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Bruce Ledewitz

Scott Staples

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THE ROLE OF EXECUTIVE CLEMENCY IN MODERN DEATH PENALTY CASES

*Bruce Ledewitz**

*Scott Staples***

When a governor commutes a sentence of death, typically to one of life imprisonment either with an extended mandatory term or without possibility of parole, how is this action to be understood? As former Governor Pat Brown's book about his commutation decisions illustrates,¹ in a period of widespread support for the death penalty, each commutation contains an appeal for popular support and understanding as to why the decision was made. Where the case for commutation cannot be made to the public's satisfaction, a governor is not likely to act.

Opponents of the death penalty have complained during the modern post-*Gregg v. Georgia*² era that governors rarely exercise their commutation power. It does appear that governors now commute death sentences less frequently than in prior periods. The infrequency may root in public officials' inability to place commutation in a context that is intelligible to the public.

Our ideas about commutation reflect the assumptions of an earlier death penalty era. As the nature of the death penalty changed, the justification for commutation should have, but has not, changed with it. The resulting conceptual incoherence goes beyond not having good reasons for commutation in a particular case and reaches the fundamental question of what is a satisfactory reason for commutation in the first place. A new understanding of commutation, if accepted by the public, could result in widespread use of the commutation process.

* Professor, Duquesne University School of Law.

** Assistant Professor of Psychology, Duquesne University.

1. EDMUND G. (PAT) BROWN WITH DICK ADLER, *PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW* (1989) [hereinafter BROWN WITH ADLER].

2. 428 U.S. 153 (1976).

A. *The Structure of Executive Clemency*

Although the word "clemency" applies to both reduction of a sentence and pardon of a conviction, obviously there is a tremendous difference between the two actions. There is also a dramatic difference between a reduction in a term of years and a commutation of a death sentence. In this paper, we discuss only commutation of a sentence of death to a term of years.

Typically, a governor has a great deal of discretion whether to commute a sentence of death. In some jurisdictions, the governor's commutation decision is entirely discretionary. This is also true at the federal level. On the other hand, in some states some other body must concur before a commutation can take place. Governor Brown writes of hearing at the end of his term from the Chief Justice of the California Supreme Court that a majority of the justices would concur in his decision to commute the death sentence of a prisoner with a record of prior felonies, fulfilling California's requirement of judicial approval. The chief justice explained that the justices concurred "because they know you won't be able to ask for any more."³

Even where a governor's authority to commute sentences is formally shared, a governor is likely, as a practical matter, to retain the dominant voice. In Pennsylvania, for example, the Governor cannot commute any criminal sentence without the recommendation of the Board of Pardons.⁴ Nevertheless, the Governor appoints several members of the Board⁵ and for that reason, or perhaps due to his general influence, the Board tends to follow the Governor's lead. In death penalty cases, Pennsylvania law apparently gives the Governor unlimited discretion to sign, or to not sign, a warrant of execution. Thus, no inmate can be executed without the Governor's active involvement. Although the precise forms vary in other states, the Governor typically retains a crucial role in the execution decision.

Given their considerable discretionary power, one would expect to see governors who are opponents of the death penalty liberally using the commutation power to block executions. This expectation has not been met. Perhaps there are no abolitionists in gover-

3. BROWN WITH ADLER, *supra* note 1, at 152.

4. PA. CONST. art. IV, § 9(a).

5. *Id.* § 9(b).

nors' mansions. Alternately, governors may assume that wholesale commutations would be political suicide. As Governor Brown has explained, part of the reason is the feeling that commuting all death sentences would violate a "trust to uphold [the] constitution and [the] laws . . ." of the State.⁶

It is odd that more governors do not seize upon their right to act upon grounds of general moral commitment. A governor who commutes death sentences on policy grounds does not frustrate the law any more than does a governor who vetoes a death penalty bill based upon personal opposition to underlying legislative policy. The legislature or the voters are free to rescind or limit such gubernatorial discretion. But where the discretion exists, it can be used on any basis that does not violate constitutional rights. In any event, although the straight abolition model of commutation is plausible, we will not discuss it in this paper. At least for the moment, that model does not exist.⁷

B. *The Changing Morality of the Death Penalty*

Historically, in America, the dominant death penalty structure was a mandatory penalty for certain classes of crimes, subject to executive review. The crimes for which death most commonly imposed were murder, rape and, later, kidnapping.⁸ This context shaped the American legal system's ideas about commutation.

Neither death penalty proponents nor abolitionists seem to understand the significance of mandatory imposition of the death penalty. Although state laws have moved away from mandatory capital sentences, death penalty proponents and the general public still tend to speak of acts whose performance merits execution. As will be discussed below, when imposition of the death penalty is not based upon an act deserving of death, then the legal system is relying upon judgments about the nature of a particular defendant

6. BROWN WITH ADLER, *supra* note 1, at 142.

7. The experience of Toney Anaya, Governor of New Mexico, comes closest to the abolition model. Governor Anaya commuted all death sentences at the end of his term, as a sort of good-bye to political life. More typical is the example of Dick Riley, Governor of South Carolina from 1982 to 1986. Though opposed to the death penalty, Governor Riley allowed executions to proceed throughout his term. His fear of political backlash was not unfounded. For example, it is widely believed that Michael DiSalle, Governor of Ohio, lost his 1962 race for re-election in large part because of six death penalty commutations. See Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 607-08 (1991).

8. These are the so-called "Little Lindbergh laws."

that are surely impossible to make.⁹ In contrast, a mandatory death penalty proclaims that certain criminal acts are deserving of death, regardless of the defendant's nature. Mandatory death penalties parallel a view of Biblical law and, in murder cases, they parallel the Biblical *lex talionis*, life for life.¹⁰

Where mandatory death penalties exist, executive commutation also functions biblically. Commutation is an act of grace in this context. Commutation is never deserved because the mandatory penalty dictates that death is deserved. A governor may consider factors suggesting a merciful sentence, such as particular difficulties in the prisoner's life at the time of the crime, a goading personal relationship with the victim, or the use of alcohol and drugs. Nevertheless, a prisoner has no right to have these factors considered. The legal system has determined that such inmates deserve to die for what they did.

The mandatory death penalty explains the traditional all-or-nothing approach to the insanity defense. For certain reprehensible crimes, if a sane prisoner "deserved" any punishment at all, that punishment was death. Conversely, a small class of mentally ill individuals did not deserve punishment at all. In this formulation, insane convicts are not treated as truly human. Unlike the general population, they are not regarded as capable of moral action. Most persons are held morally accountable for their acts, subject to the divine mercy that recognizes man's plight. In some cases, the agent of mercy is a governor.

The use of mandatory sentencing also explains why totally arbitrary acts of executive commutation were tolerated. A governor might grant hearings or not. A governor may study an inmate's case or not. A governor might grant many commutations, or only a few. There was no tradition of examining prior commutations to establish standards to which a governor later might be called to adhere. Commutation functioned along the lines of divine grace: "[I] will show mercy on whom I will show mercy."¹¹

Arbitrary commutation decisions were tolerable under the assumptions of a mandatory death penalty system. In that context,

9. Although not germane to the topic of clemency, the gradual restriction of death penalty eligibility to a small universe of homicides also raises serious issues of justification for this type of punishment.

10. *Exodus* 21:23-25.

11. *Exodus* 33:19.

the legal system has determined that the prisoner deserves to die. In certain cases, such as those involving the young or in cases of intra-family crimes, there might be a widespread feeling that the governor really should commute the sentence. Even in these instances, however, if a governor failed to do so, no injustice had occurred. Execution still was deserved.

It is difficult to pinpoint when the view that the death penalty was deserved for certain acts changed. Throughout the twentieth century, there has been a widespread shift away from mandatory death sentences. Certainly by the time *Woodson v. North Carolina*¹² outlawed mandatory death penalties in 1976, the change had been substantially accomplished.

The concern with arbitrary imposition of the death penalty evidenced by *Furman v. Georgia*¹³ in 1972, shows that a change in thinking already had occurred. Today, death penalty proponents regard arbitrariness in the capital system as morally insignificant. From their point of view, a lack of consistency simply indicates that some persons who deserve to be executed escape justice; an unfortunate circumstance, but not one that requires abolition of the death penalty. Proponents similarly view as irrelevant apparent racism, class bias, gender discrimination, victim impact and other inconsistencies in the imposition of the death penalty.

Based on the assumptions underlying the mandatory system, proponents of the death penalty are correct to ignore arbitrariness. We would not, for example, abolish the criminal justice system because every criminal is not arrested, even if the arrests that do occur are predictably biased along race and class lines.

What gives the arbitrariness criticism its moral weight, however, is the contrary assumption that there are judgments to be made in death penalty cases that are similar to the judgments made about guilt and innocence. The Supreme Court in *Furman* accepted the view of a non-mandatory system that only some murderers actually deserve the death penalty. However, the prevailing criminal justice system showed no sign that it could make the proper judgments about who deserved to be executed.¹⁴

12. 428 U.S. 280 (1976) (plurality opinion).

13. 408 U.S. 238 (1972) (per curiam) (holding that the imposition and carrying out of the Georgia and Texas death penalties, at the full discretion of the jury, constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments).

14. *See id.*

The assumption that only certain murderers deserve execution underlies the Supreme Court's reasoning in *Gregg v. Georgia*,¹⁵ which held that a death penalty statute must ensure that the sentencing authority is given adequate information and guidance in a formal sentencing hearing. Prior to *Furman*, governors and jurors often had complete discretion to impose a life sentence or the death penalty. After *Gregg*, however, the death penalty sentencing procedures must be designed to achieve "reliable" results.¹⁶ But, worrying about reliability assumes there is a "correct" answer to the death penalty question in a particular case. It follows that a capital defendant is entitled to the correct answer. In this structure mitigating evidence is not a plea for mercy; it is a demand for justice.

Proponents of the death penalty usually do not discuss the actual system we have, but instead discuss the mandatory structure. This is because the post-*Gregg* understanding of the death penalty cannot give an account of why a particular defendant deserves to be executed. The reason cannot be categorical, such as intentional killing, for that would be true of all murderers. Nor can the reason be a sub-category, such as torture or a long record, for then all such persons would deserve execution. This explains why death penalty proponents speak in terms of a mandatory structure rather than discussing the system as it exists today.

Generally speaking, what distinguishes murderers who receive the death penalty from those who are sentenced to life imprisonment is the admission at their trials of substantial mitigating evidence. But mitigation by its nature cannot fully account for the distribution of death sentences.

Mitigating evidence in death penalty cases typically purports to represent the causes of criminal behavior. Such evidence seeks to explain why the prisoner acted the way he did. Perhaps the defendant was abused as a child or was a drug addict. In this sense, most explanatory evidence will require a scientific, indeed psychological, examination of the criminal defendant.

15. 428 U.S. 153 (1976).

16. *Woodson v. North Carolina*, 428 U.S. at 305 (stating the Eighth Amendment requires "reliability in the determination that death is the appropriate punishment in a specific case"). See also *California v. Brown*, 479 U.S. 538, 542-43 (1987) (upholding jury instruction to ignore "mere . . . sympathy" on the ground that such an instruction introduces greater reliability in capital sentencing).

But as the philosopher Emmanuel Levinas has said, "[e]verything can be explained by its causes"¹⁷ According to this philosophy, no one is responsible, no one could be responsible, for the forces that have shaped him as a person. No five-year-old chooses to become the man who tortures a child to death. Either outside forces twisted his life or a criminal possessed genetic flaws at birth. In either case, a criminal is not fully responsible. This causal analysis raises serious questions about the meaningfulness of personal responsibility.

This paper is not the occasion to assess the causal account of human behavior. Perhaps no one is fully responsible for his actions; this may be the best reason for not having an ultimate penalty, a penalty of death. The problem with a causal analysis in the death penalty context is that it cannot distinguish between those who deserve to die and those who do not. If sufficient mitigating evidence is presented, no criminal defendant will deserve to be executed. Everyone's actions will be explained by their causes.

This discussion may seem only tangentially related to the topic of commutation. But the failure to rationally justify executive commutation of death sentences resides in the unfathomable justification for the current death penalty system.

C. *The Changing Face of Commutation*

The traditional role of mercy in commutation has little place in the modern death penalty structure. A criminal defendant with substantial mitigating factors that explain his criminal behavior does not need mercy, but justice. Such a prisoner is entitled to the reliability in sentencing that the Supreme Court has promised.¹⁸ A few state courts, notably Pennsylvania, have maintained the view that capital sentencing is discretionary. Therefore, erroneous fact-finding at this stage cannot be corrected on appeal. In one case, the Pennsylvania Supreme Court affirmed a death sentence where a jury failed to find in its evaluation of mitigating circumstances that the prisoner had no prior criminal record, despite a prosecution stipulation to that effect.¹⁹ But under the modern view of the death penalty such cases must be reversed. The prisoner who is the

17. EMMANUEL LEVINAS, *DIFFICULT FREEDOM* 25 (Seán Hand trans., 1990).

18. See *supra* notes 15-16 and accompanying text.

19. *Commonwealth v. Copenhefer*, 587 A.2d 1353 (Pa. 1991).

victim of bad fact-finding deserves reliable fact-finding; he does not need mercy.

Are there any contexts left where an appeal for mercy may lead to commutation? What of the prisoner in whose case aggravating factors outweigh mitigating evidence? Could a governor show mercy in such a case? Of course, one is inclined to ask why, short of a belief in abolition of the death penalty itself, any governor would want to commute the death sentence of such a prisoner. There is, however, a fundamental flaw in this formulation of the commutation issue. Despite the prevalence of the rhetoric of weighing aggravation against mitigation, the terms are not commensurate.

Aggravation refers to the awfulness of either the crime or the defendant, or both — a torture killing by a criminal with a significant prior history, for example. Mitigation is not an attempt to minimize the atrocity of either the crime or the defendant's record. The point of mitigation is to explain how the defendant came to commit criminal acts. As a result, it is often the case that the worse the aggravation, the more impressive the mitigating evidence. The person most likely to receive the death penalty under these circumstances may be the typical criminal who shoots a clerk during a hold-up. Even in this case, the problem is not that the aggravation outweighs anything, but that the story of mitigation is not dramatic enough to impress the sentencer because it did not have a horrible enough act or record to explain. A governor cannot be led to mercy by the rhetoric of weighing.

The foregoing does not mean there is no place today for commutation. It does mean, however, that commutation must represent more than a simple extension of mercy. We propose three models for commutation. First, a governor may act to correct an error in the prisoner's trial proceedings. Second, a governor may act in response to circumstances that have changed since the trial. Finally, a governor may exercise widespread commutation, allowing the death penalty to remain theoretically valid, but rarely applied. This last possibility is inspired by Levinas.

1. Correcting Mistakes and Omissions

Today, the most common ground for pleas for commutation, is newly discovered evidence. By and large, this is evidence that logically, if not practically, could have been introduced at trial. Often

this evidence represents new mitigating factors. Occasionally, the new evidence will relate to guilt, leading either to exoneration of the prisoner or a reduction of a prisoner's conviction to a degree of homicide less than capital murder. For example, perhaps the prisoner was guilty of no more than manslaughter.

The judicial system has a difficult time dealing with these new evidence claims. Although the courts clearly are influenced by the rhetoric of innocence, the traditional judicial concern is with error, not outcome. The fact that a defendant's best possible case was not presented at trial is usually not sufficient cause for judicial intervention, unless the omissions were the result of legal violations, such as ineffective assistance of counsel. This traditional judicial paralysis in the face of untimely new evidence of innocence was at issue in *Herrera v. Collins*,²⁰ recently argued before the Supreme Court.

In contrast, a governor has no limitation upon his ability to consider new evidence at the commutation stage. Although most do not, a governor can evaluate whether the proper outcome was attained at trial. Thus, a governor may examine all evidence, derived from any source, that was either before the sentencer originally, or is truly, newly available. In addition, a governor need not be concerned with the problem of waiver. The flexible process of commutation is not as threatened by last-minute claims and evidence as is the judicial process.

The idea that a governor takes into account what the jury did not hear, is a straight-forward role for commutation. If governors do not act in such cases, the reasons are political, not conceptual. For that matter, since this role could be satisfactorily explained to the public, the true reason governors fail to commute death sentences is timidity, rather than politics. The same is true when evidentiary standards such as waiver and burden of proof are applied at the commutation stage to lessen the impact of new evidence. The standard for governors should be straight-forward; what would a reasonable fact-finder have done if this evidence had been presented at trial. This standard allows a governor to substitute himself for the sentencer, thus justifying his action with the

20. 113 S. Ct. 853 (1993). As this article was going to print, the Supreme Court held that habeus corpus relief generally does not lie in such a case. *Id.* The Court suggested a role for executive commutation similar to that proposed in this part.

rationale that the prisoner would have received a lesser sentence in a more perfect system.

A governor's other role concerns errors that should have been corrected by others, but were not. Examples of such mistakes include: a sentence that is clearly against the weight of the mitigating evidence or is flawed in some other way; a prosecutor who is allowed to engage in inflammatory argument; or a defense attorney who is so incompetent as to deny the defendant a fair trial.

For a governor to act in this context requires a degree of political courage. For here, someone has made an error, either in the first instance or by failing to correct mistakes and a governor cannot avoid saying so. In this context, the mistakes will have to be clear before a governor will take action. The commutation advocate here must persuade the governor that life is the outcome that the judicial system should have produced.

2. Changes in the Prisoner

In contrast to the previous section, the sentencer may have possessed all the information pertinent to the case. On the eve of execution, however, typically many years later, the circumstances of the case may often have changed. The classic instance of this situation, and a common one, is a change in the prisoner himself; he is now remorseful or has demonstrated himself to be a worthwhile member of society by becoming educated, or behaving himself well.

A change of great magnitude in a prisoner's attitude does not fit easily into the current death penalty system. Although a defendant's remorse is admissible as mitigating evidence at a sentencing hearing, it is different from other forms of mitigation. Such evidence does not purport to explain the causes of human behavior.

One could assert that such changes in the defendant do reflect the causal theory. Perhaps the defendant has changed because the forces that caused him to commit criminal acts, such as drugs or street life, now have been removed by prison discipline and time. Thus, the prisoner's true nature has been clarified. If a more accurate assessment of a defendant's character had been available at the trial, the outcome would have been different. In this way, a convict's remorse is properly characterized as mitigating evidence.

However, this account of remorse remains somewhat unsatisfactory. A fact-finder's consideration of evidence of remorse raises

fundamental questions regarding the modern justification for the death penalty. Even proponents of the death penalty often will admit that there is no point in executing someone who, years later, is utterly different from the ruthless being who committed the original crime. But, if that were so, execution always should be postponed and ultimately abandoned because the sixty-year-old death row convict consistently will be different from his twenty-year-old former self. The possibility of change renders strict justice impossible.

The attraction for the prisoner who has changed is surprisingly difficult to articulate. The conceptual problem with remorse, whether the prisoner later becomes remorseful or feels great sorrow at his original trial, is that remorse conflicts with all other grounds of mitigation. Generally, mitigation reduces the prisoner's responsibility for his acts by demonstrating causes for behavior over which the criminal had little control. Remorse, on the other hand, must be the act of a morally free person who accepts responsibility for his behavior and its consequences. Thus, while mitigation is a step away from full humanity, remorse is a step toward true humanity.

It seems unjust to execute a person who was starved and beaten as a child who hardly could have avoided becoming ruthlessly violent. But it does not seem unjust, though it may be immoral, to execute some criminals who truly are sorry for their actions. Such prisoners will even admit that they deserve full punishment for their crime. For this reason, the remorseful criminal can ask only for mercy, not for justice. The idea of remorse is tied to the older view that the commission of certain acts deserves the death penalty, along with that view's religious foundations.

Since the public still accepts, in part, that older view, there is a role for commutation. In the abstract, the public probably can approve of merciful commutation for dramatically changed prisoners. The political problem is quelling suspicions of dissembling: is the prisoner only pretending to have changed? One solution would be to allow a prisoner to make his case to the public, through media interviews for example. If the public becomes convinced that the prisoner is reformed, the governor will have a mandate to act.

3. Commutation in Every Case

Opponents of the death penalty are often criticized for seeking commutation in every case; they are perceived to lack sincerity. Of course abolitionists believe that no one should be executed and would be happy if commutation became the political vehicle which accomplished their goal. But, as we have seen in our examination of the current system, it is plausible that there are reasons in every death sentence case for commutation. With introduction of enough explanation, mitigating factors can always be said to outweigh aggravation. The incoherence of the modern formulation should not be blamed upon the abolitionist.

There is, however, a more profound possibility of commutation in every case. Emmanuel Levinas explains in his essay on the *lex talionis* the virtues of the Jewish approach of retaining the letter of the death penalty while as a practical matter hardly ever executing anyone.²¹ Certain crimes are so heinous that they call for an extraordinary response. Homicide is more reprehensible than any other crime. Theoretically, the death sentence is an appropriate punishment in such cases.

However, according to Levinas, man must never kill in the name of justice. Indeed, he defines Judaism as the quest "to be without being a murderer."²² Rabbis dealt with this tension by adopting rules of procedure and evidence in capital cases that never could be satisfied. A governor could accomplish the same result by commuting the penalty from death to life in every death penalty case.

These commutations would not represent abolition. The governor would agree that the prisoner deserves to die. However, there is an important difference between deserving to die and killing. Even a justified killing is a killing. When justice requires killing, there is an obligation to find a way not to do justice.

It is not realistic in the current political atmosphere to expect a governor to commute every sentence of death. Yet, the death penalty pollutes each member of society by its violence. And, the same forces in society that allow huge numbers of murders to take place, prevent a reaction of horror in response to an execution. Nevertheless, the horror of violence is a sounder foundation for commutation than is excessive sympathy for the murderer. Perhaps this

21. LEVINAS, *supra* note 17, at 146-47.

22. *Id.* at 100.

foundation could persuade the public that widespread use of commutation is appropriate.

