

5-1-2004

Apology, Legislation, and Mercy

Robert Weisberg

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

Recommended Citation

Robert Weisberg, *Apology, Legislation, and Mercy*, 82 N.C. L. REV. 1415 (2004).Available at: <http://scholarship.law.unc.edu/nclr/vol82/iss4/7>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

APOLOGY, LEGISLATION, AND MERCY

ROBERT WEISBERG*

| | |
|---|------|
| INTRODUCTION | 1415 |
| I. THE JUSTICE-MERCY CONUNDRUM..... | 1416 |
| II. THE PECULIAR MERCY OF CAPITAL PUNISHMENT LAW | 1421 |
| III. THE MODERN CYCLE OF LAW, REMISSION, AND APOLOGY | 1424 |
| IV. AFTER <i>MCCLESKEY</i> : EXECUTIVE AND LEGISLATIVE MERCY | 1434 |
| CONCLUSION | 1439 |

INTRODUCTION

The stated theme of this colloquium, but also its unstated central paradox, is “the jurisprudence of mercy.” This theme is paradoxical because mercy has a jurisprudence only if it fits within some theory of law or is rooted in some internal legal principle. Yet the most fundamental question raised by any act of pardon or commutation is precisely whether mercy is part of, or at least consistent with, justice. Is mercy an act outside justice, in a separate realm? Or is it an act of *injustice*?

This Essay first, in Part I, reviews the current state of the jurisprudence of mercy; thus, it considers the varying definitions of the nature of the act of mercy, as well as the widely disparate views of legal scholars on the relationship between mercy and justice—i.e., whether mercy is consistent with, entailed by, or actually subversive of justice. Parts II and III consider the especially complex link between mercy and the morality, justice, and utility of the death penalty, in older British law and in modern American constitutional law respectively. Then, in Part IV, this Essay approaches these important questions from an admittedly unusual perspective: it redefines the nature of capital mercy in what may seem a counterintuitive way—by endowing parties other than the executive with the power to grant it. Furthermore, this Essay focuses most intently upon how legal systems implicitly struggle with these

* Edwin E. Huddleson, Jr. Professor of Law, Stanford Law School. B.A., C.C.N.Y.; J.D., Stanford; Ph.D., Harvard.

questions rather than explicitly answering them. Specifically, this Essay takes an oblique look at the recent Illinois drama by focusing not on the mass commutation itself as an act of mercy, but on the Illinois Death Penalty Reform law that was passed almost a year after the gubernatorial commutation.¹

I. THE JUSTICE-MERCY CONUNDRUM

It will be useful to begin with two very general observations about the way scholars have addressed these questions. First, some scholars have usefully examined the act of pardon or commutation or other form of remission of punishment by asking exactly what kind of *act* it is in the first place. After all, to discern mercy's relation to justice requires us to know what mercy actually *does*. What does an act of mercy *do*? Technically, it can vacate a conviction, release a person from prison, protect the convicted from collateral consequences of conviction, or spare the condemned from death. But what else does it do? Some have raised the idea that mercy is a way to *forgive*.² But they note the complexity of forgiveness, asking, for example, whether it is the state or the victim who forgives, and how forgiveness is meant to change the moral status of the offender and the relationship between offender and victim.³ Another interesting notion is that mercy can function as an act of *forgetting*,⁴ as in amnesty procedures; this conception of the act of mercy also raises very troubling questions about mercy's consistency with justice, which seems, intuitively, to require a good deal of remembering, indeed of historically recording, since justice would seem to exist in relation to acts known to have been done. Others have suggested that mercy is relational in the sense that it acts to invite the criminal to do an act—to seek atonement, for example, or that mercy itself is the act of granting atonement.⁵

This Essay suggests an additional possible form of verbal action to mercy, possibly a counterintuitive one: mercy can be an act of

1. Capital Punishment Reform Study Committee Act, 2003 Ill. Legis. Serv. 93-605 (West).

2. See Stephen P. Garvey, *Is It Wrong To Commute Death Row? Retribution, Atonement, and Mercy*, 82 N.C. L. REV. 1319, 1337 (2004).

3. See, e.g., P.E. Digeser, *Justice, Forgiveness, Mercy, and Forgetting: The Complex Meaning of Executive Pardoning*, 31 CAP. U. L. REV. 161, 165-69 (2003) (questioning the extent to which a pardon serves as forgiveness for the underlying offense); see also Daniel Markel, *Against Mercy*, 88 MINN. L. REV. (forthcoming 2004) (suggesting that "[m]ercy is an act, whereas forgiveness is an attitude").

4. See Digeser, *supra* note 3, at 173-77.

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

apology. Of course, we normally think of the apology as what the *criminal* offers in hope of, or as a condition of, obtaining mercy. This Essay proposes the opposite—the notion that in extending mercy, the state, or the society for which it acts, itself apologizes to the criminal, or, as is made clear below, to the set of citizens who by historical fact or social category are most likely to have been condemned for the crime in question.⁶ In doing so, the apologizing authority also in some way confesses error.

A sub-variant of this “mercy as apology” phenomenon also exists. In such cases, the legal authority offers not quite an apology, but an *apologia*—that is, it will declare that it will not, or cannot, remit the punishment, but the legal authority nevertheless confesses the errors in its system of justice, or at least admits the *appearance* of error, while justifying its refusal (or rationalizing its claimed inability) to remit. Put differently, an *apologia* may be characterized as a withheld act of apology and often a defensive, anxious rationalization of a decision not to grant mercy.

The second general observation is that even before the controversy over the Ryan commutation, mercy and its allied versions of remission of punishment had recently become very lively topics in American jurisprudence. Because mercy seems to be, in the abstract, an undeniable virtue, the interesting question is always about what is *wrong* with mercy, rather than when mercy might be justified or even obligatory. Recent writings raise the question of whether mercy is indeed inconsistent with justice or, more drastically, something of which society even ought to be ashamed.⁷ Why the recent revival of interest in mercy and its critique? One reason may be that legal philosophy has seen of late a great revival of interest in clarifying the principles of retributive justice,⁸ perhaps because, for the last generation, the legal academy has been dominated by economic utilitarianism of various forms.⁹ One part of this revival has been a

6. See *infra* notes 42–46 and accompanying text.

7. See Markel, *supra* note 3, *passim*.

8. See generally Russell Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843 (2003) (arguing that “retributivism is no better than consequentialism as a theory of punishment”); David Dolinko, *Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment*, 16 L. & PHIL. 507 (1997) (commenting on the “problematic nature of retributivism”); Douglas Husak, *Holistic Retributivism*, 88 CAL. L. REV. 991 (2000) (arguing that the fundamentals of retributivism are more holistic than individualistic); Daniel Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157 (2001) (writing with the hope of spurring “reconsideration of what constitutes attractive punishment in a society such as ours”).

9. The most cited legal scholar of the past half-century is the father of law and

new critique of mercy, whereby scholars have questioned whether mercy can be part of justice as defined in terms of one's preferred theory of retributivism.¹⁰ One writer in particular, Kathleen Dean Moore, seems to have done the academy a great favor by attempting to lay out in broad terms the criteria by which mercy can be reconciled with, or be a part of, justice.¹¹ Though her argument will not be reviewed in this Essay, it should be noted that her line-drawing has been boldly explicit and detailed, and therefore unavoidably controversial, so as to provide a kind of foil for those not disposed to see any comfortable relationship between mercy and justice.¹²

In that regard, a provocative new essay by Daniel Markel, *Against Mercy*,¹³ takes on Moore specifically and the claims of a mercy-justice link more generally. As his title would suggest, Markel argues forcefully that mercy, as conventionally defined, is in fact a very bad thing for justice.¹⁴ Mercy, according to Markel, dangerously releases offenders from moral accountability and violates our most central notions of equality; moreover, what he worriedly calls the "legalization of mercy" undermines democratic government.¹⁵ Markel attacks those such as Moore who, he believes, blur the mercy/justice line by wrongly adumbrating certain factors—such as the offender's belief that she acted in justified civil disobedience—under the criteria of just punishment.¹⁶ Markel argues that the legal system must be careful in distinguishing equitable defenses to legal culpability from truly arbitrary irrelevant factors; therefore, he places a number of morally tempting factors (e.g., a prisoner's age or infirmity as it bears on the subjective experience of punishment, the suffering of an inmate's family) on the non-justice side of the line because they play no rational role in his understanding of

economics, Richard Posner, who has been cited almost twice as often as the runner-up. See Fred R. Shapiro, *Interpreting Legal Citations*, 29 J. LEGAL STUD. 409, 424 (2000).

10. See Markel, *supra* note 3, *passim*.

11. See KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST 131–81 (1989) [hereinafter MOORE, PARDONS]; Kathleen Dean Moore, *Pardon for Good and Sufficient Reasons*, 27 U. RICH. L. REV. 281, 286–88 (1993). For one excellent critique of Moore along these lines, see Mark Strasser, *Some Reflections on the President's Pardon Power*, 31 CAP. U. L. REV. 143, 143–50 (2003).

12. See, e.g., MOORE, PARDONS, *supra* note 11, at 138–41, 144–46 (arguing that pardons are appropriate for cases of "reduced ability offenders" or unsuccessful attempts or "repaired" crimes).

13. Markel, *supra* note 3.

14. *Id.* at 5.

15. *Id.* at 27.

16. *Id.* at 6.

retribution.¹⁷

Another reason why mercy-critique has become more common has been the advent of an emerging jurisprudence of restorative justice. Restorative justice refers to the wide array of purportedly non-adversarial, reconciliation-aimed schemes of resolution that, in many parts of the world, have strikingly encroached on the making of formal criminal justice systems. This is too broad a subject to tackle here, though a recent symposium offers a wonderfully comprehensive look at the movement.¹⁸ But the promotion of restorative justice has prompted criticisms of its premises.¹⁹ Because mercy may be a potential or implicit component of some of the principles of restorative justice, these criticisms parallel the attack on the mercy-justice link. An example is contained in a new book by Professor Annalise Acorn,²⁰ who lays out the link between mercy and restorative justice as follows: "Restorative justice . . . rejects the idea that mercy is a corrective to the excesses of hard-hearted justice. Rather, justice itself is defined in terms of an active extension of mercy to, and between, victim, offender, and community, each helping the others through the process of making things right again."²¹

Acorn goes on to elaborate on what she takes to be the predicates of the movement's attempt to align mercy and compassion with justice:

The restorative justice critique of punishment as justice . . . argument is grounded in a theory of the desirable and, more precisely, the *truly* desired. Punishment of the offender is not what the victim *really* wants. The victims' authentic longings for justice are better understood in terms of their desire for the experience of affirmation of their worth and secure membership in the community. What victims really want is for the offender to own responsibility for the harm, to shift his or her attitude from disrespect to respect for the victim and the norms of the community, and to feel and express genuine

17. *Id.* at 31.

18. Eric Luna, *Introduction: The Utah Restorative Justice Conference*, 2003 UTAH L. REV. 1 (examining restorative justice in light of the United States' contemporary problems with crime and punishment). For a superb overview of the issues, see generally Erik Luna, *Punishment Theory, Holism, and the Procedural Consequences of Restorative Justice*, 2003 UTAH L. REV. 205, 227-302 (2003).

19. See, e.g., Douglas Sylvester, *Myth in Restorative Justice History*, 2003 UTAH L. REV. 471, 493-522 (remarking on the historical underpinnings of restorative justice). See generally Robert Weisberg, *Restorative Justice and the Dangers of Community*, 2003 UTAH L. REV. 343 (commenting on the "danger" the restorative justice movement faces).

20. ANNALISE ACORN, *COMPULSORY COMPASSION* (2004).

21. *Id.* at 48.

shame, remorse, and contrition. Victims want the shared feeling of letting go of the loss and sadness of the past harm through forgiveness and healing. They want the public vindication that is achieved through caring and authoritative acknowledgment of their suffering. Punishment does not deliver any of these outcomes. It is a mere token: an external fact that does not and cannot fulfill our internal longings for experiential justice.²²

Acorn's attack on restorative justice is a complex one, but her concluding summary bears strongly, if implicitly, on the role of mercy. Her argument is that the expression of mercy and reconciliation may have far more to do with the psychological needs of the mercy-granting authority than with the reform of the offender or the health of the society:

Restorative justice, then, is a ritual that we purposefully create with a view to eliciting a performance of the offender's compassion and remorse. We know that his remorse will make us uncomfortable and embarrassed, that we will want to put a stop to this — *our own vicarious discomfort* — and that the only way to do so will be by restoring the offender to pride of place. . . . The momentum of the restorative encounter thus takes advantage of the good nature of the victim and community, riding on the strange but compelling power of that combined discomfort and euphoria we feel over the sinner who repents.²³

At a general level, this Essay seeks to somewhat reframe the critique of mercy's relation to justice. The scholarship noted above is sharply normative in its insistence in opposing mercy to justice. But one can also make a historically or philosophically descriptive or

22. *Id.* at 49.

23. *Id.* at 160. Acorn's view of restorative justice is even more bitingly negative than that, extending her psychological criticism of it to alarming contemporary trends:

But I have come to the conclusion that the vision restorative justice offers us is not a vision of perfection or even of anything genuinely desirable. The sensibility of restorative justice is drawn from a whitewashing culture informed by new-age thinking ("I love and affirm everything in the universe"), self-help ("what I hear you saying is . . ."), pop psychology's mantra that "revealing is healing," and a soft religion that, instead of seeing punishment as an integral part of processes of repentance and forgiveness, sees repentance and forgiveness as a substitute for punishment. Its sensibility is drawn from a culture that not only tells us that everything, including justice, is a matter of expressing and validating our own and other's feelings, but also feeds us canned, synthetic lines for doing both. The so-called magic of the restorative ritual requires us to buy into these ersatz pieties.

Id. at 136.

analytic critique. That is, it is possible to study a legal system by observing how it agonizes over the relationship of justice to mercy, or how it consciously or unconsciously rationalizes the relationship between the two, or how it exploits the inherent tension between them for instrumental purposes. This is largely this Essay's approach to the death penalty. In fact, it is this Essay's goal to rework the recent history of American capital punishment law into a narrative of neurotic, conflicted, erratic, and incomplete acts of mercy aimed at reconciling American law with confessed errors in our history that no law can readily cure.

II. THE PECULIAR MERCY OF CAPITAL PUNISHMENT LAW

Now, to turn to Governor Ryan and the death penalty itself. The commutation of a death sentence has always been the most dramatic motivator to scholars considering the role of mercy in our legal system, and often leads to inquiries into the nature of mercy and the full remission of punishment for crime in general.²⁴ My main goal here is to offer two particular angles on the Ryan commutation, one that in a sense narrows its significance and one that slightly broadens it.

First, I suggest that not only is the commutation of a death sentence the most dramatic example of an act of mercy, but also that the Ryan commutation needs to be understood in the context of the particular dynamics of modern death penalty law in the United States. Second, though we naturally view acts of legal mercy as tied to the pardoning power of the executive, we should look at mercy more broadly in terms of government powers. More specifically, other branches of government can exercise mercy or can be induced by the executive to give mercy. Thus, judges and juries can spare a capital defendant's life, even in the face of the facts and the law of capital sentencing, and leave the State no appeal.²⁵ Thus, this Essay poses the following: the American legal/political system has a very guilty conscience about the death penalty. It has, at several points, granted a kind of systemic pardon, one which this Essay will recharacterize as an apology or confession of error, but also sometimes an apology. Moreover, the judicial and legislative

24. See generally Symposium, *Clemency and Pardons*, 27 U. RICH. L. REV. 177 (1993) (gathering essays on clemency occasioned by statements about anti-death penalty stand of former New Mexico Governor Tony Anaya); *Statement of Tony Anaya on Capital Punishment*, *id.* at 177-83.

25. *Bullington v. Missouri*, 451 U.S. 430, 441-46 (1981) (double jeopardy bars any review or retrial of penalty phase "acquittal" of death).

branches have played significant, perhaps predominant, roles in granting clemency.

A useful prelude to the story of the modern American death penalty, is a reminder of a three-decade-old examination of a centuries-old episode in the merciful remission of the death penalty. This examination is a key text in the critical leftist jurisprudence of Great Britain a generation ago, a movement closely tied to, and perhaps underlying, the modern American Critical Legal studies movement.²⁶ Perhaps the central work of that British jurisprudence was Douglas Hay's *Property, Authority, and the Criminal Law*.²⁷ Hay's essay depicts the peculiar paradox of criminal justice in late eighteenth century England. The British legal landscape of the time included horrifyingly draconian criminal laws that often imposed the death penalty as punishment for property crimes, confounded by a complex and mysterious system whereby judges of various levels could issue pardons, and whereby perhaps half of all death sentences were revoked by some discretionary decree.²⁸ The pardons were sometimes acts of equitable discretion on the part of judges responding to the facts of the cases, but just as often, the pardons came on the petition of the propertied.²⁹ Indeed, petitioning for a pardon of the criminal was often the chief way that a landholder could signal his social prestige.³⁰ Hay explains how these gentlemen, far more concerned about crimes of disloyalty from their subordinates than from the threats of external robbers or burglars, discovered that control through selective mercy was a much more powerful tool of ensuring their socioeconomic authority than categorical invocation of statutory punishments.³¹

Hay speculates that what worked for the landholder was really what worked for British society as a whole: at a time of widespread crime, but when the statutes themselves, if fully enforced, would lead to legalized massacres of working people or, conversely, widespread nullification and rebellion, the most effective way for social superiors to retain psychological and moral authority was to induce criminals to (literally) beg for their lives and then exploit the magisterial image of

26. See MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987).

27. See DOUGLAS HAY ET AL., *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 17-63* (1975).

28. *Id.* at 43.

29. *Id.* at 45.

30. *Id.* at 47.

31. See *id.* at 40-49.

discretionary mercy they gained from frequent commutations.³² Mercy in Hay's description was a hideous act of cruelty especially because it was an act lying within the inherent moral or political discretion of a lawmaker, yet not itself required by any rule of law.³³ Mercy functioned as a form of torture because it could be denied, and even if it was ultimately granted, the temporary withholding of it was a sadistic way of exacerbating a person's fear of death and reminding him that his fate lay within the judgment (or whim) of someone else.³⁴ Nonetheless, the act of mercy was an important legal ritual, the ultimate demonstration of the law's imperial majesty. What Hay calls "the prerogative of mercy"³⁵ was a way of sustaining the law's appearance of magisterial fairness while masking the corrupt discretion and cynical political manipulation by which it really operated.³⁶

As Hay describes the awesome paradox of the law's power: "The judge might . . . emulate the priest in his role of human agent, helpless but submissive before the demands of his deity. But the judge could play the role of deity as well, both the god of wrath and the merciful arbiter of men's fates."³⁷

Thus, as Hay notes, legal power is most insidious when embedded in private power. "Where authority is embodied in direct personal relationships, men will often accept power, even enormous, despotic power, when it comes from the 'good King,' the father of his people, who tempers justice with mercy."³⁸

Pardons, Hay explains, were presented as "acts of grace rather than as favours to interests,"³⁹ and as Hay describes "the peculiar genius of the law":

It allowed the rulers of England to make the courts a selective instrument of class justice, yet simultaneously to proclaim the

32. Many prosecutors even required the pardoned man to sign a letter of apology and gratitude, which was printed in the county newspaper. *Id.* at 42.

33. *Id.* at 42.

34. As Hay notes, our modern concept of a rationalized, abstract bureaucracy of justice would have been unfamiliar to individuals living during this era, which thought of justice more in personal, relational terms. *Id.* at 39.

35. *Id.* at 40.

36. *Id.* at 44–45 (explaining that pardons were more likely when the petitioner could exploit his or the condemned person's family connections).

37. *Id.* at 29.

38. *Id.* at 39. Hay notes that mercy served to save those criminals who themselves had wealth or status, and also as a tool to manage patronage where a criminal was a useful subordinate. But most dramatically, for Hay, it was a tool of ideological oppression. *Id.* at 46–47.

39. *Id.* at 47.

law's incorruptible impartiality, and absolute determinacy. . . . Discretion allowed a prosecutor to terrorize the petty thief and then command his gratitude, or at least the approval of his neighborhood as a man of compassion. It allowed the class that passed one of the bloodiest penal codes in Europe to congratulate itself on its humanity.⁴⁰

Hay's thesis that the merciful pardon was a devious device for political legitimation as a means of class control has proved controversial.⁴¹ Moreover, presumably not even Hay would extend his thesis to the very different setting of the death penalty in modern America. Nevertheless, his essay serves as a useful prelude to examining the modern history of American capital mercy because it illustrates how we can look to the merciful pardon as a component of the overall hydraulics of a legal system. Moreover, if we accept Hay's thesis that the merciful pardon worked quite effectively in Britain, his essay is especially useful in setting up the *contrast* to modern America, where capital mercy has not been the result of any such master-manipulation, but rather is evidence of the fits and starts of a dysfunctional system that has attempted to establish the legitimacy of a capital punishment system by alternating execution and mercy.

III. THE MODERN CYCLE OF LAW, REMISSION, AND APOLOGY

In a sense, the modern history of the American death penalty begins with an awkward expression of moral reluctance—somewhere between an apology and apologia. And for what was there to apologize? By the late 1950s the death penalty had come under attack on several broad grounds.⁴² It was denounced as a cruelly capricious lottery, revealing no rational pattern by which unguided juries distinguished the death-deserving from the life-deserving;⁴³ there was emerging doubt whether it had any demonstrable marginal deterrent effect on murder as compared to life imprisonment;⁴⁴ and, most dramatically for American history, it was an instrument of racial bias, a bitter legacy of slavery⁴⁵ whether the bias was intentional or

40. *Id.* at 48–49.

41. See John H. Langbein, *Albion's Fatal Flaws*, 98 PAST & PRESENT 96–120 (1998) (arguing that Hay's theory of legitimation is circular and non-falsifiable).

42. See JAN GORECKI, CAPITAL PUNISHMENT: CRIMINAL LAW AND SOCIAL EVOLUTION 87–95 (1983).

43. See SAMUEL R. GROSS & ROBERT MAURO, DEATH & DISCRIMINATION 5 (1989).

44. Rudolph Gerber, *Death is Not Worth It*, 28 ARIZ. ST. L.J. 335, 350 (1998) (reviewing studies and finding no reliable support for a deterrent effect).

45. GROSS & MAURO, *supra* note 43, at 5–6.

negligently implemented, and whether it was measurable in terms of the race of offenders or the race of victims.⁴⁶ Ironically, the issue that has become most salient now, the risk of executing the absolutely innocent, was probably far less important to the public and legal community at that time.

Surely most American legislatures wanted to continue the death penalty as it had existed as late as the 1960s.⁴⁷ But as the death penalty came under attack for its arbitrary and racially biased implementation in the 1950s, the key legal achievement that made it possible for the death penalty to survive ultimate legal challenge was the Model Penal Code's ("MPC") reconception of how a death penalty law might be fair. The drafters commissioned by the American Law Institute ("ALI") would have preferred no death penalty at all—such was their progressive, optimistic faith in the ability of modern penology to exploit the discoveries of social science and to use the tools of rehabilitation, incapacitation, and deterrence to provide the optimal remedies for crime.⁴⁸ The key drafter, Herbert Wechsler, had expressed these views earlier in what was the philosophical rationale for the MPC's homicide rules:

If the death penalty is commonly regarded with greater dread than even life imprisonment, as we usually think it is; if criminal homicides are disturbingly frequent; if the attempt to apply the death penalty will not lead to nullification; and if it can be applied without exciting too much public hysteria, without brutalizing the population and without destroying too many lives, then there is a strong case for employing it in the most aggravated cases for deterrent purposes. . . . But if these conditions do not exist . . . it would seem at least to experiment with a less severe penalty than death.⁴⁹

And then in the MPC commentary itself, the drafters exhibited a quaint moral delicacy in acknowledging that they were repelled by what they saw as the vulgarity of the death penalty and its potential to

46. See generally Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305 (examining the major death penalty case decisions handed down by the Supreme Court in late 1982, as well as the Supreme Court's prior capital punishment doctrine).

47. *Id.* at 363–67 (describing old "unguided" discretion statutes).

48. The ALI report is published as THORSTEN SELLIN, *THE DEATH PENALTY: A REPORT FOR THE MODEL PENAL CODE PROJECT OF THE AMERICAN LAW INSTITUTE* (1959). For a discussion of the origins of the modern death penalty in the Model Penal Code, see Robert Weisberg, *The New York Statute as Cultural Document: Seeking the Morally Optimal Death Penalty*, 44 BUFF. L. REV. 283, 288–92 (1996).

49. Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1306–07 (1937).

cause social disruption:

Apart from the efficacy of the death penalty as a deterrent, its possible imposition has a discernible and baneful effect on the administration of criminal justice. A trial where life is at stake becomes inevitably a morbid and sensational affair, fraught with risk that public sympathy will be aroused for the defendant without reference to guilt or innocence of the crime charged.⁵⁰

Indeed, they acknowledged that whatever the political or legal necessity of jury sentencing in capital cases, they would have preferred pure bench trials at the penalty phase because these would be "less emotional or prejudiced."⁵¹

Yet the drafters knew that their commission from the ALI was to write a reformist code that had some reasonable chance of widespread adoption across the states and that the MPC therefore had to accommodate many of the consensus legal norms. Given these realities, they created the basic structure of the guided discretion statute, with the balancing of specified aggravating and mitigating factors, that ultimately won approval from the United States Supreme Court.⁵²

Whether the states would be required to accept the MPC model remained uncertain for years. In 1971, the Supreme Court refused to strike down the old unguided discretion statutes under the Due Process Clause, with Justice Harlan uttering his famous admonition against further challenges to the death penalty on what he considered the quixotic ground that they failed to conquer the twin problems of caprice and racial bias:

Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability. . . . For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of

50. SELLIN, *supra* note 48, at 79–80.

51. *Id.* at 73.

52. *See Gregg v. Georgia*, 428 U.S. 153, 191–95 (1976) (plurality opinion).

circumstances would ever be really complete.⁵³

If *Furman v. Georgia*,⁵⁴ the very next year, was an apology, and *McGautha v. California*⁵⁵ became the core text of our legal system's apologia—an acknowledgment of the imperfection of justice but, at the same time, a tragically resigned refusal to grant mercy because to do so would be to gratuitously confess error when in fact the legal regime of the death penalty could not be perfected in such a way that the failure to do so could require a confession of error. Thus, *McGautha* was not a confession of error so much as an admission of inevitable imperfectability.

In any event, the Supreme Court's suspension of the death penalty in the 1972 *Furman* decision constitutes an act of apology and pardon. Of course, some might insist on definitionally excluding a *judicial* decision, at least a decision rendered on a legal question, from the category of extra-jurisdictional mercy. But *Furman* invalidated the entire death penalty structure of the United States in one gesture and, in so doing, permanently released hundreds from death row. Moreover, it did so in an implicit holding that confessed nothing so simple as legal error at trial, but rather, the moral failure of the whole history of capital punishment in the United States.⁵⁶ *Furman* itself was preceded, though not necessarily motivated by, gubernatorial pardons of death sentences in the late 1960s, at a time when the civil rights movement had shamed the United States over the random but, more importantly, racially imbalanced administration of the death penalty.⁵⁷ Thus, I suggest viewing the decision as a parallel to those gubernatorial pardons, or indeed as harmonizing them into a national act of amnesty. Indeed, *Furman* is the second of two major apologies for historical racism in the modern Supreme Court—the other, of course, being the singular Warren opinion in *Brown v. Board of Education*.⁵⁸

Furman's suite of opinions—with all nine Justices opining—can hardly be reduced to a single principle. The concurring Justices' opinions are, on their face, mostly lengthy historical and philosophical

53. *McGautha v. California*, 402 U.S. 183, 204, 208 (1971).

54. 408 U.S. 238 (1972).

55. 402 U.S. 183 (1971).

56. See Weisberg, *supra* note 46, at 316.

57. See MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 210, 235–36 (clemency bars executions in California and New York).

58. 347 U.S. 483 (1954).

disquisitions about the meaning of "cruel and unusual punishment,"⁵⁹ technical analyses of Eighth Amendment precedent,⁶⁰ adversions to scientific examinations of the social utility of the death penalty,⁶¹ and debates over the criteria by which a societal moral consensus can be established.⁶² But we know that the decision was substantially animated by the moral and historical embarrassment deliberately provoked by petitioners' briefs and by the civil rights movement's wider attack on the death penalty.⁶³ Consequently, some of the opinions themselves employ the language of apology and confession of error.⁶⁴ In perhaps the most famous passage from the case, Justice Potter Stewart confessed:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.⁶⁵

Justice William O. Douglas made sure to specifically apologize for the racist history of the death penalty, quoting the President's Commission on Law Enforcement and Administration of Justice: "Finally there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups."⁶⁶

Justice Douglas cited a study of capital cases in Texas from 1924 to 1968 that established that:

Application of the death penalty is unequal: most of those

59. *Furman*, 408 U.S. at 242-45 (Douglas, J., concurring) (tracing the meaning of the clause to British history).

60. *E.g., id.* at 264-86 (Brennan, J., concurring) (examining over a century of cases).

61. *E.g., id.* at 348-53 (Marshall, J., concurring) (citing statistical studies on deterrence).

62. *E.g., id.* at 361-71 (Marshall, J., concurring) (questioning the value of opinion polls where much of the public is uninformed).

63. GORECKI, *supra* note 42, at 87-95.

64. *E.g., Furman*, 408 U.S. at 255 (Douglas, J., concurring) (lamenting that laws leaving judges and juries unguided discretion have fed prejudice against the poor and powerless).

65. *Id.* at 309-10 (Stewart, J., concurring).

66. *See id.* at 249-51 (Douglas, J., concurring) (quoting PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY*, 143 (1967)).

executed were poor, young, and ignorant.

Seventy-five of the 460 cases involved codefendants, who, under Texas law, were given separate trials. In several instances where a white and a Negro were co-defendants, the white was sentenced to life imprisonment or a term of years, and the Negro was given the death penalty.

Another ethnic disparity is found in the type of sentence imposed for rape. The Negro convicted of rape is far more likely to get the death penalty than a term sentence, whereas whites and Latins are far more likely to get a term sentence than the death penalty.⁶⁷

And quoting the warden of New York State's Ossining Penitentiary, the notorious "Sing Sing":

Not only does capital punishment fail in its justification, but no punishment could be invented with so many inherent defects. It is an unequal punishment in the way it is applied to the rich and to the poor. The defendant of wealth and position never goes to the electric chair or to the gallows.⁶⁸

In 1976, in *Gregg v. Georgia*⁶⁹ and companion cases, the Supreme Court returned to the problems identified four years earlier in *Furman*, but now held that the post-*Furman* "guided discretion" statutes, employing separate penalty phase with the statutory criteria of aggravating and mitigating circumstances, adequately solved the constitutional problem.⁷⁰ The Court in effect revoked the remission of death sentences when, in *Gregg*, it approved the new guided discretion statutes.⁷¹ But the cautious language of the plurality opinion in *Gregg* is significantly ambiguous.⁷² It holds that statutes like Georgia's, rooted in the MPC structure, seem well-designed to

67. See *id.* at 250 (Douglas, J., concurring) (quoting Rupert Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 CRIME & DELIN. 132, 141 (1969)).

68. LEWIS E. LAWES, LIFE AND DEATH IN SING SING 155-60 (1928), quoted in *Furman*, 408 U.S. at 251 (Douglas, J., concurring).

69. 428 U.S. 153 (1976).

70. See *id.* at 206-07; see also *Roberts v. Louisiana*, 428 U.S. 325, 335-36 (1976) (plurality opinion) (striking down statutes that purported to solve the *Furman* problems by eliminating all jury discretion and imposing mandatory death penalty for certain murders); *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (approving law similar to Georgia's); *Proffitt v. Florida*, 428 U.S. 242, 259-60 (1976) (same).

71. See *Gregg*, 428 U.S. at 153 *passim*.

72. See *id.* at 187-206 (plurality opinion) (holding that new guided discretionary statutes facially cure problems of old laws, but leaving open whether future empirical review is required).

cure the problems diagnosed by *Furman*, to provide the proper balance between rationality and discretion, and to require sufficient indicia of extreme moral desert to avoid racial bias.⁷³ But, in so doing, did the Court approve these statutes conditionally or unconditionally? Did it categorically withdraw its remission, start history over again, and declare that from now on any death sentence consistent with its opinion would be constitutionally legitimate? Or did it, perhaps in the spirit of the original MPC drafters themselves, conditionally proffer the new statutes as having the potential to solve the constitutional problem, with the proof of their success remaining to be seen? Was the apology withdrawn entirely, or did it morph into a kind of conditional apologia?

In the decade that followed *Gregg*, of course, the Court tinkered with the constitutional nuances of the new statutes,⁷⁴ claiming to fine-tune its balance between rationality and discretion,⁷⁵ though some would say it simply exacerbated its original failure to find the magic solution to the conflict between them.⁷⁶ In one telling instance of this effort at fine-tuning, the Court had to face fairly explicitly the notion of "mercy" in the proper administration of capital punishment. In *California v. Brown*,⁷⁷ a penalty-phase jury in California was instructed not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."⁷⁸ Cautiously finessing the determinacy/discretion line, the defendant did not argue that passion or public feeling should play any role in the jury's sentencing determination. Instead, he argued that as likely construed by the jury, the challenged instruction told the jurors not to be swayed by "sympathy."⁷⁹ The Court rejected this constitutional challenge:

By concentrating on the noun "sympathy," respondent ignores the crucial fact that the jury was instructed to avoid basing its decision on mere sympathy. Even a juror who insisted on focusing on this one phrase in the instruction would likely

73. *See id.* at 206-07.

74. *See, e.g.,* *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (holding that a capital defendant must be free to offer all relevant mitigating circumstances).

75. *Id.* at 604-05.

76. *See, e.g., id.* at 629 (Rehnquist, J., dissenting) (stating that "the Court has gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts, and appellate courts must of necessity rely has been all but completely sacrificed").

77. 479 U.S. 538 (1987).

78. *Id.* at 539.

79. *Id.* at 540.

interpret the phrase as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase. . . . We think a reasonable juror would . . . understand the instruction not to rely on "mere sympathy" as a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase.⁸⁰

The Court concluded that the instruction indeed "serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, which, we think, would be far more likely to turn the jury against a capital defendant than for him."⁸¹

Moving to the end of the Supreme Court's role in the story, the great reckoning occurred in *McCleskey v. Kemp*,⁸² where one distinct flaw in our capital system, acknowledged indirectly in *Furman* and glossed over in *Gregg*, was squarely presented to the Court: new, highly refined statistical evidence that even under the new guided discretion statutes, death sentences were handed down in drastically disproportionate numbers to defendants who killed white victims.⁸³ The Court might well have rejected *McCleskey*'s claims on the available narrow ground, cited by the Eleventh Circuit, that the statistics remained less than fully convincing.⁸⁴ But though the outcome met the predictions, its basis did not. Justice Powell's majority opinion famously conceded the salience of the statistics,⁸⁵ startlingly accepted their logical implications, but refused to accept their arguably legal consequences.⁸⁶

Justice Powell's opinion combined the two kinds of expression we saw earlier—apology and apologia. Rather than finesse the issue of racial discrimination, Powell invoked the apologia language of Justice Harlan, but with a distinctly greater emphasis on apology—i.e., he confessed that there is inherent racial bias in the death penalty.

McCleskey's claim, taken to its logical conclusion, throws into

80. *Id.* at 542.

81. *Id.* at 543.

82. 481 U.S. 279 (1987).

83. *Id.* at 286–87.

84. See *McCleskey v. Kemp*, 753 F.2d 877, 892–99 (11th Cir. 1985).

85. See *McCleskey*, 481 U.S. at 312–13 (accepting evidence of "a discrepancy that appears to correlate with race").

86. See *id.* at 315 (explaining that accepting such a claim would condemn the whole criminal justice system).

serious question the principles that underlie our entire criminal justice system. The Eighth Amendment is not limited in application to capital punishment; but applies to all penalties. Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalties. Moreover, the claim that his sentence rests on the irrelevant factor of race could easily be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. Similarly, since McCleskey's claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys, or judges. Also, there is no logical reason that such a claim need be limited to racial or sexual bias. If arbitrary and capricious punishment is the touchstone under the Eighth Amendment, such a claim could—at least in theory—be based upon any arbitrary variable, such as the defendant's facial characteristics, or the physical attractiveness of the defendant or the victim, that some statistical study indicates may be influential in jury decisionmaking. As these examples illustrate, there is no limiting principle to the type of challenge brought by McCleskey.⁸⁷

Nevertheless, it was precisely because Justice Powell fully recognized that McCleskey had effectively condemned the moral legitimacy of our entire criminal justice system that he declared the Court unable to grant McCleskey the remedy he sought:

The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system that includes capital punishment. As we have stated specifically in the context of capital punishment, the Constitution does not "plac[e] totally unrealistic conditions on its use."⁸⁸

Whereas Justice Harlan had stressed the dangers of randomness, Justice Powell was explicit in confessing the indestructibility of racism—indeed he sustained the death penalty only by virtue of making an apology of the widest possible magnitude. He apologized for the entire criminal justice system, but asked for acceptance that

87. *Id.* at 314–19 (citations omitted).

88. *Id.* at 319 (citations omitted) (quoting *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976)).

society cannot afford to choose perfect justice over law enforcement.

Then, remarkably, just three years later after leaving the Court, Justice Powell explicitly confessed error for the *McCleskey* decision, calling it one of two major decisions he regretted. In effect, Justice Powell uttered an *apology* for his previous *apologia*.⁸⁹ Apparently, Justice Powell had come to believe that the unpredictability of capital litigation might call for abolition. In 1990, he declared that he would now, if in a legislature, vote against capital punishment and would also vote the opposite way in the *McCleskey* case if given the chance.⁹⁰ Interestingly, Justice Powell stressed that it was, in effect, the Harlan argument in *McGautha* that persuaded him.⁹¹ Upon reflection, Powell found that the death penalty violated his sense of the dignity and majesty of the law.⁹²

Soon thereafter, Justice Blackmun, while still on the Court, confessed error for his dissenting vote in *Furman* and his concurring vote in *Gregg*. Justice Blackmun's confession of error essentially repeated Justice Powell's explanation, but with an interesting emphasis on his conception of the historical role of mercy—not just equitable discretion—in the supposed balance that *Gregg* had claimed to achieve.⁹³ It should be noted that Justice Blackmun dissented in *Brown*, asserting, “The sentencer’s ability to respond with mercy towards a defendant has always struck me as a particularly valuable aspect of the capital sentencing procedure,” and that “the sentencer’s expression of mercy a distinctive feature of our society that we deeply value.”⁹⁴

Justice Blackmun wrote that more than twenty years after *Furman*, the death penalty remained “fraught with arbitrariness, discrimination, caprice, and mistake [T]he problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form. . . .”⁹⁵

Recognizing that capital punishment must accommodate such competing factors as systemic consistency and individual mercy, he concluded:

89. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 450–53 (1994).

90. *Id.*

91. *Id.* at 451.

92. *Id.* at 451–52.

93. See *Callins v. Collins*, 510 U.S. 1127, 1128–38 (1994) (Blackmun, J., dissenting from denial of certiorari).

94. *California v. Brown*, 479 U.S. 538, 562–63 (1987) (Blackmun, J., dissenting).

95. *Callins*, 510 U.S. at 1130.

[T]his Court, in my view, has engaged in a futile effort to balance these constitutional demands, and now is retreating not only from the *Furman* promise of consistency and rationality, but from the requirement of individualized sentencing as well. Having virtually conceded that both fairness and rationality cannot be achieved in the administration of the death penalty, see *McCleskey v. Kemp*, the Court has chosen to deregulate the entire enterprise, replacing, it would seem, substantive constitutional requirements with mere aesthetics

From this day forward, I no longer shall tinker with the machinery of death. . . . Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. . . .⁹⁶

IV. AFTER *MCCLESKEY*: EXECUTIVE AND LEGISLATIVE MERCY

This Part stretches the definition of acts of pardon, mercy, and apology to cover an affirmative act of death penalty legislation.

For two decades after *Gregg*, New York remained among the holdout states that did not pass new death penalty laws. But its commitment to abolishing capital punishment was weaker than the tradition in states such as Massachusetts and Michigan, and throughout the 1980s the New York State Assembly constantly tried to reinstate it.⁹⁷ It was largely one person, Governor Mario Cuomo, who prevented reinstitution—he was the sole politician of major national status to risk political penalty by opposing the death penalty.⁹⁸ Indeed, though he mysteriously refused to run for national office, Cuomo may have been the only politician capable of getting elected to national office despite his refusal to take the “oath” of death penalty support.⁹⁹ Throughout his three terms as Governor, he discouraged and, when necessary, vetoed reinstatement legislation.¹⁰⁰ But whatever the role of that opposition in state politics, George

96. *Id.* at 1129.

97. STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 276 (2002).

98. *Id.*

99. Weisberg, *supra* note 48, at 283.

100. See Franklin Zimring, *The Wages of Ambivalence: On the Contexts and Prospects of New York's Death Penalty*, 44 BUFF. L. REV. 303, 310, 316 (1996).

Pataki defeated Cuomo in 1994, enabling a majority in the legislature to enact a new death penalty law in 1995.¹⁰¹

But the oddity of the New York situation was evident in the nature of the new law. Ultimately, the New York statute was a kind of update of the Model Penal Code statute in light of the post-*Gregg* Supreme Court refinement of the death penalty. As I have described earlier,¹⁰² New York's is a remarkable death penalty statute. It is, in effect, an apologetic, merciful death penalty law.

The New York law had remarkable features. Rather than stingily testing the limits of constitutional intervention in the death penalty, like most state laws, the New York law explicitly built into its statutory structure many of the constitutional "overrides" imposed on the states in the previous decade.¹⁰³ Indeed, the statute even anticipated and legislatively granted constitutional claims not yet recognized, or ever likely to be recognized, by the courts.¹⁰⁴ It also moved one step beyond the normal boundaries of a substantive death penalty statute, with an elaborate scheme for death qualification for jurors,¹⁰⁵ incorporating a defendant-generous version of the death-qualification rules established in *Witherspoon v. Illinois*¹⁰⁶ and *Wainwright v. Witt*.¹⁰⁷ In some bizarre statutory language, it offered a kind of passive-aggressive reminder to the prosecution that it will always have opportunities throughout a trial to revoke the capital charge.¹⁰⁸ And, most strikingly, its rule exempting the mentally retarded from the death penalty (anticipating by several years the Supreme Court's ruling to that effect¹⁰⁹) read less like an exception to

101. See Weisberg, *supra* note 48, at 283–84.

102. See generally *id.* (discussing the background of the New York statute, as well as the various ways of reading the New York death penalty law).

103. Thus, for example, it built into the state scheme the broadest possible construction of the Court's *Lockett* ruling and implemented many of the legal implications of the Court's important decision in *Bullington v. Missouri*, 451 U.S. 430 (1981), virtually equating the penalty phase of a capital case with a regular guilt phase trial. Thus, for example, it required that both the presence of aggravating circumstances and the ultimate dominance of aggravation over mitigation proved beyond a reasonable doubt. See N.Y. CRIM. PROC. LAW §§ 400.27(3), 400.27(7)(b) (McKinney 2003).

104. The statute preempted the then—and still—unaccepted constitutional argument that the state could not deem the absence of a statutorily enumerated mitigating circumstance to be introduced as an aggravating circumstance. See N.Y. CRIM. PROC. LAW § 400.27(6).

105. N.Y. CRIM. PROC. LAW §§ 270.16(1), 270.20(f).

106. 391 U.S. 510, 522 (1968).

107. 469 U.S. 412, 426–27 (1985).

108. N.Y. CRIM. PROC. LAW § 400.27 (1) (“[N]othing in this section shall be deemed to” preclude the People from withdrawing a capital charge).

109. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002).

a death penalty law than an almost tenderly empathetic disability rights statute.¹¹⁰ Thus, New York's was the first of what one might call the "politically correct death penalty laws" of the post-*Gregg* era.

Almost a decade later, New York has not executed a single person, and, given the tiny number of death sentences, combined with elaborate state appellate review,¹¹¹ there may not be any executions for quite some time.¹¹² Of course, it is fanciful to impute any coherent intention to a law passed by a modest majority, and reflecting, presumably, an awkward conglomeration of legislative compromises. Nevertheless, in terms of the neurotic dynamics of American death penalty law, it is useful to view the New York law as a kind of apology for the political decision to reinstate the formal death penalty law, offering a kind of implicit pre-remission of death sentences by virtue of the state taking on such self-imposed legal constraints as to ensure that no defendant would die for a decade.

The Ryan mass commutation, while itself the most dramatic and prolific act of executive clemency for the death penalty in our history, is only part of the Illinois story. Closely tied to the pardon is the act of the Illinois legislature, which resembles a fascinating echo or aftershock of the pardon, and of the New York statute.

Whether motivated by, politically required by, or simply sympathetic to, the Ryan commutation, the revisions in the Illinois statute immediately following the pardon amount to a further confession of error and apology. Some of the changes in the law are careful fine-tunings of the legal protections against abuses of the death penalty parallel to those in the New York statute. Thus, for example, the new law removes from the scope of felony murder aggravation mere participation in drug crimes.¹¹³ Predictably, it also addresses the "actual innocence" question by providing for broad post-conviction access to DNA testing,¹¹⁴ and in the face of the Supreme Court's *Herrera v. Collins* decision,¹¹⁵ it waives any state

110. N.Y. CRIM. PROC. LAW § 400.27(12)(e) (2001).

111. See *People v. Cahill*, No. 123, slip. op. 18881 (N.Y. Nov. 25, 2003) (striking down death sentence on grounds including faulty capital jury selection), available at 2003 WL 22770167; *id.* (Smith, J., concurring) (stating that the New York statute remains constitutionally questionable for failure to prevent arbitrary and race-based outcomes).

112. For a prescient prediction, see generally Zimring, *supra* note 100 (arguing that New York's death penalty is characterized by ambivalence and moral uncertainty which has influenced both the shape of the law and the likelihood that it will be some time before the state conducts another execution).

113. 720 ILL. COMP. STAT. 5/9-1 (b)(6) (Supp. 2003).

114. *Id.* at 5/114-13(b).

115. 506 U.S. 390, 400-01 (1993) (providing that a claim of "actual innocence" normally does not warrant federal habeas corpus relief where newly discovered evidence

interest in the timely assertion of these and other issues, and it waives virtually any constraints on the defendant's rights of discovery against the prosecution.¹¹⁶ In its version of exempting mentally retarded persons from the death penalty, the Illinois statute goes even beyond New York law in laying out an elaborate and generous setoff criteria to determine retardation, along with a set of statutory invitations—written with sledgehammer subtlety—for the parties to introduce the evidence of retardation at any time during or even after the trial.¹¹⁷

But there is more to the Illinois statute. In an act of gratuitous legislative symbolism, the new law adds the statutory mitigating circumstances of “extreme emotional or physical abuse” and “reduced mental capacity.”¹¹⁸ Note that in the wake of *Lockett*, it is not necessary to add by statute any mitigating evidence that bears on the defendant's character, record, or offense—the trial court would have no power to refuse to admit evidence of these matters even absent any statutory authorization. Indeed, it is not even clear that the statutory provision would enhance the specificity of any jury instruction on these matters. So what purpose does this provision serve? Perhaps it is a public admonition to, and apology for, the past omissions of capital defense lawyers. Or possibly it is an expressive act, unconcerned with any legal effect.

The Illinois law mirrors the New York statute in the enactment of a highly exquisite balancing test for the ultimate death decision. Thus, whereas the statute had previously been at the restrictive end of the continuum for guided discretion statutes (“there are no mitigating factors sufficient to preclude the imposition of the death sentence”¹¹⁹), it now declares that the jury may only impose death if “after weighing the factors in aggravation and mitigation,” it finds that “death is the appropriate sentence.”¹²⁰ The absurdly vague but delicate word “appropriate” is itself a subtle invitation for nullification. Finally, in perhaps the most remarkable substantive provision of the new law, the appellate court itself is allowed to vacate the death sentence if finds it to be “fundamentally unjust as

is offered outside state law deadline).

116. 725 ILL. COMP. STAT. 5/114-13(b).

117. *Id.* at 5/114-15, 5/122-2.2. Somewhat oddly the statute allows *any party* to raise the issue. Most of the statute is a fairly mundane description of what any judge would have to do anyway—a pretrial hearing, and the appointment of an expert. And the issue can be raised at any time, pretrial or during the penalty phase, though if done at this later phase the rules on appointment of experts change slightly, putting more burden on the defense.

118. 720 ILL. COMP. STAT. 5/9-1 (c)(6), (7).

119. *Id.* at 5/9-1(h) (repealed 2003).

120. *See id.* at 5/9-1(g).

applied to the particular case . . . independent of any procedural grounds for relief."¹²¹ This invitation to judicial nullification, in effect, turns Justice Harlan's original *McGautha* admonition on its head.¹²² It enables appellate judges to grant mercy to otherwise properly sentenced capital defendants because, in the view of the appellate court, the technical and procedural rules by which they were supposed to monitor capital sentencing could not capture the moral concerns that society demands.

But the Illinois General Assembly has taken still more drastic steps. Whereas the New York statute had only mildly stepped outside the normal boundaries of death penalty legislation by tacking on a jury qualification rule, the Illinois statute legislates huge changes in the criminal procedure rules governing the Illinois police generally. First, the statute takes the unique step of enacting unusual new requirements for videotaping interrogations and other procedural devices that were implicated in the supposedly wrongful convictions.¹²³ In particular, it sets up a pilot program to test state-wide videotaping of confessions by or interrogations of all first-degree murder investigations.¹²⁴ That limitation to first degree murder is interestingly ambiguous. It suggests that the legislature wanted to make any new requirement for videotaping applicable only in death penalty cases, but it had to speak in terms of first-degree murder because it may not be clear at the interrogation stage whether the state will ever bring a capital charge.¹²⁵ Whether this limitation proves under- or over-inclusive will yet be seen, and so the legislature may have only negligently adverted to the possibility that it was reforming state criminal justice beyond the scope of the death penalty.

On the other hand, the new law quite purposefully extends to all criminal investigations, for all crimes, complex new regulation of line-ups and restrictions on accusation by informant or uncorroborated

121. *Id.* at 5/9-1(i).

122. *See supra* note 53 and accompanying text.

123. 20 ILL. COMP. STAT. 3930/7.2.

124. *Id.* at 3930/7.2(9).

125. Generally, first-degree murder is any killing done without lawful justification, if committed intentionally or with extreme recklessness towards human life, or in the act of committing or attempting an independent "forcible felony". 720 ILL. COMP. STAT. 5/9-1(a). It can then be a capital murder if the state proves any of several specified aggravating circumstances. *Id.* at 5/9-1(b). A killing meeting the definition of first degree murder is reduced to second degree murder if the killer acted under a "sudden and intense passion" or in response to "serious provocation by the person killed" or where the killer sincerely but unreasonably believed the killing was legally justified. *Id.* at 5/9-2.

eyewitness,¹²⁶ all going far beyond any constitutional requirements.¹²⁷ The special statutory restrictions on the use of jailhouse informants—even if they do not violate the Sixth Amendment¹²⁸—are essentially apologies for the whole history of abuses by the Illinois police. And the new law even includes new rules on the decertification of police officers if they have engaged in perjurious behavior—this set of rules designed for the middle-broad category of any “homicide” investigation. In effect, it creates a civilian review board, replete with a whole new administrative structure,¹²⁹ itself essentially a combination of a code of civil procedure, a civil service manual, and a new substantive law of perjury, all attached to a death penalty law.

The Illinois statute marks the first time that death penalty legislation has been the vehicle for such sweeping reforms in the legal supervision of police conduct generally. In its efforts to cure the ills of the system which Governor Ryan cited,¹³⁰ the legislation has, in effect, done what Justice Powell half-did, in *apologia*, in the *McCleskey* opinion, and then said he wished he could do, in full act of judicial contrition, when he later expressed regret over that decision—it apologizes for the past administration of criminal justice in Illinois.

CONCLUSION

As this Essay has suggested, the relationship of mercy and justice is complex and contested, and the Ryan commutation has provoked some intriguing new questions about that relationship. Some might view the commutation as an act of grace wholly outside the field of justice. But Governor Ryan surely had *some* notion of justice in mind—in effect, he thought the death sentences he was commuting

126. 725 ILL. COMP. STAT. 5/107A-5.

127. Constitutional restrictions on line-ups are minimal. *Wade v. United States* imposes a Sixth Amendment right of counsel—but only in the rare cases where the subject of a line-up has already been formally charged with the crime. 388 U.S. 218, 237 (1967). Otherwise, line-ups are subject to only vague and fact-specific due process standards to prevent “impermissibly suggestive” line-ups. See *Manson v. Braithwaite*, 432 U.S. 98, 109–14. (1977).

128. The only constitutional restrictions on the use of prosecution informants are a vague balancing test for disclosure of informant identities at trial (rarely an issue in capital cases), see *Roviaro v. United States*, 353 U.S. 53, 62 (1957), and Sixth Amendment restrictions on testimony from informants who were acting as police agents when they encountered the accused and who “deliberately elicited” inculpatory statements from them, see *United States v. Henry*, 447 U.S. 264, 274–75 (1980).

129. 50 ILL. COMP. STAT. 705/6.1.

130. See Governor George Ryan, Speech at the Northwestern University School of Law (Jan. 11, 2003) (on file with the North Carolina Law Review).

had been unjust, if not technically illegal. Critics of his action might therefore view his act of mercy as *violating* justice by invoking the wrong legal principles or exercising unwarranted legal authority.

But the commutation might also be viewed as a very distinct type of mercy, though one with a certain pedigree in American death penalty law. That is, it can be seen as an apology for systemic injustice, and in that regard it bears an interesting relationship to the legislation it produced. That legislation is itself an act of *prospective* mercy in the sense that it will probably spare from the death penalty defendants who would otherwise receive it and, under the older law, deserve it. All legislation changes law, but in the wake of the commutations, this new legislation means not just to change the law but to confess error in entire legal system. On the other hand, by taking the approach of reforming, without ending, the death penalty, the legislature's act of mercy might end up ensuring that future deaths sentences and executions will be immune to claims of individual mercy, because the legal system will have assimilated its merciful sense of justice into its own mechanisms. Whether this will happen and whether it would be a good thing are as contestable as the question with which this Essay began: What does mercy *do*?