Showing Mercy Through a Presumption of Retribution

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Introduction

Comparative law scholars often contrast European and American approaches to criminal law by noting the far harsher nature of most U.S. punishments. Not only does the United States retain the death penalty, a penalty long since abandoned in Western Europe,[1] but prisons in the United States house more than 200,000 prisoners sentenced to life terms or their practical equivalents.[2] Over 50,000 of these prisoners have no possibility of parole.[3] In Europe, by contrast, a whole life sentence is extraordinary.[4]

Professor James Whitman attributes this punitive chasm between continents to a divide in principle. In Western Europe, cultural and judicial norms center on what Whitman calls "a presumption of mercy."[5] Defendants in Europe enjoy not only trial safeguards to avoid wrongful conviction, but protections after conviction against debilitation and dehumanization by the state's penal apparatus. In the United States, by contrast, the focus is on a "presumption of innocence," and concern for innocence brings a significant array of trial protections to the accused. After conviction, however, protections dissipate for the defendant in an American court, and he faces a

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1. DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 13 (2010) ("The American death penalty . . . is the only capital punishment system still in use in the West.").

2. Michael M. O'Hear, *The Beginning of the End for Life Without Parole?*, 23 FED. SENT'G REP. 1, 4, 7 (2010) (noting "an emerging international consensus against [life without parole]"); ASHLEY NELLIS, THE SENT'G PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE SENTENCES 4 (2021), https://www.sentencingproject.org/app/uploads/2022/08/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf [https://perma.cc/8EC6-JLPE] ("The number of people serving life without parole . . . is higher than ever before, a 66% increase since our first census in 2003 . . . .").

3. NELLIS, *supra* note 2, at 32.

4. In England and Wales, for example, "[t]here are currently 64 people serving a whole life sentence." MATTHEW HALLIDAY, PRISON REFORM TR., BROMLEY BRIEFINGS PRISON FACTFILE 14 (2023), https://prisonreformtrust.org.uk/wp-content/uploads/2023/02/January-2023-Bromley-Briefings.pdf [https://perma.cc/C8TR-ZF5A]. Most "life" sentences usually allow for eventual release—even if they are labeled "mandatory life." *See id.* ("People serving mandatory life sentences are spending more of their sentence in prison. On average they spend 18 years in custody, up from 13 years in 2001."); *see also* NELLIS, *supra* note 2, at 32 ("Life without the possibility of parole (LWOP) is virtually unheard of in the rest of the world.").

5. James Q. Whitman, Presumption of Innocence or Presumption of Mercy?: Weighing Two Western Modes of Justice, 94 TEXAS L. REV. 933, 934 (2016).

harsh sentencing regime and the possibility of many years, or even a lifetime, in the dehumanizing and dangerous conditions of a state or federal prison.[6]

Whitman leaves little doubt that he prefers the European presumption of mercy and more broadly, the European approach to punishment.[7] He urges us to consider the continental approach with "an open mind,"[8] but elsewhere implies that the United States today is too fundamentally oriented toward retribution to offer much room for mercy or moderation.[9] If America wishes to build a more humane and just criminal legal system, he warns, it must first forego its focus on blame and retribution.

And yet, without blame, what is the role for mercy? Surely Whitman is right that a criminal justice system oriented more toward rehabilitation might dispense less harsh punishments (though perhaps not less lengthy ones).[10] But mercy in its narrowest and arguably most virtuous sense requires reference to retribution, for this mercy is the *withholding of deserved punishment*.[11] As C.S. Lewis explains: "The essential act of mercy [i]s to

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6. *Id.* at 942. As Whitman posits:

> You may enjoy more far-reaching evidentiary protections in an American courtroom than in a continental one, but once you are convicted, the American state is much more likely to condemn you to years, decades, or even life in a violent and degrading prison with limited hope of parole, or no hope at all.

Id.

7. *See id.* at 935 ("The continental mode of justice . . . is better suited to creating a just criminal justice order for the modern world.").

8. *Id.*

9. James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85, 95 (2003) ("It is not entirely an accident that retributivism has come to the fore during the period of our crackdown [on offenders]. Of course there is something 'American' about a philosophy of blame—which makes it all too unsurprising to find retributivism flourishing at the end of the American twentieth century."); *id.* at 92 ("Actors throughout the [U.S.] system, from prosecutors to judges to representatives on all levels of government, make political careers by running on tough-on-crime platforms. Talking about crime is a way of exciting voters in America, and that is not achieved by advocating sobriety and moderation.").

10. C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224, 224 (1953) (arguing that a non-judgmental, treatment-oriented approach to crime—what Lewis dubs a "humanitarian theory of punishment"—is claimed to be "mild and merciful," but in fact "disguises the possibility of cruelty and injustice without end").

11. Mary Sigler, *Equity, Not Mercy*, *in* THE NEW PHILOSOPHY OF CRIMINAL LAW 231, 232 (Chad Flanders & Zachary Hoskins eds., 2016) ("[E]xtending mercy means failing to give some offenders the punishment they deserve . . . ."); Jean Hampton, *The Retributive Idea*, *in* FORGIVENESS AND MERCY 111, 161 (1988) ("Compare God to a parent meting out punishment to a beloved child. Like any parent, he is merciful not because it is just to be so . . . but because his love for the wrongdoer makes it appropriate for him to be so."); Jeffrie G. Murphy, *Mercy and Legal Justice*, *in* FORGIVENESS AND MERCY 162, 166 (1988) (describing mercy as "best viewed as a free gift—an act of grace, love, or compassion that is beyond the claims of right, duty, and obligation"); R. A. Duff, *The Intrusion of Mercy*, 4 OHIO ST. J. CRIM. L. 361, 364 (2007) ("[M]y concern is with the kind of mercy that involves mitigating or remitting the sanction that is, from the perspective of the criminal law and the factors that it recognises are relevant, fully deserved—with mercy as something distinct from rather than a refinement of criminal justice.").

pardon; and pardon in its very essence involves the recognition of guilt and ill-desert in the recipient. If crime is only a disease which needs cure, not sin which deserves punishment, it cannot be pardoned."[12] If a defendant is blameless, sparing him punishment is not an act of grace. If a defendant owes society no debt, no debt can be forgiven.[13]

A retributive focus on desert is not a roadblock to mercy but its starting point. In fact, clarity as to retributive desert[14] is the necessary platform for mercy. Recognition of retributive desert opens an opportunity for withholding punishment, *yet without denying wrongdoing.* Under these circumstances, mercy has meaning and virtue precisely because it is an act of undeserved grace. In this sense, mercy differs from "equity," as Mary Sigler has explained.[15] Whereas equity requires tempering an unduly harsh general penalty in light of the particulars of a specific case, mercy entails "going outside considerations of moral justice or equity, and treating a person more leniently than is generally thought warranted by her overall deserts."[16]

To those who consider retributive justice an absolute obligation or the highest good in criminal justice, mercy may seem unjust and impermissible. But for those who see retribution as a moral good, but not the only moral good, mercy too can play an important role in elevating human society. A society that has strong moral norms does not always need to impose deserved punishment in order to recognize and condemn wrongdoing. Stating and

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12. Lewis, *supra* note 10, at 229–30.

13. *See, e.g.*, Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 483 (1968). As Morris explains:

> It is this conception of 'a debt owed' that may permit, as I suggested earlier, under certain conditions, the nonpunishment of the guilty, for operative within a system of punishment may be a concept analogous to forgiveness, namely pardoning. . . . What is clear is that the conceptions of 'paying a debt' or 'having a debt forgiven' or pardoning have no place in a system of therapy.

Id.

14. This Essay uses the phrase "retributive desert" to invoke the retributivist claim that punishment is justified to the extent—and only to the extent—that an offender deserves it. *See, e.g.*, Kent Greenawalt, Commentary, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 347 (1983) ("[A] retributivist claims that punishment is justified because people deserve it . . . ."); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 595 (2005) ("[R]etributive theory punishes in direct proportion not just to the actual or threatened harms associated with the offender's prior crime(s) but also to his culpability (intent, motive, role in the offense, diminished capacity, etc.).").

15. Sigler, *supra* note 11, at 232 ("Equity, like mercy, operates in the realm of discretion, but, unlike mercy, equity aims at justice, for '[e]quity involves weighing all justice-visible properties' in order to reach a fully just decision." (quoting Andrew Brien, *Mercy Within Legal Justice*, 24 SOC. THEORY & PRAC. 83, 95 (1998))); *see also* RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 127 (2019) (describing power to grant clemency and pardons as "corrective[s]" to overly broad and harsh general laws).

16. Sigler, *supra* note 11, at 240 (quoting Andrew Brien, *Mercy Within Legal Justice*, 24 SOC. THEORY & PRAC. 83, 94 (1998)). Sigler notes that "at least some of what is sought in the name of mercy actually sounds in equity." *Id.* at 243.

denouncing the wrong in clear terms may sometimes be enough, especially when the absence or reduction of punishment is explained as an act of grace unrelated to the culpability of the offender. A wrongdoer who expresses extreme remorse for his offense and strives to make up for the harm he has caused, for example, has already recognized his wrongdoing, and his actions have affirmed to society the wrongfulness of his transgression. Though punishing such an offender still would be retributively just, he and society are not obviously harmed by withholding or reducing his formal punishment. And even if some harm results—perhaps the victim feels unsatisfied by state condemnation without penal suffering—that harm is at least offset by the educational value and virtue of the act of mercy. Acts of mercy, whether by individuals or by state actors, remind us that there can be greater good in demanding less than that to which one is formally entitled. The mercy-giver, in foregoing recompense, affirms the shared humanity that exposes both giver and recipient to pain, suffering, and moral error. Without denying the guilt or culpability of the defendant, the mercy-giver embraces the wrongdoer as enduringly human, someone whose suffering remains of shared concern. Mercy is an undeserved act of human relationship, inviting solidarity in a way that a categorical demand for retribution cannot replicate.[17] Especially today, as America faces political polarization and cultural fracture, we should make space for such empathetic human encounter.[18]

In a society that sees justice as strength, it is important to underscore that mercy is not weakness. To the contrary, a grant of mercy is a sign of power—a sign that society is sufficiently confident in its social fabric and moral norms that it can afford not to demand every bit of deserved punishment. A grant of mercy shows that society is not threatened (in terms of safety or its moral norms) by undeserved acts of moral grace.

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17. In the words of Pope John Paul II:

> [M]ercy [i]s an indispensable element for shaping mutual relationships between people, in a spirit of deepest respect for what is human, and in a spirit of mutual brotherhood. It is impossible to establish this bond between people, if they wish to regulate their mutual relationships solely according to the measure of justice.

John Paul II, Encyclical Letter, *Dives in Misericordia* (Nov. 30, 1980), https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_30111980_dives-in-misericordia.html. [https://perma.cc/HAS9-GHE5].

18. *Cf.* Carol S. Steiker, *Tempering or Tampering? Mercy and the Administration of Criminal Justice*, *in* FORGIVENESS, MERCY, AND CLEMENCY 30–31 (Austin Sarat & Nasser Hussain eds., 2007) (noting that "social and systemic tendencies toward attitudes of smugness and even satisfaction in punishing 'evil' . . . are always latent in a society with deeply rooted religious attitudes toward personal responsibility for sin," and advocating for "the ideal of mercy—taken quite self-consciously from the very religious tradition that contributes to retributivism's ratchet" toward severity as a "necessary counterbalance").

I. Adopting a Rebuttable Presumption of Retribution

This Essay proposes a path toward the systematic consideration of mercy in American sentencing. America does not have to choose between retributive blame on the one hand and nonjudgmental mercy on the other. Inspired by Whitman's description of the European "presumption of mercy," America can implement a presumption of its own—one that opens the door to the nonarbitrary exercise of mercy, while retaining a clear focus on retributive desert. Such a presumption, tailored to American political realities and moral norms, might be called a "presumption of retribution"—and this presumption could be codified in law while explicitly made rebuttable in favor of mercy to the extent consistent with the state's duties to the safety of its citizens.

Such a statutory "presumption of retribution" would clarify the priority of retribution over other legislative sentencing objectives, while opening a space for mercy. Despite America's cultural focus on retributive desert, state and federal sentencing statutes rarely express a clear preference for retribution over other, usually utilitarian, sentencing objectives[19] (though judges on their own may prioritize retribution). As the drafters of the Model Penal Code explained, sentencing statutes usually describe retributive proportionality "as one important objective alongside a number o[f] others, including one or more of the crime-reductive utilitarian purposes"[20]—but leave it "unclear what result is intended when proportionality in punishment conflicts with another statutory goal of sentencing, such as the rehabilitation

19. *See* ALA. CODE § 13A-1-3 (2015) (prioritizing public safety and fairness over retributive sentencing objectives); COLO. REV. STAT. ANN. § 18-1-102.5 (West 2023) (listing retribution as just one of many objectives, including fairness, deterrence, and rehabilitation); DEL. CODE ANN. tit. 11, § 201 (West 2015) (prioritizing public safety, deterrence, and rehabilitation over retributive sentencing objectives); HAW. REV. STAT. ANN. § 706-606 (West 2023) (listing retribution as just one of many objectives, including deterrence, public safety, and rehabilitation); MASS. GEN. LAWS ANN. ch. 211E, § 2 (West 2023) (same); NEB. REV. STAT. ANN. § 29-2322 (West 2016) (same); N.J. STAT. ANN. § 2C:1-2 (West 2023) (same); N.Y. PENAL LAW § 1.05 (McKinney 2009) (same); N.C. GEN. STAT. ANN. § 15A-1340.12 (West 2021) (same); N.D. CENT. CODE ANN. § 12.1-01-02 (West 2021) (same); OHIO REV. CODE ANN. § 2929.11 (LexisNexis 2024) (listing retribution as one of three objectives, along with public safety and rehabilitation); MISS. CODE ANN. § 99-19-153 (West 2024) (listing public protection as well as restitution for the victim as primary objectives); OR. REV. STAT. ANN § 161.025 (West 2024) (embracing sentencing goals of public safety, proportional penalties, and rehabilitation); OKLA. STAT. ANN. tit. 22, § 1514 (West 2021) (listing retribution as just one of many objectives, including public safety, rehabilitation, and restitution); TEX. PENAL CODE ANN. § 1.02 (West 2021) (listing retribution as just one of many objectives, including fairness, deterrence, and rehabilitation); *see also* State v. Klinetobe, 958 N.W.2d 734, 741 (S.D. 2021) ("Courts should consider the traditional sentencing factors of retribution, deterrence—both individual and general—rehabilitation, and incapacitation.").

20. MODEL PENAL CODE: SENT'G § 1.02(2) reporters' note (AM. L. INST., Proposed Final Draft 2017).

or incapacitation of an offender."[21] Some states expressly leave the choice of how much to prioritize retribution or other sentencing goals up to judges.[22]

A rebuttable presumption of retribution would reduce this ambiguity by making retributive proportionality the default priority over utilitarian benefits achieved by lesser punishments.[23] But the presumption should only be the default and one expressly made by statute to be rebuttable upon persuasive evidence in favor of mercy. Retribution would end up establishing not only the upper penal limit—reflecting the bedrock principle that no person should be punished more than he deserves[24]—but also serving as a presumptive metric for the quantity and kind of appropriate punishment.

In a sense, the proposed presumption would be a relatively minor adjustment to present law in most states, which already embrace retributive proportionality and instruct sentencing judges to pursue it.[25] In another sense, however, the proposed approach would make a clear and crucial statement as to mercy as a sentencing *good*, one that is worth pursuing under at least some circumstances. Present statutory sentencing law—at least outside the death penalty realm—does not explicitly address mercy. This does not mean that mercy is never granted by sentencing courts, but rather that judges are left to determine for themselves its permissibility. Some judges may decide to extend mercy at least on occasion. Other judges may interpret statutory silence as to mercy—in stark contrast to the statutory embrace of retribution and other goals—to mean that mercy is categorically inappropriate. By explicitly embracing mercy as a sentencing concern, legislatures can clarify

21. *Id.*

22. *See, e.g.*, CAL. RULES CT. 4.410 (instructing the sentencing court to choose on its own "which objectives are of primary importance" if, in a particular case, statutory sentencing goals "suggest inconsistent dispositions").

23. This presumption would align with the American emphasis on retribution. It is worth noting that when the American Law Institute recently revised the Model Penal Code's sentencing provisions to better align with contemporary American penal priorities, it established retribution as the primary goal of sentencing. MODEL PENAL CODE: SENT'G § 1.02(2)(a)(i) (2023) (requiring "sentences in all cases" to be "within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders" and urging consideration of utilitarian sentencing goals only within the bounds of retributive desert).

24. *See* Marah Stith McLeod, *Preventing Undeserved Punishment*, 99 NOTRE DAME L. REV. 493, 501, 508 (2023) [hereinafter McLeod, *Preventing Undeserved Punishment*] (describing how, under American statutory and case law, "desert serves not only as the bedrock predicate for criminal liability per se, but as a constant penal aim both constraining and justifying sentencing decisions" and proposing reforms to judicial sentencing procedure to more effectively enforce desert as a limit on punitive severity); Marah Stith McLeod, *A Democratic Restraint on Incarceration*, 76 FLA. L. REV. (forthcoming 2024) (manuscript at 7–8) (on file with author) (arguing that trial juries, not judges, can best determine desert and that no sentence should be permitted above what a jury deems to be deserved)*; see also* MODEL PENAL CODE: SENT'G § 1.02(2) reporters' note (AM. L. INST., Proposed Final Draft 2017) (noting that American sentencing codes almost always embrace desert as "at least an implied—or potential—limit on sentence severity in pursuit of utilitarian objectives").

25. *See* McLeod, *Preventing Undeserved Punishment*, *supra* note 24, at 507 & nn.72–73 (quoting statutes prescribing deserved punishment and retributive proportionality).

that judges have not only discretion but also responsibility to consider mercy when evidence is presented in its favor.

Judges could still reach varied decisions on the propriety of mercy in any given case, but defendants could challenge a judge's total refusal to consider the possibility of mercy. Although the sentencing court's ultimate decision as to whether mercy is appropriate on the particular facts of a case should be reviewed with great deference,[26] review should be permitted to ensure that courts at least *consider* relevant any admissible evidence favoring mercy. Thus, the proposed approach is an argument *in favor* of embracing mercy as a recognized and legitimate goal of sentencing, though one that first requires a clear-eyed assessment of retributive desert.

Sentencing judges would therefore retain discretion to grant or deny mercy but would be obligated to exercise this discretion in accordance with the stated sentencing objectives of the legislature. Retribution would be the presumed priority unless a defendant presented evidence in favor of mercy sufficient to overcome the retributive presumption. Legislatures could offer courts guidance by enumerating factors that favor mercy—perhaps including remorse, efforts to repair harm done to the victim, extraordinary pain and abuse in the defendant's life, acts of moral heroism by the defendant, or an impending tragedy in the defendant's life (such as discovery of a child's terminal illness).[27] Legislatures should not attempt, however, to exhaustively list the factors that may favor mercy—that task would be impossible and could be misleading (because isolated facts may favor mercy in one context but not in another).[28]

Against mercy, legislatures could list relevant factors as well, such as if mercy would impair a defendant's understanding of his wrongdoing and likelihood of remorse. Mercy also might conflict with the state's duty to guard its citizens from known threats to their safety. Suppose a defendant who has been convicted of assault expresses sincere remorse for the attack and gives all his funds to aid in the victim's recovery. Such remorse and restitution might invite mercy. However, if the defendant is violent and

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26. Authorizing judicial review of exercises of mercy will tend "to depress mercy," as Rachel Barkow has rightly observed. Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1365 (2008). To avoid this chilling effect, states might make the *final* mercy decision entirely unreviewable, allowing only appellate *procedural* review as to whether a trial court duly recognized retribution as the presumptive but rebuttable priority, considered any evidence for (and against) mercy, and fulfilled its duty to weigh the good of mercy against any competing public safety needs.

27. Reasonable people may debate whether certain facts are relevant to mercy or to desert. Defining desert—and what facts bear and do not bear on it—is a challenging but essential task for any sentencing regime based on desert as a justification and limiting principle. *See infra* note 36.

28. *See* Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFFS. 83, 119 (1993) (arguing that "categories for mitigation should not be codified in advance" because "it will be impossible for such a code to anticipate adequately the countless ways in which factors interweave and bear upon one another in human reality").

remains dangerous to society, mercy could endanger innocent others (including the defendant's prior victim). In such a case, the court may have a moral duty to deny mercy in order to protect others. Indeed, legislatures may codify this point expressly, making the presumption of retribution rebuttable in favor of mercy *only to the extent* that withholding deserved punishment would not endanger anyone.

The proposed approach would not *guarantee* mercy; it would simply recognize mercy as a legitimate social good and systematize the *consideration* of mercy in criminal sentencing. Sentencing judges (and sometimes sentencing juries) would still need prudence and discretion to assess whether the facts and circumstances of the case call for mercy and whether the state can grant mercy without betraying any higher obligations to the safety of its citizens or the well-being of the defendant. All sentencing judges should be authorized and required to make these assessments regarding the propriety of mercy whenever a defendant presents evidence for mercy. Mercy should not creep into judicial analysis only on sporadic occasions or silently, as if it were an act of secret lawlessness. Our law can make space for mercy not by forgetting the aim of retribution but by subtracting from its requirements.

A statutory presumption of retribution, rebuttable in favor of mercy, would mitigate potential legitimacy concerns with mercy in sentencing. In seeking to explain why American culture resists mercy for the convicted while going to great lengths to protect the innocent, Whitman points to America's populist "distrust of government" and "reflexive distrust of officialdom."[29] Americans have little difficulty protecting the innocent by

29. Whitman, *supra* note 5, at 955 (describing the hesitancy of Americans to assume the "superior wisdom" of state officials). Europeans, by contrast, put enormous trust in professional judges. *See, e.g.*, Johannes Riedel, *Training and Recruitment of Judges in Germany*, 5 INT'L J. FOR CT. ADMIN., Oct. 2013, at 42, 43, 44, 48, 49 (2013) (explaining how Germany uses judicial appointment commissions and staff managers of ministries of justice to select career criminal-court judges based on professional competence, exam results, personal competence, and social competence). The European approach to judicial selection differs markedly from that of the United States, where trial court judges are usually chosen by popular vote. *See Significant Figures in Judicial Selection*, BRENNAN CTR. FOR JUST. (Apr. 14, 2023), https://www.brennancenter.org/our-work/research-reports/significant-figures-judicial-selection [https://perma.cc/UCG3-L6JA] ("Nonpartisan elections are used to select judges to trial courts in 21 states . . . . Partisan elections are used in 11 states to select judges to state trial courts."). In some states, lay juries even make sentencing decisions in non-capital felony cases. ARK. CODE ANN. § 5-4-103 (West 2023); KY. REV. STAT. ANN. § 532.055 (West 2011); MO. ANN. STAT. § 557.036 (West 2017); OKLA. STAT. ANN. tit. 22, § 926.1 (West 2024); TEX. CODE CRIM. PROC. ANN. art. 37.07 (West 2019); VA. CODE ANN. §19.2-295 (West 2021). And in capital cases, jury sentencing is the norm. *When Jurors Do Not Agree, Should a Death Sentence Be Imposed?*, DEATH PENALTY INFO. CTR. (Sept. 13, 2023), https://deathpenaltyinfo.org/news/when-jurors-do-not-agree-should-a-death-sentence-be-imposed [https://perma.cc/KQ87-LBTP] ("In most states, a death sentence may only be imposed by a jury in unanimous agreement.").

restricting the ease with which the state may obtain convictions.[30] But to exercise mercy, Americans must empower state officials, such as sentencing courts, to withhold punishments approved by their elected legislatures. As Whitman explains, "mercy is inevitably more difficult for Americans to accept than exculpation, since it assumes the legitimacy and superior wisdom of paternalistic state officials in a way against which they tend to rebel."[31] However, a *statutory* presumption of retribution, made explicitly rebuttable by evidence in favor of mercy, would lend the people's imprimatur to the exercise of mercy. Statutory law would make clear that mercy *is* in fact a social good to be weighed alongside other social goods sentencing judges already must consider (normally including incapacitation, deterrence, rehabilitation, and retribution). Rather than deferring to the "superior wisdom" of judges as to mercy's value, this approach would *require* judges to treat mercy as an important concern.

Incorporating an explicit judicial opportunity for mercy would not conflict with a focus on retributive desert. To the contrary, desert would remain the first and primary question in sentencing procedure. If mercy has meaning by reference to retribution, then we must first determine desert before we can contemplate mercy. Present sentencing law, unfortunately, does not require a careful and independent assessment of desert; instead, it allows judges simultaneously to consider desert and utility.[32] I have explained elsewhere that failure to assess desert separately and expressly invites arbitrariness and confusion in criminal sentencing.[33] Ambiguity as to retributive desert also obscures the potential need and impact of mercy, decreasing mercy's moral inspiration and blunting the sympathetic connection it forges between giver and recipient. Unless mercy is highlighted in sentencing, a defendant who receives a lenient sentence may simply

30. *See id.* at 952. Explaining the American value of protecting citizens from wrongful convictions, Whitman states:

> We fear, understandably, that evils will transpire in the American investigative process; we share a cultural sensibility that imagines that the state is out to get us; and, committed to forestalling the conviction of the innocent and more broadly to preserving liberty, we agree—on both the American left and the American right—that we must make it difficult for the state to prove its case and difficult for the state to blacken the jury's perception of the defendant.

Id.

31. *Id.* at 950.

32. *See* McLeod, *Preventing Undeserved Punishment*, *supra* note 24, at 528 & n.171 (describing how sentencing laws allow judges to blend and blur consideration of desert and utility).

33. *Id.* at 528 (explaining how simultaneous consideration of desert and utility can obscure these incommensurate concerns); *see also* Marah Stith McLeod, *Communicating Punishment*, 100 B.U. L. REV. 2263, 2290 (2020) (critiquing sentencing decisions unaccompanied by explanation of how the sentences reflect desert and advance utilitarian goals).

believe that he has benefitted from a system error or that the state wants to conserve penal resources.[34]

Failure to consider desert apart from utilitarian goals can blur and distort the scope of retributive desert. A judge who believes a low penalty is appropriate for rehabilitation may subconsciously understate desert. A judge who deems a high penalty necessary for protection of society through incapacitation may exaggerate desert. These distortions can be reduced by requiring judges to consider desert first and alone, as I have argued in a prior article.[35] But I did not previously point out that a judgment of desert can naturally lead to a consideration of mercy. If a defendant presents evidence in favor of mercy, the judge must decide whether and to what degree it should trump the presumptive priority of retribution.[36] If he decides in favor of

34. Cost concerns can impact sentencing choices. Indeed, that was the hope of progressive Philadelphia District Attorney Larry Krasner when he ordered his line prosecutors to provide sentencing courts with a realistic calculation of the "actual financial cost" to taxpayers of any potential prison sentence. PHILA. DIST. ATT'Y'S OFF., NEW POLICIES (2018), https://phillyda.org/wp-content/uploads/2022/04/DAO-New-Policies-2.15.2018-UPDATED.pdf [https://perma.cc/7JBY-9GJE].

35. McLeod, *Preventing Undeserved Punishment*, *supra* note 24, at 531–36.

36. This proposal presupposes that some evidence will be relevant to mercy that is not relevant to desert. Yet how can judges determine whether evidence bears on desert or on mercy? For example, a man convicted of murder may present evidence that he was abandoned and abused as a child. These experiences may have scarred him emotionally and left him unable to empathize with others. By thus diminishing a psychological barrier to violence, does his background suffering now reduce his culpability for murder, making his background suffering relevant to desert, and not to mercy? Or is he fully culpable because he chose to kill, knowing it was wrong and illegal, making his undeserved childhood agonies a possible ground for mercy, but not relevant to desert?

Distinguishing the realm of desert from the realm of mercy will require philosophical judgments about free will. A person who strongly believes in free will may deem nature and nurture never to be an excuse, but instead possible grounds for mercy. Another person may believe that human choice is greatly constrained and influenced by nature and nurture, making most life circumstances relevant to desert rather than to mercy. The first belief will leave a larger opening for mercy, but the second need not close it entirely. As long as the defendant still deserves *any* punishment, mercy may remit some or all of it (to the extent permitted by public safety).

A state might decide—perhaps for practical reasons or to best reflect public moral intuitions—to define desert to exclude facts relating to nature or nurture that did not clearly contribute to the defendant's actions. The state might still allow such facts to be grounds for mercy. (This definitional approach could thus categorize some sentences as "merciful" that might, as a philosophical matter, be nothing more than the defendant deserves, all things considered. Nevertheless, a state might well decide that such a categorization is in practice an acceptable price to pay for a workable and democratically legitimate definition of desert in sentencing procedure—especially since the final sentencing outcome may depend very little on whether a reduction in sentence is categorized as excuse or as mercy.) Although a truly precise calibration of desert might encompass most background circumstances that would invite empathy for a defendant, the public's understanding of desert may be less refined and quicker to attribute blame. Some scholars have argued that the law *ought* to tether punishment to public conceptions of desert rather than deontological notions of desert. *See, e.g.*, Paul H. Robinson, *Empirical Desert*, in CRIMINAL LAW CONVERSATIONS 29 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan, eds. 2009) ("[U]nlike moral philosophy's deontological desert, empirical desert can be readily operationalized—its rules and

mercy, he should then go on to determine whether mercy would conflict with (and therefore must give way to) superseding state duties—especially the state's duty to protect public safety.

In his final sentencing decision, the judge should be explicit regarding any impact of mercy. For example, if a judge decides that a defendant deserves to spend two years in prison for his crime, but deems a merciful reduction of punishment to two years of community service to be warranted in light of the defendant's remorse, he should explain that in his sentencing decision. Such explanation will make the grant of mercy more transparent, will confirm that the judge has weighed the relevant evidence, and will underscore—to the defendant, to the victim, and to the public—that the defendant's act deserved condemnation and warranted his temporary loss of liberty, though that penalty was withheld as a compassionate act of grace. Over time, these individual invocations of mercy can form a common law of mercy that reflects both the community's right to punish and the community's capacity for compassion.

Through a rebuttable presumption of retribution, America can create a systematic and legitimate opening for mercy in criminal sentencing. By accepting both retribution and mercy as important goods, with retribution serving as the default priority, legislatures can make mercy a valid, explicit, and consistent consideration in American sentencing procedure.

II. Embracing a Practice and Theory of Mercy Suited to American Law

Although some scholars worry that America is myopically focused on meting out blame and retribution,[37] American law and culture in fact do not always insist on retribution over other goods.[38] Executive power to grant clemency and pardon, regardless of retributive desert, have long been part of

principles can be authoritatively determined through social science research into peoples' shared intuitions of justice.").

In any event, the philosophical and practical challenges of defining desert cannot be avoided by ignoring mercy as a sentencing concern. *Any penal system* that views desert as a normative constraint on permissible punishment must make judgments about the meaning and extent of desert. The present proposal to make space for mercy simply invites renewed consideration of what desert entails and does not entail.

37. *See, e.g.*, Ekow N. Yankah, *Punishing Them All: How Criminal Justice Should Account for Mass Incarceration*, 97 RES PHILOSOPHICA 185, 188–89 (2020) (arguing that unwinding mass incarceration requires turning away from the idea of desert); BARKOW, *supra* note 15, at 125 (attributing American penal severity to uninformed and unchecked "retributive impulses"); Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 STAN. L. REV. 77, 79 (2013) (objecting to the "deleterious effects of reliance on desert as the linchpin of punishment policy"); Whitman, *supra* note 9, at 106 ("The very activity of 'blaming' tends to excite people, and indeed to bring out unexpectedly savage and vindictive impulses.").

38. A secular model of criminal justice may deny any state obligation to approximate the divine justice of a retributive God, instead viewing the role of the state's penal system as protecting order and public safety in accord with the values of the people.

federal and state constitutional jurisprudence.[39] Unlike some European countries,[40] moreover, America does not have a principle of mandatory prosecution; instead, it permits prosecutors (and even the police) substantial discretion to decline charges for reasons unrelated to the guilt of the defendant, including mercy.[41] Moreover, in capital cases, as further discussed below, a narrative clearly calling for mercy in sentencing is part of current practice. As these examples confirm, America is not so wedded to retributive desert that it cannot see that other goods may, at least occasionally, be more important.

A presumption of retribution, rebuttable in favor of mercy, would be largely consistent with a model of limiting retributivism. In his leading exposition of limiting retributivism, Norval Morris argued that all sentences should be selected based on retributive proportionality.[42] However, Morris did not believe that desert offered a precise metric for calculating

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39. *See, e.g.*, U.S. CONST. art. II, § 2, cl. 1 ("The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."); *see also* United States v. Klein, 80 U.S. 128, 147 (1871) ("To the executive alone is intrusted the power of pardon; and it is granted without limit."); THE FEDERALIST NO. 74 (Alexander Hamilton). As Hamilton wrote:

> Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.

Id. State constitutions enshrine executive pardon powers as well. *See, e.g.*, TENN. CONST. art. III, § 6 ([The Governor] shall have power to grant reprieves and pardons, after conviction, except in cases of impeachment."); N.J. CONST. art. 5, § 2 ("The Governor may grant pardons and reprieves in all cases other than impeachment and treason . . . .").

40. *See* Joachim Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 468, 470 (1974) ("Compulsory prosecution, except where otherwise provided by law, is regarded as a German constitutional requirement based on the equal rights clause."). *But see* BVerfG, 2 BvR 2628/10, Mar. 19, 2013, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2013/03/rs20130319_2bvr262810.html [https://perma.cc/74LG-ANMK], *translated in* Federal Constitutional Court, 2 BvR 2628/10, Mar. 19, 2013, https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/2013/03/rs20130319_2bvr262810en.pdf?__blob=publicationFile&v=5 [https://perma.cc/TH63-88T3] (upholding the constitutionality of statutory provisions allowing plea bargaining in certain cases).

41. A defendant, for example, may offer valuable information about another offender in exchange for prosecutors dropping or reducing a charge. Prosecutors may also decline or reduce charges due to lack of evidence, investigatory limitations, or resource constraints—or out of mercy. *See* Barkow, *supra* note 26, at 1351 (discussing the "broad power" in prosecutorial discretion); William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1892 (2000) (arguing that prosecutorial discretion permits mercy); Lee Kovarsky, *Prosecutor Mercy*, 24 NEW CRIM. L. REV. 326, 327, 362 (2021) (arguing that local prosecutors should be given even greater power to show mercy through "prosecutor-driven sentence reductions").

42. *See* NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 157, 161 (1982) ("To the limiting retributivist, desert sets the outer limits, upper and lower, of punishment.").

punishment.[43] Instead, he argued that desert could be used to determine *end-points* of the appropriate sentencing range, above which a sentence would be clearly undeserved and therefore impermissible, and below which a sentence would be undeservedly lenient and therefore generally unwise.[44] Unlike whole-hearted retributivists, Morris believed that utilitarian goals should be consulted in order to determine an appropriate sentence within the not-clearly-undeserved range.[45] Invoking the principle of parsimony, Morris contended that for utilitarian and humanitarian reasons, the least burdensome penalty that would achieve legitimate goals should be imposed.[46] Morris believed that this approach was both theoretically defensible and "congruent with the widely held values and practices of judges and other system actors."[47] Limiting retributivism is now a leading paradigm for sentencing and is explicitly embodied in the sentencing provisions of the Model Penal Code.[48]

The proposed rebuttable presumption of retribution would align in significant respects with Morris's limiting retributivism. While focusing on retribution as a constraint on state-imposed punishment, it would consider utilitarian interests—in particular public safety—when deciding how much deserved punishment to impose. However, the proposed approach would clarify certain aspects of the limiting retributivism model and diverge from others. First, a presumption of retribution would treat desert as a sufficient

43. *Id.* at 148–49 ("It is rarely possible to say with precision, 'that is the deserved punishment.' All one can properly say, I submit, is 'that is not an undeserved punishment.' Desert defines a range of punishments.").

44. *Id.* at 150 ("[A] deserved punishment must mean a not undeserved punishment which bears a proportional relationship in the hierarchy of punishments to the harm for which the criminal has been convicted."); *id.* at 151 (explaining that the "proportional range of deserved punishments . . . often has to be quite wide").

45. *Id.* at 149. In his discussion of the relationship between moral desert and utilitarianism, Morris states:

> Desert justifies and limits eligibility for punishment; desert and utility combine to distribute punishments. The fine-tuning of sentencing, its distribution, is the result of a balance between social protection by deterrent and incapacitative (or social control) punishment, on one side of the scales, against the minimization of suffering by a parsimonious application of punishment on the other.

Id.

46. NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 60–61 (1974) ("The least restrictive—least punitive—sanction necessary to achieve defined social purposes should be chosen. . . . This principle is utilitarian and humanitarian; its justification is somewhat obvious since any punitive suffering beyond societal need is, in this context, what defines cruelty.").

47. RICHARD S. FRASE, JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM 84 (2013).

48. MODEL PENAL CODE: SENT'G § 1.02(2) reporters' note (AM. L. INST., Proposed Final Draft 2017) (explicitly noting that the Code's sentencing provisions were "borrow[ed] from" Morris's theory of limiting retributivism).

reason for punishment, even if a penalty were not otherwise useful.[49] This approach aligns with state and federal sentencing laws, which generally treat desert as an adequate justification for punishment. Second, the proposed approach would embrace mercy as a potential reason to sentence *below* even the retributive minimum. A principle of parsimony invoked by limiting retributivists like Morris, by contrast, would prescribe punishment *at* the retributive minimum if greater punishment were not needed for utilitarian ends.[50] In my proposal, the upper limit of punishment would be set by desert and the lower limit set by utility, with mercy operating between those two limits.

How frequently the proposed procedure would lead to actual grants of mercy would depend on several factors. States could influence the frequency of mercy by making the presumption of retribution easier or more difficult to rebut. A state amenable to frequent exercises of mercy could require only a preponderance of the evidence to favor mercy, for example.[51] A state leery

49. *Contra* MORRIS, *supra* note 45, at 75 ("The concept of desert is a necessary but not sufficient condition of the punishment of crime."). According to Jacob Bronsther, limiting retributivists who believe in enforcing (1) desert as a strict limit on permissible punishment and (2) the principle of parsimony can never support punishment above the retributive *minimum*—regardless of utilitarian benefits. *See* Jacob Bronsther, *The Limits of Retributivism*, 24 NEW CRIM. L. REV. 301, 309 (2021). But Bronsther's claim proceeds from two debatable premises: first, that desert is always imprecise, and second, that all points on the not-undeserved spectrum are equally retributively proportionate. The human mind may simply be unable to determine desert with precision, and we cannot therefore assert that all points on the possible desert spectrum are equally sufficient for retributive purposes. The principle of parsimony does not tell us why we should accept a risk of *understating* desert. The proposed rebuttable presumption of retribution, by contrast, invokes *mercy* as a sufficient good to justify withholding punishment that seems deserved (or at least not undeserved). Sentencing judges would not be obligated to impose the *least* potentially deserved penalty for those defendants who offer no persuasive argument for mercy.

50. MORRIS, *supra* note 46, at 78 ("The criminal law has general behavioral standard-setting functions; it acts as a moral teacher; and, consequently, requires a retributive floor to punishment as well as a retributive ceiling."). Morris sometimes suggested that the lower bounds of desert are more flexible than the upper bounds. *See, e.g.*, *id.* at 74 ("The criminal law applies a concept of desert which *sometimes* assesses the minimum of punishment the convicted offender must suffer if he is to be reaccepted as a member of society but *always* defines the maximum of punishment that may be inflicted on him." (emphasis added)). However, this asymmetric flexibility is a departure from Morris's basic idea that utility can guide sentencing *within the bounds* of desert. An approach that embraces both retribution and mercy as goods will more naturally allow for sentences below desert (without suggesting similar flexibility in desert's upper limit, of course).

51. As a simplification of the argument for clarity, the text discusses protection of public safety primarily in terms of incapacitation of dangerous offenders. It is worth noting that deterrence theorists believe that failure to impose punishment endangers others as well. *See, e.g.*, Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 706 (2006) (arguing that if recent studies are correct that capital punishment deters many murders for each execution, then "[s]tates that choose life imprisonment, when they might choose capital punishment, are ensuring the deaths of a large number of innocent people"). Deterrent effects of punishment, however, are notoriously difficult to demonstrate, particularly in individual cases. My own inclination would be to accept mercy even at some cost to deterrence, provided that mercy does not become the *norm* but remains the exception. Future offenders might then hope for mercy, but few could rationally expect to receive it.

of frequent mercy could erect a higher bar for mercy, such as by requiring compelling or clear-and-convincing evidence in favor of mercy. States could also alter the chances of mercy by narrowing or widening the scope of state concerns that should preclude mercy. At several points, this Essay has suggested that the state's duty to ensure public safety should restrict any grant of mercy. Courts should not grant mercy if this non-obligatory act of grace would release a dangerous offender to wreak predictable violence on particular citizens. But should mercy also be denied merely because punishment might enhance social order and prosperity—such as by fostering general deterrence of similar crimes? Answering this question would require more extensive exploration than is possible in this Essay. It would also turn upon the values and priorities of the affected community.

I consider general deterrence, for example, to be a weaker reason to deny mercy to a particular defendant than incapacitation if the latter is predicated on evidence that the particular defendant would otherwise commit violence against others. But others may weigh general deterrence more heavily, feeling a slightly increased risk to many to be a greater danger than a much more likely risk to a few. These are value judgments about the state's duties to the people, the importance of mercy, and the relative importance of social order, property rights, and other goods. Each jurisdiction must make such value judgments for itself.

III. Humanizing the Sentencing Process

Last but by no means least, the incorporation of a focus on mercy would add a humanizing element to the sentencing process. Whereas limiting retributivism and the principle of parsimony would train attention on reasons for punishment, a focus on mercy would contemplate more holistically the humanity and life of the defendant. The words the defendant would hear from the judge would often be ones of compassion and encouragement rather than only of condemnation.[52]

Even if a state were to adopt a restrictive standard for the exercise of mercy, the proposed approach would serve a crucial function. Not only would it affirm mercy as a legitimate good that sentencing judges must at least consider, but it would alter the sentencing process. Rather than centering solely on the criminal wrongs of a defendant, the sentencing process would expand to encompass a broader narrative of the defendant's life, character, and experiences, which, though not bearing clearly on his crime or culpability for that crime, nonetheless might call for empathy, understanding, and compassion. These narratives would serve as reminders that defendants in

52. A judge should always explicitly explain his sentencing decisions to the defendant in order to "affirm[] the dignity of the offender as a reasoning moral agent whose suffering must be premised on legitimate goals." McLeod, *supra* note 33, at 2267–68.

court are more than the crimes that they may have committed; they are enduringly human beings with reason and moral agency, capable of evil and capable of goodness, who have caused suffering and usually themselves suffered cruelties at the hands of others and fate.

Such humanization of the sentencing process would be valuable, even if mercy were rarely granted.[53] Under the present criminal justice system and in current culture, too little is done systematically to highlight the humanity of the condemned and invite sympathy. Media reports highlight sensational accounts of crime, for serious crimes impart curiosities and anxieties. Much less media interest tends to lie in the harsh conditions of defendants' childhoods, on the crimes they have themselves suffered, or in the remorse they may feel. Charges, trials, and convictions focus on crimes and often capture significant public interest. Sentencing—which could offer a fuller picture of the humanity of the offender—is often complex, technical, and obscure.[54] When sentencing guidelines require attention to mitigating factors, they rarely do so in a way that invites holistic consideration of a defendant's life story. Openness to mercy requires a focus on a defendant's life *narrative*, for as Martha Nussbaum writes: "[D]efendants a[re] inhabitants of a complex web of circumstances, circumstances which often, in their totality, justify mitigation of blame or punishment."[55] It is for the sake of this narrative and more holistic vision of the humanity of criminal offenders that we cannot flatten, narrow, constrain, or routinize the exercise of mercy to some limited set of predetermined conditions, such as expressions of remorse. The consideration of mercy must be open to the variation and complexity of the human experience.

Only in capital cases is that kind of narrative a core part of sentencing procedure. In capital cases, defendants may not be barred from presenting the jury with evidence of their character or record, including "compassionate or mitigating factors stemming from the diverse frailties of humankind" that

53. A closer look at the life of a defendant may not elicit compassion in every case, of course. Evidence may reveal, for example, that a defendant has lived a life of persistent cruelty and disregard toward others, or that he has boasted about his crime—contradicting his claim of sincere remorse. Because considering the defendant's life more holistically may reveal such character flaws and invite harsh treatment unrelated his charged crime, it is critical that courts first assess how much punishment the defendant deserves *for the crime he has committed*, thus setting a ceiling on morally permissible punishment.

54. *See, e.g.*, KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 169 (1998) (critiquing the mechanical nature of the federal guidelines); Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25, 27 (2005) (same). Some guidelines regimes do not purport to serve any primary purpose of punishment; the federal sentencing guidelines, for example, were simply pegged to "pre-guidelines sentencing practice." U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A, at 1–2, 7 (U.S. SENT'G COMM'N 2023).

55. Nussbaum, *supra* note 28, at 110–11 (summarizing arguments made by John Roemer).

might incline a jury toward life.[56] The Supreme Court has held that this rule reflects "the fundamental respect for humanity underlying the Eighth Amendment."[57] Thus, in capital cases, a defendant may introduce aspects of a defendant's life story that invite compassion, regardless of whether they bear on his culpability for the specific charged offense. The Supreme Court has taken this evidentiary approach only in capital cases, however, on the grounds that death is "qualitatively different" from all other penalties.[58] We should not, however, be so cramped in our willingness to look at the humanity and lives of defendants. The Supreme Court's decisions effectively open the door to mercy in capital cases. States should do the same in non-capital ones.

Perhaps counterintuitively, creating a rebuttable presumption of retribution could cast a more humanizing light on defendants than would a rebuttable "presumption of mercy." If a state adopted a presumption of mercy, rebuttable in favor of retribution, the state would have a powerful incentive to respond with evidence designed to create hostility and harshness toward the defendant. Informed by probation departments and state investigators, prosecutors could highlight wrongs and bad character from all chapters of the defendant's life. Rather than humanizing the defendant, the process could demonize him. Of course, prosecutors could introduce at least some of the same unfavorable evidence to overcome any argument for mercy, but a presumption of retribution would at least give the defendant the choice whether to raise the issue of mercy and invite such a response. The judge's consideration of mercy, moreover, would start with the defendant's sympathetic narrative, not the state's hostile counter-report.[59]

IV. Addressing Legitimacy Concerns

In this general proposal for a systematic embrace of mercy in criminal sentencing, readers may find a notable omission: victims play no stated role. At first glance, this may suggest a significant legitimacy concern. How can mercy be granted without involvement from those most directly aggrieved by crimes and most in need of retributive vindication? How can courts

56. Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion).

57. *Id.*

58. *Id.* at 305. Opponents of the death penalty have also sought more generally to humanize death row inmates, including by publicly recounting their life stories, histories of disadvantage, and acts of remorse, conversion, and atonement. *See, e.g.*, Michael L. Radelet, *Humanizing the Death Penalty*, 48 SOC. PROBS. 83, 83 (2001) (detailing the author's "experiences over the past two decades working with death row inmates" in order to help eliminate the inhumanity and immorality of capital punishment). Non-capital prisoners tend to receive far less attention.

59. A presumption of retribution would also be more politically palatable because it would allow legislators to affirm the priority of retribution and would place the burden on defendants to prove that mercy is warranted, more important than retribution under the circumstances, and consistent with the state's duties to public safety.

legitimately forgive a debt that is owed *to someone else*? One might think a victim should at least have a right to veto mercy. For several reasons, however, victims should not have such a right. First, our criminal justice system is not a tool of private justice, but an instrument for the good of the whole community. Even when prosecution in America was largely private, the penalties attached to crimes were set by law.[60] A victim could not demand a higher penalty than the law allowed,[61] or appeal a jury's decision to acquit a guilty defendant in order to avoid a penalty fixed by law that the jury deemed to be excessive.[62] Nor could a victim require mercy for a defendant once convicted.[63] Now that private prosecution has been supplanted by state prosecution in the interests of the community, we have even less reason to cede the choice of punishment to victims. The state has both the right to exact just punishment on behalf of the people as a whole, including the victim, and the related power to withhold deserved punishment for the sake of a greater social good.[64]

60. Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 821 (1968) ("Fixed penalties for many felonies were mandatory by common law or by statute."); *see also id.* at 822 (noting that executive pardons were used with some frequency to temper these mandatory penalties).

61. *Id.* at 822 ("[T]he only *right* of the man who had violated society's law was to be given a sentence not greater than that prescribed by the law he had violated."); *id.* (noting that executive pardons were granted as "a matter of grace rather than of right").

62. *See, e.g.*, Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 693 (2010) ("Ignoring the law to effect a more lenient outcome was well within the jury's role. In fact, several colonies explicitly provided for jury sentencing." (footnote omitted)); *id.* at 693 n.10 ("Blackstone called the jury practice of convicting of a lesser charge to mitigate against the death penalty as 'pious perjury.'" (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 238–39 (1749))); *id.* at 695 ("Unlike other common law countries, appellate review of sentences was extremely limited in American courts.").

63. Today, victims' rights laws give victims a right to be heard in regard to charging and sentencing decisions, but do not give victims power to veto or to mandate particular charging or sentencing decisions. The federal Crime Victims' Rights Act, for example, gives victims a "reasonable right to confer" with the prosecution, 18 U.S.C. § 3771(a)(5), and a "right to be reasonably heard at any public proceeding in the district court involving . . . sentencing," *id.* § 3771(a)(4). Such laws give victims "a voice, not a veto." United States v. Rubin, 558 F. Supp. 2d 411, 418, 424 (E.D.N.Y. 2008); *see also* United States v. Thetford, 935 F. Supp. 2d 1280, 1285 (N.D. Ala. 2013) ("Government prosecutors simply may not be commandeered to do [victims'] bidding."); *Understanding Victim Rights*, U.S. DEP'T OF JUST. (Jan. 11, 2024), https://ovc.ojp.gov/events/understanding-victim-rights [https://perma.cc/2RVK-MY69] ("Victims' rights are the way that victims are guaranteed a voice in the criminal justice system. Established by statute or constitution, the rights ensure that victims know about case proceedings and can share their views with the prosecutor and the court."); State v. Lara, 2 N.W.3d 856, 866 (Neb. 2024) (noting that victims' statutory "right to provide victim impact statements . . . does not limit a sentencing court's broad discretion to consider relevant evidence from a variety of sources when determining a criminal sentence").

64. The notion that the state has the right to exact just punishment does not mean that the state has some absolute moral obligation to do so. A secular democratic regime may be authorized by the

Courts may, of course, consider victims' views in their sentencing decisions. But they should be cautious. As Eric Muller writes: "We do not allow victims to sentence criminals because we lack confidence that [] victims would be 'fair' to their malefactors."[65] Jeffrie Murphy notes that victims "have a natural tendency to make hasty judgments of responsibility, magnify the wrong done to them, and thus seek retribution out of all just proportion to what is actually appropriate."[66] Victims may not be able to focus on factors that counsel in favor of mercy: they may not hear or believe a defendant's expressions of remorse; they may still be suffering so much hurt and anger from the crime that they cannot perceive or empathize with the suffering in the defendant's life. Furthermore, if victims are prone to "magnify the wrong done to them"[67] and "exaggerate the wrongfulness of the [defendant's] conduct,"[68] then even if they do approve some measure of mercy, they may still expect more punishment than the defendant can reasonably be said to deserve. Muller argues that judges already tend to sympathize more with victims than with offenders;[69] if victims already have sympathetic representation through the courts, they may not need additional power over the mercy decision. States should still give victims a voice and an opportunity to forgive their offenders if they choose, or to advocate for or oppose mercy, but victims should not have the power to veto a grant of mercy by a judge or a jury speaking for the community, nor should they have the power to compel such mercy. The state must decide whether mercy is consistent with the protection and order of society as a whole.

Skeptics of mercy in sentencing may believe that legitimacy concerns still remain. How can a single judge forgive the debt that an offender owes to the community as a whole? Even if judicial mercy is authorized by the legislature—as is proposed here—the ultimate choice to grant mercy will still require value judgments by a judge who may not share the norms of the community.[70] This objection applies more broadly to the assessment of retributive desert, which is also a moral question that judges may not always

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people to exercise prudential judgment in advancing competing social goods, and mercy at times may be more important than just retribution. I thus disagree with Jeffrey Murphy's assertion: "Judges in criminal cases are obligated to do justice. . . . There thus simply is no room for mercy as an autonomous virtue with which their justice should be tempered." Murphy, *supra* note 11, 173–74 (footnote omitted).

65. Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 SETON HALL L. REV. 288, 333 (1993).

66. Jeffrie G. Murphy, *Hatred: A Qualified Defense*, *in* FORGIVENESS AND MERCY, *supra* note 11, at 88, 100.

67. *Id.*

68. Muller, *supra* note 65, at 334.

69. *Id.* at 335–36.

70. As Rachel Barkow has explained, similar concerns have been raised against the executive use of clemency power and pardon. *See* Barkow, *supra* note 26, at 1350 (noting that critics object to the lack of a process to ensure that clemency decisions accord with the public interest).

answer in ways that accord with community values. Even when judges are selected by popular vote, they may not share the general moral norms of a community.[71] Thus, on moral questions like desert and mercy, judges may suffer from a lack of democratic legitimacy. As Justice Breyer has explained: "In respect to retribution, jurors possess an important comparative advantage over judges. In principle, they are more attuned to 'the community's moral sensibility,' because they 'reflect more accurately the composition and experiences of the community as a whole.'"[72] Albert Dzur notes that "[b]ecause of random selection procedures, juries are . . . more representative than . . . government bodies [including the legislature, sentencing agencies, and the judiciary], which significantly overrepresent white male Protestants from backgrounds of medium to high socioeconomic status."[73] If we want to enhance the legitimacy of the sentencing decision—not just any consideration of mercy but its bedrock justification in retributive desert—we should consider turning to juries rather than to judges.

Elsewhere I have argued that American sentencing as a whole would be improved and rendered more democratically legitimate if trial juries decided not only guilt but the permissible maximum punishment based on desert. The combined judgment of twelve jurors would ensure a richer snapshot of community norms than the moral perspective of a single judge. The pooling of experiences and insights from many distinct lives renders juries capable of greater depth of moral analysis,[74] and "better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments."[75]

71. PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. OF JUST., TASK FORCE REPORT: THE COURTS 50 (1967), https://www.ojp.gov/pdffiles1/Digitization/147397NCJRS.pdf [https://perma.cc/B5B7-JN8H]; *see also* Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137, 142–44 (2013) (recounting harms from socioeconomic bias in the judiciary). In jurisdictions where state judges are elected, election results may turn less on the match between a judge's moral perspectives and those of the community, and more on factors such as influential special interests. Darryl K. Brown, *Structure and Relationship in the Jurisprudence of Juries: Comparing the Capital Sentencing and Punitive Damages Doctrines*, 47 HASTINGS L.J. 1255, 1285–86 (1996). Even if judges stand for reelection after having made decisions about desert or mercy with which a community does not agree, voters may have independent reasons for reelecting them (or may neglect to vote).

72. Ring v. Arizona, 536 U.S. 584, 615 (2002) (Breyer, J., concurring) (quoting Spaziano v. Florida, 468 U.S. 447, 481, 486 (1983) (Stevens, J., concurring in part and dissenting in part)).

73. ALBERT W. DZUR, PUNISHMENT, PARTICIPATORY DEMOCRACY, AND THE JURY 141 (2012); *see* Tracey E. George & Albert H. Yoon, *The Gavel Gap: Who Sits in Judgment on State Courts?*, AM. CONST. SOC'Y FOR L. & POL'Y 7, https://www.prisonpolicy.org/scans/acs/gavel-gap-report.pdf [https://perma.cc/4BWU-THTR] (describing a 2014 study of state trial judges that found 57% were white men, 26% white women, 9% men of color, and 8% women of color).

74. *See* Jeremy Waldron, *The Wisdom of the Multitude: Some Reflections on Book 3, Chapter 11 of Aristotle's* Politics, 23 POL. THEORY 563, 564 (1995) ("The people acting as a body are capable of making better decisions, by pooling their knowledge, experience, and insight, than any individual member of the body, however excellent, is capable of making on his own.").

75. Atkins v. Virginia, 536 U.S. 304, 324 (2002) (Rehnquist, C.J., dissenting).

Moreover, because jurors must reach consensus decisions, they must engage in reasoned discussion with one another, taking into account each other's values and perspectives.

Juries may also be fairer and more open-minded in post-trial sentencing where judges have strong incentives to impose harsh punishments to encourage future defendants to plead guilty.[76] (A "trial penalty" helps judges more quickly clear their dockets.) Thus, defendants who have not received or accepted leniency from prosecutors through plea deals may be unlikely to receive mercy before judges. Jury decisions about desert and mercy, by contrast, would not be distorted by these incentives to promote plea deals and would be "free of the distortions of the political marketplace."[77]

Ideally, the jury would decide the upper limit of retributive desert at the outset of sentencing after trial, thereby establishing a ceiling on the defendant's sentence. The jury would then address the possibility of mercy. If a jury approved a certain measure of mercy, the judge would need to decide whether public safety (or other sufficiently important utilitarian sentencing goals) should override that call to mercy. Here the judge's role would mirror in key respects the role that judges already play in discretionary sentencing regimes, which require them to advance and balance competing retributive and utilitarian goals. But mercy would be in the mix as well—a mercy directly authorized by the members of the lay jury. Incorporating juries in sentencing could thus pave the way for more democratically legitimate decisions both as to desert and as to mercy. We should pursue such reforms. In the meantime, however, as long as we entrust judges to decide for the people the punishment that defendants deserve, we should also entrust them with the power to forego deserved but non-useful retribution in an act of mercy.

Conclusion

This discussion of democratic legitimacy and punishment norms began with James Whitman's contrast between a European emphasis on mercy and an American focus on retributive desert. We do not need to choose between mercy and retribution, however. In fact, by sharpening our focus on retributive desert, we can create a space for superseding acts of moral grace.

76. Voters often read sensationalized news reports of crime and fear violence; judges campaigning for election respond by promising to dispense justice through harsh sentences. These promises—and the electoral consequences of breaking them—may make judges hesitant to grant mercy even when they feel inclined in its favor.

77. DZUR, *supra* note 73, at 141.