South Dakota Law Review

Volume 67 | Issue 2

2022

Inconceivability, Horror, and the Mercy Seat

Thomas E. Simmons

INCONCEIVABILITY, HORROR, AND THE MERCY SEAT

THOMAS E. SIMMONS†

I. INTRODUCTION 212
II. DISCUSSION 216
A. DEBRA SUE JENNER 216
B. APRIL OF 1987 217
C. DEBRA'S INNOCENCE CAMPAIGN 224
D. TRIAL AND APPEAL 225
1. Trial 225
2. Direct Appeal 235
E. POST-CONVICTION PROCEEDINGS 238
1. Federal Habeas 238
2. State Habeas 238
3. A § 1983 Claim 241
F. THE JANKLOW FACTOR AND DEBRA'S COMMUTATION 241
G. PAROLE HEARINGS (2003-PRESENT) 244
1. 2003 244
2. 2005 245
3. 2007 246
4. 2013 246
5. Two Mandamus Writs and the § 1983 Claim 248
6. 2017 250
7. 2021 251
H. PAROLE BOARD CONSIDERATIONS 254
I. LOCATING AND MAPPING THE "MERCY SEAT" 257
1. The Lid of the Mercy Seat 257
2. Opening the Lid 260
3. Peering Within It 264
J. THREE FINAL POINTS: THE JENNER PROBLEMS 270
1. The Fundraising Factor 270
2. The Toy Airplane Problem 271
3. Inconceivability 273
III. CONCLUSION 276

† Professor, University of South Dakota Knudson School of Law. The author previously served as a member of the South Dakota Board of Pardons and Paroles (from 2013 to 2014 and as an auxiliary member from 2015 to 2019). The views expressed in this essay are entirely his own and offered solely in his individual capacity.

In an ordinary home in Huron, South Dakota—sometime in the very early morning hours of Sunday, April 5, 1987—a young girl was murdered in her crib. By March of the next year, her mother, Debra Jenner, had been convicted of second-degree murder. She was sentenced to life in prison. Although she became eligible for parole in 2003 after Governor Janklow commuted her sentence, her applications for discretionary parole were consistently denied. She remained incarcerated until last year, when she was finally granted parole. This essay embarks on a retelling of Debra Jenner's trial, her subsequent post-conviction proceedings, and her numerous parole hearings, including the one in which she finally won release in September of 2021. In the process, it confronts a criminal act so ghastly that it evades nearly every attempt to comprehend it and attempts to assess the proper role of mercy in the criminal justice system—specifically, in the context of applications for discretionary parole.

[M]ercy is above this scepter'd sway . . . .[1]

- Shakespeare

I. INTRODUCTION

As Shakespeare has Portia articulate in *The Merchant of Venice*, mercy reveals itself in two primary aspects: first, in human society, and second, in God's.[2] First, there is mercy as an imperfect human attribute; an act of judgment coupled with an exercise of the will in carrying out a human action directed toward another.[3] Then, there is heavenly mercy; a divine, spirit-driven, perfected mercy directed at one or more of us.[4] There is that which we render; that which we emulate; that which we pray for; that which is demanded from us.[5] Mercy is not unknown in the law, but it is often incorporated in an offhand way, not in any kind of systemized doctrine or framework. We mostly do it only lip service.

1. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1, l. 2134, 2140-41. Shylock rejects the grace of mercy and insists upon justice. He responds: "I crave the penalty . . . ." *Id. See also* Stephen W. Sathner, *Shakespeare for Lawyers – "The Quality of Mercy*," 14 AM. BANKR. INST. J. 10, 10 (1995) (outlining Portia's admonition and references to it in published cases).

2. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1.

3. *See Luke* 6:36 (DRA) ("Be ye therefore merciful."); *Proverbs* 11:17 ("A merciful man doth good to his own soul."); *Zechariah* 7:9 ("Thus saith the Lord of hosts, saying: Judge ye true judgment, and shew ye mercy."); *Matthew* 5:7 (DRA) ("Blessed are the merciful.").

4. *See Hebrews* 4:16 (DRA) ("Let us go . . . to the throne of grace: that we may obtain mercy"); *Psalms* 51:10 (DRA) ("I . . . have hoped in the mercy of God."); *Psalms* 25:10 (EHV) ("All the paths of the Lord are mercy."); *Ephesians* 2:4 (DRA) ("God, (who is rich in mercy,) for his exceeding charity wherewith he loved us."). Pope Francis has said, "The message of Jesus is mercy . . . it is the Lord's strongest message." Peter Stanford, *The Name of God is Mercy Review – Mixed Messages from the Pope*, GUARDIAN (Jan. 10, 2016, 2:30 PM), https://www.theguardian.com/books/2016/jan/10/pope-francis-the-name-of-god-is-mercy-review.

5. *Matthew* 6:14 (OJB) ("if you give men *mechila* (pardon, forgiveness) for their *chattaim* (sins), so also your *Av shbaShomayim* [Father in Heaven] will give *selicha* (forgiveness) to you.").

When a just sentence is pronounced, presumably, it takes account of both retribution and an easing of it; a balancing; a sentence that blends a moiety of mercy into the recipe. The Ancient Greeks would characterize justice as a mean between the extremes of unrestrained retribution and unrestrained empathy.[6] Thus, for the ancients, mercy modulates justice. If this approach is correct, then too much mercy (excessive mercy) could be as unbalanced as too little (defective mercy).[7] What we should aim for, according to Aristotle and other thinkers, is a temperate mercy; a Goldilocks dose of the stuff—neither too much nor too little: a moderate amount.[8]

But what is this treasured ingredient, exactly? Mercy is regularly praised, frequently sought, and oftentimes pleaded, but seldom construed. What *is* it?

---

6. *See* ARISTOTLE, THE NICOMACHEAN ETHICS bk. II, at 37 (A. Beresford, trans., Penguin Books 2020) (asserting that "virtues must aim at a mid-point."); *id.* at 38 (explaining that virtue is "a 'middle' state both because it's between two ways of being bad – [two vices] – one caused by going too far and one caused by falling short, and also in the other sense that vices either make us fall short of or go beyond what's required in our feelings and our actions, while the [relevant] virtue finds and chooses the mid-point.").

7. "The domain in question here is punishment, and the virtuous person is the person who will take action to ensure that the right amount of punishment is inflicted." Roger Crisp, *Justice and Mercy*, PRACTICAL ETHICS (Sept. 8, 2009), http://blog.practicalethics.ox.ac.uk/2009/09/justice-and-mercy/.

8. *See* C.S. LEWIS, GOD IN THE DOCK: ESSAYS ON THEOLOGY AND ETHICS 294 (1970) (Walter Hooper ed. 1970) (observing: "Mercy, detached from Justice, grows unmerciful."); C.S. LEWIS, THE BOY AND HIS HORSE 218-19 (HarperCollins 1982) (1954) (quoting Aslan, as he explained that his sentencing of Rabadash to be transformed into a donkey represented a temporary rather than a permanent state of existence for the condemned: "Justice shall be mixed with mercy."). *But see* Theodore Eisenberg & Stephen P. Garvey, *The Merciful Capital Juror*, 2 OHIO ST. J. CRIM. L. 165, 165 (2004) (asserting that mercy interferes with the administration of justice if "mercy means imposing less punishment than an offender deserves, and less than similarly-situated defendants receive."). Professor Theodore Eisenberg and Professor Stephen P. Garvey reframe and restate this thesis as follows: "A punishment less than that which is deserved is an undeserved and therefore unjust punishment, albeit an unjustly lenient one." Eisenberg & Garvey, *supra* note 8, at 167. They also consider an alternative view, among others, where justice and mercy are not enemies of each other, distinct and separate virtues. Under this view:

> Both [Justice and mercy] require a form of fact-specific, as opposed to rule-based, decision-making. They differ over the individual facts and circumstances to which they attend. For example, one might argue that justice attends to all the facts and circumstances of the crime and the culpability of the offender, but nothing more. Mercy, in contrast, attends to a different set of facts. It might, for example, attend to the character of the offender, or to the impact of the offender's punishment on innocent third parties, or to any other fact the natural tendency of which is to summon our sympathy, pity, or compassion. Thus, one offender might in mercy's name receive a lesser sentence than an otherwise similarly-situated offender if the first offender, but not the second, acted out of character, or if he, but not the second, is a single father whose otherwise just punishment would impose particular hardship on his dependents.

Id. at 169-70. Mercy, however, is typically construed more in terms of a free and unearned gift; "an act of supererogation." *Id.* at 170. If it is unearned, however, why not simply randomize its application in the criminal justice system in order to ensure equality and fairness in its application? Barry Latzer, *Mercy-A Response to Evan J. Mandery's Commentary, Mercy and Contrition*, 42 CRIM. L. BULL. 1, 1 (2006) (letter). Professor Barry Latzer also notes an irony if we define mercy as an unearned leniency: "It is most needed by the prisoner who faces the harshest punishment, and least merited by the prisoner who has committed the most atrocious crime." *Id.* Logically, all of this follows, yet I know of few judges who consciously set out to hand down unmerciful sentences, and none who would anticipate being praised for it. *See* Hutchins v. Woodward, 730 F.2d 953, 954 (4th Cir. 1984) ("Judges regard themselves as merciful."). Given the centrality of mercy, it seems it must represent more than merely the correct modulation of justice. It must be greater than the equivalent of tuning an automobile's throttle.

If it is merely a codeword for restraint, how should we mete it out?[9] When should we withhold it? What role should it play? Is it merely descriptive of a lenient sentence? Is it present whenever a prisoner qualifies for early release and absent whenever a prisoner does not? Is it mere sentimentality and free-flowing empathy, or is it an authentic precept with a genuine role within the criminal justice system?[10]

Not infrequently, we call upon mercy as an essential component to the administration of justice.[11] In this sense, mercy might be less like restraint and more akin to attention, caution, and freedom from bias—that is, as an element of judgment; an important part of all good judicial decision-making; a characteristic in any praiseworthy verdict. Like salt, we might notice a deficiency when it is lacking ("This meatloaf needs salt") but never as the key form of justice (One would never say, "Tastiness means saltiness," or even "The true mark of a great chef is one who knows how much salt to use"). But unlike salt, we could never have too much of it insofar as we would never accuse a judge or a jury of excessive impartiality. We would never characterize an unfair verdict as one suffering from a tad too much thoughtful attention.

Whatever mercy is, it also proves difficult to locate—however construed—within the body of the law. Both its quiddity and its position are elusive; both its what-ness and its proper role are fleeting—but I hope to stalk mercy's edges in the pages which follow. I will not capture mercy. Even if I did, I would remain uncertain about its application, though I am convinced of its essential qualities. Or at the least I am convinced that mercy does possess a particular set of characteristics, if not precisely what those characteristics are.

Mercy, whatever it is, is a particularly relevant inquiry framed against Debra Sue Jenner, a mother from Huron. Her crime "shocked the town of Huron and stands out as one of South Dakota's most high-profile cases in recent decades."[12] Following her conviction for the brutal murder of her young daughter, she served

---

9. Pope John Paul II construed mercy as more than merely restraint or modulation. *See* John Paul II, *Dives in Misericordia*, VATICAN (Nov. 30, 1980), https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_30111980_dives-in-misericordia.html [hereinafter *Dives in Misericordia*] (explaining: "Not only does He speak of [mercy] and explain it by the use of comparisons and parables, but above all He Himself makes it incarnate and personifies it. He Himself, in a certain sense, *is* mercy.") (emphasis added). He defined mercy as God Himself. *See id.* The Latin title to this encyclical translates as "rich in mercy."

10. For explorations of the virtue of mercy, see generally Lyla H. O'Driscoll, *The Quality of Mercy*, 21 S.J. PHIL. 229 (1983); George Rainbolt, *Mercy: An Independent, Imperfect Virtue*, 27 AM. PHIL. Q. 169 (1990). For analyses of mercy in the courts, see generally Andrew Brien, *Mercy Within Legal Justice*, 24 SOC. THEORY & PRAC. 83 (1998); Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83 (1993); Mary Sigler, *The Story of Justice: Retribution, Mercy, and the Role of Emotions in the Capital Sentencing Process*, 19 L. & PHIL. 339 (2000).

11. *E.g.*, Matter of Grand Jury Proceedings Empanelled May 1988, 894 F.2d 881, 886 (7th Cir. 1989) ("The difference between appealing to the district judge's equitable discretion and appealing to some undefined quality of judicial mercy is semantic rather than practical . . . ."); Higginbotham v. Ford Motor Co., 540 F.2d 762, 774 (5th Cir. 1976) ("[T]he quality of Georgia mercy is strained indeed in the wrongful death area . . . .").

12. John Hult, *Bar Photos, Says Woman Who Killed Her Girl*, ARGUS LEADER (Sept. 30, 2014, 7:43 AM), https://www.argusleader.com/story/news/2014/09/30/bar-photos-says-woman-killed-girl/16465907/.

time in the South Dakota prison system (first at Springfield; later at Pierre) from 1988 until 2021, when she was finally granted discretionary parole.

If there is reason to soften toward her crime, it seems, it resides in mercy, though mercy was not necessarily lacking when she was originally sentenced to life in prison without the possibility of parole. (Only because of a subsequent gubernatorial commutation was she even eligible for parole.) If the original sentence was just, then to insist upon softening it with mercy would be to argue for an unjust accommodation; it would be to ask for something other than what is just.[13] Should we even speak of mercy in connection with an application for discretionary parole? May state actors ever legitimately embody mercy? Or may only pastors and parents demonstrate it?

As I said earlier, mercy is an elusive prey. If it is a divine attribute—and it is—then it is not for capturing.[14] It is for chasing. It is for modeling, but not perfectly replicating. Just how we are to emulate it, and when, are demanding dilemmas.

Debra may have merited a dose of mercy from the South Dakota Board of Pardons and Paroles in September of 2021 if only on account of the length of the sentence she had already served. Perhaps the length of her incarceration, which had already unspooled for her, naturally generated a splash of mercy where, previously, it would have been unfitting. Indeed, perhaps genuine justice *required* an additional dose of the mercy stuff at that particular juncture in Debra's legal life. Perhaps not. Perhaps she had simply served enough time, given the relevant factors to be considered in connection with an application for discretionary parole, none of which include any reference to mercy as such.[15]

Before we can arrive at our own judgment concerning her release, we must obtain sufficient knowledge of her and her crime. No sentence is seen as just—even if it happens to be correct—if it is rendered hastily, without reflection, or lacking in foundation. Perhaps in carefully examining Debra's legal life, we might glimpse the proper role of mercy in the judicial machinery which held her. So, it is to her now that we should turn. But we should be prepared to encounter a stumbling block in our assessment of Debra's parole status, which sits at the very center of justice in the realm of criminal justice; the act for which she is being punished. That act is indecipherable. It is inconceivable.

I will contend that Debra must be met with mercy despite the incomprehensibility of what she did—both to us and to her. We cannot imagine her crime, and she herself cannot recall it; she cannot remember it. So, the very act with which we are to configure a judgment is opaque. And mercy itself is

13. If both justice and mercy are virtues, can they really be in conflict? "[I]f we adopt the premises of virtue ethics as described by Aristotle, we would conclude that mercy lies between the vices of cruelty and uncaring, while justice lies between the vices of cruelty and softness." Austin Cline, *Mercy vs. Justice: A Clash of Virtues*, LEARN RELIGIONS (Jan. 30, 2018), https://www.learnreligions.com/argument-from-justice-for-existence-of-god-248257.

14. *See* REDEMPTORIST FATHERS, MANUAL OF THE PURGATORIAN SOCIETY 17 (1916) (stating, "The judgments of God are very different from the judgments of men.").

15. *See infra* Part II(H) (quoting SDCL § 24-13-7 (2013)).

difficult to pin down, and thus, it presents us with an indecipherability of its own. We seem to agree that mercy is important; we seem even to know something of its intrinsic qualities even if we bumble a bit in expressing them well. And, it seems, as lawyers, if we are called upon to assist in its application, we are also called upon to decipher it as best we can.

Ultimately, I am afraid, the correct application of mercy must be left to shaper minds than mine. But I will return to mercy; how it ought to be measured out or withheld after outlining how Debra arrived at where she was in the fall of 2021 when she was finally granted parole. The quality of mercy and its application, I contend, is especially problematic when the nature of the criminal's conduct lies beyond our powers of imagination or comprehension. Debra's case is a difficult one, but it is not beyond our faculties to wrestle with it. Indeed, we must. With her case, we must be prepared to face the reaction her crime invokes. It is one of utter inconceivability. And it is this inconceivability, I believe, that might render mute and unsure the proper dose of mercy which ought to be applied. It is, to some degree, the chief stumbling block she encountered in so many unfavorable applications for parole over the years.

Mercy is always an elusive virtue. It is especially elusive in the context of Debra, but, it seems, we are nevertheless commanded to construe it and apply it, even in difficult cases. Especially, perhaps, in the difficult cases.

II. DISCUSSION

A. DEBRA SUE JENNER

An only child, Debra Sue Jenner was born and raised in Huron, South Dakota.[16] So was her first husband and father of her children, Lynn Jenner. They had been high school sweethearts and had been married six years before having their first child, a son they named Stuart Jenner, born in 1982.[17] A daughter, Abby Lynn Jenner, followed the next year. Abby was lactose intolerant and sometimes had difficulty sleeping.[18] In other respects, the Jenner family life, from all appearances, was entirely predictable, routine, and unremarkable. Their home at 1137 Frank Avenue S.E. was commonplace, their quotidian lives, plain. Prior to April of 1987, Debra had never had contact with law enforcement for any reason.

Debra was an agri-research technician for Pioneer Hybrid International with an associate degree, while Lynn was a carpenter.[19] He worked at Farmer's Cashway Lumber.[20] Both of them taught Sunday school at the Huron Wesleyan Church. Lynn was the Sunday school superintendent; Debra taught preschool

16. Steve Young, *Would DNA Free Mom Convicted of Murder?*, ARGUS LEADER, Aug. 6, 2000, at A4.

17. *Id.*

18. State v. Jenner, 451 N.W.2d 710, 711 (S.D. 1990).

19. Appellee's Brief App. at 56-57, *Jenner*, 451 N.W.2d 710 (No. 16240).

20. *Id.* at 57.

Sunday school for several years.[21] Debra was also the church pianist, head of the youth choir, and director of the church's music department.[22] From all outward appearances, the Jenner family was ordinary in every respect.

B. APRIL OF 1987

In the spring of 1987, Abby was three and a half years old. She never reached her fourth birthday. Instead, she met a horrific, maniacal end at the hands of her mother. The event is as gruesome and horrific as it is inexplicable. It is base, cruel, and deeply disquieting.

April 3, 1987, was a Friday. That night, Abby woke up, and her parents attended to her sleeplessness.[23] The next day—Saturday, April 4—the family went on a short trip. Abby was still out of sorts, soiling her pants twice.[24] That evening, the Jenners went out with the Van Laeckens for dinner and a movie.[25] The two couples watched the movie *Hoosiers*, about a small-town basketball team's trip to the state championships.[26] Babysitters had supervised both the Jenner's and the Van Laecken's children at the Jenner residence.[27] After the movie, the babysitters went home, Debra checked on the children, turned on the nightlight, and she and Lynn went to bed.[28]

The next morning was April 5. Son Stuart was the first to rise.[29] Lynn got up to fix him breakfast while his son curled up next to his mother to watch television in the couple's bedroom.[30] Debra rose from the bed to start getting herself and her children ready for church.[31] After Lynn finished showering, he entered Abby's room to rouse her.[32] He opened her bedroom shade.[33] The sunlight flooded in. He turned to her lifeless body on her bed and approached it.[34] The clock would have shown that it was just a few minutes before 9:00 a.m.[35]

From this point on, I find it difficult to improve upon the narration contained within Justice Frank E. Henderson's majority opinion in the direct appeal of Debra's conviction. Justice Henderson's text includes an accurate description of the initial investigations of Abby's death by the Huron Police Department, the Beadle County Sheriff's Office, and the State's Division of Criminal

21. Young, *supra* note 16, at 4A.
22. *Id.*
23. *Jenner*, 451 N.W.2d at 711-15.
24. *Id.*
25. Appellant's Replacement Brief at 2-3, *Jenner*, 451 N.W.2d 710 (No. 16211).
26. *Id.* at 3; HOOSIERS (Orion Pictures 1986).
27. Appellant's Replacement Brief, *supra* note 25, at 3.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 4.
32. *Id.*
33. *Id.*
34. *Id.*
35. State v. Jenner, 451 N.W.2d 710, 712 (S.D. 1990).

Investigation. Accordingly, I will present it here, unedited. Following, then, is Justice Henderson's description of what transpired as Lynn approached his daughter's unmoving body:

> He found her in bed, lying totally still, with her mouth full of blood. He screamed, whereupon Debra came over from the master bedroom, approximately twenty feet away. Debra sat on the edge of Abby's bed and touched her. Abby's body was cold, her eyes dilated. Debra telephoned "911" at 8:59 a.m., gave her address, then relating that a three year old girl was there, with blood and "organs" coming out of her mouth. Debra's tone of voice, during this conversation, was very loud. An ambulance was dispatched.
>
> Before the ambulance arrived, at 9:05 a.m., Debra made an additional telephone call to Doctor Cynthia Kortum, M.D., her family doctor, during which her tone of voice was quite calm. She informed Dr. Kortum, matter of factly, that Abby had died during the night and requested an autopsy. Debra, in the six minutes between her 911 call and the ambulance's arrival, also telephoned her parents, Bruce Schafer and Janet Schafer, and her pastor, Darrel Wagner. At the time the ambulance arrived, she was engaged in still another call, to her friends, the Brink family. The ambulance, her parents, and officer William Ehlers, of the Huron Police Department, arrived at the Jenner home within moments of each other. An emergency medical technician entered the Jenner home, found no signs of life in Abby, and carried her, still enwrapped in bloodstained bedding, out to the ambulance. The ambulance then proceeded to the Huron Regional Medical Center.
>
> The ambulance crew noticed numerous cuts on Abby's body. Later examination revealed that *seventy* stab wounds were inflicted on Abby. Dr. Brad Randall, the forensic pathologist who performed Abby's autopsy, testified at trial that some wounds were of a slashing type, consistent with a blade sharpened on one edge and dull on the other. Other wounds were punctures, which could have been made by a model airplane owned by Stuart which was found next to the sink in the Jenners' kitchen. In particular, the geometry of one wound was described by Dr. Randall as "relatively unique", matching the model plane, as markings around the wound corresponded to a protrusion on the back of the plane and its rear fins. Dr. Randall characterized numerous cuts on Abby's arms and hands as "defensive" in nature, i.e., inflicted as Abby, who laid on her stomach, attempted to fend off the blows. He termed the attack a "frenzy type", evidenced by repeated blows with no particular target. He estimated that Abby died during the early morning hours of April 5, 1987.

No members of the Jenner family accompanied Abby to the hospital. At 9:17 a.m., six minutes after delivering Abby to the hospital, the ambulance driver, Mike Ball, returned to the Jenner home to retrieve equipment. Ball testified that [Debra] was talking on the telephone normally, in an utterly calm manner. Debra and Lynn went to the hospital only after Janis LaMont, a registered nurse, called them at home requesting information. Once at the hospital, according to LaMont, Debra appeared restless, and paced in the hallway. Lynn stayed in the waiting room, head in hands. Shirley Jenner, Debra's mother-in-law, remarked that she wished Debra would cry. David Bender, a hospital maintenance worker, spoke to Shirley, who was, herself, a hospital worker, for about 20 minutes. At one point, Shirley Jenner left him to converse with Debra. He testified that he heard Debra remark that it was a "screwed-up day", and asked "why couldn't this have been a simple death?" He also heard Debra remark, "I don't know how the hell it happened", in reference to the cuts, wounds and scratches upon Abby's lifeless body. At one point, Debra asked Shirley who Bender was. When Shirley identified him as a hospital maintenance worker, Debra responded: "Oh shit."

While at the hospital, Beadle County Sheriff Tom Beerman (Beerman) spoke to Debra and Lynn. According to Beerman's testimony at trial, he asked Debra if Abby had been sick, and Debra replied that Abby had been "hyper" for a couple of days, that she had stayed up with Abby on Friday night (April 3, 1987), and that Abby had soiled her pants a couple of times on Saturday afternoon. Debra also related that she checked on Abby at midnight Saturday night, when Abby was asleep, and did not see her again until after Lynn found her the next morning. Debra and Lynn, Beerman was told, then went to bed, only to be disturbed by noise from a party next door. They arose, looked out a window, and watched three intoxicated individuals enter a car and drive away. Per Debra, they then returned to bed and slept until the next morning. Lynn, who discovered Abby's body, informed Beerman that he went into Abby's room to waken her for church, noticed something wrong, turned her over onto her back, and saw blood. He looked in Abby's eyes and knew that she was dead.

Meanwhile, when the Jenners, mother and father of the victim, were at the hospital, Deputy Chief Robert McQuillen (McQuillen) and Sergeant William Ehlers (Ehlers) of the Huron Police Department went to their home. There they found Lynn's father, Merlin Jenner, and Ruby Wagner, wife of the Jenners' pastor. Examining Abby's bedroom, they immediately noticed that her bedding had been replaced. After Mrs. Wagner told him

she had already cleaned the room, as she did not want the Jenners to come home and see the mess, McQuillen told those present to leave the room and house alone. McQuillen and Ehlers briefly went to the hospital, and then returned to the Jenner home. They noticed that the bedding in Abby's room had been changed again. McQuillen told everyone to leave. The bedding, not taken to the hospital with Abby, was recovered that morning from defendant's father, Merlin Jenner, who had placed it in his car.

Huron police detective Dave Rand, Dr. Ilya Zeldes, a forensic scientist, and Rex Riis, a criminologist from the State Forensic Laboratory in Pierre, examined the Jenner home later that day. They found no evidence of forced entry. Bloodstains were discovered on the headboard of Abby's bed, on the wall behind the bed, on the bathroom floor, on a wall-mounted light switch in Abby's room and on a telephone near the kitchen. Abby's blood was therefore found in different parts of the Jenner home. Abby's mattress was turned over before they arrived, with the bloody side facing down. A knife which was consistent with some of Abby's slashing wounds was in a silverware tray atop a microwave oven near the kitchen sink. These officers removed clothing, similar to clothes Debra claimed to have worn to bed on the night Abby was slain, from a hamper next to a washing machine in the basement. No identifiable fingerprints were found.

Debra and Lynn went to Merlin's house after they left the hospital that day. While there, Mary Brink, a family friend, noticed that Debra washed her hands several times that morning. When asked what the problem was, appellant responded: "*I can't get the smell off of my hands.*" Debra and Lynn eventually left Merlin's for Debra's parent's home, where Beerman reached them by telephone, sometime after 5:00 p.m. Beerman asked them to come down to his office to be interviewed by Jerry Lindberg (Lindberg), a Division of Criminal Investigation (DCI) agent.

Debra was interviewed by Lindberg for approximately an hour and a half, starting at 8:30 p.m. During this interview, she repeated much of the factual background she had earlier given to Beerman. There was one significant difference, however, as she told Lindberg that she did enter Abby's room that morning just before Lynn discovered Abby's body, but noticed nothing unusual. Also, according to Lindberg's trial testimony, Debra claimed that she could not remember whether the outside doors of her home were locked the night Abby died. Lindberg observed that Debra was very calm and collected during the interview. After the Jenners left, Beerman, Riis, and Dr. Zeldes went to the Jenner's home, where hair and blood samples were given by the Jenners, by consent.

The next day, April 6, 1987, Debra offered to turn over her class ring, which she thrice assured him had not been "scrubbed". As she later testified that she wore it from Saturday night, April 4, through Sunday night, April 5, the ring, per her statements, must have been washed at least four times while she wore it (three times while at Merlin's house, according to Kay Brink's testimony, and once, additionally, in the bathtub at her home after Lynn discovered Abby's body). During this conversation, she asked Beerman why the police were not checking persons who had been at the party next door. Beerman replied that they were being investigated. Lynn, later that day, turned the ring over to McQuillen and Rand, together with other personal jewelry.

Beerman telephoned Lynn Jenner, on Tuesday, April 7, 1987, and asked that he and Debra come to his office for a few more questions. They agreed and arrived shortly after 2:00 p.m., accompanied by Lynn's parents and their Pastor, Darrell Wagner. DCI agent Lindberg spoke to them together, for five to ten minutes, and asked them to submit to a polygraph test. Lindberg explained that the tests were strictly voluntary, and that the polygraph was used as an investigative tool to help eliminate or generate suspects. Lynn readily consented to testing, and Debra consented after being assured that her grief would not affect the test results. The Jenners were then separated, and DCI agent Fred DeVaney (DeVaney) presented a polygraph consent form to Debra for signature. As she read the form, he advised her that she did not have to take the test, and discussed the test procedure. She signed the consent form. DeVaney then administered the polygraph test, which lasted 90 minutes. During the test, Debra showed no reluctance or hesitation to answer questions. According to DeVaney's trial testimony, Debra theorized that two men had broken into the house and killed Abby. She opined that it had to be two men—one to kill, and one to open doors without getting blood on the doorknobs. Between 3:30 and 4:00 p.m., having finished the test, DeVaney left Debra alone in the room for five to ten minutes, while he reviewed the polygraph charts. The charts indicated that she had been deceptive in her responses. DeVaney asked Lindberg to follow this up.

Lindberg then talked with Debra for 15 to 20 minutes. During this interview, Debra admitted past problems with physical discipline upon the deceased child, including one specific incident where she spanked Abby with a wooden spoon so hard that the spoon broke. She also stated that she and Lynn locked their bedroom door at night to prevent their children from crawling into bed with them. When asked if she hurt Abby, she replied: "I don't remember[,]" and "I didn't do this, but I could

have psyched out during the night." When asked, outright, if she killed Abby, she simply denied remembering it. At one point, according to Lindberg's trial testimony, she said: "A person could just go click and go in and do this and clean up the mess and not remember it." She denied noticing any smell of blood, even after touching Abby after Lynn found her dead, and related that she noticed nothing unusual when she entered Abby's room immediately before that (at trial, Debra testified that she only glanced at Abby, and focused entirely on the floor when passing around the bed on the way to the closet). During this discussion, Debra's demeanor fluctuated between being calm and visibly upset with great rapidity.

At 4:00 p.m., DeVaney replaced Lindberg and interviewed Debra for another hour. She exhibited no reluctance or hesitancy to continue the interview. According to DeVaney, Debra repeated that she might have "psyched out" and done it, and asked him if he was a psychologist (he was not). She also volunteered to him that she wanted to use any means in DeVaney's words, "to get the truth out of her if she had done it[,]" including the use of a psychologist or hypnosis. DeVaney testified that he left the room at one time, and came back to find that she had gone to the bathroom and returned while he was out. He also procured a Diet Coke for her, after she declined an offered Coca–Cola. At approximately 5:00 p.m., he discontinued his questioning because he perceived that she was looking down on him after he responded negatively to her inquiry as to whether he was a born-again Christian. He asked her if she was willing to continue the interview with another DCI agent, Ken Giegling (Giegling). She agreed.

During this interview, which lasted until 9:00 p.m., Debra told Giegling that neither her husband nor her son killed Abby. As in the earlier interviews that day, she indicated that she could not recall killing Abby, yet repeated that she might have "psyched out." According to Giegling, Debra asked his help in spurring her memory, and offered to undergo hypnosis, take a "truth serum", or talk to a psychologist to that end. Debra related that, in Giegling's words, "from the start of all this that she has had it in the back of her mind that she could have done this." She also informed him that she was afraid she had committed "this horrible premeditated act[.]" At another point, Giegling testified, she grabbed his hand and told him that she recalled her husband locking the front door of her home on the night in question, a fact that she had told nobody else (she claimed at a later suppression hearing, and at trial, that she could not remember if this memory concerned the night Abby died).

> DeVaney also testified that Debra described the killing several times, as seen through Abby's eyes. The first such account came, according to Giegling, without any prompting: Abby was not afraid, knew the perpetrator, trusted the person, and saw a knife, a Chicago Cutlery knife which she had seen before. The second time Debra reconstructed Abby's point of view, she indicated that her own hair was down, and Abby grabbed it. (Analysis of hair samples taken from Abby's hands and arms indicated that these hairs were consistent with samples of either Abby's or Debra's hair, but not Lynn's). Debra related that a black object was in Abby's room at the time, and identified it as a black model airplane which belonged to her son. When asked where the plane was then, Debra informed Giegling that it was on the counter in her kitchen. Giegling then left Debra and informed the police of the model airplane and its location. They found it exactly where Debra said it would be (this is the model plane, the shape corresponding to wounds on Abby's body). Up until that point, the police had been unaware of the model plane. At the suppression hearing and trial, Debra disputed Giegling's account. She testified that Giegling had simply asked if there were any sharp toys in the house, to which she replied by identifying the model and giving its location.
>
> The last time Debra described events in Abby's bedroom for Giegling, she changed her position, stating that a man was standing over Abby's bed with a knife in his hand; further, that he took the knife with him when he left.
>
> At approximately 9:00 p.m., Giegling became concerned with Debra's demeanor, which had been changing throughout the interview. He brought Lynn into the room, and Debra, as Giegling told it, cried out, "I did it, I did it, I did it [,]" which statement her husband then acknowledged by saying "You did it", (Debra and Lynn later disputed Giegling's account on this point, by testifying that she actually said "I did it, didn't I?"). Debra then asked Lynn if he helped her, to which he replied that he had not. She then said: "If you didn't help me how could I do this, clean up and go outside?" No further questioning was undertaken by the police that night.[36]

The police questioning had terminated following an outburst by Debra that was so disconcerting that it led Giegling to believe she "was suffering a nervous breakdown."[37] Giegling brought in psychologist Duane Majeres to assess Debra's mental state. Majeres, however, found her to be very calm and well-oriented.[38]

36. *Id.* at 712-15 (brackets in the original).
37. *Id.* at 729 (Sabers, J., dissenting).
38. *Id.* at 715 (Henderson, J., majority).

Following this psychological assessment, Debra left the Sheriff's office at about 10:00 p.m.[39] Abby's funeral was scheduled for the next day at the Wesleyan Church. Debra's interrogation had continued through a family memorial service for Abby that evening.[40] Now, it was too late for the parents to attend the service. So instead, a DCI agent and deputy sheriff dropped Debra and her husband off at their pastor's home.[41]

The next day, Debra retained attorney David Gienapp.[42] The investigation of Debra continued apace. But it was four and a half months before the state would seek an indictment.

C. DEBRA'S INNOCENCE CAMPAIGN

Debra doggedly maintained her innocence in the months leading up to her indictment, before her trial, following her conviction, and for years afterward. An indicted individual—even if guilty of the offense or offenses charged—has the absolute right to put the state to its burden of proof by pleading not guilty. Indeed, more occurs within a criminal trial than an objective determination of the quantum of evidence submitted and whether it meets the threshold of proving the elements of an offense beyond a reasonable doubt. Pleading not guilty may have more than mere strategic considerations. A trial can also represent a process by which the defendant comes to understand her guilt.[43] For defendants charged with offenses such as sexual abuse of a child, insisting on a trial can represent a strategy of a different sort—retaining the ability to insist on innocence in order to avoid or at least mitigate an exceptionally unpleasant experience in prison where inmates reputably treat child rapists with an exaggerated cruelty.[44] In other circumstances, a defendant may be simply psychologically unprepared to admit to guilt.[45] She may be in denial.[46]

Debra's self-advocacy for her own release, however, was exceptional. Her vociferous insistence on her innocence was almost unprecedented—to the extent

39. *See* Appellant's Replacement Brief, *supra* note 25, at 7 (stating "Debra and Lynn arrived at the sheriff's office at approximately 2:00 PM . . . the entire interviewing process proceeded for seven to eight hours.").

40. *Id.* at 23.

41. Appellee's Brief at 21, *Jenner*, 451 N.W.2d 710 (No. 16240).

42. *Id.*

43. *See* Robert D. Dinerstein, *A Meditation on the Theoretics of Practice*, 43 HASTINGS L.J. 971, 972 (1992) (portraying a "client [who] was adamant about going to trial because she 'wanted to tell her story.'").

44. "Sex offenders face being ostracized or targeted by other prisoners . . . ." *Survive Prison as a Sex Offender*, ZOUKIS CONSULTING GRP., https://www.prisonerresource.com/prison-life/special-tactics/how-sex-offenders-survive/ (last visited Jul. 26, 2021).

45. *See* Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1304 (1975) (considering "a small group of obviously guilty defendants who are psychologically incapable of admitting their guilt.").

46. *See also, e.g.*, Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2503 (2004) (explaining: "Offenders who falsely believe they are innocent probably overestimate their chances of acquittal at trial because they think juries will share their own distorted perspectives.").

that even after she eventually admitted guilt, some of her supporters believed that she had made a false confession, so convincingly had she maintained her innocence up until that point. Moreover, Debra not only maintained her innocence, she spun tales about the purportedly real culprit or culprits while conducting a well-orchestrated—and financially successful—campaign to raise funds for her defense. Presumably, the real murderer was a bad actor attending or associated with the noisy next-door neighbor's party the night Abby was killed.

A website was maintained to solicit donations in order to prove her innocence. Text on the website suggested corruption on the part of the police and judges.[47] Debra was responsible for invective "directed at the circuit judge who presided over her case, over the prosecutors, the police, basically alleging at every opportunity that she had been railroaded."[48] Debra's parents have testified that Debra's legal bills as of 2003 totaled "as much as $200,000," which they paid.[49] They explained that the amounts raised by the website were "a drop in the bucket."[50] The website itself indicated that approximately $35,000 had been raised.[51]

D. TRIAL AND APPEAL

1. Trial

Abby had died sometime late Saturday or early Sunday, April 5. A brief account appeared in the *Huron Daily Plainsman* on Monday.[52] It said only that the death of three-and-one-half-year-old Abby, the daughter of Lynn and Debra, was being investigated.[53] Initially, Beerman refused to elaborate or even confirm

47. Amended Verified Complaint Ex. 1 at 3, Jenner v. Nikolas, No. 4:14-CV-04147-KES, 2015 WL 4600352 (D.S.D. 2015).

48. *Murdering Mom Asks for Parole Again*, SIOUX CITY J. (Dec. 21, 2005), https://siouxcityjournal.com/news/state-and-regional/murdering-mom-asks-for-parole-again/article_81602fd4-3565-53a7-8547-aef0053d603d.html (quoting Mark Barnett).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Death of Huron Girl Investigated*, HURON DAILY PLAINSMAN, Apr. 6, 1987, at 1. The account ran 118 words. *Id.* Its full text is printed below:

> Local and state law enforcement officials are investigating the weekend death of Abby Lynn Jenner, 3½-year-old daughter of Lynn and Debra Jenner, who live at 1137 Frank Ave. S.E.
>
> Beadle County Sheriff Tom Beerman and Deputy Police Chief Robert McQuillen refused to elaborate on the case.
>
> "It involves a 3½-year-old girl and the investigation is continuing," Beerman said, adding he would make no further comments on the investigation.
>
> Beerman said the sheriff's office, police department and state Division of Criminal Investigation are involved in the case.
>
> Beerman did say that an autopsy was conducted Sunday night in Sioux Falls. He declined, however, to confirm or deny whether the child's death was by natural causes.

Id.

53. *Id.*

whether Abby's death was by natural causes and that an autopsy had been conducted Sunday night.[54]

By Wednesday, the day of Abby's funeral, which was attended by 350 to 400 people, word of her violent death was out.[55] Wednesday was also the day that newly elected Attorney General Roger Tellinghuisen arrived in Huron to work with law enforcement.[56] The Huron paper referred to interviews that law enforcement had conducted on Tuesday and now referred to Abby's death by stabbing as a homicide.[57] Rumors began to fly that the police had already solved the case, something which Beerman flatly denied, saying, "I wish it was (solved)" and "If that was the case, I'd be doing something besides what I'm doing."[58]

In the days immediately following Abby's violent death, Debra had not yet been identified as a suspect, and Huron's parents feared for the safety of their own children.[59] The Huron hardware stores all reported spikes in the sales of locks.[60] The schools undertook special care with unnerved children.[61] Teachers attempted to quell gossiping; the population was on edge. One rumor suggested a cult-like killing.[62] The community feared an unidentified child killer who lurked in their midst.

On Friday, Beerman described the status of laboratory forensic analyses which were being conducted, some of which were expected to take some time, and he announced that the investigation had revealed a suspect.[63] Law enforcement offered comfort in repeatedly assuring the community that Huron's children were not in any danger. Beerman explained: "We feel that there is no immediate danger to others, even though we will always encourage parents to do their best to safeguard their children."[64] Beerman's assurances were repeated in the Sunday paper.[65] Although the state forensics laboratory completed its tasks quite speedily, the testing by a Chicago laboratory proceeded at a slower pace,

54. *Id.*

55. Roger Larsen, *Sheriff Denies Rumors That Case Solved in Recent Stabbing*, HURON DAILY PLAINSMAN, Apr. 9, 1987, at 1 [hereinafter Larsen I]; Roger Larsen, *Schools Respond to Questions on Child's Death*, HURON DAILY PLAINSMAN, Apr. 9, 1987, at 1 [hereinafter Larsen II]. The public relations officer for the Attorney General's office noted that the Jenner homicide was "the first major case in South Dakota since Tellinghuisen took office and that he wanted to come to Huron to offer any assistance he could." Larsen I, *supra* note 55, at 1.

56. Larsen I, *supra* note 55, at 1.

57. *Jenner Probate Continues*, HURON DAILY PLAINSMAN, Apr. 8, 1987, at 1.

58. Larsen I, *supra* note 55, at 1.

59. Roger Larsen, *Suspect Claimed in Stabbing: Tensions Ease in Huron*, HURON DAILY PLAINSMAN, Apr. 12, 1987, at 1.

60. *See id.* (discussing the increase in lock sales in the area and the domination that the event had on conversations throughout the town); *see also* Larsen II, *supra* note 55, at 1 (discussing schools' approach of "play[ing] it low key" around the children).

61. Larsen II, *supra* note 55, at 1.

62. Angela Kennecke, *Convicted 1987 Child Killer, Debra Jenner, Granted Parole in Unpublicized Hearing*, KELO-LAND (Sept. 30, 2021), https://www.keloland.com/news/investigates/convicted-1987-child-killer-debra-jenner-granted-parole-in-unpublicized-hearing/ (quoting Tellinghuisen as referring to rumors "about this being some type of cult killing" in 1987).

63. *Suspect Claimed in Jenner Killing*, HURON DAILY PLAINSMAN, Apr. 10, 1987, at 1.

64. *Id.*

65. Larsen, *supra* note 59, at 1.

eventually prompting criticisms from both Beadle County State's Attorney Mary Keller and the Sioux Falls *Argus Leader* in an editorial.[66] A week and a day later, Tellinghuisen took over the case.[67]

Once the Chicago forensic assessments were completed, the Attorney General convened an eight-person grand jury to begin the indictment process, commencing on June 24.[68] Circuit Court Judge Eugene Martin, of Huron, would preside, while Tellinghuisen would present evidence alongside Assistant Attorney General (and chief of the litigation division) Dennis Holmes.[69] Assistant Attorney John Bastian (who would later serve as Circuit Court Judge in the Fourth Circuit for twenty years) would also present evidence to the grand jury.[70] Given the secret nature of grand jury proceedings, very little information appeared in the press while it deliberated, but Tellinghuisen did reveal that Abby's death had been the result of being "stabbed by a sharp instrument, 'a knife or something of that nature.'"[71] He also confirmed that the grand jury investigating Abby's death would not be the same panel that had recently convened to investigate Beadle County pimping and prostitution activities.[72] He reassured the public that the at-large suspect did not present a threat to the community and confirmed that members of the Jenner family had not been ruled out as suspects.[73] A *Huron Daily Plainsman* editorial the next day re-emphasized the Attorney General's assurances

66. *See* Roger Larsen, *Tests Continue in Jenner Probe*, HURON DAILY PLAINSMAN, Apr. 30, 1987, at 1 (noting Keller's "concerns about the delays in the investigation" and quoting her as saying, "Although I have received assurances that reports will be forthcoming, my office file on this matter consists of newspaper clippings and [the autopsy report.]"); Roger Kasa, *Keller Unhappy Over Jenner Case Editorial*, HURON DAILY PLAINSMAN, May 6, 1987, at 1 (referring to an editorial in the Saturday (May 5) edition of the *Argus Leader* (which Keller deemed "irresponsible") characterizing law enforcement as "overly cautious").

67. Roger Kasa, *Tellinghuisen, DCI Given Jenner Case*, HURON DAILY PLAINSMAN, May 11, 1987, at 1. "Complicated murder investigations traditionally involve the attorney general's office," Tellinghuisen explained, and Keller had requested the Attorney General's office to take over the investigation. *Id. See also* Roger Kasa, *Limited Local Resources Sends Jenner Case to State*, HURON DAILY PLAINSMAN, May 12, 1987, at 1 (quoting Tellinghuisen as describing the Jenner case, then in its sixth week, as "a major investigation that takes major resources."). Tellinghuisen was in Huron speaking to a government class at the Huron High School and detailing "the 21-year-old drinking age case that he recently argued before the Supreme Court." *Id. See generally* South Dakota v. Dole, 483 U.S. 203 (1987) (upholding the constitutionality of the National Minimum Drinking Age Act which withheld five to ten percent of highway funds from states which failed to adopt a uniform twenty-one-year-old drinking age). The case began in District Judge Andrew Bogue's courtroom who held against the state. His decision was affirmed by the Eight Circuit. South Dakota v. Dole, 791 F.2d 628, 634 (8th Cir. 1986). Oral arguments had been held on April 28. Transcript of Oral Argument, *Dole*, 483 U.S. 203 (No. 86-260). Ultimately, the United States Supreme Court affirmed Judge Bogue and the Eighth Circuit panel, reasoning that Congress' spending power had been properly exercised. *Dole*, 483 U.S. at 212.

68. Roger Kasa, *Attorney General to Convene Grand Jury on Jenner Death*, HURON DAILY PLAINSMAN, June 16, 1987, at 1. *See also* SDCL § 23A-5-1 (2016) (providing: "A grand jury shall consist of not less than six nor more than ten members.").

69. Kasa, *supra* note 68, at 1.

70. Roger Kasa, *Grand Jury Meets Again in Huron on Jenner Case*, HURON DAILY PLAINSMAN, July 14, 1987, at 1.

71. Kasa, *supra* note 68, at 1.

72. *Id.*

73. *Id.*

that the suspect was being monitored daily and "that the suspect is not a threat to the Huron community."[74]

Although the Beadle County Grand Jury was convened, as planned, on June 24, the Attorney General did not immediately begin presenting evidence.[75] Nine days later, the *Plainsman* noted impatiently that the Attorney General had not yet met with the grand jury to present evidence of Abby's murder.[76] A schedule had been worked out with the grand jurors, Tellinghuisen explained, but the schedule itself would not be made public.[77] The grand jury met for the first time on July 6.[78] It met again on July 13.[79] It met for a third time in a two-day session the following week, and a fourth time on July 29.[80] The location of the proceedings was kept secret, and not all of the grand jury meetings were disclosed.[81] Tellinghuisen projected that the probe would conclude at or near the end of August.[82]

His forecast proved precise. On the morning of Friday, August 28, following the testimony of approximately fifty witnesses over several non-consecutive days, the grand jury issued a double indictment which was handed to Circuit Court Judge Irvin Hoyt.[83] The charges were second-degree murder and first-degree manslaughter.[84] The people of Huron then learned what some may have been suspecting for some time; that Debra herself was the suspect in the case.

Judge Hoyt issued an arrest warrant, Debra turned herself in voluntarily the same morning, and she was "held in the Regional Correction Center under $100,000 bond."[85] The front-page story announced: "Mother arrested in Jenner

74. *Jenner Murder Probe to Reach Crucial Stage with Grand Jury*, Opinion, HURON DAILY PLAINSMAN, June 18, 1987, at 4.

75. Roger Larsen, *Tellinghuisen, Jury Not Yet Meeting on Jenner Case*, HURON DAILY PLAINSMAN. July 3, 1987, at 1.

76. *Id.*

77. *Id.* The paper recalled that authorities had "said that residents of the community should not fear for their safety." *Id.*

78. Kasa, *supra* note 70, at 1.

79. *Id.*

80. Roger Kasa, *Tellinhuisen Sees Another Month's Work in Jenner Case*, HURON DAILY PLAINSMAN, July 29, 1987, at 1.

81. *See Grand Jury Meets at Undisclosed Site Wednesday*, HURON DAILY PLAINSMAN, Aug. 26, 1987, at 1 (reporting that the grand jury met again on August 26); *Grand Jury Hears More Testimony*, HURON DAILY PLAINSMAN, Aug. 27, 1987, at 1-2 (noting that the grand jury continued to hear evidence the next day, August 27).

82. Roger Kasa, *Jenner Jury Probe Nears 'Deadline*,' HURON DAILY PLAINSMAN, Aug. 24, 1987, at 1.

83. Roger Kasa, *Mother Arrested in Jenner Slaying*, HURON DAILY PLAINSMAN Aug. 28, 1987, at 1; Roger Larsen, *Requests Jury Trial: Jenner Pleads Not Guilty*, HURON DAILY PLAINSMAN, Sept. 16, 1987, at 1.

84. *Jenner Faces Arraignment*, HURON DAILY PLAINSMAN, Sept. 15, 1987, at 1. *See* SDCL § 22-16-7 (2017) (describing second-degree murder as that "perpetrated by any act imminently dangerous to others and evincing a depraved mind, without regard for human life, although without any premeditated design to effect the death of any particular person . . . ."); SDCL § 22-16-15 (2017) (defining first-degree manslaughter in relevant part as that, "[w]ithout any design to effect death . . . and in a heat of passion, but in a cruel and unusual manner," or "[w]ithout any design to effect death . . . but by means of a dangerous weapon . . . .").

85. Kasa, *supra* note 83, at 1.

slaying."[86] That same afternoon, her bond was adjusted downward to a $50,000 property bond in her first court appearance, alongside Gienapp (who would later serve as a Circuit Court Judge for the Third Judicial Circuit). Holmes argued that her bond should not be reduced based on the danger she posed "to others in the community and to her 5-year-old son."[87] But Judge Hoyt reduced the bond over his objections. If Gienapp had pointed out that the state had been reassuring the public for months that their unnamed suspect posed no danger to the community, the *Plainsman* did not record it. Debra promptly posted bond and was released.

Debra's arraignment hearing was held on the afternoon of September 16.[88] Judge Hoyt reviewed Debra's rights and outlined the possible sentences that she would face—a minimum sentence of life for the conviction of second-degree murder (without the possibility of parole) and a maximum of life imprisonment for first-degree manslaughter.[89] Debra plead not guilty to both charges.[90]

A trial date of February 16 was announced in November.[91] Judge Martin reserved three weeks for the trial. The judge noted that he had not received any defense motion for a change in venue, and so the trial was expected to take place in the Beadle County Courthouse in Huron.[92] Pre-trial motions were argued in December.[93] The prosecution and defense tussled over an exchange of witness lists and a transcript of the grand jury proceedings.[94] They scrimmaged again in a day-long suppression hearing in January of 1988.[95] Gienapp argued that Debra's statements during her questioning by the police should be excluded. Judge Martin considered oral arguments and also required briefing by counsel. Ultimately, he ruled in favor of the state.[96]

In preparation for the trial, five-page questionnaires were mailed to ten panels of twenty-five jurors each—a total of 250 potential jurors.[97] The panels would report in staggered intervals beginning on Tuesday, February 16. Judge Martin planned to select two alternates in addition to the twelve jurors.[98] Reporting

86. *Id.*

87. Kim Smith, *Reduced to $50,000: Jenner Posts Bond*, HURON DAILY PLAINSMAN, Aug. 30, 1987, at 1. Holmes also pointed to the seriousness of the charges against Debra and the possibility she might flee. *Id.*

88. Larsen, *supra* note 83, at 1. *See also* SDCL § 23A-7-1 (2016) (outlining procedures for arraignments).

89. Larsen, *supra* note 83, at 1. *See* SDCL § 22-16-12 (2017) (classifying second-degree murder as a Class B felony); SDCL § 22-16-15 (classifying first-degree manslaughter as a Class C felony); SDCL § 22-6-1(2) (2017 & Supp. 2021) (mandating life imprisonment for conviction of a Class B felony); SDCL § 22-6-1(3) (providing a maximum sentence of life imprisonment for conviction of a Class C felony).

90. Larsen, *supra* note 83, at 1. Judge Hoyt noted "that he would be leaving the circuit court bench Oct. 2 to begin new duties as South Dakota's second federal bankruptcy judge, and he asked that a schedule for pre-trial motions be worked out between [the attorneys] and Circuit Judge Eugene Martin." *Id.*

91. *Debra Jenner Trial to begin on Feb. 16*, HURON DAILY PLAINSMAN, Nov. 24, 1987, at 2.

92. *Id. See also* SDCL § 23A-17-8 (2016) (outlining change of venue motions).

93. *Areas of Disagreement in Jenner Case Studied*, HURON DAILY PLAINSMAN, Dec. 4, 1987, at 2.

94. *Id.*

95. *Suppression Hearing Held Regarding Jenner Case*, HURON DAILY PLAINSMAN, Jan. 7, 1988, at 1.

96. *Id.*

97. Roger Larsen, *Jenner Trial to begin this Week*, HURON DAILY PLAINSMAN, Feb. 14, 1988, at 1.

98. *Id.*

Tuesday morning were Holmes and Bastian from the Attorney General's office and Gienapp, assisted by attorney William D. Matheson, for the defense. By Tuesday noon, the selection was proceeding at a good clip, and by the lunch recess, "four of about seven potential jurors had been passed for cause, in which the court found no reason why they should be dismissed."[99] The *Plainsman* explained:

> When 54 to 60 potential jurors have been passed for cause, that panel will be used to select the 12 jurors and two alternates who will hear the case.
>
> Attorneys on both sides will each be able to reject – with peremptory challenges – 20 of those 54 to 60 in the final panel, until the final 14 are selected.
>
> The alternates, who won't know who they are, will listen to the expected two weeks of testimony, but will be dismissed before the jury retires to deliberate the case.[100]

The pace of jury selection slowed somewhat Tuesday afternoon, and Judge Martin dialed back the start time for Wednesday from the usual 9:00 a.m. to 8:00 a.m.[101] Thursday court also commenced at 8:00 a.m.[102] By lunchtime on Thursday, twenty-nine jurors had been passed for cause, making them eligible to be among those ultimately selected.[103] Potential jurors who said they had already formed an opinion about the guilt or innocence of the accused or who personally knew the Jenners—and one who claimed to have a hearing problem—were dismissed.[104] Jury selection continued through Friday. Attorneys Holmes and Bastian indicated in *voir dire* that the jury should expect to be shown "unpleasant photographs of the victim."[105] There was a brief moment of levity when Matheson asked a potential juror whether anything in the questionnaire he had completed in mid-January needed to be corrected.[106] The man paused, considered the question carefully, and, "in all seriousness," said he lived twenty-one miles from the Beadle County Courthouse—not twenty-two miles, as he had answered on the questionnaire.[107] The response prompted Matheson to quip to the judge, "I believe we just saved Beadle County 20 cents . . . ."[108]

By Friday's end, eighty-seven potential jurors had been questioned, and forty-three passed for cause.[109] Finally, by noon the next Tuesday, a panel of

---

99. Roger Larsen, *Selection of Jury Under Way*, HURON DAILY PLAINSMAN, Feb. 16, 1988, at 1. *See also* SDCL § 23A-20-8 (2016) (describing juror challenges for cause).

100. Larsen, *supra* note 99, at 1.

101. *30 Queried for Jenner Trial Jury*, HURON DAILY PLAINSMAN, Feb. 17, 1988, at 1.

102. *Attorneys Question 55 Jurors in Jenner Case*, HURON DAILY PLAINSMAN, Feb. 18, 1988, at 1.

103. *Id.*

104. *Id.*

105. Roger Larsen, *Trial Testimony Begins this Week in Jenner Case*, HURON DAILY PLAINSMAN, Feb. 21, 1988, at 1.

106. Roger Larsen & Kim Smith, *First Witness May Testify Wednesday in Jenner Trial*, HURON DAILY PLAINSMAN, Feb. 19, 1988, at 1.

107. *Id.* at 2.

108. *Id.*

109. Larsen, *supra* note 105, at 1.

fifty-nine had been picked.[110] From those, a jury of five men and nine women was selected following the peremptory challenge phase of jury selection on Wednesday morning.[111] Opening statements began at 2:00 p.m. the same day.[112]

At the center of the trial, both sides recognized, were Debra's statements to law enforcement. The prosecution, in its opening statement before a packed courtroom, characterized her statements as a confession and described Debra's actions as a "frenzied attack."[113] The state also projected that the evidence would show that a Chicago Cutlery knife and a toy airplane had been used in Abby's death and that the home showed no signs of forced entry.[114] The defense disputed the validity of her alleged confession and asserted that "to this day, the Jenners do not know who is responsible for the death of Abby Lynn Jenner last April."[115] The defense would assert that Debra's statements to law enforcement were "in the form of a question and not a statement, and that the defendant was emotionally distraught after a grueling seven-hour interrogation."[116] The state managed to introduce several exhibits, including photographs and a diagram of the interior of the Jenner home, along with Abby's autopsy photographs, and to call four witnesses—a police officer and three ambulance attendants—before court recessed after the first partial day.[117]

The following day, the first witness for the state was Dr. Kortum, the Jenner family physician. She outlined Abby's allergies, diagnosed at three months of age, which, if she ingested milk or soybeans, would cause her ear infections, sniffles, diarrhea, and potentially, sleeplessness.[118] She also described two phone calls from Debra, the first being a rather calm report on the morning of April 5, in which Debra stated that Abby's body had been found in her bedroom and that an autopsy would be required.[119] The second phone call, on April 5, was to relay that the police did not think that she could have killed her daughter and to query whether Abby might have had meningitis or a seizure disorder.[120] Other witnesses followed, including Dr. Randall, who testified as to his autopsy findings and reviewed slides of Abby's entry wounds—"cuts, scrapes and slashing-type wounds on her neck and arms . . . ."[121] After the conclusion of the first full day

110. *59 Potential Jurors Picked in Jenner Trial*, HURON DAILY PLAINSMAN, Feb. 23, 1988, at 1.

111. Roger Larsen, *Jury of 14 Selected for Trial of Jenner*, HURON DAILY PLAINSMAN, Feb. 24, 1988, at 1 [hereinafter *Jury of 14*]. The jury included a heavy equipment operator, a custodian, a farmer, a sales clerk, a businesswoman, a travel agent, two homemakers, a hostess, and a teacher. Roger Larsen, *Members of Jury Have Varied Background*, HURON DAILY PLAINSMAN, Feb. 24, 1988, at 1.

112. *Jury of 14*, *supra* note 111, at 1-2.

113. Roger Larsen, *10 Witnesses Give Testimony*, HURON DAILY PLAINSMAN, Feb. 25, 1988, at 1A.

114. *Id.*

115. *Id.*

116. Roger Larsen, *Jurors to Retire for Deliberation: Jenner Trial Nearing Conclusion*, HURON DAILY PLAINSMAN, Mar. 13, 1988, at 1.

117. *Id.*

118. Larsen, *supra* note 113, at 1A.

119. *Id.*

120. *Id.*

121. *See* Roger Larsen, *Jenner Trial in Recess; Autopsy Reports Given*, HURON DAILY PLAINSMAN, Feb. 26, 1988, at 1 (relaying testimony by Dr. Randall, a forensic pathologist concerning Abby's seventy

of evidence on Thursday, February 26, court recessed to allow one of the attorneys to attend the funeral of his mother-in-law on Friday.

The trial resumed on Monday, February 29, for another full day of witnesses for the state.[122] On Tuesday, Lindberg described Debra's demeanor—swinging from near-hysteria to calm and back again—when she conceded to him she may have "psyched out" and that "a person could click, clean up the mess and not remember."[123] He also testified that Debra told him that she could not remember killing Abby. Giegling testified the next day how Debra, at the conclusion of her interview on the Tuesday after Abby's murder, said: "I did it, I did it, I did it" three to six times in an "ear piercing, high-pitched voice" when her husband entered the interrogation room.[124] He also noted that "the most striking thing about her appearance was that her eyes didn't blink."[125] One of Debra's co-workers at Pioneer Hi-Bred testified that she had had lunch with Debra at Riverside Park in either late May or early June and that Debra told her that on account of her talks with law enforcement, "she was beginning to have doubts and maybe could have killed Abby."[126] She quoted Debra saying "she wished she could remember . . . ."[127] Late Tuesday afternoon, Beadle County Deputy Sheriff Jim Sheridan described an exterior search of the Jenner family home in which he examined a bag of garbage and found nothing remarkable in it. Additional conversations with co-workers filled the testimony on Wednesday.[128] The state rested; court adjourned for the week just after noon on Thursday.[129]

Court resumed on Monday, March 7.[130] The defense began its case with Debra being called to the stand. Tearfully, she denied killing her daughter. Her testimony was relatively brief, and the state was already cross-examining her before lunch.[131] During cross, Holmes "keyed in on whether the defendant knew Abby was dead when she began making telephone calls that morning as the ambulance was on its way to their house."[132] The next day, Reverend Wagner, his wife, neighbors, and several family members were called by the defense.[133] Testimony from Lynn occupied two and a half hours.[134] The defense rested, the

---

stab wounds and their consistency with a knife and characteristics of a small metal toy airplane introduced into evidence).

122. Roger Larsen, *Evidence Was Moved, Jury Told*, HURON DAILY PLAINSMAN 1 (Feb. 29, 1988).

123. Roger Larsen, '*Psyched Out' Used 10-12 Times: Agent*, HURON DAILY PLAINSMAN, Mar. 1, 1988, at 1.

124. Roger Larsen, *DCI Agent Testifies: Mrs. Jenner said, 'I did it, I did it*,' HURON DAILY PLAINSMAN, Mar. 2, 1988, at 1.

125. *Id.* at 2B.

126. *Id.* at 2A.

127. *Id.*

128. Roger Larsen, *Friends of Jenner Cite Conversations*, HURON DAILY PLAINSMAN, Mar. 3, 1988, at 1.

129. Roger Larsen, *Jury Trial Resumes Monday*, HURON DAILY PLAINSMAN, Mar. 6, 1988, at 1.

130. Roger Larsen, *Jenner Denies Killing Daughter*, HURON DAILY PLAINSMAN, Mar. 7, 1988, at 1.

131. *Id.*

132. *Id.* at 2.

133. Roger Larsen, *Two Who Cleaned Jenner Room 'Unaware of Slaying*,' HURON DAILY PLAINSMAN, Mar. 8, 1988, at 1.

134. Roger Larsen, *Testimony Ends in Jenner Trial*, HURON DAILY PLAINSMAN, Mar. 9, 1988, at 1.

prosecution quickly called four rebuttal witnesses on Wednesday morning, and Judge Martin adjourned the proceedings just before 10:00 a.m., asking the jurors to return on Thursday at 9:00 a.m. to view Abby's bedroom.[135]

On Thursday morning, the jurors took a Beadle County Transit System bus to the Jenner home on Frank Avenue.[136] The bus received a police escort. While the bus idled in the Jenner driveway, jurors entered the home, two at a time, to view Abby's cramped eight-foot by ten-foot bedroom, escorted by the bailiff.[137] Judge Martin had instructed them not to ask any questions or make any comments while they were within the home. Debra, Matheson, and Holmes observed silently from the home's interior. The prosecution's motion for jurors to view the home related to Debra's claim "that when she entered Abby's bedroom the morning the young girl was found dead, she quietly sneaked into the room to get a dress to iron for her to wear to church."[138] Debra had testified that "she went around the foot of the bed, to the closet and then back again, but noticed nothing wrong with Abby, glancing over at her to only see the top of her head."[139] Given the tiny area of Abby's bedroom, the prosecution implied, for Debra to have noticed nothing wrong was unlikely.[140] Over nine days of testimony, a total of thirty-seven prosecution witnesses and twelve defense witnesses had been called.[141]

The jurors were then released for the week, and the attorneys returned to court to settle jury instructions.[142] The defense proposed four alternative instructions on the defense of unconsciousness as codified at South Dakota Codified Law section 22-3-1, which provides that a person is not capable of committing a crime if the alleged perpetrator "committed the act charged without being conscious thereof."[143] Unconsciousness—or automatism—has been described by the Wyoming Supreme Court as "the state of a person who, though capable of action, is not conscious of what he is doing" so that "[w]hile in an automatistic state, an

135. *Id.* The rebuttal witnesses were "Beadle County Sheriff Tom Beerman, Division of Criminal Investigation Agent Jerry Lindberg, Huron Detective Capt. Dave Rand and Wolsey carpenter Victor Dracy." *Id.* Dracy revealed that two or three weeks prior to Abby's murder, Lynn had remarked that he was tired on account of Abby having kept him up the night before; that this was common because Abby had irregular sleep patterns and that "he and Debra took turns getting up with Abby." *Id.* at 2. The defense had no rebuttal witnesses of its own. *Id.*

136. Roger Larsen, *Jurors Look at Bedroom Where Abby Jenner Slain*, HURON DAILY PLAINSMAN, Mar. 10, 1988, at 1.

137. *Id.*

138. *Id.* at 2.

139. *Id.*

140. The visit to the Jenner home generated the effect on the jurors that the state desired. Years later, juror Shirley Johnson was quoted as saying: "We were in that bedroom . . . . It was so narrow between the bed and the wall, you hit the bed walking by. How could you do that and not see your child?" Steve Young, *Confession More Critical than Hairs, Jurors Say*, ARGUS LEADER, Aug. 6, 2000, at 5A. Another juror, Deloris Ziltener, agreed. *Id.*

141. Roger Larsen, *Jurors to Retire for Deliberation: Jenner Trial Nearing Conclusion*, HURON DAILY PLAINSMAN, Mar. 13, 1988, at 1. *The Plainsman* also notes "four rebuttal witnesses called by the state." *Id.* However, only one of the rebuttal witnesses had not been called previously.

142. Roger Larsen, *Jurors Look at Bedroom Where Abby Jenner Slain*, HURON DAILY PLAINSMAN, Mar. 10, 1988, at 1.

143. SDCL § 22-3-1(4) (2017). *See* Appellant's Replacement Brief, *supra* note 25, at 28-39 (outlining the defense's arguments).

individual performs complex actions without an exercise of will."[144] The court rejected the instructions and instead adopted an instruction on amnesia, which simply confirmed that amnesia is not a defense.[145]

On Monday morning, attorneys made their closing arguments, Judge Martin delivered the jury instructions, the two alternate jurors were dismissed, and, just before noon, the jury began deliberating.[146] The jury was given the choice between finding Debra (i) guilty of second-degree murder but not first-degree manslaughter; (ii) not guilty of second-degree murder but guilty of first-degree manslaughter; or (iii) not guilty of both counts.[147] The final jury, less the two alternates, was comprised of eight women and four men.[148]

The jury deliberated for seven hours before concluding its deliberations on Monday.[149] Returning Tuesday morning, deliberations continued for another hour and a half. They notified the bailiff at 10:40 a.m. on Tuesday that a verdict had been reached. Shortly after 11:00 a.m., Judge Martin assembled counsel and Debra in the courtroom, and the verdict of guilty of second-degree murder (and not guilty of first-degree manslaughter) was read.[150] Key to the jury's decision, jurors said later, was Debra's confession.[151]

144. Fulcher v. Wyoming, 633 P.2d 142, 145 (Wyo. 1981). "Automatistic behavior may be followed by complete or partial inability to recall the actions performed while unconscious." *Id. See also* California v. Lisnow, 151 Cal. Rptr. 621, 624 (App. Dep't Super. Ct. 1978) (emphasizing that unconsciousness "negates capacity to commit any crime at all."); State v. Weatherford, 416 N.W.2d 47, 55 (S.D. 1987) (holding that a jury instruction which included "language indicating that the burden of proof rests on the State to prove the defendant was conscious at the time he committed the act, or acts, constituting the offense charged, is consistent with the proper burden.").

145. Appellee's Brief, *supra* note 41, at 51 (citing State v. Johnson, 139 N.W.2d 232 (S.D. 1965)).

146. Roger Larsen, *Jury Begins Deliberating Jenner Case*, HURON DAILY PLAINSMAN, Mar. 14, 1988, at 1. Gienapp pointed out the lack of a motive connecting the accused with the crime: "A mother is going to murder her daughter because she has an allergy?" *Id.* "There is no evidence to show that she had anything but love for her daughter." *Id.* In order to convict, he continued, "jurors must be convinced that the defendant mocked her emotional call to the 911 emergency number, that she cleaned up and went back to bed that night, that she went downstairs and washed bloody clothes she was wearing." *Id.* at 1-2. Gienapp also returned to Debra's alleged confession and the tactics used by the police saying that they were "just as brutal as beating a confession out of someone." *Id.* at 2. Holmes countered that it was even more outlandish to claim that an unknown intruder had been the culprit when there was no sign of forced entry and the only physical evidence suggesting an intruder was a wreath which had been on the front door but was found placed on a living room chair. *Id.* Holmes remarked that it was "inconceivable" that Debra could have entered Abby's room and not seen or smelled blood in navigating past the bed and to the closet: "'You were in that house,' he told the jury, 'You almost have to turn sideways to get around the bed.'" *Id.* Judge Martin cautioned the jurors that their tour of Abby's bedroom was not evidence but to allow them "to get a better understanding of" witnesses' testimony. *Id.* Holmes also focused the jury's attention on Debra's saying "I did it" repeatedly. *Id.*

147. The State appealed this jury instruction, arguing that Debra "was charged with two distinct statutory violations and could be convicted of both." State v. Jenner, 451 N.W.2d 710, 724 (S.D. 1990). The South Dakota Supreme Court did not consider the issue because it did not grant Debra a retrial. *Id. See also* Wilcox v. Leapley, 488 N.W.2d 654, 657 (S.D. 1992) (holding "double homicide convictions for a single death are improper.").

148. Roger Larsen, *Jenner Found Guilty of Murder*, HURON DAILY PLAINSMAN, Mar. 15, 1988, at 1.

149. *Id.*

150. *Id. See also* SDCL § 23A-26-1 (2016) (governing verdict returns).

151. Steve Young, *Confession More Critical than Hairs, Jurors Say*, ARGUS LEADER, Aug. 6, 2000, at 5A.

The *Plainsman* described Debra as showing no visible emotion.[152] "Her Bible rested on the table in front of her, and she leaned on one of her attorneys, Matheson, Sioux Falls, after jurors were dismissed from the courtroom."[153] Judge Martin thanked the jurors for their service.[154] On Holmes' motion, bond was revoked, and Debra, accompanied by Matheson, was escorted from the courthouse by Beadle County Sheriff officers to jail.[155]

Sentencing was set for 4:00 p.m. on Friday, March 25, and occupied just thirty minutes.[156] Given the mandatory nature of the sentence, neither Holmes nor Gienapp advanced any arguments, and Debra declined to make any statements either.[157] Judge Martin pronounced the statutory mandatory sentence of life without parole, and on March 30, Debra began serving her sentence at the Springfield Correctional Facility, which had opened in December of 1984, after the campus of the University of South Dakota, Springfield, had been converted into a co-ed prison.[158] The dormitories once used by students were used to house prisoners; the male prisoners in two dorms while the female inmates occupied Harmon Hall.[159]

2. Direct Appeal

Debra appealed, still represented by Gienapp. The state was again represented by Bastian. Debra raised eight issues, which the court consolidated into four:

> 1. Whether the circuit court had erred in denying her motion to suppress her statements during the April 7 questioning;

---

152. Larsen, *supra* note 148, at 1.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Jenner Sentencing Set*, HURON DAILY PLAINSMAN, Mar. 18, 1988, at 1. *See also* SDCL § 23A-27-1 (2016) (governing sentencing hearings).

157. Roger Larsen, *Jenner to Begin Serving Life Term*, HURON DAILY PLAINSMAN, Mar. 27, 1988, at 1.

158. Roger Larsen, *Debra Jenner to Begin Serving Life Term at Springfield Facility*, HURON DAILY PLAINSMAN, Mar. 25, 1988, at 1; Roger Larsen, *Jenner Appeal Several Months Away*, HURON DAILY PLAINSMAN, Mar. 30, 1988, at 1. Judge Martin denied a defense motion to release Debra on bail pending an appeal. Larsen, *supra* note 148, at 1.

159. Larsen, *supra* note 148, at 1. For some time after Debra's conviction, there were suggestions that the grand jury might also indict Lynn and/or others for tampering with evidence (e.g., cleaning up) following Abby's murder but nothing ever came of it. *See Jury to Examine Actions of Others in Jenner Case*, HURON DAILY PLAINSMAN, Mar. 20, 1988, at 1 (relaying Tellinghuisen's statement that "he will ask the eight-member grand jury to look at the actions of Lynn, Merlin Jenner and others."); *Grand Jury Reconvenes*, HURON DAILY PLAINSMAN, Apr. 5, 1988, at 1 (reporting on Tellinghuisen's statement "that it would be up to the grand jury to decide who it would look at in terms of possible additional charges in the case."); Roger Larsen, *Grand Jury Views Possible Cover-up*, HURON DAILY PLAINSMAN, Apr. 6, 1988, at 1 (referring to "Merlin Jenner, Debra's father-in-law, and Ruby Wagner, the wife of the Jenner's pastor" who had "testified that they had removed blood-stained bedding from Abby's room, but before they learned" she had been murdered); *see also Grand Jury May Meet with A.G.*, HURON DAILY PLAINSMAN, May 25, 1988, at 1 (noting that the grand jury panel had been reconvened on April 5 but had not met since). The grand jury's eighteen month term expired at the end of 1988. *Id.*; SDCL § 23A-5-20 (2016).

> 2. Whether incorrect jury instructions regarding unconsciousness, amnesia, and insanity were submitted;
>
> 3. Whether the circuit court had erred in granting the state's motion in limine to exclude evidence of an unknown perpetrator; and
>
> 4. Whether the conviction was supported by insufficient evidence.[160]

The South Dakota Supreme Court, in a majority opinion authored by Justice John Konenkamp, rejected all of Debra's arguments and upheld the jury verdict.[161] The issue which most occupied the court—and generated forceful dissents by two of its members—was the first, concerning Debra's statements to law enforcement during the lengthy questioning on April 7.[162] Debra's attorneys described the interrogation as "eight hours of emotional terrorism," which produced only "confused, inconsistent, and emotional outbursts."[163] The state emphasized the fact that "the subject of killing one's child is certainly in and of itself an emotional subject."[164]

The claimed error in failing to suppress Debra's statements contained two components: whether the statements were involuntary and whether they were elicited in a custodial environment (requiring *Miranda* warnings).[165] In rejecting Debra's arguments, the majority paid special attention to the fact that "she was actually begging the officers to assist her in recalling what happened or who had killed her daughter."[166]

Justice Robert Morgan, in his dissent, first decried the DCI agents' failure to tape record the April 7 interrogation proceedings. "It is inconceivable to me," he wrote, "that they would gather a team of agents from across the state, with two sets of polygraph equipment, and not have any form of tape recorder available."[167] Justice Morgan was also troubled by an interrogation technique utilized by "both Devaney and Giegling [that] had planted the seed in Debra's mind that 'there is a rational Debbie and an irrational Debbie,' and 'a good Debbie and a bad Debbie.'"[168] Justice Morgan went on to emphasize in his dissenting opinion that so long as deference was granted to the trial court's findings (such as the size of the interrogation room, the defendant's age and experience, etc.), "the trial court is in no better position than we are to judge *the totality of the circumstances* to determine whether the confession was obtained in violation of the due process clause of the 14th Amendment."[169]

---

160. State v. Jenner, 451 N.W.2d 710, 711 (S.D. 1990).

161. *Id.* at 724.

162. *See generally id.* at 716-20, 724-32 (focusing on the admissibility of Debra's statements).

163. Appellant's Replacement Brief, *supra* note 25, at 24.

164. Appellee's Brief, *supra* note 41, at 39.

165. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966) (creating *Miranda* rights); State v. Janis, 356 N.W.2d 916 (S.D. 1984) (discussing *Miranda* rights in South Dakota).

166. *Jenner*, 451 N.W.2d at 720.

167. *Id.* at 724 (Morgan, J., dissenting).

168. *Id.* at 725.

169. *Id.* at 726 (citation omitted).

Justice Richard Sabers largely skirted the standard of review issue.[170] But viewing the totality of the circumstances, he opined that "it is not even a close question that the statements were *in* voluntary."[171] Among the facts highlighted by Justice Sabers were Debra's lack of sleep, lack of food, and the various interrogation techniques utilized, including hostility, yelling, trickery, and false hypotheticals.[172] The agents "played upon her strong religious convictions and her sex life with her husband."[173] Justice Sabers also read Debra's request that Giegling "jar her memory" and that DeVaney "hypnotize her to help her remember" as indicative of "Jenner's emotional breakdown, rather than any desire to make voluntary statements."[174]

Justice Morgan's emphasis upon the standard of review issue was prescient. Six years after the Jenner direct appeal decision, the United States Supreme Court issued its decision in *Ornelas v. United States*.[175] *Ornelas* held:

> [R]easonable suspicion and probable cause should be reviewed de novo on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.[176]

In *State v. Hirning*,[177] the South Dakota Supreme Court, following *Ornelas*, adopted the *de novo* standard of review for reasonable suspicion and probable cause determinations for warrantless searches.[178] It subsequently applied the *de novo* standard to appellate review of the voluntariness of an admission.[179] As a result, it is possible that the South Dakota Supreme Court today would reverse a finding of voluntariness and/or a custodial context under a less deferential

170. *See id.* at 732 (Sabers, J., dissenting) (opining that Debra's statements were involuntary "without regard to the standard of review" but Justice Sabers also "join[ed] Justice Morgan's dissent in all respects.").

171. *Id.*

172. *Id.* at 728-29.

173. *Id.* at 729. According to Debra's testimony, DeVaney asked Debra: "Why do we find long blonde hair in Abby's hand? Are you filthy to your husband, now that he knows you did it?" Appellee's Brief App., *supra* note 19, at 56. DeVaney denied that he questioned Debra in this manner. *Id*. Judge Martin found that Giegling "would preface some questions with the fact that the Defendant was a good mother and Christian and then go on to ask the question." Appellee's Brief App. B at 207, *Jenner*, 451 N.W.2d 710 (No. 16240).

174. *Jenner*, 451 N.W.2d at 729 (Sabers, J., dissenting).

175. 517 U.S. 690 (1996).

176. *Id.* at 699.

177. 1999 SD 53, 592 N.W.2d 600.

178. *Id.* ¶ 9, 592 N.W.2d at 603.

179. State v. Stanga, 2000 SD 129, ¶ 8, 617 N.W.2d 486, 488. *See also, e.g.*, State v. Ralios, 2010 SD 43, ¶ 24, 783 N.W.2d 647, 654 (reiterating: "This Court reviews the denial of a motion to suppress alleging a violation of a constitutionally protected right as a question of law by applying the de novo standard.") (citations omitted). The South Dakota Supreme Court still considers "the totality of the circumstances surrounding the interrogation as factual determinations, giving deference to the trial court's findings of fact." *Ralios*, 2010 SD 43, ¶ 25, 783 N.W.2d at 655 (citations and internal citations omitted). "However, the issue of whether the interrogation was ultimately voluntary is a legal question." *Id.* (citation omitted).

standard of review. However, the weight granted to Judge Martin's detailed findings suggests that a reversal and retrial would still be unlikely, even under a less deferential standard of appellate review.[180]

E. POST-CONVICTION PROCEEDINGS

1. Federal Habeas

Next, Debra sought *habeas corpus* relief in federal court. She filed a petition in the Southern District of the U.S. District Court in South Dakota.[181] Judge John Jones confirmed that Debra, being "young, in good health, and well educated," had not made involuntary statements and that her questioning had taken place in a non-custodial environment.[182] Judge Jones, therefore, denied her *habeas* relief. The Eighth Circuit Court of Appeals affirmed.[183] It noted "[t]he testimony of the psychologist who evaluated Jenner immediately after the interviews [who] confirmed that she was still alert and in control of her faculties" in upholding the finding of voluntariness.[184] It emphasized that "Jenner had cooperated with the police investigators for two days, voluntarily came to the police station to answer further questions . . . and was not arrested even after making incriminating statements" in affirming the finding of a non-custodial interrogation.[185] Later, Debra's petition for certiorari was also denied.[186]

2. State Habeas

In January of 1996, Debra made an application for a writ of *habeas corpus* in Beadle County Circuit Court.[187] She alleged that she had received ineffective assistance of counsel and moved for discovery of the crime scene hair samples in order to conduct a DNA analysis on them.[188] Among her assertions were that her trial counsel had failed to counter the testimony of Dr. Randall regarding the knife marks in Abby and that the hair and blood samples taken were never subjected to DNA analysis.[189] Circuit Judge Ronald Roehr dismissed her claims without an

180. *See, e.g.*, Appellee's Brief Appx. B, *supra* note 173, at 201-13 (containing Judge Martin's Findings of Fact, Conclusions of Law and Order re: Suppression Motion); Jenner v. Smith (*Smith*), 982 F.2d 329, 331, 335 (8th Cir. 1993) (discussed below) (upholding the finding of voluntariness concerning Debra's statements under the de novo standard).

181. *See Smith*, 982 F.2d at 330, 333 (describing the district court proceedings). The district court opinion is not reported.

182. *Id.* at 333.

183. *Id.* at 335.

184. *Id.* at 334.

185. *Id.* at 335.

186. Jenner v. Smith, 510 U.S. 822 (1993) (denying cert.).

187. Jenner v. Dooley (*Dooley*), 1999 SD 20, ¶ 6, 590 N.W.2d 463, 466.

188. *Id.*; Appellant's Brief at 54, *Dooley*, 1999 SD 20, 590 N.W.2d 463.

189. *Dooley*, 1999 SD 20, ¶ 7, 590 N.W.2d at 467.

evidentiary hearing.[190] He reasoned that her writ was untimely and further that Debra could not show prejudice as a matter of law.[191]

The South Dakota Supreme Court affirmed unanimously in another opinion authored by Justice Konenkamp, but on different grounds than the circuit court.[192] The South Dakota Supreme Court noted that South Dakota law permits the dismissal of belated *habeas* applications.[193] At the time, South Dakota Codified Law section 21-27-3.2 provided that an application may be dismissed when the state has been prejudiced by the delay and that prejudice is presumed when the application is filed more than five years after the judgment.[194] Because Judge Roehr had not held an evidentiary hearing to allow Debra an opportunity to rebut the presumption, the court held that dismissal for untimeliness was inappropriate.[195] However, the court reasoned that dismissal under Rule 12(b)(5) (*habeas* applications are civil in nature—not criminal) had been correct.[196] It ruled that trial counsel's failure to counter Dr. Randall's testimony did not, as a matter of law, prejudice the outcome:

> Dr. Randall admitted that [the airplane-shaped] wound on Abby's body was only "similar" in shape [to the toy airplane]. Dr. Randall did not testify that any of the wounds were in fact caused by the airplane found in the Jenner home. What could a counter expert have said on this point that would be so impeaching as to have changed the outcome of this case? Debra's counsel gives us no suggestion.[197]

The court also adopted a framework for Debra's discovery motion for post-conviction DNA analysis. A three-part test was articulated: whether (1) the evidence would meet the *Daubert* standard; (2) a favorable result would likely produce an acquittal upon retrial; (3) the costs would not impose unreasonable burdens on the state.[198] Applying these guidelines, the court concluded that DNA testing should not be ordered since no likelihood could be discerned "that a favorable DNA test result of the hair and blood evidence would produce an acquittal were Debra granted a new trial."[199]

Obviously, hair and blood evidence that matched an assailant other than Debra would present compelling evidence for her defense and ought to qualify her

190. *Id.* ¶ 9, 590 N.W.2d at 467.

191. *Id.*

192. *Id.* ¶¶ 11-22, 590 N.W.2d at 468-72.

193. *Id.* ¶ 12, 590 N.W.2d at 468.

194. SDCL § 21-27-3.2 (repealed 2012).

195. *Dooley*, 1999 SD 20, ¶ 12, 590 N.W.2d at 468. "How the court could know whether the memories of witnesses had faded is unknown, and neither appellate counsel suggest an answer." *Id.*

196. The federal counterpart to South Dakota's Rule 12(b)(5) is Rule 12(b)(6). SDCL § 15-6-12(b)(5) (2014); FED. R. CIV. P. 12(b)(6); Thompson v. Summers, 1997 SD 103, ¶ 4, 567 N.W.2d 387, 389 n.1 ("SDCL 15–6–12(b)(5) is identical to Federal Rule of Civil Procedure 12(b)(6).").

197. *Dooley*, 1999 SD 20, ¶ 17, 590 N.W.2d at 471.

198. *Id.* ¶ 20, 590 N.W.2d at 472.

199. *Id.* ¶ 21, 590 N.W.2d at 472. "Because the intruder theory was so implausible, . . . DNA testing . . . appears to revive a legally and factually insupportable defense." *Id.* (citing State v. Jenner, 451 N.W.2d 710, 722-23 (S.D. 1990)).

for a new trial. The court, however, reasoned that the hair and/or blood might be shown to have originated from either (1) Debra; (2) Abby; (3) Lynn; or (4) some other unknown assailant.[200] If the samples originated from Debra, then this would only support her conviction. If the samples originated from Abby, it "would only create another circumstance on which to argue reasonable doubt."[201] A showing that Abby had strands of her own hair in her tiny hands "would not be conclusive on the question of innocence, especially in light of all the other evidence against [Debra], including her oblique but damaging admissions."[202] The court concluded it was too unlikely that the samples would match Lynn given that the state "criminalist, Rex Riis, eliminated the father as the originator of the hair found on Abby's body and the credibility of his examination [was] not challenged in this respect."[203] The court found it even less probable that the samples would match an unknown assailant.[204] Law enforcement had "found no trace of any trespasser in the home."[205] The intruder theory was "so implausible"—and the evidence in support of it "so remote"—that at trial, Debra had not been allowed to introduce any of it.[206] (This "truly persuasive" demonstration of "actual innocence" requirement for reopening a conviction can be modified by a statutory framework for testing of DNA evidence, an observation which underlies the proposed legislation drafted by State Senator Kermit Staggers, as touched upon below.)[207]

---

200. *See id.* ¶ 19, 590 N.W.2d at 472 (discussing the reasoning for a decision on whether to reopen a case when newer technology becomes available).

201. *Id.* ¶ 21, 590 N.W.2d at 472.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* Debra's third-party perpetrator evidence amounted to:

> 1. Debra's neighbor secured restraining orders against her ex-husband to avoid physical abuse;
>
> 2. A woman telephoned the neighbor's house at 1:50 a.m. on the night Abby died, asking for Russell (the ex-husband's name was Russell);
>
> 3. A guest at the neighbor's party on the night Abby died saw a man she did not know walking near the Jenner home at 11:30 p.m.; and,
>
> 4. A man was seen in the graveyard where Abby was buried eight days after she died, who dressed similarly to the man seen walking near the Jenner home.

State v. Jenner, 451 N.W.2d 710, 722 (S.D. 1990). In Debra's trial, Judge Martin had excluded it. *Id.* This ruling was affirmed on appeal. *Id.* at 722-23 (citing State v. Luna, 378 N.W.2d 229 (S.D. 1985)) (adopting a balancing test for third-party perpetrator evidence and affirming exclusion of evidence that shortly after a killing, a violent drunk was seen near the crime scene covered in blood). Debra asserted prosecutorial misconduct in her state habeas proceedings on account of the prosecutor's claim that there was no evidence of a third-party perpetrator when the trial court had precluded her from offering evidence on that theory. *Dooley*, 1999 SD 20, ¶ 7, 590 N.W.2d at 467. The South Dakota Supreme Court declined to consider this argument because it had not been raised in Debra's direct appeal. *Id.* ¶ 10, 590 N.W.2d at 468 n.1. In Debra's direct appeal, she had asserted that the trial court had improperly excluded her third-party perpetrator evidence. *Jenner*, 451 N.W.2d at 721-23. She did not argue alternatively that if the court held that the evidence was properly excluded that the prosecutor's claim that no such evidence even existed constituted reversible error. As a result, it was dismissed without consideration in her *habeas* proceedings.

207. Nebraska v. El-Tabech, 610 N.W.2d 737, 747 (Neb. 2000) (citations omitted). *See also* Engesser v. Young, 2014 SD 81, ¶ 38, 856 N.W.2d 471, 484 (concluding in the context of that case that the court "need not consider whether a freestanding claim of actual innocence exists under the South Dakota Constitution."). *Engesser v. Young* also discusses the South Dakota Legislature's enactment of South Dakota Codified Law section 21-27-5.1 in 2012 governing newly discovered evidence and the state

Accordingly, the dismissal of Debra's *habeas* application and the denial of her motion for discovery were affirmed.[208]

3. A § 1983 Claim

A third post-conviction legal proceeding was commenced by Debra in connection with a manila envelope containing color photographs of Abby, which had made its way into Debra's parole file. Her efforts to exclude the photos led to an unsuccessful petition for a writ of mandamus with the South Dakota Supreme Court and a federal claim. Before summarizing these legal efforts, however, it is necessary to tell how she became eligible for parole in the first place. We will then return to the manila folder litigation.[209]

F. THE JANKLOW FACTOR AND DEBRA'S COMMUTATION

Initially, Debra was housed at the co-ed state prison at Springfield. Governor William J. Janklow had successfully campaigned—at no small political cost—to close a branch of the University of South Dakota at Springfield and convert it to a medium-security prison.[210] The college closed, and the new prison opened in 1984.[211] The Springfield prison was later renamed the Mike Durfee State Prison—also under Janklow's watch—in 1999.[212]

When a new and dedicated women's prison opened in Pierre in 1997, Debra moved there and remained incarcerated there until 2021.[213] Not long after her conviction, Debra's husband Lynn filed for divorce.[214] In 1998, Debra remarried.[215] She had met her new husband, Michael Tyler, at the then co-ed state prison in Springfield and took his name by hyphenating her Jenner surname.[216] Tyler was serving a sentence for kidnapping; he was released in 1997.[217] Debra

---

statutory writ of habeas corpus. *Engesser*, 2014 SD 81, ¶¶ 23-28, 856 N.W.2d at 479-82. *See also infra* Part II(F) (discussing Stagger's proposed legislation).

208. *Dooley*, 1999 SD 20, ¶¶ 21-22, 590 N.W.2d at 472.

209. *Infra* Part II(G)(5).

210. Marshall Damgaard, *Closing Time: A Twenty-five-Year Retrospective on the Life and Death of the University of South Dakota at Springfield*, 39 S.D. HIST. 189, 189 (2009).

211. *Dakota Town Upset by Plan to Close School*, N.Y. TIMES (May 6, 1984), https://www.nytimes.com/1984/05/06/us/dakota-town-upset-by-plan-to-close-school.html.

212. *Mike Durfee State Prison*, S.D. DEP'T OF CORR., https://doc.sd.gov/adult/facilities/mdsp/dedication/ (last visited Dec. 8, 2020).

213. *Adult Corrections: South Dakota Women's Prison*, S.D. DEP'T OF CORR., https://doc.sd.gov/adult/facilities/wp/ (last visited Dec. 8, 2020).

214. Joe Kafka, *Parole Board Denies Request of Mother Who Murdered Her Child*, RAPID CITY J. (Sept. 19, 2007), https://rapidcityjournal.com/news/state-and-regional/parole-board-denies-request-of-mother-who-murdered-her-child/article_4ed4d36c-8fcf-571a-bb9e-567780a14323.html.

215. *Id.*

216. *Id.*

217. *Id.*

went by the name Debra Jenner-Tyler until, following Michael's release, they were divorced.[218]

Around this same time, Staggers of Sioux Falls became interested in Debra's case.[219] He introduced bills in the State Legislature regarding DNA testing.[220] He claimed that he wanted to see a DNA testing of Debra in order to determine whether she was really guilty of her daughter's death.[221] The initial bill proposed a "loser-pays" cost allocation of approximately $5,000 in lab fees.[222] Staggers served in the State Senate from 1995 until 2002.[223] He died in 2019.[224] When Debra finally admitted her guilt to Janklow, Staggers was surprised, and even a bit skeptical, saying: "I suppose she was just being realistic if this was an opportunity to get out of jail."[225]

Initially, Debra was ineligible for parole on account of her life sentence without the possibility of parole. Janklow, a four-term South Dakota governor, however, wielded his clemency power rather generously.[226] In 2002, Debra met with a member of Janklow's staff and, for the first time, conceded her guilt. In the final days of his fourth term as Governor, Janklow met with Debra at the state airplane hangar in the capitol city of Pierre, inside Janklow's car.

Fifteen years had elapsed since her daughter's murder in April of 1987 when Debra finally confessed to the crime in late 2002. As recently as 2000, Debra had

---

218. *Id.*

219. Young, *supra* note 16, at A1.

220. *See* S.B. 108, 75th Leg., Reg. Sess. (S.D. 2000); S.B. 228, 76th Leg., Reg. Sess. (S.D. 2001); S.B. 91, 77th Sess. (S.D. 2002). The first bill passed the Senate but was defeated on the House floor. S.B. 108, 2000 Leg., 75th Leg., Reg. Sess. (S.D. 2000). The second bill passed the Senate, squeaked by (39-30) in the House, but was vetoed by Janklow and a veto-override failed. S.B. 228, 76th Leg., Reg. Sess. (S.D. 2001). The third bill again passed the Senate but failed in the House State Affairs Committee (11-2). S.B. 91, 77th Leg., Reg. Sess. (S.D. 2002).

221. *Woman Convicted of Killing Daughter Gets Sentence Reduced*, YANKTON DAILY PRESS & DAKOTAN (Jan. 27, 2003), https://www.yankton.net/news/article_1652bc05-d682-5f58-a562-cf72d8754b24.html [hereinafter, *Woman Convicted*].

222. Steve Young, *S.D. Bill Would Ensure Access to Tests for Some Convicts*, ARGUS LEADER, Aug. 6, 2000, at 5A.

223. *Kermit L. Staggers*, LEGACY, https://www.legacy.com/obituaries/argusleader/obituary.aspx?n=kermit-l-staggers&pid=194585765&fhid=18053 (last visited Dec. 14, 2020).

224. *Id.*

225. *Woman Convicted*, *supra* note 221.

226. Stu Whitney, *Janklow Used Commutation Power Often*, RAPID CITY J. (Jun. 29, 2003), https://rapidcityjournal.com/news/state-and-regional/janklow-used-commutation-power-often/article_3ab6dc69-9049-5601-ab6d-d37f3154288e.html. Between 1995 and 2003, Janklow granted 1,999 commutations. *Id.* "South Dakota's commutations led the nation during that time . . . ." *S.D. Governor Reviews Inmate Commutations for Work*, CRIME REP. (Jul. 2, 2003), https://thecrimereport.org/2003/07/02/sd-governor-reviews-inmate-commutations-for-work/. One 1982 commutation, during Janklow's first two term (1979-87) turned out to be a mistake. The Governor commuted the sentence of Rocky Blair. "Months later Blair killed a nurse in McKennan hospital's parking ramp." *Our boy Janklow ….again……*, VTXOA (Feb. 17, 2004), https://www.vtxoa.com/threads/our-boy-janklow-again.4821/. Blair re-offended just eleven days after his release. Arielle Zionts, *UPDATE: Senate Narrowly Passes Bill that Ends Life Without Parole Sentence for Young People*, RAPID CITY J. (Feb. 10, 2021; updated, Mar. 25, 2021), https://rapidcityjournal.com/news/local/crime-and-courts/update-senate-narrowly-passes-bill-that-ends-life-without-parole-sentence-for-young-people/article_af9a56b6-c2fc-5228-8628-3853738d0772.html.

publicly insisted upon her innocence. The *Argus Leader* quoted her as identifying a credible suspect, without naming the suspect.[227] Debra claimed:

> "There were days that I wish I could" admit to killing Abby, "just to make it stop."
>
> . . . .
>
> "I can't . . . because that wouldn't be the truth."
>
> "We have a solid case . . . . We have a name. We have witnesses to this name. This man has a motive, a history, and suspicion is high of him."
>
> "And I believe we have the physical evidence that, if tested, would identify it as him. That's why I want DNA testing."
>
> . . . .
>
> "There is hair on the evidence list that is the same as mine and [Abby's], a light brown . . . . But there is also hair on that list that is a whole different color. That's what we want tested."
>
> . . . .
>
> "All I know is, that's not my hair."[228]

Two years later, inside his car at the airplane hangar, Janklow would describe how Debra expressed deep remorse, cried through their entire meeting, and confessed to killing Abby. Convinced that "what happened was in an emotional heat of passion when she killed that child," Janklow commuted her sentence from life to one hundred years, a decision which proved unpopular with the public.[229] The commutation made Debra immediately eligible for parole—a discretionary decision vested in the South Dakota Board of Pardons and Paroles.[230]

On account of the severity and violent nature of her conviction, parole for Debra would require two steps. First, a two-member panel (or "sub-panel") of the board would have to agree to send her request to the full board.[231] The sub-panel could deny her parole, but it lacked the power to approve it. Second, a majority of the full board (typically a month following the two-member panel's decision) would have to vote in favor of her parole, with or without specific conditions that the board might impose. If never paroled by an action of the Parole Board, she

---

227. Young, *supra* note 16, at 1, 4A.

228. *Id.*

229. *Woman Convicted*, *supra* note 221. "Janklow drew criticism in January when it was learned he dropped the sentence of Debra Sue Jenner-Tyler—convicted of stabbing her child to death in 1987—from life to 100 years, making her eligible for parole." Whitney, *supra* note 226.

230. *See* SDCL § 24-15-5(1) (2013) (stating "[a]n inmate is eligible for parole, subject to § 24-15-4, after deducting from the inmate's sentence the statutory time granted for good conduct pursuant to § 24-5-1: (1) If convicted of a felony for the first time, when the inmate has served one-fourth of the time remaining"); SDCL § 24-5-1 (2013) (stating "[e]very inmate sentenced for any term less than life . . . and subject to the provisions of §§ 24-2-17 and 24-2-18, is entitled to a deduction of four months from his or her sentence for each year and pro rata for any part of a year for the first year to the tenth, and six months for the tenth year and for each year thereafter until the expiration of the period of the sentence as pronounced by the court, for good conduct.").

231. *See* SDCL § 24-15A-10 (2021) (providing that "[t]he chair of the board may designate panels of two or more board members to conduct hearings pursuant to this chapter and chapters 24-13, 24-14, and 24-15, take testimony, and take final action").

would have "flatted" her sentence and been released on September 25, 2039, assuming the full allowance for good behavior and further assuming that she did not predecease that date.[232] She would then have been eighty-three years old.[233]

Debra qualified for a new parole hearing every eight months, with the ability to waive one or more hearings if she chose.[234] (This law was amended in 1996 to extend the maximum term between parole hearings, but her crime predates that change.) Even after being finally paroled in 2021, she retains a kind of technical and genuine confinement. As a statute confirms, "[e]ach parolee shall at all times be considered confined, in the legal custody of the Department of Corrections, and shall remain under conviction for the crime for which the parolee was convicted and sentenced."[235]

G. PAROLE HEARINGS (2003-PRESENT)

1. 2003

Debra's first parole hearing was held in February of 2003, just months after Janklow's reduction of her sentence.[236] Debra was represented by Terry L. Pechota (former U.S. Attorney for South Dakota).[237] The state was represented by Chief Deputy Attorney General Mark Barnett, who insisted that Debra ought not to be released, but that she ought not to serve another fifteen to thirty years in prison, either.[238] (Mark Barnett served as Attorney General until 2003 and was appointed to the Circuit Court bench in 2007, retiring in 2019.) Some three dozen supporters of Debra also attended. The two-member sub-panel, comprised of Chery Laurenze-Bogue of Dupree and Dennis Kaemingk of Mitchell, listened to Debra on a Tuesday and forwarded her on to the full board to consider her application for parole on Thursday of the same week.

Members of the board listened to the tape recording of Debra's conversation with Janklow and Laurenze-Bogue noted: "In there, he had to press her also to say that she committed murder[.]"[239] The board reviewed gruesome photographs of

232. Amended Verified Complaint Ex. 1, *supra* note 47, at 3.

233. Kafka, *supra* note 214.

234. *See* SDCL § 24-15A-3 (2013) (suspending the application of numerous sections of title 24 to individuals "sentenced to prison for a crime committed after July 1, 1996"). Prisoners subject to previous parole calculations and time frames are referred to as "old system." Hoeft v. S.D. Bd. of Pardons and Paroles, 2000 SD 88, ¶¶ 8-9, 613 N.W.2d 61, 63.

235. SDCL § 24-15-13 (2013). *See also* SDCL § 24-15-19 (2013) (providing that "[i]f the purposes or objects of parole are not being served, the Department of Corrections and its parole agents may use any necessary means to establish discipline, arrest, or take custody and control of the parolee pending the issuance of a warrant of arrest by the executive director").

236. Carson Walker, *Board Denies Huron Woman's Parole*, RAPID CITY J. (Feb. 21, 2003), https://rapidcityjournal.com/news/local/board-denies-huron-womans-parole/article_ea9a4384-30a4-541b-bd84-7bcea2724b6f.html.

237. Amended Verified Complaint Ex. 1, *supra* note 47, at 2.

238. *Id.* at 3. Barnett also noted the support for Debra—even from those she deceived concerning her guilt—and said: "If these people deceived by her for so many years stand by her side, I think her day of parole will come while we're all still on this planet." *Id.*

239. *Id.*

the victim, Abby, and one board member described them as nauseating. Laurenze-Bogue noted her understanding that Janklow had reviewed Debra's file, but not those photos and that the photos demonstrated that Debra had suffered more than a fleeting lack of control, explaining: "Once you view the pictures, there's absolutely no way it was a momentary loss of control, because she herself says she went to the kitchen to get the knife . . . . That child was brutally murdered, and it took a long time to do it."[240]

The board denied Debra's first request for parole, as it did in her second and third hearings.[241]

2. 2005

Debra's fourth parole hearing was held in March of 2005.[242] The two-member sub-panel again forwarded her on to the full board, which convened the following month. Debra explained that she qualified for a program which would permit her to remain at the prison but accept employment outside the prison for the first half-year or so of her parole. Barnett once again urged the board that it was too early for parole given how long she had denied her own culpability and took advantage of others to raise funds for her defense by falsely claiming innocence.[243]

In a letter provided to the parole board, Barnett wrote:

> We have several reports from her fellow inmates that Ms. Jenner-Tyler tells the board, in only the most vague and evasive way, that she did do the crime, but then goes back in the cell hall and tells them she really didn't do it and is just telling you that so you will let her out[.][244]

Barnett went on: "Anyone that can butcher her own defenseless daughter in a crib and then for over a decade scam many good Christian people out of hard-earned money to promote her release from prison has a black heart to the core[.]"[245] Barnett's points were compelling and well-taken. Debra was once again denied parole.

---

240. *Id. See also infra* p. 89 (considering the space in the narrative in which presumably Debra retrieved the knife). If one takes at face value Debra's claim to have no recollection of having committed the murder while accepting that she now accepts the overwhelming evidence of her guilt as proof of her culpability, her narrative of how the murder occurred—like the juror's and ours—is based a reasoned analysis of the available evidence.

241. Doris Haugen, *Parole Board Denies Request from Child Murderer*, BLACK HILLS PIONEER (Aug. 26, 2004), https://www.bhpioneer.com/parole-board-denies-request-from-child-murderer/article_209612ee-8032-5ada-8c2c-c3c917678ed7.html. Debra's third parole application hearing was also referred to the full board, but the board decided against parole. *Id.*

242. *S.D. Woman Who Killed Daughter Seeks Parole*, SIOUX CITY J. (April 20, 2005), https://siouxcityjournal.com/news/state-and-regional/s-d-woman-who-killed-daughter-seeks-parole/article_b7de1975-00ef-54dd-9759-6fa907d0bd63.html.

243. *Id.*

244. *Id.*

245. *Id.*

3. 2007

Two years later, at Debra's eighth parole hearing in 2007, Debra testified: "I feel so guilty . . . for the mess that I made . . . . The thought that it was me makes me just want to throw up."[246] This time, Attorney General Larry Long (who became a Second Circuit Court Judge in 2009) appeared before the board to argue against Debra being granted parole. He said that when Debra's sentence was reduced to 100 years, she "received all of the lenience she was entitled to get . . . ."[247] He continued, "I don't know how long is long enough is for Mrs. Jenner, but I will say this. Twenty years, which is about what it is now, is not long enough . . . ."[248] The two-member panel agreed, rejected Debra's request, and did not forward her on to the full parole board.

4. 2013

At this particular point in this essay, I need to insert a personal narrative. In 2013, I was a newly appointed member of the South Dakota Board of Pardons and Paroles. About halfway through a morning's worth of hearings at the second component of a two-person sub-panel, Debra, her attorney, and a representative of the attorney general's office presented themselves for her hearing. Although I am a lifetime South Dakotan, more or less, and was living in Rapid City both at the time of Abby's murder and during Debra's trial, I could not recall ever hearing of Debra or anything about her prior to flipping to her file as she entered the room at the women's prison.[249]

The appearance of attorneys in a parole hearing is not uncommon, but I would estimate that fewer than one in thirty or so hearings include counsel. Witnesses and guests are also not uncommon—a spouse, parents, pastors, and so on—and their appearance is less infrequent than lawyers.

I cannot recall all the details of the 2013 hearing now, but I do remember that Debra and her attorney presented a compelling case for parole. Debra "clicked all the boxes." Let us assume, for the purposes of this article, that her disciplinary history could not have been improved. And she had been eligible for parole for a long time already without ever having been released, so she also lacked a history of failed attempts at parole that so many parolees exhibit. Her parole plan was prudent; her parents were willing to support her. Moreover, I recall, Debra emphasized her parents' ages and articulated her objective of being paroled while they were still living. Her demeanor was quiet and forthright. When her attorney

246. Kafka, *supra* note 214.

247. *Id.* The quoted text ("all the lenience she was entitled to get . . . .") is a direct quote of the text of the newspaper article, but the article does not frame it as a direct quote of Attorney General Long.

248. *Id.*

249. My ignorance of Debra's indictment and trial can only be explained by the rare attention, as a twenty-year-old, that I devoted to newspapers or current events. Today, at age fifty-five, I am more attentive to such matters, and less attentive to the ones I was when I was twenty.

concluded, I felt myself feeling open, if not yet favorable, toward the idea of voting to forward her on to the full board.

By the time the assistant attorney general had concluded, I felt otherwise. The gravity of her crime—the absolute horror of it—was simply unparalleled in anything I had seen in a parole hearing.[250] It was unimaginable. I recall asking Debra, respectfully but directly, what had made her do it. What had triggered it? What had been the catalyst? Her eyes became downcast. She shook her head. It seemed as if the horror was simply beyond either of our abilities to penetrate. Coupled with the additional tale of an orchestrated campaign to raise funds for her innocence by which numerous individuals were convinced, perhaps tricked, to make donations toward her cause, my interior pendulum swung back. I was firmly convinced now that a full board hearing would be fruitless.

Debra, I know now, has no recollection of having murdered Abby. The horror that took place sometime during the early morning of April 5 (or perhaps late on April 4), 1987, is blocked from her conscious recollection. She cannot recall it. Amnesia is not uncommonly associated with traumatic events.[251] The fact that Debra is both morally and legally responsible for the event taking place does not mean that it was not traumatic for her—so traumatic that even today there is only a blank space in her recollection between going to bed on April 4, 1987, and awakening the next morning. Indeed, I would venture that the fact that she has come to take responsibility and ownership of that horror only deepens the divide that her subconscious mind has constructed to prevent her from reliving it. The human mind seems to have self-protective wiring preprogrammed into it.[252]

Before my fellow board member and I discussed our mutual decision to "continue Jenner 8 months" until her next automatic parole hearing date, I also

250. Homicides, generally, are relatively rare offenses. "In the state system, less than 3 percent of new court commitments to state prison typically involve people convicted of homicides." MICHELLE ALEXANDER, THE NEW JIM CROW 101 (rev. ed. 2012). Moreover, a good slice of those prisoners will never qualify for a parole hearing at all.

251. *See generally* Jane E. McNeil & Richard Greenwood, *Can PTSD Occur with Amnesia for the Precipitating Event?*, 1 COGNITIVE NEUROPSYCHIATRY 239 (1996) (discussing the link between PTSD and amnesia); Eduardo D. Espiridion, Jayesh Gupta, Andre Bshara & Zachary Danssaert, *Transient Global Amnesia in a 60-year-old Female with Post-traumatic Stress Disorder*, CUREUS (Sept. 28, 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6827854/?report=classic (noting the link between PTSD and amnesia). When Stephen King was "barely four," he "had gone off to play at a neighbor's house – a house that was near a railroad line." STEPHEN KING, DANSE MACABRE 90 (1981). King relays that "the kid I had been playing with had been run over by a freight train while playing on or crossing the tracks (years later, my mother told me they had picked up the pieces in a wicker basket)." *Id.* But King retained no memory of the event. *Id.*

252. I once had a good friend whom I have since lost track of, a South Dakotan who was scraping by in New York. One day, he was the victim of a hit and run. He left his apartment, crossed the street, and a gypsy cab hit him. He was thrown through the air and very seriously injured. He was not expected to live, and then once it was clear that he would survive, not expected to walk again. He did. He even regained enough athleticism to be my yoga instructor, years later. He could recall brushing his teeth on the morning of the accident and nothing thereafter until regaining consciousness in the hospital. The accident itself—even his beginning to cross the street—were all blocked, perhaps permanently, by his brain. I have no reason to doubt, therefore, that Debra cannot recall stabbing Abby, what led to it, nor what followed it (cleaning up, etc.). Indeed, this is perfectly consistent with her behavior with law enforcement in the days following Abby's murder when she requests assistance in determining what happened.

recall asking the assistant attorney general something to this effect: "If it's still too soon for Ms. Jenner to be released on parole today, when will it be time?" He did not have an answer.

5. Two Mandamus Writs and the § 1983 Claim

As foreshadowed above, Debra's third post-conviction legal proceeding arose out of her parole hearings.[253] These proceedings focused on the contents of a manila envelope. Debra pursued an objection to a manila envelope of photographs being included as part of her parole file.[254] Inside the envelope were family snapshots of Abby, along with photographs of the crime scene, and horrific images taken during Abby's autopsy on the evening of Sunday, April 5, in Sioux Falls. The autopsy photographs were especially graphic and gruesome. Debra claimed that the manner in which they had been included in the file was suspect and that the photos themselves were unduly prejudicial.

Procedurally speaking, Debra's first step in attempting to suppress the grisly photos stretched back to 2009 when her attorney requested access to his client's file maintained by the Board of Pardons and Paroles. By an e-mail dated January 19, 2009, the request was denied, and it was explained that because the file is considered confidential, a court order for release would be required.[255] This determination was perfectly consistent with the law governing parole files.[256]

Debra filed suit in the Hughes County Circuit Court requesting a writ of mandamus to compel the board to allow her to review her file.[257] (Debra also sought an order allowing her to undergo a licensed psychologist to examine her.)[258] Circuit Judge John L. Brown denied her petition for the writ.[259] She appealed.[260] The South Dakota Supreme Court affirmed in January of 2010.[261]

Following Abby's murder in 1987, Sheridan had helped with the investigation. He obtained consent from Lynn to retrieve the toy airplane from the Jenner home and accompanied the Jenners to Reverend Wagner's home at the conclusion of Debra's most intense day of police questioning.[262] Later, as a parole

253. *See supra* Part II(G)(5) (explaining how Debra's third post-conviction legal proceeding arose).

254. Jenner v. S.D. Bd. of Pardons & Paroles (*S.D. Bd. of Pardons & Paroles*), 789 N.W.2d 320 (S.D. 2010) (table).

255. Mandamus Brief for Appellant at 4, *S.D. Bd. of Pardons & Paroles*, 789 N.W.2d 320 (Nos. 25347 and 253478).

256. SDCL § 24-15A-14 (2013). This code provisions states:

> No person other than members of the board, its executive director, the secretary, and any person specifically delegated for such access by the secretary, may inspect the file unless otherwise ordered by a circuit court or subpoena after notice to the secretary and an opportunity for a hearing on any objections to inspection.

Id.

257. Appellant's Mandamus Brief, *supra* note 255, at 1.

258. *Id.*

259. *Id.*

260. *S.D. Bd. Of Pardons & Paroles*, 789 N.W.2d at 320.

261. *Id.*

262. Appellee's Brief, *supra* note 19, at 20-21.

board member, he consistently recused himself from hearings involving Debra.[263] Going back to her first parole hearing in February of 2003, a large manila envelope with twenty-six photos of Abby was included in her file, circulated among board members, and discussed in her hearings.[264] In 2005, for example, Barnett told the board, "The old adage, a picture is worth a thousand words, could not apply in any other case like it does in this one."[265] And in 2003, a board member confessed that the photographs "absolutely turned my stomach" and "I can't begin to comprehend something like that."[266]

The outside of the manila envelope was addressed from Sheridan to a second board member and postmarked January 27, just under one month prior to Debra's first parole hearing.[267] The file revealed no written request for the photographs and no release from the coroner, DCI, the Attorney General, or the Beadle County Sheriff's Office.[268] After Debra filed a lawsuit, Sheridan admitted to an *Argus Journal* reporter that he had been the source of the illicit pictures.[269] According to Debra, Sheridan had "done by indirection that which he could not do directly—argued against Jenner's release on parole."[270] Her counsel continued:

> If former Attorney General is right about that old adage [that a picture is worth a thousand words], then a board member who had recused himself before and after he salted Jenner's file with illicit photographs has spoken volumes about a subject on which he had surrendered his right to speak.[271]

Consequently, in the latter part of 2014, Debra submitted a motion and accompanying brief with the Board of Pardons and Paroles, demanding that the unsettling photographs be removed from her file.[272] I recall having participated in the December 12, 2013 hearing on Debra's motion. I understood—either from markings on the envelope or from what a fellow board member or a representative of the Department of Corrections said—what the envelope contained. I elected not to peruse its contents. I felt that they were unnecessary for making a determination of Debra's motion. I also anticipated that the photographs were ones that a viewer could not un-see. I had no wish to examine them. After considering the motion, the Board unanimously denied her request.[273]

---

263. Brief for Appellant at 6, Jenner v. Nikolas, 828 F.3d 713 (8th Cir. 2016) [hereinafter Appellant's 1983 Brief].

264. *Id.* at 3.

265. *Id.* at 6.

266. *Id.* at 5.

267. *Id.* at 3-4.

268. *Id.* at 4.

269. *Id.* at 7.

270. *Id.* at 6.

271. *Id.* at 7.

272. Complaint, at Ex. A-B, Jenner v. Nikolas, No. 4:14-CV-04147-KES, 2015 WL 4600352 (D.S.D. 2015).

273. *Id.* at Ex. C. Special Assistant Attorney General for the Department of Correction Patrick Pardy wrote in a letter to Debra's attorney, Mark Marshall: "'[T]he motion was denied because the board believes the statute allows the executive director to include any information that is relevant to the board's consideration in the file and does not want to tie the director's hands regarding future decisions about what

Next, in February of 2014, Debra applied for a writ of mandamus with the South Dakota Supreme Court, seeking review of the Board's decision.[274] The South Dakota Supreme Court denied her application in another 3-2 split decision.[275] One week later, however, the Executive Director of the Board removed some of the photographs on his own initiative.[276] Citing South Dakota Codified Law sections 24-15-1 and -2, he confirmed "that he removed all photographs received before January 14, 2014, from Jenner's file . . . with the exception of photographs received from the South Dakota Attorney General . . ." and that those remained "available to aid Board members who wish to consider the nature and circumstances of Jenner's offense when determining whether to grant or deny parole."[277]

The next month, Debra applied for an *ex parte* writ of mandamus with the South Dakota Supreme Court.[278] This time, she sought a review of the Board's decision to retain the manila envelope and its remaining contents. Later, in September of 2014, Debra brought a § 1983 claim against the members of the parole board.[279] She claimed that Abby's photographs had had the effect of denying her right to have her parole applications heard by a fair and impartial board. District Court Judge Schreier dismissed her claim after concluding that Debra had not raised a protected liberty interest, as required in a § 1983 claim.[280] The Eighth Circuit Court of Appeals affirmed and thereafter also refused to grant an *en banc* rehearing.[281]

6. 2017

By 2017, newspaper accounts of Debra's parole hearings had almost lost count of the number of unsuccessful parole hearings she had had. Pierre's *Capitol Journal* simply noted that she had "been denied parole more than a dozen times, and other times has waived her right to a parole hearing . . . ."[282] As far as the

photos may or may not be included.'" *Id.* Pardy was appointed to the bench in 2015. *Governor Appoints New Judge in South Dakota's Third Circuit*, VOLANTE (Vermillion) (May 7, 2015), http://volanteonline.com/2015/05/governor-appoints-new-judge-in-south-dakotas-third-circuit/. Marshall himself has served as a federal magistrate judge and later as a magistrate judge for the Seventh Judicial Circuit Court.

274. Complaint, *supra* note 272, at Ex. G. By early 2014, I was no longer a member of the Board, having had to resign after one year's service on account of the newly imposed demands of an academic (as a newly hired associate professor at the University of South Dakota School of Law in the fall of 2013) which precluded the level of participation on a monthly basis demanded of members of the Board. I would, however, later serve as an auxiliary board member for a period of four years. *See* SDCL § 24-13-13 (2021) (describing former board member service in an auxiliary capacity).

275. Complaint, *supra* note 272, at Ex. I.

276. Appellant's 1983 Brief, *supra* note 263, at 8.

277. *Nikolas*, 2015 WL 4600352, at * 1.

278. Appellant's 1983 Brief, *supra* note 263, at Ex. VIII.

279. *See generally Nikolas*, 2015 WL 4600352, at *1-2 (detailing Debra's § 1983 claim).

280. *Id.* at *6.

281. Jenner v. Nikolas, 828 F.3d 713, 718 (8th Cir. 2016).

282. Stephen Lee, *Debra Jenner, Serving 100 Years in Prison in Pierre for Slaying 3-year-old Daughter, Has Parole Hearing in July*, CAP. J. (June 30, 2017), https://www.capjournal.com/news/debra-

media was concerned, her parole application denials had become almost routine and, it seems, her failure to secure parole, all but assured.[283]

By this point, Debra had appeared before a sub-panel a total of twenty-one times.[284] On three occasions, her application was forwarded to the full board.[285] But each time, her application for parole was ultimately denied. On November 16, 2020, parole for Debra was denied again by a two-person sub-panel staffed by board members Chuck Schroyer (former Assistant Attorney General and State's Attorney for Hughes County) and Reverend Patricia White-Horse Carda (a retired Episcopal priest).[286]

7. 2021

On August 9, 2021, Debra appeared for her next parole hearing at the Pierre Women's Prison before board members Schroyer and Gordon Swanson (a retired Circuit Court Judge and vice-chair of the Board of Pardons and Paroles).[287] Attorney Raleigh Hansman of the Sioux Falls law firm of Meierhenry Sargent, LLP appeared on Debra's behalf, while Attorney General Jason Ravnsborg appeared for the State.[288] Those in attendance included Debra's parents (ages eighty-four and eighty-seven) and her daughter-in-law.[289]

Ravnsborg emphasized the heinousness of the crime, Debra's fundraising campaign, and shared his view that she had not yet shown sufficient remorse.[290] Hansman focused on an important alteration to Debra's parole plan since her last hearing: an offer of employment from the same local thrift shop where Debra had worked through a work-release program the last several years.[291] Traditionally, a

jenner-serving-100-years-in-prison-in-pierre-for-slaying-3-year-old-daughter/article_a0f396fa-5d52-11e7-9e32-1fbdb7d355f9.html.

283. *See* Zionts, *supra* note 226 (narrating the Senate's passage, in 2021, of Senate Bill 146, amending South Dakota Codified Law section 24-15-4 so as to make persons convicted for an offense committed before age twenty-six and sentenced to life imprisonment eligible for discretionary parole at age fifty and emphasizing—to allay the fears that this could mean the release of Debra, or inmates like her—that parole is never granted automatically). "The fact that Janklow commuted the life sentence of Debra Jenner but the parole board has repeatedly refused to grant her parole is evidence that this new law will work, Sen. [David] Wheeler said in reference to the Huron woman convicted of killing her daughter." *Id.* Senator Arthur Rusch, who had introduced the bill, was also quoted as saying: "It's not a get out of jail free card . . ." and inmates will "only be released if the parole board decides that they've been rehabilitated and they're no longer dangerous." *Id.* Senate Bill 146 failed in the House Judiciary Committee. S.B. 126, 96TH S.D. LEG., REG. SESS. (S.D. 2021), https://sdlegislature.gov/Session/Bill/22242.

284. E-Mail from Traci Fredrickson, Operations Supervisor of the South Dakota Board of Pardons and Paroles, to author (Dec. 9, 2020, 14:43 CDT) (on file with author).

285. *Id.*

286. BOARDS AND COMMISSIONS {STATE OF S.D.}, NOVEMBER 2020 BOARD ACTIONS 14 (Nov. 19, 2020), https://boardsandcommissions.sd.gov/bcuploads/ParoleBoardActionsNov2020.pdf.

287. BOARDS AND COMMISSIONS {STATE OF S.D.}, MONTHLY SCHEDULE AUGUST 2021, at 1 (Sept. 7, 2021), https://boardsandcommissions.sd.gov/bcuploads/ParoleBoardScheduleAugust2021.pdf.

288. Telephone Interview with Raleigh Hansman, Meierhenry Sargent LLP (Sept. 23, 2021) (notes on file with author).

289. *Id.*

290. *Id.*

291. *Id.*

two-person panel concludes a parole hearing so as to deliberate privately and notifies the applicant of their decision in writing before the end of the week. That same process was followed this time, and Debra soon received notice that her application would be forwarded to the full board the next month.[292]

Thus, it was on the morning of Thursday, September 16, at the State Penitentiary in Sioux Falls, that Debra appeared for her full-board hearing, again with Hansman at her side.[293] Attorney General Ravnsborg once again appeared for the State, this time via Zoom.[294] In addition to the supporters for her who had appeared at her hearing the previous month were Debra's son, her thrift store supervisor, and her counselor, Janette LaPlante (all via Zoom).[295]

Attorney General Ravnsborg reiterated the State's concerns with and objections to Debra being paroled. Board member Gregg Gass, State's Attorney for Kingsbury County, questioned the quotation from Debra that she may have "psyched out"[296] and emphasized the concern that the catalyst for the crime had never been identified.[297] Hansman responded by pointing to an evidence-based risk assessment evaluation ranking Debra's risks as low to none.[298] Board Member Kenneth Albers (former Lincoln County Sheriff and state legislator) noted that Debra's risk assessment was the lowest he had ever seen.[299] Albers had served on the board for more than ten years.[300] Ultimately, Schroyer moved to grant parole subject to two conditions: (1) Debra's submission to a psychiatric evaluation within ninety days of her release in order to conduct a further risk assessment at Debra's expense, mandating that any evaluation recommendations be followed through with as a condition of parole; and (2) "No contact with children without specific approval of parole agent."[301] Swanson seconded the motion.[302] The board proceeded to vote—six yeas against three nays—to parole Debra.[303]

Remarkably, the media seems to have wholly overlooked Debra's last two hearings. The first coverage of the events was not published until two weeks following the September 16 full board hearing.[304] The *Argus Leader* devoted such scant attention to the event that it mistakenly quoted a section of the parole board

292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.*
296. State v. Jenner, 451 N.W.2d 710, 711-15 (S.D. 1990) (quoted *supra* Part II(B)).
297. Telephone Interview with Raleigh Hansman, *supra* note 288.
298. *Id.*
299. *Id.*
300. Bret Hayworth, *Former Canton Legislator Tapped for S.D. Parole Board*, SIOUX CITY J. (Jan. 14, 2010), https://siouxcityjournal.com/news/local/former-canton-legislator-tapped-for-s-d-parole-board/article_b5fe1498-0153-11df-ba6c-001cc4c002e0.html.
301. BOARDS AND COMMISSIONS {STATE OF S.D.}, SEPTEMBER 16, 2021 MINUTES 2 (Sept. 23, 2021), https://boardsandcommissions.sd.gov/bcuploads/ParoleBoardMinutesSeptember2021B.pdf.
302. *Id.*
303. *Id.*
304. Alfonzo Galvan, *Woman Convicted of 1987 Stabbing Death of Daughter Granted Parole*, ARGUS LEADER, September 30, 2021, at 3A.

minutes relating to another inmate.[305] The *Huron Plainsman* online edition devoted a mere 121 words to the topic.[306]

KELO-Land crafted a denser report. It claimed to have misread the online parole reports.[307] Debra's two-person parole hearing and its positive outcome were visible for anyone who looked, but she had been inadvertently left off the published full-board agenda, although a SAVIN (Statewide Automated Victim Information and Notification) notification had been transmitted both in advance of and following her full-board hearing.[308] Thus, even the *KELO-Land* report was more concerned with an implied allegation of misleading the press than it was with the actual outcome of the hearing. It is probably to Debra's advantage that her infamy has faded to such an extent that she is, today, nearly forgotten and ignored. It may further enhance the likelihood that she will succeed and perhaps even flourish on parole if she is left to live the remainder of her life in peace.[309] Following the quiet reports of Debra's successful parole hearing, Sheridan was quoted as saying "that he doesn't think Jenner is going to harm anyone and that she paid her dues and he expects her to follow the rules of her parole."[310] Debra walked away from the Pierre Women's Prison on October 4, 2021.[311]

---

305. *Id.*; BOARDS AND COMMISSIONS {STATE OF S.D.}, *supra* note 301, at 2. The *Argus* quoted from that section of the minutes relating to parole applicant Arden Long Soldier, who appeared after Debra and was also granted parole that day.

306. *Huron Woman Sentenced in 1987 Stabbing of Daughter Paroled*, HURON PLAINSMAN (Sept. 29, 2021), https://www.plainsman.com/article/huron-woman-sentenced-in-1987-stabbing-of-daughter-paroled. The full text is printed here:

> A Huron woman serving a 100-year prison sentence for killing her 3-year-old daughter by stabbing was granted parole earlier this month, according to a report by Dakota News.
>
> 65-year-old Debra Jenner appeared before the parole board in Sioux Falls on September 15. Her parole was granted subject to submission to psych evaluation within 90 days. She had spent three decades behind bars and was denied parole more than a dozen times.
>
> Authorities say Jenner in April 1987 stabbed Abby Jenner more than 70 times with a toy metal airplane and a kitchen knife. She was sentenced the following year to life in prison.
>
> Gov. Bill Janklow reduced the sentence to 100 years in return for Jenner admitting the crime in January 2003.

Id. The pithy text is so condensed, it almost exactly matches the word-count of the initial account of Abby's death in 1987, before it was even known that she had not perished of natural causes. *See supra* note 52. These tiny accounts bookend the lengthy and sensational coverage over three decades. They suggest that Debra can now recover a degree of anonymity and perhaps some peace.

307. Angela Kennecke, *Convicted 1987 Child Killer, Debra Jenner, Granted Parole in Unpublicized Hearing*, KELO-LAND (Sept. 28, 2021), https://www.keloland.com/news/investigates/convicted-1987-child-killer-debra-jenner-granted-parole-in-unpublicized-hearing/. The SAVIN website confirms Debra's release. *Debra S. Jenner Offender Details*, S.D. OFF. ATT'Y GEN.: S.D. SAVIN & ALERT NOTIFICATION SERV., https://savin.sd.gov/portal/Offender/OffenderDetail.aspx?OffenderGuid=510e0c57-0d47-e611-b355-005056890ba0 (last accessed Oct. 16, 2021) [hereinafter *Debra S. Jenner Offender Details*].

308. Kennecke, *supra* note 307 (quoting Hansman).

309. *See* Arielle Zoints, *South Dakota Woman who Murdered Daughter is Granted Parole*, S.D. PUB. BROAD. (Sept. 30, 2021) https://listen.sdpb.org/news/2021-09-30/south-dakota-woman-who-murdered-daughter-granted-parole (providing a brief 222-word report of Debra's release).

310. Kennecke, *supra* note 307.

311. *Debra S. Jenner Offender Details*, *supra* note 307.

H. PAROLE BOARD CONSIDERATIONS

In South Dakota, the Board of Pardons and Paroles is made up of nine members, with the Governor, the Attorney General, and the South Dakota Supreme Court each appointing three members to four-year terms.[312] The functions of the Board include granting "the privilege of parole to deserving inmates," making pardon and commutation recommendations to the Governor, and adopting policy.[313] It is administered under the supervision of the Department of Corrections but retains a certain "quasi-judicial, quasi-legislative" independence.[314] Moreover, the Department of Corrections is required to "cooperate with the Board of Pardons and Paroles and the executive director of the board, give access to all inmates, and furnish such information as the board or the director may request pertaining to the performance of their duties."[315] When assessing the suitability of parole for an inmate, the Board considers numerous factors, including:

> (1) The inmate's personal and family history;
>
> (2) The inmate's attitude, character, capabilities, and habits;
>
> (3) The nature and circumstances of the inmate's offense;
>
> (4) The number, nature, and circumstances of the inmate's prior offenses;
>
> (5) The successful completion or revocation of previous probation or parole granted to the inmate;
>
> (6) The inmate's conduct in the institution, including efforts directed towards self-improvement;
>
> (7) The inmate's understanding of his or her own problems and the willingness to work towards overcoming them;
>
> (8) The inmate's total personality as it reflects on the possibility that the inmate will lead a law-abiding life without harm to society;
>
> (9) The inmate's family and marital circumstances and the willingness of the family and others to help the inmate upon release on parole from the institution;
>
> (10) The soundness of the parole program and whether it will promote the rehabilitation of the inmate;
>
> (11) The inmate's specific employment and plans for further formal education or training;
>
> (12) The inmate's plan for additional treatment and rehabilitation while on parole;
>
> (13) The effect of the inmate's release on the community;

312. SDCL §§ 24-13-1 to -2 (2013).
313. SDCL § 24-13-6 (2013).
314. SDCL § 24-13-3 (2013).
315. SDCL § 24-13-6.

> (14) The effect of the inmate's release on the administration of justice; and
>
> (15) The effect of the inmate's release on the victims of crimes committed by the inmate.[316]

In parole cases, the question of release is bound up in concerns for the safety of the community into which the prisoner would resettle.[317] These sorts of questions are most frequent with individuals convicted of sexual abuse, habitual violence, or repeatedly driving while intoxicated. Even if the individual is eligible for parole, has completed all the recommended programming, and is free of any significant disciplinary infractions, it may be inadvisable to parole them. Community safety concerns are paramount. Evidence of rehabilitation is the second major concern.

Debra presented few community safety concerns. I say "few" and not "none." By this, I mean it seems unlikely that she would commit another violent act. Certainly, it is possible. It is also possible that I will commit a violent act tomorrow, next week, or next year. Or that you will. It is possible that any of us will. Debra is more likely to harm another human being if she is released from prison given that she physically harmed and ended the life of her daughter. But compared with other applicants for discretionary parole, she presented few safety worries.

The Board of Pardons and Paroles may grant a prisoner parole once the prisoner has become eligible for parole if it determines that:

> (1) The inmate has been confined in the penitentiary for a sufficient length of time to accomplish the inmate's rehabilitation;
>
> (2) The inmate will be paroled under the supervision and restrictions provided by law for parolees, without danger to society; and
>
> (3) The inmate has secured suitable employment or beneficial occupation of the inmate's time likely to continue until the end of the period of the inmate's parole in some suitable place within or without the state where the inmate will be free from criminal influences.[318]

In some cases, the question of release is tied to unrealized rehabilitation goals.[319] The inmate may have programming still awaiting completion. Serious, recent, or recurring disciplinary infractions can be viewed as an indication that rehabilitation has not occurred. Disciplinary infractions can also indicate a greater

316. SDCL § 24-13-7.

317. *See, e.g.*, Barge v. Pa. Bd. of Prob. & Parole, 39 A.3d 530, 546 (Pa. 2012) (emphasizing that the parole board is required "to protect public safety as its foremost consideration."); *In re* Dyer, 283 P.3d 1103, 1108 (Wash. 2012) (en banc) ("Public safety is the 'paramount' concern in making parolability decisions.").

318. SDCL § 24-15-8 (2013).

319. *See* Greenholtz v. Inmates of Neb. Penal and Corr. Complex, 442 U.S. 1, 8 (1979) (emphasizing that "state-created parole system serve[] the public-interest purposes of rehabilitation").

likelihood of recidivism. A behavioral analysis suggests that prisoners ought not to be rewarded with parole when they have violated the rules of the institution.

Another important factor in a parole decision is a prediction of success outside the prison walls.[320] Is the prisoner's parole plan sound? Is the prisoner likely to succeed when the proposed parole plan involves moving in with an unmarried cohabitant with a history of abuse and addiction? The parole board might approve a parole application in principal but continue the hearing for a month to allow some fine-tuning of the individual's parole plan.

Still another factor is the prisoner's past success—or lack of success—on parole.[321] Not uncommonly, a prisoner released on parole will re-offend, abscond, relapse, or otherwise violate the terms of their supervision and be returned to prison. Not uncommonly, they will be given a second chance at parole, a third time, even a fourth time on the same underlying sentence. The greater the failed attempts at parole, of course, the greater the chance that another try will also fail, although not all parole violations are equal in this regard.

Then, layered on top of this multi-factored rubric, a prudent insistence on evidence-based practices has been legislatively required.[322] The Board of Pardons and Paroles is also required to employ evidence-based analysis to applications for parole.[323] Evidence-based practices have the goal of ensuring "'smarter sentencing' strategies."[324] As a recent article explains:

> Today, recidivism prediction algorithms identify correlations between preexisting offender background factors (e.g., age, family background, criminal history) and recidivism not only for offenders generally but also for subgroups (e.g., sex offenders). These statistical correlations are transformed into risk assessment instruments that identify an offender's predicted probability of recidivism. Parole board members can then separate higher-risk

320. *See* Partee v. Evans, 969 N.Y.S.2d 733, 737 (Sup. Ct. 2013) (explaining parole risk assessment determinations for parole applicants which are designed predict "the likelihood of success of such persons upon release.").

321. *E.g.*, Prowell v. Hemmingway, 234 F.3d 1269 (6th Cir. 2000) (table), 2000 WL 1679451, at * 1 (detailing an inmate's succession of three paroles and three parole revocations); Montana v. Watson, 686 P.2d 879, 890 (Mont. 1984) (justifying maximum prison sentence based on, *inter alia*, "past failures on parole supervision").

322. SDCL §§ 24-15A-45 to -46 (2013).

323. *See* SDCL § 16-22-1(7) (2014) (defining "evidence-based practices" as "supervision policies, procedures, and practices and treatment and intervention programs and practices that scientific research demonstrates reduce recidivism among individuals under correctional supervision"); *see also South Dakota Public Safety Improvement Act Criminal Justice Initiative*, S.D. DEP'T OF CORR., https://doc.sd.gov/about/CriminalJusticeInitiative.aspx (last visited July 27, 2021) (explaining that "Parole Board members will undergo annual training on the use of risk and needs assessments and the use of evidence-based practices in making parole decisions."). This mandate was part of Senate Bill 70, the South Dakota Public Safety Improvement Act (SDPSIA) (a/k/a The Criminal Justice Initiative) that was signed into law by Governor Dennis Daugaard in 2013. *South Dakota Public Safety Improvement Act Criminal Justice Initiative*, *supra* note 323.

324. Edward E. Rhine, Joan Petersilia & Kevin R. Reitz, *The Future of Parole Release*, 46 CRIME & JUST. 279, 301 (2017).

> from lower-risk offenders, enabling a more efficient use of prison resources.[325]

Statistical reports and algorithms promise greater freedom from bias and subjectivity. As another scholar explains: "These practices include assessing risk and needs, targeting interventions based on risk and need (focusing resources on moderate and high-need individuals), relying on graduated sanctions (including the use of positive reinforcements), utilizing cognitive behavioral therapy, and measuring outcomes beyond recidivism, including drug use and employment."[326] These various risk assessments primarily aim to predict risks of recidivism with raw numbers.[327] In doing so, they help correct subjective human deficiencies by predicting objectively whether an individual will re-offend or not. They also generate a series of shortcomings of their own, however—including algorithmic biases against racial minorities.[328] Still, evidence-based practices can distill and quantify recidivism risks in a way that is undoubtedly helpful to parole board decision-making. As a practical tool, they are probably here to stay, at least in some form.[329]

I. LOCATING AND MAPPING THE "MERCY SEAT"

1. The Lid of the Mercy Seat

With that historical-legal background unpacked, it is time to return to the question of mercy. I should roadmap in advance for the reader that I have not succeeded in finding any firm answers to the questions posed in the introduction, to wit: What is mercy, where should it be located—if at all—in the context of an application for parole, and how it can be applied to Debra? Alternatively, assuming that mercy may play some role in parole decisions, we can ask ourselves, *was* it applied so as to permit Debra Jensen to qualify for discretionary parole? Or do the statutory factors governing parole preclude its application?

Not long ago, I undertook an informal study of an uncle of mine. I never had the opportunity to meet him, though our lives overlapped. Brother James Ebner was born to my paternal grandfather's sister Violet Ebner and her husband, a railroad station agent, in Itasca County, Minnesota, in 1915. After completing high school in Duluth, Minnesota, and Glencoe, Missouri, Brother Ebner obtained six degrees, including a doctorate from the Catholic University of America, and took his perpetual vows in 1940. I came to know him through a book he penned

325. Edward E. Rhine, Joan Petersilia & Kevin R. Reitz, *Improving Parole Release in America*, 28 FED. SENT'G REP. 96, 98 (2015).

326. Christine S. Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 N.M. L. REV. 421, 455-56 (2011).

327. Aaron Rappaport, *The Institutional Design of Punishment*, 60 ARIZ. L. REV. 913, 949-50 (2018).

328. Rhine, Petersilia & Reitz, *supra* note 325, at 98.

329. *See* Rhine, Petersilia & Reitz, *supra* note 324, at 299-301 (citing "[a] recent survey [that] found that 88 percent of paroling authorities report using an actuarial risk prediction instrument to guide decision making."); Scott-Hayward, *supra* note 326, at 456 (asserting that the "general approach of implementing evidence-based practices in parole is increasingly popular among states and early results show promise.").

on modern theological thinkers.[330] Brother Ebner was lanky, eccentric, and fastidious, a friend of his told me.[331] He was extremely learned, and he lectured on theology for most of his life, but with his students, he returned to one particular phrase frequently enough that he was remembered for it. It was this: "I don't have the answers, just the questions."[332]

That's the best I can hope for here, as well. But the questions I have are worth asking. They are questions which consider the nature of mercy.

I employ the term "mercy seat" in the heading to this section and in the title of this essay as a referent to the Greek term *hilasterion* found, *inter alia*, in Paul's Letter to the Romans:

> [All] are now made just as a gift of grace through deliverance in Jesus Messiah, whom God put forward as a *hilasterion* through the faithfulness [shown] in his blood, to be a public proof of justice[.][333]

Most scholars translate *hilasterion* as expiation, propitiation, or "sacrifice of atonement."[334] But some translate it as the mercy seat, a physical place where something critically important happens at a particular moment in time.[335] It can

---

330. *See* JAMES H. EBNER, GOD PRESENT AS MYSTERY: A SEARCH FOR PERSONAL MEANING ON CONTEMPORARY THEOLOGY (St. Mary's College Press1976) (discussing modern theological thinkers).

331. Teleconference Interview with Brother Robert Smith (Ph.D.), Senior Vice President at St. Mary's (Nov. 25, 2019).

332. *Id.*

333. DOUGLAS HARINK, RESURRECTING JUSTICE: READING ROMANS FOR THE LIFE OF THE WORLD 33 (InterVarsity Press 2020) (quoting the author's translation of *Romans* 3:24-25).

334. *Id.*

335. *Compare 1 Chronicles* 28:11 (DRA) ("the house of the mercy seat"), *with 1 Chronicles* 28:11 (CEB) ("the room for the cover"), *1 Chronicles* 28:11 (CJB) ("the place for the ark-cover"), *1 Chronicles* 28:11 (EHV) ("the chamber for the atonement seat"), *1 Chronicles* 28:11 (GNT) ("the Most Holy Place, where sins are forgiven"), *1 Chronicles* 28:11 (JUB) ("the seat of reconciliation"), *1 Chronicles* 28:11 (LEB) ("the house of the lid of the ark"), *1 Chronicles* 28:11 (NOG) ("the room for the throne of mercy"); *1 Chronicles* 28:11 (MSG) ("the Chest of the Covenant of God – the cherubim throne"), *1 Chronicles* 28:11 (NASB) ("the room for the atoning cover"), *1 Chronicles* 28:11 (NCV) ("the place where the people's sins were removed"), *and 1 Chronicles* 28:11 (WYC) ("the house of propitiation, *or of mercy doing, that is, of the holy of holy things, where the propitiatory was*"). Court opinions rarely—though occasionally—make reference to the mercy seat, by my count two in the eighteenth century, one in the nineteenth, and none thus far in the twentieth. First, there is Alabama's Judge Cates who once characterized the American jury—properly operating—as the mercy seat:

> The Common Law devised juries to make individual distinctions. The jury is an ad hoc quasi-legislative body to fill in the lacunae of the law. It can tell an errant miscreant to go and sin no more. It often finds lesser degrees of guilt than the outward facts show. In short it is the great Mercy Seat of justice.

Ex parte Clifton, 262 So.2d 626, 629-30 (Ala. Crim. App. 1972) (Cates, J., concurring). Second, in a response to New York Governor DeWitt Clinton, the jurist Ogden Edwards twice makes reference to the mercy seat in the context of a discussion of executive clemency. Miller's Case, 9 Cow. 730 (N.Y. Sup. Ct. 1827). Third, in a decision of the United States Supreme Court (issued decades before the enactment of the Fourteenth Amendment), a New Orleans ordinance prohibiting Catholic priests from exposing corpses as part of a funeral mass was challenged. Permoli v. Mun. No. 1 of City of New Orleans, 44 U.S. 589, 590 (1845). The ordinance required that the corpse instead "be brought to the obituary chapel, situated in Rampart street . . . ." *Id.* Part of the petitioner's argument (a losing, though impressively learned argument) was framed as follows:

> What is this function he is forbidden to exercise? His church—the holy Catholic church—teaches that the mercy of God, while it mitigates, does not merge his justice; that, though many, through the atoning blood of the Saviour, escape eternal woe, they

signify the top of the ark in the Jewish tabernacle where the blood of a sacrificed goat or lamb would be sprinkled in order to purify the community—this place is not the sacrificed animal, nor the altar, mind you, but the lid of the ark.[336] It is that which opens up to reveal something else. I think this is an appropriate image for undertaking an assessment of the location of mercy.[337]

Mercy is an imprecise term, but the image of a lid at least gives it concreteness. In one sense, mercy means charity toward any person in need. We treat a man without a coat with mercy when we give him our own.[338] We exhibit mercy when we help the poor, the downcast, the widowed, and the orphaned.[339]

> do not all pass directly from this probationary state to celestial bliss. Souls may depart this life unpolluted with mortal sin, which would consign them to everlasting misery, and yet bearing some stains of earth, which may not be admitted to His presence, before whose awful purity archangels veil their faces; and such, according to the fearful parable, are cast into that prison whence there is no egress till 'payment of the uttermost farthing;' till expiation of 'every idle word,' of which we are to 'give account.' This expiatory state is termed by theologians, 'purgatory;' and the Catholic doctrine is, that those who suffer there are aided by the prayers, almsdeeds, and other good works of their brethren still in the flesh, and the suffrages of the blessed spirits; exhibiting thus, blended in one tender 'communion of saints,' the church triumphant in heaven, the church militant on earth, and her suffering members in the middle state. Thus, Catholic charity ceases not with the last and offices rendered to these fainting frames. When eyes that beamed on us with kindness are closed for ever, when the intellectual light that blazed about and guided us is darkened, when the hearts that loved and trusted us are cold and stil [sic], then are we stimulated to new demonstrations of affection, by the very agony of our bereavement. And the church, whose every precept is founded on the deepest philosophy of human nature, knowing that the efficacy of prayer is proportioned to its urgency, (as her divine master 'in his agony prayed the more,') directs that they shall be offered under every circumstance that can animate hope, strengthen faith, or kindle charity. And, therefore, to her temples, where she receives the little child at 'the laver of regeneration,' and where she delights to bless the nuptial ring, she commands that we bring the bier; that, kneeling beside the dear remains of friend or relative, before the awful memorials of our redemption, surrounded by the relics of those who have gone before, and whom we believe to be confirmed in glory, in the very presence of the mercy-seat, where, less terrible but dearer than in the shekinah that filled the tabernacle of the early dispensation, the Almighty shrouds his glory beneath the sacramental veil, we may pour out our souls in fervent supplication, that those we mourn may be admitted to the mansions of eternal rest, and have their longing hopes crowned with everlasting fruition.

Id. at 598. There is also passing reference made to "the Mercy Seat Baptist Church" in an opinion from the Missouri Court of Appeals, but it is in reference only to the name of a church, and not in reference to the mercy seat invoked in these pages. Missouri v. Underwood, 530 S.W.2d 261, 263 (Mo. Ct. App. 1975).

336. DARRIN W. SNYDER BELOUSAK, ATONEMENT, JUSTICE AND PEACE: THE MESSAGE OF THE CROSS AND THE MISSION OF THE CHURCH 245 (William B. Eerdmans Publishing Company 2012).

337. *See also, e.g.*, *Leviticus* 16:2 (DRA) (quoting God's commandment to "enter not at all into the sanctuary, which is within the veil before the propitiatory, with which the ark is covered . . . .").

338. *See, e.g.*, *Luke* 3:11 (DRA) (stating "He that hath two coats, let him give to him that hath none . . . .").

339. For example, the Catechism of the Catholic Church provides:

> The *works of mercy* are charitable actions by which we come to the aid of our neighbor in his spiritual and bodily necessities. Instructing, advising, consoling, comforting are spiritual works of mercy, as are forgiving and bearing wrongs patiently. The corporal works of mercy consist especially in feeding the hungry, sheltering the homeless, clothing the naked, visiting the sick and imprisoned, and burying the dead.

CATECHISM OF THE CATHOLIC CHURCH 588 (2d ed. 1994) (no. 2447).

In this sense, mercy is generosity of spirit, self-sacrifice, and love for our friends, neighbors, and even our enemies. That is the sort of place that it is. It is, I suppose, a softening of the heart toward another.[340] It is an active, affective state expressed toward Debra. It is similarly directed toward poor, murdered Abby. It is more than a state or a feeling; it is a certain kind of action that seems to derive from that which is beneath a sacred hinge or a lid.

2. Opening the Lid

So, mercy as a lid. That is at least an image that makes mercy more tangible. But it is insufficient to resolve the primary dilemma of mercy—whether it is opposed to justice; whether it is a dilution of a legally correct punishment. I am going to attempt to assert here something I cannot quite grasp; that mercy "is a way of applying the law"—not opposing it.[341] Not diluting it. But fulfilling it. Completing it.

Gerald J. Bednar explains:

> Although aware of abstract principles, mercy attends primarily to concrete circumstances. There is no law of mercy in the statutory sense of the term. No recipe exists for when and how it should be applied. Mercy subsists in a different realm. Mercy resists concrete circumstances that need individual assessment. Mercy resists legal formulation. Nor is mercy an alternative to law. *Mercy is rather a way of applying rules and laws.* Jurisprudence that attends only to abstract principles or rules, therefore, can result in a mean-spirited application of the law.[342]

Now, nothing in South Dakota Codified Law section 24-13-7 commands the parole board to include a dose of mercy in their deliberations concerning a prisoner's application for discretionary parole.[343] Nor does any statutory text impose on them an obligation to love the prisoner. Indeed, were you to poll the members of the South Dakota Board of Pardons and Paroles immediately after voting on the release of any given prisoner, asking them each, "Do you love the prisoner?" or "Do you love the victim?" I would predict that they would rather

---

340. *See Dives in Misericordia*, *supra* note 9 (construing mercy). Pope John Paul II writes that mercy is essentially convertible with love:

> Jesus revealed that love is present in the world in which we live - an effective love, a love that addresses itself to man and embraces everything that makes up his humanity. This love makes itself particularly noticed in contact with suffering, injustice and poverty - in contact with the whole historical ""human condition," which in various ways manifests man's limitation and frailty, both physical and moral. It is precisely the mode and sphere in which love manifests itself that in biblical language is called "mercy."

Id.

341. *See* GERALD J. BEDNAR, MERCY AND THE RULE OF LAW: A THEOLOGICAL INTERPRETATION OF *AMORIS LAETITIA* 2 (2021) (e-book) (describing that the Catholic Church applies a set of rules and laws through mercy).

342. *Id.* at 51.

343. *See* SDCL § 24-13-7 (disclosing the standards for granting or denying parole).

sensibly and unanimously reply in the negative. Yet, we are commanded by divine law to do just that—to not only forgive, dignify, and mete out mercy, but, indeed, to love the convict.[344] Mercy is absent from a legal text like South Dakota Codified Law section 24-13-7, Bednar insists, because mercy does not even exist in a statutory sense.[345] Mercy is not at loggerheads with either justice or law. Indeed, without mercy, justice cannot be fully achieved. "Mercy," Bednar explains, "is the sensibility with Christians interpret the sense of the law."[346] Mercy might "produce a hug and sometimes a kick in the pants," depending on the circumstances.[347] Love might require greater liberality, elevated strictness, or something else. But love is, in any case, indispensable to the proper functioning of any law. Love is the means by which a legal text can be applied to a human being. Without it, there can be no justice.

Is this outrageous? William Temple, former Archbishop of Canterbury, for one, does not think so. Temple says: "It is axiomatic that love should be the dominant Christian impulse and that justice is the primary form of love in social organization."[348] Those who live their professional lives in the criminal justice system seem, therefore, even more called upon to love by virtue of their role in the courts of law and the administration of justice. Ought we to query about their love? Ought we then to swear in jurors by requiring them to take an oath to love the victim and the accused? Ought we to debrief our litigants by asking whether they loved their opponents? It is hard enough to love one's own clients, let alone the ruthless, single-minded adversary squaring off against us from the second counsel table. Or her client.

With Debra, if we are to speak about mercy, it is in a very particular sense as applied to her and her concrete circumstances. It is related to the question of calibrating punishment. Her release should not follow because she had been—and was being—imprisoned unjustly. She had been imprisoned justly, I believe, up to the point of her release.

By justice here, I mean "primarily in terms of retributions and punishments for transgressions and crimes committed."[349] I, for one, will not shirk retribution as a legitimate justification for punishment.[350] But I also mean procedural fairness—impartiality—as well as a kind of truth being reflected in the verdict; an

344. *See Hebrews* 13:3 (DLNT) (stating "Remember the prisoners, as-though having been imprisoned-with them . . . ."); *Matthew* 25:36 (DRA) (noting "I was in prison, and you came to me"); *Matthew* 25:45 (DRA) (quoting "I say to you, as long as you did it not to one of these least, neither did you do it to me."); *see also* Jeffrie G. Murphy, *The Justice of Retribution*, 2016 HEDGEHOG REV. 101, 103 (asserting that if individuals "are committed to the values of love and forgiveness, punishments far less than the wrongdoers actually deserve as a matter of justice.").

345. BEDNAR, *supra* note 341, at 52.

346. *Id.*

347. *Id.*

348. *See* LORD DENNING, THE INFLUENCE OF RELIGION ON LAW 30 (Canadian Institute for Law, Theology, and Public Policy, Inc. 1997) (quoting Temple).

349. HARINK, *supra* note 333, at ix.

350. *But see* JEFFRIE G. MURPHY, GETTING EVEN: FORGIVENESS AND ITS LIMITS 42 (2003) (offering that retribution as a justification for punishment "is perhaps little more than a metaphor left over from old theological notions of cosmic or divine justice . . . .").

assessment of guilt that corresponds to reality.[351] Mercy demands charity as well as nuance. Perhaps we could even say that doing the work of a lawyer—thinking, as we often say, as a lawyer—means thoughtful interpretation, particularized consideration, and delicate application of the legal text to human beings by means of active mercy. If Bednar and Temple are correct, this is the *only* way in which a lawyer should allow herself to think, to do, to speak, to listen—and to practice law. For lawyers especially, the lid must be opened and remain so, even when we are afraid, ambitious, or aghast at the deed which confronts us.

Debra received a fair trial in which participated counsel of the highest caliber, overseen by a seasoned judge of undiluted integrity,[352] a trial, I have no reason to doubt, decided by a jury of fair-minded men and women. More, the outcome—guilty of second-degree murder—was correct in that she did, in fact, commit murder. Justice, in that sense, was done and therefore was being served by Debra's continued incarceration because her punishment was true. It was correctly arrived at. Therefore, it was procedurally justified. In fact, in my view, it was also substantively just. It was carefully calibrated to her crime. Her release—when it was granted last September—was based on a fresh assessment and judgment that she had—at that point; *at that particular point* in space and time—been punished enough. The immense difficulty in arriving at this judgment—that this human being has now been punished enough for this criminal act—cannot be understated. It is a staggering idea that we might even be fit to engage in this sort of assessment; to judge another; to pass judgment; to calibrate a term of imprisonment. It seems to require of us that we judge others as God judges us, with divine mercy. But how?

How? How is it, exactly, that we apply mercy if not to simply curtail a sentence or to accelerate a release? I cannot say, exactly. Perhaps mercy transcends both the argument for a lesser punishment and a call for a more severe one; perhaps it even transcends justice. But I think it is closer to the truth to say that it *completes* justice. Medieval philosopher Thomas Aquinas says that "mercy does not destroy justice, but in a sense is the fulness thereof."[353] As for me, mercy remains obscure. But even if I cannot quite grasp its quiddity, I can nevertheless assert its necessity. I can call out to it. I can pursue it. Mercy is something that allows us to actually apply an impersonal legal text upon an individual person, though just how we are to do that, I am unable to say.[354] But I will continue to ask "how?" in spite of its seemingly impenetrable mystery. It seems to me to be a light worth following.

As the uncle I never met used to say, "I don't have the answers, just the questions."

---

351. *See Psalms* 82:2 (DRA) (equating injustice with partiality).

352. Retired Judge Martin was gracious and generous enough to discuss the Jenner case with me and respond to an earlier draft of this paper with many thoughtful, pointed, and well-placed criticisms, some of which I have attempted to address and others which I have been unable to.

353. THOMAS AQUINAS, SUMMA THEOLOGICA I q. 21 a. 3 (Beniger Bros. ed. 1947).

354. *See* BEDNAR, *supra* note 341, at 62 (stating: "Only people can extend mercy; laws cannot.").

Some scholars have argued that a parole board should never reevaluate a sentence grounded in proportional punishment; instead, a "parole board should ask whether a prison stay beyond the date of first release eligibility is necessary to serve the goal of public protection."[355] They assert that the only ground for denying parole should be credible evidence that the inmate presents a significant risk of offending if she is released.[356] There is some sense in removing from the parole board the task of re-weighing what represents a just punishment for a crime.[357] "In most states today, parole boards have effective authority to reevaluate any and all aspects of the judge's original sentence, including how much time a prisoner deserves to spend in prison for his offense and his criminal record."[358] There seems little sense in re-examining the trial judge's calibration of a measured, proportionate, and individuated sentence which typically involved significantly more evidence and a much more searching inquiry into the nature and circumstances of the crime than can take place during a parole hearing. An expectation that the parole board should continually re-assess and redetermine the fitness of a sentence can be reasonably called into question.[359] The severity of the crime remains a statutory factor, but, under South Dakota law, only one of fifteen factors.[360] The parole board has a much greater ability to assess the applicant's performance in prison than it does to retry the defendant for the crime or crimes committed, and so, it seems, much greater emphasis should be placed on the former. But the severity of the crime must still, somehow, be measured. And re-measured—re-judged—with each new parole hearing; again and again; for as many times as it takes to reach a decision to release the prisoner under supervision, to arrive at the statutory point in time of mandatory release without supervision, or to reach the point of the prisoner's natural death. The cycle of judgment and re-judgment must continue until it ceases.

I do not endorse the idea of doing away with a crime's severity as a legitimate factor in discretionary parole decisions. Ignoring it would have been especially inapt in Debra's case, given that the only reason she was even permitted to apply

355. Rhine, Petersilia & Reitz, *supra* note 324, at 297.

356. *Id.* One could frame the assertion with the presumption reversed just as well (and indeed better) thusly: A parole board should deny parole unless it is clearly persuaded that public safety is not impaired.

357. Here, things are admittedly complicated by the first true/correct/just sentence pronounced by Judge Martin and the second also (at least in my view) true/correct/just commutation of that sentence by Janklow. Some see Janklow's commutation as having undermined Judge Martin. I do not see things that way. While it is correct to say that one sentence cannot be different from another one as applied to the same defendant at the same time and in the same circumstances unless at least one of them is unjust, Judge Martin and Janklow made decisions separated by more than a decade. More, they made different kinds of decisions, substantively and procedurally, from one another, and in different roles as state actors. And so, I do think it is possible for them both to have been correct—and just. I do in fact see them both as prudent jurists.

358. Rhine, Petersilia & Reitz, *supra* note 324, at 298.

359. *See id.* (noting that "we have no standards to guide" the manner in which "discretion over lengths of prison terms should be apportioned between judges and parole boards.").

360. SDCL § 24-13-7(3). *See generally* Bernard Connaughton, *Parole Reform Must Happen*, 89 CATH. WORKER 1 (2021) (complaining of parole boards that deny "parole based on one, unchangeable factor – the nature of a person's crime – and not a person's age, many accomplishments in prison, personal transformation or network of support.").

for parole in the first place was because Janklow commuted her sentence in 2002, the effect of which was to make her immediately eligible for parole. The key word here is "eligible." Janklow clearly did not contemplate that her parole would be granted more or less automatically without a multi-pronged assessment by the Board of Pardons and Paroles; otherwise, he would have simply commuted her sentence to the degree necessary to permit her to retroactively "flat" her sentence, so long as she was in compliance with her institutional rehabilitation plan. Or, Janklow might have simply pardoned her. He did not. His decision was more measured than that, and it was to be given its due by virtue of the parole board *not* simply handing Debra a "get out of jail free card."

Still, if the only significant factor remaining for consideration in connection with Debra's ongoing applications for parole was a proportional sentence, it ought to be recognized that the parole board has limited means at its disposal to undertake a comprehensive assessment, at least relative to the kind of searching analysis that a sentencing court or a Governor would have undertaken. Parole hearings are rather truncated. The due process safeguards may also be diminished by comparison to trial court safeguards, as underscored by Debra's assertions of board conflicts of interest. And so, the inherent limitations of the Parole Board, relative to a Governor or a Circuit Court, in calibrating a judgment with precision, ought not to go unremarked upon.

3. Peering Within It

But back to mercy. I have proposed the following tentative formula for mercy in the context of Debra: It is the application of kindness and charity to the prisoner—adhering to the recognition of Debra as a person—while re-assessing the proposed punishment in the form of continued incarceration.[361] "Punishment" here is a potentially loaded term since we are knitting with a woven strand of multiple objectives associated with imprisonment, including, for example, rehabilitation.[362] This formulation insists on an objective assessment of *all* the relevant circumstances—including the community and the victim—while maintaining a focus on Debra, the human being. The subjective and the objective are not alternatives to one another. Christian teachings speak of a *subjective* justice as "behaviour that is based on the will to recognize the other as a person . . . ."[363] It is not the sole criterion by which justice is implemented, but it informs unceasingly any administration of a rule-bound or socially-situated intersubjective analysis.[364]

361. *See supra* Part II(I) (framing mercy).

362. *See supra* text accompanying notes 349-352 (discussing justifications for punishment).

363. PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH, 201 (June 29, 2004), https://www.antoniano.org/carbajo/FST/Readings/Magisterium/EN_Compendium_CST.pdf.

364. *Id.* "[Justice] . . . from an objective point of view, constitutes *the decisive criteria of morality in the intersubjective and social sphere*." *Id.*

The effort to recognize the prisoner as a person must be embedded in any objective implementation of the rule of law, including measuring out a bit of retribution; fitting the sentence to the crime.[365] We must always be merciful, but mercy is not simply another word for tenderness, nor any ruling in the prisoner's favor, nor any decision with which the State's Attorney is disappointed. Nor is it merely restraint. Instead, it is a virtue that we can never abandon. It is a cloak we constantly patch and never shed. It is a place we need to continually visit. It is a lid that must be tirelessly re-opened. It does not guarantee a particular outcome. Yet its role is essential. At its core, it is love.

This is troubling, I think. But mercy can be troubling.[366] When the prisoner pleads for mercy, she does so in the context of praying for a particular outcome; it is true. When one "throws herself on the mercy of the court," it implies the hope for leniency, not love. She asks for less punishment. She desires freedom. She is underscoring her preference for a sentence of less rather than more, a preference opposed by the state. This does not mean that only one side has a reservoir of mercy to draw upon or call down. Both the prosecutor and the defendant must embrace mercy equally, though their agendas are necessarily opposed. Both are divinely commanded to be merciful to both offender and victim, difficult as it may be.[367]

Perhaps when the prisoner pleads for mercy, she is asking for an acknowledgment that the sentence will be imposed on her, a human being. She is reminding the fact finder of this essential fact: that the law is confronting flesh, her own. When the state embodies mercy, it acknowledges the defendant's humanity. And—commanded as we are to love one another—the defendant prays that we love her, though not necessarily release her, while the prosecutor reciprocates, though not necessarily with a position which the defendant joins. Justice is not akin to manufacturing widgets of a certain style. Nor is it a tennis match between advocates, each trying to score more points than the other. It is about imposing justice on individual flesh and blood, men and women.

Mercy is this reminder—that the defendant is no less a person than the defense attorney, the prosecutor, the bailiff, the court reporter, the judge, the victim, and anyone else in the courtroom or outside of it. Mercy is an insistence that we orient our decision-making toward the prisoner as a subject rather than as an object; that we see the person who is the focus of the proceedings. That we meet their gaze in pronouncing the decision and do so without meanness. That we see her. Without unpleasantness. Without misplaced sympathy, either. Fairly. Squarely. Lovingly. And authentically.

A rejoinder here is fair and equally just. It asks: "And what of the person of Abby Lynn Jenner?" An advocate for her ought to claim the stage. Was not she equally a subject who was treated as if she were an object and cruelly snuffed out

365. *See also infra* note 370 (discussing retribution).

366. "Mercy troubles the faint-hearted, because it requires mature judgment and discernment." BEDNAR, *supra* note 341, at 65. "It leads to ambiguity and uncertainty." *Id.*

367. Indeed, it is probably not just difficult but nearly impossible. *See Matthew* 19:26 (DRA) ("With men this is impossible: but with God all things are possible.").

of existence? Oftentimes, the victim of a crime will participate in the fact-finding which underlies a parole application. Victim engagement can be critical, and Abby, of course, cannot speak. (Studies do show that victims' input can affect the outcome of a parole hearing; mostly "in the direction of denial of release.")[368] Should not Abby's sad fate be foremost in any consideration of Debra's parole? Does not the voiceless Abby deserve a voice?

Yes. A punishment ought to be meted out upon Abby's killer. And, for more than three decades of Debra's legal life, it was by means of an initially perpetual and later indefinite incarceration. Today it continues to be meted out insofar as the conditions and constraints of her parole.[369] It will be thereafter parceled out in additional measures insofar as the felony conviction mars her record and opportunities.

The question presented, rather, is how much *more* punishment ought to have been added to it. When has Debra been punished enough? If she ought not to have been paroled, then to what end would additional incarceration punishment have served?[370] Proportionality may suggest that she was past due for release on

368. Rhine, Petersilia & Reitz, *supra* note 324, at 281.

369. Debra will stay under the supervision of a parole agent until September of 2039, according to the calculations of her counsel, Raleigh Hansman. E-Mail from Raleigh Hansman, counsel for Debra Jenner, to author (Oct. 5, 2021, 13:13 CST) (on file with author).

370. *See* Richard Lowell Nygaard, *Crime, Pain, and Punishment: A Skeptic's View*, 102 DICK. L. REV. 355, 357-58 (1998) [hereinafter, Nygaard, *Crime*] ("Clearly, under the 'crime equals punishment' equation, severe punishment is called for [when the crime is severe]"). It is the wrongness of the crime which generates a punishment; the more heinous the offense, the lengthier the prison term. This explains the relationship between criminal conduct and prison sentence, but it fails to give a justification or a reason for the punishment. Why does an especially callous criminal act produce an especially long jail term? A functionality must be articulated. We cannot say: "Because that's the way it is." Generally speaking, there have been only four reasons by which we justify punishment: (1) deterrence; (2) containment; (3) rehabilitation; and (4) retribution. *Id.* at 361-63. *See also* CHARLES W. THOMAS, CORRECTIONS IN AMERICA: PROBLEMS OF THE PAST AND PRESENT 36 (Sage Publ'ns 1987) (listing the three things "that we seek to do or gain when we impose punishment" as (1) deterrence; (2) rehabilitation; and (3) retribution). I will sidestep an analysis of whether containment is ever a legitimate goal of sentencing and simply consider it as a justification and aim, legitimate or not. Deterrence and rehabilitation clearly have legitimacy in general terms (though I am very skeptical of any claim that Debra needs to be indefinitely incarcerated in order to deter other mothers from stabbing their three-year-olds). But does retribution have any legitimate role? Third Circuit Court of Appeals Judge Richard Lowell Nygaard answers this question with a firm "No." He claims:

> Retribution is revenge plain and simple. We punish offenders who violate the law because we are angry and want to get even. Retribution is about power. It is about force. It is about repression. Under this theory, the offender's *violation* of the law legitimates our vengeful punishment and absolves us of any injustice or transgression we may commit upon her because the offender *deserves* some suffering for violating the social order. However, power creates the cruelty of indifference; force sacrifices justice to achieve peace. And, any peace gained by these means is always an uneasy one that is lost when the force of power is not present.
>
> We rationalize punishment by various means. But when the penological smoke clears, punishment is psychologically for the punisher. We like to punish, and our rationale for doing so is really quite simple. The ugly truth is that we punish because it makes us feel good to get even. I am opposed to any penological expression of revenge.

Nygaard, *Crime*, *supra* note 370, at 363. *See generally* Richard Lowell Nygaard, *On the Philosophy of Sentencing: Or, Why Punish?*, 5 WIDENER J. PUB. L. 237 (1996) (outlining the development of criminal sentencing from a philosophical standpoint); Matthew A. Pauley, *The Jurisprudence of Crime and Punishment from Plato to Hegel*, 39 AM. J. OF JURIS. 97 (1994) (same). I think Judge Nygaard has either

parole.[371] Still, the horror of her crime is likely out of proportion with other mothers who have killed their children. And perhaps other fathers who have. The heinousness factor for Debra is very much off the charts. And the fact that Debra wielded a toy airplane gives all of us the shivers.[372] How do we calculate the correct number of years? How can we possibly translate the inconceivable into some slice of the integers which mark her lifespan? How do we arrive at a number? My only answer is that we must scout for it with a lamp of mercy in hand, and not simply convert her term-of-years sentence of imprisonment into a life term by exasperation or inaction or inertia.[373]

---

too-narrowly construed retribution, too broadly construed rehabilitation, or else he has omitted an additional justification for punishment. A woman who commits an unjustified, callous, intentional act of harm against a helpless person, it seems to me, ought to receive some measure of punishment even if it is convincingly demonstrated that (1) her punishment will have no deterrent effect upon other would-be offenders; (2) there is no need to contain her to prevent additional crimes; and (3) the punishment will not serve to rehabilitate her in in any way whatsoever. Take a twenty-five-year term of imprisonment, for example, as a reasonable sentence. If we can find some agreement upon the justness of such a sentence for such an act, even in the absence of (1) deterrence; (2) containment; or (3) rehabilitation, then perhaps we have defined rehabilitation too narrowly. Perhaps receiving a just punishment is itself rehabilitative in some way. It is a sort of participation in justice as a means to correct an injustice for which the defendant is responsible. I do not mean rehabilitation in terms of the receipt of programming, education, and enrichment within the prison walls, but simply by virtue of the punishment fitting the crime, the defendant may be, in some measure, mended. A mending, I think, is not "revenge plain and simple." Nygaard, *Crime*, *supra* note 370, at 363. Or, alternatively, perhaps this sort of mending is not rehabilitation *per se* but still contains some value for the defendant—and also, perhaps especially, for society—apart from deterrence or containment. A sentence which fits the crime attempts to rebalance that which has been unbalanced, disrupted, and mangled in the social fabric; a kind of re-stitching of that which the defendant rent. *See* ETIENNE GILSON, THOMISM: THE PHILOSOPHY OF THOMAS AQUINAS 306-07 (Laurence K. Shook and Armand Mauer, trans., 2002) (claiming "there is nothing more to a sanction than the strict observance of the law, the satisfaction found in order, and the realization of a perfect balance between acts and their consequences."). "The defendant, we demand, should participate in the correction. This "is not to *cancel* the crime" because, after all, "what is once done can never be made undone." WHITLEY R.P. KAUFMAN, HONOR AND REVENGE: A THEORY OF PUNISHMENT 5 (2012) (citing Plato 1989, Laws, 934a) (emphasis added). But it is to *address* it. Admittedly, though, this essentially amounts to a claim that lengthy prison terms for heinous offenses "are good only because we cannot do without them," CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 13 (H. Paolucci, trans. 1963), and, as such, it is a flimsy one indeed. It is like the worn-out parent who responds to a child's insistent "why's" with a snarly "Just because!" Philosopher Georg Wilhelm Friedrich Hegel dresses it up better when he says that we presuppose that "punishment is inherently and actually just" by means of insisting that crime be annulled or somehow reversed, "not because it is the producing of an evil, but because it is the infringement of the right." GEORG WILHELM FRIEDRICH HEGEL, THE PHILOSOPHY OF RIGHT 70 (T.M. Knox, trans. 1942). But it amounts to the same argument.

371. *See S.D. Woman Who Killed Daughter Seeks Parole*, SIOUX CITY J. (Apr. 20, 2005), https://siouxcityjournal.com/news/state-and-regional/s-d-woman-who-killed-daughter-seeks-parole/article_b7de1975-00ef-54dd-9759-6fa907d0bd63.html (quoting Debra's attorney Ron J. Volesky who said "that the average prison term for a woman who kills her child in South Dakota is 40 years, and most of them are paroled in less than six years.").

> A Watertown woman who killed her 10-month-old son in 1987 by leaving him to freeze to death in a shelterbelt was not released until her 12th parole hearing in 1999. Pamela Ruml, who was 17 at the time of the death, was convicted of first-degree manslaughter and given a 38-year prison term.

Id.

372. I take up the "toy airplane problem" *infra* at Part II(J)(2).

373. I will emphasize—and emphasize again—that this essay should not be read as suggesting that the South Dakota Board of Pardons and Paroles has ever rejected Debra's parole applications out of hand, or without serious, searching, careful assessment. I am trying to insist, however, that we continue to do so.

It might be argued that retribution and proportionality (illuminated by Mercy) are not the only considerations; that we ought to also map redemption. Can Debra be redeemed? Or is she irredeemable? It seems to me that these are not the right questions. They are questions for Debra and her final judge. No one is irredeemable. We lack both the authority and the judicial machinery to redeem others. It was not for the parole board to either grant or deny Debra a chance at redemption. Redemption is not on this particular table. It is located elsewhere, somewhere above.[374]

Rehabilitation, on the other hand, can fairly be considered.[375] Could more rehabilitation be expected from Debra? More than thirty years' worth? Does the ideal of punishment which claims that there is a medicinal quality to its effects, indeed, demand more years from Debra?[376] Might the prisoner be purified by greater punishment?

The verdict of guilty was pronounced on Debra—and pronounced justly by a jury of her peers in 1987. A just sentence followed—life imprisonment without the possibility of parole. Then, that sentence was modified by the Governor. There are some who feel that Janklow committed a serious error in commuting Debra's sentence to 100 years. They speculate that he did not have all of the evidence in front of him; that he lacked, for example, Abby's autopsy photographs. And truly, although the frenzied act appears to have been as unpremeditated as it was unexplainable, there seems to have been a space in the narrative where Debra might have abandoned the toy airplane as an implement of death and traded it for a knife. Surely there had not been a knife in Abby's bedroom, unless Debra initially entered Abby's bedroom armed with a knife. How do we weigh Debra's trip from the bedroom—to the kitchen where the cutlery presumably lay—and, having retrieved a knife, back again to Abby's room? Was there space enough for premeditation? This troubling blank space in the narrative is not a sound enough reason for anyone to rest a conviction of first-degree murder upon it.[377] But it is a hole in the narrative that may have proved capable of swallowing any chance of parole for Debra. Perhaps, some feel, Janklow never

374. At most, the courts may take pains to preserve the possibility of redemption. *See* Brainard v. Francis, 2 Mart.(n.s.) 150 (La. 1824) (reasoning that a strict application of debtor imprisonment statutes would render the debtor "truly a prisoner without hope; without any means or prospects of redemption.").

375. SDCL § 24-13-7(12).

376. Thomas Aquinas construes punishment as medicinal:

> Punishment is inflicted as a medicine that is corrective of the sin, and also to restore right order violated by the sin. Punishment functions as a medicine inasmuch as fear of punishment deters a man from sinning; that is, a person refrains from performing an inordinate action, which would be pleasing to his will, lest he have to suffer what is opposed to his will. Punishment also restores right order; by sinning, a man exceeds the limits of the natural order, indulging his will more than is right. Hence a return to the order of justice is effected by punishment, whereby some good is withdrawn from the sinner's will. As is quite clear, a suitable punishment is not assigned for the sin unless the punishment is more galling to the will than the sin was attractive to it.

THOMAS AQUINAS, COMPENDIUM THEOLOGIAE ch. 121 (Cyril Vollert, trans.) (1947), available at https://isidore.co/aquinas/english/Compendium.htm.

377. *But see* Appellee's Brief, *supra* note 41, at 10 (quoting Debra as referring to Abby's murder as a "horrible premeditated act.").

considered the evidence that suggested this was not a spontaneous crime arising out of snapped nerves, exhaustion, or a momentary loss of control.[378]

Or perhaps they feel that even with mercy properly deployed, a sentence of a full century of incarceration is quite coherent for Debra. One may conclude against parole without necessarily shortchanging mercy. These opinions, varied as they are, if not equally true to the same degree, are at least proportionately reasoned. They would withstand an appeal on a deferential standard of review. They fall within the ordinary scope of discretion for an authoritative decision-maker. But they risk missing the intersection where Debra was residing prior to her release at the South Dakota Women's Prison. The intersection is a crossroads between continuing her incarceration indefinitely—perhaps for life, the sentence that was originally imposed—and parole.

I would submit that it might also have been entirely just to continue to incarcerate Debra, to continue to deny her parole. Her crime, insofar as proportionality and due measure are concerned, could certainly justify imprisonment for life.[379] Her crime was originally calibrated, by a learned, wise, and virtuous judge having before him all the relevant facts, to a life sentence without the possibility of parole. His decision, at the point in space and time when it was made, was, in his judgment (and mine), entirely just. Indeed, Judge Martin could not have ruled otherwise, statutorily speaking, since her sentence was a mandatory one. Moreover, even following Janklow's intercession, as the statute provides: "A prisoner is never *entitled* to parole."[380] Parole is always discretionary. Therefore, a new set of mercy-embodied judgments was contemplated. There was never any guarantee of Debra's release on discretionary parole.

"However, parole may be granted *if* in the judgment of the Board of Pardons and Paroles granting a parole would be in the best interests of society and the prisoner."[381] True, Janklow reshuffled the deck by insisting that her parole-ability be considered—and regularly reconsidered, if it were not granted. The question posed might be considered as a simple one—one of best interests. But it is far from simple or easy. It must be one of a thoughtful assessment with many important factors held together by mercy, that divine glue. For myself, after many hours of reflection and analysis, I have not reached a conclusion. I do not know how I would have voted in September of 2021—parole or nay? It is an enormously difficult question. When I had the chance, at a different point in space and time, I voted nay. I said no to her. So did the second individual on our two-person panel.

---

378. Janklow's papers are kept at the University of South Dakota's ID Weeks Library. Unfortunately, although those files do contain numerous commutation consideration papers from the relevant time period, none of them speak to the Debra commutation. Given that it was a very serious crime and a high-profile case, I expect it may have merited its own banker box. Somehow, that banker box has gone missing.

379. *See* THOMAS AQUINAS, SUMMA THEOLOGICA II-II q. 108 a. 2 (Benziger Bros. ed., 1947) ("the *virtue* of vengeance consists in observing the due measure of vengeance with regard to all the circumstances") (emphasis added); *see also Proverbs* 13:24 (NIV) ("Whoever spares the rod hates their children, but the one who loves their children is careful to discipline them.").

380. SDCL § 24-15-1.1 (2013) (emphasis added).

381. *Id.* (emphasis added).

At that point, in 2013, it was not yet time. But I did feel a warmth and a hope for Debra upon receiving notification of her being granted parole in 2021, not disappointment. I was glad for her.

I know from experience that the members of the South Dakota Board of Pardons and Parole face a difficult task with each individual who appears before them. All that I am prepared to advance is a suggestion—that the parole determination be made carefully, thoughtfully, respectfully, and with a quantum of mercy.[382] And from all appearances, the decision to parole Debra last year was undertaken in just such a manner. As were the numerous decisions to deny her parole prior to that last hearing.

J. THREE FINAL POINTS: THE JENNER PROBLEMS

Three additional points remain. The first is the role of the span of years in which Debra continued to insist on her innocence and in which she oversaw—or at least implicitly condoned—a fundraising campaign to achieve her release, falsely propounding a theory of an unidentified assailant. The second is what I'll call the "toy airplane problem." The third—suggested by this essay's title—are the remarkably inconceivable aspects of her horrible crime. I address each seriatim.

1. The Fundraising Factor

Retired Circuit Court Judge and former Attorney General Barnett adduced that Debra's incarceration hourglass did not even begin to clock her time until February of 2003, when she first publicly admitted her guilt. He characterized Debra's innocence campaign as a "scam." The latter is not unsupportable, but the former goes too far. Fourteen years in prison should not count for naught. As a matter of legal strategy, for Debra to have adhered to an actual innocence platform when she was under a life sentence with no possibility ever for parole was sensible, if dishonest.[383] Debra's substantial delay in admitting guilt was certainly a relevant factor in assessing her eligibility for parole, but it is a factor that dimmed with each passing year. Barnett's arguments were once compelling. By 2021, they carried much less force. By 2021, Debra had simply served significantly more time behind bars.

Still, Debra's long-running scam to finance her legal costs is a factor well worth considering in weighing the prudence of paroling her. It is a blemish. And a dark one. Considerations of the prisoner's rehabilitation are sound, and Debra could not be genuinely rehabilitated while she still wove falsehoods about her

382. This should not be interpreted as any slight against the Board of Pardons and Paroles, nor as a suggestion that their decision making has been impartial, biased, or inadequate.

383. Amended Verified Complaint, Ex. 1, *supra* note 47, at 4.

culpability in order to generate coin for more lawyers.[384] Still, Debra was not sentenced for her scam. And even if she had been convicted of a scam crime, the typical sentence would not be measured in multiple decades.[385] It is not inappropriate to weigh Debra's fundraising scam in the balance, but it is inappropriate to deny her parole as a means to punish her for it.

2. The Toy Airplane Problem

The natural reaction to listening to the gruesome details of Abby's murder is to wince and recoil at Debra's use of her son's toy airplane in the attack upon her daughter. This metal plaything seems at once deeply symbolic and extremely troubling.[386] It is a perversion—like a murderous clown, a fanged infant, or the scene when Christine removes the Phantom's mask to release an even more grotesque mask.[387] It is something from a horror movie. Our responses are not universal; some respond to certain images or tropes more than others.[388] But it is undeniable that certain sorts of penetrative and primordial images get to us. The black hairs sprouting from the center of Count Dracula's palm makes *our* hair stand on end.[389] These sorts of images concentrate a response. They have the effect of a slap in the face.[390] They assault our sensibilities. They unbalance us.

---

384. I can criticize Debra's fundraising without besmirching in any way the very fine lawyers who have represented her with honor and zeal.

385. *See* Amended Verified Complaint, Ex. 1, *supra* note 47, at 3 (quoting Board of Pardons and Paroles member Dennis Kaemingk addressing Debra in her February 2002 hearing: "Our concern now is, you were trying to raise this money out there, and quite frankly, I think it borders on theft by deception."). In South Dakota, theft by deception is a recognized offense. SDCL § 22-30A-3 (2017). In Debra's case, assuming her misleading website campaign could be charged out as grand theft, that crime is classified as a Class 4 felony if the amount in question was between $5,000 and $100,000. SDCL § 22-30A-17 (2017). A Class 4 felony is punishable by up to ten years imprisonment. SDCL § 22-6-1(7).

386. Symbolic of what? I suppose the toy airplane can signify an inversion of the natural state of affairs in a family home—in which a toy is intended for children and is meant for play. But here, an adult wields it, and does so for a purpose as opposed to play as evil is opposed to good—as an implement of maiming and death directed at an innocent child by the child's parent.

387. *See* STEPHEN KING, IT (1986) (murderous clown); THE BROOD (New World Pictures 1979) (killer kids); THE PHANTOM OF THE OPERA (Universal Pictures 1925) (unmasked foe); *see also* Joanne Cantor, *"I'll Never Have a Clown in my House" – Why Movie Horror Lives On*, 25 POETICS TODAY 283, 297 (2004) (observing: "Certain visual images, such as attacking animals and physical deformities, automatically arouse fear").

388. *See* Noam Meiri, Zeev Schnapp, Amichi Ankri, Itay Nahmias, Amnon Raviv, Omer WAgi, Mohamad Hadad Saied, Muriel Konopnicki & Giora Pillar, *Fear of Clowns in Hospitalized Children: Prospective Experience*, 187 EUROPEAN J. OF PEDIATRICS 269, 270 (2017) (calculating the incidence of moderate and severe coulrophobia among children at 1.2%). I recently viewed the first GAMERA film and found myself cringing at the unnaturalness of the monster—at once both ridiculous and unsettling—a giant turtle which walks as a biped. GAMERA: THE GIANT MONSTER (Daiei 1965).

389. BRAM STOKER, DRACULA (chapter 2) (1897), available at https://www.gutenberg.org/files/345/345-h/345-h.htm ("Strange to say, there were hairs in the centre of the palm."). *See also* Hawkins v. McGee, 146 A. 641 (N.H. 1929) (the "hairy hands" contracts case which, as part of the typical 1L curriculum, also makes law students squirm).

390. *See* Matthew Hudson, Kerttu Seppala, Vesa Putkinen, Lihua Sun, Enrico Glerean, Tomi Karjalainen, Henry K. Karlsson, Jussi Hiryonen & Lauri Nummenmaa, *Dissociable neural systems for unconditioned acute and sustained fear*, 216 NEUROIMAGE 1, 2-3 (2020) (investigating "the neural mechanisms involved in generating acute fear responses after threat onset and those supporting sustained anticipatory fear when the threat is not yet present" in subjects viewing horror movies).

Now, there are gradients of horror and ghastliness. I am not a criminal lawyer. I live an insulated and generally bucolic life. Most of the dread I encounter is of the fictional variety. There are tame comic books intended for ages ten and under featuring ghosts. There are mildly frightening scenes in certain Disney movies. There are the *Goosebumps* books, Creepypasta, and PG-13 slasher flicks. And then there are horror films like *It* and torture epics like *Saw*, which are so over-the-top that they are unwatchable; sick; appalling; nauseating.[391] But I am not talking here about the level of gore, but rather "tricks" that narrators can employ to amp up an emotional response. The toy airplane in Debra's hand functions in this way. It is outsized.

Within a narrative, certain imagined details pull on us with greater force than others. A skilled novelist, a screenwriter, or a film director can use particular details to great effect. A well-chosen detail can provoke a visceral reaction with associated feelings of anxiety, fear, disgust, and discomfort. In the parole hearing context, emotions are not irrelevant, and the typical visceral response to the toy airplane element of Debra's act is authentic. Still, an emotional response has the possibility of overloading the decision-maker, overwhelming reason and judgment, or, at a minimum, resulting in a particular detail playing an outsized role in assessing the gravity of the offense.

I am not suggesting that the toy airplane is a problem because it is fictional. It is not made up, although it bears emphasis that the evidence was far from conclusive that the toy airplane was actually wielded by Debra. The state, not unreasonably, perceived the effect of the toy airplane and wove it directly into the narrative. The state suggested that Debra entered Abby's bedroom in the middle of the night, "stepped on a toy airplane left on the floor and snapped."[392]

I am not averring that the toy airplane is unimportant, nor that it should be ignored or excluded as evidence. My point is that its ability to horrify us and even make the re-imagined events of April 5, 1987, unwatchable—unviewable—is out of proportion to its actual significance. The intensity of an attack on Abby is relevant, but the gruesomeness of an event is not. True, a bullet to the chest is less reprehensible than a death by torture.[393] Both are cruel, but one is *crueler* than the other. These are grim comparisons, but necessary ones. The emphasis on a toy airplane implement, however, is outsized. Both the state and defense counsel

---

> In addition to generating immediate survival responses, fear systems also modulate vigilance in anticipation of threat caused by environmental cues, perceptual uncertainty, and ambiguity that elicits a sustained fear prior to actual encountering of threat . . . giv[ing] rise to subjective feelings of anxiety, tension, suspense, dread, or foreboding . . . .

Id. at 2.

391. *See infra* note 400.

392. Steve Young, *Would DNA Free Mom Convicted of Murder?*, ARGUS LEADER, Aug. 6, 2000, at 1A, 4A.

393. *Compare* State v. Piper, 2006 SD 1, ¶¶ 89-96, 709 N.W.2d 783, 816-17 (upholding a death sentence when a killing involved torture), *with* Godfrey v. Georgia, 446 U.S. 420, 422-33 (1980) (reversing a death sentence where defendant killed his wife and his mother-in-law with a single shot each to the head, reasoning that the murders did not reveal depravity because, *inter alia*, the victims died instantly).

seem to have recognized it as such. We must caution ourselves against meting out punishment in greater measure on account of an act's emotional triggers.

3. Inconceivability

Not long ago, an obituary appeared for a World War II veteran in the Sioux Falls *Argus Leader*. Lieutenant Colonel Wendel Hanson passed away on June 15, 2021. He was 101 years old and counted among his accomplishments his military service as a B-25 combat pilot. In 1944, he was introduced to a teacher by the name of Helen Brumbaugh at a high school where he was recruiting students to enlist in the air force. They spoke in the hallway for only a few moments, but so smitten was he that he was inspired to write her a letter asking for her hand in marriage.

She mailed her curt reply promptly, writing: "I do not even know you well enough to say no."

Eventually, of course, the two married. Otherwise, it would not have been mentioned in the obituary. But Helen Brumbaugh's initial answer to Lieutenant Colonel Hanson's marriage proposal is the point I want to consider. Initially, she refused to accept his proposal; she also declined to reject it, reasoning that she lacked sufficient knowledge at that point in time to do either. Since she was without ample sensory data and knowledge to form a judgment either way, she declined to do so. Lacking the ability to conceive the rightness or the wrongness of marrying "Wen" Hanson, she simply demurred. She deferred judgment.

Similarly, I consider the primary stumbling block in any evaluation of Debra's parole application to be the incomprehensibility of what took place in Abby's bedroom in the wee hours of that Sunday in 1987. In weighing the gravity of any given offense in my mind, I find myself engaging in a sort of empathy. Not empathy in the sense of forgiveness or even sympathy, really, but as a means by which to better assess what the offender did, how they did it, and why. To come to grips with it. To grasp it and come to terms with it in some way. To "get" it in some way. To see the criminal event through the perpetrator's eyes in order to comprehend it.

With Debra's frenzied attack, our imagination fails us. Our ability to approach any sort of rough understanding of the event falls short.[394] It is too dark. Lacking even a rudimentary understanding, we can find ourselves responding in the same way that Helen Brumbaugh did to her future husband's initial proposal and demurring. We do not even know enough about what Debra did to refuse her parole—let alone grant it. We cannot grasp it. Indeed, perhaps Debra cannot grasp precisely what happened, either.

If we again utilize the way that horror movies work in scaring us the most with what is left unseen, this dovetails with the observation that the unknowability of Abby's woeful death gives it an additional veneer of horror. It is not what the

394. Debra has been quoted as commenting to her friends in the days after Abby's murder "on a spiritual warfare going on inside her." Appellee's Brief, *supra* note 41, at 13.

film director shows us which most causes our hearts to race, but what remains unseen. That which might lurk there; that is what causes an audience to panic. In a sense, Debra's offense is even more unsettling than a dark shape in the water or a shadow in the closet that we cannot quite make out. With Debra's offense, even when we turn a bright lamp on the thing and examine the evidence—even if we look directly at what it tells us, it remains a puzzle with all of the center pieces missing. It might be visually observable, but it remains utterly incomprehensible. Even when we look at it, we cannot see it. We stare at a void. It is not merely unknown but unknowable. Thus, we demure for lack of knowledge. We give up.

And it is not merely that we cannot see it; it is that we do not want to see it. Some fender benders cause drivers to slow down and gawk as they drive by. No small number of onlookers even gawk at the nastier car crashes. But for most, we turn away—both out of a sense of respect and an instinct of self-preservation. There are some things we do not want to see; we may even contort ourselves to avoid seeing an atrocity. We may contort a fair understanding of what happened. We push the thing away and reconfigure it into something that it is not. We "buffer our sensibilities from the brutality" of it.[395] Those contortions can have the effect of blurring our faculties; our lenses, judgment, and human reason, to the point of misapprehending the event.[396] If something is unspeakable, it can also be unknowable, at least without engaging a disciplined attention to matters.[397]

I realize here that I seem to have fallen prey to a contradiction. In the last section, I asserted that caution was necessary when it came to the toy airplane. I claimed that our view of that detail could overcome our faculties of judgment without the conscious exercise of restraint and focus. In a sense, I identified a problem of "seeing too much." In this section, I am complaining of seeing too little—of "seeing nothing"—an empty space confronts us when we try to reconstruct how Debra went from an evening of restaurant chatter and watching *Hoosiers* to carving up her child. It is incomprehensible. It is beyond our ken, and apparently, hers, too. But both problems must be addressed in order to identify how problematic the decision to grant Debra parole really was and what it involved: both the too-vivid and the too-obscure. We should at least be willing to think deeply about her fate and not turn away from her, either on account of the difficulty of seeing her offense—or on account of the squeamishness that its too-visible parts generate in us. Adhering to the precept of mercy requires this—to re-center our examination of Debra's offense while not losing sight of her.

The erudite reader will notice that I have twice now fallen back on references and comparisons to popular horror films in order to try to explain Debra's

395. Roxane Gay, *The Careless Language of Sexual Violence*, *in* ROXANE GAY, BAD FEMINIST: ESSAYS 130 (2014).

396. *See id.* at 128-36 (examining a journalist's report of the gang rape of an eleven-year-old girl which avoids seeing the victim and instead focuses on "how the men's lives would be changed forever, how the town is being ripped apart," and so on).

397. This difficulty confronts both the defense attorney and the prosecutor, it seems, but in different ways: the jury may be over-anxious to find the defendant to be the culprit so as to avoid further sifting of reasonable doubt; the jury may also be too quick to conclude that some unidentified person other than the defendant must be to blame.

applications for discretionary parole.[398] That is not out of animus toward Debra, nor sarcasm, but because of a lack of analytical tools.[399] I am sure that stalwart judges, prosecutors, and defense attorneys do not relapse into the narratives of *Saw* or *It*.[400] But because I lack the professional rubrics and frameworks for the task, those are the stories I retreat to. But as I do so, I want to strenuously resist characterizing—as the films do—the offender as a monster, as a mask; as an "other," or as a bogeyman. I want to continue to insist, as I believe in my heart, that Debra is no more a monster than I or any of us. That she is every bit a person as anyone else. Her deed was black. Her heart is not.

Not long ago, my son turned twenty-two years of age. He demonstrates wisdom far beyond his years, so I asked him what sort of sentence he thought would be appropriate for a mother who stabbed her defenseless toddler to death in the middle of the night. "How many years should she serve?" I asked him.

He replied briskly, "None at all."

When I pressed him, he explained that the murder had to have been the product of a mental illness. There was no other way to account for it. This turned to a discussion of the *M'Naughton* rule, its justifications, and how it might be too limited in some circumstances.[401] I ventured my own theory that the insanity defense might be replaced by an analogue to the insane delusion doctrine for setting aside a decedent's last will and testament, which simply asks: "Was the bequest caused by the decedent's insane delusion?"[402] Could not we just as well ask: "Was the crime caused by the defendant's mental illness?" Which was truly responsible, the defendant or the diseased parts of her psyche?[403]

While, initially, it might seem that those who insist that Debra should serve out a term of imprisonment for the remainder of her natural life and those, like my son, who believe that any term of imprisonment would be unwarranted are examining the issue from opposed polarities, but, in fact, they could be operating within the same obscurity—the inability to explain or understand how Debra could have possibly done what she did. One explanation is that she herself did not—an overpowering psychosis must be at fault. Or perhaps she has been wrongfully convicted. It is simply incomprehensible to think otherwise. On the other hand, it is Debra, more than anyone else, who sketched this incomprehensible deed. She is the principal culprit and the cause. And so, is it not just to burden her with its incomprehensibility?

---

398. *See supra* Part II(J)(2).

399. *See* New Jersey v. Williams, 243 A.3d 648, 661 (N.J. 2021) (holding that prosecutor's summation comparing defendant to the character of Jack Torrance in *The Shining* deprived the defendant of his right to a fair trial); STEPHEN KING, THE SHINING (1977); THE SHINING (Warner Bros. 1980).

400. SAW (Lions Gate Films 2004); IT (Warner Bros. Pictures 2017).

401. SDCL §§ 22-1-2(20), 22-5-10 (2017), 23A-10-2 (2016); State v. Calin, 2005 SD 13, ¶ 6, 692 N.W.2d 537, 540-41.

402. Matter of Estate of Tank, 2020 SD 2, ¶¶ 27-32, 938 N.W.2d 449, 457-59.

403. I have considered this idea, but not adopted it. *See* Johnson v. Phelan, 69 F.2d 144, 151-52 (7th Cir. 1995) (Posner, J., concurring and dissenting) (overruled by Henry v. Hulett, 969 F.3d 769, 779 (7th Cir. 2020)) ("It is wrongful to break the law [even] when the lawbreaker is flawed, weak, retarded, unstable, ignorant, brutalized, or profoundly disadvantaged, rather than violent, vicious, or evil to the core.").

We can imagine an unknown assailant with a kidnapping motive, but how can we imagine a mother doing that to her child? Perhaps we cannot. There is some attraction to an approach such as this: That the act is unfathomable, thus, we can never truly assess it, and so, the assessment having been aborted, any further consideration of the idea of parole should similarly be jettisoned. We simply throw up our hands at the task.

I believe that both conclusions are unsound. My inability to comprehend how a mother could murder her child is not a valid criterion for rejecting any consideration of parole. The gravity of her act may be. The frenzy of it may merit continued incarceration, as horrific, bizarre, and fleeting as that frenzy was. But the limitations of my imagination or empathy ought not to be.[404] Inconceivability can explain the denial of parole, but it ought not to justify it. Nor require it.

In the case of Debra, the primary considerations connected to her applications for discretionary parole were the gravity of her act, the authenticity of her contrition, and the genuineness of her rehabilitation. Her parole plan, we can assume, was as sound as they come. The danger she poses to the community—to the extent that predictors can be relied upon—is minimal.[405] Her disciplinary record, spotless. She probably completed all the rehabilitative programming available to her. An evidence-based approach to parole decisions yields about as strong a computation as can be that she should be given a chance at parole. A single hesitation remains. A single apprehension fixes itself. And it is what she did to her daughter—that horrendous, inexplicable, opaque mania that ended Abby's life. Let us consider that while we continue to weigh the fate of an ordinary woman in her sixties from Huron named Debra, who has now—at long last—been granted parole.

III. CONCLUSION

When I myself had the opportunity to consider Debra's fate as one of her judges, the enormity of her crime seemed so weighty that it overcame other considerations of release on parole. It overcame me. Being "hung up on" a single factor—the enormity of the parole applicant's crime—is not flatly inconsistent with the statutes governing parole hearings.[406] But if the assessment does not take due account of the other statutory factors, it is an incomplete analysis.

404. Debra may be as uncomprehending of the genesis or cause of her offense as we are. In parole hearings, she has made reference to sleeplessness and post-partum depression at the time of Abby's murders as contributing factors. Debra's own uncertainty about how to explain or make some sort of sense out of her offense may be a more valid objection to granting her parole. It suggests that she may not have effectively processed it yet.

405. *But see* Greenholtz v. Inmates of Neb. Penal and Corr. Complex, 442 U.S. 1, 8 (1979) (noting that "[i]n parole releases, like its siblings probation release and institution rehabilitation, few certainties exist.").

406. SDCL § 24-13-7. *But see In re* Lawrence, 190 P.3d 535, 564 (Cal. 2008) (holding that the egregious circumstances of a criminal offense may not be the sole reason for denying parole). The *Lawrence* Court, parsing California statutes, emphasized that current dangerousness of the applicant for parole "is the fundamental and overriding question for the Board and the Governor." *In re Lawrence*, 190 P.3d at 554. "[T]he facts of the commitment offense, the specific efforts of the inmate toward

As I remember it, when I asked her to try to explain to me what had happened to Abby, she averted her gaze from mine and simply shook her head. I involuntarily responded to the gravity of her criminal act by mirroring her gesture. I simply shook my head in utter disbelief. Her act in Abby's bedroom silences us and takes away our speech. It arguably even silences us away from release, even when we decide her fate from the mercy seat. To deny Debra release on discretionary parole can be just so long as we do not rest solely upon being rendered dumb in the wake of her crime, so long as the decisions to deny her parole are ones that take due account of mercy. Precisely how we go about locating the mercy seat for Debra's case is a question—among others—that I must leave unresolved.[407] I do, however, feel relief at the news of her release. I feel a gladness. I am hopeful for her.

Debra's act threatens to overwhelm our ability to recognize it or to grasp it. It dumbs our intellects. It is beyond our imaginative powers to fathom. Its meaning and its motive befuddle us completely. In that act, we are simply pummeled with its senselessness, its utter sadness, and its absolute depravity. The murder of young Abby is inexcusable and unexplainable. It is a kind of void, a nothingness. I will not be proposing anything akin to forgiveness. Nor condemnation. Nor discomfort with what could have continued: a lengthy and indefinite imprisonment as a sentence for Debra's crime. But I do want to insist on continuing to contend with mercy's place; a particular place; an occurrence, and an event, which we participate in.

My point in this essay is a modest one: That the incomprehensibility of a crime is not an absolute bar to parole. That an offense is unfathomable does not mean that the applicant herself is. The horrific act did not apply for parole. A dignified human being—Debra from Huron—applied for parole. I submit that while the invocation of mercy is not another way of simply saying that parole ought to have been granted. The invocation of mercy requires us to consider Debra—the person—as a subject and not as an object—as we ponder whether, taking due account of Abby's bloody end, it was the right time for her mother to be paroled.[408]

---

rehabilitation, and, importantly, the inmate's attitude concerning his or her commission of the crime, as well as the psychological assessments contained in the record—must, by statute, be considered and relied upon" as well. *Id.* The California Supreme Court allowed that the callousness or cruelty of the crime may be relevant. *Id.* at 548-49. "However, the aggravated nature of the crime does not in and of itself provide some evidence of current dangerousness to the public . . . ." *Id.* at 555. Subsequent decisions have, for the most part, either minimized or declined to follow *Lawrence*. *E.g.*, Anselmo v. Bisbee, 396 P.3d 848, 851 (Nev. 2017) (distinguishing *Lawrence* based on statutory variations); *see also* Blaire Russell, Note, *In re Lawrence and Hayward V. Marshall: Reexamining the Due Process Protections of California Lifers Seeking Parole*, 14 BERKELEY J. CRIM. L. 251, 260-65 (2009) (discussing *Lawrence*); Joey Hipolito, Note, *In re Lawrence: Preserving the Possibility of Parole for California Prisoners*, 97 CALIF. L. REV. 1887, 1897 (2009) (same).

407. We must judge her; we may reproach her; we must not reject her. *Cf.* JOHN PAUL II, CROSSING THE THRESHOLD OF HOPE 7 (Alfred A. Knopf, Inc. 1994) (noting that Christ severely reproached Peter but did not reject him) [hereinafter, JPII]; *Mark* 8:33 (DRA).

408. *See* Samuel J. Levine, *Looking Beyond the Mercy/Justice Dichotomy: Reflections on the Complementary Roles of Mercy and Justice in Jewish Law and Tradition*, 45 J. CATH. LEGAL STUD. 455, 470 (2006) (quoting ABRAHAM R. BESDIN, REFLECTIONS OF THE RAV: LESSONS IN JEWISH THOUGHT,

Although I have taken the liberty of peppering this essay with Biblical references and grounded a discussion of Debra in a Christian theological context, a purely utilitarian cost/benefit question can also be framed. Independent of any divine commandments, any rule-based morality, natural law, or even sentimentality, those who argue that Debra should instead serve additional years incarcerated in the South Dakota Women's Prison ought to be able to articulate a reason; that more good will come of it than bad. They ought to be able to articulate why. Why should she stay behind bars until both of her parents have passed on? To what end? Surely not punishment for its own sake; punishment as an end unto itself. That is too circular. I know of no utilitarian who could track it.[409]

We can claim that Debra's frightful crime merits her punishment continuing indefinitely; that she does not "deserve" parole; that she does not "merit" it. We can refuse to give her a reason other than that we desire it. If she asks why, we can reply: "Just because." Her crime still makes the mind reel. But having served nearly three and one-half decades of her life behind bars for that terrible, terrible crime, it seems now, to me, that no good would come of it if she had served more. Something milder will do. Justice permits it. Mercy suggests it. Our law should embrace it, in this place and at this moment in time. Now. Here.

Godspeed and God bless, Debra Sue Jenner. And rest in peace, Abby Lynn Jenner.

ADAPTED FROM LECTURES BY RABBI JOSEPH B. SOLOVEITCHIK 57 (1981)) ("The principle of [righteousness] demands that [justice] reflect the existential condition of [humans'] inevitable imperfection.").

409. There are precious few ends in themselves. But there are a few. Utilitarian philosophers like John Stuart Mill would label human happiness as an end in itself. Thus, they are able to solve human problems with a math which questions: "How much happiness?" It is a kind of unmoored capitalism—what profit it? One surer end in itself is the human person. "[M]an, it is said, 'is the only creature on earth that God has wanted for his own sake.'" JPII, *supra* note 407, at 202 (quoting *Gaudium et Spes* 24 (1964)). And that creature—that "*person is realized through love*." *Id.*