governor 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

One goal of this Article is to deepen our understanding of the tension between retribution and mercy, and by extension, the implications of Justice Kennedy's remarks about mercy and Governor Ryan's decision, by situating that tension within the framework of liberal democratic discourse.¹⁴ As the title indicates, my intention is to show what is wrong with mercy in the criminal justice system. Although I present this case against mercy drawing on an account of retributive justice that I have been developing in the last few years, I want to highlight two important conclusions of my argument: First, one need not be a retributivist to share my anxieties about the place of mercy in our current constitutional structure. It is sufficient to be a liberal, that is, committed to the principle of equal liberty under law, to be against mercy. Second, I will show that from a retributivist or liberal perspective, mercy based on compassion is just as problematic as mercy motivated by bias or caprice.

To criticize mercy and to defend the law's apparently unyielding reach, one must ostensibly join the ranks of snitches and schoolmarms. Nonetheless, this Article dons Javert's cape,¹⁵ or something like it, to explain the attraction of resisting mercy's call through retribution. Such effort seems necessary because mercy, even when narrowly defined as leniency afforded on grounds of compassion, caprice, or bias, still has dangerous charms.

Indeed, while any person concerned about the values underlying our criminal justice system may be interested in the argument here, there are at least four particular audiences for whom this Article's argument is intended. The first group in-

thing").

14. I should make clear that Justice Kennedy's specific policy reforms—shorter sentences, eliminating mandatory minimums, reinvigorating the pardon process—are not my concern here. They can each be potentially justified on retributivist grounds, as will be made clear. The concern I have is with Justice Kennedy's apparent endorsement of these changes on grounds that a "people confident in its laws and institutions should not be ashamed of mercy." Kennedy, *supra* note 10, at 4. Though he leaves mercy undefined and elsewhere discusses the injustice of some of these sentences, I will assume Justice Kennedy means mercy as leniency driven by compassion for the offender and the proper application of human grace; Kennedy's speech, in urging more executive pardons, quotes William Shakespeare's *Merchant of Venice*, observing that "mercy is 'mightiest in the mightiest. It becomes the throned monarch better than his crown.'" *Id.* (quoting *MERCHANT OF VENICE*, act 4, sc. 1). For this reason, I doubt Justice Kennedy understood mercy simply as leniency designed to correct injustices.

15. See *supra* note 7.

cludes those who believe that the institutions and practices of criminal justice should be arranged to permit or encourage a greater role for compassion or bias than is currently allowed.¹⁶ The second audience comprises those scholars, policy makers, or judges who do not forthrightly embrace compassion, caprice, or bias as such, but who advocate legal reforms that will most likely permit a higher incidence of compassion, caprice, or bias in the criminal justice system. Two examples of such an audience come to mind. The first are those who, perhaps bolstered by the Supreme Court's recent opinions in *Apprendi v. New Jersey*¹⁷ and *Ring v. Arizona*,¹⁸ support an increased use of juries in decisions affecting punishment.¹⁹ A second example in-

16. On compassion, see, for example, Garvey, *supra* note 11; Robert L. Misner, *A Strategy for Mercy*, 41 WM. & MARY L. REV. 1303 (2000); Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 SETON HALL L. REV. 288 (1993); Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501 (2000) (criticizing retributivism's position against mercy for not allowing leniency based on compassion for an offender's rehabilitation); Joshua Dressler, *Hating Criminals: How Can Something That Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448, 1472 (1990) (reviewing JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* (1988)) (stating that "if I were a judge I would occasionally act mercifully, . . . even if my act violated my job description. Perhaps some judges would refuse to act this way, even in the most compelling circumstances. If so, I might commend them for their judicial restraint, but for little else."); Brian L. Vander Pol, Note, *Relevance and Reconciliation: A Proposal Regarding the Admissibility of Mercy Opinions in Capital Sentencing*, 88 IOWA L. REV. 707 (2003) (advocating the introduction of statements urging leniency by families of murder victims); *cf.* *Brogan v. United States*, 522 U.S. 398, 404 (1998) (rejecting as mere "compassion-inflation" the argument, embraced by many circuit courts, that failure to permit an "exculpatory no" creates a "cruel trilemma" for guilty defendants). Some reformers advocate changes that would permit the introduction of greater bias. *See, e.g.*, Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

17. 530 U.S. 466 (2000).

18. 536 U.S. 584 (2002).

19. *See, e.g.*, Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33 (2003); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311 (2003). Barkow and Iontcheva rely on a rich history valorizing the role of jury service as akin to democratic political participation. But whereas Barkow believes that jurors should be responsible for finding any fact that triggers a mandatory punishment or a new punishment range, Iontcheva goes further, advocating that jurors be the primary decision makers of sentencing (as is the case in six states, Iontcheva, *supra*, at 314). Holders of the pro-jury view tend to embrace that position because it permits a larger role for a communal voice in sentencing. *See, e.g.*, Barkow, *supra*, at 78; Iontcheva, *supra*, at 316 (celebrating the "democratic virtues of jury involvement" in sentencing and contending that juries are more likely to bring legitimacy to the process of

cludes those who advance vigorous rights for victims in sentencing.²⁰ Endowing jurors or victims with greater power in sentencing increases the odds of leniency based on compassion, caprice, or bias because some offenders will have compassionate, capricious, or biased jurors or victims while others will not.²¹ Third, the argument I make against mercy sharpens the

sentencing determinations). It is thus a permissible inference to conclude that adherents to this position accept the possibility of a higher incidence of compassion, caprice, or bias. See DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* 401 (1990) (detailing the impact of a victim's race in the application of the death penalty in Georgia); SAMUEL R. GROSS & ROBERT MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* 109 (1989) (studying racial disparities in capital sentencing in eight states); Michael D. Weiss & Karl Zinsmeister, *When Race Trumps Truth in the Courtroom*, in *RACE AND THE CRIMINAL JUSTICE SYSTEM: HOW RACE AFFECTS JURY TRIALS* 63 (Gerald A. Reynolds ed., 1997); Barkow, *supra*, at 74–75 & n.186 (recognizing that juries create a situation where “defendants may be treated disparately depending on their own race or the race of their victims” and citing Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 82–85 (1993); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1626 (1985); Douglas O. Linder, *Juror Empathy and Race*, 63 TENN. L. REV. 887, 904–05 (1996)). Iontcheva similarly acknowledges that juries appear to act in a biased manner with respect to race or ethnicity, though she believes that such bias could be curbed by judicial review. See Iontcheva, *supra*, at 362–63. Recognizing that disparities resulting from sentencing are also a problem, she argues that this problem could readily be reduced if jurors were given more information about average sentences. *Id.* at 359–60.

Both Barkow and Iontcheva argue that the risks of bias are possible “whenever any actor in the criminal justice system is given discretion to mitigate punishment.” Barkow, *supra*, at 75; see also Iontcheva, *supra*, at 360–64. The risks associated with jury outcome disparity seem to me to be dramatically different because all the other main actors in the criminal justice system (police, prosecutors, judges, governors) are repeat players and are therefore far more likely to be amenable to discipline by various institutional carrots and sticks such as educational programs, incentives for career advancement, appellate reversal, re-election, or press criticism—to name just a few. The one-off nature of jury membership renders jurors essentially immune from the carrots and sticks that can reduce the incidence of improper compassion, caprice, or bias.

20. See, e.g., GEORGE P. FLETCHER, *WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS* (1995) (advocating, inter alia, that victims be consulted in plea bargains). I note the obvious point that not all so-called victims' rights are objectionable. While victims should have no special role in determining culpability or sentencing, I see nothing wrong with setting up governmental programs to help assist victims with whatever unique needs their experiences qua victim present.

21. As explained above, disparities based on compassion, caprice, or bias can be reduced when the discretion in sentencing is held by repeat players subject to incentives for misuse of discretion. See *supra* note 19.

debate within the retributivist camp; I provide what I think is a more defensible account of what reasons ought to serve as grounds for leniency than some of the major figures in this ongoing debate among retributivists.²² Finally, the argument I make also indicates, as I suggested before, why liberals committed to the principle of equal liberty under law, and not only retributivists, should be hostile to the unreviewable sites for mercy within our criminal justice system.

Having explained to whom I am addressing my argument,

22. See, e.g., KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST* (1989); Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardon Power from the King*, 69 TEX. L. REV. 569 (1991). Kathleen Dean Moore, for example, argues that retributivism-compliant pardons should be granted, *inter alia*, when a crime is justified, that is, when a crime is conscientiously performed and when the act is morally justified. MOORE, *supra*, at 11. Moore's desire to keep a space for pardoning a conscientious rebel reflects profoundly antidemocratic anxieties. Her book offers no account of who decides when an act that has been proscribed by legitimate democratic institutions under the constraints of a liberal constitution should bypass these conventional authorities and receive the imprimatur of moral philosophers. This well-intentioned but nonetheless reckless desire to leave a safety valve of pardons for morally justified crime exemplifies the failure of philosophers to confront questions about implementation with which lawyers are obsessed. Cf. CESARE BECCARIA-BONESANA, *AN ESSAY ON CRIMES AND PUNISHMENTS* 159 (Edward D. Ingraham trans., Academic Reprints 1953) ("Let, then, the executors of the law be inexorable, but let the legislator be tender, indulgent, and humane.").

Moore extends her theory of retributivist leniency to offenders of "excusable crimes," those offenders who 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. MOORE, *supra*, at 11. What Moore does not realize is that if there is a legally recognized excuse or justification, such as duress or necessity, the person will never need a pardon. To be sure, some types of excuses Moore would recognize are not legally based: for example if the offender is the only victim of his crime. But determining why this circumstance is an "excuse" requires an account that is at odds with the premises of democratic action, which may engage in justifiable paternalism at times. The point is that the executive's pardon power or the judicial branch's discretion should not be used as merely a device to further subjectively perceived flaws in the legislation emerging from the polity. This subverts basic rule of law values—unless, that is, the constitutional or statutory arrangement expressly delegates that discretion. (Moore, however, does not suggest this legal delegation as the basis for her recommendation.)

Furthermore, Moore wishes to extend leniency on retributivist grounds to offenders who have suffered enough, someone "whose particular circumstances would make him suffer more than he deserves." *Id.* Unfortunately, Moore conflates suffering with punishment and thinks retributivism is indifferent to the distinctions that can be drawn between them, a point discussed in this Article, *infra*, at note 84.

let me suggest four reasons that may justify the present endeavor. First, I think prior retributivist critiques of mercy have failed to grapple with what I call the democratic difficulty of mercy, which is the difficulty presented to these critiques by mercy that is authorized by constitutional or democratic laws and institutions, such as the presidential pardon or grand jury nullification.²³ It is difficult to speculate why these prior accounts have neglected the democratic difficulty: perhaps it is because theorists of retributivism often have the training and abstracting minds of philosophers rather than lawyers,²⁴ and therefore are less sensitive to institutional perspectives.²⁵ Regardless of the etiology of this problem, this Article attempts to qualify the force of the critique against mercy from those critics who view their arguments as consonant with liberal democratic norms. Although I ultimately share prior retributivists' hostility toward mercy, I arrive at that conclusion for reasons not fully recognized before.²⁶ If the weaknesses of these prior retributivists' positions are revealed, we can better see the proper implications of these views when applied to practical problems in the criminal justice system.

Second, my approach to retributive justice differs from previous accounts and in that way implicitly avoids some of the challenges brought by retributivism's recent critics. For example, my approach does not rely on, and indeed rejects, "retribu-

23. Previous retributivist critiques of mercy have not realized the fullness of the difficulty that mercy presents for legal retributivism. See, e.g., MOORE, *supra* note 22; Kobil, *supra* note 22. Both Moore and Kobil argue, on retributivist grounds, that pardons or other forms of mitigation are occasionally appropriate to assure a tight connection between punishment and desert, but neither consider how the relationship between retributivism and liberal democracy affects dispensations of leniency.

24. Exceptions exist, of course. Some retributivists are trained as lawyers too, like Michael Moore. See, e.g., MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* (1997).

25. See Guyora Binder, *Punishment Theory: Moral or Political?*, 5 BUFF. CRIM. L. REV. 321 (2002) (insisting that punishment is better justified as a political, not moral, phenomenon); cf. RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001) (noting that the lawyerly virtues of the Supreme Court's work must supercede calls from theorists that the Justices work as historians or moral philosophers).

26. My claim that mercy is a failure of equal liberty under law, which is similar to a claim that mercy is a failure of impartiality, is not itself new. See WHITMAN, *supra* note 1, at 181–85 (discussing anxieties arising from egalitarian concerns about the pardon power in eighteenth- and nineteenth-century America). What is unusual, so far as I can tell, is that no critic of mercy has observed the special difficulty legal retributivists face in critiquing constitutionally authorized sites of mercy.

tive hatred," a notion developed by Jeffrie Murphy in *Forgiveness and Mercy*.²⁷ Nor is it based on other emotions such as resentment²⁸ 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 The account I offer abjures these notions and is instead faithful to public legal ideals and a framework of inclusive positive law in liberal democracies.³¹ Thus, to the extent that the account I offer is coherent and attractive, it frustrates the criticism that punishment qua retribution is merely a primitive practice: instead, we can show that it is bound up with our best understanding of how individuals and communities live well together.³²

Third, in developing the general argument, I explain how retributivism can countenance leniency to offenders on retribu-

27. JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 88–110 (1988).

28. For the best discussion of punishment arising from resentment, or ressentiment, see FRIEDRICH WILHELM NIETZSCHE, *ON THE GENEALOGY OF MORALS* (Walter Kaufmann & R.J. Hollingdale trans., Random House 1967) (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).

[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

Id.; see also Robert Solomon, *Justice v. Vengeance*, in *THE PASSIONS OF LAW* 123 (Susan A. Bandes ed., 1999). A more muted endorsement of revenge can be found in Miller, *supra* note 8, at 161–202. See also JEFFRIE G. MURPHY, *GETTING EVEN: FORGIVENESS AND ITS LIMITS* 17 (2003) (giving "two cheers for vindictiveness").

30. Rapaport, *supra* note 16, at 1511.

31. By inclusive positive law, I mean that the sources of law draw upon not only discrete statutes or case law but also moral principles that are rooted in the public legal culture of liberal democracy. See, e.g., Stephen R. Perry, *Method and Principle in Legal Theory*, 111 *YALE L.J.* 1757, 1757 (2002) (reviewing JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2001)) (characterizing Jules L. Coleman as a leading proponent of this view).

32. I have in mind the recent attacks against retributivism found in Russell L. Christopher, *Deterring 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 (2001); Edward Rubin, *Just Say No to Retribution*, *BUFF. CRIM. L. REV.* (forthcoming), available at <http://ssrn.com/abstract=413660>. In a separate future article, *The Confrontational Conception of Retribution*, I address these points of difference at length.

tivist grounds for postconviction achievements. Insofar as this argument is successful, it dissolves an important debate between proponents of postconviction clemency and their retributivist critics.³³

Finally, the retributivist argument I make for creating institutional spaces for the exercise of "justice-enhancing" discretion rests upon a novel adaptation of the public choice literature. It is a step, but only a step, toward reconciling the aspirations of high theory with the sausage factory that is the criminal justice system.

The trajectory of this Article can be mapped. Part I provides some background in the philosophy of punishment that should help delineate what I mean by mercy and how it is distinct from forgiveness, and discretion. I then begin the argument of the paper in Part II by offering an abbreviated account of retributivism that I call the confrontational conception of retribution (CCR). Next, in Part III, I explain the basis for retributivism's hostility toward mercy. The essence of that critique focuses on a failure of justice. On this account, when mercy is separated from concerns about an offender's culpability, it should be enfeebled as much as possible.

I contend, however, that once we examine the animating forces of the CCR, this critique of mercy is sustainable only in part. When scrutinized more closely, the retributivist critique runs into previously unanticipated problems: the difficulties associated with constitutionally or democratically authorized sites for mercy. Specifically, I argue that the liberal democratic nature of retributivism's premises works to qualify the argument against mercy. Notwithstanding the difficulties these sites for mercy present for the basic critique, I contend that the thrust of the retributivist argument against mercy perseveres, showing that mercy is less a problem for justice (*qua* just deserts) than for equality under law. Two important implications of this argument arise. First, as suggested before, one need not be a retributivist to be allergic to mercy. So long as one is committed to the principle of equal liberty under law, then mercy is unattractive within a properly liberal criminal justice system. Second, mercy based on compassion is as problematic from the liberal or retributivist perspective as it is when it is based on caprice, corruption, or bias.

In Part IV, I highlight the unusual institutional implica-

33. See *infra* note 103; text accompanying *infra* note 154.

tions of my argument: specifically, that the realization of retributive justice requires institutions that preserve and license the exercise of discretion, as distinct from mercy. This need for justice-enhancing (or equitable) discretion is readily apparent in light of retributivism's traditional insistence on protecting the innocent from unwarranted punishment. Less obvious, perhaps, is why the need to preserve these sites for discretion is especially urgent, given what Professor William Stuntz has identified as the pathology of the politics of criminal law.³⁴ Stuntz illustrates how the politics of criminal legislation tends to yield overbroad statutes that require an even more nuanced development of prosecutorial judgment than that which executive branch officials typically need to enforce broad legislative delegations. These overbroad laws are designed to allow politicians to reap the political benefits of broad criminal legislation without having to make the difficult decisions of application and implementation. Thus, taking a cue from Aristotle, I argue that sites for discretion are required in order to offset the potential inequities that might otherwise arise.³⁵ Recognizing that these sites for discretion are also often sites for unreviewable mercy, and to avoid or minimize this potential for abuse, I suggest several potential reforms that would make available review where currently little or none exists: first, a greater use of ombudspersons who will have third-party standing to investigate and enforce abuses of discretion in law enforcement and prosecution declinations; second, judicial review for acquittals under an appropriately crafted standard of review; and third, use of ombudspersons to seek judicial review of executive leniency, which would force executives to provide reasons for the use of the pardon power.³⁶

34. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

35. See ARISTOTLE, *THE NICOMACHEAN ETHICS* 132-34 (David Ross trans., Oxford Univ. Press 1988); see also THE FEDERALIST NO. 37, at 269 (James Madison) (Benjamin Fletcher Wright ed., 1974) ("All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal . . .").

36. I self-consciously do very little to flesh out these suggestions for reform, believing that they are better developed in a separate project. I recognize that aspects of these recommendations stand at odds with some settled case law under the Constitution, but it is important that we not confuse the familiar with the necessary. The Constitution itself changes both by amendment and judicial revisitation; moreover, these ideas may be of interest or use for nations whose terrain of criminal justice is more amenable to innovation. My

The Conclusion summarizes these points and turns to a related question: whether there is any truth to the supposition that retributivists oppose mercy in all spheres of life.³⁷ I finish by briefly exploring why mercy is worth caring about as a private virtue, even if it is better eliminated from the realm of criminal justice.

I. SOME BACKGROUND TO THE PHILOSOPHY OF PUNISHMENT

A. RETRIBUTION AND CONVENTION

As I noted at the outset,³⁸ I take retributive punishment to be the state's infliction of some hard treatment upon an offender, after fair and reasonable procedures, on account of the offender's conviction for violating a legal norm.³⁹ The intensity of the punishment and the trigger for the punishment are products of democratic deliberation.⁴⁰ On these questions of

primary focus for reform in this Article, then, are those sites where unreviewable leniency may be afforded, for example, the presidential pardon or the grand jury. The United States Sentencing Guidelines are different in that their application is subject to appellate review. Hence, I leave for another day the way in which some of the argument made here applies to the United States Sentencing Guidelines.

37. See Rapaport, *supra* note 16, at 1504–05 (“Alien to the spirit of retributivism . . . is the notion that we are obliged to forgive those who transgress against us, at least those who are contrite, and do penance or make restitution.”).

38. See *supra* note 1.

39. John Rawls's oft-cited definition of retribution states that the retributive view of punishment is based on the idea that

wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing. . . . [T]he severity of the appropriate punishment depends on the depravity of his act. The state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not; and it is better irrespective of any of the consequences of punishing him.

John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4–5 (1955). Notice several differences between Rawls's view, which is the moral view of retributivism, and the definition I offered in the text, which is essentially a legal view of retributivism. Rawls does not mention the state, nor does he limit the scope of wrongdoing to legal offenses. He also characterizes retributivists as being unconcerned with the consequences of the inflicted punishment. As I explain later, to be unconcerned with consequences is to breach the central maxim underlying retributivism—namely, that citizens must take responsibility for the reasonably foreseeable consequences of their actions; that maxim applies to retributivists as much as to offenders.

40. The infliction of hard treatment serves as the state's coercive measure, which is designed to diminish the plausibility of the claim of superiority a

criminal legislation and sentencing, the polity makes a series of social judgments that calibrate punishment according to the gravity of the offense and the culpability of the offender.⁴¹ The polity presumably does not make such decisions lightly, but there is no specifically retributivist contribution to the determination of what kind of behavior ought to be the subject of criminal legislation. The subject of criminal legislation is one that philosophers, economists, and judges⁴² dispute—whether it should be limited to some understanding of John Stuart Mill's harm principle,⁴³ for example—but it is not one in which retributivists have a stake as retributivists, though they undoubtedly should, and often do, engage the topic as thoughtful citizens.⁴⁴

What induces retributive punishment is the offense against the legal order.⁴⁵ Where the law runs out, so must retribution.

criminal makes by his criminal action against his victim, fellow citizens, and government. This point is developed further in Part II, *infra*.

41. See ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 366–68 (1981). It is true that these questions raise further questions: for example, how grave is car theft relative to health care fraud? That we do not have clear a priori answers to some of these value assessments highlights the role of our democratic institutions to help us come to some answer. It indicates that in the absence of absolute confidence in our convictions about ranking of crimes we must recourse to positive law and a political conception of punishment.

42. See Oral Argument at 43, *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (No. 02-102) Compare Justice Scalia's dissent, who argued that traditional values may properly be reflected in criminal law, with Justice Breyer, who observed that a criminal prohibition on homosexual sodomy is as irrational as the earlier American criminal prohibition of teaching German in schools.

43. See JOHN STUART MILL, *ON LIBERTY* (Alburey Castell ed., F.S. Crofts & Co. 1947) (1859).

44. For example, MOORE, *supra* note 24, develops a plausible and attractive account of criminal legislation, but the account's connection to retributivism qua justification for punishment is tenuous. A very useful discussion of the proper scope of criminal legislation can be found in Larry Alexander, *The Philosophy of Criminal Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND LEGAL THEORY* 815 (Jules Coleman & Scott Shapiro eds., 2002). For varying accounts of the proper scope of criminal law, compare Meir Dan-Cohen, *Defending Dignity*, in *HARMFUL THOUGHTS: ESSAYS ON LAW, SELF, AND MORALITY* 150, 150 (2002) (arguing that "the main goal of the criminal law is to defend the unique moral worth of every human being"), available at <http://ssrn.com/abstract=331200>, with SANFORD H. KADISH, *The Crisis of Overcriminalization*, in *BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW* 21 (1987) (criticizing criminalization of victimless crimes).

45. By contrast, revenge may address slights, injuries, insults, or nonlegal wrongs. Nozick notes additional distinctions between retribution and revenge: retribution ends cycles of violence, whereas revenge fosters them; revenge is personal, whereas retribution is impartially administered; no generality attaches to the avenger's interest, whereas retributivists seek to vindicate law's

Where the law prohibits activity that you would rather not see punished—or permits activity that you would like to see punished—your recourse is democratic agitation. Take it to Congress.⁴⁶ That said, where the law punishes along dimensions that are incompatible with retributivism's animating ideals, there is room for argument on retributivist grounds.⁴⁷

B. MERCY, FORGIVENESS, AND DISCRETION

People often define mercy in various ways, and often what passes for mercy is thought of as justice too. I will define mercy in a more narrow way so that there can be a distinct difference between reasons that serve to lessen punishment for purposes of justice and reasons that lessen punishment for purposes of mercy. In order to achieve some conceptual precision, I have devised a table that will guide our discussion. Let us think of "leniency" towards an offender as a value-free umbrella term under which an offender receives less punishment than is possible. On one side of the table is what I will call equitable discretion (or justice).⁴⁸ This is when an offender receives less or no punishment for reasons that are tied to the offender's choice

breaches; revenge has a particular emotional tone, whereas retribution is cool and unemotional. See NOZICK, *supra* note 41, at 366–68. A few other distinctions may be noted: retribution is targeted at the offender, whereas revenge may affect the offender's relatives; retribution is interested in the moral autonomy and dignity of the offender, whereas revenge is indifferent (this affects whether and what kind of excuses might limit revenge); retribution seeks the internalization of moral responsibility for lawful actions, whereas revenge does not. See Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2216–17 (2001).

Some may cavil with this dichotomy between revenge and retribution. For example, William Miller denies that retribution is cool and impartial relative to revenge; he thinks retribution is motivated by emotions such as a sense of duty and disapproval. See Miller, *supra* note 8, at 162–63. To the extent these are emotions, they are reflective emotions, rather than impulsive ones. See Dan M. Kahan & Martha C. Nussbaum, *Two Concepts of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 277–78 (1996). That they are reflective emotions means that they are subject to greater malleability upon deliberation and dialogue.

46. This is not to say that anything legislatures do is permissible. The boundaries of democratic action are properly demarcated by constitutionalism rooted in fundamental liberal principles.

47. See Markel, *supra* note 45, at 2240–41 (arguing that punishments that violate the animating premises of retributivism cannot be justified).

48. As I mentioned, I am using "leniency" in a value-neutral manner, although I recognize that mitigation in the service of justice may not seem lenient but rather a matter of right to which the alleged offender is entitled.

to commit the crime, or to the severity of the crime itself. For example, perhaps the offender develops evidence that he was erroneously convicted or he had diminished capacity. On the other side of the table is mercy. Mercy I define first as the remission of deserved punishment, in part or in whole, to criminal offenders on the basis of characteristics that evoke compassion or sympathy but that are morally unrelated to the offender's competence and ability to choose to engage in criminal conduct. We can call this first type of mercy "compassion-based" mercy.

LENIENCY	
EQUITABLE DISCRETION	MERCY
<i>Excuses and Justifications; Severity of Wrongdoing; Identity</i>	<i>Compassion</i>
<u>Anterior</u> : minor age, insanity <u>Concurrent</u> : duress, lesser evils <u>Posterior</u> : erroneous conviction; reduced social cost of crime due to surrender, guilty plea, good behavior	<u>Anterior</u> : offender is poor or a war veteran
	<u>Concurrent</u> : offender performed illegal euthanasia
	<u>Posterior</u> : offender experienced religious conversion, heroism
	<i>Corruption/Caprice/Bias</i>
	<u>Anterior</u> : offender is friend of President <u>Concurrent</u> : offender commits crime on Inauguration Day <u>Posterior</u> : offender donates substantially to President's campaign
This table summarizes two types of leniency and their potential subtypes, as discussed in the text. Examples of each subtype are given. The designations "anterior," "concurrent," and "posterior" refer to the relationship in time between the reason eliciting the leniency and the time that the offense occurred.	

Let me provide a very rough typology of compassion-based mercy. One might be merciful because of *anterior* reasons of

human status: for example, the President decides to pardon all offenders who are war veterans, or elderly, or new immigrants. Under the appropriate circumstances, the fact that someone is old or a veteran may be utterly irrelevant to the offender's decision to commit the crime. (As I mentioned above, I put aside those instances where someone says that the factor eliciting compassion is what necessitated their criminal action and treat that possibility under the category of justice-enhancing or equitable discretion, under which various excuses and defenses are recognized as mitigating or exculpating factors.) One might also decide to be merciful because of a reason *concurrent* with the offense; for example, the offender whose reckless driving kills her best friend or child. Here it looks like the offender will suffer more because of the nature of her crime and that evokes sympathy and a desire to be somewhat merciful. Finally, some might also like to extend mercy for reasons *posterior* to the offense: for example, the offender has a change of heart and repents, or the offender becomes ill or aged and will die in prison.⁴⁹

In part because of the historical associations between mercy and grace and mercy and sovereign prerogative, I will also define as mercy those grants of leniency that are motivated by bias, corruption, or caprice—even though I recognize that such a definition encompasses more types of leniency than colloquially used.⁵⁰ In the conception I am developing, mercy is something that someone has neither a natural nor a legal right to claim—it is bestowed upon the offender—perhaps like some understandings of grace.⁵¹ Indeed, in the United States Su-

49. One can see on the table that there are analogues to equitable discretion, so context and judgment are vital. An anterior reason for justice-compatible leniency is that the offender is a minor. A concurrent reason for justice-compatible leniency is the presence of duress or necessity. A posterior reason for justice-enhancing leniency is that the state has scaled punishments to the social cost of the wrongdoing, in which case it is appropriate to punish less someone who earns good behavior credits during the period of his punishment.

50. As I mentioned, *supra* note 1, mercy has historically been associated with leniency for these reasons as well.

51. In an article considering the motivations behind the use of executive clemency, the author noted:

The feeling is that we should do as little as possible to grant relief. . . . It's a dangerous trend for the executive to override the function of the courts and the parole system too much Clemency is bestowed as an act of grace, not as a matter of right.

Kevin Krajick, *The Quality of Mercy: The Methods of Deciding Who Receives Clemency Often Have More To Do with Luck, Publicity or Politics Than with*

preme Court's early jurisprudence on the presidential pardoning power, Chief Justice John Marshall characterized the pardon as "an act of grace . . . which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed."⁵² This view is consistent with some historical practices in which dispensations of mercy linked grace with luck: the Romans, for example, released all criminals facing death sentences if they encountered a vestal virgin en route to their execution, so long as the encounter was by chance.⁵³ While fortune's good grace sometimes dispenses mercy, it is more often motivated by compassion. Compassion, unlike fortune, can be instigated by plucking sentimental strings that are quite predictable.⁵⁴ What is important about these other reasons for mercy is that, like compassion, they are granted for reasons unrelated to the offender's competence or autonomy, or the severity of the offense.⁵⁵ Again, these forms of mercy should be distinguished from leniency that is motivated by other reasons that are more properly viewed as triggering equitable or justice-enhancing discretion.⁵⁶

Justice, CORRECTIONS MAG., June 1979, at 46, 48 (quoting Raymond Theim, Deputy United States pardon attorney); cf. *Bush Pardons \$11 Thief and a Moonshine Seller*, N.Y. TIMES, Dec. 24, 2002, at A20 (reporting President George W. Bush's grant of only seven pardons for petty criminals).

52. *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833). Later, Justice Holmes repudiated this conception of the pardon, rooting the pardon not in the magisterial nature of the Presidency, but as an articulated "part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed." *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

53. See Kobil, *supra* note 22, at 585 n.87 ("[I]f in their walks they chance to meet a criminal on his way to execution, it saves his life, upon oath made that the meeting was an accidental one, and not concerted or of set purpose." (quoting 1 PLUTARCH, *Numa Pompilius*, in *THE LIVES OF THE NOBLE GRECIANS AND ROMANS* 74, 83 (John Dryden trans., Arthur Hugh Clough ed., 1979))).

54. See *supra* text accompanying note 49.

55. Capricious or arbitrary leniency is rarely defended except in cases of political theatre, where the sovereign affirms its power through grants of ostensibly magnanimous behavior. (I discuss whether the theatrical use of mercy can be rendered compatible with democracy in Part III, *infra*.) As to bias, I refer to leniency afforded, either consciously or unconsciously, to offenders by those judicial or executive agents who share (or otherwise favor those with) some morally arbitrary characteristic of the offender.

56. Kobil usefully distinguished clemency that was used for justice-enhancing, justice-neutral, and justice-defeating purposes. See Kobil, *supra* note 22, at 579-80. Justice-enhancing purposes include ensuring horizontal and vertical equity among offenders or clearing the record of the erroneously convicted. Justice-neutral purposes include facilitating social reconciliation

Mercy, like other forms of leniency, can appear throughout the life cycle of a crime. Mercy is possible whenever an officer encounters suspicious activity and decides whether to turn away. Prosecutors can be merciful in deciding to decline bringing charges,⁵⁷ or in deciding which charges to bring, and what plea bargain to offer. Judges can—though they frequently do not—direct acquittals or sentence below the range of the guidelines for merciful reasons. Similarly, grand jurors can resist a prosecutor's desire to indict someone (though they are not informed of this power),⁵⁸ and petit jurors can give a verdict of not

after fissures in the national fabric (the pardon of Nixon was alleged to be an instance of this purpose). One can imagine extreme circumstances that a society faces in which it must undertake tragic choices between competing moral priorities that might be deemed "justice-neutral." See Jonathan Allen, *Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 315, 320 (1999); see also WHITMAN, *supra* note 1, at 181 (discussing American use of the political pardon after times of war or rebellion). One can also imagine that some types of leniency are harder to categorize: What happens, for instance, when mass pardons are given merely to relieve overcrowding of prisons? Is this justice-neutral, justice-defeating, or even justice-enhancing? I can imagine arguments for a variety of positions. In any case, Kobil argues that the use of justice-neutral leniency is something that should be limited to executive branch figures who can be held accountable through elections. Kobil, *supra* note 22, at 636–38 (proposing procedures for keeping the use of justice-neutral leniency in check). Though this proposal is promising, it does not really address situations when the executive branch may decide to exercise its powers when there is no political check available, for example the last day of office. For now, I leave aside these justice-neutral exercises of discretion.

57. The scope of prosecutorial declinations is often underappreciated. To give one example, for the fiscal year 1976, the federal government declined to prosecute 108,000 out of the 171,000 criminal matters that were referred to the federal prosecutorial force. To be sure, these declinations occur for a wide variety of reasons, including determinations based on the merits and relative scarcity of resources. But out of 108,000 declinations, one must wonder how many were products of prosecutorial compassion, bias, favoritism, and indeed even caprice. The numbers seem even more likely to climb when counting the "uncounted declinations" that are made by investigative agencies. See MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS* 805 (2d ed. 2003) (quoting the statement of Assistant Attorney General Philip Heymann before the Senate Judiciary Committee); see also *id.* at 808 (stating that in 1999, federal prosecutors filed charges in sixty percent of the criminal matters referred to them, but that this number was low because it did not include minor matters that took less than an hour of a prosecutor's time and citing BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1999 table 2.2 NCJ-16179 (Apr. 2001)).

58. See *United States v. Marcucci*, 299 F.3d 1156, 1159–60 (9th Cir. 2002); see also Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1 (2002) (advocating

guilty despite overwhelming evidence of guilt.⁵⁹ Governors or Presidents may authorize pardons, amnesties, commutations, remissions of fines, and reprieves.⁶⁰ This Article focuses chiefly on those sites for mercy that are largely, if not totally, unreviewable: executive pardons, jury acquittals, and prosecutorial declinations.

Note, then, what mercy is *not*: it is not forgiveness. The two are distinct.⁶¹ Mercy is an act, whereas forgiveness is an attitude.⁶² That is, mercy contains a publicly observable aspect that is distinct from forgiveness: mercy could be granted without any change in the grantor's feeling toward the wrongdoer. Conversely, as Murphy has noted, one can forgive someone, even oneself, but still wish for him to experience the full extent of punishment. Forgiveness needs no observable action.⁶³

Note again that mercy must be kept distinct from what I will call (equitable) discretion, if the distinction between retributive justice and mercy is to retain any significance.⁶⁴ If

a robust role for grand juries).

59. See *Horning v. Dist. of Columbia*, 254 U.S. 135, 138–39 (1920) (“[T]he jury has the power to bring in a verdict in the teeth of both law and facts.”); Butler, *supra* note 16, at 680 (“Racial considerations by African-American jurors are legally and morally right.”).

60. See, e.g., *supra* text accompanying note 11.

61. Mercy and forgiveness are often conflated. See, e.g., ANDRE COMPTE-SPONVILLE, *A SHORT TREATISE ON THE GREAT VIRTUES* 118 (Catherine Temerson trans., William Heinemann 2002) (1996) (“Mercy . . . is the virtue of forgiveness . . .”); Misner, *supra* note 16, at 1359 (“Mercy requires a particular attitude.”). The relationship between mercy and clemency is also worth exploring. In this Article, clemency refers to a reduction in punishment once the punishment has already been determined. See Rapaport, *supra* note 16, at 1503 (“Clemency . . . denote[s] only relief granted *after* the punishment is initially determined.”). That clemency may be merciful insofar as it is motivated by compassion, caprice, or bias. Or, it might simply be leniency afforded as a function of justice-guided discretion.

As Rapaport notes, clemency can take different forms. See *id.* at 1505. Clemency can be the commutation of a sentence, a pardon for an offense, or the restoration of rights forfeited during the penal sentence. *Id.* It can attach to classes of persons (amnesties) or particular persons. *Id.* Amnesties, however, can also occur before any determination of culpability. Clemency can also be manifested merely in a reprieve, which delays the sentence or the remission of fines. *Id.*

62. MOORE, *supra* note 22, at 188.

63. See MURPHY & HAMPTON, *supra* note 29, at 14.

64. In a well-known essay, Martha Nussbaum traced the development of mercy as the consequence of an equitable attention to the particular details of an offender's background. See MARTHA C. NUSSBAUM, *Equity and Mercy*, in *SEX & SOCIAL JUSTICE* 154, 154–83 (1999). But this attention to detail is in no way fundamentally at odds with retributive goals of sentencing in accordance

mercy, understood as leniency afforded on “justice-defeating” grounds such as compassion, caprice, or bias, were to overlap with discretion, that is, leniency afforded for justice-enhancing reasons, then it would be hard to differentiate mercy from retributive justice. This may seem semantically controversial, because many people run “just” and “merciful” together, but it is necessary to distinguish them if we want to form an argument about the concepts. As I suggested earlier, there are numerous reasons for which findings of no culpability or reduced culpability are desirable on retributivist grounds—for example, diminished capacity, special circumstances including necessity or coercion, or new evidence affecting guilt determinations. These findings require the use of justice-enhancing discretion, that is, judgments based on articulable standards of desert in relation to culpability and the severity of the offense.⁶⁵

Retributive theory seeks to cabin sites for leniency (such as the executive pardon) so that these sites are not used for justice-defeating purposes. Because retributive justice seeks to punish an offender because she deserves to be punished in a manner commensurate to her legal wrongdoing and responsibility, an institutional design that creates discretionary spaces for the purpose of individuated justice is necessary to assure that someone is getting what she deserves. Not more, not less. And because retributive punishment is predicated on the use of individuated adjudication, mercy’s ambit thus contracts (relative to popular understandings). It is useful, then, to identify those reasons for leniency that are often lumped under mercy when they should instead be categorized as reasons for justice. What is left for mercy is admittedly smaller than is commonly

with desert. See A.T. Nuyen, *Straining the Quality of Mercy*, 23 PHIL. PAPERS 61, 63–67 (1994) (criticizing Nussbaum’s argument for equity as failing to distinguish it from justice). The background of the offender may be relevant to determining whether the offender’s decision to commit the crime was freely undertaken or subject to some diminished capacity. See Carol S. Steiker, *Tempering or Tampering? Mercy and the Administration of Criminal Justice* 10 (Apr. 12–13, 2002) (unpublished manuscript, on file with author) (“[U]nder this skeptical view of mercy, justice embraces a piece, perhaps a very large one, of what in common parlance goes by the name of mercy.”). These views were noted long ago in St. Anselm’s writings. See ST. ANSELM, *PROSLGION*, 125, 127, 129 (M.J. Charlesworth trans., Oxford Univ. Press 1965) (observing that mercy appears to be an injustice since it means punishing less than deserved, but that many factors that call for mercy actually affect the distribution of punishment, and therefore mercy is a redundancy).

65. As noted earlier, discretion to extend leniency may also result from justice-neutral considerations that are similarly not the product of compassion, caprice, or bias. See *supra* note 56.

referenced, but it is by no means a trivial amount or a null set.⁶⁶

The goal of this Article, then, is to see what is wrong with mercy, that is, leniency granted out of compassion, bias, corruption, or caprice. It is important to emphasize the constraints I have put on these definitions because there would be little point in discussing the tension between justice and mercy if they overlapped. So let me reiterate: the giving of mercy is not something that can be tied to desert if mercy is to have any meaning distinct from what justice requires or permits.⁶⁷

I also want to clarify a related point. That retributive justice justifies punishment under ordinary circumstances does not mean that punishment ought to be imposed under all circumstances. Retributivists can and should recognize that retributive justice is not the only value that makes life worth living, and that there are times when the suspension of retributive justice may be necessary.⁶⁸ This is consistent with retributivism's animating moral ideals because, far from being unconcerned with consequences, retributivists urge on offenders the maxim that they must take responsibility for the rea-

66. This restrictive definition of mercy is nothing new among those who have written on the subject. See Misner, *supra* note 16, at 1361 ("[M]any scholars conclude that justice and mercy indeed are inconsistent concepts, at least as to public justice and public mercy."); see also Ross Harrison, *The Equality of Mercy*, in JURISPRUDENCE: CAMBRIDGE ESSAYS 107, 121 (Hyman Gross & Ross Harrison eds., 1992); MURPHY & HAMPTON, *supra* note 27, at 162, 164; H.R.T. Roberts, *Mercy*, 46 PHIL. 352, 353 (1971) ("A genuine act of mercy is always unjustified . . ."). That said, the point about providing the typology of reasons for compassion-based mercy, see *supra* text accompanying note 49, is to show that even defined narrowly, mercy is not a null set.

67. I reiterate the point that, even defined narrowly and apart from desert, mercy is embraced or celebrated by those who think that compassion for the offender, manifested in mercy, should trump retribution. See, e.g., *supra* note 16. My argument is also addressed to those who would embrace changes that likely will increase the incidence of bias and prejudice in criminal sentencing, for example, Barkow and Iontcheva, *supra* note 19, as well as to others who attempted to justify greater leniency, on retributivist grounds, such as those who have suffered enough or suffered disproportionately to their offense, for example, MOORE and Kobil, *supra* note 22. To the latter group, this Article argues that they misunderstand the ideas behind retribution and therefore misapply those ideas to sentencing issues.

68. I have in mind, as one example, cases of supreme emergency in which the project of retributive justice and all other good projects are endangered. Cf. MICHAEL WALZER, JUST AND UNJUST WARS 251-55 (1977) (discussing supreme emergency); Dan Markel, *The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States*, 49 U. TORONTO L.J. 389 (1999) (arguing that an attractive retributivism is ultimately consequentialist).

sonably foreseeable results of their actions. That same maxim cannot be abrogated when retributivists are designing systems of justice or advocating reforms therein.⁶⁹

C. THE THREE QUESTIONS OF CRIMINAL LAW

With these notions in mind, turn now to the structure of the philosophy of criminal law, where most interesting questions fit into three broad areas of inquiry. First, what types of acts or omissions should be the object of criminal legislation?⁷⁰

69. That is why, for example, the call to compassion from retributivism's critics must be assessed critically: Compassion runs in many directions, and the sense of compassion in the system builder must extend not only to the offender, but also to the future victims of undeterred crime, the potentially innocent people swept up in an error-prone criminal justice system, and the taxpayers who must fund the entire system, warts and all. It goes without saying that many of these concerns will resonate with those who view the criminal justice system through welfarist lenses as well. *Cf.* Kaplow & Shavell, *supra* note 32.

70. This question is vital, as promiscuous use of criminal sanctions creates greater risk of error and abuse by authorities. The modern state punishes more than just the usual array of force or fraud. In the United States, more than 300,000 federal regulations are said to be sanctioned by criminal penalties. Take two examples that are favorites of law professors: the environmental regulation that criminalizes the disturbance of mud in a cave on federal lands, 16 U.S.C. §§ 4302(1), 4302(5), 4306 (a)(1), 4306(b) (2000), and the Currency and Foreign Transaction Reporting Act, Pub. L. No. 91-508 §§ 209, 221, 84 Stat. 1114, 1121-22 (1970), which criminalizes the failure of a financial institution to file a report for bank transactions of \$10,000 or more. *See generally* Douglas N. Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959, 963 (2000).

Husak raises a concern germane to the legal conception of retribution in this paper. He worries that the array of activities subject to criminalization far exceeds the array of activities that are "essentially concerned with wrongdoing and blame." *Id.* at 966. Because of our bloviated codes, "no theory about the function of the criminal law will closely fit existing practice." *Id.* at 966-67. Insofar as the "function of the criminal law" can be equated with the justification for a criminal penalty, I think Husak errs. As we will see in the text that follows, the account I offer justifies the imposition of punishment on activities that have been denominated as criminal with little regard for their actual content. Subject to the boundaries delimited by basic "background rights," which create and preserve a moral space in which one can act without interference from the state or from others, *see, e.g.*, *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), it is enough for legislatures to decide that a certain activity is subject to criminal sanction for the law to merit our compliance and for our disobedience to be punished. If the legislature acts within those boundaries, then to flout legislative will becomes wrongful *simpliciter*. While this approach may justify punishment for activities that Husak does not think should be punished, there is nothing implausible about it. *See* Husak, *supra*, at 967. In short, the connection between a legislative directive and punishing wrongdoing is tighter than Husak apparently believes. (One might argue that Husak's

Second, what justifies the role of the state, and not some other actor, in imposing punishment against an offender of legal norms? Third, if punishment is warranted, what framework is appropriate to determine how much and what kind of hard treatment should be inflicted upon an offender? These issues may be thought of as legislation, punishment, and sentencing.

The first question is relatively unimportant right now, but it will come up in Part IV when the public choice problem associated with the politics of criminal law is discussed. The latter two are of immediate significance, as shown in the next section. For if the justification for punishment permits no deviation or relief from sentencing, then the question of how much punishment should be inflicted is obviously implicated.⁷¹

Turning to the justification question, note that philosophers of punishment traditionally offer four justifications for punishment: deterrence of future wrongful actions by either the offender or the general population, incapacitation, rehabilitation, and retribution. This Article focuses on the last purpose, retribution, by discussing a theory that I call the confrontational conception of retribution, or the CCR. The argument I make, therefore, does not preclude a role for mercy if punishment is justified along lines other than retributive justice.⁷²

conception of background rights is considerably more capacious than mine, and that is where our disagreement lies. But consider whether his apparent scorn for currency control or environmental legislation is compatible with reasonable conceptions of natural or background rights.) For the distinction between background or natural rights on the one hand, and legal or institutional rights on the other hand, see Randy E. Barnett, *A Law Professor's Guide to Natural Law and Natural Rights*, 20 HARV. J.L. & PUB. POL'Y 655, 670-71 (1997) (glossing on RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 93 (1977)).

71. Although the second and third questions are analytically distinct, there is a connection: Any time a justification for punishment is offered, it will always have at least some implications for the quantum as well as the kind of punishment inflicted on an offender. For example, if someone thinks punishment is justified by virtue of specific deterrence alone, he might not punish someone who, after he has committed a crime, becomes so severely disabled that he would be unable to commit another crime later. I have explored this connection between punishment and sentencing elsewhere. Markel, *supra* note 45, at 2215-40 (explaining how a retributivist justification of punishment counsels against the use of shaming punishments, but in favor, for the most part, of guilt punishments or private prisons).

72. From here on, I will often conflate punishment with retribution, and retribution with my particular conception of it.

II. THE CONFRONTATIONAL CONCEPTION OF RETRIBUTION

Retribution is often characterized as being concerned with the offender's past wrongdoing.⁷³ Responding to this infraction, retribution endorses the infliction of hard treatment on an offender because he deserves it. As to the level of punishment, we say it should be commensurate to the seriousness of the wrong and his blameworthiness in committing it.

Though widely held, this typical account does not explain why the state, rather than the victim or her allies, is the punitive agent. It also fails to unpack the claim that an offender deserves something: by virtue of what can it be said that he deserves this stigmatic, harsh treatment? In other words, the intuition behind desert requires elaboration because, frankly, not everyone will agree with the claim that the state should punish Jim because Jim committed wrongdoing. Others may not even accept, on its face, the more elemental claim that Jim deserves punishment. Instead, they might advocate some form of treatment. As a result, we need to flesh out the idea of desert.

The confrontational conception of retribution, or CCR, identifies the idea of desert as a placeholder for three other principles that have broader acceptance as specifically—though not necessarily only—political ideals: moral accountability for unlawful actions, equal liberty under law, and democratic self-defense.⁷⁴

The first point is that retribution instantiates, as and in a socio-legal practice, the ideal of individual moral responsibility. When we punish an offender who knows, or reasonably should have known, that it was illegal to have stolen, raped, or murdered, we tell him that his actions matter to this community constituted by shared laws. To illustrate, imagine that I physically attacked my neighbor. 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 to

73. See the definition offered by Rawls, *supra* note 39, at 4–5.

74. It is not my intention here to explain in great detail where this account of retribution draws upon and departs from previous accounts, but rather I seek here to apply the account to the problem of mercy. For purposes of this Article, then, one should discount attempts to ascribe or claim originality regarding the account of retribution.

me that my actions will not be taken seriously by the state.⁷⁵ 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.

It bears mentioning that the attempt at punishment seems sufficient to communicate this norm, and yet punishment itself may not be necessary to communicate the point. When the state credibly threatens to use coercion, through the institution of retributive practices, that is sufficient to communicate the norm that our actions and our interests matter to the state. (If we insisted that the state actually achieve complete enforcement and punishment, then we would almost certainly be in the untenable position of spending our every and last unit of collective resources on criminal justice.) Relatedly, we might 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 the first ideal has been internalized by the offender.

This leads to the second justification, that punishment as retribution effectuates the principle of equal liberty under law. In a liberal democracy, punishment serves under equality's flag. When I steal, rape, or murder, I am arrogating a license to act in ways that the polity has officially proscribed. I lord this license over my victim and those around me. It is a claim of su-

75. These statements, however, are contingent upon several important factors affecting the determination of the offender's culpability. For instance, did the offender have knowledge of what he was doing? Did he know or should he have known, according to some objective test of reasonableness, that his actions were unlawful? Could he conform his behavior to that legal standard? *E.g.*, MODEL PENAL CODE § 4.01(1) (1962). If the answer is yes, the offender has satisfied the competence criterion. Second, culpability is also shaped by 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. *E.g.*, *id.* §§ 2.09, 3.02, 3.04. Call this the context criterion. For some people, the context criterion is quite capacious, and includes rotten social backgrounds (RSBs) as an excuse. To my mind, a RSB, or other factors that evoke compassion, can only be considered if there is strong evidence of a causal connection between the choice to commit the crime and the feature that elicits compassion. *But see* MOORE, *supra* note 22, at 167 (advocating leniency for offenders whose personal characteristics are not necessarily related to their role in crime, such as advanced age).

periority—namely, that I am a law unto myself, that society's laws do not bind me.⁷⁶ On this view, it does not matter that not everyone, if given the chance, would similarly seek to steal, rape, or murder.⁷⁷ 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.⁷⁸ If no attempt is made to punish me, my claim to superiority over others commands greater plausibility than it would if I were made to experience some level of coercion that is not inflicted on nonoffending fellow citizens.⁷⁹

When a person is aware of the credible threat of the state's intent to impose some level of hard treatment that would otherwise not be inflicted, the state is giving its best reasonable efforts to reduce the plausibility of a false claim to superiority. The coercive measures communicate the norm of equal liberty under law and they are directed to the offender, the person

76. 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: 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. 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 69, 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.

77. In this way, we sidestep the problems accompanying Herbert Morris's well-known "anti-free-riding" account of retribution. Herbert Morris, *Persons and Punishment*, in *THEORIES OF PUNISHMENT* 77 (Stanley E. Grupp ed., 1971).

78. I table for now the question of what characteristics make a legal order to which I have good reason to give my allegiance. The question is addressed largely in the literature of political legitimacy. Classics in that literature are PLATO, *THE REPUBLIC OF PLATO* (Allan Bloom trans., 1968); THOMAS HOBBS, *LEVIATHAN* (Richard Tuck ed., Cambridge Univ. Press 1991) (1651); and, more recently, JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

79. One might wonder how an offender's repentance affects the analysis. My sense is that an offender's repentance, if it is to be credited among the public, must include willingness to endure some hard treatment to evidence his own repentance to his fellow citizens.

most in need of hearing it.⁸⁰ Being the target of coercion reduces the plausibility of a claim to superiority.⁸¹

The reasons mentioned so far, however, do not explain why the state should be the institution that punishes. I have explained only why an offender's action deserves reprobative treatment by dint of the wrongdoing. Accordingly, the third good that justifies retribution is the achievement of a form 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; it is also an active rebellion against the political order of equal liberty under law. Each time an offense occurs, the offender is trying to shift where the rules of property, liability, and inalienability lie;⁸² in doing so, the criminal is revolting against the democratic determinations of where those rules lie.⁸³ He is

80. This rationale—that punishment is defending equal liberty under law—is inspired in part from Jean Hampton and Georg Wilhelm Friedrich Hegel, but it offers its own permutations. Whereas Hampton's work defended a nonpolitical 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 in PHILOSOPHY OF RIGHT is metaphysically encumbered, see GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT (T.M. Knox trans., Oxford Univ. Press 1952) (1820), the account I offer here seems a bit more straightforward and is capacious enough to include “victimless” crimes that are legislated as a product of democratic deliberation. For a trenchant overview of deliberative democracy, see ETHAN J. LEIB, DELIBERATIVE DEMOCRACY IN AMERICA (2004).

81. The idea of punishment reducing the plausibility of the claim of superiority over the victim is from a chapter written by Jean Hampton, entitled “The Retributive Idea,” in MURPHY & HAMPTON, *supra* note 27, at 111–61. 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.

82. 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).

83. For example, possession of cocaine is currently illegal and may lead to imprisonment. If tomorrow the legislature prospectively permitted cocaine possession, that legislative change would not be a justification for setting free those who are currently in prison for cocaine possession. However, if a state had a wicked legal regime or a discrete set of wicked legal practices, then setting free those convicted under wicked laws would be justified following a reform of the regime or its practices. One sees, therefore, that the outer limits of what retributivism permits are marked by liberalism's boundaries regarding the substance of the criminal law, and in some cases, its procedures. (I recognize that not everyone would accept that the externalities of cocaine possession are sufficient to justify criminal sanctions, but that is a topic for another day.)

usurping the sovereign will of the people by challenging their decision-making structure.⁸⁴

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 of the decision-making authority of the regime itself. That is why, for example, federal officers swear an oath to protect the Constitution of these United States against its enemies.⁸⁵ It is an oath to protect the decision-making structure of the nation. That these officers swear the oath illuminates the idea that when defending the Constitution, one is defending it against attack from those who shift the rules unlawfully—these shifts reveal crimes as, to a greater or lesser degree, political rebellions.⁸⁶ Of course, not all crimes

84. 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 69, 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 in a more qualified form by MOORE, *supra* note 22, at 173, suggests that as long as the suffering is "equivalent," the "intuitions" of retributive justice would be satisfied. See Husak, *supra* note 69, at 970. Once one realizes the variegated nature of suffering and its multiple social meanings, one realizes the deficiencies of this claim.

85. State judges and many other nonfederal officers take similar oaths.

86. 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*, it is important to see one's criminal actions as an expression of defiance against the decision-making regime and the people who make the decisions developed in presumptively legitimate constitutional regimes. It is rarely the case that this is one's specific intent, but it is a reasonable reading of an offender's 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, including delegation to judges of the obligation to exercise sentencing discretion within guidelines. Cf. *Mistretta v. United States*, 488 U.S. 361 (1989) (discussing the constitutionality of congressional authorization of sentencing commissions and guidelines). For a fascinating discussion of judicial confinement and innova-

look like rebellions and not all rebellions need be quashed with maximal use of resources. 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.⁸⁷ Previous accounts of retributivism have had difficulty explaining what proportionality is and why it is relevant to the justification of punishment.⁸⁸ 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 to the severity of the social cost of the crime but neither more nor less under normal circumstances.⁸⁹

Because retribution instantiates these widely accepted and attractive principles of moral accountability for unlawful actions, equal liberty under law, and democratic self-defense, the practice of retribution has an internally intelligible character. It is a practice that, generally speaking, can be justified independent of the contingent benefits it might generate, such as specific or general deterrence.⁹⁰

Before examining the implications of this rationale for mercy, I want to emphasize that this account is a legal conception of retribution, one that characterizes a criminal offense as

tion in the world created by the federal sentencing guidelines, see *Berthoff v. United States*, 140 F. Supp. 2d 50 (D. Mass. 2001), in which a court reluctantly denied habeas corpus relief for a defendant sentenced under the U.S. Sentencing Guidelines and excoriated the prosecutors' office for its hidden practice of fact bargaining.

87. The practice of retribution is only one attractive social practice among many. Every person interested in social planning has to realize that, on the margins, resources spent on the project of retributive justice are resources not spent on feeding the hungry, housing the homeless, and healing the sick. Moreover, the practice of retribution poses significant nonpecuniary risks: especially 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.

88. See Rubin, *supra* note 32 (criticizing the assumption that retributivism and proportionality are necessarily linked).

89. The account in the text not only limns the often obscured connection between the proportionality principle and retributive justice, it shows, through its linkage with the principle of frugality, see JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION Ch. XV (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.

90. But as indicated earlier, just because something is internally justifiable does not make it required in all circumstances. And as indicated in note 87, *supra*, because of its costs and the dangers of error and abuse, the practice of retribution must be conducted in a manner mindful of those costs and risks.

a breach of legitimate legal norms within legitimate regimes. The literature sometimes distinguishes this conception of punishment from moral retributivism, which focuses on giving someone what he "really deserves" independent of the law.⁹¹ Accordingly, I want to wave a few cautionary flags about moral retributivism.⁹²

First, the moral (or nonpolitical) conception of retribution really embraces something closer, if not identical, to revenge, inasmuch as its justification of retaliation does not require the state's existence. Unlike the confrontational conception of retribution, moral retributivism cannot provide an internally coherent reason why the state should be *an* agent of punishment, let alone the exclusive one. Some defenders of moral retributivism might downplay this failure, insisting that the marginalization or exclusion of the state in punishment means little. But by minimizing the role of the state, these critics must then defend the awkward position of being against impartiality in the administration of punishment. Or they must explain how they will achieve impartiality in the absence of the state.⁹³

A second concern is the scope of what the moral retributivist seeks to punish. Moral retributivism necessarily expands beyond law's orb, covering all morally suspect behavior. This aspiration makes the great the enemy of the good.⁹⁴ It also risks fostering a passion for punishment so strong that limitless retributive energy consumption would deplete social resources from the demands of other moral projects, such as the provision

91. See, e.g., JOEL FEINBERG, *Justice and Personal Desert*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 55, 56–58 (1970) (drawing the distinction between pre-institutional desert and legal entitlement); 1 JOEL FEINBERG, *MORAL LIMITS OF CRIMINAL LAW: HARM TO OTHERS* (1984) (same); GEORGE SHER, *DESERT* (1987) (defending moral retributivism); Christopher, *supra* note 32, at 885–87 (offering a stylized distinction between the two types of retributivism).

92. See also Guyora Binder's fine essay, *supra* note 25.

93. See *supra* note 45 (discussing distinctions between retribution and revenge). It is possible, of course, that moral retributivists are prepared to invite the state to participate, but such an invitation occurs on grounds entirely alien to their own conception; that is, it serves as a pragmatic concession rather than as an idea organic to their views about punishment and desert. Alternatively, impartiality could be achieved by outsourcing either adjudication or punishment or both to third parties; but then a question of legitimacy in pluralistic societies arises, which requires the state to reenter the situation. See Markel, *supra* note 45 (discussing the reasons why the state's presence is a desideratum for purposes of punishment).

94. Cf. PLATO, *supra* note 78 (dramatizing the tension between ideal political institutional overhaul and moderate incremental political reform).

of education, hunger relief, health care, and shelter.⁹⁵ The legal retributivist is less imperialistic precisely because what someone "deserves" is a function of clear breaches of politically designated guidelines for behavior.

On the flip side, legal retributivists are able to give voice to self-government in a way that seems unavailable to moral retributivists. Simply put, a moral retributivist lacks the conceptual resources to justify punishing conduct that would be *malum prohibitum*.⁹⁶ The federal law punishing the "disturbance of mud" in caves on federal lands, for example, seems laughable to the moral retributivist because it does not on its face suggest that there is anything morally blameworthy to punish. By contrast, under the CCR, one is not beholden to a fixed understanding of what social priorities the state must advance through the criminal law. What is right or good can be realized through self-government.⁹⁷

Of course, to be committed to legal retributivism does not mean that all is morally permitted so long as it has a democratic pedigree. The argument I offer begins from a fixed point asserting respect for the free and equal nature of persons and the concomitant responsibility of designing legal institutions that confer equal liberty to persons before and under the law. Within that general framework, however, legal retributivism is embraced, such that the terms of positive law govern insofar as

95. St. Thomas Aquinas, in asking "whether it belongs to human law to repress all vices," recognized the limits of human law:

Now human law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft and such-like.

ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. I-II, Question 96, art. 2 (Fathers of the English Dominican Province trans., Benzinger Brothers 1947).

96. One can try, as Chad Flanders has urged on me, to erase the dichotomy I have suggested by imagining a moral retributivism that confers this rebuttable presumption of obligation to laws passed in a constitutional democracy, see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 9 (1977), and comparing that with the conception of legal retributivism constrained by liberalism that I have suggested in the text. This does some work in dissolving the tension, but I think not enough, for a moral retributivist assumes the classic position of seeking punishment of wrongdoers independent of the state, and the position taken by Flanders depends on the existence of the state, an encumbrance rejected by most pure moral retributivists.

97. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 68 (1993).

they operate within liberalism's bandwidth. The subject of legislation (and therefore the object of retribution) may be influenced by moral judgments. But the key is that those judgments be refracted through the processes that make those judgments (liberal) laws and not mere opinions.

In sum, the rationale of the CCR explains—without recourse to mere intuitions or emotions of vengeance, resentment, or hatred—why the state should punish the guilty and not punish the innocent.⁹⁸ If we agree that these principles animate a nobler image of retributive justice, we have to ask whether the doctrines and the institutional practices we have developed are consistent with these underlying principles. And this is where mercy's troubles begin—at least in the context of law.

III. RETRIBUTION AND MERCY

A. THE RETRIBUTIVIST CRITIQUE OF MERCY

Consider first the following question: to whom does the prerogative of granting mercy attach in a complex legal system? In private affairs, it is presumably the wronged person who can waive whatever penalty might be owed him or her on account of the offender's wrongdoing. But when a violation of the criminal law occurs, the retributive rationale does not admit that crime is only against one person or even a discrete set of individuals.⁹⁹ Because of the democratic pedigree of criminal laws in liberal democracies, crimes are expressions of superiority to the polity, not merely to the particular victim. That is why, if the victim pleads for mercy toward the defendant, such pleas should be given little or no weight.¹⁰⁰ In a normatively at-

98. The innocent have neither made any claims of legal superiority through their actions nor have they usurped power from the decision-making structure that they have good reason to obey *ex ante*.

99. See Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 67 (1999) (taking the extreme position that victims "should and must be ignored if you are claiming to be doing retributive theory"). Moore goes too far: Victims can be included in various ways but they need not be present or active in order for retributive goals to be realized. For example, it does no wrong to retributive theory for the state to send a letter to a victim to let her know that the trial or sentencing hearing will take place in two weeks' time or, for that matter, to inform her that her aggressor is being released from prison in two months. There is, in short, greater than realized compatibility between retributive theory and the state's awareness and solicitude of victims' interests.

100. See generally Joseph L. Hoffmann, *Revenge or Mercy? Some Thoughts About Survivor Opinion Evidence in Death Penalty Cases*, 88 CORNELL L. REV.

tractive polity, only the state's actors have standing to dispense mercy and punishment.

But why grant mercy? At first blush, at least, acts of mercy ultimately undermine each of the principles undergirding the CCR—moral accountability, equal liberty under law, and democratic self-defense.

Consider first the moral accountability argument.¹⁰¹ If I am a disabled war veteran (or pregnant, or elderly) and one day I attacked my neighbor because I did not like his dog barking at my spouse, why should I not receive mercy? The argument would be this: by not punishing me as we would punish others for this crime, the neighbor's interests in personal security do not matter in the same respect; moreover, we are saying to the offender, we are not going to take your actions as being seriously the actions of a dignity-bearing autonomous moral agent. Put differently, if the state did grant leniency because of that compassion-evoking characteristic, in what way is the ideal of moral accountability effectuated? If twin brothers commit the same crime and the second receives leniency, would it not be correct to say that only an act of grace benefited him? In secular terms, mustn't that disparate treatment be regarded as arbitrary and therefore to be minimized if not eliminated in the liberal state? Wouldn't such mercy violate, at least in a *prima facie* way, the right of citizens to see the state make a good faith effort at punishing offenders in a proper and fitting manner?¹⁰²

530 (2003) (arguing that evidence describing the victim and impact on the survivor should usually be excluded from capital sentencing hearings). In large measure due to the success of the victims' rights movement, many jurisdictions in the United States do permit some expression of the victim or her family to enter into the consideration of the sentencer. To my mind this focus is misplaced. It is one thing to ensure that victims can be informed of when and where the system is confronting the offender; it is quite another thing, and altogether unacceptable, for them to play a role in the outcome of the offender's sentencing. Giving victims a role can create dramatic disparities in punishment that are based on things that are morally arbitrary. While well intentioned, this result is fundamentally illiberal and antithetical to the basic norms underlying retributivism. *But cf.* *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (holding that the Constitution does not prohibit introduction of victim impact statements during the penalty phase of a capital trial); Vander Pol, *supra* note 16, at 710–11 (2003) (advocating the introduction of statements urging leniency by families of murder victims).

101. This argument, recall, states that when the state makes an effort at punishing me for my offense, it acknowledges my capacity for moral responsibility and it expresses fidelity and respect to the rights of its citizens.

102. This sensitivity probably explains some of the outrage with President

Admittedly, I could imagine permitting leniency for a whole host of *other* reasons: for example, that he operated under diminished capacity or his act was a choice of lesser evils.¹⁰³ But these reasons stand apart from mercy; these situations offer reasons that are consistent with determinations of moral culpability and responsibility in theories of retributive justice.¹⁰⁴

This concern about the role of mercy extends to the principle of equal liberty under law. If everyone is entitled to the same package of liberties safeguarded by political and legal in-

Clinton's last-minute pardons. The fact that Marc Rich had been powerfully connected and wealthy created the stench of pardons for sale, a practice not unknown in history. See MOORE, *supra* note 22, at 202 (discussing the practices of King James II and Oklahoma Governor J.C. Walton in which pardons were sold for personal enrichment).

103. Or, alternatively, that the offender came forward after the statutory crime was committed and accepted responsibility before a trial was held; that he cooperated substantially in prosecution of other crimes; that he independently made restitution for the theft; or that he was a model of good behavior in prison. Postconviction actions can be susceptible to analyses of retributive desert if we view, as I think we should, the severity of an offender's actions as encompassing the social cost of his conduct. Someone who comports himself well in prison imposes a smaller social cost than someone who does not, and the legislature ought to scale the punishment to the gravity of the social cost of the crime to the extent possible. Hence the offense includes both the statutory trigger and the presence of certain legislatively denominated conduct after the statutory trigger. Nonetheless, this is a point that has not been well understood in the literature. See, e.g., Rapaport, *supra* note 16, at 1518 (characterizing retributivists as committed to the idea that "[a]ll information relevant to just desert is at least in principle available at the time of sentencing. While errors that were not avoided at the time of sentencing ought later to be corrected, nothing the offender does after sentencing is relevant to a clemency decision.").

104. The more helpful the criminals are, and the earlier they render their help, the less manifest their rebellion against the regime is. The same sensibility can be reflected in a legislature's decision to give shorter sentences to those who behave better in prison. Being a retributivist does not entail a commitment to ignore all postconviction information that does not affect the accuracy of the conviction. For example, exculpatory evidence is something retributivists pay attention to postconviction. Other issues may be of similar importance. For example, what if an offender unwittingly swallowed a pill that erased his entire memory of the crime? On the CCR's view, there would be no point to his punishment qua retributive punishment. (Whether he ought to be detained and/or treated in different facilities because he remains a danger to society should be determined in a civil confinement proceeding. Cf. *Kansas v. Crane*, 534 U.S. 407, 410–15 (2002) (upholding state civil detention for statutory sexual predators who lack sufficient behavioral self-control, as proven by the state); *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997) (upholding state civil detention for statutory sexual predators). By contrast, the person who swallowed such a pill purposefully could arguably be punished.

stitutions, it is hard to see how granting mercy to some offenders but not to others effectuates this ideal. This might not be the case if there were nonarbitrary *reasons* why we granted leniency, such as the ones I mentioned earlier. But then the leniency becomes tied to desert, broadly understood, and is therefore not mercy but rather the exercise of equitable or justice-enhancing discretion.

Finally, mercy stands at odds with the nature of the modern liberal democratic regime under rule of law. Recall the third justification for retribution: the polity's self-defense against the offender's usurpation of political power. The criminal's action, *because* it is a criminal action, can plausibly be read as contemptuous of a structure of reasonable power-sharing and decision-making modules; hence, his action is undeserving of mercy. To grant mercy to an offender would undermine a basic norm of reciprocity and fair dealing. That is not to say that our political institutions should not exhibit a certain plasticity over time to change various criminal laws as social conditions demand; but when an offender breaks a law in place at the time he broke it, even if that law later changes, there is a promise to be kept.¹⁰⁵ Not keeping it will rupture the reasonable expectation that the legal norm will be vindicated.¹⁰⁶

Taken together, these arguments constitute what I take to be the "first wave" retributivist critique of mercy.

B. "DEMOCRATIC" DISPENSATIONS OF MERCY

The problem with the argument I have just sketched—that the punishment authorized by democracy's laws should not be remitted for reasons of compassion, caprice, corruption, or bias—is that it invites deeper interrogation of the premises. What happens to the retributivist critique of mercy once we are assessing democratically authorized instances of mercy that are unreviewable?

The third argument for retribution, resistance to the usurpation of democratic power, illustrates this tension well. It appears that this is ultimately a weaker argument against mercy, at least when mercy's authorization has a legally entrenched

105. Query whether the promise is rescinded when a law falls into desuetude. See, e.g., Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, UNIV. OF CHICAGO LAW SCHOOL JOHN M. OLIN LAW & ECONOMICS WORKING PAPER NO. 196 (Sept. 2003), available at <http://ssrn.com/abstract=450160>.

106. This is subject to the caveats expressed *supra* note 83.

basis *ex ante*. Surely a constitutional democratic regime could, for instance, authorize compassion, bias, or caprice by expressly creating a role for unreviewable mercy and delegating that power to actors within its judicial institutions.

Indeed, the American constitutional regime permits the exercise of mercy in different contexts.¹⁰⁷ A good example is the Fifth Amendment's grand jury requirement. The Framers of the Bill of Rights expressly inserted an independent institution comprising members of the community who stand between the accuser and the accused. Although it is often viewed today as little more than a rubber stamp of prosecutorial designs, according to the Supreme Court, the grand jury is legally empowered to refuse to indict a person even if there is probable cause that he is guilty of some legal wrong.¹⁰⁸ The grand jury can also choose to return an indictment for a noncapital offense instead of a capital one, just as it can indict on lesser charges than those that the prosecutor wants.¹⁰⁹ Moreover, it can do so in a way that is judicially unreviewable.¹¹⁰

The grand jury serves, then, not only to check zealous and ill-founded prosecutions, but also as a potential mercy-dispensing mechanism largely unconstrained by legal niceties.¹¹¹ If a grand jury favors a local (and occasionally generous) mobster against an unfamiliar prosecutor, it may spurn the government notwithstanding probable cause that the mobster is guilty of the crime of which he is accused.¹¹² The same power

107. I point this out, not to endorse these particular mercy sites, but rather to show that the idea of *ex ante* authorization of mercy is more familiar than it may seem at first glance.

108. See *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986). Grand jurors may sense they have some wiggle room: Currently, the model grand jury instruction says "you should return an indictment if you believe there is probable cause." It does not say "shall" or "must." For a discussion of whether this power must be articulated to the grand jury and whether the current model instruction to the grand jury is constitutional, see *United States v. Marcucci*, 299 F.3d 1156, 1159–62 (9th Cir. 2002), *cert. denied*, 538 U.S. 934 (2003). See also *Simmons*, *supra* note 58, at 3–4 (advocating a robust role for grand juries).

109. *Vasquez*, 474 U.S. at 263.

110. See *id.*

111. One constraint on the effectiveness of the grand jury's capabilities in this area is the fact that the Double Jeopardy Clause does not attach to the grand jury's rejection of an indictment. Thus, a prosecutor can always try to present the evidence against a person to another grand jury and hope for better results.

112. For examples where the grand jury acted this way, see *Simmons*, *supra* note 58, at 4–16.

to acquit against the evidence exists, and is even more controversial, at the petit jury stage.¹¹³

As I noted in Part I, this potential for mercy is not an unusual feature of our government: presidential and gubernatorial pardons permit mercy to those who may have already been convicted and sentenced and for whom good reason still exists to think they are guilty of the crime for which they were convicted. And, police and prosecutors have the power to act mercifully in a virtually unreviewable manner. All of them stand on firm, if not uncontroversial, constitutional ground.¹¹⁴

Given that these institutions, devices, and practices are part of the democratic fabric, it becomes much harder to say that grants of mercy—as distinct from justice-enhancing discretion—defy the third justification for retributive justice.¹¹⁵ Our

113. Furthermore, although it has yet to materialize, there is now growing popular support for the proposition that the petit jurors be told of their abilities to acquit a defendant despite his guilt. Cf. David C. Brody, Sparf and Dougherty Revisited: *Why the Court Should Instruct the Jury of Its Nullification Right*, 33 AM. CRIM. L. REV. 89, 89–90 (1995) (noting that in the first half of 1995, ten states had legislation or proposals for constitutional amendments that would require juries to be instructed of their power to acquit despite strength of a prosecutor's case); Adam Liptak, *A State Weighs Allowing Juries to Judge Laws*, N.Y. TIMES, Sept. 22, 2002, at A1 (discussing South Dakota's proposed Amendment A, permitting jury nullification). Petit jurors—those sitting in judgment at trial—are currently never instructed that they can acquit the defendant even if they believe beyond a reasonable doubt that he committed the offense. Nonetheless, the American jury's powers are substantial. See *Horning v. Dist. of Columbia*, 254 U.S. 135, 138 (1920) (“[T]he jury has the power to bring in a verdict in the teeth of both law and facts.”). By contrast, jury acquittals in Canada can be appealed on various grounds. ALAN W. MEWETT, AN INTRODUCTION TO THE CRIMINAL PROCESS IN CANADA 205–10 (1996).

114. In contrast, some nations speak of prosecutorial duty, rather than prosecutorial discretion. See MILLER & WRIGHT, *supra* note 57, at 823 (quoting the German Code of Criminal Procedure, StPO § 152(2), which states that the public prosecutor “is required . . . to take action against all judicially punishable . . . acts, to the extent that there is a sufficient factual basis”); *id.* (quoting the Italian Constitution, COST. art. 112, which states that “[t]he public prosecutor has the duty to exercise criminal proceedings”).

115. This argument may seem to resemble one that Kant made, in which he said that leniency is proper in cases when society encourages the very crime committed. Kant specifically referred to dueling and the infanticide of babies born out of wedlock. IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 106–07 (John Ladd trans., Bobbs-Merrill Co. 1965) (1797). Because society fostered “a foolish regard for honor,” Kant thought there was an inappropriate hypocrisy. MOORE, *supra* note 22, at 33. But Kant's point is distinguishable. He was discussing social norms that may not have been pervasive in all classes; those social norms, moreover, operated in a different space than legal obligation. The argument I have sketched out in the text refers to legal

law in fact authorizes the possibility of mercy dispensation.¹¹⁶ In other words, just as We the People design and are responsible for the conduct rules, We the People also are responsible for the decision rules that shape the adjudication of infractions of the conduct rules.¹¹⁷

To the extent that this rebuttal argument—the legalization of mercy—is true, does it reach further? Does it extend to the first two prongs of the confrontational conception of retribution—effectuating moral accountability and equal liberty under law?

Consider moral accountability again. There the argument was that the failure of the state to address someone's legal wrong communicates condescension and, to a degree, acquiescence to the offender's behavior and indifference to the victims' interests. In order to make that inference, we must ask whether that same message of indifference attaches when an offender benefits from our system, a system that permits the opportunity to grant mercy. To wit: if I rob a bank, but the grand jury—captivated by my veteran status or recent immigrant status—decides not to indict notwithstanding probable cause, is the state really indifferent to my behavior? Can we fairly say the state really is indifferent to the victims of my robbery? No—society bears the responsibility for allowing state institutions like the grand jury to act compassionately or capriciously in an unreviewable manner. Essentially, the law is not that you may not steal, but rather that if you get caught for theft, there is a good chance you will be punished unless you

space, which, in theory, is open to and inclusive of all who reside there.

116. Currently, virtually no penalty (aside from a potential political one at the polls) attaches to dispensations of mercy. A prosecutor, policeman, jury member—all endure no tangible consequences for their merciful leniency. It might be said that we cannot have the institution of the grand jury (or the petit jury) to check zealous prosecutors without the potential for its abuse, and that overall we value the former enough to permit the latter. The same analysis might apply to pardons or other sites of mercy distribution. The suggestion is that these sites of mercy exist for justice-enhancing discretion, and when they are used for mercy based on compassion, bias, or caprice, those actions can be criticized as abuses of discretion. To the extent this observation is true, then there is work to be done—and it is a point whose normative force I reckon with at the end of Part IV, where I advocate the greater use of judicial review, even for executive dispensations of leniency. As a descriptive matter, however, the suggestion above seems to rely on an inference of institutional intent or design that we have little evidence for thinking is true.

117. See generally Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

can consistently persuade a grand jury to decline indicting you.¹¹⁸

It is true that one's bank robbery deserves scorn as a matter of good morals, but the ambition of retribution is restricted to responding to legal offenses, and it is this (positive) legal restriction that both circumscribes and gives (additional) content to the ideal of moral responsibility for lawful actions.¹¹⁹ If the state and society want to get serious about denouncing unlawful behavior and proclaiming adherence to the ideal of moral responsibility for unlawful actions, then they have to insert a check on these institutions to prevent actions based on morally arbitrary characteristics.¹²⁰

The argument seems to run parallel to the second justification that animates retributive justice: equal liberty under law. I said earlier that attempts to punish an offender for his unlawful behavior are valuable because they diminish the plausibility of a claim to superiority by the offender. The offender who is left alone has the unanswered crime to flaunt as evidence of his superiority. If I assault my neighbor and the President grants me mercy because I am a war hero or a recent immigrant, presumably we could say that I am being treated equally because any other person whose case comes before the President may also be able to elicit the President's compassion (or bias). The mercy bestowed by the President is a benefit distributed by a law that everyone had formal equality in shaping.

And yet, there is something particularly unsatisfying about this characterization, because the President is able to grant mercy in a way that flouts our understanding of what equal liberty under law truly demands. Presumably, we do not want the

118. *See id.* at 626-27.

119. As suggested earlier, the reason that retribution does not reach imperialistically to govern and discipline all conduct is that we live in a society of perilously scarce resources. *See, e.g.,* GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* 74-76 (1978). All responsible designers of social institutions recognize that if we pursued each moral infraction with the sledgehammer of the criminal law, we would bankrupt ourselves and leave unfulfilled our other moral obligations as a polity. The project of retributive justice, as mentioned before, is one attractive social practice among others, and only a fanatic would devote the last unit of social resources to the pursuit of criminal justice. (Of course, the scarcity of social resources is not the only reason to limit the reach of the state.)

120. As I discuss later in the Article, one way to address these problems would be the use of independent government actors, such as an ombudsperson, to intervene and challenge suspected abuses of discretion within our constitutional structure.

President to grant me mercy merely because I am white or because I contributed to his presidential library. But as the Supreme Court has made clear, the United States Constitution leaves this possibility open,¹²¹ the same way it preserves unreviewable discretion in the grand jury's choice not to indict.¹²² And this power, when exercised in this controversial manner, flies in the face of equal liberty under law, at least understood in a more robust way. It does this by allowing me (the offender) to brandish my unanswered crime as evidence of superiority because the President (or grand jury) liked or shared my race, ethnicity, or some other morally arbitrary feature of my identity. The same unattractive messages about human status attach as long as I receive a penalty less severe than what I would otherwise receive if I were from a nonfavored group.

Notice, then, that the retributivist anti-mercy argument still has power. Its power stems from an idea of equality that stands outside democracy (understood as facilitating majority preferences) but inside a vision of liberalism (understood as respecting the free and equal nature of all persons without respect to features that are morally irrelevant to their choices to commit crimes). This idea is the enduring heart of retributivism's case against mercy.¹²³ And it is also the liberal case

121. See *Ohio Adult Parole Auth. v. Woodward*, 523 U.S. 272, 280 (1998) (plurality opinion).

122. By inserting an accusatory body between the prosecutor and the accused, the Framers created an institution that, serving as a "conscience of the community," can act mercifully—out of compassion, caprice, or bias—when it screens cases. *United States v. Marcucci*, 299 F.3d 1156, 1168 (9th Cir. 2002) (Hawkins, J., dissenting) (quoting *Gaither v. United States*, 413 F.2d 1061, 1066 n.6 (D.C. Cir. 1969)), *cert. denied*, 538 U.S. 934 (2003).

123. Perhaps one could argue that retributivism's hostility to mercy would be stronger if retributivism were conceptualized as moral retributivism rather than legal retributivism. That is because mercy interrupts the narrative of privation that the offender must experience on account of his desert. Because moral retributivism does not obsess about details such as the constitutional or statutory basis for mercy dispensations, the so-called democratic difficulty never arises. While tempting, reliance on moral retributivism is a false start. In fact, in some cases, moral retributivism's position against mercy may be weaker because of its implicit commitment to match suffering with wrongdoing rather than punishment with wrongdoing. (Hence, some retributivists will look to a drunk driver who runs over his child and say, "Don't punish him; he's suffered enough.") To truly engage in moral retributivism the way Kathleen Dean Moore indicates, *supra* note 22, one would likely have to examine the whole life of an offender, including, potentially, his genetic makeup and social environment. This kind of character assessment places the liberal state in murky, if not completely tenebrous, waters. See Jeffrie G. Murphy, *The State's Interest in Retribution*, 1994 J. CONTEMP. LEGAL ISSUES 283, 297–98. *But see*

against mercy.

I want to unpack these ideas a bit more. I used bias and corruption as examples of illicit grounds for leniency because they are widely regarded to be morally irrelevant to the offender's choice to engage in the crime (or to the severity of the crime itself). I submit that the same conclusion attaches when considering extending mercy to someone who is poor, ill, elderly, or a war veteran. To be sure, there are times when someone's possession of one of these compassion-eliciting features will be causally connected to the commission of the crime, and in those cases, that connection should be assessed under the rubric of justice or equitable discretion. But at least as conceivable, if not more so, the feature of that person that elicits compassion or sympathy will be as irrelevant to the choice to commit the crime as when the President pardons offenders who commit crimes on Tuesday. Consider the case of the drunk driver who runs over his child. Some people may say that he should not be punished as severely as someone who ran over a stranger's child. But to recognize this sympathetic situation through some form of punishment discount would be to privilege mere bad luck. It is true that bad luck often is privileged elsewhere in the current criminal justice system.¹²⁴ It hardly makes sense to exacerbate its pernicious role.

There are obviously going to be tougher cases around the borderline. How might we determine what features count as morally irrelevant? One possible solution is to employ a stylized version of the familiar Rawlsian veil of ignorance, behind which one internalizes all the necessary information except that one does not know what position in society she will occupy after having chosen the relevant rule. The value of this heuristic is it achieves impartiality. Under this veil, I ask which rule of justice would I think is most likely to secure the conditions for human flourishing. Would I endorse giving a person with this characteristic some form of a punishment discount? Not knowing whether I will be a victim, offender, bystander, or taxpayer,

Jean Hampton, *Retribution and the Liberal State*, 1994 J. CONTEMP. LEGAL ISSUES 117, 142-44 (critiquing Murphy's position). Moreover, it may not be feasible for courts to readily determine the moral calculus of every offender's life in the context of practical real-life institutions for each offense on the books.

124. See, e.g., Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Result of Conduct in Criminal Law*, 122 U. PA. L. REV. 1497, 1600-03 (1974) (arguing that the criminal law, by looking at harm instead of culpability, too often and impermissibly privileges luck).

but knowing that I want to pick the most reasonable and attractive rule, I would not think of distributing punishment discounts to anyone unless he had a justification or excuse, such as diminished capacity, self-defense, duress, etc. Features of a person that evoked compassion or sympathy would be filtered out if they were irrelevant to the choice the offender had in undertaking his conduct (or to the severity of his conduct) because there is no unfairness in punishing persons for conduct they could, by definition, control, and consequences they can reasonably anticipate.¹²⁵

Three key implications arise from this analysis. First, so long as you are committed to the principle of equal liberty under law, you should be skeptical about the claims of mercy. In other words, you do not need to be a committed retributivist to share the anxieties about these sites for unreviewable mercy.

Second, various reforms are implicated by this analysis.¹²⁶ To list just three: Prosecutors should have the ability to seek appellate review of acquittals that go so far against the great weight of evidence that no reasonable person would have acquitted except based on illicit grounds such as racial bias or undue compassion. Further, we should create ombudspersons who will have standing to seek judicial review of presidential pardons, such as in South Africa, where in the *Hugo* case, the constitutional court applied something similar to our equal protection jurisprudence.¹²⁷ Additionally, these ombudspersons or

125. Of course, fair notice is not the only relevant concern. A prohibition against cruel punishments would also apply.

126. As I mentioned at the outset, I plan to develop a separate paper discussing the constitutional and administrative law implications of such reforms, so I do little more than gesture at such possibilities here.

127. In *President of the Republic of South Africa v. Hugo*, 1997 (6) BCLR 708 (CC), a father of a minor child challenged the pardon Nelson Mandela gave to mothers of minor children, claiming sexual discrimination. What is notable about the decision is first, that it gave the court the power to decide and review the executive clemency, and second, that it upheld the pardon anyway. The Court emphasized "that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups." *Id.* at 36. But in upholding the blanket pardons, the Court perpetuated a self-reinforcing premise of gender stereotypes:

As many fathers play only a secondary role in child rearing, the release of male prisoners would not have contributed as significantly to the achievement of the President's purpose as the release of mothers. . . . Were [the President] obliged to release fathers on the same terms as mothers, the result may have been that no parents would have been released at all.

independent agencies could collect data and challenge abuses of prosecutorial and police discretion.

Finally, I have given some reasons to think that compassion-based mercy is no less a vice than racial bias or capricious state action—and for that reason, with all due respect to Justice Kennedy, I have explained why a nation confident in its laws and secure in its institutions should be ashamed of the practice of mercy in its criminal justice system.

Of course some objections may exist—some of which I develop in the next section. And there are limits to this account also. For instance, my argument will not address the problems or promise of mercy if you are prepared to deny the importance of equal liberty under law and its constitutive significance for classical liberal jurisprudence.¹²⁸ Indeed, perhaps because it is a second-best world, some people are willing to make that compromise and are willing to redistribute what are essentially “punishment discounts” because of failures elsewhere in the system. While I would not defend that, I would acknowledge that my account, on its own terms, would not extend to justify punishment under illiberal laws or procedures. Even with those limits, however, I think the argument indicates where there is work to do, and we should get started if we are to lend promise to the vision of realizing equal liberty under law.

C. DEFENDING, WITHOUT SOFTENING, THE RETRIBUTIVIST HARD LINE

I want to try to address some objections to the account I have offered. First, is it really true that mercy is offensive to ideas of political and retributive equality? Imagine that every Tuesday at 9 P.M., the state held a lottery in which every prisoner in the nation was automatically entered.¹²⁹ Relying purely on the lottery, the state would randomly choose five offenders and halve their sentences. It would randomly choose another five people awaiting trial and drop charges altogether. The idea behind this ceremony of clemency would be to express the sovereign superiority of the people through their capacity for mercy.¹³⁰ Couldn't mercy as political theatre serve the value of

Id. at 41–42.

128. I discuss whether compassion should be elevated over equal liberty under law in the next section.

129. See *supra* note 53 and accompanying text (referring to the relationship between chance, caprice, and mercy).

130. I thank Matt Price for raising this point.

retributive equality—that is, the repudiation of an offender's false claim of superiority?

This suggestion seems plausible at first blush, but I think the suggestion ultimately conflates collective claims of superiority with individual ones. One reason why retributivism is attractive is not that it makes a generalized claim of retributive equality against the class of citizens who have violated the law; rather, it is attractive because it communicates, via its coercion, to individuals who need to hear the message of retributive equality directed specifically at them. Whereas the lottery is designed to *express* the sovereignty of the people to the people, retributive punishment *communicates* directly to offenders. Retribution, in practice, is not interested merely in propounding banal social messages; its focus, rather, is in confrontation. Moreover, retributivism's notional fidelity to the rule of law requires skepticism toward the use of arbitrariness in the production of social meaning. For that reason, it is not just the lottery of mercy that earns retributivism's scorn but all other sites of mercy, with or without a democratic pedigree, that afford leniency to offenders for capricious reasons. Retributivism, it might be said, is a philosophy of punishment for a republic of reasons.¹³¹

A second objection centers on the role of compassion in criminal justice, and there are several aspects to this critique. First, one might ask whether compassion-based mercy, either at the outset of a sentencing proceeding or later in a clemency request, is appropriate when the offender is ill, elderly, or dying. Some retributivists have tried to justify leniency based on these factors.¹³² According to this argument, growing old and dying are much worse in prison than elsewhere, and that fact adds an unfair amount of suffering to the punishment.¹³³ To endure illness under prison conditions similarly adds greater

131. Cf. SUNSTEIN, *supra* note 97, at 20 ("The minimal condition of deliberative democracy is a requirement of reasons for governmental action. We may thus understand the American Constitution as having established, for the first time, a republic of reasons."). This is not to say that other theories of punishment are irrational or unreasonable, but I do think that retributivism, properly understood, coheres best with the values of liberal democracy and what might be called responsible egalitarianism.

132. See, e.g., MOORE, *supra* note 22, at 174.

133. Oddly, Kathleen Dean Moore did not address that this possibility was expressly contemplated when offenders are sentenced to life without possibility of parole. See MOORE, *supra* note 22.

than anticipated suffering.¹³⁴ Under these circumstances, it is argued, doesn't the denial of leniency undermine retributivism's commitment to just deserts?

The answer is no, but I will add a couple qualifications to that negative response. The basic answer is that an offender—so long as he satisfies the competence criterion for punishment¹³⁵—anticipates (or should reasonably be expected to anticipate) a risk that he will die or become ill while being punished. If we presume that inference, which is not an unreasonable one, there is nothing unfair to the offender about the risk of old age or infirmity in prison being realized.¹³⁶ As I stated earlier, there is no unfairness in punishing persons for conduct they could, by hypothesis, control, and consequences they can reasonably anticipate. Of course, a finding of no culpability may be appropriate if the offender had diminished mental capacity—but that is individual justice, not mercy. By contrast, whether a competent person was voluntarily intoxicated, young, old, or physically ill should not matter with respect to whether he can claim, on retributivist grounds, that he deserves lighter punishment.¹³⁷ The same point applies to

134. *See id.* at 173–74.

135. The competence criterion must be satisfied at the time of the criminal offense, the trial, and the punishment to satisfy the CCR's insistence that punishment be intelligible to the offender. Specifically, the offender must have freely undertaken the criminal action and known (or should have known) that his conduct was unlawful at the time he committed the crime; at the time of adjudication, the offender had to either freely and knowingly plea guilty or have the competence to assist in the preparation of his case for trial; and at the time at which the punishment is inflicted, he had to be able to understand that he is being punished for his unlawful actions.

136. *Cf.* A. Alfred Taubman's recent conviction and sentence for his role in the criminal price-fixing scandal in Sotheby's. *United States v. Taubman*, No. 01-CR-429, 2002 WL 548733, *14 (S.D.N.Y. Apr. 11, 2001), *aff'd*, 297 F.3d 161, 166 (2d Cir. 2002) (*per curiam*) (affirming sentence to one-year jail term and a \$7.5 million fine). Taubman, who had given generously to philanthropies and was nearly eighty years old when sentenced, may have merited a downward departure for aberrant behavior, but the fact of his largesse or his age should not have played a special role in the prosecutor's decision to seek imprisonment. Of course, those factors might play a role in determining what kind of facility to put the offender in, but those are matters pertaining to the state's discretion in administering prison facilities effectively and humanely.

The argument about fair notice, it might be suggested, would seem to undercut opposition to the death penalty on the ground that it is unfair. But the unfairness associated with critiques of the death penalty is based not on whether the offender had notice of what punishment he might face so much as the unfairness of inflicting death in a system rife with predictable error and morally arbitrary determinants such as race or intrastate geography.

137. That is why the common law rule that voluntary intoxication is a de-

class.¹³⁸ As alluded to earlier, in order to change a merciful impulse into a story about justice (and equitable discretion), there needs to be a causal connection drawn between the feature of a person that elicits someone's compassion (e.g., that she is a mother) and the choice to commit the crime.¹³⁹ Absent the causal connection, we can insist on a meaningful distinction between factors about someone's background that, in the main, should not mitigate the sentence, and factors surrounding someone's criminal action with which retributivism is properly concerned.¹⁴⁰ In being concerned with persons who commit of-

fense against certain specific-intent crimes was a mistake. Nonetheless, other retributivists have been prepared to justify clemency on grounds of age or illness or intoxication. *See, e.g.,* MOORE, *supra* note 22, at 173-75 (noting that an elderly inmate's life sentence is brief compared to a young murderer's); Kobil, *supra* note 22, at 625-29 (justifying lesser punishment to the extent that the offender is less blameworthy because of a personal characteristic). Their concessions are mistaken: Intoxication should not matter because one cannot disclaim responsibility for the consequences of action that tends to diminish one's competence to choose between the lawful and the unlawful. Strict liability is compatible with retributivism when one knowingly undertakes risky behavior, and drinking is per se risky behavior.

As to age, obviously a child does not have the same competence as an adult and should be treated—and treatment may include some hard treatment—rather than punished for offenses. Being elderly should not trigger leniency. The state may decide to put elderly offenders in lighter-security prisons if it decides that such environments would be safer for the elderly and that they pose less risk of danger to others, but that would not be a claim that the offender can reasonably argue is his natural right. The claim, advanced by Kobil, *supra* note 22, at 625-29, and MOORE, *supra* note 22, at 173-75, that twenty-year-old offenders are disadvantaged compared to ninety-year-old offenders if they get life imprisonment is unpersuasive: the offender, by his offense, implicitly authorized the punishment upon himself at the age he committed the offense.

138. While it is true that many offenders are motivated to commit crime by environmental factors, the truth is that there are many people who have substantially similar backgrounds and experience the same environmental factors who do not commit crimes. Hence, the Marxist critique of retribution, most famously articulated—and later disavowed—by Jeffrie Murphy, fails to persuade. *See* Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF., 217, 240 (1973). That said, there may be times when social stratification is legally reified and there are no meaningful ways in which the poor and disenfranchised can participate in the project of self-government. In those situations, crimes of a political nature may not be crimes punishable in the usual manner. I examine this claim in depth in Markel, *supra* note 68, at 440-41.

139. Or, as the table described at the outset demonstrates, there is some other reason related to the merits of the case that warrants less punishment: for example, the offender has reduced the social cost of his wrongdoing by coming forward to the government.

140. Unless and until it is recognized through legislation, the motivation for crimes should not be a factor in determining culpability or sentencing—

fenses, the criminal justice system is not required to be especially compassionate because of Mary's stomach condition or Joe's advancing age when sentencing Mary or Joe.¹⁴¹

That said, I want to qualify the point here with reference to the maxim I highlighted earlier, the maxim that undergirds retributivist thought. That maxim is the belief that one cannot disclaim responsibility for the reasonably foreseeable consequences of her conduct. That maxim applies not only to the offenders, but also to the policy makers who create institutions of punishment. Two implications therefore arise.

First, our compassion and concern should extend to harms imposed on innocent third parties by our punishments. Thus, an offender who is the sole caregiver for young children or for aged or ailing parents presents an unusual situation. As a general matter, harms to third parties should be ameliorated through the institutions of distributive justice, not criminal justice. In an attractive polity, a child without a parent should receive state and communal aid regardless of whether the parent is not around due to sickness, death, or imprisonment. But where the state has failed its obligations of distributive justice, it would be reasonable to tailor the punishment of "caregiver" offenders in a way that mitigates third-party harms without simultaneously elevating the offender's status in violation of the principle of equal liberty under law. The use of a conditional sentence may be one option to explore. Under such a sentence, which presumably would apply for less serious offenses, the offender's freedom of movement would be dramatically cut back so that only work and necessary chores (e.g., taking one's child to the doctor) would be permitted. Electronic bracelets or other tracking devices could be used to ensure compliance. Additionally, the state may attach extensive community service obligations (of various levels of desirability). Failure to abide by the conditions would lead to more severe punishment. In short, there are ways of using alternative punishments that still, by their coercion or deprivation, communicate to the offender the norms of equal liberty under law without wreaking havoc on

unless that motivation was so strong that it destroyed the person's capacity for reasonable choice. Such reasoning applies to actions motivated by conscience or religion, such as trespass by antiwar protestors or the destruction of abortion clinics by pro-life advocates, some of whom may believe that they are serving God and saving lives.

141. This does not release the state from its obligation to provide adequate medical care to its inmates, and it assumes that the factor eliciting the compassion or sympathy was not tied to the choice to commit the crime.

the lives of innocent third parties.¹⁴²

Second, the state must take all reasonable measures to protect the basic needs of its offenders, including their lives and physical integrity.¹⁴³ The state may not, in the name of retributivism, simply abandon its responsibilities for the care of its charges. Thus, if there is a high likelihood that the strain of a work farm will kill a senior citizen, it would be inappropriate for the state to send him there. Awareness of imminent risk of serious harm should prevent the state from imposing conditions of punishment likely to lead to grievous assault, illness, rape, or death.¹⁴⁴ Thus, decision makers should alter the conditions of confinement for an offender if his medical condition threatens to infect others in prison.¹⁴⁵ The relevance of age or condition would also appear when considering whether to put juveniles with nonviolent records in the same cells as violent pederasts. Perhaps the best way to articulate the relationship

142. A slightly different issue is whether punishments should be altered to increase general social welfare (as opposed to the more narrow situation of minimizing third-party harms). One can imagine a state saying: We will give you a punishment discount if you forfeit more of your wealth (or healthy organs) to the state. Or the President may decide to pardon an offender who agrees to give up some of his rights or a pending lawsuit against the state. Depending on the circumstances, one might think the norm of equal liberty under law was being corrupted by the bargain. If two offenders commit the same offense under similar circumstances, but one is wealthy, the offender who gets the pardon in exchange for the donation to the re-election campaign fund (or the President's favorite charity) is treated unequally to the one without the funds. For a fascinating discussion of conditional pardons, see Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CAL. L. REV. 1665 (2001).

143. Cf. *DeShaney v. Winnebago County Soc. Servs. Dep't.*, 489 U.S. 189, 198 (1989) (recognizing that in limited circumstances, if the state creates the risk of danger, it is obligated to take affirmative steps to reduce the danger). Obviously, if the state authorizes the death penalty, then it is not deliberate indifference that becomes relevant but actual intent to harm the offender under the apparent aegis of the legislature. I will argue that the death penalty is indefensible on retributivist grounds in a separate paper I am developing.

144. Cf. *Farmer v. Brennan*, 511 U.S. 825, 832-34 (1994) (holding that prison officials face Eighth Amendment liability for deliberate indifference to prisoners who face a substantial risk of serious harm).

145. Cf. Edward A. Adams, *Cuomo Faces Annual Ritual of Deciding on Clemency*, N.Y. L.J., Dec. 28, 1992, at 1-2 (discussing Cuomo's grant of medical clemency to a prisoner dying of AIDS). Mario Cuomo granted clemency to a prisoner dying of AIDS and to others with terminal illnesses. See Kevin Sack, *Cuomo Gives Clemency to Inmate with AIDS*, N.Y. TIMES, Jan. 1, 1991, at 32L. He later faced criticism for singling out prisoners with AIDS over other conditions. Some states indicate clemency may be appropriate when a terminal illness affords an inmate the expectation of less than one year left to live. See, e.g., S.C. CODE ANN. § 24-21-970 (Law. Co-op. 1989).

between compassion and responsibility in this context is to observe that, for purposes of determining culpability, details about a person's background do not matter—aside from her basic mental and physical competence. But in determining what kind of sentencing that person receives, the state is obligated to secure the basic needs of each of its inmates and must tailor a punishment that is not indifferent to that person's basic needs.

This point has its limits too. The state is not obligated to devise punishments that are tailored to the individual because of factors that might cause one to "suffer" above the norm for a particular crime or punishment, say, by being deprived of expensive wines to which one has become addicted. As a general matter, none of those special factors should trigger mercy so long as the offender was competent when the crime was committed and is competent through the period of punishment.

Notwithstanding the qualifications already articulated, some might still say there is a further role for compassion-based mercy.¹⁴⁶ What if legislators authorized this compassion-based mercy because this compassion was thought to be democratically popular (and morally laudable)? Think of a situation where an offender contracts a disease that will kill him in six months after he commits his crime and there is no evidence to suggest he poses a threat to others if he were in prison. Would it be illiberal and antiretributivist for the legislature to permit this person to die in his parents' home instead of in prison (assuming that was the typical baseline punishment for his offense)?¹⁴⁷ I think the answer is yes even though I also realize that some people would say, if that is so, then this is where I get off the liberal retributivist train and where I transfer to the compassion train. My response would be that if we took the appropriate legislative *ex ante* perspective, we would all recognize that it is better to exhibit fidelity to the principles of moral autonomy and equal liberty under law than to circulate punishment discounts—so long as the offender could have chosen otherwise. From that *ex ante* perspective, to give a discount for an after-acquired illness would be as morally arbitrary as giving leniency to, say, widely acclaimed poets whom we fear will

146. I am particularly grateful to Steve Sugarman and Steve Heyman for sharpening my thinking about the points that follow.

147. *Ex hypothesi*, guidelines would constrain the relevant executive or judicial decision makers to minimize horizontal inequality between two offenders with the same compassion-eliciting feature, such as illness.

write less prolifically under prison conditions.¹⁴⁸ (I also think that as soon as an offender with an after-acquired illness committed another crime because he realized his relative impunity, people might be willing to realize why the *ex ante* perspective should be prioritized.)

A related objection from the defenders of compassion focuses on the nature of the crime. A crime, it is suggested, may be unlawful but nonetheless carried out in a manner attracting great sympathy. The star athlete whose reckless driving kills his best friend and teammate is one current iteration of this genre. Another heart-wrenching version arose in Canada not long ago, where a devoted father, seeing his daughter suffer tremendous and persistent pain associated with her deteriorating physical condition caused by cerebral palsy, killed her. The Supreme Court of Canada unanimously upheld the application of the mandatory minimum sentence for homicide to this man, Richard Latimer.¹⁴⁹ There was nothing deficient in the writing of the law or its application to this man, although Latimer surely posed no general threat to society and frankly needed no real rehabilitation. Arguably, his courageous compassion can be commended, notwithstanding his illegal actions. But there is no wrong in sentencing him to prison for failing to heed society's prohibition of taking life, absent recognized justifications. One's sense of justice should not be offended by Latimer's punishment and the unanimous decision upholding his conviction and sentence.¹⁵⁰

The last objection I wish to address is the challenge of Elizabeth Rapaport, who contends that retributivism is necessarily and unwisely hostile to considerations of the postconviction achievements of an offender.¹⁵¹ Call this objection the redemptive clemency objection: it tries to justify leniency for the offender who performs heroic service while imprisoned or who has otherwise rehabilitated himself.¹⁵² Rapaport posits these

148. The concern about arbitrariness would be a sufficient reason to think that a properly liberal state should prevent this practice. Cf. SUNSTEIN, *supra* note 97, at 20 (discussing deliberative democracy and a republic of reasons).

149. *R. v. Latimer*, [2001] S.C.R. 3.

150. I am grateful to Ernie Weinrib for alerting me to and pressing me on the *Latimer* case.

151. See *supra* note 103.

152. The example of heroism sometimes used to illuminate the point is Dr. Samuel Mudd's postconviction distinction of stemming a yellow fever epidemic while in prison. See MOORE, *supra* note 22, at 197. He was convicted for "conspiring to assassinate" President Lincoln because he set the leg of John Wilkes

moments of redemption as hard cases for the retributivist because of the retributivist's alleged commitment to refuse compassionate leniency based on the postconviction rehabilitation of offender.

These are not hard cases, however, because there is no intrinsic reason why a retributivist must adopt the position that Rapaport attributes to her.¹⁵³ That is because it would be consistent with retributivism for the *legislature* to authorize executive consideration of postconviction good behavior for a reduction in the severity of certain punishments. If we view (as we should) the severity of an offender's actions as a compound of the statutory offense and its social cost, postconviction actions are susceptible to analyses of desert, and therefore are compatible with retributivism. Any determination of the social cost of an offense considers the amount of social resources needed on average to prevent, prosecute, and punish the offense. Hence no problem on retributivist grounds arises with sentencing an offender, for example, to five years of prison for a theft if he conducts himself well in prison and ten years if he does not. Obviously, determining whether the additional five years should attach will be based on postconviction information about the offender's "achievements."¹⁵⁴

Booth. *Id.* Dr. Mudd, however, did not know that Booth was Lincoln's assassin. *Id.* Later, Dr. Mudd was pardoned on the basis of his work in the prison, not because of his innocence or the problematic trial that led to his conviction. *Id.*; cf. Margaret Colgate Love, *The Quality of the President's Mercy*, N.Y. TIMES, Dec. 19, 2002, at A39 ("Even if the legal system were foolproof and no mistakes were ever made, post-sentence pardons would still offer the president an opportunity to recognize criminal justice success stories.").

153. Nonetheless, it is a position some retributivists have embraced. Moore, for example, argues that Dr. Mudd should have been pardoned only because he was innocent and not because he had performed heroic service. MOORE, *supra* note 22, at 204, 210.

154. The U.S. Sentencing Guidelines have struggled with similar issues, and not long ago, they were amended to repeal the consideration of postconviction rehabilitation as a factor for downward departures when that rehabilitation occurred before sentencing. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2003). The Sentencing Commission found that this factor tended to benefit disproportionately those with access to private counsel and those who could afford to "repent" during the gap between the conviction and the sentencing. For the vast majority of (often indigent) offenders, virtually no gap exists because a plea bargain is made, and in a plea, the sentence is usually recommended by the prosecutor to the judge. The distinction between postconviction and postsentencing redemption or achievements was not noted by Rapaport, but my guess is that her argument applies to both postconviction and postsentencing rehabilitation or heroism. See generally Rapaport, *supra* note 16 (discussing redemption through executive clemency). My own sense is that

Thus, if the legislature seeks to give incentives to postconviction rehabilitation or heroism, it can do so in a matter compatible with the kind of retributivism I have sketched. By contrast, if a state's executive extended leniency to the offender on account of postconviction conduct without specific imprimatur to consider that factor, then such leniency would be subject to a moral critique that such leniency is improper because it will lead to ad hoc and arbitrary disbursements of punishment discounts that were not contemplated as part of the social cost analysis that is properly undertaken in the legislature.

IV. RETRIBUTIVISM AND DISCRETION

Though retributivism may be merciless, it is not heartless. This conclusion arises from retributivism's attachment to justice-enhancing discretion. Let me clarify. The practice of retribution requires an institutional design that creates room for discretion, or judgment that is sensitive to particular circumstances surrounding the criminal act. This design is required for two reasons. The first one is familiar and emphasizes the likelihood that a complex system of criminal justice will often, as in the past, commit pervasive and in some cases predictable error in adjudication and sentencing.¹⁵⁵ The ubiquitous presence of error counsels the design of a system in which error can be discerned and corrected over time, whether through direct or collateral appeals in the courts or through leniency afforded by the executive branch or an administrative agency.¹⁵⁶ The correc-

given the obvious and predictable inequities resulting from postconviction rehabilitation, however, the Sentencing Commission was probably correct to amend the Guidelines as it did.

155. See *United States v. Quinones*, 205 F. Supp. 2d 256, 268 (S.D.N.Y. 2002) (striking down as unconstitutional the federal death penalty in light of the mounting evidence that innocent people are at high risk of being sentenced to death and citing Professor James S. Liebman's study of prejudicial error in the American capital punishment system), *overruled by United States v. Quinones*, 313 F.3d 49, 70 (2d Cir. 2002).

156. Indeed, one consequence arising from the introduction of federal sentencing guidelines is the enormous shift in discretion from judges to prosecutors. Because of that shift in power, and because, as is well recognized, virtually all criminal cases settle in plea agreements, see George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 1039 (2000), there is less opportunity for error in the system to be ferreted out. Coupled with the preference for broad drafting of criminal statutes, these changes effectively empower the prosecutor to determine whether and how many charges will be filed and what the offender's likely sentence will be. The opportunity for discerning error is thus dramatically diminished. This should not be too worrisome if we assume that defendants who accept plea agreements are convinced of their own guilt,

tion of error in adjudication is fundamental to the project of retributive justice, and an institutional design encouraging the prevention and correction of error probably does not need much further justification—except to say that we cannot afford to spend so much money on assuring accuracy that we jeopardize our social and moral obligation to meet other human needs.

More unusual is the second argument in favor of discretion, the public choice argument.¹⁵⁷ Without subscribing to the entire public choice indictment of complex democratic systems,¹⁵⁸ I want to highlight one particular insight of this school of thought. That is, our democratic institutions, our legislatures in particular, have strong incentives to draft very broad legislation that seems to overcriminalize conduct that might be socially beneficial or at least not obviously harmful.¹⁵⁹ This is what Professor Stuntz calls the pathological politics of criminal law.¹⁶⁰

but there is a legitimate fear that a prosecutor who can stack all sorts of charges at trial with a much longer potential sentence will be able to railroad both innocent and noninnocent (but not guilty of the maximum threatened charges) parties into plea agreements. Cf. *N. Carolina v. Alford*, 400 U.S. 25 (1970) (deciding against a defendant who sought postconviction relief on the ground that he pled guilty to avoid death penalty but claimed that he was in fact innocent of the crime). Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361 (2003). Relatedly, the incentives of defense counsel must be considered. See Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1988–90 (1992) (maintaining that defense counsel have strong personal incentives to avoid trial).

157. According to one definition:

The public choice or economic theory of legislation explains governmental behavior as the result of interest-group processes. Legislation, including the receipt of governmental 'permission' to act, is a commodity supplied and demanded much the same as any other economic good. As such, permission or legislative protection passes to those that gain the greatest value from it—i.e., those who are willing to pay the most for it—independent of any concerns for overall social welfare.

DONALD J. KOCHAN, THE FEDERALIST SOCIETY, RIPENESS, PERMITTING AND PUBLIC CHOICE (2001), at <http://www.fedsoc.org/Publications/practicegroup/newsletters/administrativelaw/ripeness-adminv2i3.htm>.

158. See generally DANIEL A. FARBER & PHILLIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991); DONALD P. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE (1994); Symposium, *Getting Beyond Cynicism: New Theories of the Regulatory State*, 87 CORNELL L. REV. 267 (2002).

159. See *Atkins v. Virginia*, 536 U.S. 304, 315 (2002) (noting "the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime").

160. See generally Stuntz, *supra* note 34 (discussing the motivations be-

Because legislators have robust incentives to respond to false “moral panics” as well as real crises,¹⁶¹ they often draft legislation that confers upon law enforcement officials broad discretion to bring charges against someone for something that might not have been chargeable earlier.¹⁶² The federal mail and wire fraud statutes are often viewed as paradigmatic instances of this: Congress drafts legislation very broadly, expecting prosecutors to exercise discretion and to not bring charges against everyone who actually violates the law.¹⁶³ The same goes for the concerns about the drafting of cyberlaw antihacking statutes¹⁶⁴ and the antiterrorism measures enacted after September 11.¹⁶⁵

The reason why legislators draft broad legislation, according to Stuntz, is that they want to provide prosecutors with the tools to go after someone hard the next time. Too often, legislators have to tell their outraged constituents that a person’s behavior was legal or perhaps lightly sanctioned—albeit noxious and socially harmful—because at the time, such behavior was not on the radar screens of the legislature. But, they promise, if and when such behavior is repeated, the prosecutors will have the appropriate sources of law to bring charges—or in the case of illegal immigrants, to gather evidence about them in order to

hind, and the consequences of, the law’s breadth).

161. On moral panics, see PHILIP JENKINS, *MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA* (1998); MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST AND SHAME IN THE LAW* (2004).

162. See Stuntz, *supra* note 34, at 529–33; see also *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1915, 1934–39 (2002) (discussing the vague and broad terms of the USA PATRIOT Act, enacted after the 9/11 massacres).

163. See *United States v. Maze*, 414 U.S. 395, 405–06 (1974) (Burger, C.J., dissenting) (observing that the mail fraud statute serves “as a first line of defense” or “stopgap device” to tackle new types of frauds before particularized legislation is developed); *United States v. Czubinski*, 106 F.3d 1069, 1079 (1st Cir. 1997) (stating that the “broad language of the mail and wire fraud statutes are both their blessing and their curse” because “[t]hey can address new forms of serious crime that fail to fall within more specific legislation,” but that “they might be used to prosecute kinds of behavior that, albeit offensive to the morals or aesthetics of federal prosecutors, cannot reasonably be expected by the instigators to form the basis of a federal felony.”).

164. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 434 (2d Cir. 2001) (considering the applicability of the Digital Millennium Copyright Act to posting of computer code).

165. See, e.g., *Developments in the Law*, *supra* note 162. But see Orin S. Kerr, *Internet Surveillance Law After the USA Patriot Act: The Big Brother That Isn’t*, 97 NW. U. L. REV. 607 (2003) (arguing that conventional critical reaction to the USA PATRIOT Act is overwrought).

detain or deport them. To avoid humiliation or awkwardness, legislators draft broad statutes, presuming that prosecutors will exercise discretion to make sure that those "undeserving" of punishment will not be charged.¹⁶⁶ The problem here is if prosecutors are too "hungry," the legislators will still presume that somewhere down the line, the undeserving will get leniency from the jury, judge, Governor, or President.¹⁶⁷ Legislators have little practical reason or incentive to constrain their delegation of responsibility for the operation of the criminal justice system.¹⁶⁸ In a situation where legislators are merely responding to the incentives to overcriminalize or to permit indefinite detention, and where prosecutors might be motivated by the wrong reasons, we should be both grateful for the several outlets we have for the exercise of discretion and vigilant in their preservation.

The hard puzzle is figuring out how to curb mercy even as we preserve discretion. Many states have clemency boards to screen petitions for postconviction discretionary leniency. These should, as a matter of good policy, be the norm, and they should be guided by the kind of justice-enhancing principles I have already discussed. Attention should also be paid to those persons who benefit unduly from executive leniency, for example at the law enforcement or prosecutorial level. In the previous section I identified a few possible reforms, such as loosening standing requirements so that state and federal ombudspersons may not only investigate but also bring forward claims and challenges to apparent abuses of discretion by prosecutors and other actors in the criminal justice system, where currently both prosecutorial and agency nonfeasance are essentially unreviewable.¹⁶⁹ If

166. Cf. STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993) (lamenting the tendency of decision makers to overregulate new risks).

167. See Stephen Garvey, *Politicizing Who Dies*, 101 YALE L.J. 187 (1991) (discussing the incentives of various actors in the death penalty context to deny their role in assigning the death penalty to someone).

168. Actually, because of the incentives politicians have to be tough on crimes and criminals, they not only create opportunities for discretion by prosecutors by drafting broad statutes but sometimes they also eliminate discretion by judges by enacting mandatory minima for sentencing or "three strikes and you're out" laws. See, e.g., *Ewing v. California*, 538 U.S. 11, 15 (2003) (detailing trend of three-strikes laws). When legislatures act carelessly, though, courts employ a host of moderating devices, such as the rule of lenity, which reads criminal statutes narrowly in cases of ambiguous language.

169. *Heckler v. Cheney*, 470 U.S. 821, 830 (1985) (noting that due to concerns of institutional competence and manageability, courts will not compel

regulations or criminal laws are selectively enforced, then application of an arbitrary and capricious standard would force government actors to articulate reasons for their choices.¹⁷⁰ The Supreme Court has expressed its reluctance to scrutinize the decisions of these executive officers because of the relative institutional competence of prosecutors and courts.¹⁷¹ "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake."¹⁷² These factors present, however, precisely the kind of questions an independent agency (or subagency) may analyze. Indeed, that same agency may also seek remedies after seeing a pattern or practice emerge from a series of similar complaints.¹⁷³ These same considerations extend to enhancing judicial review of executive pardons or other extensions of leniency that occurred for arbitrary and capricious reasons.

agency action that is committed to agency discretion whether or not to enforce regulations); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests *entirely* in his discretion." (emphasis added)). As the Supreme Court has noted, a prosecutor's discretion is "subject to constitutional constraints." *United States v. Batchelder*, 442 U.S. 114, 125 (1979). These constraints are nominally limited by the Due Process Clause of the Fifth Amendment. *United States v. Armstrong*, 517 U.S. 456 (1996). While *Armstrong* sets the bar extremely high for potential challenges to prosecutorial action, prosecutorial inaction is not reviewable after *Heckler*.

170. *Cf. Armstrong*, 517 U.S. at 456 (imposing a very difficult burden on the criminal defendant to show selective prosecution). Presumably standing law precludes *Armstrong's* burden from being borne by plaintiffs other than the criminal defendants, thus preventing the issue from being relieved through impact litigation measures. If prosecutors knew that their conduct would be subject to an abuse of discretion or arbitrary and capricious standard, their current power, especially under the Sentencing Guidelines regime, could be canalized.

171. *Wayte v. United States*, 470 U.S. 598, 607-08 (1985).

172. *Id.* at 607.

173. Compare the screening role of agencies like the Equal Employment Opportunity Commission and the Federal Trade Commission in investigating complaints about abusive practices. These are potential models to emulate in the criminal justice system.

CONCLUSION: MERCY AND REAL LIFE

Retributive justice and mercy sit in inexorable tension with each other. It has often been observed that if punishment is deserved, mercy to the offender is a breach of the duty of justice and a rupture in the public trust in the reliability and consistency of law. Compassion to wrongdoers has a home, but it is not in the courthouse or at clemency hearings. This is the familiar trope.

In this Article, I have tried to uncover some significant details that this trope obscures—but also why there is still some truth to it. In doing so, I have explained why retributivists would endorse the creation of discretionary sites in a system of criminal justice, as well as the kind of guardrails necessary to protect those sites from the possibility of improperly insinuated compassion, caprice, corruption, or bias. The goal is to preserve discretion and to canalize it.

To be sure, the problem of wrongful punishment is far more pressing than wrongful leniency, but to prioritize a problem over another problem is not the same as denying that a separate problem exists. The unreviewable sites for mercy are a problem; precisely because they are unreviewable and not subject to predictable interest group maneuvering, these sites pose a problem that typically flies beneath the radar.

My hope is that by highlighting how these sites for mercy are a problem not only for retributivists but also for all those concerned about equal liberty under law, we can find the courage to collectively constrain mercy. For as I suggested at the outset, there are various crusades on behalf of mercy that, from the liberal or the retributivist perspective, are fundamentally misguided. Those who seek mercy directly, and those who endorse reforms—such as greater roles for victims and jurors in sentencing—that substantially increase its possibility, must at least recognize the injury they are imposing upon society's commitment to equal liberty under law. What is more, the good intentions underlying calls for compassion through mercy provide no real justification for these efforts. For as I also explained, from the perspective of equal liberty under law, grants of mercy based on compassion are as problematic as grants of mercy based on caprice, sovereign grace, corruption, or bias.

This last point is one that many good people are inclined to resist, in part because we are so often instructed to be both compassionate and merciful as individuals. I want therefore to

offer some thoughts about how to mediate this apparent disconnect between the virtues of a polity and the virtues of a person.

First, I want to stress again the larger point 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. Leaving mercy behind in the realm of law is, in short, no impediment to moving forward toward the realization of humane institutions of criminal justice, and away from the misbegotten and often brutal status quo we currently tolerate and endure. I recognize, however, that this is a promise I have only begun to make good on in this Article.¹⁷⁴

Second, having focused attention on the anxieties one might have about mercy granted through public actors and legal institutions, I want to turn to a related question: does the argument of the Article translate at all to the private realm? I have left unanswered the question whether mercy should be encouraged among individuals for noncriminal wrongs, harms, slights, and injuries. This omission has been deliberate. Like Socrates, we must endeavor to see what similarities exist between justice in the city and justice in the soul.¹⁷⁵

Experience runs in different directions for us all, but mine suggests that merciful souls tend to be flourishing souls, better able to forge new relationships and strengthen ongoing ones.¹⁷⁶ Here, I have in mind the ancient virtue of being magnanimous, or large-souled. The magnanimous individual is slow to anger, eager to forget the nits of gnats on his great soul.¹⁷⁷ Fraught as

174. I have made some effort at showing the play in retributivism's joints elsewhere: Markel, *supra* note 45; *supra* note 47 and accompanying text; Dan Markel, *Commuting Death Row: A Retributivist Defense* (manuscript in progress) (defending Governor George Ryan's commutation of death row on retributivist grounds).

175. PLATO, *supra* note 78, at 370.

176. One friend sounds the following caution: that merciful souls, if they are known as merciful souls, are more easily manipulated and cheated.

177. Perhaps the most famous example of magnanimity is the patience in the Gospel parable of the father toward his Prodigal Son. See *Luke* 15:11–32. Contrast the father's "merry" dispensation of mercy with the jealous brother's anguished perception of horizontal inequality:

Lo, these many years I have served you, and I never disobeyed your command; yet you never gave me a kid, that I might make merry with my friends. But when this son of yours came, who has devoured your living with harlots, you killed for him the fatted calf!

Luke 15:28–32.

it is with baggage, this aristocratic sensibility is one we do well to cultivate. That is because the ability to refrain from exacting a full pound of flesh allows me to elevate the two of us and to say, your attempt to devalue me through exploitation will not work.¹⁷⁸

When you commit noncriminal wrongs against me, in other words, my showing of mercy may be desirable if I value the relationship and wish to avoid the time and energy of resentment. This is especially so if it is clear from your postwrong actions that you have internalized norms of decency and reciprocity, and you evince your intent to continue conducting your behavior in accordance with those norms.¹⁷⁹ Or, I may permissibly and simply be moved by the compassion spoken of by Shakespeare's Isabella and so many others.¹⁸⁰ One may wonder, then, why shouldn't the polity reflect the same virtue of mercy? My answer is this: when your actions violate rights or interests protected by criminal sanction, then I cannot speak *for* others as I have already spoken *with* them—through law. It is for this reason that, with all due respect to Justice Kennedy, mercy *is* a source of especial shame for a nation secure in its institutions and confident in its desire to share the blessings of equal liberty under law.

178. But the aristocratic sensibility has its dangers: it may cultivate a disposition in which we view others as gnats only and always. As Chad Flanders noted in a personal e-mail: Part of taking others seriously as equals means taking what they do to you as real and important and occasionally hurtful. You cannot possibly value your friends qua friends if you read their slights as mere nits from gnats. The equality undergirding friendship and love requires a degree of vulnerability for the relation to flourish. Jeffrie Murphy makes a related point, namely that a person who ignores real moral injuries is at risk of becoming servile. Jeffrie G. Murphy, *A Rejoinder to Morris*, 7 CRIM. JUST. ETHICS 20 (Summer/Fall 1988).

179. Of course, the private virtue of mercy can be realized through civil law, for example, when a tort victim chooses to abandon suit of the tortfeasor, or perhaps, to seek different or smaller remedies than she might otherwise be entitled by law to receive.

180. See WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, *supra* note 6.