

Notes

Reviving Mercy in the Structure of Capital Punishment

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The very finality of the death penalty would seem to necessitate the possibility of mercy.¹ Mercy, which encompasses the discretion of decision-makers at every stage of the death penalty process, has been eroded by politics and an increasingly bureaucratized capital punishment system. Mercy's demise can be seen particularly in the actions of governors and juries, who have been discouraged from exercising merciful discretion. Yet a host of constitutional, legal, and public policy factors, as well as humane intuitions, argue that mercy must play a central role in any capital punishment scheme. A merciful instauration in the context of the modern death penalty will require both a renewed commitment on the part of public leaders and strengthened institutional supports for the practice of mercy.² This Note proposes a revival of mercy through the actions of courts, legislatures, and governors.

1. This Note uses the term "mercy" to refer to the larger category of "compassion or forbearance shown . . . to an offender," WEBSTER'S NEW COLLEGIATE DICTIONARY 713 (1981), of which executive clemency and jury, judicial, and prosecutorial discretion to lessen punishment are subsets. One legal philosopher has further described mercy as "an autonomous moral virtue (i.e., not reducible to some other virtue—especially justice) [and as] a virtue that tempers or 'seasons' justice—something one adds to justice (the primary virtue) to dilute it and perhaps, if one takes the metallurgical metaphor of tempering seriously, to make it stronger." Murphy, *Mercy and Legal Justice*, in FORGIVENESS AND MERCY 166 (1988).

Grants of mass clemency do not strictly fall within this description of mercy. Blanket commutations are better characterized as decisions about the justice of capital punishment rather than instances of empathy for individuals. See generally Black, *Governors' Dilemma: May They Commute All Death Sentences?*, THE NEW REPUBLIC, Apr. 28, 1979, at 12 (governors should grant mass clemency when they believe death penalty is unconstitutional).

2. It has been argued that the executive should be given an increased role in reviewing death sentences, see AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE DEATH PENALTY

In addition to political and bureaucratic factors that have worked to discourage mercy, the ongoing conceptual debate over the relationship between mercy and justice has contributed to mercy's decline.³ Some scholars have distinguished mercy from justice by noting that mercy inheres in individuals, while justice is a function of institutions,⁴ and that mercy is necessarily arbitrary and inconsistent.⁵ Mercy has often been seen as either subordinate to justice—filling in the gaps left by particular instantiations of due process—or as superior and external to the justice yielded by due process.⁶ Viewing mercy as one aspect of justice, however, reduces it

106-07 (1987), and that executive clemency should be accompanied by greater due process protections, see Note, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 YALE L.J. 889, 905-11 (1981). The literature, however, is devoid of solutions to the more fundamental problem of how to encourage clemency-granting authorities to be merciful, in the face of the political unpopularity of executive clemency decisions and the unwillingness of many courts to allow juries to exercise merciful discretion.

3. Situating the concept of mercy in relation to that of justice has occupied philosophers since at least the time of Saint Anselm. In Chapter IX of his *Proslogion*, Anselm presents the paradox of a just God showing mercy to the wicked, an unjust act by definition: "[W]hat kind of justice is it to give everlasting life to him who merits eternal death? How then, O good God, good to the good and to the wicked, how do You save the wicked if this is not just and You do not do anything which is not just?" ST. ANSELM'S PROSLOGION 125-27 (M. Charlesworth trans. 1965); see also Murphy, *supra* note 1, at 168-69.

As a matter of logic, however, mercy and justice are not mutually exclusive. Given that murderers receive a broad range of punishments for comparable crimes across the several states, there is no reason to view mercy as inimical to justice. "Huge as this country's death row population has become, it does not include—and has never included—more than a tiny fraction of those who are convicted of murder." Bruck, *Decisions of Death: The Lottery of Capital Punishment is Rigged by Race*, THE NEW REPUBLIC, Dec. 12, 1983, at 18. That the death penalty is rarely imposed implies that one could never claim that any given murderer "deserves" anything more than a life sentence. Assuming that justice is achieved when murderers receive what they deserve, there can be no conflict between justice and mercy: even murderers to whom mercy is extended receive life sentences, and that is nothing less than what they deserve. "[T]here are *disjunctive* deserts: disjunctions of penalties each of which alone can serve as a sufficient desert for the improper act in question. . . . [T]o act mercifully is to act in accord with justice since the merciful person gives someone what is deserved." Hestevold, *Disjunctive Desert*, 20 AM. PHIL. Q. 357, 360-61 (1983) (emphasis in original). In other words, because the criminal justice system is already "unfair" in that it imposes disparate sentences on murderers convicted of essentially similar crimes, mercy—by changing particular outcomes of due process—does not introduce the element of unfairness into the system.

4. At least one author has argued that mercy 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." Card, *On Mercy*, 81 PHIL. REV. 182, 182 (1972) (emphasis in original). Card explains that John Rawls' notion of justice as fairness refers only to justice as a function of social institutions. Card makes a distinction between "social justice" and "personal justice" and includes mercy within the latter, thus viewing mercy as contained within the idea of justice but different from even-handedness. *Id.* at 188-89.

5. "[T]here must be a certain arbitrariness to mercy: sometimes an agent can show mercy and other times not with respect to the same improper action. . . . The fair but arbitrary tempering of deserved suffering can only be possible if there *are* disjunctions of sufficient deserts some of which are more severe than others." Hestevold, *supra* note 3, at 362 (emphasis in original). Hestevold argues that, if mercy were consistent, it would become obligation: non-arbitrary mercy would require that all future cases be pardoned when one person is pardoned. However, the motive for these future pardons would be the precedent of the earlier pardon, rather than compassion. *Id.* at 361-62; see also N. MORRIS, *MADNESS AND THE CRIMINAL LAW* 180 (1982) ("[M]ercy cannot be precisely quantified and institutionalized or it ceases to be mercy and becomes leniency . . .").

6. In a modern day example, Professor Welsh White—by questioning whether the Georgia Board of Pardons was bound by the Supreme Court's determination that capital punishment is an inappropriate penalty for the crime of rape—has criticized the Board for denying clemency to Roosevelt

to a redundancy: it is no longer freely given; it is no longer a function of compassion.⁷ Mercy must be seen as "injustice"; mercy must stand outside and above justice, contemplating death sentences from a perspective external to the norms of due process, in order to satisfy the intuition that judicial norms may not always suffice in fixing a punishment as difficult as death.

I. THE TRADITION OF MERCY

Mercy is an ancient concept that has a long and venerable tradition in religion,⁸ philosophy,⁹ literature,¹⁰ and the criminal law.¹¹ The tradition of mercy was implemented in North America through the pardon authority of the colonial governors,¹² and, later, the discretion of juries to recommend mercy. Although few colonies allowed royal governors unfettered

Green. W. WHITE, *THE DEATH PENALTY IN THE EIGHTIES* 127 (1987). Green had raped a woman but did not participate in her subsequent murder. *Id.* White's criticism reflects the view that mercy should be exercised to fulfill the assurances of due process, not necessarily to enlarge or supersede justice. Responding to White, Ernest van den Haag, an advocate of the death penalty, maintains that mercy "is left to the conscience of the authority entitled to consider pleas which is not bound by court decisions meant to do justice." Van den Haag, Book Review, 49 U. PITT. L. REV. 607, 609 (1988) (reviewing W. WHITE, *THE DEATH PENALTY IN THE EIGHTIES* (1987)).

7. See, e.g., Murphy, *supra* note 1, at 169 ("[I]f we simply use the term 'mercy' to refer to certain of the demands of justice (e.g., the demand for individuation), then mercy ceases to be an autonomous virtue and instead becomes a part of (is reducible to a part of) justice.")

8. See, e.g., Savoy, *The Spiritual Nature of Equality: Natural Principles of Constitutional Law*, 28 HOWARD L.J. 809, 818-20 (1985) (discussing mercy as equitable supervision of law in Kabbalah, Jewish mystical tradition); Luke 15:11-32 (prodigal son parable illustrating mercy and merits of uneven punishment); *THE ASCETICAL HOMILIES OF SAINT ISAAC THE SYRIAN* 244 (Holy Transfiguration Monastery trans. 1984) ("Mercy and justice in one soul is like a man who worships God and the idols in one house . . . [M]ercy belongs to the portion of righteousness[;] justice belongs to the portion of wickedness."); JOHN PAUL II, *DIVES IN MISERICORDIA* (1980) (papal encyclical on virtues of mercy; "mercy differs from justice, but is not in opposition to it"), *quoted in* N. MORRIS, *supra* note 5, at 156.

9. See, e.g., SENECA, *On Clemency*, in *THE STOIC PHILOSOPHY OF SENECA* 137, 138 (M. Hadas trans. 1958) (urging rulers to use mercy liberally; "One man's youth sways me, another's age; one man I have relieved for his eminence, another for his insignificance; and when I found no other ground for pity I have shown charity to myself."); 5 E. BURKE, *THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE* 285 (H. Frowde ed. 1920) ("Mercy is not a thing opposed to justice. It is an essential part of it: as necessary in criminal cases, as in civil affairs equity is to law.")

10. See, e.g., W. LANGLAND, *PIERS THE PLOWMAN* (M. Williams trans. 1971) (morality poem concerning, in part, need for justice before mercy); M. STOKES, *JUSTICE AND MERCY IN PIERS PLOWMAN* 273-75 (1984) (Langland considered mercy unjust when unaccompanied by expiation and repentance); W. SHAKESPEARE, *THE MERCHANT OF VENICE* Act IV, Scene 1 ("The quality of mercy is not strain'd, / It droppeth as the gentle rain from heaven / Upon the place beneath: / it is twice blest; / It blesseth him that gives and him that takes . . ."), *quoted in* M. ANDREWS, *LAW VERSUS EQUITY IN THE MERCHANT OF VENICE* 7 & n.36 (1965); J. MILTON, *Paradise Lost, Book X*, in 2 *THE WORKS OF JOHN MILTON* 307 (F. Patterson ed. 1931) ("temper . . . Justice with Mercie").

11. See, e.g., An Act for Recontinuing Liberties in the Crown, 1535, 27 Hen. 8, ch. 24 (vesting exclusive prerogative of mercy in King of England); Grupp, *Some Historical Aspects of the Pardon in England*, 7 AM. J. LEGAL HIST. 51, 52-55 (1963) (mercy prerogative of English kings extant since at least eighth century); Hay, *Property, Authority and the Criminal Law* in *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* 40-44 (1975) (although mercy formally vested in Crown, judges and aristocracy also exercised prerogative in 1700's).

12. See generally Note, *supra* note 2, at 895-98 (discussing historical role of clemency in capital punishment system).

discretion to grant mercy,¹³ in the new republic state constitutions normally vested the mercy prerogative solely in the governor.¹⁴ In the nineteenth and twentieth centuries, abuses of the pardon power¹⁵ led some states to require pardons to be approved jointly by the governor and a board of pardons. At present, of the states with the death penalty, twenty-two confer an exclusive clemency power on the governor, while fifteen use a pardon board or other body to check the executive.¹⁶

The nineteenth century also witnessed the abolition of mandatory capital punishment statutes and the rise of absolute jury sentencing discretion in capital cases, which included the discretion to be merciful. This discretion was a response to jury nullification of mandatory capital sentences in circumstances in which leniency seemed appropriate and also may have been motivated by a desire to institutionalize local racial sentiment in the application of criminal punishments.¹⁷

At least until recently, the exercise of mercy was not delimited by the judicial process. Jurors were allowed to consider any factor in mitigation of capital punishment, including mercy and compassion for the defendant,¹⁸ and governors could weigh reasons for granting clemency that transcended legal categories.¹⁹ Under formerly-prevailing conceptions of who

13. All but five of the colonies required the concurrence of an executive council to grant a pardon, and cases of treason and premeditated murder needed the Crown's assent for pardon. See Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 140-41 (1964).

14. *Id.* at 141.

15. For example, between 1915 and 1917, Texas Governor James Ferguson granted 1,774 pardons. *Id.* at 141 n.25.

16. In discussing the commutation of sentences, this Note will generally refer only to the power of governors, because governors (as opposed to pardon boards) have the final clemency discretion in 22 of the 37 death penalty states, and there have been no recent Federal death sentences. Arizona, Delaware, Florida, Louisiana, Montana, Nebraska, Nevada, Oklahoma, Pennsylvania, South Dakota, and Texas require the concurrence of a cabinet or board of pardons in order for a governor to grant a commutation. Connecticut, Georgia, Idaho, and Utah vest complete power to commute sentences in a board of pardons. All other death penalty states leave the mercy prerogative in the sole discretion of the governor. S. STAFFORD, *CLEMENCY: LEGAL AUTHORITY, PROCEDURE, AND STRUCTURE* 7-90 (1977).

17. See *Woodson v. North Carolina*, 428 U.S. 280, 291-92 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (noting rise of jury capital sentencing discretion); W. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA* 10-11 & Table 1-2 (1981) (jury capital discretion dates); Bedau *Background and Developments*, in *THE DEATH PENALTY IN AMERICA* 9-12 (H. Bedau 3d ed. 1982) (history of transition from mandatory to discretionary jury capital sentencing).

18. One representative early capital statute vested the power of mercy exclusively in the jury's hands in Federal murder and rape trials. Act of Jan. 15, 1897, ch. 29, § 21, 29 Stat. 487 (current version at 18 U.S.C. § 1111(b) (1982)). Interpreting this statute, the Supreme Court reversed a murder conviction in which the jury instructions informed the jury that they were not to recommend mercy unless they found one of the mitigating circumstances: "How far considerations of . . . sympathy or clemency . . . should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone." *Winston v. United States*, 172 U.S. 303, 313 (1899); see also *McGautha v. California*, 402 U.S. 183, 197-203 (1971) (discussing *Winston* and history of discretionary jury capital sentencing), *vacated on other grounds*, *Crampton v. Ohio*, 408 U.S. 941 (1972).

19. Courts have been clear that the use of the clemency power for whatever reason, extra-legal or even illegal, is not reviewable. See, e.g., *Sullivan v. Askew*, 348 So. 2d 312, 315 (Fla.) ("[T]he people of this state chose to vest sole, unrestricted, unlimited discretion exclusively in the executive in exercising this act of grace."), *cert. denied*, 434 U.S. 878 (1977); *People v. Herrera*, 183 Colo. 155, 516 P.2d

might exercise mercy, then, juries and governors were free to be as merciful as conscience dictated.

II. THE CURRENT INSTITUTIONAL STATUS OF MERCY

Despite this tradition, unfolding events in United States politics and death penalty jurisprudence are frustrating the exercise of mercy. Executive clemency, the vehicle through which governors may show mercy, has become unavailable in practice, largely as a result of the popularity of the death penalty. The Supreme Court has permitted judges to limit the sentencing discretion of juries by allowing them to instruct jurors not to act out of mercy, sympathy, or compassion for capital defendants.²⁰ This limitation of jury discretion is symptomatic of the current Court's effort to formalize and streamline death penalty procedure.²¹ Judges and prosecutors, as part of the same process that mercy is meant to override, are structurally prevented from being merciful decision-makers.

A. Executive Mercy

The exercise of executive clemency for capital defendants has fallen into desuetude since the death penalty was reinstated in the United States by *Gregg v. Georgia*.²² For example, prior to 1972, when the Supreme Court banned executions imposed under then-existing death penalty statutes,²³ some Florida governors commuted over thirty percent of all death sentences. Since *Gregg*, Florida governors have granted clemency in only eight percent of all cases.²⁴ Nationally, the rate of commutations as compared to executions has dropped significantly in the post-*Gregg* era.²⁵

626 (1973) (governor's commutation power cannot be exercised by judiciary); *Flavell's Case*, 8 Watts & Serg. 197, 199 (Pa. 1844) ("The propriety or wisdom of granting such pardons, or of the terms and conditions annexed, must rest with the executive, to whom the constitution entrusts this authority."). *But see* Note, *supra* note 2, at 894 n.19 (discussing possible constitutional limitations on clemency power).

20. *See infra* text accompanying notes 34-53.

21. *See, e.g., Rehnquist: Cut Jurisdiction*, A.B.A. J., Apr. 1989, at 22-23 (Chief Justice Rehnquist suggests consolidation of all Federal collateral attacks on capital sentences in one petition, thereby limiting successor habeas petitions).

22. 428 U.S. 153 (1976) (plurality opinion). *Gregg* approved Georgia's revised capital punishment procedures. These procedures attempted to guide jury sentencing discretion through the use of a two-stage trial in which guilt was first assessed, and then aggravating and mitigating circumstances were weighed by jurors in determining whether a defendant should receive a life or death sentence. Georgia's statute also provided for comparative proportionality review of all Georgia death sentences by the state supreme court. *Id.* at 196-98. Most state capital statutes now follow procedures similar to those upheld in *Gregg*. *See* AMNESTY INTERNATIONAL, *supra* note 2, at 21-24.

23. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) (death penalty as applied violates Eighth and Fourteenth Amendments).

24. Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 844 (1986); *see also* AMNESTY INTERNATIONAL, *supra* note 2, at 102 n.4. Tabak notes that "while clemency traditionally was granted frequently in appropriate cases, today the 'right' to consideration for clemency is more theoretical than real." Tabak, *supra*, at 844 (citation omitted).

25. There have been over 100 executions and only 15 commutations of death sentences in the 13

Clemency authorities repeatedly have relied on the accuracy of the legal process afforded capital defendants to justify denials of clemency. Governors perceive their mercy prerogative as limited by the bounds of procedure. Representative of this view is Governor Bill Clinton of Arkansas, who has said, "The appeals process, although lengthy, provides many opportunities for the courts to review sentences and that's where these decisions should be made."²⁶

Political considerations have figured prominently in the unwillingness of many governors to be merciful. The popularity of the death penalty suggests to these officials that the safest course of action is to avoid the exercise of their clemency powers.²⁷ Prisoners scheduled to be executed shortly before election day are particularly vulnerable to denials of clemency.²⁸

Abdication of the executive clemency power in favor of the judicial branch has been encouraged by the courts. Given the special procedures and levels of review provided capital defendants since *Gregg*, some courts have implied that any death sentence that can survive such hurdles should be carried out, because arbitrariness and unfairness in the imposition of capital punishment have been reduced by procedural guarantees.²⁹ This

post-*Gregg* years. However, in the 17 years between 1946 and 1963, Georgia alone commuted 41 death sentences and executed 152, and in the 26 years between 1935 and 1961, Maryland commuted 35 death sentences and executed 61. *Clemency Becoming Rare as Executions Increase*, Corrections Dig., July 8, 1987, at 4, col. 1; W. BOWERS, *supra* note 17, at 433-36, 447-48. Although there are, of course, analytical difficulties in comparing such disparate jurisdictions and time periods, clemency has been granted to 12% of those scheduled to die nationally since *Gregg*, whereas in the pre-*Gregg* period Georgia granted clemency to 21% of the condemned and Maryland granted clemency to 36%. Technically, there have been at least 49 commutations since *Gregg*; however, 35 of these resulted from a provision in Texas law that requires the same jury to resentence a defendant if the original sentence is overturned on appeal. The difficulty of reassembling juries usually has led the governor of Texas to commute such sentences without passing on the merits of the application. Telephone interview with Tanya Coke, NAACP Legal Defense Fund (Nov. 30, 1988) (notes on file with author); *see also Death Row: Few Lawyers for Big Task*, L.A. Times, Mar. 21, 1988, § 1, at 3, cols. 3-4 (commutation statistics).

26. *Clemency Becoming Rare as Executions Increase*, *supra* note 25, at 2, col. 2. At the end of Clinton's first term in office, he commuted a number of death sentences. After being defeated for reelection in 1980, Clinton staged a comeback bid in 1982, promising "not to commute so many sentences if . . . given another chance." *Arkansas Gubernatorial Candidates in Close Race*, N.Y. Times, Oct. 27, 1982, at B10, col. 3. Similar statements by other governors abound. *See, e.g., Riley Wouldn't Stop Execution Out of 'Mercy'*, Columbia (S.C.) Record, Oct. 23, 1984, at 1, col. 1 ("I do not think that I as governor should intervene in the process of capital cases unless I find that a person's rights have not been afforded."); Statement of Tenn. Gov. Lamar Alexander (May 29, 1984) (on file with author) ("For [five and one-half] years I have reviewed clemency petitions only for the purpose of determining whether there might be a mistake or other extraordinary defect in certain criminal proceedings.").

27. *See Political Pressure Thwarts Clemency*, Miami Herald, July 12, 1988, at 1, col. 4 (politics discourages executive clemency); *In Florida, a Story of Politics and Death: A Governor Controls the Ultimate Sentence*, Nat'l L.J., July 16, 1984, at 1, col. 2 (same).

28. *See, e.g., Woman on Death Row Creates Political Stir in North Carolina*, Boston Globe, Sept. 7, 1984, at 2, col. 2 (possibility of clemency for Velma Barfield factor in 1984 Hunt-Helms U.S. Senate race); *Carolina Slayer Fails in Her Bid for a Reprieve*, N.Y. Times, Sept. 28, 1984, at A1, col. 2 (Hunt denies clemency to Barfield); *First Woman Is Executed in U.S. Since 1962*, N.Y. Times, Nov. 3, 1984, at A46, col. 1 (Barfield executed four days before general election).

29. *See, e.g., Spaziano v. Florida*, 468 U.S. 447, 460 (1984) (judge-imposed capital sentence con-

judicial imprimatur serves to absolve other governmental actors from responsibility for independently evaluating death decisions.³⁰

Several state legislatures have discussed proposals to limit or abolish their governors' mercy powers.³¹ Because the clemency power in those states is derived from the state constitution, proposals have taken the form of possible constitutional amendments. The catalyst for these proposals has been the election of governors who oppose the death penalty and who may be inclined to grant individual or mass clemencies to persons under sentence of death.³²

In short, the voting public, courts, and legislatures all exert pressure on state executives to relinquish the mercy prerogative. Further, executive mercy has been viewed as merely ensuring that the rules of due process have been obeyed.³³ Given the degree of judicial review in capital cases, such procedural error is unlikely. For all practical purposes, mercy is no longer available from the executive branch.

B. *Jury Mercy*

At the time the Supreme Court struck down the death penalty in the United States,³⁴ all jurisdictions allowed juries to exercise complete discretion in sentencing, including the option to be merciful.³⁵ The revised death penalty regime instituted by the Supreme Court plurality in *Gregg v. Georgia* envisioned that jurors would continue to possess substantial, if guided, discretion in determining fit cases for mercy.³⁶ Other capital pun-

stitutional; "[I]t is to be hoped that current procedures have greatly reduced the risk that jury sentencing will result in arbitrary or discriminatory application of the death penalty. . . .")

30. Prof. Robert Burt has warned of the dangers of allowing courts to preempt painful moral and ethical conversations surrounding euthanasia and psychiatric commitment by substituting legal rules for personal interaction and responsibility. R. BURT, *TAKING CARE OF STRANGERS: THE RULE OF LAW IN DOCTOR-PATIENT RELATIONS* 144-73 (1979); see also Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 392-93 (applying Burt's analysis to capital punishment). Weisberg writes that "[t]he due process romanticism of the [death] penalty trial has enabled us to avoid acknowledging the inevitably unsystematic, irreducibly personal moral elements of the choice to administer the death penalty." *Id.* at 393.

31. See, e.g., *Anaya Sparing All Inmates on New Mexico Death Row*, L.A. Times, Nov. 27, 1986, at 23, col. 1 (legislature considered withdrawing clemency power after governor mentioned possible commutations); *Leave Clemency Be*, The State (Columbia, S.C.), Dec. 16, 1984, at 2-B, col. 1 (editorial opposing legislative proposal to abolish executive clemency).

32. Toney Anaya, Governor of New Mexico from 1982 to 1986, and Dick Riley, Governor of South Carolina from 1982 to 1986, both were opposed to the death penalty prior to their elections. Anaya prevented executions during his term, while Riley felt compelled to allow executions to proceed. See sources cited *supra* note 31.

33. See *supra* text accompanying note 26.

34. *Furman v. Georgia*, 408 U.S. 238 (1972).

35. See *supra* note 17 and accompanying text (discussing rise of discretionary jury capital sentencing).

36. "[T]he isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice." *Gregg v. Georgia*, 428 U.S. 153, 203 (1976). Currently, the majority of death penalty states allows juries to set punishment in capital cases. In Alabama, Florida, and Indiana, jury sentencing verdicts are only recommendations to trial judges. California requires that trial judges review jury sentences in capital cases but does not allow judges to overturn jury recom-

ishment decisions prohibited states from excluding from the sentencer's consideration anything that might serve "as a basis for a sentence less than death."³⁷

Yet this discretion has been held to exclude mercy. In *California v. Brown*,³⁸ the Court ruled that an instruction requiring jurors to ignore "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling"³⁹ was not unconstitutional. The Court reasoned that instructions cautioning a jury against relying on "mere sentiment" or "sympathy" increase the reliability of sentencing determinations and allow those sentences to be subjected to "meaningful judicial review."⁴⁰

Jurors, in other words, are to rely only on testimony and exhibits presented during the trial insofar as they relate to specific, rationally-described, non-emotional aggravating and mitigating circumstances. They may be told to avoid examining their emotions or consciences when making sentencing decisions.⁴¹

Although anti-mercy instructions are not required, the Court's decision in *Brown* allows imposition of the death penalty without juries having considered a defendant's eligibility for mercy. Justice Blackmun, dissenting in *Brown*, expressed his concern over this prospect:

mentations of life. When Nevada juries are not unanimous in their verdicts, three-judge panels determine sentences. Four states place capital sentencing exclusively in the hands of trial judges: Arizona, Idaho, Montana, and Nebraska. AMNESTY INTERNATIONAL, *supra* note 2, at 24. For a list of the relevant statutes, see Spaziano v. Florida, 468 U.S. 447, 463 n.9 (1984). A defendant can, however, usually waive the right to a jury trial. See Patton v. United States, 281 U.S. 276, 312 (1930).

37. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (sentencer must consider all relevant evidence in mitigation offered by capital defendant).

38. 479 U.S. 538 (1987).

39. *Id.* at 542. The Court's determination that mercy is an inappropriate consideration for capital juries was prefigured by Justice Rehnquist's dissent in *Caldwell v. Mississippi*, 472 U.S. 320 (1985):

Despite the Court's rhetorical references to the need for "reliable" sentencing decisions rendered by jurors that comprehend their "awesome responsibility," I do not understand the Court to believe that emotions in favor of mercy must play a part in the ultimate decision of a capital sentencing jury. Indeed, much of our Eighth Amendment jurisprudence has been concerned with eliminating emotion from sentencing decisions.

Id. at 349.

40. *Brown*, 479 U.S. at 542-43. Justice O'Connor's concurring opinion stressed the importance of informing capital juries of their "obligation to consider all of the mitigating evidence introduced by the [defendant] . . ." *Id.* at 546 (O'Connor, J., concurring). Her concurrence was predicated on the opportunity for the lower court on remand to determine whether *Brown's* jury was in fact told of its responsibility to weigh all of the mitigating evidence before it. O'Connor reached this conclusion by a path far different from that of Chief Justice Rehnquist. The majority focused almost exclusively on the unlikelihood that the modifier "mere" would have caused a sentencing jury to disregard some or all of a defendant's evidence presented in mitigation. O'Connor's opinion was that, although emotion should generally be excluded from sentencing considerations, *id.* at 545, nevertheless it was possible that the trial court's instructions, "taken as a whole," *id.* at 546, were broad enough to preclude the consideration of certain factors essential to the determination of culpability.

41. Prosecutors frequently claim that factors such as emotion or conscience are in the realm of sympathy, and thus that jurors should not take them into consideration in sentencing. Justice Brennan's dissent in *Brown* suggests that anti-sympathy instructions effectively prevent consideration of any mitigating evidence relating to defendants' backgrounds or character. *Id.* at 553-55 (Brennan, J., dissenting).

In my view, we adhere so strongly to our belief that sentencers should have the opportunity to spare a capital defendant's life on account of compassion for the individual because . . . we see in the sentencer's expression of mercy a distinctive feature of our society that we deeply value.

In the real world, as in this case, it perhaps is unlikely that one word in an instruction would cause a jury totally to disregard mitigating factors that the defendant has presented through specific testimony. When, however, a jury member is moved to be merciful to the defendant, an instruction telling the juror that he or she cannot be "swayed" by sympathy well may arrest or restrain this humane response, with truly fatal consequences for the defendant. This possibility I cannot accept . . .⁴²

Prior to *Brown*, state supreme courts were divided over the question of instructions that precluded juries from considering mercy in their deliberations. Three states refused to allow juries to be instructed to ignore mercy.⁴³ Most jurisdictions, however, allowed mercy to be excluded from the consideration of jurors even before the Supreme Court's decision in *Brown*.⁴⁴ At least seven states have since explicitly endorsed the exclusion of mercy from the consideration of capital juries.⁴⁵ In short, the decision in *Brown* encourages trial judges to instruct juries not to consider mercy, sympathy, or compassion during their sentencing deliberations.

The status of mercy within capital sentencing schemes continues to attract the attention of the Justices. Recently the Court granted certiorari on a case that may further elucidate the import of *Brown*. In *Parks v. Brown*,⁴⁶ the Tenth Circuit held that the following anti-sympathy instruction violated the defendant's Eighth Amendment rights: "You must avoid

42. *Id.* at 562-63 (Blackmun, J., dissenting) (citations omitted).

43. These states were California, Georgia, and Washington. *See* *People v. Lanphear*, 36 Cal. 3d 163, 165-66, 680 P.2d 1081, 1082-83, 203 Cal. Rptr. 122, 123-24 (1984); *Legare v. State*, 250 Ga. 875, 877-78, 302 S.E.2d 351, 353-54 (1983); *State v. Mak*, 105 Wash. 2d 692, 754, 718 P.2d 407, 443, *cert. denied*, 478 U.S. 885 (1986).

44. "No sympathy" jurisdictions included Illinois, Nevada, Ohio, Oklahoma, and South Carolina. *See* *People v. Neal*, 111 Ill. 2d 180, 201-02, 489 N.E.2d 845, 853-54 (1985), *cert. denied*, 476 U.S. 1165 (1986); *Nevius v. State*, 101 Nev. 238, 250-51, 699 P.2d 1053, 1060-61 (1985); *State v. Scott*, 26 Ohio St. 3d 92, 108, 497 N.E.2d 55, 68 (1986), *cert. denied*, 480 U.S. 923 (1987); *Parks v. State*, 651 P.2d 686, 693-94 (Okla. Crim. App. 1982), *cert. denied*, 459 U.S. 1155 (1983); *State v. Chaffee*, 285 S.C. 21, 32, 328 S.E.2d 464, 470 (1984), *cert. denied*, 471 U.S. 1009 (1985).

45. *See* *People v. Williams*, 45 Cal. 3d 1268, 1322-23, 756 P.2d 221, 253, 248 Cal. Rptr. 834, 866 (1988) (refusal to give jury instruction emphasizing pity, mercy, and sympathy not unconstitutional), *cert. denied*, 109 S. Ct. 883 (1989); *People v. Crews*, 122 Ill. 2d 266, 522 N.E.2d 1167, 1179 (1988) (no-sympathy instruction not unconstitutional), *cert. denied*, 109 S. Ct. 3260 (1989); *State v. Copeland*, 530 So. 2d 526, 537 (La. 1988) (same), *cert. denied*, 109 S. Ct. 1558 (1989); *State v. Ramseur*, 106 N.J. 123, 296-99, 524 A.2d 188, 275-77 (1987) (same); *Commonwealth v. Clayton*, 516 Pa. 263, 281, 532 A.2d 385, 394 (1987) (not necessary for jury to consider "mere sympathy"), *cert. denied*, 108 S. Ct. 1098 (1988); *State v. Owens*, 293 S.C. 161, 169, 359 S.E.2d 275, 279 (no-sympathy instruction not unconstitutional), *cert. denied*, 108 S. Ct. 496 (1987); *State v. Porterfield*, 746 S.W.2d 441, 450-51 (Tenn.) (same), *cert. denied*, 108 S. Ct. 1756 (1988).

46. 860 F.2d 1545 (10th Cir. 1988), *cert. granted sub nom. Saffle v. Parks*, 109 S. Ct. 1930 (Apr. 24, 1989) (No. 88-1264).

any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence."⁴⁷ The circuit court distinguished this instruction from that given in *Brown*, relying principally on the distinction between the qualifier "mere" used in *Brown* and the qualifier "any" used in *Parks*.⁴⁸ The court interpreted the anti-sympathy instruction at issue as an absolute bar to jury consideration of any sympathetic factors. This prohibition might have prevented consideration of many mitigating circumstances, in violation of the requirement set forth in *Lockett v. Ohio*⁴⁹ that no mitigating evidence be precluded from capital sentencing deliberations.⁵⁰

Given the majority's focus in *Brown* on the importance of the phrase "mere sympathy"⁵¹ and Justice O'Connor's emphasis in her *Brown* concurrence on the need for jury consideration of the totality of mitigating evidence offered by defendants on trial for their lives,⁵² it seems that the Court would be bound by precedent to uphold the Tenth Circuit's decision. If, however, the Court reverses *Parks*, it will signal a significant retreat from *Lockett* and its progeny. In the interests of such bureaucratic norms as predictability of results and formal rationality, jurors will be allowed to sentence defendants to death without having considered "all relevant facets of the character and record of the individual offender."⁵³ The Court will also send the unmistakable message that mercy, sympathy, and emotion can be safely driven out of the death penalty process.

47. 860 F.2d at 1552 & n.8.

48. *Id.* at 1553.

49. 438 U.S. 586 (1978).

50. *Parks*, 860 F.2d at 1554. The court of appeals also reasoned that including "sympathy" in a list of clearly impermissible factors would cause jurors to discount sympathetic mitigating factors. *Id.*

The lower courts have taken varying approaches to the issue of mercy within capital sentencing. *See* *Britz v. Illinois*, 109 S. Ct. 1100, 1102 (1989) (Marshall, J., dissenting from denial of grant of certiorari) (noting division in lower courts); *People v. Hamilton*, 46 Cal. 3d 123, 152 & n.7, 249 Cal. Rptr. 320, 336 & n.7, 756 P.2d 1348, 1364-65 & n.7 (no-sympathy instruction should not be given in capital cases), *cert. denied*, 109 S. Ct. 1176 (1989). *But see* *State v. Clemmons*, 753 S.W.2d 901, 910 (Mo.) (en banc), *cert. denied*, 109 S. Ct. 380 (1988) (anti-sympathy instruction constitutional). The Fifth Circuit has interpreted *Brown* broadly. In *Byrne v. Butler*, 847 F.2d 1135 (5th Cir. 1988), that court held constitutional an instruction generally prohibiting the consideration of sympathy given without the modifier "mere." *See id.* at 1139-40. In a somewhat puzzling display of logic, *Byrne* reasoned that, because the trial court judge instructed the jury to ignore sympathy following the summations of both the prosecution and the defense, the judge was correctly attempting to prevent jury consideration of non-legal factors. *See id.* at 1140. However, forbidding sympathy for both the victim and the defendant will only have the effect of focusing the jury's attention on the statutory aggravating circumstances on the one hand and away from the statutory mitigating circumstances, many of which involve elements of sympathy, on the other. *See also supra* note 41.

51. *Brown*, 479 U.S. at 541-43; *see also id.* at 542 ("By concentrating on the noun 'sympathy,' respondent [Brown] ignores the crucial fact that the jury was instructed to avoid basing its decision on mere sympathy.").

52. *Id.* at 544-46 (O'Connor, J., concurring).

53. *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986). Earlier, *Woodson v. North Carolina*, 428 U.S. 280 (1976), held that the "character and record of the individual offender . . . is a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* at 304.

C. Court Mercy

The very nature of the judicial office prevents judges from exercising mercy, if by mercy one means anything more than securing procedurally correct impositions of the death penalty. Although practices vary by jurisdiction, trial court judges occasionally have the authority to decline to impose death sentences recommended by juries.⁵⁴ However, this decision must usually be justified either by a determination that the aggravating factors did not, as a matter of law, outweigh the mitigating factors, or that the jury weighed extraneous factors in making its sentencing decision.⁵⁵ Similarly, when judges determine sentences in capital cases without the aid of a jury, their discretion is often bounded by the evidence pertaining to aggravating or mitigating circumstances.⁵⁶ Such bounded discretion does not constitute mercy, because it cannot take into consideration extra-legal reasons for forgoing capital punishment. The Supreme Court has acknowledged that appellate court judges are poorly situated to consider "the mercy plea [which] is made directly to the jury";⁵⁷ an appellate record is insufficient to allow such judges to take into account "[w]hatever intangibles a jury might consider in its sentencing determination."⁵⁸

Further, both trial and appellate court judges have a mindset that is not well-suited to applying the equitable concept of mercy.⁵⁹ It simply may be impossible for judges to apply procedural rules with one hand and to be merciful with the other: given human psychology, rules normally will trump the much vaguer notion of mercy. Such rules squeeze out the essentially personal, compassionate element inherent in being merciful.

Courts may also not have the institutional self-confidence to overturn death sentences for non-legal reasons. Judicial recognition of the essentially anti-majoritarian nature of the judicial branch⁶⁰ has made judges hesitant to overturn the decisions of juries (as representatives of the polity)⁶¹ solely on the basis of personal predilection or intuition. The defer-

54. See *supra* note 36.

55. For example, when reassessing jury death verdicts, California trial judges "shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances . . . and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to *law or the evidence presented.*" CAL. PENAL CODE § 190.4(e) (West 1988) (emphasis added).

56. See, e.g., IDAHO CODE § 19-2515 (Supp. 1987), which requires the finding of at least one aggravating circumstance before a person convicted of a capital crime can be considered for death. "Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust." *Id.* at § 19-2515(c).

57. *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985).

58. *Id.* at 331.

59. See generally M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 265-66 (1977) (noting how merger of law and equity initiated by New York Field Code of 1848 led to triumph of putatively amoral formalism in legal reasoning).

60. See generally A. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (2d ed. 1986) (discussing anti-majoritarianism of courts).

61. See, e.g., J. GUNTHER, *THE JURY IN AMERICA* 231 (1988) (concluding that juries play

ence shown to jury determinations in other substantive areas of law also makes it difficult to overcome that deference and to conduct a true *de novo* review of verdicts.

D. *Prosecutorial Mercy*

Though some prosecutors may exercise mercy on behalf of some capital defendants, the nature of a prosecutor's job makes it impossible for her to empathize with the vast bulk of defendants.⁶² By definition, prosecutors are not capable of exercising mercy: Prosecutorial discretion is exercised at the beginning of the capital punishment process, and many factors go into a prosecutor's decision to prosecute that do not necessarily concern the mercifulness of a possible sentence, such as the likelihood of conviction on a particular charge or public pressure for bringing a capital case.⁶³ Further, the prosecutor's role in sentencing is limited to making recommendations to the sentencing authority; prosecutors thus have little or no discretion to exercise mercy at that stage.

In sum, the institutions that are equipped to be merciful are not performing that function. Mercy has been blocked by the reluctance of governors to exercise their clemency powers and by the Supreme Court's decision that mercy is not a necessary consideration for capital juries.

III. THE NEED FOR MERCY

The thesis of this Note is that mercy, as a concept and as a practice, no longer plays the role it once did in the capital punishment system. Mercy is nevertheless very much needed; without it: (1) the Constitution is violated; (2) consideration of non-legal factors is thwarted; (3) systemic effects of racism in sentencing, which cannot be seen in individual cases, are allowed to persist; (4) sentences are imposed without reference to sentences imposed for similar crimes; and (5) our public life is increasingly bureaucratized and dehumanized.

A. *Constitutional Mercy*

The Supreme Court's capital punishment jurisprudence is predicated upon the existence and active use of the mercy prerogative: Although the Court recently has implied that juries are not necessarily appropriate ve-

important role in maintenance of democracy).

62. *But see* Friedman, *Discretion and Public Prosecution*, in *THE INVISIBLE JUSTICE SYSTEM: DISCRETION AND THE LAW* 70 (B. Atkins & M. Pogrebin eds., 2d ed. 1982) (arguing that prosecutorial discretion is frequently merciful).

63. William Bowers has argued that the *Gregg* guidelines have actually increased the influence of extra-legal factors such as race and class on the decisions of prosecutors to prosecute, by allowing prosecutors the latitude to "upcharge" aggravating factors against minority defendants. W. BOWERS, *supra* note 17, at 340-48; *see also* Tabak, *supra* note 24, at 799-800 (prosecutors charge capital crimes to win re-election, make convictions easier, induce plea bargains).

hicles for mercy,⁶⁴ it has consistently supported the exercise of mercy by the executive. The constitutional imperative of substantive clemency review can be seen through an analysis of proposals designed to delimit clemency.⁶⁵ This Note argues that if a state or the Federal government were to eliminate executive clemency by constitutional amendment or otherwise, no death sentences could be carried out in that jurisdiction.

First, the constitutional preference for clemency results from the plurality's implicit assumption in *Gregg v. Georgia* that clement discretion would be available to persons under sentence of death. Responding to Troy Gregg's argument that a death penalty process that allowed governors, juries, and prosecutors to exempt defendants from punishment was capricious, the Court described executive clemency as one of the discretionary practices the absence of which would create a system "totally alien to our notions of criminal justice."⁶⁶ The Court thus suggested that executive clemency would play as vital a role in the revitalized death penalty jurisprudence as jury and prosecutorial discretion.⁶⁷ In approving the death penalty, the Justices apparently assumed that some extra-judicial body (namely state governors) would examine death sentences to ensure that courts have not made gross errors in sentencing, errors that may be apparent only from an extra-legal perspective.

A second, related point is that although the Supreme Court has not otherwise ruled on the need for gubernatorial clemency review,⁶⁸ and the Court's cases that do discuss clemency focus on the presidential clemency power,⁶⁹ a consistent jurisprudence also would require substantive clem-

64. See *California v. Brown*, 479 U.S. 538, 542 (1987); see also text accompanying notes 34-51.

65. See *supra* note 31 and accompanying text (proposals to abolish clemency).

66. *Gregg*, 428 U.S. 153, 199 n.50 (1976). Moreover, "In the federal system it also would be unconstitutional to prohibit a President from deciding, as an act of executive clemency, to reprieve one sentenced to death." *Id.* Likewise, the constitutions of all but six states contain provisions granting the executive branch the power of clemency. The other states—Alaska, Arizona, Kansas, Louisiana, North Dakota, and Tennessee—vest the executive's clemency power statutorily. See S. STAFFORD, *supra* note 16, at 7-90.

67. The plurality also defended the ad hoc and possibly arbitrary power of such discretionary exemptions, including executive clemency, to lessen sentences, stating that "[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." 428 U.S. at 199. But compare Justice White's dissent in the connected case of *Roberts v. Louisiana*, 428 U.S. 325 (1976):

As for executive clemency, I cannot assume that this 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. . . . The country's experience with the commutation power does not suggest that it is a senseless lottery, that it operates in an arbitrary or discriminatory manner, or that it will lead to reducing the death penalty to a merely theoretical threat that is imposed only on the luckless few.

Id. at 349-50 (White, J., dissenting).

68. Since *Gregg*, the Supreme Court has discussed the power of executive clemency in capital cases only once, and then in terms of whether the clemency review procedures of the governor of Florida were sufficient to determine if a capital-sentenced prisoner was mentally ill. *Ford v. Wainwright*, 477 U.S. 399 (1986) (determination of sanity by governor unconstitutional).

69. U.S. CONST. art. II, § 2, cl. 1, vests the power "to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment" in the President. The Court's decisions discussing clemency have focused almost solely on presidential clemency. In *Biddle v. Perovich*, the

ency review on the part of state executives because: (1) state courts have long held gubernatorial clemency to be absolute and limitable only by state constitutional amendment;⁷⁰ and (2) given that clemency is consequently an integral part of every state's capital punishment system, it must serve some purpose besides simply certifying that no legal error has occurred, which state and Federal appellate courts are adequately equipped to do. Therefore, a purely process-oriented clemency is unconstitutional in the death penalty context because courts on both the Federal and state levels have assumed that clemency-granting authorities will scrutinize capital cases on bases other than those that the courts use.

B. *Consideration of Matters Not Admitted in Court*

Mercy is needed because factors that courts do not consider may warrant life sentences, especially given the Supreme Court's assumption that extra-judicial actors would review each case for mercy. For procedural reasons, courts may refuse either to admit evidence in mitigation of punishment or to review meritorious claims on appeal. For example, local Federal appellate court rules may require the immediate litigation of appeals from Federal district courts that refuse to stay executions. The time constraints faced by attorneys in such situations make introduction of new, valid claims virtually impossible.⁷¹

The execution of Willie Darden illustrates the dangers of relying solely on the courts for justice tempered with mercy. Former Chief Justice Burger, in an unusual dissent from a grant of certiorari, complained that "[i]n the twelve years since [Darden] was convicted of murder and sentenced to death, the issues now raised in the petition for certiorari have been considered by this Court four times and have been passed upon no fewer than [ninety-five] times by federal and state court judges."⁷² Burger's implicit

Court held that pardons are an important avenue for implementing public policy: "[A pardon] is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed." 274 U.S. 480, 486 (1927) (citation omitted). More recently, the commutation power was described as "a 'pre-rogative' of the President, which ought not be 'fettered or embarrassed.'" *Schick v. Reed*, 419 U.S. 256, 263 (1974) (conditional commutation of Federal death sentence held constitutional) (quoting *THE FEDERALIST* No. 74, at 500-01 (A. Hamilton) (J. Cooke, ed. 1961)).

70. See 59 AM. JUR. 2D *Pardon and Parole* § 31 (1987); *supra* note 19.

71. See, e.g., Tabak, *supra* note 24, at 835-38 (discussing execution of Johnny Taylor, whose lawyer was unable to present ineffectiveness of counsel claim because of time constraints).

72. *Darden v. Wainwright*, 473 U.S. 928, 929 (1985) (Burger, C.J., dissenting from grant of certiorari). According to Chief Justice Rehnquist, "the flaw in the present system is not that capital sentences are set aside by Federal courts, but that litigation ultimately resolved in favor of the state literally takes years and years and years." *Rehnquist: Cut Jurisdiction*, A.B.A. J., Apr. 1989, at 23. The circular reasoning evinced in statements such as these—that people without ultimately valid claims should be executed expeditiously—fails to acknowledge the possibility that exculpatory evidence may come to light after the defendant's original trial. See, e.g., *Death Row Takes on a Higher Profile*, N.Y. Times, Aug. 21, 1989, at A10, col. 3 (discussing commutation or reversal of death sentence in Ronald Monroe's, Randall Dale Adams', and James Richardson's cases; "[I]n recent years serious questions about guilt or innocence have surfaced with increasing frequency."). The argument also fails to account for the fact that a long process is required to determine meritorious claims in any

assumption was that, simply because Darden had received numerous appeals, Darden's case warranted no further attention from the courts. Yet, several witnesses whose testimony was excluded from judicial consideration contested Darden's guilt. The exculpatory evidence was never weighed, because the Governor of Florida relied on the accuracy of the legal system to justify a denial of clemency. Darden died in Florida's electric chair in March of 1988, another victim of the demise of mercy.⁷³

C. *Systemic Impact of Racism*

Apparently pleased with its handiwork in shaping an innovative capital punishment jurisprudence for the nation, the *Gregg* plurality announced that "[n]o longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. . . . [T]he concerns that prompted our decision in *Furman* are not present to any significant degree"⁷⁴ in the new procedures. The reality is that the death penalty in the United States is not evenly applied to defendants of different races,⁷⁵ and this inequity has made the need for mercy all the more acute. The Supreme Court has held that evidence of structural racial disparity cannot invalidate capital sentences.⁷⁶ Therefore, only a sentencing authority outside of the court system can exercise merciful discretion on the basis of systemic racial discrimination.⁷⁷

D. *Absence of Proportionality Review*

The capital punishment bureaucracy has few mechanisms to check its own systemic excesses. Most state supreme courts do not evaluate the appropriateness of sentences in terms of the punishment meted out to similarly-situated prisoners. The United States Supreme Court, in *Pulley v. Harris*,⁷⁸ ruled that the Eighth Amendment does not require such proportionality review of capital sentences by state supreme courts. Many state supreme courts that do review for proportionality do not look at the sentences imposed on all those convicted of similar crimes, but only at sentences in which death was the penalty.⁷⁹ This practice, which is simply

legal system that aspires to accuracy.

73. See *The Symbolic Death of Willie Darden*, U.S. NEWS & WORLD REP., Mar. 28, 1988, at 9.

74. *Gregg v. Georgia*, 428 U.S. 153, 206-07 (1976).

75. See generally W. BOWERS, *supra* note 17, at 193-269 (statistical probability of imposition of death penalty increases if defendant black, also increases if victim white); Bruck, *supra* note 3, at 18 (race of both criminal and victim large factor in determining whether murderer is executed).

76. *McCleskey v. Kemp*, 481 U.S. 279 (1987) (statistics showing systemically discriminatory impact of capital sentencing procedures do not invalidate death penalty in any particular case).

77. Although mercy is inherently individualized and discretionary, it is certainly appropriate to take into consideration the more global forces that brought a particular person to a death sentence. If one of those forces is systemic racial disparity in capital sentencing, such disparity is rightfully one part of the mercy calculus.

78. 465 U.S. 37 (1984).

79. See Tabak, *supra* note 24, at 823-25.

an attempt to locate any similar crime for which a death sentence was imposed (as opposed to an evaluation of the proportionality of the entire pool of sentences for similar crimes), amounts to a "precedent-seeking exercise"⁸⁰ that cannot correct sentencing disparities.⁸¹ Thus, the lack of adequate proportionality review combines with the disappearance of mercy to allow executions to go forward without any decision-maker ever having evaluated the relative appropriateness of a particular sentence of death.

E. *The Death Penalty Bureaucracy*

Mercy's demise reflects the increasing depersonalization and bureaucratization of our culture. Ralph Hummel, in his critique of the bureaucratic society, notes that "bureaucrats are asked to take their guiding values from a reservoir of norms designed by the bureaucratic system. When these come into conflict with personal norms, . . . the personal norms . . . must be sacrificed."⁸² When courts instruct jurors to ignore mercy, sympathy, and sentiment in sentencing others to die, and when governors rely exclusively on the judicial system in reviewing those sentences, capital punishment truly becomes a bureaucracy of death, with internally-imposed norms and without personal reflection.⁸³ This bureaucratization affords everyone involved in capital sentencing the illusion that no one has decided that any given individual should die; in doing so, it poses the question whether we want a "headless and soulless"⁸⁴ institution sending people to their deaths.⁸⁵

Max Weber, then, was right: the impassive, rationalistic impulse of bureaucracy is inexorable,⁸⁶ even in death. The element of mercy is being squeezed out of capital punishment in the United States by a death penalty bureaucracy. The decision-makers in that system either cannot or are not exercising a merciful discretion to forgo the death penalty; jurors increasingly are prohibited from being merciful, and governors have shied away from the opportunity to be merciful. What this Note proposes in

80. AMNESTY INTERNATIONAL, *supra* note 2, at 90.

81. *But see Pulley*, 465 U.S. at 72-73 (Brennan, J., dissenting) (asserting that proportionality review reduces some irrationality in sentencing).

82. R. HUMMEL, *THE BUREAUCRATIC EXPERIENCE* 7 (2d ed. 1982).

83. The elimination of mercy from capital punishment resembles a process of reification, where "human beings so lose consciousness of their potential and their past as creators that they treat their social institutions as if they had a life of their own above and beyond human control." *Id.* at 41.

84. *Id.* at 3.

85. For example, it is clearly in the interest of the prosecutor to have a jury see a defendant as a bureaucratic case, a matter to be processed and put in the "out" box. Robert Weisberg recounts a tactic used by California prosecutors to ease jurors' qualms about the death penalty: Prosecutors argue that voting to impose the death penalty is part of the jurors' legal duty, as opposed to a moral choice. The aggravating and mitigating factors then become part of a legal arithmetic and can simply be added up to determine a sentence. *See Weisberg, supra* note 30, at 375-79.

86. *See M. WEBER, ECONOMY AND SOCIETY* 956-1005 (G. Roth & C. Wittich eds. 1968) (discussing irresistible advance of bureaucracy through all social institutions).

response to these developments is the rejuvenation of mercy in several areas.

IV. REVIVING MERCY

Mercy can be returned to the capital punishment system by all three branches of government, or any one of them.⁸⁷ Courts, legislatures, and governors can all take simple, concrete steps to preserve the possibility of mercy within the structure of the death penalty.⁸⁸

A. *Judicial Implementation of Mercy*

Apart from affirmatively instructing juries that they may be merciful, which the Supreme Court conceivably could prohibit under *California v. Brown*'s admonishment to avoid "extraneous emotional factors"⁸⁹ in capital trials, trial courts could encourage mercy by refraining from giving any instruction whatsoever concerning mercy. Silence about mercy would ensure that mitigating background and character evidence introduced by defendants would not necessarily be disregarded as irrelevant sympathetic factors,⁹⁰ and would make certain that *Lockett v. Ohio*'s mandate to allow juries in death penalty cases to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"⁹¹ is not violated. This silence would also align death penalty sentencing jurisprudence with the legal doctrine concerning jury nullification: jurors would not be told they could be merciful, but no court officer would be allowed to tell them not to consider mercy.⁹² Abstaining from anti-mercy instructions would have the double virtue of preserving merciful discretion while vesting that discretion in the community sentiment⁹³ embodied by juries, which serve at least in part to validate the outcomes of the criminal justice system.

87. Although the tradition of mercy is rooted in the executive clemency power, it would not be inappropriate for other governmental actors to implement mercy. The nation's governors have no special purchase on compassion and empathy. Indeed, fellow-feeling may be more accurately captured in the sentiments of unelected citizens serving on juries or clemency boards, than in the politically-bounded perspectives of governors.

88. Of course, it may be that it is impossible for a society to retain the death penalty and yet claim the adjective "merciful": for some decision-maker truly to come to terms with another human's life and then decide to kill that person seems incongruous at best.

89. 479 U.S. 538, 543 (1987).

90. See Justice Brennan's dissent in *Brown*, 479 U.S. at 553-55, for a discussion of the effects of anti-mercy instructions on jurors' consideration of background and character evidence.

91. 438 U.S. 586, 604 (1978) (footnote omitted).

92. The Supreme Court has upheld the refusal of a trial judge to inform the jury that it possessed the authority to nullify laws through its verdict. Juries nevertheless possess the de facto power to nullify putative sentences by absolving defendants of guilt. See generally Schefflin & Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51, 56-63 (Autumn 1980) (history of jury nullification).

93. Although at present there is strong popular support in the abstract for the death penalty as a punishment, juror sentiment regarding the death penalty as punishment for a particular individual may vary widely, especially given informal and intuitive bases (such as mercy) for deciding the

B. *Legislative Implementation*

State and Federal legislatures can encourage mercy by amending death penalty statutes to require explicitly that sentencers take mercy into consideration.⁹⁴ Such an approach, however, might also be held unconstitutional under *Brown*.⁹⁵

The most effective legislative implementation of mercy would insulate the other possible source of mercy—executive clemency—from political pressures. A statutory enactment or constitutional amendment, depending on the legislative source of the clemency power itself, could vest the sole discretion to be merciful in state clemency boards,⁹⁶ similar to those already existing in four states,⁹⁷ yet constituted so as to avoid the problems of bureaucratization and politicization.

These clemency boards should have a small membership, no more than a half-dozen. Their members should be selected from the general population by the governor and should serve lengthy, staggered terms. No member should serve for more than one term. The boards' authority should be limited to determining whether death sentences imposed should be carried out or commuted to life sentences. Furthermore, governors in their appointments should strive to keep a balance of viewpoints on the board.⁹⁸ Because, unlike a jury, mercy recommendations would not be required to be unanimous, all boards could include some members who unconditionally oppose the death penalty. The clemency boards should be required to report the basis for their invoking or disdaining mercy in each case, not in the form of "reasons" for their decision, but rather in the form of a discussion of the equities of the penalty imposed.⁹⁹

This legislative proposal would free the mercy decision from the constraints of politics, while retaining some accountability in the clemency process. Because no single governor would be responsible for appointing all members of the board, the board would not be beholden to a particular political program. The requirement that members' terms not be renewable would help ensure that clemency boards would not become entrenched

sentence.

94. A historical example of such a statute is discussed *supra* note 18.

95. 479 U.S. at 543.

96. An important feature of this proposal is the removal of clemency authority from the ultimate control of governors; experience reveals that if clemency boards make only recommendations of clemency, governors may still feel compelled by political pressures to refuse clemency. *See, e.g., Louisiana Orders Execution Stayed*, N.Y. Times, Aug. 24, 1988, at A17, col. 1 (Louisiana pardon board recommended mercy for Herbert Welcome, but outgoing governor refused to act on recommendation).

97. Connecticut, Georgia, Idaho, and Utah. *See supra* note 16.

98. The composition of Connecticut's Board of Pardons might serve as a model. It is composed of five members who serve six-year terms. The membership is appointed by the governor and must consist of two lawyers, one physician, and one social scientist; no more than two of these members may belong to the same political party. The membership also includes one judge of the state supreme court. CONN. GEN. STAT. § 18-24a (1985).

99. Thus, clemency boards' merciful discretion would be limited in that they would have to account publicly for the decisions they reach.

bureaucracies and would regularly bring fresh perspectives to boards' conversations about mercy.

Although certainly no panacea for the inequities of the death penalty, clemency boards would meet a number of the needs for mercy. First, the constitutional imperative of substantive clemency review would be met. Because of their insulation from political considerations, clemency boards would be able to contemplate factors in mitigation that the judicial system could not or would not consider. The ability of clemency boards to collect state-wide data on the imposition of the death penalty would allow them to mitigate death sentences in cases where racism, unconscious or otherwise, had played a part in sentencing (for example, where it happened that the victim and the jury members were white and the defendant was black). Further, clemency boards would be able to use their statistical information to conduct true proportionality reviews of sentences, comparing each death sentence to the sentences received by all persons convicted of similar crimes. Finally, the explicit task of clemency boards would be to review for mercy, thus helping to prevent further bureaucratization of the death penalty.¹⁰⁰

C. *Gubernatorial Implementation*

Governors may unilaterally or together with boards of pardons, if any, act to restore mercy through an active use of the executive clemency power. An engaged approach to mercy would require governors to embrace personal decision-making based on factors that are not purely rational—to consult “experience, emotion, introspection and conversation”¹⁰¹—in thinking about executive clemency.¹⁰² This approach would look much like the way people make important choices in their personal lives.¹⁰³

100. Because mercy must encompass arbitrariness and subjectivity, *see supra* note 5, clemency boards would not necessarily have a pro-mercy bias. Any predilection would have to come from individual board members' intuitions and feelings, as opposed to structural (and therefore bureaucratic) biases toward mercy.

101. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1, 56 (1984). Rejecting both nihilism and rationalism as ways of making decisions in favor of what he calls pragmatism or irrationalism, Singer argues that “[w]e do not have a rational foundation and method for legal or moral reasoning . . . ; we do not, however, need such a foundation or method to develop passionate commitments and to make our lives meaningful.” *Id.* at 5 n.8. Rational decision procedures for answering the moral question of whether a prisoner should pay with his life for a crime necessarily embody a prior moral or political choice and are therefore neither determinate, objective, or neutral. *Id.* at 9-47, 59 n.170. The idea of mercy thus fits well into an irrational perspective, as mercy is not usually defined as having a rational or consistent basis for its exercise. *See supra* note 5.

102. An early Maine statute regulating the clemency process was aimed in part at achieving such an engaged approach by allowing the governor time to reflect on the equities of each death sentence and to evaluate the possibility of rehabilitating the condemned. Act of Mar. 29, 1837, ch. 292, 1837 Me. Laws 446. The statute required that the record of each capital case be sent to the governor, and required that no clemency decision be made for one year after sentencing, during which time the convict was to be in solitary confinement at hard labor. *See also* L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 282 & n.6 (2d ed. 1985) (discussing Maine statute).

103. Singer maintains that people making such personal decisions:

It may be that most, or even all, governors may already engage actively in the process of granting clemency, although the stinginess of post-*Gregg* mercy would seem to belie that conclusion.¹⁰⁴ Further, the idea that governors and other clemency-granting authorities should take a more vigorous approach to clemency does not imply that justice can be tempered with mercy simply by multiplying procedural requirements designed to force such authorities to confront the clemency decision.¹⁰⁵ The real import of this proposal lies in clemency authorities' assumption of responsibility for the achievement of justice *and* mercy (as opposed merely to procedural due process) within their jurisdictions, and in their willingness to wrestle personally with the moral problems posed by the death penalty. Governors and pardon boards who wish to be merciful finally must be unwilling to allow courts "authoritative-seeming pronouncements to silence disputatious conversation"¹⁰⁶ about the morality of death sentences.¹⁰⁷

V. CONCLUSION: THE MIRROR OF MERCY

How we deal with what is worst in us, our propensity to kill each other, is in reality a mirror of what can be best in us, our social vision. The fate of mercy in the imposition of capital punishment reflects the kind of society we live in; the "kinder, gentler"¹⁰⁸ impulses embodied by mercy

think long and hard about what they want in life; they imagine what their lives would be like if they were to follow one path rather than another; they talk with the people who are most important to them and whose opinions they value; they argue with others and with themselves; and in the end, they make a decision.

Singer, *supra* note 101, at 62.

104. One governor who did attempt to integrate "experience, emotion, introspection, and conversation" into his thinking about mercy was Michael DiSalle, Governor of Ohio from 1959 to 1963. Though opposed to capital punishment, Gov. DiSalle felt that he would be violating his oath to uphold the laws of Ohio if he granted clemency in all cases. M. DISALLE, *THE POWER OF LIFE OR DEATH* 5 (1965). He took his mercy prerogative seriously, however, and commuted the sentences of six of the 12 people scheduled to die during his term. DiSalle expended considerable effort trying to come to a thoughtful decision about clemency: He read trial transcripts, he visited crime scenes, he asked the state police to investigate unresolved issues, he talked to psychiatrists and to accomplices and spouses of the condemned, and he personally interviewed and reinterviewed prisoners who had been sentenced to death. *See id.* at 27-117. DiSalle relates little about his decisional processes in his book on clemency, but it is clear that, through these personal, detailed investigations, he was striving to come to an irrational, pragmatic, informed sense of practice in making decisions about mercy. *See also* E. BROWN, *PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW* (1989) (discussing personal dilemmas and political difficulties faced by California Governor Edmund "Pat" Brown in deciding clemency appeals); Lewis, *He Was Their Last Resort*, N.Y. Times, Aug. 20, 1989, § 7 (Book Review), at 7, col. 1 (reviewing *PUBLIC JUSTICE, PRIVATE MERCY*) ("Governor Brown dealt with every case in [a] particularized way, putting a heavy burden on himself.").

105. *But see* Note, *supra* note 2, at 905-11 (advocating increased procedural guarantees in clemency proceedings to provide more accurate information to clemency authorities).

106. R. BURR, *supra* note 30, at 164.

107. Admittedly, such an engagement in the clemency process would require opposing prevailing public opinion. But some governors, including Hugh Carey and Mario Cuomo of New York, have blocked executions during their tenures without suffering defeat at the polls.

108. *Transcript of Bush Speech Accepting Nomination for President*, N.Y. Times, Aug. 19, 1988, at A14, col. 1.

unfortunately have been dissipated by political and bureaucratic pressures favoring executions. Yet, choosing whether another is to live or die is a disturbing and daunting moral challenge. This decision should not be made purely by following rules or by weighing aggravating and mitigating circumstances. Rational decision procedures imply that no one has really made a choice,¹⁰⁹ and that implication is one which is not acceptable in a supposedly moral society. Empathy and emotion are properly injected into decisions about capital punishment. For mercy to survive in the United States, leaders in the several institutions of public life will have to take immediate action. If they do, we may find that mercy, sentiment, sympathy, empathy, and emotion are worthy mirrors of our better selves.

109. Robert Weisberg observes: "In the case of the death penalty, the law has sometimes offered the sentencer the illusion of a legal rule, so that no actor at any point in the penalty procedure need feel he has chosen to kill any individual." Weisberg, *supra* note 30, at 393.

