STATUTORY INTERPRETATION — RULE OF LENITY — SUPREME COURT OF OHIO HOLDS COCAINE POSSESSION PENALTIES DETERMINED BY TOTAL DRUG WEIGHT. — *State v. Gonzales* (*Gonzales II*), 2017-Ohio-777, 2017 WL 938679 (Ohio Mar. 6, 2017).

The rule of lenity provides that ambiguities in penal statutes "are resolved in favor of the defendant" and against the government[1] — thus operating to block convictions and reduce sentences. An ancient rule,[2] once energetically wielded by courts to strike down criminal laws and counter "legislative blood lust,"[3] lenity today remains a "real, but not an overriding aspect of [statutory] interpretation."[4] Recently, in *State v. Gonzales*,[5] the Supreme Court of Ohio failed to apply lenity in a criminal case. By neglecting the rule, the court missed an opportunity to clarify the rule's intellectual underpinnings and to reorient the rule toward a mercy-based justification.

In the summer of 2012, Rafael Gonzales telephoned Saul Ramirez, angling for cocaine.[6] Gonzales and Ramirez met, and Ramirez allowed Gonzales to try a small sample of his cocaine.[7] Satisfied with the quality, Gonzales asked to purchase a larger quantity.[8] But Ramirez was in fact — and unbeknownst to Gonzales — a police informant.[9] Ramirez offered Gonzales two bricks of imitation cocaine, with a small bag containing real cocaine weighing 139 grams hidden inside one.[10] Gonzales paid $58,000 in cash in exchange for the two bricks.[11] Ohio authorities apprehended and arrested Gonzales soon afterward.[12]

Gonzales was indicted for cocaine possession.[13] At trial, the jury determined that Gonzales was guilty and further found that he possessed at least 100 grams of cocaine at the time of arrest,[14] which qualified him as a "major drug offender" and mandated an enhanced sen-

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1 United States v. Bass, 404 U.S. 336, 348 (1971).

2 *See* LATIN FOR LAWYERS 172 (photo. reprt. 1992) (1915) (reciting the Roman legal maxim that "[i]n penal causes the interpretation ought to be the more favourable" to the accused).

3 John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 198 (1985).

4 Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 115 (1998).

5 2017-Ohio-777, 2017 WL 938679 (Ohio Mar. 6, 2017).

6 State v. Gonzales, 2015-Ohio-461, 2015 WL 502263, ¶ 2 (Ohio Ct. App. 2015).

7 *See id.*

8 *See id.*

9 Merit Brief of Amicus Curiae, Office of the Ohio Public Defender, in Support of Rafael Gonzales at 1–2, State v. Gonzales, 2017-Ohio-777 (Nos. 2015-0384, 2015-0385), 2015 WL 8959387.

10 *Gonzales*, 2015-Ohio-461, 2015 WL 502263, ¶ 3.

11 *Id.*

12 *Id.* ¶ 4.

13 *Id.* ¶ 5.

14 *Id.* ¶ 7.

tence of eleven years' imprisonment.[15] Gonzales appealed, arguing that the trial court improperly increased his sentence based on the total weight of cocaine including fillers.[16]

The Ohio Sixth District Court of Appeals agreed with Gonzales, reasoning "that the plain language of [the cocaine possession statute] support[ed] appellant's argument."[17] The statutory definition of cocaine, unlike those of other controlled substances, did not include the term "mixture";[18] instead, cocaine was defined strictly as "a salt, compound, derivative, or preparation of coca leaves."[19] This meant that the State could establish the level of Gonzales's offense only if he carried over 100 grams of chemically pure cocaine.[20]

Recognizing an appellate split,[21] the Supreme Court of Ohio accepted an appeal by the State and affirmed.[22] Writing for a three-justice plurality, Justice Lanzinger[23] first recited the rule of lenity,[24] but then proceeded to find the statutory language unambiguous: the term "cocaine" did not include cocaine mixtures and referred solely to pure cocaine.[25] The plurality thus rejected the dissent's argument that the statutory term "compound" included mixtures[26] and viewed the term "compound" as referring only to "[t]he chemical makeup."[27] Further, the plurality was unpersuaded by the State's assertions that the interpretation urged by Gonzales would run counter to legislative intent.[28] Not only was the legislative intent irrelevant where the statute

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15 OHIO REV. CODE ANN. §§ 2925.11(C)(4)(f), 2929.14(A)(1) (LexisNexis 2014). If not for the finding that the amount of cocaine was at least 100 grams, Gonzales would likely have been sentenced to a prison term between three and eleven years. *See id.* §§ 2925.11(C)(4)(e), 2929.14(A)(1).

16 *See* Appellee Rafael Gonzales' Merit Brief at 5–6, State v. Gonzales, 2017-Ohio-777 (Nos. 2015-0384, 2015-0385), 2015 WL 8959386. Powder cocaine is almost invariably adulterated with filler materials, which decrease purity; common fillers include baking soda and baby laxatives. OHIO DEP'T OF MENTAL HEALTH & ADDICTION SERVS., SURVEILLANCE OF DRUG ABUSE TRENDS IN THE STATE OF OHIO, JANUARY–JUNE 2015, at 88 (2015).

17 *Gonzales*, 2015-Ohio-461, 2015 WL 502263, ¶ 41; *see also id.* ¶ 57.

18 *Compare* OHIO REV. CODE ANN. § 2925.01(X) (LexisNexis 2014) (defining cocaine for purposes of drug crimes), *and id.* § 3719.41 sched. II(A)(4) (listing coca leaves and cocaine), *with id.* § 3719.41 sched. I(C)(19) (listing marijuana).

19 *Id.* § 2925.01(X)(2).

20 *See Gonzales*, 2015-Ohio-461, 2015 WL 502263, ¶ 47.

21 *See* State v. Smith, 2011-Ohio-2568, 2011 WL 2112609 (Ohio Ct. App. 2011).

22 State v. Gonzales (*Gonzales I*), 2016-Ohio-8319, 2016 WL 7449218, ¶¶ 1, 7 (Ohio Dec. 23, 2016) (plurality opinion), *vacated and superseded on reh'g*, 2017-Ohio-777, 2017 WL 938679 (Ohio Mar. 6, 2017).

23 Justice Lanzinger was joined by Justices Pfeifer and O'Neill.

24 *Gonzales I*, 2016-Ohio-8319, 2016 WL 7449218, ¶ 10.

25 *Id.* ¶ 15–17.

26 *Id.* ¶ 19.

27 *Id.* ¶ 18; *cf.* THE MERRIAM-WEBSTER DICTIONARY 148 (new ed. 2016) (defining "compound" as "a distinct substance formed by the union of two or more chemical elements").

28 *Gonzales I*, 2016-Ohio-8319, 2016 WL 7449218, ¶ 22.

was unambiguous,[29] but the State also misunderstood the legislative aim — which was, when the statute was last amended by an omnibus criminal justice reform bill,[30] to reduce criminal sentences overall.[31] A pure-weight standard would result, on average, in reduced prison terms for defendants and advance the statutory purpose.[32]

Justice Kennedy concurred in the judgment. She considered the term "of cocaine" ambiguous, but agreed that the statute should be read such that the major drug offender classification required possession of at least 100 grams of pure cocaine.[33] Ambiguity allowed Justice Kennedy to consider legislative history in order to assign meaning consonant with the legislative intent.[34] And echoing the plurality, she reasoned that the legislative intent militated toward the statutory interpretation that reduced sentences overall.[35]

Three justices disagreed. In dissent, Chief Justice O'Connor[36] accused the plurality of "introduc[ing] a purity or weight requirement for cocaine possession that is not found in the language of the statute or supported by the reality of how cocaine is produced, distributed, or consumed."[37] The statutory definition of cocaine included any "*compound*" made from cocaine, and, under both the ordinary understanding and the dictionary definition, the word "compound" would encompass mixtures of cocaine and fillers.[38] The statute, then, was unambiguous and did not include a pure-weight standard.[39]

The Ohio General Assembly acted immediately after the decision, with the lower chamber voting unanimously to amend the statute and establish a total-weight standard for cocaine possession.[40] The State simultaneously filed a motion for reconsideration, arguing that the court misunderstood and misapplied the rule of lenity.[41] The Ohio Supreme Court voted 4–3 to reconsider the case.[42] Authoring a new

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[29] *See id.* ¶ 17.

[30] *See* H.B. 86, 129th Gen. Assemb., Reg. Sess. (Ohio 2011).

[31] *Gonzales I*, 2016-Ohio-8319, 2016 WL 7449218, ¶ 17.

[32] *See id.*

[33] *Id.* ¶¶ 24, 29 (Kennedy, J., concurring in judgment only).

[34] *Id.* ¶¶ 25–26 (citing OHIO REV. CODE ANN. § 1.49 (LexisNexis 2015) (allowing courts to make certain considerations to determine legislative intent in construing ambiguous statutes)).

[35] *See id.* ¶¶ 32–35.

[36] Chief Justice O'Connor was joined by Justices O'Donnell and French.

[37] *Gonzales I*, 2016-Ohio-8319, 2016 WL 7449218, ¶ 37 (O'Connor, C.J., dissenting).

[38] *See id.* ¶ 42.

[39] *See id.* ¶ 46–47.

[40] Jim Provance, *Ohio Clears Wording of Cocaine Sentencing*, THE BLADE (Feb. 16, 2017, 1:29 AM), http://www.toledoblade.com/State/2017/02/16/Ohio-clears-wording-of-cocaine-sentencing.html [https://perma.cc/8U4H-NF2H].

[41] Appellant State of Ohio's Sup.Ct.Prac.R. 18.02 Motion for Reconsideration at 2–4, State v. Gonzales, 2017-Ohio-777 (Nos. 2015-0384, 2015-0385).

[42] State v. Gonzales (*Gonzales II*), 2017-Ohio-777, 2017 WL 938679, ¶ 22 (Fischer, J., concurring in part and dissenting in part).

majority opinion — and preempting the legislative effort to supersede *Gonzales I* by statute — Chief Justice O'Connor[43] vacated the prior decision and reversed the intermediate court judgment.[44] She adopted in substantial part her own reasoning in *Gonzales I*. By its plain meaning, the word "compound" included fillers.[45] Any contrary conclusion would "insert the words 'actual' or 'pure'" into the statute.[46]

Justices DeWine and Fischer — who both joined the Ohio Supreme Court after *Gonzales I* was decided[47] — wrote brief separate opinions but agreed with the majority on the merits of the case.[48] Justice DeWine emphasized his belief that reconsideration was proper because *Gonzales I* was "fundamentally flawed."[49] Justice Fischer, on the other hand, voiced his discomfort with reconsideration but nevertheless argued that it was his "duty to participate" after the court granted the State's motion for reconsideration.[50]

Justice Kennedy dissented. The majority, she suggested, was underhandedly overruling court precedent and slyly subverting core constitutional values.[51] Reconsideration should be limited to cases suffering from "obvious error."[52] Yet the court now willfully accepted the State's fictive "assert[ions] that the court misapplied the rule of lenity,"[53] despite the "stark[] absen[ce]" in *Gonzales I* of any consideration of lenity.[54] Reiterating her concurrence in *Gonzales I*, Justice Kennedy stressed that the cocaine possession statute was ambiguous.[55] Ambiguity necessitated the use of legislative history for interpretation, and the legislative history clearly supported a pure-weight standard.[56] In any event, the State was wrong to assert that lenity would not determine

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43 Chief Justice O'Connor was joined by Justices O'Donnell, French, and DeWine.

44 *Gonzales II*, 2017-Ohio-777, 2017 WL 938679, ¶ 3 (majority opinion).

45 *Id.* ¶¶ 10–13.

46 *Id.* ¶ 13.

47 *See* Randy Ludlow, *Paul E. Pfeifer: Retiring Ohio Supreme Court Justice Has Left Mark*, COLUMBUS DISPATCH (Dec. 26, 2016, 10:21 AM), http://www.dispatch.com/content/stories/local/2016/12/26/paul-e-pfeifer-retiring-justice-has-left-mark.html [https://perma.cc/7C7R-JGCQ]. Justice DeWine replaced Justice Pfeifer. *Id.* Justice Fischer replaced Justice Lanzinger. Jim Provance, *Lanzinger Gets Set for Retirement from Ohio's Top Court*, THE BLADE (Dec. 27, 2016, 11:44 AM), http://www.toledoblade.com/Courts/2016/12/27/Judith-Ann-Lanzinger-gets-set-for-retirement-from-Ohio-s-top-court.html [https://perma.cc/S33A-KQSJ].

48 *See Gonzales II*, 2017-Ohio-777, 2017 WL 938679, ¶ 20 (DeWine, J., concurring); *id.* ¶¶ 22–24 (Fischer, J., concurring in part and dissenting in part).

49 *Id.* ¶ 20 (DeWine, J., concurring).

50 *Id.* ¶ 27 (Fischer, J., concurring in part and dissenting in part); *see also id.* ¶¶ 22, 25–26.

51 *See id.* ¶¶ 33, 38 (Kennedy, J., dissenting).

52 *Id.* ¶ 35 (quoting Dublin City Sch. Bd. of Educ. v. Franklin Cty. Bd. of Revision, 2014-Ohio-1940, 11 N.E.3d 222, 224 (Ohio 2014)).

53 *Id.*; *see also id.* ¶ 38.

54 *Id.* ¶ 36.

55 *See id.* ¶¶ 44–46.

56 *Id.* ¶¶ 58–64.

the outcome in this case. The rule of lenity required construing the statute to punish only "clearly proscribed" conduct.[57] The statute had not clearly set out a sentencing enhancement for possession of 100 grams of cocaine "mixture"; lenity thus favored Gonzales.[58] According to settled principles of statutory interpretation, the State had to lose.[59]

Likewise, in a separate dissent, Justice O'Neill inveighed against the assertion that "*Gonzales I* misapplied any canon of statutory construction."[60] However, unlike Justice Kennedy, he maintained that the statutory language was unambiguous — and that the majority's contrary interpretation was "a major disservice to the English language."[61]

State v. Gonzales offered a unique opportunity to analyze the rule of lenity. Yet the Ohio Supreme Court did not seriously consider it. Even though Ohio is one of only two states to have codified the rule of lenity,[62] the court was willing to countenance clearly contradictory interpretations of a criminal statute without meaningful discussion of the rule. *State v. Gonzales* thus contrasts sharply with other recent state decisions in which lenity *was* supplied as a mechanism for resolving ambiguity.[63] And in declining to apply the rule, the court missed an opportunity to reject lenity's traditional notice justification and consequently its chance to normatively justify the rule on another ground — namely, on the basis of *mercy*, a historically important yet currently underappreciated theory — and ensure its robust application in future cases.

As applied to the facts of this case, the usual justification for the rule of lenity falters. The most commonly recited reason for the rule of lenity is "to promote fair notice."[64] But fair notice seems incompatible with the interpretation of Ohio's cocaine possession statute that lenity would urge. A defendant almost certainly does not know the purity of any cocaine in his possession. The purity of cocaine can vary widely,[65] with substantial disparities evident in the average purities across geographic regions[66] and fiscal quarters.[67] Even sophisticated cocaine traffickers likely lack the ability to test the purity of cocaine. In fact,

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[57] *Id.* ¶ 66.

[58] *See id.*

[59] *See id.* ¶¶ 70–71.

[60] *Id.* ¶ 74 (O'Neill, J., dissenting).

[61] *Id.* ¶ 78; *see also id.* ¶ 75.

[62] Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 902 (2004); *see* OHIO REV. CODE ANN. § 2901.04(A) (LexisNexis 2014).

[63] *E.g.*, Day v. State, 57 N.E.3d 809, 813 (Ind. 2016).

[64] United States v. Kozminski, 487 U.S. 931, 952 (1988).

[65] *See, e.g.*, DRUG ENF'T AGENCY, NATIONAL FORENSIC LABORATORY INFORMATION SYSTEM: YEAR 2001 ANNUAL REPORT 16 fig.4.6 (2001).

[66] *See id.* at 16.

[67] *See* ARTHUR FRIES ET AL., INST. FOR DEF. ANALYSES, THE PRICE AND PURITY OF ILLICIT DRUGS: 1981–2007, at 9 (2008).

Ohio authorities still lack the necessary resources to determine cocaine concentration.[68] Thus, the pure-weight standard is in some sense an unknowable rule incompatible with providing fair notice to defendants. This case corroborates what a chorus of scholars has already hypothesized: that the notice justification is insufficient to sustain the rule of lenity.[69]

However, another justification — mercy — may be particularly well suited. As framed by Professor Claudia Card,[70] mercy involves the mitigation of "punishment to insure that the legally permissible punishment does not exceed the amount of suffering the wrongdoer deserves."[71] Mercy, then, requires consideration of personal deserts.[72] For example, although the letter of the law would require the even application of punishment to every criminally negligent driver who critically injures a pedestrian, mercy would argue against further penalizing a driver who kills her husband.[73] The driver would have "already served part of what we consider a morally just punishment."[74] Mercy thus does not violate "the basic rule of justice" that like cases be treated alike;[75] mercy must "rest upon some good reason — some morally relevant feature."[76]

Mercy has especial force in criminal trials in which there is no moral distinction between the conduct that would be prohibited under the harsher reading of an ambiguous statutory provision and the conduct that would be prohibited under the more lenient reading. In these cases, a defendant's personal deserts would typically call for the lesser sentence; imposition of the harsher sentence instead would reveal "a gap between moral justice and legal justice" that would otherwise be remedied by mercy.[77] For instance, in *State v. Gonzales*, it is not clear that there is a relevant moral difference between carrying 100 grams of 20% pure cocaine and carrying 20 grams of 100% pure co-

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[68] Jona Ison, *Court's Cocaine Ruling Impacts Indictments*, CHILLICOTHE GAZETTE (Jan. 7, 2017, 3:36 PM), http://www.chillicothegazette.com/story/news/local/2017/01/07/ross-county-grand-jury-january-6/96251610 [https://perma.cc/68VB-HEJJ].

[69] *See, e.g.*, Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 348.

[70] *See* Claudia Card, *On Mercy*, 81 PHIL. REV. 182, 184 (1972).

[71] KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 191 (1989). This definition of mercy contrasts with definitions postulated by others that mercy is the compassionate "mitigation of a punishment that would otherwise be deserved as retribution," Jean Hampton, *The Retributive Idea*, *in* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 111, 158 (1988) (emphasis omitted).

[72] Card, *supra* note 70, at 193.

[73] *See id.* at 201.

[74] Alwynne Smart, *Mercy*, 43 PHILOSOPHY 345, 348 (1968).

[75] Card, *supra* note 70, at 183–84.

[76] Jeffrie Murphy, *Mercy and Legal Justice*, *in* FORGIVENESS AND MERCY, *supra* note 71, at 162, 181.

[77] Smart, *supra* note 74, at 348; *see also* Card, *supra* note 70, at 201.

caine, yet under the State's proposed interpretation, the former would be penalized much more harshly. "To base punishment on the weight of the [filler] makes about as much sense as basing punishment on the weight of the defendant."[78] The total weight says nothing about the personal deserts of the defendant. In these cases, then, a mercy-based rule of lenity would actualize substantive justice, enabling courts to "[t]reat like cases alike" and "treat different cases differently."[79]

It is important to note that Card's conception of mercy is already a feature of the American justice system. The U.S. Supreme Court has stated that, at minimum, "[n]othing in any of [the Court's] cases suggests that the decision to afford an individual defendant mercy violates the Constitution"; rather, mercy could be exercised at any of various stages in the criminal justice system, by a variety of actors.[80] Judges — with a full view of the facts of the case and a keen sense for when "legal rules . . . have lagged behind our sense of justice"[81] — may be the best situated of those actors to determine a defendant's deserts and apply the principle of mercy. And judicial mercy in fact comports with the original understanding of the basis for the rule of lenity. Lenity in its modern form emerged in seventeenth-century England as an antidemocratic nullification of harsh penal laws that mandated capital punishment for mundane crimes.[82] Early English commentators explicitly labeled the rule as an exercise of mercy.[83] Fair notice and other justifications were invented at least after the creation of the U.S. Constitution.[84]

Admittedly, grounding the rule of lenity in mercy is susceptible to the objection that mercy would enable excessive judicial discretion and encourage courts to pass judgment on morally irrelevant criteria, with potentially disastrous consequences for disfavored groups.[85] This risk may be heightened by the fact that the rule of lenity is typically applied by appellate courts, composed of judges who are often not

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[78] United States v. Marshall, 908 F.2d 1312, 1333 (7th Cir. 1990) (en banc) (Posner, J., dissenting) (referring to LSD blotter paper).

[79] H.L.A. HART, THE CONCEPT OF LAW 159 (3d ed. 2012).

[80] Gregg v. Georgia, 428 U.S. 153, 199 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). Prominently, the executive pardon power already rests largely on a theory of mercy. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *396–97; Linda Ross Meyer, *The Merciful State*, *in* FORGIVENESS, MERCY, AND CLEMENCY 64, 67 (Austin Sarat & Nasser Hussain eds., 2007).

[81] Meyer, *supra* note 80, at 67.

[82] Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 749–52 (1935); *see also id.* at 752–58 (tracing modern development in the United States).

[83] *See, e.g.*, 5 EDWARD CHRISTIAN, NOTES TO BLACKSTONE'S COMMENTARIES 16 (Boston, Thomas & Andrews 1801). Modern commentators have noted the same. *E.g.*, Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 514–21 (2002) (describing the English rule of lenity as "[i]nstitutional [m]ercy," *id.* at 514).

[84] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 296–97 (2012).

[85] *See* Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 114 (1993).

"drawn directly from, or politically accountable to, disadvantaged communities."[86] To some extent, this concern may be alleviated by the fact that mercy would be constrained by its limited application to criminal cases in which the relevant penal statute is ambiguous. And while a successful mercy-based lenity is of course contingent on a nonpathological judicial system and on judges not in thrall to prejudicial passions,[87] it is not clear that the American judiciary is irredeemably pathological. Indeed, the judicial branch is typically considered the most protective of disfavored groups.[88] Moreover, as Professor Carol Steiker has argued, even given the risk that mercy would preferentially advantage "members of powerful groups," any alternative may be intolerable: untempered by judicial discretion, legislative overpenalization — which a mercy-based rule of lenity could combat — has already had "especially devastating effects on minority groups."[89] The present limitations on judicial discretion may be significantly worse than any increase in sentencing leeway.[90]

State v. Gonzales provides a useful prism for analyzing the rule of lenity. The poor fit between the usual reason for lenity and the facts of this case may explain why the court declined to engage with the rule of lenity, despite the clear opportunity. Mercy can provide a satisfying normative theory of lenity in cases like this, in which there is no strong moral distinction between the conduct that would be penalized under the statutory interpretation urged by the State and the reading urged by the defendant. Mercy-based lenity not only may grant greater intellectual clarity to this case, but also may restore some potency to the rule of lenity — granting a sword to defendants and courts to cut down overly punitive prosecutions — by shoring up its shaky foundations.[91] The court, however, missed its opportunity to reinvigorate the rule.

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[86] Carol S. Steiker, *Criminalization and the Criminal Process: Prudential Mercy as a Limit on Penal Sanctions in an Era of Mass Incarceration*, *in* THE BOUNDARIES OF THE CRIMINAL LAW 27, 54 (R.A. Duff et al. eds., 2010).

[87] *Cf.* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1359–60, 1363–64 (2006).

[88] *See* Andrea Specht, Comment, *The Government We Deserve? Direct Democracy, Outraged Majorities, and the Decline of Judicial Independence*, 4 U. SAINT THOMAS L.J. 132, 142 (2006).

[89] Steiker, *supra* note 86, at 56.

[90] *See* Carol Steiker, *The Mercy Seat: Discretion, Justice, and Mercy in the American Criminal Justice System*, *in* THE POLITICAL HEART OF CRIMINAL PROCEDURE 212, 217 (Michael Klarman et al. eds., 2012).

[91] *See* Price, *supra* note 62, at 886 (suggesting that the rule of lenity may be moribund due to insufficiently strong intellectual underpinnings).