

# *In* ESSENCE

REVIEWS OF ARTICLES FROM PERIODICALS AND SPECIALIZED JOURNALS HERE AND ABROAD

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## POLITICS & GOVERNMENT

### The Death of Mercy

**THE SOURCE:** "The Ascent of the Administrative State and the Demise of Mercy" by Rachel E. Barkow, in *Harvard Law Review*, March 2008.

THE QUALITY OF MERCY MAY not be strained, as Portia said in Shakespeare's *Merchant of Venice*, but its quantity certainly is—at

least if you're an accused or convicted lawbreaker. Parole has been eliminated in many states, and executive clemency is an endangered species.

"These are punitive, unforgiving times," writes Rachel E. Barkow, a law professor at New York University.

The popularity of "three-strikes-and-you're-out"—the advocacy of locking the door on criminals and throwing away the key—has swept a generation of tough-on-crime candidates into elected office. They have written into law a range of severe minimum sentences, particularly for drug-related crimes.

But politics, Barkow argues, does not entirely account for the fact that some two million Americans—more than one in 100 adults—are behind bars and another five million are on



Three's a crowd. An inmate lugs his floor mat into his new cell in the Washington Corrections Center, Washington state's most overcrowded prison.

probation or some other form of supervised release from jail. She looks at the rise of the administrative state, with its accompanying laws and procedures designed to check the powers of government officials, as an important culprit. Government agencies are increasingly operating under strict procedures designed to prevent bureaucrats from rewarding friends and punishing enemies as they implement the likes of housing subsidies and pollution restrictions. The spirit of “administrative law” enjoys public support because of its perceived absolute fairness, and leaches into the judicial branch. If it is effective in limiting the executive branch’s discretion to interpret civil law, why not extend its limits to criminal matters?

In effect, Barkow says, this is exactly what is happening. Even without formal limits, presidents and governors have sharply cut their use of executive clemency. The powers of parole boards—once afforded the discretion to be merci-

ful—are highly circumscribed.

President Richard M. Nixon—himself the recipient of a presidential pardon after he was forced from office—granted 36 percent of the petitions he received for clemency for convicted wrongdoers. That number dropped steadily, to five percent of petitions granted by President George H. W. Bush, before ticking up to six percent for President Bill Clinton. Researchers have found a similar trend at the state level. And the courts themselves have placed limits on jury nullification—“not guilty” verdicts in the face of substantial evidence to the contrary.

Prosecutors still have considerable leeway to show mercy by simply declining to prosecute a case. They don’t have to follow strict guidelines about when to let somebody off the hook by failing to bring charges, and they don’t have to give reasons for their decision. Even if they are elected as crime-busters, they can’t physically or financially

prosecute every infraction and seem to get a pass on their ability to be lenient.

But drafting administrative procedures to guide juries and executives in showing mercy would contradict the most important reason for having discretion to be lenient in individual cases, Barkow concludes. The utter impossibility of anticipating every human factor in advance is the very reason for the existence of mercy.

#### POLITICS & GOVERNMENT

## The Rise of the Donor Class

**THE SOURCE:** “The Check Is in the Mail: Interdistrict Funding Flows in Congressional Elections” by James G. Gimpel, Frances E. Lee, and Shanna Pearson-Merkowitz, in the *American Journal of Political Science*, April 2008.

AMERICANS HAVE NEVER BEEN as interested in social class as Europeans, partly because most

### EXCERPT

## Broadway Neocon?

*I wrote a play about politics. . . . The argument in my play is between a president who is self-interested, corrupt, suborned, and realistic, and his leftish, lesbian, utopian-socialist speechwriter. The play [is] a disputation between reason and faith, or perhaps between the conservative (or tragic) view and the liberal (or perfectionist) view. . . .*

*I took the liberal view for many decades, but I believe I have changed my mind. . . . I found not only*

*that I didn’t trust the current government . . . but that an impartial review revealed that the faults of this president—whom I, a good liberal, considered a monster—were little different from those of a president whom I revered. Bush got us into Iraq, [John F. Kennedy] into Vietnam. Bush stole the election in Florida; Kennedy stole his in Chicago. Bush outed a CIA agent; Kennedy left hundreds of them to die in the surf at the Bay of Pigs. Bush lied about his military service; Kennedy accepted a Pulitzer Prize for a book written by Ted Sorenson. Bush was in bed with the Saudis, Kennedy with the Mafia. Oh.*

—**DAVID MAMET**, on his most recent play, *November*, in *The Village Voice* (March 11, 2008)