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

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I. Introduction

Modern constitutional theory abhors the exception. The exercise of state power unbounded by or contrary to the law is 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 collective experience 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

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torture, that flout legal and constitutional norms. Canadian political history offers its own bases for anxiety about 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 us 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, 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 work of Giorgio Agamben. Agamben 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 Schmitt and his famous statement,

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“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.

In this way, the extra-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 its relationship 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 carries a strong aspiration to contain every decision within the rule of law. Dicey’s foundational definition of the rule of law, and his distain for 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. Duplessis⁵ and Singh⁶ 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 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

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⁸ Ibid. at 2698.
The telos of this way of imagining modern constitutionalism is the extension of the reason of law’s rule, rather than the interests and passions that can infect the extralegal decision, to all claims of political justice. 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.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 a different jurisprudential valence. 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 beholden to the claims of reason alone; rather, at the limit of law, other human faculties – conscience and mercy – were needed to perfect justice. As I will show by turning to these historical sources, this attitude towards the exception was 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

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9 Ibid. at 2683.
exception is 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 artefact. It is more than an historical curiosity that has been left behind as our theories and practices of constitutionalism have evolved. Attention to 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 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 understanding of 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 a story of modern constitutionalism in which all decisions must be contained and regulated by the reason of law.

Attention to the lived realities of the criminal law thus disrupts this image of modern constitutionalism – it shows 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 remains an 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.

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 rights and the manner in which these moments are addressed discloses much about prevailing conceptions of a just state. The criminal law is something of a crucible of constitutionalism. 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. What follows is an exercise in disciplining constitutional theory with careful attention to the workings of the criminal justice system.

Before turning to an exploration of the genealogy of ideas surrounding the conscience-based exception and examining the resonances of these ideas in key aspects of our contemporary conception of criminal justice, I first pause to crystallize the modern vision of constitutionalism that I ultimately seek to trouble. I do so by briefly examining the central role of the concept of proportionality in the ethos of modern constitutionalism. This concept of proportionality is an expression of the desire to extinguish the exception
but is also intimately connected with a regulatory ideal of reason as the ultimate measure of state justice.

II. The Logic of Proportionality

Proportionality review is the elephant in the comparative constitutional scholar’s room. Despite the variation in the historical traditions and legal cultures shaping constitutionalism in modern western democracies, there is striking convergence on the idea that constitutional judgment is ultimately an exercise in the refined and careful deployment of proportionality review. Despite a notable lack of convergence on certain key substantive constitutional values – such as privacy and freedom of religion – the analytic method for judging both the boundaries of such values, as well as conflicts amongst such principles, is remarkably stable. 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 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.”

The Canadian case is exemplary of the manner in which the logic of proportionality has become integral to the way of imagining the just constitutional state.

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Finding an infringement of a Charter right has become, for a number of rights, an increasingly brief and cursory pit stop to the key analytic point: s. 1’s declaration that the rights guaranteed in the Charter are “subject… to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Even for those rights that involve more internal analytic work, the constitutionality of a law commonly turns on the s. 1 analysis. Since the Supreme Court’s 1986 decision in R. v. Oakes, this judgment as to whether the limitation of a 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. This Canadian iteration of the proportionality analysis – the Oakes test – is an echo of, if not modeled on, the necessity and suitability conditions found in the jurisprudence of the German Federal Constitutional Court and the Canadian Supreme Court has recently

13 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 Benjamin L. Berger, “Section 1, Constitutional Reasoning, and Cultural Difference: Assessing the Impacts of Alberta v. Hutterian Brethren of Wilson Colony” (2010) 51 S.C.L.R. (2d) Forthcoming.

14 The notable exceptions are s. 7 and s. 15, in which the constitutionality of a given law tends to turn on the internal rights analysis. Tellingly, the jurisprudence governing both of these rights has taken on significant elements of proportionality reasoning.


16 For the Court’s most recent explanation of this test, see Alberta v. Hutterian Brethren of Wilson Colony, [2009] 2 S.C.R. 567.
drawn inspiration in its refinement of the test from the Israeli experience of proportionality review.\textsuperscript{17}

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?” In his recent dissenting decision in \textit{Hutterian Brethren}, Justice LeBel described the \textit{Oakes} test as an “attempt to determine why and how a law could be found to be just and whether it should be enforced.”\textsuperscript{18} Justice LeBel placed the \textit{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…. 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…\textsuperscript{19}

On this view, proportionality is the ultimate measure of justice within the constitutional rule of law.

Although the \textit{Oakes} test might be its clearest and most prominent expression, this manner of imagining the regulative ideal for state justice spreads well beyond s. 1. Conceptions of proportionality are also deeply influential in shaping the criminal law. Perhaps the archetypal instance of the use of proportionality as the principle defining the boundaries of individual rights and state power is the law of self-defence, wherein the core criterion in \textit{justifying} otherwise criminal violence is the measure of proportionality.\textsuperscript{20}

Proportionality has also guided legislative assessments of just punishment: the

\textsuperscript{17} In \textit{Hutterian Brethren}, the Supreme Court cites and draws from Aharon Barak, "Proportional Effect: The Israeli Experience" (2007) 57 U.T.L.J. 369.
\textsuperscript{18} \textit{Ibid.} at para. 184.
\textsuperscript{19} \textit{Ibid.} at para. 184.
“fundamental principle” of sentencing is that “a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” At 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* 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.

Yet the role of proportionality as the measure for justice and method for judgment in the modern constitutional state has spread from the doctrinal to the theoretical realm, anchoring scholarly theories of constitutional and political justice and the rule of law. Robert Alexy’s account of constitutionalism, for example, turns on the idea that constitutional rights are *principles* (rather than *rules*) that must be assessed through a process of balancing in which a judge is seeking a “*conditional relation of precedence* between the principles in the light of the circumstances of the case.” This balancing approach, which for Alexy is core to constitutional rights, is “one part of what is required by a more comprehensive principle”, the principle of proportionality. In assigning proportionality the cardinal position amongst constitutional rights norms, Alexy is making a broader claim about state justice. He explains that “[c]onstitutional rights norms ‘radiate’ into all areas of the legal system…. so as to affect the rights and duties of

21 Section 718.1 of the *Criminal Code*, 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 *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.
all actors within the jurisdiction”. 26 For Alexy, the logic of proportionality is the heart of modern constitutionalism. 27

Similarly, David Beatty offers a theory of constitutionalism in which proportionality is none other than “the ultimate rule of law”. 28 Looking catholically 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. Proportionality analysis can “claim an objectivity and integrity no other model of judicial review can match.” 29 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 constitutional order 30 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.” 31 Like Alexy, Beatty’s emphasis on proportionality is not just about judicial review but involves a broader claim about the nature and essence of political justice, broadly writ. Rights of liberty, equality, and fraternity are actually markers for an underlying guarantee of proportionality in state action. As such, the principle of proportionality “sets the standards that every law, every

27 Alexy, supra note 24 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.
29 Ibid. at 171.
30 “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).
31 Ibid. at 168.
act of government, must meet.”\footnote{Ibid. at 170.} 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.”\footnote{Ibid. at 160.} Proportionality is none other than the very measure of political justice in a modern constitutional democracy.

The logic of proportionality has taken up stable residence in both jurisprudence and much influential theory as the centrepiece of modern constitutionalism. But note that the ascendency of proportionality involves a particular way of imagining both the constitutional order and the relationship of law to justice, one that is intimately linked to a claim about reason as the essence of 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.”\footnote{Kahn, supra note 7 at 2698.} Within the logic of proportionality review, that which is constitutionally permissible is that which is reasonable, all things considered. 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”\footnote{Beatty, supra note 28 at 162.} on the fact that it “permits disputes about the limits of legitimate lawmaking to be settled on the basis of

\footnote{Ibid. at 170.} \footnote{Ibid. at 160.} \footnote{Kahn, supra note 7 at 2698.} \footnote{Beatty, supra note 28 at 162.}
reason and rational argument.” 36 “Proportionality,” as Kahn asserts, “is nothing more than the contemporary expression of reasonableness.” 37

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:

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. 38

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.” 39

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. The truly exceptional case no longer exists, only cases

36 Ibid. at 169.
37 Kahn, supra note 7 at 2698.
38 Beatty, supra note 28 at 184. [emphasis added]
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, 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

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.40

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. Attention to these ideas that circulated in our legal genealogy attunes us to points at which a similar logic or sensibility subsists in the modern culture of the constitutional rule of law and a way of imagining constitutionalism with which they interact.

40 Beatty, supra note 28 at 170.
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.”41 This was not an empirical observation about comparative political structure. King James was making was a claim of political theory that 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 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 seek the higher justice of equity, meted out by the Chancellor, the King’s representative. Star Chamber spent most of its life as a court seeing that the King’s justice would punish the morally guilty and protect the weak even when the common law lacked the resources to do so. King James declared that Chancery “exceeds other Courts, mixing Mercy with Justice, where other Courts proceed only according to the strict rules of law”.42 “[W]here the rigour of the Law in many cases will undo a Subject,” James explained, “there the Chancery tempers the Law with equity”.43 King James similarly exalted Star Chamber, which, through its exercise of criminal equity,

41 Johann P Sommerville, ed., King James VI and I: Political Writings (Cambridge and New York: Cambridge University Press, 1994) at 216.
42 Ibid. at 214.
43 Ibid. at 214.
“punished wrongdoings that the law was too weak to remedy in order to protect the weak from the violence or cunning of the strong.”

King James’s exaltation of the exceptional powers held by these prerogative courts was not merely a self-serving arrogation of absolute monarchal authority. James was participating in a tradition 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 symbolically saturated by its late abuses of extra-legal discretion and is now 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 prevailing 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

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44 Debora Kuller Shuger, Political Theologies in Shakespeare’s England: The Sacred and the State in Measure for Measure (New York: Palgrave, 2001) at 83.
45 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.
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.  

This classic definition of equity makes clear that the need for the exception arises from the generality of law and the inability of the legal rule to anticipate all cases. Writing over 100 years later, William Lambarde expressed this same idea in his discussion of the powers exercised by Star Chamber. Lambarde explained that it was inevitable that, in the course of government, “sundry things doe fall out… that doe require extraordinarie help, and cannot await the usuall cure of common, Rule and settled Justice”. Most cases will be dealt with by the common law, 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 aboslute Power, and irregular Authoritie.  

Whether in civil or criminal law, cases will arise in which “helpe and supply must elsewhere be sought, and found, or otherwise Justice must limpe on the better legge”.  

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. This is precisely Milsom’s account of the emergence of equity: it arises when faith in direct access to divine justice is lost and what replaces it is a fallible human

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46 Christopher St. German, Doctor and Student by T.F.T. Plucknett & J.L. Barton (London: Selden Society, 1974 [1528]) at 97.
48 Ibid. at 49.
law capable of producing results that “fail to reflect a justice still seen as absolute”. Milsom explains that it was not the idea of divine justice that was novel in St. German’s ur-account of equity. Rather, “[t]he new element was a positive human law beginning to be conceived in substantive terms, in terms of a rule that on these facts this result ought to follow, and on those facts that result. And sometimes the result was visibly unjust.” 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 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 it is mercy and conscience that fill this gap between the law and justice and, hence, fuel the exception. St. German characterizes equity as a manner of doing justice that “consideryth all the pertyculer cyrcumstnaces of the dede the whiche also is temperydy with the sweetness of mercye.” 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”. 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 Justice and Equitie.” Tethered as it is to the exercise of conscience and mercy, judgment made

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50 Ibid. at 89.
51 St. German, supra note 46 at 95.
52 Sommerville, ed., supra note 41 at 214.
53 Lambarde, supra note 47 at 45.
in spite of the law has a decidedly positive connotation in the juridical and political thought of this era.

Mercy was imagined as stepping in to impel an exception that would supplement the “short measure” of the law and, thereby, do justice. So conceived, the exception was not in competition with the law nor a threat to justice; rather, “Lawes covet to be rewlyd by equyte”.54 The exception harnessed mercy to assist the pursuit of justice when the reason of the law – aspiring to the same – fell short. In assuming this attitude, 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.55 Yet, in his Summa Theologica, Aquinas articulated an equally venerable 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” 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: “mercy does not destroy justice, but in a sense is the fullness thereof.”56

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

54 St. German, supra note 46 at 95.
55 Hutterian Brethren, supra note 16.
earth was to ensure that justice be done.57 “Kings,” James explained in his speech in Star Chamber, “are properly Judges, and Judgment properly belongs to them from God: for Kings sit in the Throne of God, and thence all Judgment is derived.”58 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 that would fulfill a more perfect justice to which the law could only imperfectly aspire. 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. “[H]owsoever many Courts of ordinarie resort shall bee established”, the King always had the “pre- eminent and royal Jurisdiction”59 to provide the just remedy. Seized with this conception of sovereignty, law, and justice, Lambarde expressed the sentiment animating the 16th and 17th century notion of the exception when he asked, “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.”60

In her fascinating study Debora Kuller Shuger draws an evocative comparison between the exception as it was famously conceived by Carl Schmitt in Weimar Germany, and the exception as it was understood in 16th and 17th century-England.61 Carl Schmitt analyzed the exception as a creature of political crisis calling for “immediate and

57 See Shuger, supra note 44 at 72-73.
58 Sommerville, ed., supra note 41 at 205.
59 Lambarde, supra note 47 at 66-67.
60 Ibid., supra note 47 at 67. (Italics original)
61 Shuger, supra note 44.
drastic measures”,\(^{62}\) 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.”\(^{63}\) The contrast in the valence of the exception is 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 16\(^{th}\) and 17\(^{th}\) 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 is also 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. The positive exception was a matter of constitutional imagination, albeit one emphatically different than that reflected in contemporary jurisprudence and theory.

**IV. Imagining Contemporary Criminal Justice**

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.


\(^{63}\) *Ibid.*, *supra* note 44 at 80.
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. The sovereign decision would ensure that justice would be done despite the imperfect reason of law. The imagined gap between law and justice generated an understanding of the exceptional decision as the felicitous appearance of conscience to perfect justice when law would – and it would – fall short.

One might reconcile this apparent chasm between the influential story told in contemporary constitutional theory and this aspect of the history of our common law tradition through a narrative of progress: as the legal tradition developed, so too did our appreciation of the dark side of the exception and the excesses possible in the extra-legal decision. The refined reason of modern constitutionalism emerged from this evolved understanding of sovereignty and the exception. 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 dominant contemporary constitutional image outlined in this piece 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 – it becomes clear that conscience, mercy, and the exception continue to play a structurally potent role. This is not to deny the purchase that reason and the logic of proportionality have in the contemporary Canadian criminal justice system. As noted earlier in this piece, one finds the guiding hand of proportionality in many key places in the criminal justice system. Yet certain features of the criminal justice system betray an abiding commitment to preserving the possibility for the conscience-based exception to the law. The examples cited may seem marginal; but such is the nature of the exception. These features take their force from their presence as possibilities within the criminal justice system, the abiding potential for their appearance affecting the overall imaginative architecture 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. 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. 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.”64  Jurors are told that, as judges of the facts 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.”65  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 certain structural features of the jury make it impossible to police these expectations.  First, there is a powerful rule of jury secrecy in Canada.  Jury deliberations enjoy a common law privilege prohibiting the introduction of any evidence reflecting what took place in the jury room.66  This evidentiary privilege 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 on trial judges a positive duty to give reasons.67  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

65 Ibid.
that are presented™ 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 unable to police the content or nature of the jury’s decision-making process.™

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 juries can – and have, indeed, seen fit to – return a “not guilty” verdict. 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 verdicts against and in spite of the law, exceptional decisions made not on the basis of the impartial reason of law alone but, rather, motivated by some exercise of conscience.

™ Sheppard, supra note 67 at para. 23.
™ 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.
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.”70

The touchstone case on jury nullification in Canada is *R. v. Morgentaler* (1988).71 Dr. Morgentaler was charged with contravention of a (now constitutionally invalid) criminal law that 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 nevertheless 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”.72 He recoiled, however, at the idea that the jury should be encouraged by defence counsel to use it. To accede to the

72 Ibid. at 78.
“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.”73 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”:74

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 whom it had sympathy. Alternatively, a jury who feels antipathy towards an accused might convict despite a law which points to acquittal.75

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,76 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.”77

The systemic antipathy towards jury nullification was again strongly expressed in the Supreme Court’s decision in the tragic case of R. v. Latimer.78 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

73 Ibid. at 78.
74 Ibid. at 78.
75 Ibid. at 77.
77 Ibid. at 824.
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 distressed. At the Supreme Court of Canada, the key issue was the doctrine 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 increases the possibility of jury nullification.”79 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.”80 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.”81

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

79 Ibid. at para. 65.
80 Ibid. at para. 68.
81 Ibid. at para. 70.
system; rather, in a number of ways the law actively affirms and preserves a space for
nullification, suggesting a more complicated relationship with this exceptional decision.

Although the Supreme Court has disapproved of attempts by defence counsel to
appeal to nullification, it has also resisted direct judicial impingements on the power. In
*R. v. Gunning*, the trial judge made the following comments to the jury regarding
nullification:

> 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 into
that. So that’s what that’s all about.83

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” interfered
with the fairness of the trial “where the accused exercises his constitutional right to the
benefit of a trial by jury”. The objection to this charge was that, accurate though it may
be, it deprecated the power of the jury to come to whatever verdict it saw fit, irrespective
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. Finding no air of reality to the
necessity defence the trial judge did not put it to the jury. He instructed the jury “to retire
to the jury room to consider what I have said, appoint one of yourselves to be your

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foreperson, and then to return to the court with a verdict of guilty."87 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 religious grounds, one on grounds of conscience, requests 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. Krieger tethers the very right to trial by jury to the possibility of nullification.

Indeed, the Canadian criminal justice system has features whose very purpose is to 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 suggested by Krieger, 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 an acquittal, 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.

87 Ibid. at para. 7.
Binariis, 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 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.” Justice Arbour, writing for the Court, explained that there “is no anomaly in this result” 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.” 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? After all, the presumption only holds up to such point as there remains no reasonable doubt. What this asymmetry in the law protects 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”? Lord Mansfield had no sympathy for jury nullification, a practice he viewed as lawless and provoked him to the conclusion “[m]iserable is the condition of individuals, dangerous is the condition of the State, if there is no certain law, or, which is

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89 Ibid. at para 32.
90 Ibid. at para 33.
91 Ibid. at para 33.
the same thing, no certain administration of law”.93 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 God and their own consciences.”94 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 words 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.95

Although it acknowledged the dangers of uncertainty, unequal treatment, and bias that the practice of jury nullification 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”96 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

93 *R. v. Shipley*, *supra* note 76 at 824.
constitutional right to a jury is really the possibility of conscience-based nullification.\textsuperscript{97}

Preservation of jury nullification is, ultimately, about imagining a gap between the law and justice. Paul Butler, writing in defence of the progressive use of nullification race-based cases 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.”\textsuperscript{98}

Whether cast, as it frequently is, as the “citizen’s ultimate protection against oppressive laws and the oppressive enforcement of law”,\textsuperscript{99} or as the expression of equity and mercy, the preservation of jury nullification is an effort 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. In thrall 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 should 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 \textit{Krieger}: “under the system of justice we have inherited from

\footnotesize{\textsuperscript{97} 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. Nowlin argues, at 330, that “[t]he ‘benefit’ of the jury is not … that it 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.”

\textsuperscript{98} Butler, \textit{supra} note 92 at 723. See also Alan Scheflin & Jon Van Dyke, "Jury Nullification: The Contours of a Controversy" (1980) 43:3 Law & Contemp. Probs. 51 at 87, in which the authors describe jury nullification as the power to suspend the operation of the law “in the interests of conscience and justice.”

\textsuperscript{99} Law Reform Commission of Canada, cited in \textit{Morgentaler}, \textit{supra} note 71 at 78.}
England juries are not entitled as a matter of right to refuse to apply the law – but they do have the power to do so when their consciences permit of no other course.”

(2) The Royal Prerogative of Mercy

Jury nullification is a particularly evocative and rich instance of the possibility of the decision outside of the law as an abiding structural feature of contemporary criminal justice in Canada. Yet a survey of the architecture of the criminal justice system reveals another persisting expression of this historical sense that conscience and mercy still have a structural role in perfecting justice. 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. 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 themes of this piece – including its tie to sovereignty and its exceptional nature – is suggested in the simple lines of these provisions. The first notable feature of this power, however, is its comparatively low profile in the modern Canadian criminal justice system.

Unlike jury nullification, which has attracted significant attention from courts and has

100 Krieger, supra note 86 at para. 27.
101 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.
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 obvious 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, largely 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. Governor Ryan’s commutation of all death penalties in Illinois in 2003 re-ignited such debates. In the substantial U.S. literature on the subject, the arguments for and against the clemency power assume a familiar form, mirroring debates surrounding the role and legitimacy of jury nullification.

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 incommensurable with the norms of modern constitutionalism. Clemency carries 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

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103 Sarat’s study, *Mercy on Trial: What it Means to Stop an Execution*, focuses on Governor Ryan’s mass commutation, arguing in the end that it had little to do with the exercise of mercy.
clemency, so understood, offends and contradicts justice.”¹⁰⁴ Those sympathetic to this view seek to discipline or contain clemency within the law, severing it from questions of mercy and conscience.¹⁰⁵ 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.”¹⁰⁶ Those committed 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.”¹⁰⁷ As Sarat acknowledges, “[a]s a monarchical prerogative or an executive action in a democracy, clemency appears to be outside of, or beyond, the law and thus a threat to a society dedicated to the rule of law.”¹⁰⁸ The very nature of clemency grates on contemporary accounts of justice under 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 [sic] that people have what is

¹⁰⁵ 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.”
¹⁰⁶ Kathleen Moore, Pardons: Justice, Mercy and the Public Interest (Toronto: Oxford University Press, 1989) at 199.
¹⁰⁸ Sarat, Mercy on Trial: What it Means to Stop an Executions supra note 102 at 69.

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coming to them.”

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” – the virtue of a power of clemency 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,” Sarat and others affirm the need for this exceptional power inasmuch as it “provides ‘relief’ from legal justice strictly construed”.

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.

Prior to the final abolition of the death penalty in Canada in 1976, the royal prerogative of mercy played a similarly active and vital role in the administration of criminal justice in Canada. With every court-ordered death sentence reviewed by the executive, the prerogative of mercy was an unmistakably significant part of the criminal justice system. “Between 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.” In the 1933 Reference re Royal Prerogative of Mercy upon

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110 Beau Breslin & John J.P. Howley, "Defending the Politics of Executive Clemency" (2002) 81 Or. L. Rev. 231 at 236 [emphasis added].
111 Sarat, Mercy on Trial: What it Means to Stop an Executions supra note 102 at 69.
112 Ibid. at 19.
114 Ibid. at 561.
Chief Justice Duff, writing for a unanimous Supreme Court, went so far as to characterize the royal prerogative as 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*… 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 ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.”

This statement has a practical plausibility about it in a system that still indulges in capital punishment. What is most fascinating about the Canadian case is that the abolition of the death penalty pushed the pardon to the borders of the administration of criminal justice but it did not sap it of its constitutional and symbolic import. 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 that 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 order.

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.” The Court recognized that “the questions that arise in Mr. Latimer’s case are the sort that have

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117 *Latimer, supra* note 78 at para. 4.
divided Canadians and sparked a national discourse.”

In addition to issues of necessity and jury nullification, the case 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*. Deeply uncomfortable with the mandatory minimum, the jury 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 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. Early in the judgment, the Court acknowledged that its decision would mean 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.”

In the closing portion of its reasons, the Court returned to and emphasized this issue of clemency:

…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.

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

118 *Ibid*.
119 *Ibid*. at para. 3. [emphasis added]
The courts have 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 to mandate injustice. Minimum sentences impose a special set of stresses on the legal system, engaging and exacerbating 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.\(^{121}\) *R. v. Luxton\(^{122}\) 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.”\(^{123}\)

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*.\(^{124}\) 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 case\(^{125}\) that the constructive murder provisions were

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\(^{125}\) *Vaillancourt*, supra note 22.
unconstitutional. In light of this decision, Mr. Sarson applied to the courts to quash his 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.”

Justice Sopinka, writing for a majority of the Court, explained that neither the common law nor constitutional law could provide the remedy sought, concluding that Mr. Sarson had “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.” The rules of law offered no relief; “[a]s a result,” from the perspective of the law, “the appellant [was] deserving of his fate.” But Justice Sopinka went on to note that the royal prerogative of mercy was “one possible avenue of redress for persons convicted under [the constructive murder provisions].” 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.

The Court cited this statement with approval in R. v. Latimer.

Justice Duff stated, in 1912, that “the prerogative of pardon in itself affords some security against manifest injustice.” As the Rt. Honourable Kim Campbell, former

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126 Sarson, supra note 124 at para. 51.
127 Ibid.
128 Ibid.
129 Ibid.
130 Ibid.
131 In re McNutt, [1912] 47 S.C.R. 259, at 280. This is a particularly interesting statement given the nature of the case, which called upon the Court to rule upon its own appellate jurisdiction. Justice Duff’s comment is by way of justification of the limited jurisdiction of the Supreme Court of Canada over criminal appeals.
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.”132 Mercy stands waiting at the limit of law’s reason to ensure that justice can be done.

The courts’ invocation of the ever-present possibility of Her Majesty extending the royal mercy in “difficult cases” serves both as an acknowledgement that there is a potential gap between law and justice and as a reflection that the constitutional order has resources for bridging this gap. As a space in the criminal justice system maintained for the injection of considerations beyond law’s reason, one finds in the pardon 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’.”133

132 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 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”. Trotter’s article addresses another instance in Canadian criminal law history in which the royal prerogative of mercy was relied upon as a means of ensuring that justice would be done despite the limits of the law. The Supreme Court of Canada formally recognized the relevance of battered woman syndrome to the law of self-defence in R. v. Lavallee [1990] 1 S.C.R. 852. After years of lobbying by the Canadian Association of Elizabeth Fry Societies, the federal government appointed Justice Lynn Ratushny to conduct an inquiry of women convicted who might have benefited from the development in Lavallee. Justice Ratushny reviewed a total of 98 cases. She delivered her report in 1997, making recommendations about individual cases, and about the law in general: see Justice Lynn Ratushny, The Self-Defence Review—Final Report (Ottawa: Department of Justice Canada, 1997). Justice Ratushny recommended relief in only seven of these cases. Ultimately, the Federal Government granted conditional pardons to two women (both of whom had already completed their sentences) and remission of the sentence of to two others (both of whom had already been released on parole), referring a fifth case to the Court of Appeal. For a discussion of this report, see Elizabeth Sheehy, "Review of the Self-Defence Review" (2000) 12 C.J.W.L. 197.

133 Reference re Royal Prerogative, supra note 115 at 272.
The persistence of this kind of sovereign authority unregulated by law grates on prevailing accounts of the core ethos of modern constitutionalism and appears to many today as a dangerous incursion of the political into the rule of law; however, this “was precisely the point of housing the discretionary pardoning power in a purely political branch, so that politics would contribute to the overall process.” Even post-revolutionary France, seized with an unparalleled anti-monarchal ethos, failed in its attempt to extinguish the pardoning power. As Justice Wayne wrote of the U.S. constitutional order in *Ex Parte Wells*, “[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.” 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**

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134 Reflecting on the invocation of the royal prerogative of mercy in *Latimer*, Carolyn Strange, *supra* note 113 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.”

135 Breslin & Howley, at 249.


137 59 U.S. (1856) 307. This decision is referenced and discussed in Sarat, *supra* note 102 at 78-79.

Both jury nullification and the royal prerogative of mercy exert their influence on the way that criminal justice is imagined through their lurking presence in the wings. 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. The Supreme Court has recognized the essential role of prosecutorial discretion in “all aspects of the criminal justice system”, stating that “[a] system that attempted to eliminate discretion would be unworkably complex and rigid.”

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

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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.”\textsuperscript{141} Structurally, prosecutorial discretion happens in view of the law but not because of it. Although it does not have the exotic appeal or mystique of jury nullification or the exercise of the royal prerogative of mercy, 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. The jealousy with which the law seeks to preserve this exceptional space is intriguing. The exercise of Crown discretion is virtually unreviewable. The Supreme Court has been consistently firm on this point, making clear that courts should be “extremely reluctant to interfere with prosecutorial discretion”\textsuperscript{142} and that such interferences should be “extremely rare”.\textsuperscript{143} 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,\textsuperscript{144} a test that has rendered attempts to challenge the exercise of Crown discretion “spectacularly unsuccessful.”\textsuperscript{145} Notable about this treatment of Crown discretion in the criminal justice system is that it exempts

\textsuperscript{143} Ibid. at para. 616.
\textsuperscript{144} See Nelles v. Ontario, [1989] 2 S.C.R. 170 at 194, in which the Court describes the test as requiring the plaintiff to show 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.”
prosecutorial decision-making from the core norms of decision-making in the modern constitutional state.\textsuperscript{146} 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 discipline 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.\textsuperscript{147} To preserve its exceptional function, prosecutorial discretion must be released from these demands. Standing outside this norm, shielded from review, prosecutorial discretion is in sparse but evocative company in the criminal justice system: jury nullification and the exercise of the royal prerogative of mercy are similarly, exceptionally, immune from judicial review.

What gives prosecutorial discretion 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 essentially unregulated by the law. 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

\textsuperscript{147} See Sheppard and R.E.M., supra note 67.
venerable philosophical pedigree.\textsuperscript{148} 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”.\textsuperscript{149}

This latitude afforded to prosecutorial discretion is a systemic recognition that criminal justice requires something beyond the law. The prospect of being exempted from the purview of the law through prosecutorial discretion raises familiar anxieties. The extra-legal decision impervious to review raises the spectre of prejudice, abuse of power, and inequality under the law.\textsuperscript{150} These are the genuine risks associated with 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

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\item\textsuperscript{148} 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.
\item\textsuperscript{149} Ibid. at 393
\item\textsuperscript{150} 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”.
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constitutionalism, there is no space for the extra-legal decision, the exception unregulated by law. This is the picture suggested by the principal expression of faith in the 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. We have not yet seen fit to eradicate the decision unbound by law; indeed, we seem to jealously guard the possibility for the appearance of the exception.

This gulf 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 aspects 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 appears 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 monarchal sovereign as a means of ensuring that justice can be achieved by declaring an exception to the law. Uncomfortable though it may be 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 should not be surprising. Judges are the high priests of law, reflecting the reason of law’s rule, but not themselves positioned to exercise sovereign authority.151 Indeed, the charge of judicial activism can be understood as precisely the objection that the judiciary has arrogated to itself the authority to speak on behalf of the sovereign at the expense of other legitimate institutional sites for the expression of sovereign will. Yet a feature of contemporary constitutional theory has been the migration of judges to the centre of constitutional life. But a myopic focus on judges as the fount of justice in the constitutional order is a failure of vision. 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. In declaring the exception, these other actors stand ready to inject the will, conscience, and politics that augment the law and complete our sense of justice in the contemporary constitutional order. These other actors do not, however, figure

151 See Kahn, supra note 7 at 2697: “The role of a constitutional court is to maintain the reasonableness of the polity by subordinating politics – always the expression of interests – to law.”
prominently in theories of modern constitutionalism; this is yet another inadequacy of the prevailing story about the nature of constitutional justice.

Yet the most profound departure of much influential constitutional theory from the realities of our constitutional lives as disclosed in the workings of the criminal justice system is the assertion of the sufficiency of legal reason as a measure of the just. 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, with its intimate relationship with the faculty of reason, is all-embracing.\textsuperscript{152} 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.”\textsuperscript{153} In the 16\textsuperscript{th} and 17\textsuperscript{th} century sources, sovereign will, as opposed to legal reason, was the ultimate guardian of the just. 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.

The political theology and attendant theory of law and justice to which we are inheritors

\textsuperscript{152} Beatty, \textit{supra} note 28 at 170.
\textsuperscript{153} Wecshler, \textit{supra} note 39 at 11. See also Sarat, \textit{supra} note 102 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.”
still expresses itself in the 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.”¹⁵⁴ 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.