

The Abiding Presence of Conscience: Criminal Justice Against the Law and the Modern Constitutional Imagination

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I. Introduction

Modern constitutional theory has an overwhelming antipathy towards the exception. The exercise of state power unbounded by or contrary to the law is, by definition arising from prevailing orthodoxies, nothing other than an instance of the failure of justice in the constitutional order. The exception is an ailment that sometimes afflicts a modern constitutional order, deserving of no more sympathetic regard than that with which one might view a cancer, equally unambiguous in its danger and calling for similarly aggressive treatment.

This extreme scepticism and anxiety about “lawless” state action has unimpeachable foundations in certain proximate and historical experiences of the exercise of exceptional power. Most potently for contemporary legal scholarship, George W. Bush’s administrations seized upon theories of executive power¹ and interpretations of international law² that allowed for the creation of exceptional detention centres and tribunals, generated new categories of person such as the “enemy combatant”, and revived old practices, like torture, that flout legal and constitutional norms. Canadian

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¹ For such theories see e.g. Jack Goldsmith & John F. Manning, "The President's Completion Power" (2006) 115 Yale L.J. 2280; Jide Nzellibe & John Yoo, "Rational War and Constitutional Design" (2006) 115 Yale L.J. 2512. For critical assessments of the Bush administration’s use of extraordinary executive powers, see e.g. Mark J. Rozell & Mitchel A. Sollenberger, "Executive Privilege and the Bush Administration" (2008) 24:1 J.L. & Pol. 1; Kim Lane Scheppelle, "Law in a Time of Emergency: States of Exception and the Temptations of 9/11" (2004) 6 U. Pa. J. Const. L. 1001.

² For discussions of the Bush administration’s disregard for international law and legal norms, see e.g. Harold Hongju Koh, "A World Without Torture" (2005) 43 Colum. J. Transnat'l L. 641; Harold Hongju Koh, "Setting the World Right" (2006) 115 Yale L.J. 2350; John L. Hammond, "The Bush Doctrine, Preventive War, and International Law" (2005) 36 Philosophical Forum 97.

political history offers no shortage of fuel for this deep aversion to the exercise of state power outside the bounds of the ordinary law – the suspension of civil liberties in the October crisis, the internment of Japanese Canadians, the treatment of the Indigenous peoples of Canada, and the historical and contemporary liminal status of immigrants and refugees. The contemporary battle has been to bring more state action *within* the law and to view the exception with a well-founded suspicion and deep anxiety. In no area has this imperative to extinguish the exception been felt more keenly than in the field of criminal justice. Recent history has poignantly taught that criminal law should be loath to accept that there are points in time or geographical areas to which it does not extend its normal operation. Exceptions to due process norms and basic constitutional protections have tethered constitutional and criminal justice, tightly binding the treatment of criminal law to claims about the nature and health of the constitutional rule of law more generally.

Much contemporary scholarship identifying and condemning these injustices of the lawless exercise of power have drawn theoretical and normative inspiration from the deeply influential work of Italian theorist Giorgio Agamben.³ Agamben’s work discusses the state of exception as a condition of danger in which law does not apply, identifying the concentration camp as the quintessential exceptional space, a space in which, absent law, humanity is reduced to “bare life”. Agamben’s touchstone is, of course, Carl

³ Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005). See e.g. Susan Dianne Brophy, "Lawless Sovereignty: Challenging the State of Exception" (2009) 18.2 Soc. & Leg. Stud. 199; Kelly Oliver, "Bodies Against the Law: Abu Ghraib and the War on Terror" (2009) 42.1 Continental Philosophy Review 63; P.K. Rajaram, "The Irregular Migrant as Homo Sacer: Migration and Detention in Australia, Malaysia, and Thailand" (2004) 42 International Migration 33; Mark Lewis Taylor, "Today's State of Exception: Abu-Jamal, Agamben, JanMohamed, and the Democratic State of Emergency" (2009) 10.2 Political Theology 305.

Schmitt and his famous statement, “Sovereign is he who decides on the exception.”⁴ For Agamben, and for those that apply his theory to contemporary failures of justice in the modern constitutional state, the exception is a menacing potentiality inherent in a certain inherited concept of sovereignty.

This link between exercises of power outside of or against the law and a conception of sovereignty points to another dimension of modern constitutional scholarship’s antipathy toward the exception. Revulsion at the exception is not solely a response to material abuses of power but also a product of the manner in which the a-legal decision grates on a particular and potent image of modern constitutionalism, one that implies certain claims about the nature of the constitutional rule of law and the relationship of this law to state justice. The imagined story of the growth of modern constitutionalism is the progressive departure from the tyranny associated with a sovereign unbound by the law to *the rule of law*, a condition in which all, including the sovereign, are subject to the strictures of the law. Modern liberal constitutionalism is thus defined by its aspiration to contain every decision within the rule of law. Dicey’s foundational definition of the rule of law, and his aversion to the administrative tribunal, testifies to this aspiration; the Supreme Court of Canada’s link between constitutionalism and the rule of law in the *Secession Reference* is an acceptance of this image of state justice; touchstone cases in Canadian legal culture like *Roncarelli v. Duplessis*⁵ and *Singh*⁶ are celebrated precisely because they appear to affirm a commitment to the eradication of the decision that is unbound by law. “Ours, we believe, is a nation under

⁴ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, University of Chicago Press ed. (Chicago: University of Chicago Press, 2005) at 5.

⁵ *Roncarelli v. Duplessis*, [1959] S.C.R. 121.

⁶ *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

law, and law is a normative measure of all that it might do.”⁷ And what is the character of this normative measure? It “lies in the belief that the rule of law is the internalization of reason itself as a regulative ideal within the political order.”⁸

This is an imaginative world in which the *telos* of modern constitutionalism is the extension of the reason of law’s rule, rather than the interests and passions that can infect the extra-legal decision, to all claims of political justice. The aspiration of extending law to all reaches of state justice is, at core, the subordination of politics, passions, and interest to principles of reason, manifested in the constitutional rule of law. Kahn describes this influential view of law, reason, and the modern state:

A constitution expresses the reasonable ordering of the polity; it is reason’s presence within the internal workings of the state itself. This is not a matter of describing a particular constitutional text or of analyzing the origins of that text.... It is, rather, the animating idea behind modern constitutionalism and constitutional decisions: reason itself constitutes the implicit constitution toward which every decision is reaching. Legal scholars believe that if we cannot separate law from politics, we are already examining a failure of the rule of law.⁹

The decision made in spite of or against the law is anathema to this sense of modern constitutionalism as a world in which law, reason, and justice ought to be coextensive. It is a failure of constitutionalism.

Yet it has not always been so. For a substantial period of common law legal history the exception held another valence in jurisprudential thought. The exercise of judgment despite the law was viewed as essential to seeing that justice was done; the domains of law and state justice were not coextensive and it was the exercise of a conscience-based decision that filled the gap between the two. Such decisions were not

⁷ Paul W. Kahn, "Comparative Constitutionalism in a New Key" (2003) 101 Mich. L. Rev. 2677 at 2677.

⁸ *Ibid.* at 2698.

⁹ *Ibid.* at 2683.

beholden to the claims of reason alone; rather, at the limit of law, other human faculties – conscience and mercy – were needed to perfect justice. Justice demanded a space for a conscience-based decision in spite of or against the law. As I will show, this attitude towards the exception was, in a very real sense, a *constitutional* matter. It followed naturally on a particular conception of the nature of sovereign power and the relationship between the subject and the state. Just as it is today, the attitude towards the exception was conditioned by prevailing theories about the shape of the constitutional order. Examining the constellation of ideas that generated this conception of the positive exception is, thus, an exercise in constitutional genealogy, recovering an inherited imaginative tradition about the shape of the state and what it implied for the law, the exception, and the faculties of judgment.

The claim at the core of this paper is that this inheritance is more than an artifact, more than an historical curiosity that has been left behind as our theories and practices of constitutionalism have evolved. In particular, careful examination of the imaginative architecture of our criminal justice system discloses the continued presence of the concept of the positive conscience-based exception. This paper looks at three features of the Canadian criminal justice system – jury nullification, the royal prerogative of mercy, and prosecutorial discretion – as significant abiding expressions of the idea that law and reason alone are insufficient to give full expression to our sense of state justice. Given the intimate relationship between attitudes towards the exceptional decision and the larger constitutional imagination, the persistence of these sites for conscience-based decisions unbounded by the law ought to trouble the orthodoxies about modern constitutionalism that I have described. And, indeed, we find a telling awkwardness

around the juridical and social treatment of these aspects of the criminal justice system, an awkwardness born of the attempt to hold together the lived practices and theories of criminal justice and the orthodox story of modern constitutionalism in which all decisions must be contained and regulated by the reason of law.

This paper thus seeks to use the criminal law to disrupt this image of modern constitutionalism and to show its inadequacy as a full account of our prevailing sense of the relationship between the rule of law and the just state and its insufficiency as a description of what we experience as important to modern constitutionalism. Without denying the dangers of the exception, I suggest that the conscientious decision made against or in spite of the law is an abidingly important component of the way in which we imagine criminal justice in the Canadian constitutional order. This is a conclusion that challenges contemporary theory's myopic focus on the reason of law as a sufficient condition for the just exercise of public judgment in the modern constitutional state. Perhaps there is more will, interest, and conscience at play in modern constitutional culture than is comfortable for liberal constitutional theory.

What follows is, thus, an exercise in using the lived realities of our criminal justice system to discipline constitutional theory. Contemporary practices and theories of criminal justice are uniquely valuable in exposing the shape of a constitutional culture because the criminal law so powerfully dramatizes the core tensions that constitutional law seeks to manage. Criminal law involves our most volatile interactions of state power, public interest, and individual right and the manner in which these moments are addressed discloses much about prevailing conceptions of a just state. As such, despite widespread mutual indifference between constitutional and criminal law scholars, it

ought to come as no surprise that ideas generated in pursuit of criminal justice find echoes and cognates in constitutional jurisprudence. For example, recent Canadian criminal law has seen the development of voluntarist notions of criminal liability that focus on the capacity to exercise a “meaningful choice,”¹⁰ and idea that has similarly emerged as central to aspects of criminal procedure and police powers;¹¹ at the same time, concepts of “meaningful choice” have emerged as determinative in non-criminal aspects of constitutional law.¹² The criminal law is something of a crucible of constitutionalism. One is tempted to say that a constitutional theory that does not achieve reflective equilibrium with the practices of criminal law has missed something important about our legal and political culture.

Before exploring the historical thought surrounding the conscience-based exception and examining in detail their resonances in key aspects of our contemporary conception of criminal justice, I will first pause to crystallize the modern vision of constitutionalism that I ultimately seek to trouble. I do so by briefly examining the quintessential expression of the prevailing theoretical and jurisprudential attitude towards the extra-legal decision in the modern constitutional imagination: the rise of proportionality as the guiding ethos of modern constitutionalism. The ubiquity and discursive power of proportionality review demonstrates not only the aspiration to extinguish the dangerous exception but also its relationship with a regulatory ideal of reason in all that a state may do in pursuit of justice. It is precisely this aspiration and its

¹⁰ *R. v. Ruzic*, [2001] 1 S.C.R. 687.

¹¹ *R. v. Spencer*, [2007] 1 S.C.R. 500.

¹² *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37.

associated ideal that certain contemporary practices of criminal justice, read in their genealogical context, appear to complicate and destabilize.

II. The Logic of Proportionality

Proportionality review is the elephant in the comparative constitutional scholar's room. Despite tremendous variations in the historical traditions and legal cultures shaping constitutionalism in modern western democracies, there is a readily seen and robust convergence on the idea that judgment in contemporary constitutional democracies is ultimately an exercise in the refined and careful deployment of the tool of proportionality review. This is so despite a notable *lack* of convergence on certain key substantive constitutional values. Whereas the content of a constitutional value like privacy, for example, diverges profoundly as between continental traditions and its understanding in U.S. constitutional law,¹³ and the meaning of freedom of religion varies substantially across the 49th parallel (not to mention across the Atlantic), the analytic method for judging both the boundaries of such values as well as the appropriate posture when rights or values conflict is remarkably stable as among these traditions. The core ethic of constitutional judgment is that of proportionality. Again, there is great variation in the structural appearance of this ethic, a matter conditioned by the text and interpretation of a given constitution. In the United States, for example, proportionality review characteristically takes place as a component of defining the right in question whereas other systems conduct the review as a component of a general limitation clause. But the end point is the same, whether in Germany, Israel, Canada, or the United States: the key admonition of the modern constitutional rule of law is that any exercise of state

¹³ James Q. Whitman, "Two Western Cultures of Privacy: Dignity Versus Liberty" (2004) 113 Yale L.J. 1151.

power is either constitutional or not and the overwhelmingly common stance is that one ultimately judges this by asking whether the law or action in question is “proportional.” Proportionality review has thus been characterized as the key task of “the judge in a democracy.”¹⁴

The Canadian case demonstrates so very well the manner in which the logic of proportionality has migrated to the centre of the way of imagining the just constitutional state. Determining whether a *Charter* right has been limited or abrogated is a pit stop, increasingly brief and cursory in the case of many rights,¹⁵ to the key analytic point, which is s. 1’s declaration that the rights guaranteed in the *Charter* are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Since the Supreme Court’s 1986 decision in *R. v. Oakes*,¹⁶ this judgment as to whether the limitation of a right in pursuit of a public interest or in service of protecting another right is justified has been guided by a means-ends proportionality analysis. This analysis requires that a court identify a pressing and substantial state objective and then test the law’s proportionality in light of this objective by analyzing the rational connection between the law and the objective, assessing whether the law is the minimally rights-impairing means of achieving this objective, and culminating in an all-things-considered balancing to determine whether the salutary effects of the law are proportional to the harms of the rights infringement.¹⁷ The *Oakes* test, as this Canadian iteration of the proportionality analysis is called, is an example of a certain Western

¹⁴ Aharon Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006).

¹⁵ The s. 2(a) right to freedom of religion has, for example, become so capacious as to be analytically vacant, with almost all meaningful analysis taking place under s. 1. See, e.g., *Amselem, Wilson Colony of Hutterite Brethren*.

¹⁶ *R. v. Oakes*, [1986] 1 S.C.R. 103.

¹⁷ For the Court’s most recent explanation of this test, see *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37.

constitutional cosmopolitanism that gestures to the ubiquity of this way of imagining a constitutional order. The test is an echo of, if not modeled on, the necessity and suitability conditions that arise from the jurisprudence of the German Federal Constitutional Court and the Canadian Supreme Court has recently drawn inspiration in its refinement of the test from the Israeli experience of proportionality review.¹⁸

This test is more than an analytic tool. It is an answer to the question “how does one assess the just in a free and democratic society?” The Canadian case is particularly clear on this point. As Justice LeBel explained in his recent dissenting decision in *Hutterite Brethren*, the *Oakes* test can be understood as an “attempt to determine why and how a law could be found to be just and whether it should be enforced.”¹⁹ Justice LeBel placed the *Oakes* test in a philosophical history and international tradition of thinking about the appropriate means of assessing the justness of state action:

Many centuries ago, St. Thomas Aquinas put his mind to the same question. For him, a just law was one with a legitimate purpose which relied on reasonable or proportionate means to achieve it. Proportionate burdens should be imposed on citizens (see T. Aquinas, *Treatise on Law* (1991), at p. 96). In more modern times, the same idea informed the drafting of the European Convention of Human Rights. It inspired the approach of international law in domains like the laws of war...²⁰

Proportionality is the ultimate measure of justice within the constitutional rule of law.

One can see the breadth of this ethic – this manner of imagining the regulative ideal for state justice – by tracing its spread beyond the boundaries of s. 1. Particularly instructive for present purposes is the ubiquity of conceptions of proportionality in determining the boundaries of the sharp edge of the constitutional relationship, the

¹⁸ In *Hutterian Brethren*, the Supreme Court cites and draws from Aharon Barak, "Proportional Effect: The Israeli Experience" (2007) 57 U.T.L.J. 369.

¹⁹ *Ibid.* at para. 184.

²⁰ *Ibid.* at para. 184.

criminal law. Perhaps the archetypal instance of the use of proportionality as the principle defining the boundaries of individual right and state power is self-defence, wherein the core criterion in *justifying* otherwise criminal violence is the measure of proportionality.²¹ Proportionality has also guided legislative assessments of just punishment: in 1995 Parliament enacted s. 718.1 of the *Criminal Code*, declaring that the “fundamental principle” of sentencing is that “a sentence must be proportionate to the gravity and degree of responsibility of the offender.”²² In points of explicit nexus between constitutional and criminal law, the Supreme Court of Canada has invoked the ethic of proportionality to define minimum standards of *mens rea*²³ and, recently, has suggested that proportionality between the harms of imposing the criminal law and the conduct objected to might serve as a limit on substantive criminal laws.²⁴

Yet it is not only its doctrinal promiscuity that evinces the centrality of the logic of proportionality as the measure of justice and method for judgment in the modern constitutional state. Proportionality has also spread to the theoretical realm, anchoring scholarly theories of constitutional and political justice and the rule of law. Robert Alexy’s account of constitutionalism is among the most prominent such theories.²⁵ Drawing from his analysis of the jurisprudence of the German Federal Constitutional Court, Alexy’s key argument is that constitutional rights are not merely *rules* but have the

²¹ See *R. v. Cinous*, [2002] 2 S.C.R. 3.

²² S.C. 1995, c. 22, s. 6. To this, of course, one could add the *gross disproportionality* standard for cruel and unusual treatment or punishment standard that governs s. 12 of the *Charter*.

²³ See *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *R. v. Martineau*, [1990] 2 S.C.R. 633; *R. v. Hundal*, [1993] 1 S.C.R. 867.

²⁴ *R. v. Malmo-Levine*; *R. v. Caine*, [2003] 3 S.C.R. 571. One might say that the *de minimus* doctrine at common law is nothing other than a similar expression of a proportionality limitation for the enforcement of substantive criminal laws.

²⁵ See, esp., Robert Alexy, *A Theory of Constitutional Rights*, trans. by Julian Rivers (Oxford: Oxford University Press, 2002).

dominant property of *principles*.²⁶ The gravamen of this distinction lies in the fact that principles are *optimization requirements*, meaning that they “require that something be realized to the greatest extent possible given the legal and factual possibilities.”²⁷

Whereas rules occupy “*fixed points* in the field of the factually and legally possible”²⁸ and, hence, are either obeyed or not, principles must be assessed through a process of balancing, which seeks a “*conditional relation of precedence* between the principles in the light of the circumstances of the case.”²⁹ This balancing approach, core to modern constitutionalism, is “one part of what is required by a more comprehensive principle”, the principle of proportionality.³⁰ For Alexy, the status of constitutional rights as principles necessarily implies the principle of proportionality as the key logic of constitutionalism – the connection between the theory of principles and the principle of proportionality “is as close as it could possibly be.”³¹

In one sense, Alexy appears merely to be discussing the structure of constitutional rights. Yet to appreciate the reach of Alexy’s claims, one must appreciate that his theory of constitutional rights as principles is married with an expansive theory of positive rights and an assertion that “[c]onstitutional rights norms ‘radiate’ into all areas of the legal

²⁶ Alexy does not claim that constitutional rights are mere or pure principles, arguing instead that they have certain properties of rules as well. At the end of the day, however, their essence is that of a principle. He explains: Constitutional rights provisions can be seen not only as the enactment of, and hence decisions in favour of, certain principles, but also as the expression of an attempt to take decisions in the light of the requirement of competing principles. At this point we move to the level of rules, and in this way the provisions acquire a double aspect. On one hand they enact principles; on the other – to the extent that they show differentiated expressions of their scope and limits – they contain decisions relative to the requirements of competing principles. Of course, the decisions they contain are incomplete. In no way do they make decision-taking free from balancing exercises possible in every case.” (*Ibid.* at 82-3).

²⁷ *Ibid.* at 47.

²⁸ *Ibid.* at 48.

²⁹ *Ibid.* at 52.

³⁰ Robert Alexy, "Constitutional Rights, Balancing, and Rationality" (2003) 16:2 Ratio Juris 131 at 135.

³¹ Alexy, *supra* note 25 at 66. See Kai Möller, "Balancing and the structure of constitutional rights" (2007) 5:3 International Journal of Constitutional Law 453, in which Möller disputes the assertion that balancing is necessarily implied by principles. Critical of Alexy’s approach, Möller posits that dealing with constitutional rights will inevitably involve moral arguments, not simply proportionality review.

system.... so as to affect the rights and duties of all actors within the jurisdiction”.³² As Kumm concludes, the combined effect of Alexy’s theory is that “the domain of constitutional justice becomes prima facie coextensive with the domain of political justice generally.”³³ And the domain of constitutional justice is governed by the logic of proportionality. In essence, the key to understanding political justice in a modern constitutional order is understanding the principle of proportionality.

David Beatty offers another account of constitutionalism wherein proportionality is nothing less than “the ultimate rule of law”.³⁴ Looking catholicly at various jurisprudential traditions, he identifies the *Oakes*-style means-ends proportionality review as both the dominant mode and the theoretical zenith of modern constitutionalism. The virtues of proportionality as the guiding logic of constitutional reasoning are, for Beatty, many and profound. Proportionality can “claim an objectivity and integrity no other model of judicial review can match.”³⁵ The structured empiricism required by the principle of proportionality avoids the subjectivity and indeterminacy of other modes of constitutional debate because it eschews debates about meaning in constitutional judgment: “Proportionality transforms judicial review from an interpretive exercise, giving meaning to the words of a constitutional text, into a very focused factual inquiry about the good and bad effects of specific acts of the state.”³⁶ Inasmuch as it provides a neutral and impartial framework for judgment about just state action, Beatty also claims that proportionality review is both a uniquely democratic form of decision-making in a

³² Matthias Kumm, "Constitutional rights as principles: On the structure and domain of constitutional justice" (2003) 2:3 *International Journal of Constitutional Law* 574 at 585. See Alexy, *supra* note 25 at 352ff, discussing this theory of “horizontal effect”.

³³ *Ibid.* at 587.

³⁴ David M. Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004).

³⁵ *Ibid.* at 171.

³⁶ *Ibid.* at 183.

constitutional order³⁷ and uniquely universal: “Applied impartially, proportionality is a formal principle that is capable of being used anywhere in the world. On a shrinking planet, it is appropriately multicultural.”³⁸

Like Alexy, Beatty’s theory of proportionality cannot be contained as a theory of judicial review but, rather, hemorrhages into broader claims about the nature and essence of political justice, broadly writ. Given this conclusion that rights of liberty, equality, and fraternity are actually markers for an underlying guarantee of proportionality in state action, the principle of proportionality “sets the standards that every law, every act of government, must meet.”³⁹ He asserts that “[l]egislation, regulations, executive orders, administrative rulings, and local bylaws are all subject to the standard of fairness and even-handedness that proportionality sets. So too in most places, most of the time, are the declarations and decisions of the courts.”⁴⁰ The logic of proportionality is the regulative principle for “any act undertaken in the name of or with the authorization (explicit or tacit) of the state”.⁴¹ Proportionality is none other than the very measure of political justice in a modern constitutional democracy.

The principle of proportionality has, thus, taken up stable residence in both theory and jurisprudence as the essential ethos of modern constitutionalism. It is a particular way of imagining both the constitutional order and the relationship of law to justice. The ascendancy of proportionality as the measure of justice and the method for judgment in the modern constitutional state is, at core, a means of asserting reason as the essence of

³⁷ “The principle assumes that all who participate in a debate about the legitimacy of some course of action carried out by or with the blessing of the state are, at least for the purposes of the debate, each other’s equal.” (*Ibid.* at 172).

³⁸ *Ibid.* at 168.

³⁹ *Ibid.* at 170.

⁴⁰ *Ibid.* at 164.

⁴¹ *Ibid.* at 160.

the contemporary rule of law. Kahn makes this point when he describes the genealogy of proportionality review, which, he claims “lies in the belief that the rule of law is the internalization of reason itself as a regulative ideal within the political order.”⁴² Within the logic of proportionality review, that which is constitutionally permissible is that which is reasonable, all things considered.⁴³ The contemporary constitutional rule of law is synonymous with the legally-structured, albeit contextually-sensitive, exercise of the faculty of reason. Alexy’s use of quadratic equations and graphs as a means of explaining his principle of proportionality is suggestive of this point; Beatty is more overt, hanging the manifold political and moral virtues of proportionality as the “universal criterion of constitutionality”⁴⁴ on the fact that it “permits disputes about the limits of legitimate lawmaking to be settled on the basis of reason and rational argument.”⁴⁵ “Proportionality,” as Kahn asserts, “is nothing more than the contemporary expression of reasonableness.”⁴⁶

This elevation and celebration of reasonableness as the core ethic of constitutionalism is shaped, of course, by the alternative that it subordinates – the continued relevance of politics, interest, and will to the just constitutional order. To depart from reason as the exclusive ground of justice is, in the prevailing constitutional imagination, to lose the neutrality and consequent legitimacy that reasoned proportionality review seems to offer. The attractiveness of the principle of proportionality lies in its promise to squeeze the political out of decisions about the just:

⁴² Kahn, *supra* note 7 at 2698.

⁴³ As Kahn notes, *supra* note 7 at 2698, “[p]roportionality is the form that reason will take when there is no longer faith in formalism – i.e. when reason must be sensitive to circumstance – and there is no longer a belief in a single coherent order among what are otherwise conflicting interests.”

⁴⁴ Beatty, *supra* note 34 at 162.

⁴⁵ *Ibid.* at 169.

⁴⁶ Kahn, *supra* note 7 at 2698.

Consider what pragmatists can [*sic*] say about *Lochner*, *Brown v Board of Education*, and *Roe v. Wade* if they made proportionality part of their vocabulary. They could tell a more consistent, *less political* story about what are widely regarded as the three most important decisions of the US Supreme Court in the twentieth century than anyone has offered so far.⁴⁷

The aspiration runs deep, a desire for judgment to be based on – and a search for – “criteria that can be framed and tested as an exercise of reason and not merely as an act of willfulness or will.”⁴⁸

In this way, the logic of proportionality review also contains within it an assertion about the *adequacy* of the reason of law’s rule; it is in this sense that the contemporary constitutional imagination implies a certain imagined relationship between law and political justice and an attitude towards the exceptional decision. Given appropriate legal scales, and so long as all relevant considerations are properly loaded and weighted, balancing will yield a just result. In a constitutional order governed by the principle of proportionality, there ought to be no need for the exception to law. The truly exceptional case no longer exists, only cases in which the reasonable balancing of interests and values is unique or uniquely difficult. The logic of proportionality would extinguish the exception. Law requires no assistance in its pursuit of justice; as such, a conscience-based judgment or decision made despite the law is nothing more than a failure of the rule of law. Again, as a full working-out of a commitment to proportionality as the logic of constitutionalism, Beatty’s thought is wonderfully expressive of this attitude towards the exception. He writes that, in any state governed by the rule of law, the supremacy of the principle of proportionality

⁴⁷ Beatty, *supra* note 34 at 184. [emphasis added]

⁴⁸ Herbert Wechsler, "Toward Neutral Principles of Constitutional Law" (1959) 73 Harv. L. Rev. 1 at 11.

means that there are no exceptions and no competing principles that can limit its reach. There can never be a question of the legitimacy or extent of its application to any dispute about the authority of the state to act. All cases are always settled on the basis of the same universal principle being applied to their particular set of facts.⁴⁹

Scholars like Beatty and Alexy are adding their shoulders to the effort of contemporary constitutionalism to nudge the circle of law, understood as a particular deployment of reason, into perfect overlap with that of justice. In this way of imagining modern constitutionalism, the exception appears only as a dangerous and unnecessary eruption of politics and interest into the regulative domain of reason.

III. The Constitution of the Positive Exception

Yet in the history of the common law, the exceptional decision – the decision *against* the law – has held a different valence.

In his speech in Star Chamber in 1616, King James made the simple but conceptually pregnant statement, “There is no Kingdome but hath a Court of Equitie.”⁵⁰ James was not making an empirical observation about comparative political structure. His was a claim of political theory that well expressed certain prevailing views of law, justice and sovereignty in 16th and early 17th century England, views that invested the legally-exceptional decision with a meaning far different than it has in contemporary jurisprudence and constitutional theory.

King James’s statement is part of his account of the virtues of the Court of Chancery and Star Chamber, the two institutional loci for the exercise of equity in the 16th and early 17th century. Both courts exercised the exceptional power to decide cases

⁴⁹ Beatty, *supra* note 34 at 170.

⁵⁰ Johann P Sommerville, ed., *King James VI and I: Political Writings* (Cambridge and New York: Cambridge University Press, 1994) at 216.

in spite of the common law. Whereas Chancery dealt with civil matters, Star Chamber dispensed its brand of equity in criminal cases. In Chancery, a litigant aggrieved of what the law yielded could literally cross Westminster Hall and seek the higher justice of equity; the Chancellor, as the King's representative, could do justice *against* the law. Star Chamber spent most of its life as a court seeing that the King's justice would be done to punish the morally guilty and protect the weak even when the common law lacked the resources to do so. Speaking of Chancery, King James declared that "it exceeds other Courts, mixing Mercy with Justice, where other Courts proceed only according to the strict rules of law".⁵¹ "[W]here the rigour of the Law in many cases will undo a Subject," James explained, "there the Chancery tempers the Law with equity".⁵² King James similarly exalted Star Chamber, which, through its exercise of criminal equity, "punished wrongdoings that the law was too weak to remedy in order to protect the weak from the violence or cunning of the strong."⁵³

King James's exaltation of the exceptional powers held by these prerogative courts was not a mere arrogation of absolute monarchical authority.⁵⁴ James is participating in a tradition of thought in which the exceptional decision was celebrated as a moment in which, in spite of the limits of law and legal reason, justice could be done. To be sure, the exercise of discretion outside of law saw its share of substantial abuses. Indeed, Star Chamber has become so symbolically burdened by its late abuses of extra-legal discretion that it stands for little else in popular recollection. Star Chamber is now

⁵¹ *Ibid.* at 214.

⁵² *Ibid.* at 214.

⁵³ Debora Kuller Shuger, *Political Theologies in Shakespeare's England: The Sacred and the State in Measure for Measure* (New York: Palgrave, 2001) at 83.

⁵⁴ Though it was, also, that. Indeed, the battle between law and equity become something of a proxy struggle in the Stuart era conflict between the King and Parliament culminating in the civil war.

commonly invoked as one emblem of precisely why we would aspire to a constitutional order in which the reason of law has extinguished the exception. However, this was emphatically not the way in which those working with the legal and political tradition – the jurists and theorists of the time – understood the extra-legal decision.

Instead, the understanding of equity rested on a particular conception of the nature of law and the relationship between law and justice. In his treatise, *Doctor and Student*, written in 1528, Christopher St. German ultimately offers the following answer to the student’s question, “what is equity”:

And for the plainer explanation of what equity is thou shalt understand that sith the deeds and acts of men for which laws have been ordained happen in divers manners infinitely, it is not possible to make any general rule of the law but that it shall fail in some case. And therefore makers of laws take heed to such things as may often come and not to every particular case, for they could not though they would. And therefore to follow the words of the law were in some case both against justice & the commonwealth. Therefore in some cases it is good and even necessary to leave the words of the law & to follow what reason and justice requireth, & to that intent equity is ordained; that is to say, to temper and mitigate the rigor of the law.⁵⁵

One sees from this classic definition of equity that the necessity of the exception arises from the generality of law and the inability of the legal rule to anticipate all cases. St. German reflects an appreciation for the lawmaker’s desire to craft a legal rule that would extend to all cases, but asserts that there will always remain cases in which following the legal rule would be contrary to the just. Writing over 100 years later, William Lambarde eloquently expresses this same idea in his discussion of the extraordinary extra-legal power exercised by Star Chamber:

⁵⁵ Christopher St. German, *Doctor and Student* by T.F.T. Plucknett & J.L. Barton (London: Selden Society, 1974 [1528]) at 97.

As in the Government of all *Common-weales*, sundry things doe fall out, both in *Peace* and *Warre*, that doe require an extraordinarie helpe, and cannot await the usuall cure of common *Rule*, and settled *Iustice*; the which is not performd, but altogether after one sort, and that not without delay of helpe, and dispense of time: So, albeit here within this Realme of *England*, the most part of *Causes* in complaint are and ought to be referred to the ordinarie processe & solemne handling of *Common Law*, and regular distribution of *Iustice*; yet have there alwayes arisen, and there will continually, from time to time, grow some rare matters, meet (for just reason) to be reserved to a higher hand, and to be left to the aide of absolute *Power*, and irregular *Authoritie*.⁵⁶

The “extraordinarie help” or “irregular Authoritie” is necessary because law cannot anticipate the sundry things that “doe fall out” in the course of civic life. Lambarde argues that most issues ought to be resolved by ordinary processes of law but, whether in civil or criminal law, cases will arise in which “*helpe* and *supply* must elsewhere be sought, and found, or otherwise *Iustice* must limpe on the better legge”.⁵⁷

This is an imaginative world in which the circles of law and justice are not coextensive. When the gap between the two is encountered equity would provide assistance through the exception, correcting the shortcomings of law in service of a greater justice. Milsom’s account of the emergence of equity is precisely this: equity arises when faith in direct access to divine justice is lost and what replaces it is a fallible human law capable of producing results that “fail to reflect a justice still seen as absolute”.⁵⁸ Referring to St. German’s foundational account of equity in the common law legal tradition, Milsom explains that “[w]hat was new in *Doctor and Student*, then, was not the idea of justice as divine: that was older than Christianity. The new element was a positive human law beginning to be conceived in substantive terms, in terms of a

⁵⁶ William Lambarde, *Archeion: or, a Discourse upon the High Courts of Justice in England* (Cambridge, Mass.: Harvard University Press, 1957 [1635]) at 48.

⁵⁷ *Ibid.* at 49.

⁵⁸ S.F.C. Milsom, *Historical Foundations of the Common Law*, 2nd ed. (London: Butterworths, 1981) at 90.

rule that on these facts this result ought to follow, and on those facts that result. And sometimes the result was visibly unjust.”⁵⁹ Equity emerges from the desire to do justice despite the limits of human reason as expressed in law. Otherwise put, the “positive” exception arises from a belief in the severability of law and political justice.

On this theory of justice, some dimension or faculty of judgment must activate at the limits of law to ensure that justice is done despite the inadequacies of legal reason. In this period of common law history, the image is absolutely clear: mercy and conscience fill the gap between the law and justice and, hence, fuel the exception. St. German characterizes equity as a manner doing justice that “consideryth all the pertyculer cyrcumstnaces of the dede the whiche also is temperyd with the sweetness of mercye.”⁶⁰ King James refers to Chancery as “dispensier of the Kings Conscience,” explaining that Chancery “exceeds other Courts” by “mixing Mercie with Iustice, where other Courts proceed only according to the strict rules of Law”.⁶¹ Tethered as it is to the exercise of conscience and mercy, judgment made *in spite of the law* has a decidedly positive connotation in the juridical and political thought of this era. Lambarde explains equity as ensuring “that the Gate of *Mercie* may bee opened in all Calamitie of Suit: to the end (where need shall bee) the Rigour of *Law* may bee amended, and the short measure thereof extended by the true consideration of *Iustice* and *Equitie*.”⁶²

Lambarde’s statement expresses the way in which mercy was imagined as stepping in to create an exception that will supplement the “short measure” of the law and, thereby, do justice. His statement also evidences that, so conceived, the exception

⁵⁹ *Ibid.* at 89.

⁶⁰ St. German, *supra* note 55 at 95.

⁶¹ Sommerville, ed., *supra* note 50 at 214.

⁶² Lambarde, *supra* note 56 at 45.

was not in competition with the law nor a threat to justice; rather, “Lawes covet to be rewlyd by equyte”⁶³ inasmuch as one acknowledges that the exception is a moment in which mercy can assist the pursuit of justice when the reason of the law – aspiring to the same – falls short. In assuming this attitude, Lambarde, St. German and the jurists of the time were participating in a venerable tradition of thinking about the conscientious or merciful exception and its necessity in the pursuit of a more perfect justice. Recall that in a recent Supreme Court of Canada decision Justice LeBel looked to St. Thomas Aquinas as authority for the idea that proportionality is the basic measure of the just.⁶⁴ Yet, in his *Summa Theologica*, Aquinas articulated an equally venerable – and in this era in the common law, far more potent – aspect of the western legal tradition’s conception of justice. In response to his imagined interlocutor’s objection that “mercy is a relaxation of justice” and, hence, unbecoming a just God, Aquinas explains that although the merciful act goes beyond the letter of the rule, mercy is not best understood as a departure from justice; rather, “it is clear that mercy does not destroy justice, but in a sense is the fullness thereof.”⁶⁵

There is, in fact, good reason to link Aquinas’s theological discussion of mercy with an account of the theories and configurations of the Tudor-Stuart administration of justice. The basic theory of the state in this era of the development of the common law revolved around a sacral King whose key duty as sovereign and God’s representative on earth was to ensure that justice be done.⁶⁶ “Kings,” James explained in his speech in Star Chamber, “are properly Judges, and Judgment properly belongs to them from God: for

⁶³ St. German, *supra* note 55 at 95.

⁶⁴ *Hutterian Brethren*, *supra* note 17.

⁶⁵ St. Thomas Aquinas, *Summa Theologica*, vol. 1 (New York: Benzinger Brothers, 1947), Pt 1, Q. 21, Art.4, at 119.

⁶⁶ See Shuger, *supra* note 53 at 72-73.

Kings sit in the Throne of God, and thence all Judgment is derived.”⁶⁷ Justice was ultimately the responsibility of the sovereign and, like God’s justice, could extend beyond the limits of the law to declare the extraordinary exception, a judgment that would involve mercy as the perfection of the justice to which the law could only imperfectly aspire. Lambarde explains:

For as it is inseparably annexed to the *Office* of a King, to be the *Judge* of his people, and as he cannot any longer remaine *King* indeed, than he shall be readie to deliver *Judgement* and *Iustice* unto them... So howsoever many Courts of ordinarie resort shall bee established by him, yet if either they have not, as I said, *authoritie* to apply Remedie for all wrongs and diseases, or if that *power* and *authoritie* which they have, may not enjoy her free course and passage, then must the King either exercise his *pre-eminent* and *royal Jurisdiction*....⁶⁸

Human reason, as expressed in the common law, could never exhaust the domain of justice. Mercy and conscience were exercised by the King, whether personally or in the form of his prerogative courts, as a means of ensuring that these shortcomings were not realized among his subjects. And so, seized with this conception of sovereignty, law, and justice, Lambarde expresses the sentiment animating the 16th and 17th century notion of the exception when he asks, “Shall no helpe at all bee sought for at the hands of the King, when it cannot be found in the *Common Law*? that were to stop his eares at the crie of the oppressed, and would draw wrath and punishment from *Heaven*.”⁶⁹

In her fascinating study, *Political Theologies in Shakespeare’s England*,⁷⁰ Debora Kuller Shuger draws an evocative comparison between the exception as it was famously conceived of by Carl Schmitt in Weimar Germany, and the exception as it was

⁶⁷ Sommerville, ed., *supra* note 50 at 205.

⁶⁸ Lambarde, *supra* note 56 at 66-67.

⁶⁹ *Ibid.*, *supra* note 56 at 67. (Italics original)

⁷⁰ Shuger, *supra* note 53.

understood in 16th and 17th century-England. Carl Schmitt analyzed the exception as a creature of political crisis calling for “immediate and drastic measures”,⁷¹ with the dangerous resonances that this kind of exception has for us today. “In contrast,” Shuger explains, “Tudor-Stuart discussions of equity... tend to define the exception as a case where the ordinary legal penalties would be inappropriately and unjustly harsh.”⁷² “The sovereign can deal with the exception, as the law cannot, because he has the authority to show clemency, to pardon the offender, to protect the oppressed for whom the law provides no remedy, to take account of mitigating circumstances”.⁷³ The contrast in the valence of the exception is, of course, striking. Equally illuminating, however, is the structural continuity that runs between these two visions. What one sees here is the consistent assertion that there is something in the nature of sovereignty that implies a power to decide the exception beyond or against the law.

In tracing the idea of the positive exception in 16th and 17th century English thought, one ends up excavating an understanding of law, its relationship to justice, and the role of conscience and mercy lying at the foundations of the common law tradition. It also becomes apparent that these elements of a conception of political justice were, in turn, all supported and bound together by a particular conception of the state and the nature of sovereignty. In this period in the development of the common law, the exception was a vital and celebrated artefact of a prevailing vision of the juridical and political order. As such, the positive exception was very much a matter of constitutional

⁷¹ *Ibid.*, *supra* note 53 at 80.

⁷² *Ibid.*, *supra* note 53 at 80.

⁷³ *Ibid.*, *supra* note 53 at 80.

imagination, albeit one emphatically different than that reflected in the story told in contemporary jurisprudence and theory.

IV. Imagining Contemporary Criminal Justice

That image painted in the self-told stories of contemporary constitutional law and theory is one in which the domains of law's reason and justice are co-extensive. A capacious ethic of proportionality review – “the form that reason will take when there is no longer faith in formalism”⁷⁴ – is the principal expression of this way of imagining state justice in contemporary constitutionalism. And within this story is a tacit but powerful aspiration to extinguish the exception. In a world in which the reason of law can, if properly refined and deployed, take one the full distance to political justice, the decision made in spite of or contrary to the law is nothing other than the unnecessary and dangerous appearance of will and interest in the reasonable fabric of law's rule. This is a theory of modern constitutionalism in which the exception appears as a failure of justice.

Yet I have excavated from our legal tradition a period in which a particular constellation of ideas about law, justice, politics, and sovereignty yielded a very different, and positive, valence for the exceptional decision. This was an era in the development of the common law in which constitutionalism did not end at the frontier of reason; rather, notions of mercy, conscience and equity had active roles in the constitutional imagination, serving as the means by which, through the sovereign decision, the imperfect reason of law would be buttressed, augmented, and extended to ensure that justice would be done. The imagined gap between law and justice generated an

⁷⁴ Kahn, *supra* note 7 at 2698.

understanding of the exceptional decision as the felicitous appearance of conscience to perfect justice when law would – and it would – fall short.

One way of reconciling this apparent chasm between the story told in contemporary constitutional theory and jurisprudence and this component of the genealogy of our common law tradition is through a narrative of progress: as the legal tradition developed, so too did our appreciation of the dark side of the exception – the excesses possible in the extra-legal decision – and the result was the refined reason of modern constitutionalism. On this view, the archaeology is interesting so far as it goes; it is not unlike dusting off the bones of an early primate to discover that we once had a tail. But conceptions of the political tend not to become vestigial quite so readily. Another possibility is that the contemporary constitutional image is not an adequate reflection of our sense of law, justice and the exception. Perhaps this older constellation of ideas still expresses itself in some ways in our modern lived realities. Perhaps, otherwise put, dusting off these bones gives us a chance to realize that we are still more monkey than we are generally comfortable admitting.

That is the argument of this piece. When one stands back to survey the conceptual architecture of a key component of our constitutional lives – the criminal justice system – conscience, mercy, and the exception show themselves as continuing to play a structurally potent role. This is not at all to deny the tremendous purchase that reason and the logic of proportionality have in the contemporary Canadian criminal justice system. Indeed, as I have noted earlier in this piece, one finds the guiding hand of proportionality in many key places in the criminal justice system, from acting as the fundamental principle of sentencing to serving as a substantive limit on the criminal law.

Yet certain features of the criminal justice system betray an abiding commitment to the importance of preserving the possibility for the conscience-based exception to the law as a means of ensuring that justice can be done. In so doing, they complicate and disturb the contemporary story about justice in a constitutional state. Although I will also briefly address the example prosecutorial discretion, two such features are particularly illuminating: jury nullification and the royal prerogative of mercy. Neither is a commonly invoked component of the criminal justice system in Canada; but such is the character of the exception. Both of these features take their force from their continuous presence as a *possibility* within the criminal justice system, the possibility of the conscience-based exception to law. The potential cannot be ignored by actors within the system and so exerts itself symbolically, affecting the overall imaginative apparatus of criminal justice in Canada.

(1) *Jury Nullification*

It is axiomatic in the common law system that, in a trial by judge and jury, the judge is responsible for deciding questions of law whereas the jury's task is to apply that law to the evidence, finding facts and returning the ultimate verdict. This is the core division of labour in a trial by judge and jury. In this configuration, the jury is imagined as contained within and constrained by the law – an implement of the law; debates about the interpretation, applicability and constitutionality of the law are all decided without the input of the jury and, indeed, usually in its absence. At the end of the trial the judge will inform the jury of the law, at which point the responsibility of the jury is to be faithful to this law, applying it to the evidence at hand.

The judge's charge to the jury is the opportunity to review the evidence and equip the jury with the necessary knowledge of the law. The charge begins, however, with an explanation of the role and responsibility of the jury. In *CRIMJI*,⁷⁵ a set of model jury instructions in Canada, the judge is told to explain to the members of the jury that they “must accept the law as I explain it to you without question.”⁷⁶ Specifically, the judge is to instruct jurors that “[y]ou are not allowed to decide this case on the basis of what you think the law is or what you think it should be if that conflicts with what I tell you about the law.”⁷⁷ The jurors are informed that, by contrast, they are “the sole judges of the facts.”⁷⁸ The judge instructs the jurors that it is their duty “to consider the evidence carefully and dispassionately and to weigh it without any trace of sympathy or prejudice for or against anyone involved in these proceedings.”⁷⁹ The strong formal expectation is of a jury that exhibits utter fidelity – indeed submission – to the law, applying it to the case at bar through the exercise of reason alone.

Yet there are certain structural features of the jury that make it impossible to police these expectations. First, there is a powerful rule of jury secrecy in Canada. Jury deliberations enjoy a kind of common law privilege prohibiting the introduction of any evidence reflecting what took place in the jury room.⁸⁰ Justice Arbour articulated this rule clearly in *R. v. Pan*:

Statements made, opinions expressed, arguments advanced and votes cast by members of a jury in the course of their deliberations are inadmissible

⁷⁵ Gerry A. Ferguson, Michael R. Dambrot & Elizabeth A. Bennett, *CRIMJI: Canadian Criminal Jury Instructions*, 4th ed., vol. 1 (Vancouver: Continuing Legal Education Society of British Columbia, 2008).

⁷⁶ *Ibid.*, at 4.02-1.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, at 4.02-2.

⁷⁹ *Ibid.*

⁸⁰ See S. Casey Hill, David M. Tanovich & Louis P. Strezos, *McWilliams' Canadian Criminal Evidence*, 4th ed., vol. 1 (Aurora: Canada Law Book, 2009) at 14-40ff.

in any legal proceedings. In particular, jurors may not testify about the effect of anything on their or other jurors' minds, emotions or ultimate decision.⁸¹

This rule is mirrored by s. 649 of the *Criminal Code*, which creates an offence for jurors or those assisting a jury to disclose information regarding the deliberations of a jury. In addition to this rule of secrecy, juries are relieved of any responsibility to produce reasons for their ultimate verdict. The modern jury provides a “blank verdict,” simply indicating “guilty” or “not guilty.” This decision-making without reasons stands in marked contrast with the way in which the judge-alone trial has developed in Canada. In recent years, the Supreme Court of Canada has imposed a positive duty to give reasons on trial judges, a duty owed to the public in a democratic society.⁸² The Court has emphasized the crucial role that reasons play in allowing for meaningful appellate review and has argued that “having to give reasons itself concentrates the judicial mind on the difficulties that are presented”⁸³ in a given case. Yet the jury has no such duty. The combined effect of jury secrecy and the absence of reasons means that, whatever the hopes and expectations surrounding a jury's fidelity to its expected role, the system is utterly unable to police the content or nature of the jury's decision-making process.

It is worth pausing to note the extent to which these features themselves mark off the jury as a unique and curious decision-making institution in a modern democracy. The modern administrative state puts a premium on both transparency and the giving of reasons in the exercise of governmental power. Yet here we see a decision-making body responsible for determining the liberty of the subject entirely relieved of both obligations.

⁸¹ *R. v. Pan*, [2001] 2 S.C.R. 344, at para. 77.

⁸² *R. v. Sheppard*, [2002] 1 S.C.R. 869.

⁸³ *Sheppard*, *supra* note 82 at para. 23.

The possibility for jury nullification arises in this space created by jury secrecy and the absence of a duty to give reasons. Jury nullification occurs when, rather than accepting and applying the law without question, the jury chooses to make its decision in spite of or against the law. It is impossible to know how often nullification occurs; in most cases it will not be discernable whether an acquittal is the result of jury nullification of a law or simply the jury's assessment that the Crown has not proven its case beyond a reasonable doubt. The issue comes into high relief in cases in which the accused has effectively admitted the constituent elements of the offence and the judge has ruled that the defences advanced by the accused have no merit as a matter of law. The jury is then sent to deliberate but left with only one legally possible result – a finding of guilt. Yet the jury can – and juries have – return a verdict of “not guilty.” These are the clearest cases of jury nullification. In such cases juries have concluded that, for some reason, on the facts of the case, fidelity to the law would be unjust. These are emphatically verdicts against and in spite of the law, truly exceptional decisions made not on the basis of the impartial reason of law alone but, rather, motivated by some exercise of conscience.

The telling point, then, is how this possibility is understood and managed in the criminal justice system. The answer is that law has responded with a provocatively ambivalent attitude towards jury nullification: recognizing, affirming and even protecting it as a structural possibility while disavowing it as a rightful component of the criminal justice system. This ambivalence is perhaps best expressed in the Supreme Court's revealing statement in *R. v. Latimer* that “[a]s a matter of logic and principle, the law

cannot encourage jury nullification. When it occurs, it may be appropriate to acknowledge that occurrence.”⁸⁴

The touchstone case on jury nullification in Canada is *R. v. Morgentaler* (1988).⁸⁵ Dr. Morgentaler was charged with contravention of the criminal law that (then) limited women’s access to abortion. Morgentaler did not deny performing the abortions but, rather, relied on an argument that the law was unconstitutional. The trial judge found no breach of the *Charter* and so the trial proceeded without a substantive defence. The jury nevertheless acquitted. The Court of Appeal reversed and ordered a new trial, critiquing counsel for seeming to encourage the jury to exercise its power of nullification. At the Supreme Court of Canada, Morgentaler was successful on the constitutional point, but the Court made important statements on the appropriate legal posture towards jury nullification. Chief Justice Dickson recognized that “[i]t is no doubt true that juries have a *de facto* power to disregard the law as stated to the jury by the judge”.⁸⁶ He recoiled, however, at the idea that the jury should be encouraged by defence counsel to use it. To accede to the “argument that defence counsel should be able to encourage juries to ignore the law would be to disturb the ‘marvelous balance’ of our system of criminal trials before a judge and jury.”⁸⁷ Chief Justice Dickson reasoned that the principle “that a jury may be encouraged to ignore a law it does not like, could lead to great inequities”:⁸⁸

One accused could be convicted by a jury who supported the existing law, while another person indicted for the same offence could be acquitted by a jury who, with reformist zeal, wished to express disapproval of the same law. Moreover, a jury could decide that although the law pointed to a conviction, the jury would simply refuse to apply the law to an accused for

⁸⁴ *R. v. Latimer*, [2001] 1 S.C.R. 3, at para. 68.

⁸⁵ *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

⁸⁶ *Ibid.* at 78.

⁸⁷ *Ibid.* at 78.

⁸⁸ *Ibid.* at 78.

whom it had sympathy. Alternatively, a jury who feels antipathy towards an accused might convict despite a law which points to acquittal.⁸⁹

Jury nullification stands firmly against the impartial and dispassionate reason of law and, as such, is not a rightful component of the administration of criminal justice. Chief Justice Dickson quoted approvingly from Lord Mansfield's discussion of jury nullification in *R. v. Shipley*,⁹⁰ citing his famous articulation of the appropriate juridical posture towards nullification: "[i]t is the duty of the Judge, in all cases of general justice, to tell the jury how to do right, though they have it in their power to do wrong, which is a matter entirely between God and their own consciences."⁹¹

The systemic antipathy towards jury nullification was again strongly expressed in the Supreme Court's decision in the tragic case of *R. v. Latimer*.⁹² Robert Latimer was charged with murder for the "mercy killing" of his severely disabled daughter, Tracy. His only defence was necessity, a defence that the trial judge ultimately withdrew from the jury. Despite the necessary legal conclusion, the jury appeared to wrestle with the result, returning a verdict of guilty only after the judge assured the jurors that they would have input into sentencing. Upon learning that this "input" was merely into the question of where the parole ineligibility for the mandatory life sentence should be set within the range of 10-25 years, some jurors were visibly distraught. At the Supreme Court of Canada, the key issue was the law of necessity but defence counsel also argued that the judge had interfered with the jury's power of nullification. The Court rejected this argument, holding that, as a matter of law, "[t]he accused is not entitled to a trial that

⁸⁹ *Ibid.* at 77.

⁹⁰ (1784), 99 Eng. Rep. 774.

⁹¹ *Ibid.* at 824.

⁹² [2001] 1 S.C.R. 3.

increases the possibility of jury nullification.”⁹³ The Court unanimously confirmed the sentiments expressed in *Morgentaler*, holding that “saying that jury nullification may occur is distant from deliberately allowing the defence to argue it before a jury or letting a judge raise the possibility of nullification in his or her instructions to the jury.”⁹⁴ Indeed, the Court went further, stating that “[g]uarding against jury nullification is a desirable and legitimate exercise for a trial judge; in fact a judge is required to take steps to ensure that the jury will apply the law properly.”⁹⁵

On the strength of these judicial pronouncements, one might conclude that there is but a grudging acceptance of the fact that juries might nullify contrary to their oaths and responsibilities, an acknowledged power that is nevertheless suppressed by the judge’s obligation to prevent nullification from occurring, a refusal to inform the jury of this power, and a rule that defence counsel may not encourage jurors to ignore the law. The system would extinguish nullification if it could. The picture, however, is rather more complex. Jury nullification is not merely recognized as a necessary hazard of our trial system; rather, in a number of ways the law actively affirms and preserves a space for nullification, suggesting a more complicated relationship with the emphatically exceptional decision.

As much as the Supreme Court has fended off attempts by defence counsel to appeal to nullification, it has also resisted direct judicial impingements on the power. In

⁹³ *Ibid.* at para. 65.

⁹⁴ *Ibid.* at para. 68.

⁹⁵ *Ibid.* at para. 70.

R. v. Gunning,⁹⁶ the trial judge made the following comments about nullification in the context of explaining the respective roles of judge and jury:

What I consider a reasonable conclusion on the facts is only me, it isn't necessarily decisive on you. There is a concept in our law, believe it or not, that there is a privilege on the part of a jury to reach a perverse verdict. In other words, that they may come to a completely different conclusion on the facts than I might or that I might think any reasonable person might, and because a jury's deliberations are theirs alone and secret, of course we can't inquire in to that. So that's what that's all about.⁹⁷

Writing for a unanimous Supreme Court, Justice Charron found “the unfortunate comment about the privilege on the part of a jury to reach a perverse verdict”⁹⁸ interfered with the fairness of the trial “where the accused exercises his constitutional right to the benefit of a trial by jury”.⁹⁹ Although utterly accurate in its detail, the objection to this charge is that it deprecated the power of the jury to come to whatever verdict it saw fit, irrespective of the strength of the evidence in the case. A more dramatic case arose in *R. v. Krieger*.¹⁰⁰ The accused was charged with unlawful production of cannabis. He admitted the elements of the offence but argued necessity on the basis that he was producing the marijuana for his own palliative care and that of others. The trial judge found no air of reality to the necessity defence and so did not put it to the jury.

Accordingly, he instructed the jury “to retire to the jury room to consider what I have said, appoint one of yourselves to be your foreperson, and then to return to the court with a verdict of guilty.”¹⁰¹ After some period of deliberation, the jury asked to see a copy of the oath that they had sworn. Two jurors then asked to be excused from the panel, one on

⁹⁶ [2005] 1 S.C.R. 627.

⁹⁷ *Ibid.* at para. 17.

⁹⁸ *Ibid.* at para. 36.

⁹⁹ *Ibid.* at para. 28.

¹⁰⁰ [2006] 2 S.C.R. 501.

¹⁰¹ *Ibid.* at para. 7.

religious grounds, one on the grounds of conscience, a request that the trial judge denied. Ultimately, the jury returned a guilty verdict. There was no live defence before the jury and the facts were not in dispute. However, a unanimous Supreme Court of Canada quashed the conviction and ordered a new trial on the basis that the accused had been deprived of his constitutionally protected right to trial by jury. The unique facts of *Krieger* tether the very right to trial by jury and the possibility of nullification.

Indeed, the Canadian criminal justice system has features that preserve the jury's power of nullification. As jealous as it purports to be of the judge's role in deciding questions of law, the system takes pains to protect the possibility of a jury finding the accused "not guilty" *no matter how unreasonable and contrary to the law that decision may be*. First, as *Krieger* alludes to, although a trial judge has a power to direct an acquittal when there is "no evidence" upon which a properly instructed jury acting judicially could convict, there is no such power to direct a conviction. That is, even if the judge concludes that there is no reasonable view of the evidence that could legally support a conviction, the judge may not order that the jury return a verdict of guilty. The Canadian law of appellate review contains a similar asymmetrical feature that preserves the possibility of jury nullification. Both the Crown and the accused can appeal a verdict if a judge has made an error of law. But what of the case in which no error of law was made but the jury returns a conviction that is manifestly unreasonable? In *R. v. Biniaris*,¹⁰² the Supreme Court held that an unreasonable conviction is a "question of law" for the purposes of an accused's access to appellate review – an unreasonable verdict is, in effect, a verdict contrary to law and amenable to appellate interference. But

¹⁰² [2000] 1 S.C.R. 381.

the Court was clear that this interpretation did not expand the Crown’s rights of appeal: “As before the Crown is barred from appealing an acquittal on the sole basis that it is unreasonable, without asserting any other error of law leading to it.”¹⁰³ Justice Arbour, writing for the Court, explained that there “is no anomaly in this result”¹⁰⁴ because “as a matter of law, the concept of ‘unreasonable acquittal’ is incompatible with the presumption of innocence and the burden which rests on the prosecution to prove its case beyond a reasonable doubt.”¹⁰⁵ But this justification does not satisfy. Has the Crown not discharged its burden and rebutted the presumption of innocence when there is no evidence upon which a properly instructed jury could acquit? The presumption only holds, after all, up to such point as there remains no *reasonable* doubt. What this asymmetry in the law does protect, however, is the power of the jury to decide a case contrary to the reason of the law.

Why hold open this space for jury nullification when the practice is so utterly at odds with the formally articulated role and responsibilities of the jury and is “subversive of the rule of law”?¹⁰⁶ Lord Mansfield had no sympathy for jury nullification, a practice he viewed as lawless and provoked him to the sentiment that “[m]iserable is the condition of individuals, dangerous is the condition of the State, if there is no certain law, or, which is the same thing, no certain administration of law”.¹⁰⁷ Recall his famous conclusion that “[i]t is the duty of the Judge, in all cases of general justice, to tell the jury how to do right, though they have it in their power to do wrong, which is a matter entirely between

¹⁰³ *Ibid.* at para 32.

¹⁰⁴ *Ibid.* at para 33.

¹⁰⁵ *Ibid.* at para 33.

¹⁰⁶ Paul Butler, "Racially Based Jury Nullification: Black Power in the Criminal Justice System" (1995) 105 *Yale L.J.* 677 at 706. Butler explains that jury nullification “appears to be the antithesis of the view that courts apply settled, standing laws and do not ‘dispense justice in some *ad hoc*, case-by-case basis.’”

¹⁰⁷ *R. v. Shipley*, *supra* note 90 at 824.

God and their own consciences.”¹⁰⁸ But our practices of criminal law suggest that we are far less comfortable than Lord Mansfield with the perfect equation of the right with the law; or, otherwise put, we seem more covetous of an opportunity, slender though it might be, for the justice of a matter to be decided beyond the boundaries of the law – in the words of Lord Mansfield, to be decided by jurors as “a matter entirely between God and their own consciences.” In its study of the criminal jury, the Law Reform Commission summarized the virtues and theory of jury nullification in a manner that could have been penned by St. German over 350 years ago:

While in the vast majority of cases a general rule of law, founded upon proper policy, will lead to the equitable resolution of individual disputes, it might not do so in all cases. Since all factual situations cannot be foreseen in formulating general rules of law, invariably cases will arise in which a rigid application of the law will lead to an inequitable result....Many jurists argue...that in serious cases it is the jury who must retain the ultimate responsibility for dispensing equity.¹⁰⁹

Although it acknowledged the dangers of uncertainty, unequal treatment, and bias that nullifications presents, the Commission argued that the evidence before it tended “to suggest that when the jury deviates from a strict application of the law it most often does so in a manner consistent with shared community notions of equity”¹¹⁰ and concluded that this, alone, could be sufficient justification for the retention of the jury. Indeed, one Canadian scholar has argued that the very benefit protected by the constitutional right to a jury is really the possibility of conscience-based nullification.¹¹¹ Sustenance of jury

¹⁰⁸ *Ibid.* at 824.

¹⁰⁹ Law Reform Commission of Canada, *The Jury in Criminal Trials*, Working Paper 27 ed. (Ottawa: Minister of Supply and Services Canada, 1980) at 8-9.

¹¹⁰ *Ibid.* at 10.

¹¹¹ See Christopher Nowlin, "The Real Benefit of Trial by Jury for an Accused Person in Canada: a Constitutional Right to Jury Nullification" (2008) 53:3 *Crim. L.Q.* 290. Referencing the s. 11(f) *Charter* right “to the benefit of trial by jury”, Nowlin argues, at 330, that “[t]he ‘benefit’ of the jury is not ... that it

nullification is, ultimately, about imagining a gap between the law and justice. Paul Butler, writing of the use of nullification in racially progressive ways in the United States asserts that he is “not encouraging anarchy” but, rather, “reminding black jurors of their privilege to serve a higher calling than law: justice.”¹¹² Schefflin and Van Dyke define nullification as “a power of conscience that permits the jury to suspend the application of a particular law in a particular instance to a particular defendant in the interests of conscience and justice.”¹¹³ Whether cast, as it frequently is, as the “citizen’s ultimate protection against oppressive laws and the oppressive enforcement of law”,¹¹⁴ or as the expression of equity and mercy, the preservation of jury nullification is an attempt to allow room for the operation of conscience when the law falls short of justice.

Herein lies the source of the awkwardness with which jury nullification is treated in the Canadian criminal justice system. Seized with and beholden to a story about modern constitutionalism in which the reason of law is sufficient to do justice and the exceptional decision is a dangerous breach of the rule of law, jury nullification appears anathema and must be resisted. We are not, however, comfortable letting it go, not ready to extinguish it, because in spite of that powerful story the practices of our criminal justice system reveal an abiding sense that conscience and mercy still have a role in perfecting the justice of the law. And so we are left in the evocatively ambivalent position so well expressed by Justice Fish in *Krieger*: “under the system of justice we have inherited from England juries are not entitled *as a matter of right* to refuse to apply

brings ‘common sense’ into the courtroom. The benefit for an accused person is that the jury can do what some judges might like to do but will not do, for fear of being overturned by a higher court.”

¹¹² Butler, *supra* note 106 at 723.

¹¹³ Alan Schefflin & Jon Van Dyke, "Jury Nullification: The Contours of a Controversy" (1980) 43:3 Law & Contemp. Probs. 51 at 87.

¹¹⁴ Law Reform Commission of Canada, cited in *Morgentaler*, *supra* note 85 at 78.

the law – but they do have the *power* to do so when their consciences permit of no other course.”¹¹⁵

(2) *The Royal Prerogative of Mercy*

Jury nullification is a particularly evocative and rich example of the continued expression of the need for the possibility of the decision outside of the law as an abiding structural feature of contemporary criminal justice in Canada. The manner in which this power conflicts with certain orthodoxies about the role of the jury and the preeminence of law has generated a notable body of case law and academic debate on the nature of the exceptional power. Yet jury nullification is not the only continued expression in Canadian criminal law of this historical sense that conscience and mercy still have a role in perfecting justice. A survey of the architecture of the contemporary justice system reveals more. If one can exit the cathedral of legal reason and gain a sense of the structure as a whole, one sees another conscience-based flying buttress that supports the gothic elegance of the law – the royal prerogative of mercy.

The royal prerogative of mercy, as well as the associated power of the Governor in council (Cabinet) to grant a free or conditional pardon, is preserved in ss. 748-749 of the *Criminal Code*.¹¹⁶ Section 748(1) states that “Her Majesty may extend the royal mercy to a person who is sentenced to imprisonment under the authority of an Act of Parliament” and s. 749 establishes the super-ordinance of this power over all criminal law in Canada: “Nothing in this Act in any manner limits or affects Her Majesty’s royal prerogative of mercy.” Much regarding the nature of this power and its link to the

¹¹⁵ *Krieger, supra* note 100 at para. 27.

¹¹⁶ The *Criminal Records Act* also creates a “pardon” power controlled by the National Parole Board, but this power is tied to the maintenance of criminal records rather than a residual power to exempt an individual from the effects of the law. When I use “pardon” in this section, I am referring to the powers available to the executive, pursuant to s. 748 of the *Criminal Code*.

themes of the piece – including its tie to sovereignty and its exceptional nature – is suggested in these simple lines. The first notable feature of this power, however, is its comparatively low profile in the modern Canadian criminal justice system. The royal prerogative of mercy and the pardon are simply not as present as part of the thinking and debate about the shape of criminal justice in Canada as was the case with jury nullification. Unlike jury nullification, which has attracted significant attention from courts and has generated a good deal of scholarship in Canada, we hear and say little about the royal prerogative of mercy in the Canadian criminal justice system.

The structural role and theoretical contours of the pardon are more patent when one looks south of the border. In the United States debates about the propriety and appropriate management of the presidential and gubernatorial power of clemency are very much alive, in no small measure owing to the persistence of capital punishment. The death penalty tends to focus the mind on questions of mercy; and with this focus, the pardon migrates to the centre of the image of the criminal justice system. Issues of clemency in capital cases have driven academic and public debate on the nature of the power, its relationship to the rule of law, and the role of mercy in the administration of criminal justice.¹¹⁷ Governor Ryan’s commutation of all death penalties in Illinois in 2003 re-ignited such debates.¹¹⁸ The arguments for and against the clemency power assume a familiar form in the substantial U.S. literature on the subject, a form strongly analogous to that surrounding the role and legitimacy of jury nullification.

¹¹⁷ See Austin Sarat, *Mercy on Trial: What it Means to Stop an Execution* (Princeton: Princeton University Press, 2005).

¹¹⁸ Sarat’s study, *Ibid.*, focuses on Governor Ryan’s mass commutation, arguing in the end that it had little to do with the exercise of mercy. He concludes, at 115, that “[w]hile at first glance Ryan’s action might seem to mark the triumph of redemption and mystery, it was, as we will see, moved by neither redemptive purposes nor by an embrace of the inexorable mystery that sits just over the horizon of legality.”

To some, the existence of an exceptional and unregulated power to suspend the normal operation of the law is simply antithetical to the rule of law, an expression of personal preference and extra-legal discretion incommensurate with the norms of modern constitutionalism. Clemency presents the risk of caprice and signals the unequal application of the law. The potential for executive excess “has moved many commentators to seek to excise mercy entirely from the law of crimes on grounds that clemency, so understood, offends and contradicts justice.”¹¹⁹ Those sympathetic to this view seek to discipline or contain clemency within the law, severing it from questions of mercy and conscience.¹²⁰ Moore, for example, has offered a strictly retributive theory of the pardon, arguing that the clemency power is “abused when a pardon is granted for any reason other than that the punishment is undeserved.”¹²¹ Those faithful to this argument suggest that whereas private citizens might not be bound by the rule of law in all that they do, “state actors... enjoy no such freedom. The rule of law always binds state actors acting in their official capacities.”¹²² As Sarat acknowledges, “[a]s a monarchical prerogative or an executive action in a democracy, clemency appears to be outside of, or

¹¹⁹ F.C. DeCoste, "Conditions of Clemency: Justice *from* the Offender" (2003) 66 Sask. L. Rev. 1 at 4. See Trevor R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of law* (Oxford: Oxford University Press, 2001) at 176: “There is no place for mercy where it is conceived as standing in opposition to justice. Mercy, so conceived, denies the equality before the law that is fundamental to governmental authority and legitimacy. No one, even if convicted of serious crimes, should in any circumstances be subject to the unfettered discretion of a public official, or be dependent on grace or favour, bestowed on idiosyncratic grounds, and vulnerable to personal antagonism or caprice.”

¹²⁰ See, e.g., Jeffrie G. Murphy, "Mercy and Legal Justice" in Jules Coleman & Ellen Frankel Paul eds., *Philosophy and Law* (Oxford: Basil Blackwell, 1987) 1, at 9, in which Murphy argues that actors in the criminal justice system should “keep their sentimentality to themselves for use in their private lives with their families and pets.”

¹²¹ Kathleen Moore, *Pardons: Justice, Mercy and the Public Interest* (Toronto: Oxford University Press, 1989) at 199.

¹²² Stephen Garvey, "Is it wrong to Commute Death Row? Retribution, Atonement and Mercy" (2004) 82.1 N.C.L. Rev. 1319 at 1333.

beyond, the law and thus a threat to a society dedicated to the rule of law.”¹²³ The logic of clemency grates on the justice of the constitutional rule of law.

In contrast, there are those who, turning their minds to executive clemency in the United States, have supported it precisely *because* it introduces a set of faculties of judgment and considerations beyond the reason of law’s rule. Responding to Moore’s retributive focus, Digeser argues that “it is not implausible to suppose that, at least on occasion, other values may be more important than insuring that people have what is coming to them.”¹²⁴ On this view, “executive clemency represents an ‘escape valve’ whereby officials unaffiliated with the judiciary can survey the landscape and make decisions *based on factors beyond the law*.”¹²⁵ The virtue of clemency as a *possibility* within the criminal justice system inheres precisely in its extra-legal status. While acknowledging the risks of an act that “always contains something beyond the complete discipline or domestication of law, something essentially lawless,”¹²⁶ Sarat and others affirm the need for this exceptional power inasmuch as it “provides ‘relief’ from legal justice strictly construed”.¹²⁷

A familiar tension thus emerges in the U.S. debates: the pardon grates on certain closely-held values of modern constitutionalism and so appears abject; yet its lawless nature offers the possibility of the expression of certain aspects of just judgment beyond the reason of the law.

¹²³ Sarat, *supra* note 117 at 69.

¹²⁴ P.E. Digeser, "Justice, Forgiveness, Mercy, and Forgetting: The Complex Meaning of Executive Pardoning" (2003) 31 *Capital U.L. Rev.* 161 at 164.

¹²⁵ Beau Breslin & John J.P. Howley, "Defending the Politics of Executive Clemency" (2002) 81 *Or. L. Rev.* 231 at 236 [emphasis added].

¹²⁶ Sarat, *supra* note 117 at 69.

¹²⁷ *Ibid.* at 19.

But perhaps this complex status of the extraordinary power of clemency in a criminal justice system is an artefact of the extraordinary penalty of death, fading in both practical and symbolic importance when enlightened and humane norms prevail and capital punishment is abolished. To be sure, prior to the final abolition of the death penalty in Canada in 1976,¹²⁸ the royal prerogative of mercy had an active and vital role in the administration of criminal justice in Canada; one that, in comparative light, may suggest that the contemporary pardon is merely vestigial. The prerogative of mercy was a visible and consequential component of the criminal justice system prior to abolition, with every court-ordered death sentence reviewed by the executive.¹²⁹ Indeed, “the royal prerogative was exercised frequently”¹³⁰ in Canada; “[b]etween Confederation and 1962, the year of Canada’s last execution, the federal Cabinet commuted the death sentences of just under half of those condemned to die.”¹³¹ The royal prerogative was not only an active feature of the administration of criminal justice in this era; in the 1933 *Reference re Royal Prerogative of Mercy upon Deportation Proceedings*,¹³² Chief Justice Duff, writing for a unanimous Supreme Court, held that it was a feature of our constitutional order:

A sentence in the judgment of Holmes J., speaking for the Supreme Court of the United States in *Biddle v. Perovich* [(1927) 274 U.S. 480, at 486.] applies equally to the exercise of the prerogative of mercy in Canada. A pardon, said that most learned and eminent judge, “is a part of the Constitutional scheme. When granted it is the determination of the

¹²⁸ For a succinct history of the abolition of capital punishment in Canada see Robert Harvie & Hamar Foster, "Shocks and Balances: *United States v. Burns*, Fine-Tuning Canadian Extradition Law and the Future of the Death Penalty" (2004/05) 40:2 Gonzaga L. Rev. 293 at 308-11.

¹²⁹ Carolyn Strange, "Mercy for Murderers? A Historical Perspective on the Royal Prerogative of Mercy" (2001) 64 Sask. L. Rev. 559 at 564.

¹³⁰ *Ibid.* at 561.

¹³¹ *Ibid.* at 561.

¹³² [1933] S.C.R. 269.

ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.”¹³³

What is most fascinating about the Canadian case is that, despite the intervening abolition of the death penalty and the consequential migration of the pardon to the borders of the administration of criminal justice, and despite the conceptual friction between prevailing orthodoxies about modern constitutionalism and the exercise of executive clemency, the royal prerogative is still a structurally potent aspect of our criminal justice system and is appealed to by the courts in hard cases. The invocation of the possibility of the merciful decision outside the boundaries of the law is the durable expression of something deep about our sense of law and criminal justice; and, consistent with the argument of this piece, it is, no less than it was in 1933, part of the constitutional scheme.

One of the early framing remarks in the Supreme Court of Canada’s judgment in *R. v. Latimer* was that “[t]he law has a long history of difficult cases.”¹³⁴ The Court recognized that “the questions that arise in Mr. Latimer’s case are the sort that have divided Canadians and sparked a national discourse.”¹³⁵ The case, recall, concerned Robert Latimer’s murder of his severely afflicted daughter, Tracy. The key substantive issue in the case was whether the defence of necessity was available to Mr. Latimer but the case also raised the question of whether the mandatory minimum sentence of life imprisonment with a parole ineligibility period of 10 years constituted cruel and unusual punishment contrary to s. 12 of the *Charter*. The jury, deeply uncomfortable with the mandatory minimum, had suggested a parole ineligibility period not available at law – 1 year. The trial judge had agreed, arguing that on the exceptional facts of the case, the law

¹³³ *Ibid.* at 273.

¹³⁴ *Latimer*, *supra* note 92 at para. 4.

¹³⁵ *Ibid.*

should recognize a “constitutional exemption” for Mr. Latimer. The Supreme Court held that the defence of necessity was not available and that the mandatory minimum was not unconstitutional. The law could offer no relief. But in a provocative move, the Court invoked the possibility of relief through the exceptional decision of the executive. The Court stated that its decision meant that “that the appellant will not be eligible for parole consideration for 10 years, *unless the executive elects to exercise the power to grant him clemency from this sentence, using the royal prerogative of mercy.*”¹³⁶ The Court emphasized its limited mandate: “The Court’s role is to determine the questions of law that arise in this appeal” whereas “the matter of executive clemency remains in the realm of the executive”.¹³⁷ In concluding its judgment the court emphasized that “[i]t is... worth referring again to the royal prerogative of mercy that is found in s. 749 of the *Criminal Code*”¹³⁸ explaining as follows:

But the prerogative is a matter for the executive, not the courts. The executive will undoubtedly, if it chooses to consider the matter, examine all of the underlying circumstances surrounding the tragedy of Tracy Latimer that took place on October 24, 1993, some seven years ago. Since that time Mr. Latimer has undergone two trials and two appeals to the Court of Appeal for Saskatchewan and this Court, with attendant publicity and consequential agony for him and his family.¹³⁹

The Court’s sympathy for this man is palpable, as is its felt inability to provide redress through the normal operation of the law.

In a case questioning the legality of a minimum sentence the courts has leaned upon the royal prerogative of mercy as a structural feature of the criminal justice system that serves as a kind of “release valve” when the law would seem likely, sooner or later,

¹³⁶ *Ibid.* at para. 3.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.* at para. 89.

¹³⁹ *Ibid.* at para. 90.

to mandate injustice. Minimum sentences impose a special set of stresses on the legal system, emphasizing and engaging the inherent frailty of law that concerned 16th and 17th century jurists – the incapacity to anticipate the just in all cases given the curious vicissitudes of life.¹⁴⁰ *R. v. Luxton*¹⁴¹ raised the constitutionality of the minimum sentence for first degree murder – life imprisonment with 25 years of parole ineligibility. Chief Justice Lamer, writing for a majority of the Court, found the minimum sentence constitutionally sound but offered the comfort that “even in the case of first degree murder, Parliament has been sensitive to the particular circumstances of each offender through various provisions allowing for the royal prerogative of mercy, the availability of escorted absences from custody for humanitarian and rehabilitative purpose and for early parole.”¹⁴²

What is happening at a structural or imaginative level when the exceptional and otherwise rather marginal royal prerogative of mercy is appealed to in these ways? One gets the greatest sense of an answer from the invocation of the royal prerogative of mercy in the case of *R. v. Sarson*.¹⁴³ Mr. Sarson had been charged under the constructive murder provisions of the *Criminal Code* and pled guilty to the lesser-included offence of second-degree murder. Only eleven months after his conviction the Supreme Court of Canada held in another case¹⁴⁴ that the constructive murder provisions were unconstitutional. In light of this decision, Mr. Sarson applied to the courts to quash his

¹⁴⁰ See Benjamin L. Berger, “A More Lasting Comfort?: The Politics of Minimum Sentences, the Rule of Law, and *R. v. Ferguson*” (Forthcoming 2009) 47 S.C.L.R. (2d).

¹⁴¹ [1990] 2 S.C.R. 711.

¹⁴² *Luxton*, *supra* note 141 at 725. See also *R. v. Nash* (2009), 240 C.C.C. (3d) 320 (NBCA), at para. 4, in which Justice Robertson noted that when a parole ineligibility period is set too high, “[t]he offender must rely on the ‘faint hope clause’ found in s. 745.6(1) or the royal prerogative of mercy.”

¹⁴³ [1996] 2 S.C.R. 223.

¹⁴⁴ *Vaillancourt*, *supra* note 23.

warrant of committal. The Supreme Court of Canada carefully canvassed the applicable law but concluded that he had “no legal redress for his conviction under an unconstitutional law.”¹⁴⁵ Justice Sopinka, writing for a majority of the Court, explained:

Well-settled rules of the common law clearly prevent the issuance of the remedy sought by the appellant. In disposing of this appeal, I have determined that the appellant is both legally and morally responsible for the murder of [the deceased]. Clearly, in cases such as that of the appellant, no remedy is required. He has failed to demonstrate that his imprisonment is at odds with the tenets of fundamental justice, and he has failed to demonstrate any right to *habeas corpus*. As a result, the appellant is deserving of his fate.¹⁴⁶

The rules of law offered no relief; from the perspective of the law, Mr. Sarson was “deserving of his fate.” But Justice Sopinka went on to point out that the royal prerogative of mercy was “one possible avenue of redress for persons convicted under [the constructive murder provisions].”¹⁴⁷ His explanation is illuminating:

Where the courts are unable to provide an appropriate remedy in cases that the executive sees as an unjust imprisonment, the executive is permitted to dispense 'mercy', and order the release of the offender. The royal prerogative of mercy is the only potential remedy for persons who have exhausted their rights of appeal and are unable to show that their sentence fails to accord with the *Charter*.¹⁴⁸

The Court cited this statement with approval in *R. v. Latimer*. As the Rt. Honourable Kim Campbell, former Prime Minister of Canada put it, “[m]ercy is to the criminal law what equity is to the civil law. It is in this power that persons have recourse when they have exhausted all other legal remedies.”¹⁴⁹ Mercy stands waiting at the limit of law’s reason to ensure that justice can be done.

¹⁴⁵ *Sarson, supra* note 143 at para. 51.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ Kim Campbell, "Post-Conviction Review in the Criminal Justice System" (1994) 28 *Suffolk U. L. Rev.* 609 at 610. See also Gary Trotter, "Justice, Politics and the Royal Prerogative of Mercy: Examining the

This is the heavy symbolic lifting that the royal prerogative of mercy does in the contemporary Canadian criminal justice system. The invocation of the ever-present possibility of Her Majesty extending the royal mercy to a legally guilty, lawfully punished subject serves as an acknowledgement that, in the practical workings of the modern rule of law, there is a potential gap between law and justice. The royal prerogative of mercy is invoked by courts in “difficult cases” as a signal of the limits of law’s justice and a reflection that the constitutional order, nevertheless, has resources for bridging this gap. It is a space in the criminal justice system maintained for the injection of considerations beyond law’s reason. And, as such, in the pardon one finds an echo of a sense of sovereignty and political justice that, even in a modern constitutional order, is not exhausted by law. In the *Reference re Royal Prerogative of Mercy*, Chief Justice Duff, writing for the Court, approved of Dicey’s account of the royal prerogative as

“both historically and as a matter of actual fact nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown. The King was originally in truth what he still is in name, ‘the sovereign’.”¹⁵⁰

The persistence of this kind of sovereign authority unregulated by law grates powerfully on prevailing accounts of the core ethos of modern constitutionalism and appears to us as a dangerous incursion of the political into the rule of law;¹⁵¹ however, this “was precisely the point of housing the discretionary pardoning power in a purely political branch, so

Self-Defence Review" (2000) 26 Queen's L.J. 339 at 362, in which, commenting on *Sarson*, he observes that “[t]he Court contemplated that in cases where the principle of finality prevents the courts from delivering relief, aggrieved individuals ought to be able to look to the executive to remedy injustice” and that, “[c]ast in this light the RPM truly functions as a safety valve”.

¹⁵⁰ *Reference re Royal Prerogative*, *supra* note 132 at 272.

¹⁵¹ Reflecting on the invocation of the royal prerogative of mercy in *Latimer*, Carolyn Strange, *supra* note 129 at 563, observes that “executive discretionary justice, previously exercised on a regular basis, now reeks of political interference. As Latimer himself predicted: ‘The politicians won’t touch this with a [ten]-foot pole... They’ll never get near this.’”

that politics would contribute to the overall process.”¹⁵² Even post-revolutionary France, seized with an unparalleled anti-monarchal ethos, failed in its attempt to extinguish the pardoning power.¹⁵³ As Justice Wayne wrote of the U.S. constitutional order in *Ex Parte Wells*,¹⁵⁴ “[w]ithout such a power of clemency... it would be most imperfect and deficient in its political morality and in that attribute of Deity whose judgments are always tempered with mercy.”¹⁵⁵ The modern reliance on the royal prerogative of mercy is a durable expression of a conception of a constitutional order that must, at points, lean on extra-legal decisions to create the positive exception. Contemporary realities of the administration of criminal justice disclose that we are not yet rid of the sense that something beyond the law is necessary to perfect justice. Abrasive though it is on modern sensibilities, we still seem to covet “that attribute of Deity” that can be expressed in the sovereign exception.

(3) *Prosecutorial Discretion*

Both jury nullification and the royal prerogative of mercy show themselves to be truly extraordinary but symbolically influential components of the administration of criminal justice system, exerting their formative pressure on the way that criminal justice is imagined through their lurking presence in the wings. Their complex status and interesting management make them illuminating examples of the abiding expression of a configuration of law and justice that disturbs the idea that the justice of the modern

¹⁵² Breslin & Howley, at 249. “To try to reform the clemency process away from its political underpinnings and more in line with a judicial model is thus to ignore a critical historical lesson.”

¹⁵³ See Jean Teillet, “Exoneration for Louis Riel: Mercy, Justice, or Political Expediency?” (2004) 67 Sask. L. Rev. 359 at 383. Noting that only post-revolutionary France attempted to abolish the pardoning power, Teillet explains that “[t]he experiment was short lived as the need for some extra-judicial means of mitigating the harshness of the justice system became apparent.”

¹⁵⁴ 59 U.S. (1856) 307. This decision is referenced and discussed in Sarat, *supra* note 117 at 78-79.

¹⁵⁵ *Ibid.* at 310.

constitutional state is achieved through reason; they disrupt the idea that, despite its centrality in the normal operation of the criminal justice system, the logic of proportionality is the ‘ultimate rule of law’. There is, however, a far more quotidian aspect of the Canadian criminal justice system that, although structurally commonplace, is no less a space maintained in the architecture of the criminal justice system in which the positive exception can emerge. Indeed, it is not only a place where decisions despite the law *can* occur; it is one in which we hope and trust that it will occur - the integrity of the overall structure depends upon it. Despite its omnipresence and seeming banality, prosecutorial discretion participates in many of the features of the examples that I have discussed in more detail.

The Crown prosecutor wields tremendous power within the Canadian criminal justice system. An individual Crown may exercise her discretion to lay or approve charges, stay a prosecution, proceed on a lesser charge, accept a plea bargain, or insist that a matter be prosecuted to the strict letter of the law. Policy may guide Crown in many of these decisions, but the ultimate decision is one made in the breast of the prosecutor. Tasked with the enforcement of the law, the exercise of discretion is the essential task of the Crown prosecutor. The Supreme Court has “recognized that for our system of criminal justice to function well, the Crown must possess a fair deal of discretion” and that, “[m]oreover, this discretion extends to all aspects of the criminal justice system.”¹⁵⁶ “Discretion,” the Court has held, “is an essential feature of the

¹⁵⁶ *R. v. Cook*, [1997] 1 S.C.R. 1113 at para. 14.

criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid.”¹⁵⁷

A prosecutor may exercise this pervasive discretion for a host of reasons. It may be that the practicalities of proof and the rules of evidence suggest that prosecution on a given charge is unlikely to succeed; it might be that the workload of a given Crown office precludes prosecution of a minor offence; or a prosecutor may take the view that a prosecution would not serve the interests of the victims. In short, not all exercises of prosecutorial discretion are expressions of conscience or mercy. But these points of discretion are moments when the equities of a case can become dominant over the law alone. “It is the use of discretion by prosecutors that enables our trial process to consider the individual circumstances of each case and each accused.”¹⁵⁸ Structurally, prosecutorial discretion happens in view of the law but not because of it. It does not have the exotic appeal or mystique of jury nullification or the exercise of the royal prerogative of mercy, but prosecutorial discretion is the chief and most common means by which the *justice* of the law is assessed in the criminal justice system.

The pervasive and immense power of prosecutorial discretion is, in this way, the constant presence of the possibility of the exception, offering relief from the harshness of the law. Most intriguing is the jealousy with which the law seeks to preserve this exceptional space. The exercise of Crown discretion is virtually unreviewable. The Supreme Court has been consistently firm on this point, making clear that courts should

¹⁵⁷ *R. v. Beares*, [1988] 2 S.C.R. 387 at 140. See also *R. v. Lyons*, [1987] 2 S.C.R. 309.

¹⁵⁸ Wayne Gorman, "Prosecutorial Discretion in a *Charter*-Dominated Trial Process" (2000) 44 *Crim. L.Q.* 15 at 16. On this basis, Gorman concludes, at 15, that “[n]o other participant in the Canadian criminal trial process wields such immense power” as the Crown prosecutor.

be “extremely reluctant to interfere with prosecutorial discretion”¹⁵⁹ and that such interferences should be “extremely rare”.¹⁶⁰ Although this immunity from review is not absolute, courts will only interfere when convinced that there has been an abuse of process or malicious prosecution,¹⁶¹ a test that has rendered attempts to challenge the exercise of Crown discretion “spectacularly unsuccessful.”¹⁶² What is notable about this treatment of Crown discretion in the criminal justice system is that it exempts prosecutorial decision-making from the core norms of decision-making in the modern constitutional state.¹⁶³ One of the signal features of the modern constitutional order is that all quasi-judicial decisions require reasons and are amenable to judicial review. Indeed, this ethic of reason-giving and review is so powerful as to reach into ministerial decisions. This is not solely a matter of administrative law; in the criminal justice context itself the law is now clear that judges must give reasons sufficient to facilitate meaningful appellate review, an essential component of due process and fundamental justice.¹⁶⁴ To preserve its exceptional function, prosecutorial discretion must be released from these demands. And standing outside this norm, shielded from review, prosecutorial discretion is in sparse but evocative company in the criminal justice system: jury nullification and

¹⁵⁹ *R. v. Power*, [1994] 1 S.C.R. 601 at 623.

¹⁶⁰ *Ibid.* at para. 616.

¹⁶¹ See *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at 194-94: “To succeed in an action for malicious prosecution against the Attorney General or Crown Attorney, the plaintiff would have to prove both the absence of reasonable and probable cause in commencing the prosecution, and malice in the form of a deliberate and improper use of the office of the Attorney General or Crown Attorney, a use inconsistent with the status of ‘minister of justice’. In my view this burden on the plaintiff amounts to a requirement that the Attorney General or Crown Attorney perpetrated a fraud on the process of criminal justice and in doing so has perverted or abused his office and the process of criminal justice.”

¹⁶² Gorman, *supra* note 158 at 19.

¹⁶³ On this point see Rachel E. Barkow, “The Ascent of the Administrative State and the Demise of Mercy” (2008) 121 Harv. L. Rev. 1332.

¹⁶⁴ *R. v. Sheppard*, [2002] 1 S.C.R. 869.

the exercise of the royal prerogative of mercy are similarly, exceptionally, immune from judicial review.

From whence does prosecutorial discretion draw this special status? In Canada prosecutions are brought in the name of the Queen; in this, prosecutorial discretion is made of the same stuff as the royal prerogative of mercy. The sovereign may choose to pardon; the sovereign may choose not to prosecute. Both decisions are beyond the law, ultimately regulated only by the demands of conscience. The structural resonance is interestingly analogous in the United States where criminal prosecutions are brought in the name of ‘the people’. Just as the people, constituted as a jury, may decide an exception to the law, so too the sovereign “we the people”, represented by the prosecutor, may exercise discretion in the enforcement of the law. Indeed, this idea of the prosecutor “as a kind of surrogate sovereign” has a venerable philosophical pedigree.¹⁶⁵ And this dimension of sovereignty at play in the office of the prosecutor makes sense of its special immunity from judicial review. Sarat and Clarke argue that the reticence to subject prosecutorial power to scrutiny disclosed in the case law “shows judicial recognition of the sovereign logic of prosecutorial power,”¹⁶⁶ a logic that they describe thusly:

Decisions of prosecutors are quintessentially sovereign acts in that they are moments when officials can decide who shall be removed from the purview of the law. They mark the boundaries of the rule of law even as they do the work that law requires.¹⁶⁷

The tremendous room afforded prosecutorial discretion is a systemic recognition that criminal justice requires something beyond the law. Familiar anxieties are raised by the

¹⁶⁵ Austin Sarat & Conor Clarke, "Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law" (2008) 33.2 *Law & Social Inquiry* 387, at 406. Sarat and Clarke find this idea in the thought of Montesquieu, Locke, and Blackstone.

¹⁶⁶ *Ibid.* at 393

¹⁶⁷ *Ibid.*, at 410-11.

prospect of being exempted from the purview of the law through prosecutorial discretion. The extra-legal decision impervious to review raises the spectre of prejudice, abuse of power, and inequality under the law.¹⁶⁸ These are the genuine risks attendant on the sovereign exception. But whatever the perspective on these risks from the heights of constitutional theory, our structural faith in and reliance on prosecutorial discretion means the exception is always palpable in the atmosphere of the criminal justice system.

V. Conclusion: Sovereignty, Will and the Missing Exception

At the outset of this piece I described this project as an exercise in disciplining constitutional theory with the realities of criminal law. The foregoing has disclosed a chasm between the status of the exception in modern constitutional theory and its structural and symbolic role in the contemporary Canadian criminal justice system. The aspiration of much modern constitutional thought and jurisprudence is to nudge the domains of legal reason and state justice into perfect coincidence. In this image of constitutionalism, there is no space for the extra-legal decision, the exception unregulated by law. This is the picture presented by the prevailing expression of faith in the ultimate sufficiency of legal reason – the logic of proportionality as the central ethos of constitutionalism. Yet close attention to the practical and symbolic structure of our criminal justice system shows an abiding role for the exception to law as a necessary aspect of ensuring that justice is done in the modern constitutional state. We have not yet actually seen fit to eradicate the decision unbound by law; indeed, we seem to jealously guard the possibility for the appearance of the exception.

¹⁶⁸ See Faizal R. Mirza, "Mandatory Minimum Prison Sentencing and Systemic Racism" (2001) 39 Osgoode Hall L.J. 491 at 506: "The exercise of prosecutorial discretion to frame charges and offer plea bargains is largely out of the purview of the public eye, and thus prone to abuse and discriminatory exercises of power".

This chasm between the exception in constitutional thought and its place in contemporary criminal justice points to the inadequacy of the conventional story told about the modern constitutional order. It is an incomplete picture that elides dimensions of our constitutional lives, our cultural conceptions of the nature and source of state justice, as expressed in the crucible of criminal justice.

Modern constitutional orthodoxies miss the dimension of sovereignty that continues to underwrite our understanding of state justice. We no longer have a King who might mount the throne in Star Chamber and dispense God's justice; this is anathema to our sense of the modern rule of law. Yet there is still a sovereign remainder at work in the Canadian constitutional order, displaying that earmark of sovereignty – the power to decide the exception to the law. In the United States this “sovereign remainder” is readily traced in the migration of the sovereignty of the king to that of “we the people”: the popular sovereign. The picture is characteristically complex, muddy, and interesting in Canada. As a democratic polity the people are sovereign. In the criminal justice system, this dimension of sovereignty emerges apparent in the power of the jury to overrule the law, reclaiming from law ultimate authority for state justice. As a constitutional monarchy, we find that the sovereignty of Her Majesty exerts a durable symbolic influence. The royal prerogative of mercy and prosecutorial discretion lean on the imaginary of a monarchical sovereign as a means of ensuring that justice can be perfected through a decision to declare an exception to the law – whether as extraordinary as the free pardon or as comparatively banal as the declination to prosecute. Uncomfortable though this fact is for much contemporary constitutional theory, we are

not yet done with sovereignty beyond law as a significant dimension of our constitutional lives.

A telling feature of all of the examples of the conscience-based exceptions drawn from contemporary criminal justice is that they all involve non-judicial actors. That this is so ought to be unsurprising. Judges are the high priests of law, reflecting the reason of law's rule, but not themselves positioned to exercise sovereign authority. As Kahn puts it, “[t]he role of a constitutional court is to maintain the reasonableness of the polity by subordinating politics – always the expression of interests – to law.”¹⁶⁹ Indeed, the charge of judicial activism is nothing other than the objection that a judge has assumed powers appropriately wielded by the sovereign, usually the legislative power of the people but sometimes the prerogatives of the executive. Yet a feature of contemporary constitutional theory has been the migration of judges to the centre of constitutional life. Tracing the ways in which the exception remains an essential component of our vision of criminal justice shows that this myopic focus on judges as the fount of justice in the constitutional order is something of a distortion. The justice of the criminal law is in fact curated by a host of actors in our modern constitutional life, be it the jury, the prosecutor, or the executive. By declaring the exception, these other actors stand ready to inject the will, conscience, and politics that can augment the law and complete our sense of justice in the contemporary constitutional order. These other actors do not, however, figure prominently in theories of modern constitutionalism; this is yet another inadequacy of the prevailing story about the nature of constitutional justice.

¹⁶⁹ Kahn, *supra* note 7 at 2697.

Yet it is in the assertion of the sufficiency of legal reason as a measure of the just that the contemporary theories I am assessing depart most profoundly from the realities of our constitutional lives as disclosed in the workings of the criminal justice system. The attempt to extinguish the exception is bound up with the hope of extending the reason of law to all corners of state justice. Recall Beatty's claim that in a state governed by the rule of law, the logic of proportionality is all-embracing: "there are no exceptions and no competing principles that can limit its reach.... All cases are always settled on the basis of the same universal principle being applied to their particular set of facts."¹⁷⁰ The overwhelming aspiration of modern liberal constitutional theory is to craft a constitutional order in which all decisions are bound by "criteria that can be framed and tested as an exercise of reason and not merely as an act of willfulness or will."¹⁷¹ In the 16th and 17th century sources, the role of sovereign will, as opposed to legal reason, in effecting justice was palpable. It was in the space preserved for the operation of will that mercy and conscience could, when needed, achieve a "higher" justice than the justice of law's rule. We are not free of this idea. It would be folly to deny the regulative force of reason and the potency of the logic of proportionality in the modern constitutional order. However, the realities of the contemporary criminal justice system show that the integrity of this order is preserved by the persistence of the possibility for the exceptional decision despite or even contrary to the law. We still covet institutional spaces for the appearance of conscience and mercy unregulated by the law. In short, the political theology and attendant theory of law and justice to which we are inheritors still expresses itself in the

¹⁷⁰ Beatty, *supra* note 34 at 170.

¹⁷¹ Wechsler, *supra* note 48 at 11. See also Sarat, *supra* note 117 at 119: "Modern legality is founded on an effort to make reason triumph over emotion and due process over passion and to make punishments proportional in their severity to the crimes that occasion them."

modern state in the form of fidelity to the idea that reason is not the only faculty of judgment necessary to achieve justice. Anathema though it may be to orthodoxies about modern constitutionalism, there is still much will, conscience and potential for mercy circulating in our conception of the state. A theory of constitutionalism that fails to account for the exercise of will beyond reason fails as an adequate description of our constitutional lives.

That such a theory fails in a descriptive mode does not preclude its pursuit as an aspiration. As much as it presents an opportunity for the expression of mercy and an equitable manifestation of conscience, the exception is a liminal phenomenon that also poses very real dangers. As Sarat has put it “[s]anctioning the exercise of mercy, it turns out, always involves a risk.”¹⁷² So one might acknowledge the continued presence of the conscience-based exception in our constitutional order yet still wish to see it extinguished on the basis of the dangers that it poses. Yet to do so would involve a political judgment about the kind of system in which one wishes to live *despite* the constitutional system in which we currently find ourselves. And one who would wish to see the exception extinguished would have to wrestle not only with the feasibility and practicality of ridding our constitutional architecture of spaces for the exercise of conscience but also with the normative question of whether the structural avoidance of these dangers is worth the loss of the felicitous appearance of conscience in our constitutional order.

¹⁷² Sarat, *Mercy on Trial: What it Means to Stop an Execution*, *supra* note 117 at 158.