The Underfunded Death Penalty: Mercy as Discrimination in a Rights Based System of Justice

Malla Pollack, American Justice School of Law

Available at: https://works.bepress.com/malla_pollack/17/
UMKC Law Review
Spring, 1998

*513 THE UNDER FUNDED DEATH PENALTY: MERCY AS DISCRIMINATION IN A RIGHTS-BASED SYSTEM OF JUSTICE

Malla Pollack [FNa1]

Copyright © 1998 Curators of the University of Missouri; Malla Pollack

INTRODUCTION ..................................................... 513

I PHILOSOPHICAL BACKGROUND ......................... 515

A. St. Anselm's Problem .................................. 515

B. Alwynne Smart ......................................... 518

C. Claudia Card ........................................... 519

D. H. Scott Hestevold .................................. 521

E. Jeffrie G. Murphy ..................................... 523

F. Joel Feinberg .......................................... 523

II. THE THESIS .................................................... 524

A. Discussion ............................................... 524
INTRODUCTION

The quality of mercy is not strain'd, [FN1] It droppeth as the gentle rain from heaven Upon the place beneath, it is twice blest; It bleseth him that gives, and him that takes... [FN2] cm

*514* We all know Portia's famous defense of Mercy delivered to the unmerciful Shylock in the unmerciful court of Venice. But Portia's speech is rhetoric, not analysis, and reflects oversimplifications which are still bedeviling philosophers. Portia speaks in a human court of law, [FN3] but presents as the proper archetype a Divine judgment thus assuming that the two are relevantly similar. But Divine justice is the purist of duty-based systems, and human law, at least in Western democracies, is a rights-based system. [FN4] Relatedly, her scenario only includes the *515* dispenser of awards and the receiver of awards. In rights-based systems, other members of the society also warrant consideration. Several modern philosophers have discussed the relationship of justice to mercy but none have directly addressed Shakespeare's underlying assumption.

This paper suggests that the relationship between justice and mercy is dependent on the system in which they are operating. [FN5] In a rights-based system, one where discrimination is forbidden, mercy is acceptable only when it is a subset of justice. Arbitrary mercy treating like cases in unlike fashion is moral only if individuals have no "right" to equal treatment, i.e., in a duty-based
This paper begins with moral theory: part I briefly presents other recent philosophical treatments of mercy; part II states a philosophical "Thesis," illustrates it with the leading case of Queen v. Dudley, and explains why Dudley cannot be bodily transposed into a rights-based society. Turning to positive law in the United States, the paper tests several leading death-penalty cases (part III) and pardon jurisprudence (part IV) against the earlier philosophical conclusions and finds them wanting.

I. PHILOSOPHICAL BACKGROUND

A. St. Anslem's Problem

Philosophy is a term attached to many (sometimes irreconcilable) activities. This paper uses what lawyers would call the "reflective equilibrium" method. [FN6] First, it brings to the legal reader's attention several items from the philosophical literature [FN7] which prompted it. All converge on the following problem: Mercy is a virtue. Justice is a virtue. Justice involves giving persons in relevantly similar situations like punishments (or rewards). Mercy involves changing (tempering) the results reached through justice. Mercy must, therefore, be unjust or a subset of justice. Mercy, however, cannot be justice: justice is obligatory and requires equal treatment of like cases; mercy is supererogatory and cannot, therefore, require anything. This paper addresses at length only the equal protection component of mercy. The issue of whether mercy is supererogatory is distinct and unnecessarily confuses the issue of whether mercy has an equal protection component. [FN8]

*517 Saint Anselm articulated the human unease with seemingly unjust divine mercy:

    God of goodness, . . . how can you save the wicked, if it is not right to do so, and you cannot do anything that is not right? [R]eason certainly cannot comprehend why through your supreme goodness you should save some, and through your supreme justice condemn others, when both are equally evil. [FN9] cm But Saint Anselm's problems are cabined by the twin sureties [FN10] that God underlies the structure of justice and that God can reconcile problems irreconcilable by
human reason. The command is to "love thy neighbor as thyself, [because] I am the Lord," [FN11] not because your neighbor has a claim to such treatment.

A "modern" discussion cannot use God as an escape mechanism from dilemmas or retreat into a metaphysical construct. [FN12] The "answers" must deal with *518 social experience. [FN13]

B. Alwynne Smart

Following other contemporary discussions of human mercy, we begin with Alwynne Smart's paper [FN14] separating two disparate uses of the term "mercy." The first she considers to be a misuse: "fitting the punishment to the crime where the law is too inflexible and unsophisticated to do so." [FN15] The second, and, to Smart, only correct usage, "is deciding not to inflict what is agreed to be the just penalty, all things considered." [FN16] Smart claims true mercy occurs when (a) the punishment is lessened to mitigate the suffering of a third party, (b) the offender at the time of the commutation is no longer the "same person" as the one who committed the crime (reformed, newly sane, etc.), [FN17] or (c) the punishment would create disproportionate adverse consequences to the social group. Smart considers mercy to make sense only in a retributivist theory of punishment. In a utilitarian scheme, the just punishment is what maximizes "good" in the society; to give less or more punishment would be wrong: "'I shall act mercifully' can only mean [the incoherent statement] 'I shall impose a penalty less than the one which will [[[do the] most good because this action is the one which will [do the] most good.'" [FN18]

Smart's examples of true mercy, however, do not fall outside the formal definition of justice: equal treatment for instances equivalent within all relevant categories. She is merely listing instances where less common, or non-retributivist, categories are considered. Her summary tacitly admits this: "[We are] justified in being merciful . . . when we are compelled to be by the claims that other obligations have on us." [FN19] Seemingly because of her belief that criminal punishment should be retributive, she misses the contradiction between this claim and the other half of her conclusion: "we regard mercy as deciding, solely through benevolence, to impose less than the deserved punishment on an offender." [FN20] These two statements make sense together
only if you limit "deserved" to "deserved when we consider a narrow set of [retributively relevant] categories" and posit the claims of the other obligations as existing outside of that narrow set of categories. But this formulation *519 reduces Smart's true mercy to her false mercy. She is caught up in a contradictory attempt to give moral praise for the judge's motive in choosing to look at these broader categories and yet have his actions be just, in the formal sense. Her central concern is to justify praising the judge. This difficulty evaporates if you distinguish between mercy as a characteristic of people and as a characteristic of actions. The decision to choose good is virtuous even when one's choice does not create the goodness of the chosen action. In other words, the merciful judge deserves praise for having the character trait of mercy for recognizing and acting on a choice "compelled" (morally, not by positive law). [FN21]

C. Claudia Card

Claudia Card began an alternative line of analysis: mercy as a subset of charity. [FN22] To Card, mercy is not an alternative to justice. In relationship to punishment,

[m]ercy [is] a moral response characteristic of justice as a virtue of persons who have the right to punish, although it is not part of the justice of the institution of punishment in so far as that institution is defined by rules delineating rights in accord with principles of social justice. [FN23]

Card's mercy principle is the following:

*520 Mercy ought to be shown to an offender when it is evident that otherwise (1) he would be made to suffer unusually more on the whole, owing to his peculiar misfortunes, than he deserves in view of his basic character and (2) he would be worse off in this respect than those who stand to benefit from the exercise of their right to punish him (or to have him punished). [FN24]

When this principle is met, the offender "deserves" mercy but this desert does not create a right to receive it. Card adopts Feinberg's analysis of "right" versus "desert." [FN25] Desert is what one deserves morally based on all considerations; right is an institutionally recognized entitlement. Society sets up rules by which persons prove their rights. Rules attempt to match rights to deserts, but the match is never perfect; rules, however, are needed to create predictability.
Initially, this paper will not challenge Feinberg’s definition of "rights." Card defines "social justice" as institutional distribution of rights according to rules. "Personal justice" is practiced by persons with socially given authority to punish when they adjust outcomes in those cases where rights do not match deserts and in which better entitlement rules could not be created. Card construes Smart's pseudo-mercy as the set of cases where the rules of positive justice could, but do not, match desert. To Card, real mercy is found in those cases where personal responses, rather than better rules, are needed to align outcomes and deserts.

Card's description of "real mercy" matches Aristotle's account of "equity:" The equitable is not just in the legal sense of "just" but as a corrective of what is legally just. The reason is that all law is universal, but there are some things about which it is not possible to speak correctly in universal terms. . . . [Equity is a] rectification of law where law falls short by reason of its universality.

Card, however, fails to mention that Aristotle considered "equity" "a kind of justice and not a characteristic different from justice." Card also overlooks that both her categories are sets of cases where rules are in fact too unsophisticated to be morally just. No hard distinction exists. Either set of defective rules could be improved by better rules; neither could be perfected by any generalization short of "do what moral justice commands," (unacceptable both for allowing fallible humans too much discretionary power and for failing to clearly warn possible offenders).

Furthermore, Card has not solved the mercy-justice conundrum, she has merely relocated it. Card has institution/society delegating the equitable tailoring of justice to merciful persons. According to Card, these merciful persons are morally (though not institutionally) bound by the formal rule of justice: like cases must be treated in like fashion. To Card, if one is merciful to some but not all persons in a given category, one is both unmerciful and formally unjust. One has no obligation to show mercy, but if one does show mercy, one is obligated by formal justice to show it to all offenders in the same category. "Mercy is deserved on the basis of what
one has endured and the nature of one's moral character on the whole, rather than on the basis of individual performances or omissions." [FN32]

Card's philosophical discussion is largely an apologia for the pragmatic (and largely utilitarian) suggestion that social institutions (presumably the criminal justice system) administer the fine tuning of justice by delegating power to authorized, individual agents (presumably executives with pardoning power or judges with sentencing discretion). Under this view, Card should have discussed two other issues: (a) whether institutions are morally obligated to provide such "merciful" outlets, and (b) how the state/principal can give authorization to the individual/agent to perform an act outside the state/principal's authority. [FN33]

D. H. Scott Hestevold

H. Scott Hestevold claims to solve the mercy/justice problem in both the private and the institutional setting. [FN34] According to Hestevold, sins, crimes, etc., do not each have a single just desert. There is a set of possible deserts each of which in itself is a sufficient desert for having done a particular action. When a person with the right to assign a desert as a punishment for the action chooses to inflict one of the less severe sufficient deserts, he is showing mercy. This action does not contradict justice as the desert chosen is a sufficient desert.

Hestevold concedes that his analysis depicts mercy as somewhat arbitrary. Hestevold attempts to refute the charge that this type of arbitrariness results in mercy's being unjust by supplying two absurdities that he claims are required by that conclusion. Hestevold points out that, under his opponents' interpretation, once you have acted mercifully in a certain situation, you (and all others in your position) are obligated to act in the same merciful way whenever the situation arises again. Scenario: you forgive one loan to a person under conditions C in an act of mercy; now, you and all debtors are morally obligated to forgive such loans to all persons when conditions C exist. First absurdity, the original act of mercy destroys the possibility of later acts of mercy of the same type, as these acts are now obligatory. Second absurdity, since the original act is no longer merciful, I must further reduce the penalty if I wish to act mercifully. Hestevold is supply-
ing a non-legal example parallel to Smart's "absurdity" that if one criminal is mercifully given a lower penalty for crime C, all other penalties must be lowered to retain their proportionality; the next act of mercy will again lower all penalties, etc.

Let us welcome such "absurdity": by creating the obligation to give a lesser penalty, we have continued to later parties the benefit of receiving the lower penalty. Consider the historical change in the meaning of "cruel and unusual punishment." [FN35] Furthermore, this change reflects a positive improvement in mental states; it involves persons being less willing to condone hardship or pain of some type applied to others. Considering this outcome distressing, the destruction of the possibility of mercy results from a myopic focus on part of reality somewhat akin to the Greek problem of how a later-starting runner could pass a tortoise. [FN36] All you "lose" is a possibility in a word-use game. [FN37]

*523 E. Jeffrie G. Murphy

Jeffrie G. Murphy [FN38] rejects Card's and Smart's analyses as incorrectly placing mercy in the criminal law paradigm; he, instead, chooses the private law paradigm. According to Murphy, the private law paradigm allows mercy to be an autonomous virtue that does not clash with justice. In this version, mercy is giving up something to which I have a right, but which I do not have an obligation to collect. Courtroom judges, however, are obligated to enforce society's claim on offenders.

Murphy's analysis, at most, handles St. Anselm's first problem with mercy: [FN39] how can God be merciful, if to be merciful is to be unjust, and God is always just. Murphy concedes that this analysis does not solve St. Anselm's second problem: how can God be just if he chooses only some sinners for mercy, i.e., the equal protection argument. [FN40] Murphy lessens the extent of the equal protection problem by allowing the merciful person to take into account the effect of the merciful act on herself. She may remit the first loan of five dollars because she can afford to lose that much money, but she may choose not to remit the second because she cannot afford to lose ten dollars. [FN41]
The last major contributor is Joel Feinberg, who does not actually mention mercy. Feinberg provides a masterful discussion of the distinction between comparative and non-comparative justice the central problem in this paper. [FN42]

Feinberg points to another venerable definition of "justice," giving every person their due. [FN43] Feinberg's comparative justice occurs when a person's due is determinable only by reference to his relationships to other persons. Feinberg's noncomparative justice occurs when one's due is determined independently of other persons'. To Feinberg, typical examples of comparative justice are (1) competitive prizes, (2) distribution of burdens and benefits, and (3) creation, administration, or enforcement of general rules. Noncomparative justice includes (1) unfair punishments and rewards, (2) merit grading, and (3) derogatory judgments.

Feinberg limits the nondiscrimination principle, treating like cases alike, to comparative justice. Often comparative and noncomparative principles apply to the same situation and may reinforce each other or lead to opposing results. Most *524 genuine conflicts are cases where a treatment is condoned by noncomparative principles but condemned by comparative ones. Examples are grace in the Christian theologies where no one deserves salvation, when an authority makes an "example" or "exception" for one of a class of wrongdoers, and when a charitable person helps all but one possible beneficiary of equal desert. A situation is more just if it is just by both comparative and noncomparative principles, but we often compromise comparative justice for practical reasons when noncomparative justice has been met. Feinberg, however, insists that arbitrary discrimination (comparative injustice) hurts people "as a matter of psychological fact" and that this hurt "is perceived to be in some important way offensive to reason." [FN44] Feinberg does not explicate when offended reason warrants action.

Using the tools supplied by Feinberg, Hestevold, Murphy, Card, and Smart, we can evaluate the Thesis of this paper.
II. THE THESIS

A. Discussion

The diagram of a merciful act is that A has a right to take X from B. X may be punishment in response to an offense, money in response to a debt, etc. A decides to take less than X. (Many analyses add other conditions, but all include these two basic ones.) Pardon, the act of an official remitting a legally imposed punishment, is a subset of merciful acts. Previous explications concentrate on A and B, but C and D are central to the relationship between mercy and rights. C is a person in the same category as B from whom A exacts the full value of X. D is another member of the community with no direct involvement in the A-B or A-C transaction. The question in this paper is whether in a rights-based system A's showing mercy to B is unjust to C or D.

The A to C or D relationship is not a problem in a duty-based system (at least theoretically). Consider the paradigm of a sin against God. The sin can be forgiven by God, without the consent of His other creatures, because God was the one injured. God is free to "show mercy to whom He will show mercy." [FN45] The closest human example is the criminal justice system of a monarchy where a crime is an offense against the Queen's peace. Since the offense is against the Queen, no third *525 person is affected, at least in theory. But in many theologies, spokespersons are uncomfortable with this explanation and question the relationship of C and D to the merciful action, hence, St. Anselm's second problem, the equal protection argument discussed by Murphy among others. [FN46] Similarly, royal use of the pardoning power has engendered numerous complaints by C's and D's. [FN47] In short, even when theory supports an explication limited to A and B, the ghosts of C and D haunt the explainers.

Rights-based systems necessitate formal justice treating all persons in the same relevant category in the same way. If mercy is a refining of justice, the judge's decisions are based on categories; she has merely enlarged the number of factors to consider when assigning an outcome. B and C have received different treatment because they are not in the same category. Perhaps B took out the loan at usurious rates under a contract of adhesion while C borrowed the money with more
freedom of choice. Perhaps B committed the offense because he knows only Spanish and could not read the English warning sign while C chose to ignore a sign he could have read. This type of mercy does not outrage rights. Smart, however, considered this pseudo-mercy. [FN48]

To refine the discussion, let us now distinguish between two types of mercy. For clarity, designate mercy which involves the invoking of "extra" categories as mercy-j. Designate mercy which does not invoke categories, i.e., which is arbitrary, as mercy-a.

In addition, we should revisit the definition of "rights." Feinberg and Card define rights as institutionally guaranteed entitlement. Card assumes this means guaranteed by the court system thus limiting the definition of "rights" to "deserts enforceable by lawsuit." Feinberg repeatedly insists that "moral rights" in the sense of "moral deserts" misleads, rather than clarifies thought. The distinction between entitlement and desert aids discussion it forces both sides to openly declare how a disputed "right" is allegedly grounded (positive law, structural view of the Constitution, divine revelation, inherent nature of humanity, etc.). We should not, however, lightly jump from the usefulness of Feinberg's distinction to a substantive conclusion denying the felt importance of aligning entitlement with deserts. Merely pointing out that "moral rights" require theoretical grounding does not by itself prove that "moral rights" are insufficient to create obligations, at least moral obligations. [FN49] This paper will now use "entitlement" to mean rights enforceable under positive law and "rights" in a more Dworkian sense as what moral reflection shows should be enforceable.

Clearly there is no theoretical problem with mercy-j in a rights-based system. One could discuss whether the categories used are appropriate and equally applied, [FN50] but that is a substantive problem which is answered in many different ways by many different substantive systems. A possible method of analysis would be to run the suggested categories through Rawls' model and ask if those categories would be chosen through a veil of ignorance. [FN51]

Mercy-a, however, is a major problem in a rights-based system. Consider Rawls' construct:
would a person, who did not know her position in society, who was moderately selfish, and who made her decision by comparing worst possible outcomes, choose to allow the state (or any other party against whom she held a right to be treated justly) to arbitrarily choose like persons for better treatment? The worst possible outcome is that she is one of the most needy class and she does not receive the merciful treatment. Mercy-a is not just by Rawls' standard.

This conclusion is not mere envy. [FN52] First, consider the case where the X being divided is a positive right or a negative right which affects the distribution of economic and social goods. In both Rawls' and the real world, some scarcity exists. To increase B's share will automatically decrease the remainder available for distribution (i.e., negatively impact C and D). If the right is a negative right to political or civil freedom, the theoretical analysis changes, but not the result. First, negative rights are not totally negative. All have a social cost which depletes the limited fund of resources or changes the locus of power--remember George Orwell's Animal Farm and the pigs who were "more equal" than others. [FN53] Second, even if no "actual" harm were done to C or D, their complaint cannot be dismissed as "mere envy" if you take seriously the basic right to be treated equally as a person valuable qua person. [FN54] If B is treated better than C for no reason, C is not being treated with the same respect as B. D may object to society's failure to abide by its duty to treat all persons with equal dignity even though D is not "directly" involved. [FN55] Such unjust behavior changes the underlying agreement between A, B, C, D, and all other members of their society. Without D's consent, it changes the "rules" D has (at least implicitly) approved. Furthermore, how can D be sure that rules (once breached) will hold later when D is personally involved?

The nagging uncertainty behind the envy argument may be a slippage of experience into theory. In our experience, mercy is usually given to those with the least. This affirms our emotional commitment to something akin to Rawls' difference principle. [FN56] But mercy-a is not equivalent to better treatment for those worst off. "Those worst off" is a category; better treatment for any category is mercy-j.
Consider the theoretical possibility that mercy-a involves Feinberg's non-comparative justice. If so, the equal protection principle does not apply. How Feinberg would respond to this is unclear. He lists unfair punishments and rewards as non-comparative, but classes as comparative both (1) distribution of burdens and benefits and (2) making, administering, and enforcing general rules. [FN57] Feinberg asserts that non-comparative injustice is worse than comparative injustice yet agrees that discrimination is resented as "offensive to reason." [FN58]

Why offensive? Using different standards for different allegedly non-comparative judgments is a comparative injustice: it "offends reason" to first non-comparatively judge A to be worth X-reward/punishment because he possesses Y, and then to judge B who is identical to A in all supposedly relevant respects (i.e., who also possesses Y) as not worth X. Whatever the underlying quality or quantity Y which the judge is using to decide the distribution of X, it offends reason for the meaning of Y to change between the two judgments. Reason is offended even if the judge renders only a descriptive judgment about A and B without assigning any further reward or punishment. Unless Y is relevant only to some quality of the judge (such as her inclination), B has an equal protection complaint (even if not an entitlement). But the judge's inclination is sufficient to ground a decision (if at all) only in systems premised on duties owed to the judge. Unless the judge can by fiat change the meaning of terms, [FN59] she must use the same meaning for those terms when judging A and B or offend reason. [FN60]

*528 Rendering a series of judgments concerning a series of persons involves administering or enforcing a general rule even if only a general rule about the meaning of linguistic terms; according to Feinberg, enforcing a general rule is a comparative-justice category. Feinberg, of course, classes derogatory judgments about individual persons as non-comparative injustices. [FN61] But any seemingly non-comparative judgment (whether it distributes a reward/punishment or not) that is part of a series automatically acquires a comparative aspect: to the extent that we use terms (or standards, paradigms, etc.) to make judgments, all judgments are parts of some series. [FN62]
Comparative and non-comparative justice, therefore, are almost completely inseparable in any language-using society (and all human societies seem to be language based). Feinberg's valuable insight into the analytic distinction between comparative and noncomparative justice should not be used to obscure the dearth of instances when the two occur separately.

The next question is the relevance of Hestevold's interesting concept of disjunctive desert, where each action deserves an entire gamut of responses and mercy is merely choosing a less onerous member of the set, all of which are just. Does disjunctive desert allow mercy-a in a rights-based system? No. Allowing all of Hestevold's arguments, A in choosing among disjunctive deserts is still choosing whether each recipient will be treated as a B or a C.

**B. A Suggestion for Applying the Thesis**

Hestevold's answer does, however, suggest a practical way to invoke mercy-j. In most cases the just outcome will be computed using standard categories. However, in certain cases extra categories will be considered. Specific attributes will trigger consideration of additional categories for deciding whether some of the lesser penalties in the disjunctive desert set will be activated. The theoretical problem is justifying the use of more refined categories for B but not C. Rawls' difference principle and utilitarianism both permit such action. The attributes triggering additional categories will be either (a) unusual, (b) single out the least advantaged, or (c) include the possibility of extremely large harm. The choice of the least advantaged will satisfy Rawls' criteria for justice. The unusualness limitation and the privileging of decisions involving large harms allow a utilitarian justification for not using additional categories for all judgments.

To satisfy utilitarianism, the triggering attributes could be those which cost more to check for in all circumstances than will be lost if some attribute-holders are never segregated. For example, suppose we allow a lesser penalty if the offender has a mother, who is a "virtuous" person, whose death will be triggered with ninety-five percent certainty if the offender is sentenced to over five years in prison. This is a fairly unusual attribute. Perhaps it is so unusual that checking
each offender will consume more societal resources than will be saved by helping the few we will locate with this attribute.

A practical question: how will A know that the possible recipient is a B rather than a C? Experience supplies two answers. First, the recipient in his own interest will claim membership in the class. Second, society will supply a prompter for any strongly potential B who has the indicia of not knowing how to raise the issue. [FN68] We can also invoke utilitarian calculus by claiming that the extra cost imposed on the system to locate the remaining B's is greater than the value created by locating them. Without agreeing that utilitarian willingness to overlook the burdens on specific individuals is ethically correct, we should acknowledge that we often act as if it is correct especially if the specific person bearing the extra cost is unknown when we make the choice, if the burden being placed on that person is not large, if that person had some part in making the decision or choosing the decision-makers, and if most specific persons who are later harmed will probably have done some less-than-perfect action in the causal chain towards their respective injuries. [FN69]

The next question is in what situations, if any, mercy-a is appropriate. Several answers have been suggested. Harrison and Sverdlik posit the line between public and private actions; [FN70] Murphy posits the line between the criminal law and the private law. [FN71] The thesis of this paper is that mercy-a is acceptable when C and D have no right against A for equal treatment in the matter at issue. This is, of course, a merely formal answer whose content will change with different substantive systems. [FN72] The many earlier analyses, which did not draw lines, [FN73] imply this answer. [FN74]

Examples reinforce this response. The inappropriateness of mercy-a in a rights-based society's criminal justice system seems widely accepted. [FN75] In contrast, mercy-a is considered appropriate in the duty-based theology of complete dependence on Divine Grace a free gift from God no man can earn. Several commentators have suggested the private debt as a paradigm for mercy-a. But consider the example of a debt owed to a corporation. Can the president use mercy-
a to lower the terms of repayment? No, unless he can show the utility to the corporation of changing the terms, he is being unjust to the shareholders.

Another suggested paradigm is the family. Can a father treat his children differently because of mercy-a? [FN76] John Stuart Mill believed family members had liberty interests against each other. [FN77] Consider an historical example. After the Roman conquest of Israel, masses of Jews were enslaved. To ransom the captives, the international Jewish community attempted a fund-raising drive of extraordinary size relative to the wealth of the available donors. Rabbis insisted, however, that it was wrong for any person to donate more than a set proportion of his total wealth even though ransoming the captives was the declared to be the highest form of *532 charity. [FN78] The potential familial heirs of the donors had rights to at least a minimum inheritance. [FN79] In another tradition, when the Prodigal Son's older brother objected to his father's feasting the young prodigal, the father reassured him, "all that I have is thine." [FN80] Contrast a father who decides through mercy-a to remit a large debt owed to him by his son B but not the debt owed him by his son C; add that the father's decision affects the inheritance received by son D. To return to Shakespeare, when Bassanio asserted that he would give up all, including his beloved wife, to deliver Antonio from Shylock, Portia remarked: "Your wife would give you little thanks for that/ If she were by to hear you make the offer." [FN81] Family members seemingly have rights against each other.

To summarize the thesis in a formal definition: O claiming "mercy-a is just" is equivalent to stating that "neither C nor D [FN82] has any rights against A." We use utilitarian calculus to decide when to invoke additional categories when setting outcomes under justice/mercy-j. But is the utilitarian solution morally acceptable?

The utilitarian method of limiting considered categories rests on administrative cost. Society can afford five dollars but not ten dollars. Society, unlike God, has a limited pocketbook. But this decision forces the person being judged to assume the cost. Hence this paper's suggestion that we consider extra categories when the possible harm to the recipient is extremely large. Many op-
pose the death penalty because the cost of death is too much for society to foist on any individual in the name of administrative budget-restraint (even if renamed judicial finality). [FN83] That problem will be discussed more fully in sections III and IV below.

*533 C. The Thesis Illustrated: The Queen v. Dudley [FN84]

[O]n July 5, 1884, the prisoners, Thomas Dudley and Edward Stephens, with one Brooks, all able-bodied English seamen, and the deceased also an English boy, between seventeen and eighteen years of age, the crew of an English yacht . . . were cast away in a storm on the high seas 1600 miles from the Cape of Good Hope, and were compelled to put into an open boat . . . . [T]hey had no supply of water and no supply of food, except two 1-lb. tins of turnips, and for three days they had nothing else to subsist upon. . . . [O]n the fourth day they caught a small turtle . . . [T]hey had no fresh water, except such rain as they from time to time caught in their oils skin capes. . . . [T]he boat was drifting on the ocean, and was probably more than 1000 miles away from land. . . . [On the 25th of July], the boy was . . . lying at the bottom of the boat quite helpless, and extremely weakened by famine and by drinking sea water . . . . The prisoner Dudley offered a prayer asking forgiveness for them all . . . . Dudley, with the assent of Stephens, went to the boy, . . . put a knife into his throat and killed him . . . . The three men fed upon the body and blood of the boy for four days; . . . on the fourth day . . . the prisoners were rescued [by a passing vessel], still alive, but in the lowest state of prostration. [FN85]

Rebuffing a plea of necessity, the court found the defendants guilty of capital murder but suggested that the Queen modify the sentence. [FN86]

The court was obviously in sympathy with the defendants [FN87] but rejected "the broad proposition that a man may save his life by killing, if necessary, an innocent and unoffending neighbour[sic]" [FN88] for fear that acquittal might lead other men in difficult situations to injure the innocent. [FN89] The opinion recites this verdict to be compatible with moral law. [FN90] But if the judges were really comfortable with the decision, why did they suggest Royal mercy? [FN91]
Why does the Dudley court act as if judicial mercy is not acceptable in these circumstances but that Royal mercy is? The court felt that judicial mercy would be (or believed by the public to be) mercy-j, thus creating a precedent. [FN92] The case had, *534 unfortunately, the dangerous tendency of extending the rules of necessity, not just because of the uneasy belief in enforcing heroic virtue [FN93] but because the weakest was chosen to die [FN94] and the necessity was not definite. [FN95] The court speaks as if the reaction of Cs to a court decision would be to believe the decision created a right for them to act similarly but that, since the Sovereign is outside the system of rights, Her action would not create any right in potential Cs; it would not be a precedent: the Thesis explicates that the monarch is a duty holder in a duty-based system while the court, in contrast, is a rights-creator in a rights-based system. [FN96]

The Queen's function as a duty holder is further supported by the court's unease with the method used to pick the victim. One of the men had suggested casting lots to choose a victim, but lots were not cast. [FN97] The victim was never asked if he consented to die (by lot or otherwise). [FN98] The jury's special verdict declared that "assuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other three men." [FN99] In contrast, after another shipwreck, the mariners drew lots to choose a victim; the lot fell on the one who had proposed casting lots; the others drew lots to decide on the butcher/killer; the survivors were treated with kindness, not blame. The Dudley court dismisses the story on the sole ground that it is not a court decision. [FN100] But the use of lots means that the butcher/killer was not, like the killer in Dudley, "a private person acting upon his own judgment [who] takes the life of a fellow creature." [FN101] The lot-casters resemble the sailors in Jonah who cast lots to decide (correctly) what person on board had offended the Deity and, thus, brought the storm. [FN102] Casting lots is an ancient method of placing the decision in the hands of the ultimate power, God or the gods. [FN103] It passes the decision to a duty holder. [FN104]

*535 A monarchy can, perhaps, place the crown in the position of God: [FN105] a duty holder outside the system of rights. Does an equivalent entity exist in a rights-based democracy? Let us
consider this issue as a matter of theory before turning to practice in the United States.

Can a rights-based government delegate to some person or group the authority to grant mercy-a? Despite Rousseau's contrary statement, the author thinks not. Rights theory rests governmental/institutional legitimacy on delegation of power from individuals. The scope of power delegated is limited by individuals' reciprocal needs or (implied) approval. Since the government does not have the right-bearers' approval to act arbitrarily (unjustly), it cannot delegate such approval. What if the majority votes to allow such delegation? No change. Under rights-theory, the group does not have the power to deny justice to any individual. What if everyone consents? Presumably, anyone can consent to deprive herself of any alienable res. Many theories, however, deny individuals the right to alienate the essence of individual self-hood. Such rules protect not only the putative seller, but the other members of her polity. If individuals are allowed to sell their votes, mine, which I refuse to sell, becomes powerless against successful vote-buyers. A full discussion of the alienability of the right against mercy-a must wait for another paper, but the issue is unimportant in practice. Actual consent by all is unlikely to be requested (let alone given), except for small groups stranded in life-threatening insolation, such as ship-wrecked sailors. The practically important issue is whether the (implied) "social contract" includes implied consent. But this is the same issue as whether the rights-based government may legitimately exercise mercy-a, a question already answered, "no."

If one constructed government legitimacy on a different basis, the answer might change. Perhaps the basic institutions of government could be the subject of an implied social contract under which the citizens give up all right to challenge the justice of specific decisions made by allowed political procedures. This is not, however, a "rights-based system" while the government is operating. Individual "rights" ceased to exist at the moment of contract.

Murphy does allow government officials to act on mercy inside the criminal law paradigm if, and only if, "all those who have been victimized by the criminal" wish to waive their individual
rights to punish the criminal. [FN114] Murphy does not specify, however, the theory of government he is assuming. Murphy's analysis, furthermore, does not discuss the identity of the "victims." This author would argue that in a rights-based polity (a) all members of the society are "victims," and (b) that direct victims (e.g., the person whose purse was stolen) do not have individual rights to punish the criminal because their rights (if any) are vested in the society to which they belong. [FN115]

A more radical question remains. Can a rights-based system use "scientifically" arbitrary mercy, i.e., randomness a computer generated random-number table that is not seen as a mask for God? The easiest answer is to stop *537 before trying to answer the question. One stops by recognizing that someone or some institution needs to make the decision to toss the outcome of a choice (or set of choices) into the random number generator. As discussed above, no person or group of persons (with the possible exception of everyone actually placed in the hopper) has the right to make that choice. As discussed in Section III below, the United States Supreme Court has (at least in words) barred "arbitrary" imposition of the death penalty.

Rawls does walk partway into true randomness, but he seems to walk alone. Rawls argues that intelligence, diligence, and other "meritocracy" categories are undeserved and, therefore, merely possessed (as opposed to owned) by specific individuals. This insight allows Rawls to found the difference principle, i.e., to view the property generated by intelligence and diligence as community property despite his insistence on radically atomistic individuals. [FN116] Character, Rawls insists, "depends in large part upon fortunate family and social circumstances for which [the subject] can claim no credit." Rawls, despite the seeming inconsistency, however, refuses to follow this argument into retributive, i.e., criminal justice. [FN117] One could, with Nozick, dispute Rawls' claim that desert needs to be justified "all the way down." [FN118] Nozick's position denies that the "arbitrariness" of character traits matters for assigning deserts as to either property or criminal penalties. One could, of course, escape this Rawlsian dilemma by adopting a more communitarian or otherwise "thicker" view of the self, i.e., not recognizing as a "self" whatever
"exists" after removal of all the attributes Rawls labels undeserved. [FN119]

Nicholas Rescher points out another possibility for randomness in distributive justice, but his version is limited to scenarios where all claimants have equal deserts. [FN120] Rescher divides distributive justice into a "narrower" sense (a sense that only looks at fairness between recipients) and a "wider" sense (that adds considerations of the general good). Rescher suggests that if justice in the narrower sense is unavailable, we make the best of a bad deal by providing equal opportunity *538 (which he considers fairness in the distribution procedure). [FN121] Rescher suggests two scenarios where random choice (by lottery, coin toss, etc.) provides acceptable procedural fairness. First, instances where we are required to distribute goods that cannot be distributed because they are indivisible (e.g., "when precedence must be given to one of two ambassadors whose claims are perfectly equal"). [FN122] According to Rescher, random distribution in such situations is "the standard procedure in everyday life"; yet, he provides no factual evidence, historical background, or theoretical justification of this claim. [FN123] Rescher's second scenario covers instances where equal division of some good places all recipients below the level of minimum adequacy; this scenario seems to include Dudley's shipwrecked sailors. [FN124] Rescher is unhelpful here because his assumption of equal deserts avoids our current question, when (if at all) should we declare total equality of desert before looking at all available, relevant categories? The Dudley problem could be solved by accepting the defendants' reasonable belief that the ship's boy was the only person in the (to them) relevant category of "most likely to die first."

Having outlined the theoretical background of the Thesis, this paper now turns to positive law in the United States and attempts to measure practice against the Thesis.

III. DEATH PENALTY CASE LAW

The state just looks at this case as a number. Behind this number, there's a name, a face, a heart, a soul and a family that they have totally destroyed. [FN125]

The death penalty is an obvious trigger for using additional (even unlimited) categories in judg-
The penalty is invoked in a relatively limited number of cases. The burden on the defendant is incomparable. The court system would, seemingly, be the institution that would enforce any mercy-j entitlement in the United States. Does case law agree?

Death penalty jurisprudence restarts with Furman v. Georgia. In Furman, the Supreme Court held the death penalty (as then administered) unconstitutional. Furman is a plurality opinion. Some of the viewpoints expressed strongly imply that, in a criminal justice system, mercy to B creates a right to lesser punishment in C. Furman does not turn the Thesis into positive law; the case must be approached with caution for several reasons. First, it is a decision based on Constitutional law, which is not equivalent to moral law. Second, it is a plurality opinion. The Court's own opinion is per curiam and philosophically unhelpful; it contains no justification for the judgment. Third, none of the opinions rest solely on C's rights. Fourth, adding up the opinions does not give a majority of justices articulating the Thesis.

Justice Douglas' concurrence attacks the death penalty statutes at issue both because they are not arbitrary and because they are arbitrary. First, Douglas is concerned with the possibility that the disparate sentences inflicted by juries were motivated by use of improper categories. The executed include a greatly disproportionate number of African-Americans and poor Americans. Douglas cannot, however, find enough evidence of discrimination to rule on that basis. Second, he holds that "cruel and unusual punishment" includes arbitrary punishment, and that a punishment's rarity "raises a strong inference of arbitrariness." In other words, since many Bs have not been executed, the Cs before the Court have a right not to be executed. That Douglas would have ruled identically if only arbitrariness were present cannot, of course, be assumed.

Brennan in concurrence states that "[a] punishment is 'cruel and unusual' . . . if it does not comport with human dignity." Brennan discusses four indicia of unacceptability: severity of pain, arbitrariness, unacceptability to contemporary society, and excessiveness
(availability of a less severe punishment which will accomplish the desired goal). [FN137] Brennan's arbitrariness standard is a direct statement that mercy to B creates rights in C: "[T]he State must not arbitrarily inflict a severe punishment. This principle derives from the notions that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others." [FN138]

Brennan's statement does not clarify at what level of severity this right becomes constitutionally enforceable, or if the right exists for lesser punishments at a non-constitutional level. Since Brennan believes that no legislature is likely to enact a punishment which is unconstitutional under one prong alone, [FN139] we can only guess that sufficient arbitrariness by itself would create unconstitutionality.

Justice Stewart's opinion is a short replay of Douglas' and Brennan's main points. Stewart is disturbed by the unproved possibility of racial discrimination, considers death a "cruel" punishment in itself, and is pushed to his decision by the arbitrariness of its imposition [FN140].

Justice White places special emphasis on the punishment's arbitrary infliction and the unlikelihood of its utility [FN141]. Since the first is evidence for the second, the separate force of the arbitrariness argument is unclear despite strong dicta. [FN142]

Chief Justice Burger's dissent skirts our issue. [FN143] His historical judgment is that the Framers were only targeting torture. [FN144] While he does not wish to downgrade any word in the Constitution as unnecessary, he will only hypothesize a relevance to "unusual" if the punishment under discussion were newly created or not legislatively imposed. [FN145] Burger considers the Framers not to have expressed an opinion on C's rights. Burger's view on mercy-a is further camouflaged by his *541 refusal to admit that juries are arbitrary. [FN146] He does, however, recognize that the Court's judgment turns on the plurality's perception of arbitrariness. [FN147]

Justice Powell recognizes both anti-discrimination and anti-arbitrariness arguments in the con-
curring opinions. [FN148] He finds both unpersuasive, but concedes that sufficient evidence of racial discrimination (use of an unacceptable category) would create unconstitutionality. [FN149] His rejection of the arbitrariness argument is unclear. He may consider arbitrariness either nonexistent or not problematical. [FN150]

Since Furman, the Supreme Court has upheld the death penalty in numerous cases including many where the common-sense understanding of arbitrariness was outraged. Notably, in McCleskey v. Kemp [FN151] the Supreme Court refused an African-American defendant's statistically-supported claim that his death sentence was unconstitutional racial discrimination. [FN152] The McCleskey majority categorizes Furman as targeting arbitrariness. [FN153] The Court continues to so construe Furman: "The guiding principle that emerged from Furman was that States were required to channel the discretion of sentencing juries in order to avoid a system in which the death penalty would be imposed in a 'wanton' and 'freakish' manner." [FN154] But *542 if statistics are not acceptable evidence of arbitrary jury behavior, what obtainable evidence would count?

Post-Furman cases [FN155] impose two constitutionally based limits on the death penalty: constraints on the categories useable to support a death sentence; unacceptability of any constraints on the categories useable to support mercy. [FN156] In 1994, Justice Blackmun declared the two lines incompatible. Blackmun concluded that the death penalty could not be administered in accordance with the United States Constitution. [FN157] Justice Scalia agreed with Blackmun's case analysis, but declared that the proper "remedy" was to overrule the cases as importing non-constitutional limits into the Constitution. [FN158]

Justice Blackmun's position shouts injustice from the rooftops not because he decided the death penalty was unconstitutional as administered but because he accused his colleagues on the Supreme Court of refusing to accept reality so that they would not have to deal with the burden of getting the law right:

[I]t is clear that this Court is not prepared to meet the challenge. In apparent frustration over its
inability to strike an appropriate balance between the Furman promise of consistency and the Lockett requirement of individualized sentencing, the Court has retreated from the field. . . . In my view, the proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them. [FN159]

Blackmun's claim is that the Court has refused to enforce mercy-j (and the absence of mercy-a) for unacceptable, administrative reasons. [FN160] Does the *543 United States have any other mechanism of enforcing mercy-j in capital sentencing?

IV. PARDON JURISPRUDENCE

Chief Justice Rehnquist punted mercy-j to the executive dispensing clemency at least in belated claims of actual innocence. [FN161] Does the executive fulfill this role?

"The President . . . shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." [FN162] The language of the Constitution does not limit the President to reasonable, i.e., well-considered mercy-j, pardons. Is this an official approval of mercy-a in the delineating document of a government supposedly based on rights? No.

Let us assume for the sake of this argument that the English monarch's pardoning power (at or before the creation of the United States) was the God-derived power to exercise mercy-a. [FN163] British practice was the model lurking behind the Constitutional clause. [FN164] Debates at and after the Constitutional Convention, however, discussed the pardoning power in terms of reasons for its use: [FN165] tempering laws to individual circumstances in unusual cases, [FN166] motivating accomplices to *544 testify against "great offenders," [FN167] allowing executive protection of secret spies, [FN168] and allowing rapid executive action to defuse civil unrest. [FN169]

While the President "is free to exercise the pardoning power for good reasons, bad reasons, or no reason at all," [FN170] this statement, taken in context, refers only to court control of the execut-
ive. The President's reasons for a pardon are beyond judicial review, with the possible exception of reliance on an unconstitutional rationale such as race. [FN171] However, because "[t]he country's experience with the commutation power does not suggest that it is a senseless lottery," Justice White reasonably refused to "assume that [the pardoning] power, exercised by governors and vested in the President by Art. II, § 2 of the Constitution, will be used in a standardless and arbitrary manner." [FN172] As the Supreme Court stated earlier, "[a] pardon in our days is not a private act of grace from an individual happening to possess power...[i]t is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed." [FN173]

Both pardoners and their critics talk as if pardons have reasons. Presidents and state executives commonly supply rationales including unduly harsh sentences, physical illness, and the healing of political wounds. [FN174] When he pardoned *545 President Nixon, President Ford publicly relied on the danger of "prolonged and divisive debate." [FN175] Irrelevant or immoral reasons spur critics of specific pardons [FN176] and of classes of pardons. [FN177]

Furthermore, when the apparent reasons for pardons are sufficiently disliked, the executive may be rebuked politically, even if not by the courts. [FN178] Abuse of the pardoning power was one of the bases of President Andrew Johnson's impeachment. [FN179] Texas Governor James Ferguson was impeached and removed from office for abusing the pardoning power he allegedly sold, or otherwise unreasonably granted, 1,774 pardons. [FN180] In short, while due process rights to executive clemency have not been enforced by United States courts, [FN181] pardon is neither reasonless, nor outside the system of politically enforceable rights. [FN182] Is this *546 enough in a rights-based system of justice?

Perhaps we should finesse the issue. Feinberg defines "rights" as "institutionally recognized entitlements." [FN183] Perhaps this definition does not limit rights to those which would support a suit by an individual, private plaintiff in a court of law. We could claim that, at least when discussing the United States, rights (meaning entitlements) may be recognized by institutions other
than courts. Allowing executive (and perhaps even legislative) recognition to be sufficient guarantee of a "right" recognizes the organizational checks and balances written into the Constitution. [FN184]

Political/judicial enforcement, after all, is not a neat dichotomy. All political-enforcement mechanisms are not created equal. Some are triggered by interbranch rivalry; some require a coalition of voters. Courts are not infallible. A substantively-meritorious plaintiff may be defeated by the practicalities of the court system. [FN185] Judicial and political systems interact. "History," according to Chief Justice Rehnquist, "shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency." [FN186]

*547 But merely hoping that the executive will do justice is not enough. [FN187] President Bush, despite severe criticism that he was covering up his own liability, did pardon six associates exposed in the Iran-Contra affair. [FN188] Since Furman, state executives have rarely used their clemency power in death penalty cases. [FN189] Such behavior by elected officials is hardly surprising. Political pressure is asymmetrical: punishing leniency but not stimulating mercy-

j. The public is not responsive to the complex facts that mercy-
j considers. The public, to the contrary, is responsive to the law and order signal provided by executions regardless of whether such executions increase public security. [FN190]

Perhaps it is time for the executive to create a judicial scapegoat for the political fall out. State governors could grant clemency conditionally. Consider the oft repeated claim that an appointed defense counsel was ineffective at trial and, therefore, did not introduce helpful evidence. The courts routinely deny relief. [FN191] But a governor could state that he is uncertain if the petitioner would have been sentenced to death if counsel had been more aggressive. On the basis of that doubt, the governor could commute the death sentence to life imprisonment unless the state's supreme court [FN192] provides a new trial, new appeal, new sentencing, etc. by a certain date. This tosses Rehnquist's hot potato back to the court system. But would this reliably produce
the requisite mercy-j consideration? Perhaps, perhaps not. It might be distorted into yet another way of allowing everyone to deny personal responsibility for killing the defendant. [FN193] In states with elected judges, it just moves the political pressure to judges and judges are extremely vulnerable because judicial ethics bars them from publicly discussing pending cases. [FN194]

The closest test of the executive clemency loop-hole relied upon by Rehnquist is the Graham case, whose outcome, and level of consideration, are still in doubt. [FN195] But the Texas courts disagree with Rehnquist. They decided that courts, not governors, should review belatedly proffered evidence. The Texas court system created a new avenue for state collateral relief for belated claims of newly discovered evidence combined with claims of actual innocence. [FN196] On that basis, it declined to create additional due process rights for executive clemency, asserting that courts are institutionally more suited for "evidentiary reexamination of criminal convictions." [FN197] But the standard demanded of the allegedly-innocent by the Texas courts in Graham is "impossible by definition": based on the newly discovered evidence and the entire record before the jury that convicted him, no rational trier of fact could find proof of guilt beyond a reasonable doubt. [FN198] Nor does it include *549 any additional safeguard that the level of punishment imposed will reflect all mercy-j categories.

Texas may improve. In the non-capital case of Joe Rene Elizondo, the Texas Court of Criminal Appeals recognized that limiting relief to a "theoretically impossible" standard was "an anomaly," and, therefore, lowered the showing demanded to "clear and convincing evidence that no reasonable juror would have convicted [the petitioner] in the light of the new evidence." [FN199] In 1984, Elizondo had been sentenced to life for allegedly sexually assaulting his then ten-year-old stepson. The new evidence is the now-adult victim's recantation. [FN200] The state, however, is requesting a rehearing attacking the new standard, which one prosecutor characterized as "a potential get-out-of-jail-free card to the 100-and-some-odd-thousand inmates" in Texas prisons. [FN201] Texas court watchers hope or fear that Texas will readopt the harsher standard because three Republicans (one a former prosecutor) have been elected to replace three
Democrats on the court. [FN202]

Perhaps Illinois will do better. The Illinois Supreme Court recently announced a state constitutional right not to be punished if innocent, locating this right in both procedural and substantive due process [FN203] and allowing it to be raised by an otherwise untimely petition for post conviction relief. [FN204] As to the standard for obtaining a new trial, the Illinois Court stated that "relief has been held to require that the supporting evidence be new, material, non-cumulative, and, most importantly, of such conclusive character as would probably change the result on retrial." [FN205] Hopefully, these words will be construed to do equitable justice. As of the end of March 1997, one petitioner had received some relief: an order forcing the State to allow the petitioner access to evidence so that the petitioner could have DNA tests conducted at his own expense. [FN206] The Illinois State Legislature was considering a bill that would provide a right to modern testing in cases where reliable testing was not available at the time of trial. [FN207]

*550 Meanwhile, to our great discredit, no institution in the United States has demonstrated a commitment to enforcing the full use of all possible categories when deciding if the death penalty is the appropriate punishment in the set of disjunctive deserts. Even worse, the Antiterrorism and Effective Death Penalty Act of 1996 [FN208] makes even actual innocence of the crime charged of practical irrelevance especially to the largely poor, largely African American population of death row, who were represented at trial by appointed counsel whose errors perennially "procedurally default" innumerable meritorious claims. [FN209]

V. CONCLUSION

Arbitrary mercy (mercy-a) is not compatible with justice in a rights-based system because it violates the equal protection principle of distributive justice. The Supreme Court appeared to endorse justice regarding mercy (mercy-j) as a constitutional limitation in death penalty cases many years ago. No institution, however, has been willing to enforce that right. Worse, the Supreme Court has limited its habeas focus to actual innocence. [FN210] Justice Blackmun is right: if we refuse to do justice when we kill [FN211] we should not kill.
VI. CODA: WILLIE EARL ENOCH - AN EXAMPLE OF FAILED MERCY?

Do our minds jump too quickly from "guilty" to "deserving of the imposed sentence," even when the imposed sentence is death, even when the imposed sentence was never well supported? Have we improperly limited institutional chances for mercy?

Test for yourself. Review the materials below from the case of Willie Earl Enoch.

In 1983, Enoch was convicted of the murder of Armanda Kay Burns. He waived jury sentencing. The judge sentenced Enoch to death. [FN212]

The case presented in court against Enoch was weak and circumstantial. The strongest physical evidence against Enoch was a man's shirt stained with the victim's blood. The chief witness against Enoch testified to seeing Enoch drop the shirt as he fled the victim's apartment. [FN213]

In 1997, Enoch's defense team finally succeeded in having the sweat stains on the shirt subjected to DNA tests. The DNA tests, however, were performed by the Illinois State Police crime laboratory in Springfield, Illinois with no input or review by the defendant. [FN214] According to the laboratory report, the sweat did match Enoch's DNA with a high degree of confidence. [FN215]

This report is now being contested by Enoch's attorneys. [FN216] Assuming (perhaps counterfactually) that the report is correct, that Enoch's sweat is on the shirt, Enoch is guilty - or, to be more precise, Enoch's long standing story about the night of Burns' death is incorrect: if Enoch is innocent, he has been for some reason lying about the details of his innocence.

Assuming for this argument that Enoch was correctly found guilty in 1983, the court had a limited choice of sentences: death by lethal injection or natural life - life in Illinois' prisons without the possibility of parole. [FN217] Do the judge's remarks at sentencing reflect sufficient consideration of the alternative to death by lethal injection? Immediately upon the release of the DNA test results, public sympathy for Enoch collapsed dramatically. Seemingly, no one paused to ask if the judge was right in choosing death over life in prison. Is Enoch's case an example of an unseemly inability to conceive of mercy?
One can only be merciful to the guilty. If guilt ends all consideration, mercy is dead.

A. Why the Judge Chose Death Instead of Life in Prison: Excerpt From Judge's Remarks at Sentencing:

Death is a part of life; it is common in its occurrence, and it is common to us all making the few years of life granted to us very precious. This Court is sensitive to the fact that a social contract exists between government and its citizens. People give up the right to seek vengeance themselves and turn that over to the sovereign. And the sovereign has the obligation to see to it that justice is done. The wanton disregard for life demonstrated by the defendant makes any conclusion that he would be harmless as an inmate of the penitentiary questionable indeed. To the contrary the evidence reveals that he is a clear and present danger. . . . There are no mitigating factors sufficient to preclude the imposition of the death penalty. For the offense of murder, the defendant is hereby sentenced to death. [FN218]

B. But:

The trial court's finding that Enoch would be a clear and present danger in prison is wholly unsupported by any evidence in the record. Not even the State contends that such evidence can be found anywhere in the trial record. [FN219]

C. Court Review of the Sentence's "Factual Predicate" for Death:

The record makes it clear that the state circuit court judge's discussion of Petitioner being a clear and present danger in prison was in response to Petitioner's argument that he would be an asset to the federal penal system. Therefore, the judge's statement was not used as a basis for the imposition of the death penalty. [FN220]

D. Excerpt from Willie Enoch's Personal Statement [FN221]

Why do the courts want to execute me? The trial judge said I would be dangerous in prison. However, neither I nor any of those around me, or those who have come to know me, have seen any signs of this so-called monster the state describes. I am not running around prison waiving a
knife at everyone. I paint. I teach other prisoners how to paint. I try to make some kind of life in prison. I help other prisoners to make do with prison. I try to understand my case. I help other prisoners work through their cases. Even if the courts won't let me out, why can't they at least let me live?

E. Is Death the Fitting Penalty After This Kind of Trial or This Kind of Life?

Willie Enoch has spent the last fourteen years of his life on Illinois' death row, *553 because the legal system failed him. [FN223] Ironically, by the time he was arrested in 1983 at the age of 28, Enoch was used to being disappointed by the people and institutions he should have been able to trust.

The disappointment began early in Enoch's Mississippi childhood. Enoch's grandfather killed his father when Enoch was only two months old. Enoch's mother remarried an alcoholic who physically abused her and her children, including Willie.

With that harsh home environment, Enoch had to turn elsewhere for support and a sense of identity. As a child, he found that identity in his church choir and through his true avocation, art. As a young man who left Mississippi for Chicago, with no job skills or formal education, he sought that identity in the streets.

In 1983, Enoch was trying to get his life back on track. He moved to Peoria, where his mother had relocated, and worked to support himself by painting. In April of that year, a young woman was found murdered. After a cursory police "investigation" . . . , Enoch was accused of the crime. Enoch maintained his innocence and, as he had every right to do, relied upon his court-appointed lawyer to represent him vigorously. That did not happen. Enoch was railroaded at trial and, worse still, foreclosed from meaningful appeal because of critical errors made by his lawyer. In short, the justice system completely failed him.

Since his conviction, and despite his limited formal education, Willie Enoch has devoted consid-
erable time and energy to learning how and why the legal system could have failed so terribly in his case. He reads continually to try to understand and articulate why he has remained in prison and why the courts have refused to examine the facts of his case. Enoch has also rekindled his childhood interests in religion and art. He reads the Bible frequently. He works hard to perfect his avocation for painting portraits and landscapes, and he teaches art classes to other prisoners. His Pontiac prison record is exemplary.

F. The Press Reports: Mercy Is Dead. [FN224]

Another death penalty case. Another DNA test performed many years after the conviction. Another persuasive resolution. So this time, it went against the man sentenced to die, Willie Enoch. This time the sophisticated new tests on old evidence came back to explode in the defense camp and destroy a burgeoning public-relations campaign to sow doubt about the convict's guilt and stave off his execution . . . [T]he results released Monday vindicated [ [the state prosecutors'] work. State police forensic scientists extracted a DNA profile from sweat stains on the armpit of the shirt [left near the scene by the murderer] that matched Enoch and is found in only one in 19,000 African-Americans.

Enoch did it, in other words. He lied to and exploited his volunteer lawyers and the citizen activists who labored years on his behalf and who Monday took down the World Wide Web site that advanced the case for his innocence.

*554 He gambled that the evidence was so old it would yield inconclusive or even exculpatory results, and he lost. The result is a palpable weakening of the pleas for mercy and esoteric final-hour appeals that are his only remaining hope.

G. The Closing Misquotation: Portia Updated

The quality of mercy is impounded. It droppeth as the gentle rain from heaven Upon the place beneath. But the US Immigration and Naturalization Service prevents its unauthorized entry. And the courts claim they lack all jurisdiction to intervene.

*555 VII. BIBLIOGRAPHY OF NON-LEGAL SOURCES
Jacob Adler, Murphy and Mercy, 50 Analysis 262-68 (1990).


Rabbi Ezra Basri, Ethics of Business Finance & Charity According to Jewish Law (Rabbi Eliyahu Touger, trans., 1988).


Donald H. Bishop, Attitudinal Ethics, 6 J. of Thought 222 (1971).


R.S. Downie, Forgiveness, 15 Phil. Q. 128-34 (1965).


The Just Society, (Ellen Frankel Paul et al. eds., 1995).


Berel Lang, Forgiveness, 31 Amer. Phil. Q. 105-117 (1994).

Paul Lauritzen, Forgiveness: Moral Prerogative or Religious Duty?, 15 J. of Religious Ethics 141

David Londy, Can God Forgive Our Trespasses?, 25 Sophia 4-10 (1986).


Kathleen Dean Moore, Pardons: Justice, Mercy, and the Public Interest (1989).


Malcolm E. Munson, Power and Virtue: Institutional Ascent or Individual Decline?, 17 Int'l Stud. in Phil. 27 (1985).

Iris Murdoch, Metaphysics As A Guide to Morals (Alan Lane, ed. 1993)


A.T. Nuyen, Straining the Quality of Mercy, 23 Philosophical Papers 61-74 (1994).


Michael J. Sandel, Liberalism and the Limits of Justice (1982).


Alwynne Smart, Mercy, 43 Philosophy 345-359 (1968).


[FN1]. Associate Professor, Florida Coastal School of Law. The author thanks Richard Epstein, Michel Rosenfeld, and J.P. Jones for their helpful comments on earlier drafts. The opinions and research presented in this article are solely those of the author who takes full responsibility for any errors.

This article is dedicated to the pro bono team from Kirkland & Ellis that is defending Willie Earl Enoch, a prisoner on Illinois' Death Row and to all the other people who have helped along the long, long road.

[FN1]. "[N]ot strained" is sometimes read not "[con]strained," i.e., not limited by rules or standards. See, e.g., Jeffrie G. Murphy, Mercy and Legal Justice, in Jean Hampton & Jeffrie G. Murphy, Forgiveness and Mercy 162, 166 (1988). But see William Shakespeare, The Complete Works of William Shakespeare 606 (G.B. Harrison ed., 1972) (notes to The Merchant of Venice, act 4, sc. 1, note to line 184 "strained" means forced, Portia's point is that mercy must be given freely). Murphy's reading seems less correct in the context of the immediately preceding dialogue: [l.182, Portia:] "Then must the Jew be merciful." [l.183, Shylock:] "On what compulsion must I? [T]ell me that." [[[l.184, Portia:] "The quality of mercy is not strain'd . . ." Id.


[FN3]. Haber correctly points out that Portia is a defendant's representative addressing the plaintiff in a civil suit not a judge in a criminal case. See Joram Graf Haber, Forgiveness 64 (1991); see also Ross Harrison, The Equality of Mercy, in Jurisprudence: Cambridge Essays 107, 108 (Hyman Gross & Ross Harrison eds., 1992) (Portia is addressing an individual, not the state). However, Shylock was threatened with criminal prosecution if he insisted on his bond. Furthermore, Shakespeare's Isabella suggests the same congruence between human and divine mercy when she speaks to a judge/ruler in a criminal justice context:

   No ceremony that to great ones' longs, Not the king's crown, nor the deputed sword, The mar-
shal's truncheon, nor the judge's robe, Become them with one half so good a grace As mercy does.

. . . .

Why all the souls that were forfeit once; And He that might the vantage best have took Found out the remedy. How would you be, If He, which is the top of judgement, should But judge you as you are?

William Shakespeare, Measure for Measure, in The Complete Works of William Shakespeare 96 (G.H. Harrison ed., 1972) (act 2, sc. 2). Therefore, I refer below to Shakespeare's, not to Portia's, underlying assumption.

[FN4]. A rights-based system is one that makes a (or the only) fundamental principle of political theory "the ascription of certain rights to individuals." Charles Taylor, Atomism, reprinted in Philosophy and the Human Sciences: Philosophical Papers 2 187, 188 (1996) [hereinafter Human Sciences]. A duty-based system, on the contrary, prioritizes "a principle of belonging or obligation," such as a duty or obligation for each individual to belong to, sustain, or obey some institution or authority (to be a citizen of a Greek polis; to obey the revealed law of God). Id. at 188. In a rights-based system, "rights" are inherent to persons qua persons; "duties" to belong to groups (polities, etc.) are derivative of rights humankind would have even in a non-societal state of nature. Id. Taylor discusses the duty to belong to and support an association of other humans. He does not separately analyze a duty to obey some non-human authority. For the purposes of this paper, a "rights-based system" includes any system where the individual members of the polity are bound to respect each other's rights, rather than being limited to the totally atomistic version properly chastised by Taylor. Murdoch may represent an intermediate position. See Maria Antonaccio, Form and Contingency in Iris Murdoch's Ethics, in Iris Murdoch and the Search for Human Goodness 110, 114 (Maria Antonaccio & William Schweiker, eds., 1996) [hereinafter Murdoch Symposium] (arguing that Murdoch is attempting to create an individual situated within some type of metaphysical framework and, thus, to mediate the difference between Kant's view of a man creating the world though willful choice and a Hegalian view of
man created by his pre-existing situation in the world). This paper does not address Taylor's fascinating argument that Rawlsian individual rights are theoretically incoherent in a state of nature (i.e., outside of a society). Note that Rawls' current theoretical opponents are largely utilitarians to whom "good," i.e., the goal striven for by men (pleasure, utility, etc.), is primary or communitarians of multiple types not theologians whose definition of "good" is "commanded by the deity." See, e.g., Michael J. Sandel, The Foundations of Liberalism: Kant v. Mill, in Liberalism and the Limits of Justice 2-7 (1996) (explaining that liberalism's human agent is an autonomous Kantian individual who cannot/should not be used lightly for others' ends (goods) as utilitarian calculus demands). God-based duty systems, however, are neither liberal, utilitarian, nor communitarian in Sandel's sense. "The end of the matter all having been heard is this, Fear God and keep His commandments, for this is the whole man." Ecclesiastes 12:13, 15. Perhaps the best philosophical analogy is that the nature of God defines the telos of humans, thus making obeying God's commandments the equivalent of seeking the Good. Iris Murdoch has argued that the Good is the modern substitute for the personal god of Christianity, Islam, and Judaism. Iris Murdoch, Metaphysics As A Guide to Morals 426, 511 (Alan Lane ed., 1993) (claiming that the definitive grounding of modern morality is a demythesized God, i.e., the Good). Several philosophical theologians dispute the adequacy of Murdoch's Good as compared to their own God(s). See, e.g., Franklin I. Gamwell, On the Loss of Theism, in Murdoch Symposium, supra, 171; Stanley Hauerwas, Murdochian Muddles: Can We Get Through Them If God Does Not Exist?, in Murdoch Symposium, supra, 190; William Schweiker, The Sovereignty of God's Goodness, in Murdoch Symposium, supra, 209.

[FN5] Cf. Taylor, The Nature and Scope of Distributive Justice, reprinted in Human Sciences, supra note 4, at 289, 301 ("[D]emands of distributive justice can and will differ across different societies and at different moments in history."); Onora O'Neill, Theories of Justice, Traditions of Virtue, in Jurisprudence, supra note 3, at 55-6 (most contemporary theories of justice are based on an account of rights between human beings in society).
[FN6]. See, e.g., John Rawls, A Theory of Justice 20 (1971). Some philosophers refer to "reflective equilibrium" as "the naturalist tradition." See, e.g., Berel Lang, Forgiveness, 31 Am. Phil. Q. 105, 114 (1994) ("the naturalist tradition of ethics from Aristotle to Mill: the conception of what is desirable as indicated, if not demonstrated, by what is desired"); Aristotle, Nicomachean Ethics 175 (Martin Ostwald, trans. 1962) ("proper procedure" starts with considering "the observed facts of moral life and the current beliefs about them . . ."). Charles Taylor's term is "ad hominem practical reasoning" (which he celebrates in opposition to the impossible "apodictic" version of practical reasoning). See, e.g., Charles Taylor, Explanation and Practical Reason, in Philosophical Arguments 34, 36 (1995) [[hereinafter Arguments]. Ronald Dworkin finds equilibrium a useful technique but only in its "constructive" as opposed to its "naturalist" mode, i.e., as long as reflection seeks to form a coherent framework for human action without claiming that the framework is a type of "objective moral reality" that is merely discovered (not created) by human thought. Ronald Dworkin, Taking Rights Seriously 159-68 (1978).

[FN7]. Other recent philosophical treatments of mercy which are not discussed in this paper are listed in the bibliography. Academic legal literature also discusses justice and mercy but does not seem to have reached this issue. See Stephen P. Garvey, As the Gentle Rain from Heaven: Mercy in Capital Sentencing, 81 Cornell L. Rev. 989 (1996) (retributivist argument for incorporating mercy into the penalty phase of capital trials); Dan M. Kahan & Martha C. Nussbaum, Two Conceptions of Emotion in Criminal Law, 96 Colum. L. Rev. 269 (1996) (arguing for self-conscious evaluation of criminals' emotions during sentencing decision whether to show mercy); Paul W. Cobb, Jr., Note, Reviving Mercy in the Structure of Capital Punishment, 99 Yale L. J. 389 (1989) (arguing that mercy was receiving insufficient consideration in death penalty cases). More often, legal literature discusses Shakespeare's works including Measure for Measure and The Merchant of Venice, but again, no article seems to hone in on the specific issue raised by this paper. A full list would overpower. See, e.g., Richard A. Posner, Law and Literature: A Misunderstood Relation 90-115 (1988) (cited pages are a sustained discussion of Measure for Measure and The Merchant of Venice; Shakespeare's works are also mentioned on many other

[FN8]. For a short discussion of whether mercy is superogatory, see analysis of Smart and Hestevold below. A related issue is whether ethical theory using the "morality-as-justice" ("jurisprudential") paradigm distorts a large sphere of permitted (but not ordered) actions involving moral choices, i.e., "imperfect duties" such as charity. See, e.g., Loren E. Lomasky, Justice to Charity, in The Just Society 32-53 (Ellen Frankel Paul et al, eds., 1995) (jurisprudential paradigm is a harmful distortion). Lomasky does not use the word "mercy." For works tying mercy to charity, see infra discussion of Claudia Card and accompanying notes 22-23. For discussions of the difference between mercy as a virtue of persons and mercy as a quality of acts, see infra note 21 and accompanying text.

[FN9]. St. Anselm, The Prayers and Meditations of St. Anselm 249, 253 (Sister Benedicta Ward
trans., 1979). Many Christian theologians share the view expressed in Milton's Paradise Lost (Bk. III, lines 403-10) that Jesus died to allow God to exercise loving mercy, rather than justice, towards humankind. See, e.g., Thomas Talbot, Punishment, Forgiveness, and Divine Justice, 29 Religious Stud. 151, 151-52 (1993) ("[A]ccording to Milton and a host of other theologians, Christ died in order that God might be merciful to sinners without doing violence to his own sense of justice.") (discussing Augustinian theology and suggesting a different conception in which God's justice, mercy, and love are identical). Nicholas Rescher brought to westerner's attention an Islamic story comparable to St. Anselm's second problem:

Let us imagine a child and a grown-up in Heaven who both died in the True Faith, but the grown-up has a higher place than the child. And the child will ask God, "Why did you give that man a higher place?" And God will answer, "He has done many good works." Then the child will say, "Why did you let me die so soon so that I was prevented from doing good?" God will answer, "I knew that you would grow up a sinner, therefore it was better that you should die a child." Then a cry goes up from the damned in the depths of Hell, "Why O Lord, did you not let us die before we became sinners?"


[FN10]. God and His perfection are not "hypotheses" or "theories" to St. Anselm.

[FN11]. Leviticus 19:17-18. "Voluntarism" is the Christian theology in which standards of morality are products of the divine will. N.E. Simmonds, Judgment and Mercy, 13 Oxford J. of Legal Studies 52, 55 (1993). For a recent analytical discussion of God based ethical systems see Philip L. Quinn, Divine Commands and Moral Requirements (1978); see also Talbott, supra note 9, at 154 (in the view of St. Anselm, among others, committing a sin is an attempt to dishonor God which creates a debt from the sinner to God. God forces repayment by inflicting punishment). Joel Feinberg, among others, labels voluntarism "incoherent." See Joel Feinberg, Noncomparat-

[FN12]. Cf. Charles Taylor, Iris Murdoch and Moral Philosophy, in Murdoch Symposium, supra note 4, at 3, 13 ("In a modern humanistic ethic, the locus of the constitutive good is displaced [from God and metaphysics] onto the human being itself.").

[FN13]. For a thumbnail history of the "modern" format of ethical questions, see Iris Murdoch, Metaphysics and Ethics, reprinted in Murdoch Symposium, supra note 4, at 236-52. Cf. Sandel, supra note 4, at 116-122 (discussing methods of justification; Rawlsian liberalism creates major problem with justification by making the right prior to the good, i.e., by giving individual autonomous agents free choice between different definitions of the good).

[FN14]. Alwynne Smart, Mercy, 43 Phil. 345 (1968).

[FN15]. Id. at 349.

[FN16]. Id.


[FN18]. Smart, supra note 14, at 356. For criticisms of Smart's thesis see, for example, John Kleinig, Mercy and Justice, 44 Phil. 341, 342 (1969) (Smart's true and misnamed mercy are both "pleas for mercy based on different sorts of considerations." Mercy involves benevolence and is just since benevolence is the recipients' due "as human beings."); H.T.R. Roberts, Mercy, 43 Phil. 352 (1968) (Smart confuses mercy with leniency; mercy deals with giving up a personal entitlement and does not belong in courtrooms).

[FN19]. Smart, supra note 14, at 358-59.

[FN20]. Id. at 358.
For discussions of the difference between mercy as a character trait ("virtue") and mercy as a set of principles determining when one should perform an act, see Jacob Adler, Murphy and Mercy, 50 Analysis 262 (1990); Andrew Brien, Saving Grace, 9 Crim. Just. Ethics 52 (1990); Andrew Brien, Mercy and Desert, 20 Phil. Papers 193 (1991). Discussions of virtue as character trait include Aristotle, Nichomachean Ethics, supra note 6, and Seneca's On Mercy, reprinted in Seneca, Moral and Political Essays 117, 128-164 (John M. Cooper & J.F. Procope, eds., 1995). Churchland suggests a modern reinterpretation based on the emerging model of the human brain as a vector coding apparatus similar to parallel distributed "computer" processing in a large-scale recurrent neural network. Paul M. Churchland, The Engine of Reason, the Seat of the Soul: A Philosophical Journey into the Brain 226 (1995). Churchland agrees with Aristotle that moral learning is a form of practical reasoning. Churchland, however, says humans deal with moral (and all other decisions) in terms of vectors from learned paradigms rather than from rules stateable in language. Id. at 286-94. According to another thesis, confusion about mercy stems from the inappropriate shift from the Greek-Roman tradition of viewing mercy as a quality of persons (virtue) to the Jewish-Christian tradition of viewing mercy as a quality of acts. Daniel Statman, Doing Without Mercy, 32 S. J. of Phil. 331, 342-43 (1994). O'Neil has argued that "justice" and "virtue" ethics are not incompatible: "justice" is political and deals with perfect obligations; "virtue" is societal and deals with imperfect obligations. See O'Neil, supra note 5, at 72; see also Charles Taylor, Iris Murdoch and Moral Philosophy, in Murdoch Symposium, supra note 4, at 3, 11 ("The obligation to do [good acts] and the goodness in being [a person who does good acts] are two facets, as it were, of the same sense. . . . Traditionally, philosophical theory has explored [the second] in the language of virtue."). For a discussion of the attitude of mercy in a criminal sentencing context, see Eric L. Muller, The Virtue of Mercy in Criminal Sentencing, 24 Seton Hall L. Rev. 288 (1993) (in answer to Jeffrie G. Murphy, arguing that mercy is a highly specific state of mind in the sentencer in a retributivist theory of criminal law).

[FN23]. Card, supra note 22, at 182.

[FN24]. Id. at 184. Other offenders are included in Card's class of those who would benefit from the offender's punishment (emphasis omitted).


[FN26]. Note that rules are also needed to prevent morally inappropriate criteria from polluting the distribution of rights by writers of subordinate rules, i.e., the problems of majority faction and discretion-laden distributors of rights.

[FN27]. The definition of "rights" will be refined further in the text accompanying infra note 49.

[FN28]. Aristotle, supra note 6, at 141-42 (Bekker 1137b); see also Harrison, supra note 3, at 120-21 ("mercy" in state clemency proceedings is "intervention in particular cases, in the name of justice, to stop mechanical operation of rules of law which would be unjust in the particular case.").

[FN29]. Aristotle, supra note 6, at 142 (Bekker 1138a). Seneca's account is similar to Aristotle's, allowing for the dedication of Seneca's On Mercy to the Roman Emperor Nero. Seneca, supra note 21, book I, 1:1 at 128. Seneca provides several definitions of "mercy": "self-control by the mind when it has the power to take vengeance," "leniency on the part of a superior towards an inferior in imposing punishments," "a tendency of the mind to leniency in exacting a punishment," and "moderation that remits something of a deserved and due punishment." Id. book II, 3:1 at 160. Seneca's merciful judge is using a refined justice that looks at details of the crime (the offender "may have been misled or under the influence of alcohol" or have had "an honourable reason" for the offending actions), id. at book II, 7: 2 at 164, the best chance of reformation, id. at book II, 7:4,5 at 164, and likely public reaction, id. at book I, 3:3 at 132. But Seneca only praises mercy seen as a subset of justice: Mercy "judges not by legal formula, but by what is
equitable and good. . . . All these things [mercy] does with the idea not of doing something less than what is just but that what it decides should be the justest possible." Id. book II, 7:3 at 164. Pity, which only "looks at the plight," is a Senecan vice, id. at book II, 5:1 at 161, as is pardon, which remits "deserved punishment." Id. at book II, 7:1 at 163.

[FN30]. Card, supra note 22, at 188 ("Persons who administer the rules of the institution may be formally invested with the prerogative of mercy.").

[FN31]. Card does not specify, but this statement is embedded in a discussion using criminal punishment examples, and Card may consider it valid only in that or similar contexts.

[FN32]. Card, supra note 22, at 198. As this statement illustrates, Card's mercy is justice based on categories she finds unacceptable in positive law. But some of these categories are included in the Federal Sentencing Guidelines. See, e.g., U.S.S.G. § 3E1.1 (acceptance of responsibility); Chap. 4 (other criminal activity by defendant); Chap. 5, part H (policy statements as to which specific offender characteristics are relevant to sentencing or to conditions of probation and supervised release).

[FN33]. The second issue could be addressed by an account of the reverse: how the individual/agent can give the state/institution an acceptable ground for performing actions otherwise barred to state/institutions. For a further discussion of the delegation problem, see infra notes 62 & 67, and text paragraph accompanying note 67.


[FN35]. U.S. Const. amend. VIII. See generally Furman v. Georgia, 408 U.S. 238, 377 (1972) (Burger, C.J., dissenting) (objecting that members of plurality have changed the meaning of the constitutional phrase by holding the death penalty as administered a cruel and unusual punishment; "[T]he Framers' exclusive concern was the absence of any ban on tortures."). Note that constitutional law includes a similar "absurdity" in due process rights: while a state has no con-
stitutional obligation to provide an appellate process, if one is provided it must be provided without violating the equal protection clause. See, e.g., M.L.B. v. S.L.J., 117 S. Ct. 555, (1996) (Dec. 16, 1996) (preventing mother from appealing termination of her parental rights because she could not afford over $2,000 in costs violates equal protection and due process clauses).

[FN36] Cf. Taylor, Iris Murdoch and Moral Philosophy, in Murdoch Symposium, supra note 12, at 11-12 (Looking at mercy by asking when it is allowed/obligated to override justice is a result of "[t]he belief that all the moral deliberation we need can be effected with a calculus of obligated actions . . . another illusion of the erroneous single-term moralities, [that] only makes sense on condition that their homogeneous domain exhausts the moral." To find the relationship between justice and mercy "we may find ourselves looking at what kind of good it is to be a just person and what it is to be benevolent. We will be thinking of how to place these two virtues in our lives.").


[FN38] Murphy, supra note 1, at 162. For earlier versions of this paper, see Jeffrie G. Murphy, Mercy and Legal Justice, 4 Soc. Phil. & Pol'y 1 (1986); Jeffrie G. Murphy, Forgiveness, Mercy, and the Retributive Emotions, 7 Crim. Just. & Ethics 3 (1988). See generally Herbert Morris, Murphy on Forgiveness, 7 Crim. Just. & Ethics 15 (1988) (comment on Murphy's view of forgiveness in the immediately preceding article); Jeffrie G. Murphy, A Rejoinder to Morris, 7 Crim. Just. & Ethics 20 (1988) (answer to Morris' comment).

[FN39] Murphy claims that St. Anselm's problems with God are models of modern problems with other judges. For St. Anselm's formulation of these problems see text accompanying note 9, supra.

[FN40] Murphy, supra note 1, at 180-81.

[FN41] Id. at 182-83. This analysis is another example of extending the relevant conditions
when doing justice. The author points out that (a) this move is unhelpful if there is no morally relevant impact on the judge God can afford mercy to all, and (b) that we could also limit the scope of St. Anselm's second problem by taking into account the judgment's effect on third parties.

[FN42]. Feinberg, supra, note 11.

[FN43]. See, e.g., Aristotle, supra note 6, at 118 (Bekker 1131a).

[FN44]. Feinberg, supra note 11, at 286 (emphasis added). Later in the essay, Feinberg implies that the "offense to reason" is "offen[se] against the facts and . . . truth." Id. at 295. While Feinberg does not use the term "mercy" in this essay, his examples of noncomparative injustices are acts of mercy.

[FN45]. Exodus: 33:19. The Orthodox Jewish view holds that, because of the covenant between God and Israel, "moral duties to others are also absolute duties to God." Louis E. Newman, The Quality of Mercy: On the Duty to Forgive in the Judaic Tradition, 15 J. of Religious Ethics 155, 167 (1987). For a corresponding Christian explanation of forgiveness see Paul Lauritzen, Forgiveness: Moral Prerogative or Religious Duty?, 15 J. of Religious Ethics 141 (1987). But many believers still insist that an injurer must also request forgiveness of the human injured. See, e.g., Gates of Repentance: The New Union Prayer Book for the Days of Awe 251 (Chaim Stern, ed., 1978) ("For transgressions against God, the Day of Atonement atones; but for transgressions of one human being against another, the Day of Atonement does not atone until they have made peace with one another."); United Synagogue of America, High Holiday Prayer Book 206 (Rabbi Morris Silverman ed. 1951) ("Note on Kol Nidre Prayer: Sins between man and man are not forgiven [by God] until amends have been made for the wrong.").

[FN46]. See Murphy, supra note 1, at 180-81.

[FN47]. See Kathleen Dean Moore, Pardons: Justice, Mercy, and the Public Interest 17-54
See Smart, supra note 14, at 345-49.

Symmetrically, backers of "moral rights" often point out that enforcement by the courts and police of a country does not settle whether institutional enforced entitlement are "moral rights," i.e., should be enforced. See Dworkin, supra note 6, at 206-222.

Another interesting issue is the tie between emotions, literature, and the human ability to view offenders as complex human beings stranded in largely unchosen circumstances and, therefore, give consideration to the details supporting mercy. See, e.g., Martha Nussbaum, Equity and Mercy, 22 Phil. & Pub. Aff. 83 (1993) (tracing this view back to Seneca). Mercy-j is basically equivalent to "equity" as used by Aristotle, Nussbaum, and Nuyen. See id. A.T. Nuyen, Straining the Quality of Mercy, 23 Phil. Papers 61 (1994). Note that in Churchland's model of learning, a network (such as a mind) does not acquire the ability to deal with novel problem sets if its training set of inputs was too limited in number or diversity. In Churchland's terms, literature supplies additional training material for the human mind. See Churchland, supra note 21, at 49-53 (example of face coding).

See Rawls, supra note 6, at 75-80. Rawls is used since his criteria are relatively easy to discuss and because Rawls makes justice the "first virtue of social institutions." Id. at 3. This paper is not endorsing Rawls' hypothetical contract. The author would prefer a model incorporating Charles Taylor's insights about the social nature of man, Elizabeth Anderson's insights into the plurality of incomparable values and ideal lives, and Michael Walzer's insights into the problem of power in one "sphere of justice" overpowering more relevant criteria in a different "sphere." See bibliography listings for these authors infra part VI.

But see Michael Davis, Sentencing: Must Justice Be Even-Handed?, 1 Law & Phil. 77, 114, 104-06, 111-116 (1982) ( "If there is a basis for rejecting 'clemency by chance,' the basis is, it seems, envy." ) (denying that sentencing differences based solely on appearing before a differ-
ent judge is an injustice. The author points out that Davis' refutation of "the argument from unequal treatment" turns on the utilitarian consideration that society cannot afford a better procedure and that Davis' refutation of the "argument from chance" rests on two question begging alternatives (a) persons' asymmetrical attitude towards good versus bad luck, and (b) recasting the unequal punishments Y and Z into the equal punishments of X% chance of getting Y and a W% chance of getting Z).

[FN53]. George Orwell, Animal Farm 148 (1956).


[FN55]. In the words of Angelo's reply to Isabella: I show [pity] most of all when I show justice; For then I pity those I do not know, Which a dismiss'd offence would after gall[.] William Shakespeare, Measure for Measure, in Complete Works of William Shakespeare (1972) (act 2, sc. 2).

[FN56]. See Rawls, supra note 6, at 75-80.

[FN57]. See Feinberg, supra note 11, at 267-68.

[FN58]. See id. at 285, 286.

[FN59]. Feinberg implies such a judge is impossible. See Feinberg, supra note 11, at 282 n.10 ("[Suggesting] that God confers on the elect not only their salvation, but also their desert of salvation . . . would render the concept of desert incoherent. Even though omnipotent, God can no more make the undeserving deserving by fiat than He can make $2 \land 2 = 5$."

[FN60]. Accord Harrison, supra note 3, at 113 (we do not choose to be impartial, it is forced upon us by our rationality: "For if his humanity gives him a reason not to be killed, then any other people's humanity equally gives them a reason not to be killed. If he has a right, therefore,
then so also do they. If we recognize his particular right, we are therefore forced also to be impartial between his and these others' analogous rights. Rather than having to choose between his right and impartiality, the impartiality is forced on us.

[FN61]. See Feinberg, supra note 11, at 269-70.

[FN62]. The author originally created this argument to deal with a descriptive theory of language, a theory of language congruent with the Rawlsian view of good as a choice of the will (both share Kantian roots). The same argument seems to work for paradigms if such paradigms need to be coherent. The problems with a coherence test are beyond the current paper. (To some moral philosophers different conceptual visions place some moral visions in different epistemological worlds and each such world has stories displaying what a moral agent is when that agent has various virtues or pursues various types of action. For an analysis comparing Hare's radically descriptive use of language which goes back to the fact/value dichotomy basic to Hume and Kant with Murdoch's theory of differing visions, see Cora Diamond, We Are Perpetually Moralists: Iris Murdoch, Fact, and Value, in Murdoch Symposium, supra note 4, at 79-109. For an explanation of how paradigms (stories) operate in such visions, see, for example, Taylor, Iris Murdoch and Moral Philosophy, in Murdoch Symposium, supra note 12, at 3-28; See generally Martha Nussbaum's many works on the moral need for a literary imagination, supra note 50).

[FN63]. See, e.g., Charles Taylor, Human Agency and Language: Philosophical Papers I 215-16 (1996)[hereinafter Human Agency] (defining humans as language animals). The author reserves for another paper the interesting question of whether language makes pure non-comparative judgments impossible. Peter Westen makes a parallel argument that the two definitions of justice are equivalent. See Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537, 557 (1982) ("[T]o say that 'every person should be given his due' means 'persons who are alike should be treated alike' and 'persons who are unalike should be treated unalike.'").

[FN64]. Feinberg mentions, but does not stress, this overlap. Feinberg, supra note 11, at 278
Instances of each are rarely pure, any given example of one being likely also to have elements of the other.

Ernest van den Haag raises the non-comparative argument in support of the death penalty:

Guilt is personal. No murderer becomes less guilty, or less deserving of punishment, because another murderer was punished leniently, or escaped punishment altogether. . . . Nathanson insists that some arbitrary selections among those equally guilty are not "just." He thinks that selecting only bearded speeders for ticketing, allowing the clean shaven to escape, is unjust. Yet the punishment of the bearded speeders is not unjust. The escape of the clean shaven ones is. I never maintained that a discriminatory distribution is just only that it is irrelevant to the guilt and deserved punishment of those actually guilty.

Ernest van den Haag, Refuting Reiman and Nathanson, 14 Phil. & Pub. Aff. 165, 174 (1985) (replying to criticism of Ernest van den Haag, The Collapse of the Case Against Capital Punishment, National Rev., March 31, 1978, at 397). The opposing point of view is that sentencing involves both non-comparative and comparative justice: "[w]hether one is treated justly or not depends on how others are treated and not solely on what one deserves." Stephen Nathenson, Does It Matter If the Death Penalty Is Arbitrarily Administered?, 14 Phil. & Pub. Aff. 149, 158 (1985); accord A.M. Honore, Social Justice, 8 McGill L.J. 77, 82 (1962) ("Each member of society is thought to have a claim that the rules by which society's regulated, whatever they may be, should be observed. . . . Thus if a rule forbids parking in a certain area it is unfair to A who has parked in that area that he should be fined for doing so, whilst B who has done the same thing, is not prosecuted."). Feinberg cites Honor with approval and thus seems to agree that leniency, at least in the public rule situation, creates a reasonable expectation (if not a right-entitlement) of leniency to other offenders. See Feinberg, supra note 11, at 282 n.11; see also Richard O. Lempert, Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment, 79 Mich. L. Rev. 1177, 1224, 1226 (1981) ("Retributivist . . . cannot justify a system of state executions inevitably tainted by mistake, bias, and caprice." "If the retributivist's principles do not allow the intentional taking of the innocent life as a means to greater justice . . . they will not
justify a system that makes such takings inevitable.""); but see Ernest van den Haag, The Ultimate Punishment: A Defense, 99 Harv. L. Rev. 1662, 1665 (1986) ("Despite precautions, nearly all human activities, such as trucking, lighting, or construction, cost the lives of some innocent bystanders. We do not give up these activities[.]"). Van den Haag overlooks that we do not know who will die because of trucking, lighting, or construction. By mutually agreeing that the "dangerous" work is permissible, we are mutually agreeing to accept the quite low possibility that we might be the person subject to the future harm. In criminal law, however, we are choosing to harm a specific individual whose claim can be individually judged. For further discussion of this point see infra note 66 and accompanying text. But see Holman v. Page, 95 F.3d 481, 486 (7th Cir. 1996) (in non-capital cases, sentencing discretion is not an equal protection violation (citing Williams v. Illinois, 399 U.S. 235, 243 (1970)). The Supreme Court has refused to enforce rigid sentencing equality in capital sentencing proceeding. See Pulley v. Harris, 465 U.S. 37, 50-51 (1984) (Constitution does not require comparative proportionality review of capital sentences).

[FN65] See Hestevold, supra note 33.

[FN66] Utilitarianism is used even by nonutilitarians to make certain choices. For example, Dworkin allows utilitarianism to be used to modify some rights in his discussion of reverse discrimination. Dworkin, supra note 6, at 226-39. Smart allows mercy when it avoids more suffering than it causes. See Smart, supra note 14, at 349-50.

[FN67] Accord, Kahan & Nussbaum, supra note 7, at 369 (considering narrative history of defendant when deciding whether to mercifully moderate a sentence is "especially" appropriate "when the penalty that may be fixed is a severe one" and "where the defendant's background shows some prima facie evidence of unusual hardship or inequality."). The interrelationship of the various criteria suggested must wait for another paper.

[FN68] See, e.g., U.S. Const. amend. VI (right to appointed counsel).

[FN69] These factors coalesce in the oft-cited accident victim hypothetical. We decide to build a
road spur (or allow construction under a building code). We know in advance that 10 people will probably be hurt during construction and that 10 more people will be injured in automobile accidents related to the spur. We do not know the identity of any of the victims. Some injuries will not be serious. All construction workers will have chosen to work on that project. Most automobile accident victims and construction workers had the ability to influence the political decision on building the road (or choosing the building code). Many people who are badly hurt will have been at least careless.


[FN71]. See Murphy, supra note 1, at 174-80.

[FN72]. Substantive differences include differences in the scope of the system in which rights operate (do family members have rights against each other?) and the categories used in making choices (does being red-headed entitle you to a job?). Compare Arthur Conan Doyle's story of Sherlock Holmes and the "Red Headed League," which only employed redheads.

[FN73]. For example, Feinberg classes creation, administration, or enforcement of general rules as comparative while unfair punishments and rewards are non-comparative. See Feinberg, supra note 11, at 266-68. He, however, supplies no clear criteria for separating the two. He furthermore acknowledges the problem without dealing with it by stating that comparative and non-comparative principles may be invoked by the same circumstances. Id. at 278.

[FN74]. Nigel Walker, The Quiddity of Mercy, 70 Phil. 27 (1995) also supports the thesis without stating it. Looking at many of the articles considered in this paper (especially Smart's, Card's, and Murphy's works) Walker assumes (without discussion) that "mercy" can only be used to describe decisions not required by pre-existing rules. He also assumes as an axiom that in a just criminal system, rules require the same outcome for all actions in the same category including decisions to be lenient. He, however, wishes to allow some entity (such as executive elem-
ency) to lessen punishments when the mitigating factor cannot be articulated by a generalized rule. The types of sentence lowering actions he recommends, however, meet this paper's definition of mercy-j.

[FN75]. At least in judicial actions. Controversy rages over executive clemency decisions. Compare, for example, Kathleen Dean Moore, Pardon For Good and Sufficient Reasons, 27 U. Rich. L. Rev. 281, 285 (1993) ("every pardon is potentially a comparative injustice") with van den Haag's analysis discussed supra note 64.

[FN76]. Leave aside the psychological question of whether such treatment is bad from an utilitarian point of view because the other children may resent it. This question is empirical, not philosophical, and I surmise that the answer will be tainted by whether the children see the relationship in terms of rights or scarcity of parental concern.

[FN77]. John Stuart Mill, On Liberty 103 (Elizabeth Rapaport ed., 1978) ("A person should be free to do as he likes in his own concerns, but he ought not to be free to do as he likes in acting for another, under the pretext that the affairs of the other are his own affairs. . . . Th[e] obligation [of the state to restrain such power] is almost entirely disregarded in the case of the family relations[.]"); Id. at 106-7 (to protect liberty of public and of prospective children, the government may properly prevent destitute, putative parents from having children).

[FN78]. "Funds for pidyon sh'vuyim [redemption of captives] take precedence over all other kinds of charity . . . ." Meir Tamari, With All your Possessions, in Jewish Ethics and Economic Life 265 (Free Press 1987).

[FN79]. "Nevertheless, it is proper to leave one's heirs sufficient funds to meet their needs." 2 Rabbi Ezra Basri, Ethics of Business Finance and Charity According to Jewish Law 255 (Rabbi Eliyahu Touger, trans., 1988). Wills which disinherit ones' heirs are invalid. Inter vivos gifts which result in no estate available for ones' heirs are legally binding but the Mishnah expresses strong disapproval of the action. Dayan I. Grunfeld, The Jewish Law of Inheritance 6- 7, 16


[FN81]. See Shakespeare, supra note 2, at act 4, sc. 1.

[FN82]. D, of course, usually lacks standing to sue in the United States. But the government decision not to expend court resources does not foreclose the philosophical issue of D's moral rights. The fact that persons without standing do try to sue is a reflection of our feeling that Ds are injured in some fashion. "Standing" in American jurisprudence is limited to persons with certain types of injuries. Lack of standing does not equate to no injury. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) ("the plaintiff must have suffered an 'injury in fact' an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical'") (citations omitted).

[FN83]. Accord, Shari Seidman Diamond & Judith N. Levi, Improving Decisions on Death by Revising and Testing Jury Instructions, 79 Judicature 224, 232 (1996) (jury instructions need to be revised by a process including tests of the new instructions; death penalty is the appropriate starting place). In addition, death penalty opponents claim that society is hurt by the death penalty, not just spiritually, but in hard currency and crime rates. According to the Death Penalty Information Center, no evidence exits that executions lower crime rates. Government figures do show, however, that (1) trials where the death penalty is possible are extremely expensive compared to trials where natural life is the harshest penalty proposed, (2) jurisdictions have simultaneously increased death penalty trials and cut expenditures for patrolling policemen because of financial pressures, and (3) crime rates do go down when more policemen patrol the streets. In sum, an economically rational utilitarian society would eliminate the death penalty. Richard C. Dieter, Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty (Death Penalty Information Centers, 1994 rev.).

[FN84]. 14 Q.B.D. 273 (1884).
[FN85]. Id. at 273-74.

[FN86]. Id. at 288. Sentence was modified from death to six months in prison. Id. at 288, 288 n.2.

[FN87]. Id. at 279 "[T]he prisoners were subject to terrible temptation, to sufferings which might break down the bodily power of the strongest man, and try the conscience of the best."

[FN88]. Id. at 286.


[FN90]. Id. at 287.

[FN91]. English judges habitually asked the crown to grant mercy when they were dissatisfied with the basis for a conviction. The crown habitually complied. See Carlisle v. United States, 116 S. Ct. 1460, 1473 n.4 (1996) (Stevens, J., dissenting). In Japan from 810 to 1156, all death sentences required imperial approval, but in each case the Emperor commuted the sentence to deportation. Shigemitsu Dando, Toward the Abolition of the Death Penalty, 72 Ind. L. J. 7 (1996).

[FN92]. Similarly Portia, pretending to be a learned doctor of the laws, refuses to suggest that Shylock's bond be declared legally unenforceable because:

'Twill be recorded for a precedent, And many an error, by the same example, Will rush into state[.]

Shakespeare, supra note 2, at 203.

[FN93]. "To preserve one's life is generally speaking a duty, but it may be the plainest and highest duty to sacrifice it." Dudley, 14 Q.B.D. at 287.

[FN94]. Id.

[FN95]. "The [special] verdict finds in terms that 'if the men had not fed upon the body of the
boy then they would probably not have survived'. . . . They might possibly have been picked up next day by a passing ship . . . ." Id. at 279.

[FN96]. Whether the Dudley court was indulging in play-acting is a subject for a legal historian. See generally, A.W. Brian Simpson, Cannibalism and the Common Law (1984) (discussing the factual background of Dudley and the nautical tradition of cannibalism in extreme situations). Simpson asserts that "officialdom wanted a legal decision [that cannibalism was wrong], not the punishment of the two unfortunate men involved." Id. at 204. Both the grand jury and the prosecutor assumed the defendants would be pardoned. See id. at 204, 206.

[FN97]. Dudley, 14 Q.B.D. at 274.

[FN98]. Id.

[FN99]. Id. at 275; see also id. at 287-88 (opinion of judges making same statement). The special verdict also declared "[t]hat the boy, being in a much weaker condition, was likely to have died before [the men]." Id. To a utilitarian, the two statements are in conflict

[FN100]. Id. at 276 & n.5.

[FN101]. Id. at 276 (judicial opinion's characterization of case before it).


[FN103]. See, e.g., Esther 3:7, 12 (Haman cast lots to choose a day to kill the Hebrews); Robert Graves, The Greek Myths :1 Ch. 98, § (c), at 337 (Pelican paperback 1955) (1961) (Athenians cast lots to pick the Minotaur's victims); Joshua 7: 10-26 (at God's order using lots to identify a sinner); Michael Olmert, Points of Origin (Lotteries) 16 Smithsonian 52 (2) (April 1985) (Greeks and Romans used lots as way of giving the gods a voice in every day affairs, mentioning use of lots to choose famine victims, election winners, starting places at games, and to predict the future).
But see Roberts v. Louisiana, 428 U.S. 325, 350 (1976) ("[t]he country's experience with the commutation power does not suggest that it is a senseless lottery . . .") (White, J., dissenting) (emphasis added).

Kathleen Dean Moore, Pardon for Good and Sufficient Reasons, 27 U. Rich. L. Rev. 281, 282 (1993) ("The pardoning power of the great monarchs of seventeenth and eighteenth century Europe was analogous in theory and practice to divine grace.").

The author thanks Professor J.P. Jones of the University of Richmond School of Law for pointing out the omission of this issue from an earlier draft.

Rousseau's complex work has duty-based elements the "common will" is the "sovereign." Men owe "duties" to the sovereign since they are "subjects." However, since the common will only wants what is best for all its citizens, it does not (and cannot) ask for more than necessary for the common good. Jean-Jacques Rousseau, On The Social Contract 32-35 (Donald A. Cress, trans., 1987) (Chapter IV, On the Limits of the Sovereign Power). Rousseau's discussion of criminal punishment is puzzling. The sovereign (the common will) cannot perform "particular" acts, therefore, it cannot condemn any specific criminal. It can, however, confer on judges the power to do so. Even the sovereign, moreover, has the right to "put to death, even as an example, only someone who cannot be preserved without danger." As to "pardon, or . . . exempting a guilty party from the penalty decreed by the law and pronounced by the judge, this belongs only to one who is above the judge and the law, that is, to the sovereign." But the right to pardon is "not clearly defined" and used "quite rarely." In a well run state, few crimes occur; in a badly run state, so many crimes occur that their numbers "insure impunity." Id. at 36. Gay argues that Rousseau's Social Contract is intended only for better humans those educated like Rousseau's Emile. Peter Gay, introduction to id. at 9.

Murphy asserts that the head of a government is bound to act justly when dispensing pardon though Murphy may be read to allow the executive to use categories unavailable to court
room judges. Murphy, supra note 1, at 174 n.9.

[FN109]. See, e.g., Rousseau, supra note 107, at 102 ("The right which the social compact gives the sovereign over the subjects does not . . . go beyond the limits of public utility.").

[FN110]. Compare Ronald D. Rotunda and John E. Nowak, Treatise on Constitutional Law: Substance and Procedure § 3.3 at 309 (2d. ed. 1992) (Theoretically, the federal government is one of limited powers. But the current court test for the validity of a federal act is very forgiving, whether Congress could "reasonably" find the act with any federal power) with United States v. Lopez, 115 S. Ct. 1624, 1626 (1995) (Gun-Free School Zones Act of 1990 is beyond authority of Congress under the Commerce Clause because "[t]he Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce.").

[FN111]. Sandel provides a clear philosophical analysis of Rawls' rights-based limit on majority rule:

The priority of right over good provides a meta-ethical background to the familiar liberal notion that the preferences and convictions of the majority, however intensely held, cannot defeat a legitimate claim of individual rights. On a deontological ethic, the convictions of the majority merely reflect particular conceptions of the good. As such, they cannot claim to be 'correct from a philosophical point of view,' only preferred from a majoritarian point of view, and no mere preference can override the requirements of justice [rights].

Sandel, supra note 4, at 155.

[FN112]. See, e.g., Rousseau, supra note 107, at 20-23 (limits on selling self or ones' children into slavery or into a monarchial state). Perhaps the most famous contemporary legal writer on this subject is Margaret Jane Radin. See, e.g., Margaret Jane Radin, Market-Inalienability, 100 Harv. L. Rev. 1849 (1987) (arguing for inalienability of personality-determinative property). Radin's critics are plentiful. See, e.g., Stephen J. Schnably, Property and Pragmatism: A Critique of Rad-


[FN114]. Murphy, supra note 1, at 179-80.

[FN115]. See Davis, supra note 52, at 92 (victim cannot forgive criminal's debt to society).

[FN116].

It seems to be one of the fixed points of our considered judgments that no one deserves his place in the distribution of native endowments, any more than one deserves one's initial starting place in society. Rawls, supra note 6, at 104. Rawls' position that character-trait related property is not strongly owned by an individual and, therefore, may be distributed by the community according to any just system of entitlement is disputed by most philosophers. Sandel, supra note 4, 82-93. A somewhat related discomfort seems to underlie the controversy over whether "moral luck," the fortuity that the intended crime was unsuccessful or did not cause greater harm, may justly be used as a category in sentencing decisions. See, e.g., Garvey, supra note 7, at 1020-22 and accompanying notes. But note that the "undeserved" aspects of bad character are widely accepted in mitigation. Id. at 1024-25 and accompanying notes. The author considers moral-luck and outside influences on "bad" character to be decisions as to what are proper justice categories, not as choices to allow mercy-a.

[FN117]. Rawls, supra note 6, at 314-15; see also Sandel, supra note 4, at 88-92 (discussing this inconsistency in Rawls).

[FN118]. R. Nozick, Anarchy, State and Utopia 225 (1974); see also Sandel, supra note 4, at 83-85 (comparing Nozick and Rawls on desert).

[FN119]. See, e.g., Sandel, supra note 4; Walzer, supra note 113, at 78-93 (choices that matter are those of persons knowing their respective places in specific societies).
[FN120] Rescher, supra note 9, at 90-101.

[FN121] Rescher suggests that the three most important facets of an adequate theory of distribution are (a) the amount of goods distributed, (b) the pattern of distribution achieved, and (c) the distributing procedure. Id. at 87.

[FN122] Id. at 94. Rescher ignores many possibilities. One could let each ambassador go first on alternate occasions or consider adding extra categories in deciding precedence when a dead-heat occurs under the usually employed categories, for example, which one arrived (at the post or a specific event) first? which one has a closer relationship with the guest of honor?

[FN123] Id. at 94. Besides the theoretical problems, Rescher's suggestion may discourage creativity. King Solomon found a way to locate better evidence of desert when asked to divide an indivisible baby.

[FN124] Id. at 96-97.


[FN126] One category which has been advanced as appropriate only in death penalty cases is lingering doubt of guilt. See Craig M. Bradley, A (Genuinely) Modest Proposal Concerning the Death Penalty, 72 Ind. L.J. 25, 27 (1996) (arguing that the jury should be instructed not to impose a death sentence if even one juror has lingering doubt of the defendant's guilt).

[FN127] "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion); accord, Dando, supra note 17, at 13. Even after Furman, thousands of murderers are death eligible, but few receive the death sentence. Carol S. Steiker & Jordan M. Steiker, Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of

[FN128]. 408 U.S. 238 (1972) (per curiam). For a recent article addressing the case law in detail, see Steiker & Steiker, supra note 127 (Supreme Court has not fixed problems underlying Furman despite its overregulation of the death penalty; suggested solutions).

[FN129]. Many scholars, of course, argue that the Constitution incorporates moral law. See, e.g., Dworkin, supra note 6, at 126, 215 (Constitution incorporates morality, though not judges' personal opinions). Several Furman dissents take strong exception to the judgment as judicial legislation. For example, "[r] igorous attention to the limits of this Court's authority is likewise enjoined because of the natural desire that beguiles judges along with other human beings into imposing their own views of goodness, truth, and justice upon others." Furman, 408 U.S. at 467 (Rehnquist, J., dissenting). The issue of judges' personal opinions was raised repeatedly during Justice Ruth Bader Ginsburg's pre-confirmation testimony to the Senate Judiciary Committee. Justice Ginsburg's balanced response was that "[n]o judge is appointed to apply his or her personal values, but a judge will apply the values that come from the Constitution, its history, its structure, the history of our country, the traditions of our people." Id. at 127 The Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 103rd Cong. 127 (1993) (statement of Judge Ginsburg); "My own view on the death penalty I think is not relevant to any questions I would be asked to decide as a judge." id.at 192; see also Philip Soper, Some Natural Confusions About Natural Law, 90 Mich. L. Rev. 2393, 2409 (1992) ("Can the judge, if she thinks the law sufficiently immoral, substitute her views for the legal mandate?" was "the central question that so concerned [Senator] Biden [at Clarence Thomas' confirmation hearings].").

[FN130]. Furman, 408 U.S. at 239-40.

[FN131]. Id. at 240-57 (Douglas, J., concurring).

[FN132]. Id. at 249-51 (quoting The President's Comm'n on Law Enforcement and Administra-
tion of Justice, the Challenge of Crime in a Free Society 143 (1967); and R.C. Koeninger, Capital Punishment in Texas, 1924-1968, 15 Crime & Delinq. 132, 141 (1969). Note that many commentators on death sentence jurisprudence use "arbitrary" to mean "based on improperly chosen categories." See, e.g., Welsh S. White, The Death Penalty in the Nineties 157 (1991) ("The death penalty is arbitrarily imposed if it is imposed on the basis of factors that have no relationship to either the crime committed or the character of the offender. The race of the victim is certainly such a factor.").

[FN133] "We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black." Furman, 408 U.S. at 253 (Douglas, J., concurring).

[FN134] Id. at 249 (quoting Goldberg & Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv. L. Rev. 1773, 1792 (1970)).


[FN136] Id. at 270.

[FN137] Id. at 271-79.

[FN138] Id. at 274.

[FN139] Id. at 281.

[FN140] Furman, 408 U.S. at 306-10 (Stewart, J., concurring).

[FN141] Id. at 310-14 (White, J., concurring).

[FN142] "[T]here is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." Id. at 313.

[FN143] Id. at 375-405 (Burger, C.J., dissenting).

[FN144] Id. at 377.
[FN145]. Furman, 408 U.S. at 379.

[FN146]. Id. at 387.

[FN147]. Id. at 397-99.

[FN148]. Id. at 443-50 (Powell, J., dissenting).

[FN149]. Id. at 449.

[FN150]. Furman, 408 U.S. at 448-49.


[FN153]. McCleskey, 481 U.S. at 301. In response to this emphasis, social scientists have ex-
examined the meaning of capriciousness in the administration of the death penalty. See, e.g., Richard A. Berk, et al., Chance and the Death Penalty, 27 L. & Soc'y Rev. 89, 108 (1993) (prosecutors' decisions to charge a death-eligible homicide have the same "random" distribution of charging risks as would be produced by a lottery; "[i]t seems to us that 'as if' lotteries are virtually inevitable in death penalty charging. . . . The critical job, therefore, is to figure out which sorts of 'as if' lotteries are constitutionally acceptable and which sorts are not."); But see Raymond Paternoster, Assessing Capriciousness in Capital Cases, 27 L. & Soc'y Rev. 111, 113 (1993) ("In response to Berk and his colleagues' charge of capriciousness I offer the counter-argument that their data analysis indicates that a rough consistency in treatment has in fact been achieved . . . .") (emphasis in original).


[FN155] Several scholars argue that the post-Furman case law has required only very minor changes in death penalty statutes and their administration while misleading many into believing that the death penalty has been overly confined by procedural niceties. See Steiker & Steiker, supra note 127, at 402-03.

[FN156] But see Garvey, supra note 7, at 1000-01, 1004 (arguing that individuation principle lets in all evidence on both mitigation and aggravation; case law's superficial tension is between individuation and consistency, but the two actually work in tandem to achieve retributive justice). Another complexity is whether the Supreme Court's jury instruction cases undermine the usefulness of mitigation evidence. See California v. Brown, 479 U.S. 538, 539 (1987) (not unconstitutional to allow death sentence when jury is instructed that it "must not be swayed by
mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.


[FN158] Id. at 1141-43 (Scalia, J., concurring in denial of certiorari).

[FN159] Callins, 510 U.S. at 1143-59 (Blackmun, J., dissenting from denial of certiorari).

Justice Powell has also recanted his previous belief that the Supreme Court could tame the death penalty's racial and other problems. See Victoria J. Palacios, Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases, 49 Vand. L. Rev. 311, 327-29 (1996).

[FN160] Similarly, Justice Stevens (joined by Justices Blackmun and O'Connor) asserted that the Court too narrowly set the bounds of "innocence of the death penalty" for unacceptable administrative reasons. Sawyer v. Whitley, 505 U.S. 333, 376 (1992) ("To my mind, any added administrative burden is surely justified by the overriding interest in minimizing the risk of error in implementing the sovereign's decision to take the life of one of its citizens.") (Stevens, J., concurring).


[FN163] This assumption is probably an overstatement. The Lord Chief Justice did opine that "the Kings of England were absolute Sovereigns; . . . the laws were the King's laws [therefore] the King had a power to dispense with any of the laws of Government as he saw necessity for it [and was] the sole judge of that necessity; . . . no Act of Parliament [having the power] to take away [the King's] power." Godden v. Hales, 89 Eng. Rep. 1050, 1051 (K.B. 1686). However, note the limitation of this seemingly broad statement: it discusses power to act on personal belief in a necessity. Even if the power is unreviewable, hence unlimitable to necessity in actuality, in
theory it is not an allowance of action without necessity, let alone without reason. In addition, the
power is limited by third parties' rights to the extent that "the King cannot dispense" with legal
requirements "when the law gives any particular person an interest," even though the King can
"dispense" when the law "concerns no one person more than another," i.e., "when [the King] alone is injured." Thomas v. Sorrell, 89 Eng. Rep. 100 (1673). Furthermore, English history in-
cludes attempts to limit monarchical pardon power. See generally, William F. Duker, The Presid-
ent's Power to Pardon: A Constitutional History, 18 Wm. & Mary L. Rev. 475, 476-97 (1977)
(The Power to Bargain: The British Heritage); Daniel T. Kobil, The Quality of Mercy Strained: 
Wrestling the Pardoning Power from the King, 69 Tex. L. Rev. 569, 585-89 (1991) (The devel-
opment of the clemency power in England).

[FN164]. See United States v. Wilson, 32 U.S. (7 Peters) 150, 160 (1833) (the pardon "power ha[s] been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we . . . look into their books for the rules prescribing the manner in which it is to be used").

[FN165]. "Blackstone [thought] of pardon as an instrument only of clemency, and so more or less opposed to the law, [but] the Framers regarded it as also an instrument of law enforcement." Randall W. Bland, Theodore T. Hindson, Jack W. Peltason, [Edward S. Corwin's] The President: Office and Powers 1787-1984, at 181 (5th rev. ed. 1984). But see Wilson, 32 U.S. (7 Peters) at 160 ("A pardon is an act of grace, proceeding from the power [e]ntrusted with the execution of the laws. . . . It is the private, though official act of the executive magistrate["].

[FN166]. "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 counten-
ance too sanguinary and cruel." The Federalist No. 74, 50 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see also James Iredell, North Carolina Ratifying Convention (July 28, 1788), in 4 The Founders' Constitution 17 (Philip B. Kurland & Ralph Lerner eds., 1987) ("It is the genius of a republican government that the laws should be rigidly executed, without the influ-
ence of favor or ill-will. . . . [However, i]t is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice.

[FN167]. Iredell, supra note 166, at 18. At the Constitutional Convention of 1787, Luther Martin proposed allowing only post-conviction pardons, but withdrew his motion after Mr. Wilson pointed out that "a pardon before conviction might be necessary in order to obtain the testimony of accomplices." Duker, supra note 163, at 501-02 (quoting 5 Debates on the Adoption of the Federal Constitution in the Convention Held at Philadelphia, in 1787, at 480 (J. Elliot ed., 1845).


[FN169]. "In seasons of insurrection or rebellion, there are often critical moments, when a well timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth[.]" The Federalist No. 74, supra note 166, at 502; see also Iredell, supra note 166, at 18 ("Thus, at a critical moment, the President might, perhaps, prevent a civil war.").


[FN171]. "[T]he pardoning power is an enumerated power . . . its limitations, if any, must be found in the Constitution itself." Schick v. Reed, 419 U.S. 256, 267 (1974); see also Hoffa v. Saxbe, 378 F. Supp. 1221, 1231, 1235 (D.D.C. 1974) (President "must always exercise it [pardoning] in the public interest"; "[c]onstitutional rights . . . may be restricted [by pardon's conditions] provided that the restrictions are precisely drawn to accomplish a legitimate governmental purpose"; upholding president's power to condition commutation of Hoffa's sentence on Hoffa's not managing any labor organization until date original sentence would have expired); see generally Kobil, supra note 163, at 597-601 (reviewing case law on limited judicial review of Presidential pardons).

[FN172]. Roberts v. Louisiana, 428 U.S. 325, 349-50 (1976) (White, J., dissenting); see also


[FN176] See, e.g., Duker, supra note 163, at 478-79, n.21, 22, 26 (criticizing English kings who granted pardons to celebrate holidays, conscript soldiers, or fill the king's purse); Moore, supra note 47, at 203 (commenting on South Carolina Governor Coleman Blease who promised to pardon the crowd's chosen criminal if he was elected; an action he defended on "the position that [[I]He was the servant of the people").

[FN177] See, e.g., Moore, supra note 47, at 197-210 (most non-retributivist reasons for pardons are abuses, including pardons for the public welfare, for the welfare of the pardoner, to reward past actions, for the sake of pity, on the recommendation of the judge, jury, or prosecutor involved in the prisoner's conviction, or because the prisoner is a woman); Hugo Adam Bedau, A Retributive Theory of the Pardoning Power?, 27 U. Rich. L. Rev. 185 (1993) (retributive theory is incompatible with pardoning power).

[FN178] Certainly, several authors have called for greater accountability. See, e.g., Kobil, supra note 163, at 622-39 (suggesting that justice-neutral clemency decisions remain with the executive but that justice-enhancing (retributivist) clemency decisions be made by a professional board even though this might trigger due process protection); Daniel T. Kobil, Due Process in Death Penalty Commutations: Life, Liberty and the Pursuit of Clemency, 27 U. Rich. L. Rev. 201.
(1993) (arguing for due process protections during executive clemency proceedings); Leavy, supra note 174 (arguing for due process protections for pardon decisions in death penalty cases).

[FN179]. See Senate Comm. on the Judiciary, Impeachment of the President, H.R. Rept. No. 7, 40th Cong., 1st Sess. 57 (1867) ("he issued a [pardon] for . . . one hundred and ninety-three men . . . marked as deserters from the army in time of war . . . without previous investigation by any officer of the War Department . . . for the sole purpose of enabling such persons to vote in an election then pending in [West Virginia] . . . and with the expectation that they would so vote as to support him"); see also id. at 1, 4, 20-21, 29-31.

[FN180]. Moore, supra note 47, at 63.

[FN181]. One 1962 case did enforce a statutory provision requiring a hearing. See McGee v. Arizona State Bd. of Pardons and Paroles, 376 P.2d 779 (Ariz. bane 1962). Post-Herrara cases have refused to enforce more than the right to apply for clemency unless state statute dictates details of clemency process. See, e.g., Joubert v. Nebraska Bd. of Pardons, 87 F.3d 966 (8th Cir. 1996); Otey v. Stenberg, 34 F.3d 635 (8th Cir. 1994).

[FN182]. One could take the definitional posture that any right without a judicial remedy is nonexistent. But this may be an over-narrow reading of reality and even an over-narrow reading of the Constitution. "[T]here has been far too much emphasis, in the last generation, on the role of courts in the American constitutional system."; "[T]he founders . . . were hardly obsessed with the judiciary. James Madison, the most important voice behind both the Constitution and the Bill of Rights, came to advocate the Bill primarily because of its effects on political deliberation." Cass R. Sunstein, The Partial Constitution 9 (1993).

[FN183]. See Feinberg, supra note 25, and accompanying text.

[FN184]. "Despite the celebrated dictum of Marbury v. Madison, [5 U.S. (1 Cranch) 137, 163 (1803)] ("The government of the United States has been emphatically termed a government of
laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for violation of a vested legal right."[,] there has never been a right to individual remediation for every constitutional violation." Fallon, supra note 54, at 365-66 n. 91; see also Laurence H. Tribe, American Constitutional Law § 3-13 (2d ed. 1988) (discussing court refusal to accept individuals' suits premised on the Guaranty Clause, U.S. Const. art. IV, section 4: "The United States shall guarantee to every State in this Union a Republican Form of Government[].")

[FN185]. To consider the small-claim class action destroyed by the cost of notice to each putative class-member, see Sunstein, supra note 181, at 323-25, and the individual plaintiff suing multiple, large firms without the benefit of consolidation or class certification. Cf. In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) (granting writ of mandamus ordering district court to decertify class of plaintiffs, hemophiliacs claiming HIV infection from clotting factor), cert. denied, 116 S. Ct. 184 (1995); Malcolm v. National Gypsum Co., 995 F.2d 346 (2d Cir. 1993) (error to consolidate asbestos claims of multiple plaintiffs who were allegedly injured by various products used in various work locations).

[FN186]. Herrera v. Collins, 113 S. Ct. 853, 869 (1993) (claim of innocence based on "new evidence" not timely presented to state court does not warrant habeas relief). Because "the Supreme Court deferred to the State of Texas the right and the responsibility to exercise . . . control [over late-made claims of actual innocence]." a Texas civil court temporarily enjoined Garry Graham's execution holding the Texas Constitution required the Board of Pardons and Paroles to hold a hearing and consider recommending executive clemency. Letter from Pete Lowry, Judge, 261st District Court Travis County, TX, accompanying unpublished injunction, reprinted in Janet Elliot & Mark Ballard, Novel Track Cracks Clemency Door, Tx. Law., Aug. 23, 1993, at 1 (available on LEXIS); see also Ex parte Graham, Tx. Law., Aug. 30, 1993, at 2 (Tex. Ct. App. 1993) (granting stay); id. ("Due course of law certainly requires that such a condemned person desperately seeking executive clemency not be executed on the simple expediency that the State
officials responsible for fairly considering his plea have refused to hear it;" "the State must prove that 'Texas protect[s] a convicted felon's due process rights by providing a procedure by which he can invoke the clemency process.'") (Clinton, J., concurring; Miller, J., concurring). But the Court of Criminal Appeals of Texas, en banc, decided instead to allow delayed claims of actual innocence to be treated as state habeas petitions under Texas Code of Criminal Procedure article 11.07. State ex rel. Holmes v. Ct. of Appeals, 885 S.W.2d 389, 399 (Tex. Ct. App. 1994) (en banc). To be entitled to relief, however, petitioner needed "to show that based on the proffered newly discovered evidence and the entire record before the jury that convicted him, no rational trier of fact could find proof of guilt beyond a reasonable doubt." Id. As a dissenting judge wrote, this standard "by definition" is impossible to meet. Id. at 417 (Clinton, J., dissenting). Graham's attorney agreed. San Antonio Express-News, Jan. 11, 1996, 1996 WL 2816888. The new habeas procedure, however, led the Texas civil courts to find a clemency hearing no longer necessary. See Graham v. Texas Bd. of Pardons and Paroles, 913 S.W.2d 745, 751 (Tex. Ct. App. 1996) (claim of actual innocence requires hearing, but new habeas procedure satisfies that right). It also held that Texas' administrative procedure act does not apply to clemency petitions because they are "a matter of grace (not right or privilege)." Id. at 752. Meanwhile, the Fifth Circuit denied Graham's third federal habeas petition for failure to exhaust state remedies, even though Texas expressly waived exhaustion. See Graham v. Johnson, 94 F.3d 958 (5th Cir. 1996). For an update on Gary Graham, contact Mike Charlton, 713-522-7224, Mr. Graham's attorney. As of 4/29/97 Gary Graham was still alive and still on death row.

[FN187]. See Palacios, supra note 159 (commutation possibility does not ensure justice).

[FN188]. For a fuller discussion, see James N. Jorensen, Note, Federal Executive Clemency Power: The President's Prerogative to Escape Accountability, 27 U. Rich. L. Rev. 345, 346, 362-67 (1993). Former presidential candidate, Robert Dole, has been accused of switching his position on presidential pardons depending on whether they helped him or the Republican presidents for whom he worked. See Elain Sciolino, On the Question of Pardons, Dole Has Taken


[FN190]. See, e.g., Graham, 913 S.W.2d at 749-50 (Tex. Ct. App. 1996) (holding executive clemency is "notoriously susceptible to abuse by governors" and "greatly affected by public opinion and pressures."); Toney Anaya, Statement by Toney Anaya on Capital Punishment, 27 U. Rich. L. Rev. 177 (1993) (former Governor of New Mexico discussing political pressures for executions); Bruce Ledewitz & Scott Staples, The Role of Executive Clemency in Modern Death Penalty Cases, 27 U. Rich. L. Rev. 227 (1993) (discussing governors' political need to be able to explain clemency decisions to the public); Palacios, supra note 159, at 349 (foremost reason for the decline in grants of executive clemency is the political consequences).


[FN192]. Hopefully the highest court in each state would accept inherent authority to do this as part of its ability to supervise the state's other courts. See, e.g., Feb. 19, 1991 Press Statement from Virginia Coalition on Jails and Prisons (Laurence H. Tribe endorses governor's power to grant a conditional pardon; conditional pardon has been issued in Oregon case) (copy on file with author).

[FN193]. Bowers, supra note 152, at 1093-1098 (new studies show that jurors do not accept responsibility for their sentencing decisions); See also, e.g., Palacios, supra note 160, at 313-14, 365-69 (problem of bureaucratic death penalty system where no one feels responsible; "capital punishment process is a nameless, faceless machine"); Henry Piertkowski, Note, The Diffusion of the Due Process in Capital Cases of Actual Innocence After Herrera, 70 Chi.-Kent L. Rev. 1391, 1392 (1995) (Herrera inappropriately diffused responsibility for saving the innocent). Robert Weisberg foresaw the problem that regulation might backfire into a system of helping jurors discount their personal responsibility. Robert Weisberg, Deregulating Death, 1983 Sup. Ct.
Rev. 305, 391-95 (citing Stanley Milgram, Obedience to Authority, 138-43 (1974) (test subjects willingness to impose pain on others when requested to do so by authority figure)). Many have described the "facade" effect of the Court's jurisprudence, i.e., its ability to counter factually convince both those involved and society at large that justice is being done (in more technical language, Weberian phenomenological legitimization). See Steiker & Steiker, supra note 127, at 429-38 (reviewing literature).

[FN194]. California Chief Justice Rose Bird and two colleagues were voted out of office in 1986, seemingly because the California Supreme Court had reversed 64 of the previous 68 capital sentences it reviewed. See, e.g., Bob Egelko, New Era For High Court Following Defeat of Three Justices, AP, November 5, 1986 available in LEXIS ("Responding to an appeal to 'cast three votes for the death penalty,' California voters have removed Chief Justice Rose Bird and two colleagues from the state's supreme court."). That court's reversal record has see-sawed to 25%. Palacios, supra note 159, at 363. In 1996, Tennessee voted out state supreme court Justice Penny J. White after a campaign attacking her vote to grant re-sentencing in a death penalty case even though a new death sentence was not barred by the opinion. John Gibeaut, Taking Aim, A.B.A. J., Nov. 1996, at 50, 51, 53-54.

[FN195]. Discussed at length supra note 186.


[FN198]. Holmes, 885 S.W.2d at 417 (Clinton, J., dissenting).

[FN199]. Ex parte Elizondo, 947 S.W.2d 202, 207 (Tex. Crim. App. 1996) (en banc) (free standing claim of actual innocence, as opposed to claim of actual innocence as a gateway to merits re-
view of procedurally barred constitutional claim).

[FN200]. Id. at 209-12 (Biard, J. concurring, summarizing evidence at trial); But see id. at 212 (White, J. dissenting joined by McCormick, P.J. and Keller, J.; higher standard should not be overruled and has not been met by recantation of alleged victims, the only eye witnesses).


[FN202]. See Borreson, supra, note 201.


[FN204]. Id. at 1337.

[FN205]. Id. (citations and internal quotation marks omitted). But see id. at 1344-46 (Bilandic, J., dissenting) (dissenting on denial of reconsideration arguing for much higher standard to obtain relief under the right, which he would also not recognize).

[FN206]. Jones v. State [unpublished; opinion available from author]. A post conviction petition requesting DNA testing was filed on February 5, 1997 on behalf of Willie Enoch to whom this article is dedicated. [Papers on file with the author.]

[FN207]. H.R. 2138, 90th Gen. Assembly (Ill. 1997). The bill passed the Illinois House on April 15, 1997 and was forwarded to the Senate. According to the floor discussion, New York, Kansas, Pennsylvania and Indiana already had similar legislation. Draft Transcript of House Floor Discussion, (Ill. Apr. 15, 1997) at 9-10. The bill's conservative sponsor, Peter Roskam, explained that the bill is tightly limited to cases where the tests would show "actual innocence" rather than merely raise a "reasonable doubt" of guilt. Id. at 4. Roskam advised the press that he does not be-

[FN208]. Pub. L. 104-132 (codified in scattered sections of 28 U.S.C.). Under the "plain" language of this statute, states seemingly are only held to the most unreasonable judge's "reasonable" reading of cases emerging from the United States Supreme Court (decades of gloss by other federal or state courts may be irrelevant). 28 U.S.C. § 2254 (d).


[FN210]. See, e.g., Sawyer v. Whitely, 505 U.S. 333, 356 (1992) (Blackmun, J., concurring) (the Court's erection of procedural hurdles on habeas and its tightened "focus on innocence assumes, erroneously, that the only value worth protecting through federal habeas review is the accuracy and reliability of the guilt determination."); Id. at 361 ("There is no reason why 'actual innocence' must be both an animating and the limiting principal of the work of federal courts in furthering the 'ends of justice. . . . Fundamental fairness is more than accuracy at trial; justice is more than guilt or innocence.'") (Stevens, J., concurring).

[FN211]. Id. at 360 (Blackmun, J., concurring) ("The more the Court constrains the federal courts' power to reach the constitutional claims of those sentenced to death, the more the Court undermines the very legitimacy of capital punishment itself.").


[FN213]. [Second] Petition for [State] Post Conviction Relief at 4-13 (filed Feb. 5, 1997), Circuit


[FN216]. Direct appeal from dismissal of the [Second] Petition for Post Conviction Relief is currently before the Illinois Supreme Court.

[FN217]. 730 ILCS 5/5-8-1(a)(1).

[FN218]. Transcript of Proceedings before the Honorable Donald C. Courson, 23 November 1983, Circuit Court of the Tenth Judicial Circuit, Peoria County Illinois (No. 83 CF 1401, People v. Enoch) at R 1851-52.


[FN223]. The failure of the justice system was discussed at length in the omitted portion of the press release that argued Enoch's actual innocence.

[FN224]. Eric Zorn, Sadly for Enoch, Belated DNA Test Proves Its Worth, Chicago Tribune,

END OF DOCUMENT