MERCY

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ABSTRACT Mercy is a form of charity towards wrongdoers that justifies punishing them less severely than they deserve according to justice. Three main objections to mercy, or its exercise by organs of the state - that it is irrational, unjust and procedurally unfair - are addressed in the course of defending mercy as a value that has a place in deliberation about criminal punishment. The paper draws on both the communicative theory of punishment and aspects of existing legal practice in mounting this defence.

I

Mercy and its Paradox. The emergence, in a theoretically self-conscious form, of the idea of mercy as a distinct value can be traced to writings of the Roman Stoics and the medieval canonists. Greek philosophy recognized the kindred notion of *epieikeia* or equity, a determination of justice tailored to the particular features of a case that remedies deficiencies in the strict application of legal rules (see §II).[1] But it shows no clear-cut appreciation of mercy as a value that tempers even the most contextually refined verdict of justice. On the contrary, within an Aristotelian outlook, settling for less than what justice demands is a mark of servility. Yet it is precisely a value with a sub-optimal implication from the standpoint of justice that is affirmed by Seneca in describing *clementia*:

> [I]t can… be called a "tendency of the mind to leniency in exacting punishment"… We might speak of mercy as "moderation that remits something of a deserved and due punishment". The cry will go up that no virtue ever gives anyone less than is his due. But everyone realizes that mercy is something which "stops short of what could deservedly be imposed".[2]

[1] Aristotle, *Nicomachean Ethics* 1137b26-27.
[2] Seneca, 'On Mercy', in *Moral and Political Essays* ed. J.M. Cooper and J.F. Procope (Cambridge: Cambridge University Press, 1995), p.160.

Taking this formulation as our starting-point, we may characterize mercy as the putative ethical value that justifies leniency in the infliction of punishment that is due in accordance with justice. Only someone who has cultivated a rational sensitivity to this value in thought, feeling and action has the virtue of being merciful. It follows that not every suspension or relaxation of a just punishment is an instance of mercy; instead, leniency must be shown for the right reasons. In the mercy tradition, these are typically glossed as reasons of charity (or, equivalently for our purposes, compassion or humanity) that have their source in the value of relieving a wrongdoer's plight.[3] These reasons reflect a generalized love of humanity; in particular, a concern to alleviate serious misfortunes that the human condition is prey to and which, in consequence, one can regard as evils that could befall oneself or those to whom one has special ties.

Scepticism about mercy, itself a long-standing tradition with deep roots in the Enlightenment, is mainly directed at the existence of such reasons, or their admissibility in the public domain, and it is fuelled by a vivid historical awareness of the dubious purposes that have been pursued in mercy's name. Since the reign of Constantine, absolutist rulers have arrogated to themselves the prerogative of exempting some among their subjects from the rigorous application of law and justice, no doubt motivated in part by the desire to display thereby a grandeur that placed them above the law and beyond the reach of ordinary mortal anxieties of self-protection. Forgoing an entitlement to impose the full penalty due here expresses a lofty magnanimity that turns the Aristotelian fear about servility on its head. Where an absolutist political ideology prevails, this expressive role can be taken to recommend mercy: '[s]uch is the power of gods', wrote Seneca, in praising it as the virtue that 'most becomes emperors'.[4] But in a liberal political culture, with its intense suspicion of discretionary power, the connection brings mercy into disrepute. Hence Kant's scathing description of the right to grant clemency as the 'slipperiest' of a sovereign's powers, 'for it must be exercised in such a way as to show the splendor of his majesty although he is thereby doing injustice to the highest degree'.[5] Self-assertion aside, sceptics will point out that agents of the state have also shown offenders 'mercy' in return for bribes, deference or the promise to turn Queen's evidence; out of fear of the powerful or in condonation of their crimes; in order to save the expense of a trial, ease labour shortages in

[3] That the wrongdoer's welfare is the main, if not exclusive, *source* and not just the practical *focus* of mercy follows from mercy's nature as a form of charity, see A. Buchanan, 'Justice and Charity', *Ethics* 97 (1987) 558, p.572 for this distinction. This is the key flaw in the idea – advanced, e.g., in A. Smart, 'Mercy', *Philosophy* 43 (1968) 345 – that mercy involves leniency to a wrongdoer in order to comply with another obligation, which may be owed to others e.g. to avoid undeserved suffering by his family.
[4] Seneca, *op. cit.*, pp.157, 134.
[5] I. Kant, *The Metaphysics of Morals* tr. M. Gregor (Cambridge: Cambridge University Press, 1991), p.145.

distant colonies, reduce over-crowding in prisons, quell public unrest or foster national reconciliation.

Some of these motives are always illegitimate, but even those that come within the moral pale scarcely manifest mercy as opposed to justifiable leniency. This is because the primary justification for leniency in each case does not have its source in a concern with the wrongdoer's predicament as someone liable to punishment. Instead, leniency is instrumentalized to some other goal to which he and his interests are at best incidental. Thus, even the desire to demonstrate one's power may conceivably form part of the merciful person's motivation, but only if it operates within the bounds set by the primary reason of a charitable concern for the wrongdoer. Where the latter is absent, the former may in extreme cases constitute a failure to acknowledge wrongdoers as fully responsible agents on a par with oneself. This threatens to degenerate into an attitude that dehumanizes them, a danger exemplified by Nietzsche's celebration of mercy as 'the prerogative of the most powerful man', from whose perspective wrongdoers are 'parasites' that he can afford to leave unmolested.[6]

Revealingly, Nietzsche characterizes mercy not as a 'tempering' of justice, but as its 'self-sublimation'. Mercy is thereby torn out of the familiar context of retributive justice, guilt and resentment in which it has its life so that it can become an agent of the latter's subversion. This radically revisionist interpretation underscores the deep embeddedness of our concept of mercy in a wider ethical framework. Only wrongdoers may be punished, so only they are candidates for mercy; only those authorized to inflict punishment, or entitled to have a say in its infliction, can show mercy; and we regard mercy as 'tempering' justice in determining how much we should punish, so that an independent assessment of the amount of punishment justly deserved is presupposed. This inherent concern with the punishment of wrongdoers distinguishes mercy from most other variants of charity, such as giving relief to the destitute and the sick. Of course, wrongdoers too can be the beneficiaries of a generalized charitable concern, even qua wrongdoers. In keeping with Christian tradition, one of the acts depicted in Caravaggio's *The Seven Acts of Mercy* is the visiting of prisoners. But mercy, as I am concerned with it here, is charity doubly constrained. First, unlike most manifestations of charity, which are typically concerned with the relief of grave misfortune as such, mercy alleviates suffering that is in some sense deserved or which others are entitled to impose. Second, the specific kind of suffering in question is punishment, i.e. deliberately inflicted hard treatment meant as censure for wrongdoing, which the person authorized to punish typically has an obligation of justice to impose. So understood, mercy refers to charitable considerations that constitute reasons for

[6] F. Nietzsche, *On the Genealogy of Morality* (Cambridge: Cambridge University Press, 1994), pp.51-2.

moderating punishment relative to what justice alone would exact. Thus a 'mercy killing' motivated by charity cannot be merciful, although our punitive response to its perpetrator might be.

'Mercy', Seneca also wrote, 'joins in with reason'.[7] I have echoed this thought by implicitly drawing on the rudiments of an Aristotelian framework in characterizing the merciful person as exhibiting a reliable sensitivity to the reason-giving import of certain charitable considerations. This accords with the self-understanding of the mercy tradition, or one powerful strand within it, which is at pains to distinguish mercy from rationally uninformed sentiment or whim in moderating punishment. However, as I have noted, the rationality of mercy has been challenged by a long-standing sceptical tradition. In this vein, Ross Harrison has argued that mercy violates the rational norm of treating like cases alike.[8] If mercy amounts to anything, he suggests, it is precisely that one may treat identical cases differently, showing leniency to one wrongdoer yet withholding it from another who is similarly circumstanced.[9] Whatever the case for preserving leeway for mercy in private life, centring perhaps on the importance of individual autonomy, Harrison contends that there is no comparable argument for the exercise of mercy by the state. Individuals bear the risks of their merciful inclinations, but the decisions of states affect the interests of their citizens. They must be justified by reference to their *content* and not just their *source* (in autonomous agency, for example). This excludes mercy from the sphere of state action by eliminating any 'area of play lying beyond any possible justification'.[10]

The obvious problem with this contrast between individuals and organs of the state is that mercy is inherently other-regarding, impinging heavily on the interests of those liable to punishment. Perhaps the idea is that in the private case no *third party* interests are directly affected, whereas there is always a public interest in the condemnation of crime. But even where this is true, it is far from obvious that autonomy justifies the private exercise of mercy. Autonomy requires a range of *valuable* options from which a person can choose in determining the shape of their life. But Harrison's understanding of mercy as rationally ungoverned leniency leaves it mysterious what value it realizes, unless capricious deviations from justice are implausibly accorded value. Still, Harrison's examples suggest a special class of cases within the private sphere: those that conform to the 'private law model' of mercy favoured by Kant. In these situations, the person dispensing mercy has no obligation of justice to inflict a burden on another, but he possesses a waivable right to do so. The paradigm case is that of a creditor charitably

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[7] Seneca, *op.cit*, p.161.
[8] R. Harrison, 'The Equality of Mercy', in H. Gross and R. Harrison (eds.), *Jurisprudence: Cambridge Essays* (Oxford: Clarendon Press, 1992), p.108.
[9] *Op. cit.*, p.114.
[10] *Op. cit.*, p.117.

surrendering his claim against an indigent debtor. Mercy on this view involves the suspension or reduction of unwelcome treatment that one party is as a matter of justice entitled, but not obligated, to impose on another. This is charity with only the first of the two restrictions distinguished previously and so differs significantly from the specification of mercy from which we began. The notion that mercy relaxes the level of punishment required by justice goes by the board, not only because punishment is not *required* in such cases, but also because the hard treatment at issue is not necessarily punitive. Its infliction may be intended to express no censure (as opposed to, say, a demand for compensation) and nor is it necessarily even a response to wrongdoing.[11]

My concern, however, is with the vindication of mercy understood according to the traditional paradigm: the criminal law model of a judge, jury or other institutional agent duty-bound to punish certain legally-defined classes of wrongdoers. There are at least two reasons why mercy may have the effect that like cases are not treated alike within that context. It may be due either to the absence of any grounds for mercy or else to their normative implications. Grounds for mercy are potentially recurrent features of punishment situations that create a distinctive category of charitable reasons for the lenient treatment of offenders. Traditionally, they include the offender's seriously deprived upbringing or sincere repentance. Sometimes Harrison appears to deny the very idea of such grounds, especially when he suggests there is no content-based justification of merciful conduct. Mercy, so understood, fails to conform to reason because it does not succeed in picking out general features of punishment situations in terms of which they can be assessed as appropriate occasions for leniency and hence as relevantly similar or not. It is just the capricious tendency to moderate the level of punishment due according to justice, one that is not rationally responsive to features of the situations in which it is enacted. But there is also a second reason. Even where grounds for mercy obtain the further question arises: what is the deontic shape of the reasons they generate? Am I *obligated* to show mercy, for example, or simply *permitted* to do so? If the latter, then a consequence of admitting mercy directly into public decision-making would be that similar cases are often treated differently, and appropriately so from the standpoint of mercy.

Let us begin with the first objection. Harrison nowhere shows that mercy lacks justifying grounds. Perhaps he just takes their non-existence as definitive of mercy. But, if so, he dresses mercy in the irrationalist garb favoured by its detractors, not its supporters. Still, his discussion seems implicitly to rely on an influential argument from redundancy. If grounds for mercy exist,

[11] This is so even if we accept Nietzsche's hypothesis (*On the Genealogy of Morality*, pp.42-3) that the genealogical root of punishment is the debtor-creditor relationship, since punishment may for us bear a meaning that transcends anything present in its historical origins.

it runs, then they are morally relevant considerations. But if so they must be considerations of *justice*, not mercy. For is it not a requirement of justice that morally relevant considerations be taken into account and, in consequence, that 'morally relevant differences between persons be noticed'?[12] But this argument is question-begging. It inflates the notion of justice by incorporating within it all morally relevant considerations, whereas these may be of many different kinds. Moreover, we do not need to invoke a separate moral requirement – a norm of 'justice' – in order to take morally relevant features into account. That we ought to do so follows from their moral relevance alone. In short, the argument shows the idea of 'justice' it introduces to be redundant, not that of mercy.

However, there is a further, well-known argument that could be brought against the very idea of grounds for mercy. Such grounds purport to create reasons for tempering the amount of punishment due in accordance with justice. But how could there be a genuine ethical reason, of whatever deontic modality, for deviating from a standard set by justice? This is the 'paradox' of mercy, which goes back to Anselm's tortuous reflections on how God can combine – and maximally so - the virtues of justice and mercy.[13] In a modern, secular rendition, due to Jeffrie Murphy, the paradox is stated thus: 'If mercy requires a tempering of justice, then there is a sense in which mercy may require a departure from justice… Thus to be merciful is perhaps to be unjust. But it is a vice, not a virtue, to manifest injustice. Thus mercy must be, not a virtue, but a vice – a product of morally dangerous sentimentality'.[14] In short, mercy's existence as a separate value is bound up with its role in justifying ameliorative deviations from the amount of punishment justly deserved, but precisely this role condemns it as a vice. One of the touted advantages of the 'private law model' of mercy is that it resolves this paradox: since no obligation of justice to 'punish' exists in those cases, waiving the right to impose it is not unjust.[15] But that line of response is not available for contexts – such as the sentencing of criminals – where a duty of justice to punish the guilty plausibly obtains.

It might be objected that the paradox simply forecloses on the possibility of a pluralism that treats both justice and mercy as irreducibly distinct values that are prone to conflict. Indeed, the supposed clash between justice and mercy is standardly invoked by pluralists as an illustration of incommensurable conflict of values, whereby a range of incompatible options, each exemplifying different values to varying degrees, cannot be ranked as better, worse or equal in

[12] The point is made by Jeffrie Murphy in 'Mercy and Legal Justice', in J. Murphy and J. Hampton, *Forgiveness and Mercy* (Cambridge: Cambridge University Press, 1988), p.171, but it also influences Harrison in characterizing his norm of reason variously as a requirement of impartiality, fairness and justice.
[13] '[W]hat kind of justice is it to give everlasting life to him who merits eternal death?'. M. J. Charlesworth (ed.), *St.Anselm's Proslogion* (University of Notre Dame, 1979), IX, p.125.
[14] J. Murphy, 'Mercy and Legal Justice', p.167.
[15] See, e.g., *op, cit.*, p.177.

standing.[16] But at this stage an unargued appeal to pluralism has little force. For it merely raises a structural possibility in the domain of value and reinforces it with an allusion to ordinary ethical experience that is itself somewhat shaky in view of the paradox just described. That the paradox does not cut both ways, at least, follows from the fact that the putative value of mercy presupposes the independent value of justice. But something further can be said to motivate the specifically anti-mercy implication of the paradox. The pluralist draws attention to the possibility that mercy is a value that requires or permits unjust outcomes, at least in cases where it defeats or is incommensurable with the conflicting demands of justice. The sceptic can reply by appealing to what Philippa Foot has described as the 'conceptually verdictive' nature of the predicate 'unjust', whereby its application entails a 'final' or 'all-things-considered' 'should not'.[17] If this is correct, the idea that mercy tempers justice, thereby warranting the doing of what is unjust, appears doomed. I shall first briefly consider three other reactions to the paradox (§II), before defending the pluralist response by offering a bottom-up account of mercy that meets the structural possibility already gestured at half-way (§§III-V).

II

Transcendence, Elimination and Reduction. Elizabeth Anscombe famously questioned the viability of the key deontic notions of a 'law conception of ethics' when severed from a belief in a divine legislator and judge. However, a little reflection shows that similar concerns extend to many of the virtue concepts, such as chastity, that she advocated in their place. One response to the paradox moves in the opposite direction, exploiting this religious dimension to vindicate mercy. Mercy, it says, is the incursion of a transcendent perspective into moral life, an unconditional gesture of love or grace that is ultimately to be ascribed a supernatural origin.[18] This interpretation coheres with both the Christian understanding of charity as a theological virtue and the related mediaeval conception of an anointed king as one who serves as a worldly agent of divine grace through the exercise of powers such as the royal prerogative of mercy. Now, one can imagine a proponent of transcendence relishing the attendant tensions between justice and mercy, or else grimly regarding them as the inevitable upshot of the incoherence of a modern ethical

[16] For two prominent examples, see I. Berlin, 'The Pursuit of the Ideal', in *The Crooked Timber of Humanity* (London: Fontana, 1991), p.12 and J. Raz, 'The Truth in Particularism', in *Engaging Reason* (Oxford: Clarendon Press, 1999), p.243.
[17] P. Foot, *Human Goodness* (Oxford: Clarendon, 2001), p.78.
[18] Thus, Paul Ricoeur writes of the idea of a *pardon* that it 'stems from an economy of the gift, in virtue of the logic of superabundance that articulates it and that has to be opposed to the logic of equivalence presiding over justice. In this regard, pardon is not just a suprajuridical but a supra-ethical value… [It] constitutes a permanent reminder that justice is the justice of human beings and that it must not set itself up as the final judgment'. P. Ricoeur, *The Just* (Chicago: University of Chicago Press, 2000), pp.144-5.

consciousness. Acquiescing in the paradox, however, is not essential to the strategy. Aquinas responded to its theological manifestation with the idea that 'divine justice always presupposes the work of mercy, and is based on it'.[19] The upshot resembles the private law solution: the absence of a duty to punish undeserving sinners means God can save them without injustice, for the sins he dismisses are ultimately against himself, the supreme common good of the whole universe. But even if this solution could be extrapolated to human punitive practices, it faces the powerful objections to any articulation of legal and political values within a religious framework. Assuming that this is the direction transcendence must take, I shall put this strategy aside.

Elimination might now seem our only recourse. On this view, the paradox shows why there is no distinct value of mercy. But that abstract demonstration stands in need of continual reinforcement by specific debunking explanations. One of the more systematic examples of the genre is Douglas Hay's Marxist account of the extensive invocation of mercy in English criminal law adjudication during the 18th century. According to Hay, the propertied class confronted the problem of maintaining loyalty and order among the general populace in the absence of a centralized police force. This made it necessary to inculcate a widespread belief in the legitimacy of their rule, something they sought to achieve through 'the moral drama of the gallows' - whereby every form of theft, malicious damage and rebellion was made a capital offence. Although effective at inducing fear and deference, the extreme severity of the Bloody Code threatened to spark dangerously high levels of public outrage if strictly enforced on every occasion. The requisite flexibility was secured through the deft use of ‘mercy’, which functioned as the safety-valve of an unjust criminal law while simultaneously reaffirming the power of the ruling class.[20] Eliminativists are committed to the idea that debunking explanations of this sort will prevail in every case. But whatever the merits of Hay's particular explanation, elimination is bound to be inadequate on its own because it does not offer a plausible account of why people have felt there is a separate value of mercy to begin with. The practice of mercy could not have been an effective ideological tool in a ‘ruling-class conspiracy’ unless it connected – however distortively or hypocritically – with widespread moral beliefs, beliefs held by the class that ‘congratulate[d] itself on its humanity’ no less than by that which clamoured for mercy. And it is implausible that these beliefs were totally illusory, for how could we then find them intelligible? So the explanation must be in some measure charitable, appealing to ethical concepts we are prepared to affirm.

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[19] *ST* Ia. 21. 4; see also *ST* III, q.46.a.2,c.

[20] D. Hay, 'Property, Authority and the Criminal Law', in D. Hay et. al. *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (Pantheon, 1975), pp.48-9.

Here a third, *reductive* strategy presents itself: that of showing that belief in mercy does embody a genuine insight, but one that can be accommodated without recognizing it as a distinct value. The most popular reductionist explanation contends that mercy is equity. Let the relevant notion of punitive justice be the familiar retributive conception according to which those guilty of wrongdoing deserve to be punished and the severity of their punishment should be proportionate to the gravity of their offence. The latter may be thought of as a function both of the culpability the offence exhibits and the harm it causes or risks. Suppose too that we have a criminal code that is, on the whole, substantively just according to this conception. Nevertheless, given that the code is made up of general rules, its strict application is liable to work injustices in particular circumstances. For no code can anticipate all the variables that rightly influence our assessments of guilt and the punishment proportionate thereto. Nor could legislators attempt to anticipate all such variations without unduly sacrificing the clarity vital to law's performance of its action-guiding role. The upshot is that the strict application of criminal laws and sentencing provisions will often be either over-inclusive (authorizing the punishment of those who are not guilty, or the excessive punishment of the guilty) or under-inclusive (failing to require the punishment of those who are guilty or punishing them too leniently) with respect to their underlying retributive rationale. Equity rectifies such injustices by retrospectively adjusting the application of the legal rules in order to take account of the justice-affecting particularities of the case.

So, in the case of equitable mitigation, the legally-prescribed punishment is not truly deserved in point of retributive justice: mitigating facts obtain in the particular case that are not adequately catered for in the applicable law. These facts, insofar as they bear on the threshold issue of criminal liability, are of various sorts. They may show that no wrong was committed by the defendant or only a lesser wrong. Alternatively, they may prevent the defendant from being held fully responsible for the wrong because they preclude or diminish his ability to give a rational account of his behaviour (e.g. where he suffered from a mental illness at the time of the offence or the trial). And even if a wrong has been committed for which the defendant is responsible, he may have either a justification (e.g. self-defence) or an excuse (e.g. provocation) for it, albeit one not adequately reflected in positive law. [21] Insofar as mitigating facts bear on the gravity of the offence (what is normally called 'mitigation' in law, see §III), they may show that, for example, the offence involved a reduced level of culpability or harm than that anticipated by

[21] Justifications and excuses are rational explanations for wrongdoing and so can only be offered by agents who are rationally competent, hence responsible. Justifications identify features of the defendant's situation that provide reasons for doing what he did. Excuses operate at one remove from the action, citing reasons that the defendant had for being in the mental state (e.g. of belief, fear, anger etc.) that led to his doing what he did (where what he did was an act that is not justified). For this way of drawing the distinction, see J. Gardner, 'In Defence of Defences', in P. Asp et. al. (eds.), *Flores Juris et Legum: Festskrift till Nils Jareborg* (Uppsalla: Iustus Forlag, 2002), pp.257-62.

the legally-stipulated penalties (e.g. one who injures another negligently rather than intentionally or who unsuccessfully attempts to injure).

Of course, mercy cannot be reduced to equity without further explanation since equitable judgment can both aggravate as well as mitigate strict legal justice. Indeed, equity has been used in some jurisdictions to criminalize varieties of *mala in se* not covered by the plain meaning of existing law.[22] For all that, proponents of equitable discretion in criminal law adjudication have traditionally endorsed, albeit largely tacitly, an asymmetry of mitigation and aggravation in its exercise. A serious challenge facing the reductionist is to account for this asymmetry. One explanation is that it arises out of a pervasive empirical phenomenon, i.e. that given the innumerable and persistent obstacles to law-abidingness that afflict human life, a closer inspection of the details of any case will tend much more frequently to turn up mitigating, as opposed to aggravating, facts.[23] But this explanation merely cites an empirical basis for the asymmetry and fails to capture our sense that, in *every* case of criminal adjudication, there is a *pro tanto* reason against aggravation but not mitigation. Another explanation appeals to benevolence, which leads the adjudicator to act on mitigating facts alone when exercising equitable discretion.[24] Whatever its merits in extra-legal contexts, this account places the asymmetry on an insecure footing by failing to capture the moral *right* of offenders to be protected from retroactive punishment.

A better explanation appeals to the combined operation of equity and the principle of legality,[25] the latter being a specific implication of the rule of law ideal as it bears on legal officials. According to this principle, decisions in criminal law adjudication must comply with the legal standards declared in advance to potential offenders. Only in this way can such decisions honour the values of predictability, non-arbitrariness and respect for human dignity. These values acquire an enhanced significance in the criminal law, given the stigma of criminal liability and the relative severity of its associated penalties; hence the legal maxims *nullum crimen sine lege* and *nulla poena sine lege*. The principle of legality is in tension with the kind of retrospective exercise of discretion licensed by equity. The asymmetry of mitigation and aggravation is a

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[22] An example is the declaratory power of the Scottish High Court of Justiciary. Its canonical formulation is given by the institutional writer Baron Hume, nephew of the philosopher, in his *Commentaries on the Law of Scotland Respecting Crimes* (Edinburgh: Law Society of Scotland, 1986), I, 12: 'an inherent power as such competently to punish (with the exception of life and limb) every act which is obviously of a criminal nature, though it be such which in time past has never been the subject of prosecution'. Arguably, the power was impliedly deployed by the Court to criminalize rape within marriage in *Stallard* v *HM Advocate* [1989] SLT 469 against a contrary stream of authority, including that of Hume.

[23] M. C. Nussbaum, 'Equity and Mercy', in *Sex and Social Justice* (Oxford: Clarendon Press, 1999), p.156.

[24] C. Perelman, *The Idea of Justice and the Problem of Argument*, p.58, referred to in C. Card, 'On Mercy', *Philosophical Review* 81 (1972) 182, p.199 n.20.

[25] As I have argued in 'The Paradox of Equity', *Cambridge Law Journal* 55 (1996), pp.458-62.

means of resolving that tension in particular cases. Mitigation does not violate the underlying rationale of the principle of legality in the way that retrospective aggravatory deviations would, since the offender benefits from treatment less severe than that prescribed by law.

Should we then conclude that mercy is a by-product of the asymmetry of mitigation and aggravation consequent on the interplay between equity and legality? Doing so would enable us to side-step the paradox - since we stay on the terrain of justice - and thereby to portray the mercy-seeking offender as a dignified, rights-bearing citizen who insists on just treatment from the state, not a supplicant begging for charity from its functionaries. What is more, reductionism also has a strong historical resonance. The prerogative of mercy in the English legal system, for example, was used for centuries to distinguish the punitive treatment of those who had killed intentionally from those who had done so accidentally, a distinction not drawn by the law of murder. Of course, reduction 'saves' mercy only at the price of sacrificing its irreducible distinctiveness. At this the friends of mercy will protest, with Peter Geach, that '[r]elaxing the penalty of a general law in a "deserving case" is not mercy at all but mere justice...'.[26] But Geach's own response to the paradox takes a transcendent turn, a path we have forsworn. Can we do better in vindicating mercy as a distinct value?

III

Making Room for Mercy. Our prospects may seem bleak, for have we not effectively sealed mercy's fate by invoking retributive justice to explain equitable mitigation? Retributivism notoriously leaves no room for mercy: in its unadulterated form, the whole truth about punishment is that the guilty deserve to be punished, the severity of the punishment being proportionate to the seriousness of the offence. But the exclusion of mercy is not peculiar to retributive theories or the notion of desert they employ. Instead its source, at the most abstract level, is the tendency to regard norms of justice - which, broadly, enjoin some form or other of proportionality in the allocation of benefits and burdens between individuals and groups, allocations to which those individuals and groups are standardly thought to be entitled as of right - as exhausting the considerations bearing on justified punishment. The result is that the claims of mercy, which arise from charity rather than justice, are eliminated or subject to reduction.

This suggests that we can make room for mercy only by putting retributive justice in its proper, if still central, place as one value among others in an account of justified punishment. The so-called communicative theory of punishment is, I think, best understood as enabling us to do

[26] P. Geach, *Truth and Hope* (University of Notre Dame Press, 2001), p.96.

precisely this.[27] On this view, the essential point of punishment is to communicate society's emphatic condemnation of criminal wrongdoing. This function helps explain why the guilty deserve punishment, thus addressing the problem of justificatory inarticulacy that haunts pure forms of retributivism. The denunciation is addressed in the first instance to the wrongdoer as a rational agent capable of moral deliberation, but through him also to others in society. For the victim, the punishment publicly vindicates his status in the face of the demeaning treatment meted out to him by the offender. To potential victims it provides assurance that the community will uphold the values enshrined in its criminal law, while to the officers of law enforcement it offers a public endorsement of their efforts. To the offender, punishment expresses censure, inflicting hard treatment on him in order to convey forcefully the community's condemnation of his wrongdoing. But the censure also has a future-oriented, redemptive dimension that goes beyond the backward-looking concern of pure retributive accounts. For, by coming to accept his punishment as justified, the wrongdoer is enabled to exhibit publicly his sincere repentance, make apologetic reparation to his victim and go on to reform his character and reconcile himself with his victim or, at least, with the community whose values he had defied.

On the communicative theory, then, the retributive norm is constrained and informed by the overarching communicative point of punishment. The norm requires the punishment of the guilty because they deserve it as an appropriate condemnation of their offence and in proportion to its gravity. Within the communicative framework, it interacts with the goals of repentance, reform and reconciliation. But once that broader setting is acknowledged, a further type of consideration, that of mercy, can potentially be shown to play a role within it. Structurally, grounds for mercy are reasons for the suspension or reduction of a penalty set by retributive justice. They imply no denial, or downgrading in the level, of criminal liability: no question of lack of responsibility or wrongdoing, no element of justification or excuse. Nor is there any concern with culpability or harm as influencing an assessment of the gravity of the offence and, therefore, of the amount of punishment proportionate to it. For whereas considerations of retributive justice relate to the punishment that is deserved as an appropriate condemnation given the seriousness of the offender's wrongdoing, considerations of mercy highlight the potential excessiveness of the just punishment in the light of a further range of considerations that bear on the offender's character and the vicissitudes of his life.

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[27] In making this assessment I am influenced by John Lucas' discussion in *Responsibility* (Oxford: Clarendon Press, 1993), p.107f. What I give here is a thumbnail sketch of the communcative theory. For its leading contemporary expositions, see R.A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001), esp. ch.3 and A. von Hirsch, *Censure and Sanctions* (Oxford: Oxford University Press, 1993)..

The contrast depends in part on interpreting the retributive norm as a form of *grievance* retributivism, according to which punishment is deserved for culpably wrongful *conduct*, as opposed to *character* retributivism, according to which just deserts are a function not merely of wrongful conduct but of the quality of the offender's underlying moral character.[28] Grievance retributivism not only preserves the conceptual link between doing and deserving, it also reflects the compelling reasons, in a liberal polity, for endorsing a less intrusive understanding of retributive justice, one that does not mandate the penal system to inquire into the general moral rectitude of offenders in order to establish their criminal liability. But if this is so, then facts pertaining to character and the narrative of the offender's life can found a case for mercy independently of any indirect bearing they might have on the gravity of the offender's wrong. What is at issue here is a shift in evaluative focus from retributive concerns and not simply, as in the case of equitable mitigation, in the level of resolution at which they come into view. What sorts of facts provide grounds for mercy and wherein lies their normative significance? Consider four paradigm grounds for mercy selectively drawn from legal practice.

(1) The first category relates to the offender's history and upbringing, the formidable obstacles he may have encountered to forming a decent and law-abiding character. The morally debilitating effects of grinding poverty, severe emotional deprivation, physical abuse and other such evils in one's life do not necessarily alter the fact or level of culpable wrongdoing, nor do they necessarily have the more radical effect of diminishing the offender's status as a moral agent responsible for their actions. But a humanitarian sentiment of 'There but for the grace of God go I' may demand that these obstacles to good character be taken into account by tempering the strict requirements of retributive justice. Such grounds for mercy involve at least two assumptions. The first is that a justified claim about deserved punishment for wrongful conduct need not be deserved 'all the way down',[29] i.e. one need not deserve the character to which the conduct gives expression. The second is that the offender's plight is not straightforwardly attributable to his membership of a group that is systematically oppressed by an unjust social order. For, if it is, then rather than justifying mercy his victimization may instead undermine the state's authority to punish him.[30]

(2) Secondly, there are cases where the wrongdoing occurred in a wider context that generates charitable reasons for leniency, since it posed unusually severe obstacles to law-abiding behaviour, even though the failure to overcome those obstacles is rightly judged culpable. These

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[28] For this way of putting the distinction, see J. Murphy, 'Repentance, Punishment and Mercy' in A. Etzioni and D.E. Carney (eds.), *Repentance: A Comparative Perspective* (Lanham, MD: Rowman and Littlefield, 1997), pp.149-51.
[29] R. Nozick, *Anarchy, State, and Utopia* (London: Blackwell, 1974), p.225.
[30] For an illuminating discussion of this point, see Duff, *op.cit.*, pp.181-4.

are obstacles of the kinds mentioned in (1), although their effect is not so deep-going as to prevent the wrongdoer from forming a generally law-abiding character.[31] Thus, in *Duffy* the defendant, who had been in an abusive and violent marital relationship, killed her husband after he had gone to bed following a violent quarrel. [32] Her conviction for murder was upheld on appeal, with her plea of provocation rejected on the basis that she had undergone no sudden and temporary loss of self-control. Granting, for the sake of argument, this understanding of provocation, the relevant point here is that the jury responded to the defendant's plight as a battered woman by recommending mercy, with the result that her death sentence was commuted to life imprisonment, from which she was released after less than three years.

(3) The third category is cases where the offender is already suffering some grave misfortune which will be cruelly exacerbated by the infliction in full measure of his just deserts. This category is not to be confused with one in which the offender has already been punished independently of formal legal procedures, e.g. through informal social ostracism; instead, the suffering in question is not deliberately inflicted as deserved censure for wrongdoing. This would be the plight of a father who, in violation of a law requiring the fitting of smoke detectors in household dwellings, subsequently loses his entire family in a blaze that would likely not have had fatal consequences had he complied with the law. Alternatively, the offender's suffering may be unconnected to the offence, as is shown by the practice of leniency towards offenders who have a serious, life-threatening illness.[33]

(4) Finally, there are cases where the offender has sincerely and manifestly repented of wrongdoing, undergone profound remorse and set himself firmly against his previous transgression by radically reforming his character and making apologetic reparation to those he has wronged.[34] He remains, of course, the same person as the wrongdoer who committed the original offence – if he did not, his responsibility for the offence would be in doubt - but his repentence, remorse and radical personal conversion merit our compassion and argue for a reduction in the penalty set by the retributive norm. Such cases are to be distinguished from those

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[31] For a discussion of social deprivation as a ground for mercy as opposed to mitigated culpability, see A. von Hirsch, 'Proportionate Punishment and Social Deprivation' in P. Asp et. al. (eds.), *Flores Juris et Legum: Festskrift till Nils Jareborg* (Uppsalla: Iustus Forlag, 2002). This article came to my attention at a very late stage in revising this paper, but I am encouraged by the convergence between my claims in this section and the argument von Hirsch develops for compassion-based leniency.

[32] [1949] 1 All ER 932, discussed in N. Walker, *Aggravation, Mitigation and Mercy in English Criminal Justice* (London: Blackstone Press, 1999), pp.189-90.

[33] Thus, the Court of Appeal in *Bernard* held that 'an offender's serious medical condition may enable a court, as an act of mercy in the exceptional circumstances of a particular case, rather than by virtue of a general principle, to impose a lesser sentence than would otherwise be appropriate', quoted in Walker, *op cit.*, p.213.

[34] The Home Secretary's directions to the Parole Board issued under s.32(6) of the Criminal Justice Act 1991 require that, before recommending early release, consideration be given to 'whether the prisoner has shown by his attitude and behavior [sic] in custody that he is willing to address his offending behavior [sic] by understanding its causes and its consequences for the victims concerned and made positive effort and progress in doing so'.

where repentance influences our assessment of the gravity of the offence. These will normally be situations where the offender's repentance follows so hard on the heels of his wrongful act as to affect its very nature. Thus, it may be that an immediate and sincere display of repentance, e.g. where the offender 'turns himself in', lowers the degree of culpability the offence manifests, showing it to be an impulsive act rather than one to which he was wholeheartedly committed. Again, in the case of offences whose harmfulness consists in significant part in the insult conveyed to their victims, immediate repentance may lessen that harm by partially withdrawing the message.[35] But in cases where repentance figures among the grounds for mercy, the contention is not that the offender deserves less censure for what he *did* – the culpable wrong that is the proper focus of retributive justice – but rather that the process he has *undergone* in the aftermath of the offence justifies punishing him less than he deserves.[36]

In the four types of case listed above, the facts brought into view *qua* grounds for mercy favour leniency but not by revising downwards the level of punishment judged to be deserved. Instead, the general idea underlying such grounds is that the imposition of the sentence warranted by the retributive norm is an excessive hardship. Returning to the suggestion in §I, their salience consists in their bearing on a humanitarian concern, one that looks to the impact of a proposed punishment on the offender's well-being in the light of a searching and empathetic scrutiny of their character, life history and the broader context of their wrongdoing. If the point of punishment is to communicate censure to wrongdoers, then it is excessive to convey that censure to, say, the bereaved father in (3), by means of the sentence set by retributive justice alone, to force him to attend to his wrongdoing in a way that takes no account of the fact that he is already consumed by suffering and remorse through doing just that. It is harsh and, at the limit, *cruel* in such cases to communicate the full extent of censure that would have been warranted but for the presence of grounds of mercy. Cruelty involves a gratuitous infliction of suffering, and the characteristic claim of mercy is that the presence of these facts renders the full punishment demanded by justice in some degree gratuitous given the overarching point of communicating justified condemnation to the offender. By explicating grounds for mercy in relation to that overarching point we can plausibly encompass all four traditional grounds identified above. Contrast Martha Nussbaum's account, according to which mercy 'focuses on the social, natural, and familial features of the offender's life that offer a measure of extenuation for the fault, even

[35]These two situations are discussed, respectively, in Duff, *op.cit.*, pp.120-1 and J. Murphy, 'Repentance, Punishment and Mercy', p.150. See also Walker, *op. cit.*, pp.113-4.

[36]Antony Duff has argued that, within a communicative theory, repentance can figure only as a factor mitigating the gravity of an offence rather than as a ground for mercy. Duff, *op.cit*, pp.120-1. By contrast, I think that repentance has a dual significance and that one of the advantages of a more pluralistic interpretation of the communicative theory than Duff is willing to countenance is precisely to accommodate this duality. I hope to elaborate and make good on these claims elsewhere.

though the commission of the fault itself meets the law's strict standards of moral accountability'.[37] This only embraces cases of types (1) and (2) and, on the view I advocate, conflates certain standard grounds for mercy with a deeper explanation of why they qualify as such.

Mercy's baroque reputation notwithstanding, I contend that it both does and should play a role in deliberation about punishment. Moreover, the tendency to repress it, to shun mercy as a relic of a defunct political absolutism or a religious mentality that has no place in public decision-making, creates distortions elsewhere in our thinking. Facts whose significance consists in their being grounds for mercy are, instead, implausibly presented as falling under categories (responsibility, justification, excuse etc) that belong to the retributive norm. What takes place in such cases is an artificial, if well-intentioned, 'stretching' of these categories to achieve the desired result of a less severe punishment. Consider, for example, the case of a woman who, after several years of terrible maltreatment from her partner, kills him while he is asleep in an act of desperation, anger and fear. A number of partially overlapping possibilities need to be distinguished in interpreting this sort of case. (i) It may be that, as a result of the years of abuse, the woman suffered from a mental illness that renders her not fully accountable for her actions (a case that would fall under the legal doctrine of 'diminished responsibility'). (ii) Alternatively, she may have retained her rational competence but has an excuse for the killing insofar as she can cite good reasons for being in a such a state of anger or fear that she ended up doing what she did (a situation that would fall under the legal defences of provocation and duress respectively). (iii) Independently of our conclusions under (i) and (ii), the fact that she killed in these circumstances may mitigate the gravity of her wrong by lessening its culpability, e.g. distinguishing it from a killing motivated by greed or a generally callous disregard for human life.[38] (iv) Finally, even after all relevant considerations under (i)-(iii) have been taken into account, the possibility remains that she is a candidate for mercy on the grounds that her situation precisely as someone led to commit a culpable wrong under those circumstances properly elicits our compassion.

Scepticism may yet persist, especially with regard to the distinction between factors mitigating gravity and those justifying mercy. Such doubts can only be allayed by deliberation on actual cases. My suggestion is that such deliberation will sometimes exhibit a characteristic two-stage structure that confirms the distinction. Returning to our example, let us assume that the

[37] M. C. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge: Cambridge University Press, 2001), p.397.

[38] The difference between (ii) and (iii) is one of degree. Its significance in law is to mark the distinction between reduced culpability that amounts to a defence (perhaps qualified, reducing murder to manslaughter for example) and that which only mitigates the gravity of the offence. Procedurally, mitigation takes place at the sentencing stage, after liability has been established. I leave aside the fact that, under English law, a mandatory life sentence for murder entails no scope for mitigation by judges in sentencing.

battered woman has killed without justification or excuse. Do the facts about her history of abuse bear exclusively on an assessment of the gravity of her offence? The gravity of her wrongdoing is a function of two main factors: the harm she has caused in taking the life of another and the culpability exhibited by her in doing so intentionally. Clearly, her case exhibits mitigated culpability: in deliberately taking her tormentor's life, she was motivated by the powerful and understandable incentive to bring her intolerable situation to an end once and for all. Still, the terrible wrong of murder remains, and it exhibits a substantial degree of gravity that is a function of the harm caused and her (mitigated) culpability in intentionally killing without justification or excuse. The facts so far establish a case in retributive justice for inflicting some level of punishment as deserved condemnation that is proportionate to the crime.

Now the second phase in our deliberation begins, one that registers grounds for mercy. Here the facts are not considered as bearing on the gravity of the offence; instead, they relate to features of the offender's character (as a morally decent person) and life circumstances (someone subjected to horrible violence and abuse) that rightly arouse our compassion for her precisely as someone who was led to commit a culpable wrong and in consequence faces a punishment proportionate to its gravity. What makes this an appropriate case for mercy? To begin with, no one should have to endure what she suffered at her abuser's hands. That she did thus suffer created a powerful incentive for her to escape from her situation by killing him, the sort of incentive that most law-abiding citizens are fortunate not to experience. It is, of course, an incentive that we rightly expect ordinary people to withstand, which is why her failure to do so is culpable. Nevertheless, mercy makes a concession to human frailty in such a case - to the failure of basically decent people to exercise the rational self-discipline that they should in difficult conditions to which they should never have been subjected. To insist on communicating the full measure of punishment proportionate to the gravity of her offence without taking these extenuating circumstances into account is unduly harsh. The *pro tanto* reason of retributive justice favouring punishment of a certain amount is in consequence challenged by a charitable reason for leniency that is sensitive to the fact that her culpable wrongdoing took place against the context of the nightmarish circumstances that befell her.

Let me conclude with two observations that support the existence of mercy-based grounds for leniency in such cases. First, that there is a difference between mitigation and mercy emerges most strikingly in just those cases where we believe that a culpable wrongdoer should not be punished at all (beyond, say, the stigma of criminal liability itself) or at any rate should be punished far less severely than the gravity of the offence considered by itself would warrant. This must be due to the influence of an ameliorative consideration other than mitigation, because the

mere fact of having committed a culpable wrong implies a certain minimum level of gravity, such that were retributive justice the only consideration shaping our deliberation, a proportionate level of punishment would have to be imposed as deserved.[39] Nor is it always plausible to ascribe the moderating effect to the influence of other non-retributive factors, such as deterrence or the efficient deployment of the penal system's limited resources, since what evidently moves us to stay our hand is the offender's plight and not large-scale calculations of social benefit.

Second, openly embracing mercy as an independent value can ease a certain polarization displayed by views on the appropriate legal response to battered women who kill. On the one hand, many criminal lawyers, and particularly feminists, understandably resist the wholesale interpretation of such cases as instances of diminished responsibility. Treating the woman as suffering from some albeit temporary mental abnormality - so-called 'battered woman syndrome' - is often untrue to the facts. Where this is so, there is a failure to accord her the respect she is owed as a fully responsible moral agent who chose, albeit culpably, to do as she did. Yet the desire to show leniency creates pressure to fit such cases within the standard retributivist categories of justification, excuse or mitigation. But, on the other hand, traditional retributivists are rightly wary of the erosion these categories are thereby liable to undergo, especially both in diluting retributive justice's concern with wrongful conduct and the standard of reasonableness embedded in its notions of justification and excuse.[40] Mercy helps break this deadlock by constituting a ground for leniency that does not necessarily impugn the woman's status as a fully-fledged moral agent yet equally does not imply that what she has done is justified, excused or exhibits mitigated culpability. It explains why, even admitting culpable wrongdoing, we may be justified in punishing her less severely than is proportionate to the gravity of the offence.

Of course, there is no sharp boundary between retributive and merciful considerations, and so no privileged way of specifying the relevant distinctions. Legal doctrine must draw lines where pure ethical reasoning is indeterminate, just as it does with all the other ethical categories that inform it. The case for acknowledging mercy as a distinct value, however, is the case for thinking that some such distinction between concerns of retributive justice and those of charity has significance. It enables society to impose the stigma of criminal liability on an offender and yet out of humane concern for them to take account of special considerations warranting a

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[39] That mercy can justify refraining entirely from punishment in certain circumstances distinguishes it from mitigation of the offence's gravity; but this has wrongly led some (e.g. J.A. Corlett, 'Making Sense of Retributivism', *Philosophy* 76 (2001), p.108) to conclude that mercy must *always* favour the complete suspension of punishment. It is the different evaluative considerations the two bring to bear on the issue of sentencing that is the true difference between them.

[40] I do not mean to suggest that some of these doctrines cannot be non-distortively adapted to accommodate some (aspects of) cases involving battered women who kill (e.g. it may plausibly be thought that the requirement of a *sudden* loss of self-control in *Duffy* is unduly skewed in favour of a characteristically male termperament), only that beyond a certain point in at least some cases leniency can also have a basis in mercy.

reduction in the level of punishment specified by retributive desert. The institution of legal punishment is thereby equipped to communicate its censure in a more nuanced and humane vocabulary. This upshot seems to me to reflect well on the pluralistic interpretation of the communicative theory, which allows both justice and mercy to figure as values contributing to an all-things-considered judgment of the amount of punishment justified in any particular case.

IV

Conflict, Duty and Right. Even if mercy is a distinct value, irreducible to justice, why concede the pluralist's further claim that it conflicts with the latter? Practical deliberation confronts a conflict of values where incompatible options are supported by distinct evaluative concerns, such that some options are better supported by certain of those concerns and other options are better supported by different concerns. That justice and mercy can pull in opposite directions is in part to be established by reflection on cases falling under the four representative grounds for mercy sketched in §III, insofar as they bear out the abstract specification of the practical import of mercy as embodying a conflictual relationship with justice. Mercy, after all, is nothing other than a source of charitable reasons for punitive options less severe than those favoured by retributive justice. I have said nothing about how such conflicts are to be resolved, but the implication is that sometimes a judge, say, would be justified in acting in accordance with mercy. But if this is so, what becomes of Foot's claim that 'unjust' is conceptually verdictive?

Now, in one way it is misleading to describe the merciful penalty, assuming it defeats or is incommensurable with the punishment deserved, as simply 'unjust'. For this implies that the requirements of justice have been ignored or transgressed without justification, whereas mercy's import only takes determinate shape once the just punishment has been ascertained. But a stronger response is that it is wrong to treat 'unjust' as conceptually verdictive, something already implied by Foot's attribution of a conceptually verdictive status to the predicate 'cruel'. For when justice and mercy conflict the just penalty is in some measure cruel. On this view, Foot has an insight into a feature of ordinary moral language: we should not normally describe as 'unjust' or 'cruel' any policy that we thought rationally eligible, all things considered. But it provides no basis for legislating in advance that justice (or the avoidance of cruelty, for that matter) cannot conflict with other values or that it must prevail over them whenever it does.

Still, one might feel dissatisfied with this answer. Part of the dissatisfaction may stem from the fact that mercy awaits a prompt from justice before taking the deliberative stage, and this may encourage the supposition that justice itself has left a space in advance for mercy's speaking part. Consider, in this vein, a 'disjunctive' interpretation of justice whereby it issues in a

disjunction of penalties of varying degrees of severity, each disjunct representing adequate 'deserved' punishment for the wrong in question. The merciful person is, according to one view, characterized by the disposition to select one of the less severe disjuncts. In this way he both complies with the duty of justice and exhibits the supererogatory virtue of mercy.[41] That this reconciliation is ultimately artificial is shown by its reliance on the disjuncts of deserved punishment ranging in practically every instance from whatever maximum penalty is stipulated by justice to a disjunct imposing no penalty. For only this will accommodate situations where mercy would normally require the complete suspension of punishment. But such elasticity is a desperate way of retaining the no-conflict thesis, for it amounts to emptying retributive justice of its normative content. Far better, for the sake of clarity and fidelity to moral phenomenology, to see justice as concerned with what is deserved by way of punishment given the culpability and harm exhibited by an offence. On this basis, a range of penalties may be indicated. But in cases where mercy is operative, it is the existence of a different kind of consideration – that which is the deliverance of charity towards the offender precisely as someone facing a punishment proportionate to the gravity of their wrong – that also influences the punishment ultimately imposed, which may perhaps sometimes be within the range indicated by justice, or in some cases outside it because below the lower limit set by justice.

One might object that this view of mercy as operating within parameters fixed in advance by justice is not simply motivated by an unargued commitment to its harmony with justice but also by the idea that compliance with mercy, unlike justice, is never obligatory. For it is widely taken as axiomatic that granting mercy is a supererogatory act. As Claudia Card has put it, 'it is difficult to recognize an action as the showing of mercy if the agent was obligated to act as he did anyway'.[42] On the no-conflict disjunctive view, the disjuncts establish the baseline set by obligation; grounds of mercy generate a *permission* to select one of the less severe of the uniformly duty-fulfilling punishments. But this response skates over the fact that supererogatory action is not only *permissible* but also valuable. This axiological point is independent of, and partly accounts for, mercy's deontic implications. Once this distinction has been drawn, it seems peremptory to declare in advance that mercy can never be obligatory. The account in §III emphasized the distinctive sort of evaluative consideration mercy constitutes without strait-jacketing it into a particular deontic shape. Instead, in virtue of the generally dynamic character of values, it is a further question what its deontic implications are in any given situation. However, if

[41] This view is advocated in H. S. Hestevold, 'Justice to Mercy', *Philosophy and Phenomenological Research* XLVI (1985), 281-91. I shall not consider the merits of the disjunctive conception here, independently of its use to support a non-conflictual relationship between justice and mercy.

[42] C. Card, 'On Mercy', *Philosophical Review* 81 (1972) 182, p.184. This is certainly Hestevold's view: '[M]ercy involves sparing deserved suffering when there is no moral obligation to do so', *op. cit.*, p.288.

we think of the situation of a criminal court judge, it would seem that only a duty to grant mercy could possess the normative force needed to justify deviation from his duty to implement justice. This is not because of the illusory idea that only a duty can defeat a duty. Rather, the thought is that duties are particularly stringent sorts of reasons for action: their applicability to their subjects is non-optional, their force is in some degree exclusionary of otherwise applicable reasons, they are typically grounded in a due sensitivity to the interests of others and failure to comply with them is regarded as a basis for criticism. When mercy rightly tempers justice it requires us to depart from the obligation to comply with justice that would otherwise apply. Only a duty of mercy, I think, could have that effect.

It might now be objected that the idea of a duty of mercy is deeply counterintuitive, unless it is an imperfect duty. One interpretation of 'imperfect' duties is that they accord the duty-bearer considerable leeway in deciding when, how and in respect of whom he complies with them. On this view, one is not required to show mercy in all cases where grounds for it obtain; instead, the merciful person shows leniency in a sufficient number of such cases. The intended analogy here is with the supposedly imperfect duty of charity to aid those in dire need: for if one were obligated to assist all those in need, one would impoverish oneself in the process of trying to comply with it.[43] However things stand with charity to the needy, no potential over-burdening of punishers justifies according them discretion in showing mercy.[44] On a second interpretation, however, imperfect duties are not owed to identifiable individuals who have a right to their performance. Doesn't a right to mercy stretch credulity, almost as much as the infamous Hegelian right to be punished? Moreover, to countenance such a right seems to return mercy to the fold of justice, at least if justice is understood as the realm of rights. Yet my position may seem to have just this profoundly counter-intuitive upshot. The idea would be that the offender's interest in leniency can by itself create a duty to impose a penalty less severe than that which is deserved. But isn't a duty grounded entirely in respecting the interest of another the product of a right held by that other? [45]

Perhaps we should bite the bullet and admit a right to mercy. One way of rendering the idea less outlandish is to say that what really jars is not the right itself, but rather the moral

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[43] See, e.g. O. O'Neill, 'The Great Maxims of Justice and Charity', in *Constructions of Reason: Explorations of Kant's Practical Philosophy* (Cambridge: Cambridge University Press, 1989), p.225.

[44] Could it be argued that it would be an excessive burden on society if mercy were shown in each case where sufficient charitable grounds for it existed? This is the reasoning of Judge Richard Posner: 'Mercy in sentencing means lighter sentences; lighter sentencing means more crime; more crime means more victims of crime'. R.A. Posner, 'Emotion versus Emotionalism in Law', in S.A. Bandes (ed.), *The Passions of Law* (New York: New York University Press, 1999), p.326. Leaving aside its empirical contestability, such an argument could be sustained only within a consequentialist theory of punishment, hence one incompatible with the communicative account

[45] I am here assuming an interest-based account of rights, see J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), ch.7.

posture normally associated with the claiming of rights. An adversarial and legalistic insistence on one's interests as trumping the common good is at odds with the deep contrition we ideally expect of at least some candidates for mercy; indeed, it can undermine their case for mercy in direct proportion to its vehemence. But, of course, rights claimants need not strike an aggressive pose, while the mere fact of seeking leniency is not incompatible with genuine repentance. The repentant offender may seek a lighter sentence in order both to hasten his moral regeneration and enhance his ability to make amends to his victims. Still, it is far from clear that the interest of the offender alone is sufficient to create a duty to show mercy. For the offender's interest in mercy always confronts a strong, pre-existing case for punishment based on justice which can prevent a duty to grant mercy from arising or which defeats or counter-balances it even when it does arise. Does a right to mercy exist at least when the offender's interest in it creates an undefeated duty to show mercy? Even here it is doubtful that the interest of the putative right-holder alone is sufficient to ground the duty. For the very assessment that mercy is not overriden by justice typically includes an element of speculation and relying on it entails the assumption of a serious risk of error by the adjudicator and the community in whose name he acts. Has the offender sincerely repented? Are they truly reformed? Was their upbringing as relentlessly dreadful as it has been portrayed? In hazarding responses to these questions, the merciful person acts in large part on the basis of hope in the human capacity for redemption and trust in the good faith of others who have powerful incentives to deceive him.[46] These risks are not wholly attributable to empirical constraints on our knowledge. They also have a source in the stringent limitations on the use of coercive state power in seeking to fashion a mirror into men's souls. Yet he undertakes them in part because he believes that mercy is both an admirable personal quality and a great common good, one that makes our communal life more humane. We may be sometimes obligated to risk being duped by an unscrupulous offender, but it is going too far to credit the offender with a *right* that we gamble on him in this way. If we must look for rights in this vicinity, it is perhaps best to regard offenders generally as possessing a right to present a case for mercy, rather than to mercy itself.

V

[46] In the case of repentance, especially, it may be an unexacting conception of what it involves that causes us to underestimate the difficulty of gauging its occurrence: 'I can find no quality so easy to counterfeit as devotion unless our morals and our lives are made to conform to it; its essence is hidden and secret: its external appearances are easy and ostentatious… Before I call it repentance it must touch me everywhere, grip my bowels and make them yearn – as deeply and as universally as God does see me'. Montaigne, 'On Repenting', in *The Complete Essays* trans. M.A. Screech (London: Penguin, 1991), pp.916-7.

Procedural Fairness. Recall that the second version of Harrison's 'irrationality' objection held that it was the permissive character of mercy – the fact that mercy is supererogatory or only a matter of imperfect obligation in the first of our senses – that leads to violations of the norm that 'like cases be treated alike'. But even if mercy were permissive to some degree, no obvious *irrationality* would ensue. Rationality requires acting on an undefeated reason, not on the single best reason (for there may be none). And, in the situation we are imagining, there is an undefeated albeit non-obligatory reason to grant mercy. But the objection survives this response, because what H.L.A. Hart aptly described as 'the somewhat hazy requirement that "like cases be treated alike"'[47] can be construed as a norm of procedural fairness, one that has especially great weight in criminal law adjudication. Given the permissive character of mercy, how offenders are dealt with in relevantly similar cases will depend on the vagaries of judicial temperament. This will leave some offenders plagued by the excruciating realization that, had their case been tried by the more compassionate judge in the adjoining courtroom, the sentence imposed would have been considerably lighter.[48]

Now, the conclusion reached in §IV rejects the idea that mercy's deontic significance is inherently permissive whenever it is properly invoked to reduce a just penalty. On the contrary, in the normal case a duty of mercy exists, for only this best explains non-compliance with the obligation of justice. And although the special problems that arise in institutional decision-making militate against any complacent reliance on a presumed deontic isomorphism between ethics and law, let us assume that this moral duty justifies the imposition of a legal duty on judges to show mercy in sentencing when undefeated grounds for it obtain.[49] This still does not entirely dispose of the original objection. For if justice and mercy are incommensurable on at least some occasions, then there will be an undefeated reason to inflict a deserved punishment conflicting with an undefeated reason to show mercy. The threat that mercy converts our punitive practices into a lottery re-emerges, since a judge may properly comply with either of the undefeated reasons.

At this point one might be tempted to question the cogency of the unlucky offender's complaint. He cannot say the judge's failure to show him mercy was irrational in view of the

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[47] H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968), p.24.

[48] 'But if it can in some way be grasped why You can will to save the wicked, it certainly cannot be understood by any reason why from those who are alike in wickedness You save some rather than others through Your supreme goodness, and damn some rather than others through Your supreme justice'. Anselm, *Proslogion*, XI, pp.132-3.

[49] The issues of institutional design here are complex. Even if there are grounds for mercy that are obligation-imposing, the institutional issue of the allocation and specification of the relevant duties is a further matter. Thus, it might be objected that a proposed allocation or specification will lead to *de facto* inconsistencies in the treatment of relevantly similar cases. For such concerns in English law over the potential role of victims and their views in the exercise of mercy, see Walker, *op. cit.*, p.210.

grounds that existed for it, since the latter acted for a reason undefeated by mercy. His complaint may instead be that, whereas he has to endure that punishment, someone else in identical circumstances might be treated more leniently. We can agree that he was unlucky, but must we additionally concede that, in virtue of that bad luck, a wrong has been done to him – that he has been unfairly picked on for harsher treatment as compared with others not relevantly different from him? Now, even if procedural fairness is violated in such cases, it is but one value among others, and it may be judged worth the cost of introducing an element of inconstancy into the penal system if it is thereby rendered more humane. Indeed, the offender himself potentially stood to gain from a merciful judgment. The fact that he has not simply puts him in the position he would have occupied were the system concerned exclusively with retributive justice.

These observations dent the objection from unfairness. But they do not overcome a deeper point implicit in it, one that appeals not to the fact that others similarly situated stand to benefit from mercy whereas the offender has not, but rather that what is determining something as important as an offender's sentence is the personality of the judge who happens to decide his case. Here we encounter a radical asymmetry between personal and judicial decision-making. In the former we find it unobjectionable that when reason underdetermines the outcome it is an individual's tastes and inclinations that take over, directing them to one of the eligible options through an act of will. But in the context of judicial and, more broadly, institutional decision-making, the inference from underdetermination by reason to a fiat of will is far more problematic, even if it partly accounts for the nexus between mercy and self-assertion noted previously (§I). In the present context, this is not because the law's application is rendered unpredictable and so undermines people's capacity to plan their lives so as to avoid the coercive attentions of the state. Mercy, like the class of excusatory conditions, belongs to the range of considerations that properly guide deliberation by adjudicators rather than by citizens. Instead, the problem is that the deepest interests of offenders are subject to the idiosyncracies of whoever happens to be passing sentence in their case. And this fact may be taken to express a certain disrepect towards them.

Now, it is in part because rational underdetermination is generally problematic in this way that legal rules are required as a form of 'artificial reason' to supplement natural reason. This line of thought recommends not the expulsion of mercy from legal decision-making, but instead the adoption of a set of legal rules to regulate its official exercise and provide a supplement to natural reason in cases of incommensurable conflict with justice. These rules may vary from one jurisdiction to another, and their content will be one indication of how deep the value of mercy runs in a society. All this is a many-sided question of institutional design, well beyond the competence of philosophy to resolve. Yet it should be acknowledged that the invocation of

artificial reason here is not without its cost. For it is misleading to say that it is judges' 'tastes and inclinations' that are being pre-empted by the proposed artificial reasons. Instead, it is deepest aspects of their moral character. As Joseph Raz has written, '[p]eople do violence to themselves if they go against the grain, and act in a way which offends their moral character. Their integrity and self-respect are transgressed when they do so - unless of course, they should do so'. In cases of incommensurability, 'it is right for people to act as their moral character tells them to act. But their reason is… that they can do no other. They cannot but prefer one set of considerations to the others; for them it is the more important or stringent set of considerations, even while knowing that impersonally speaking they are incommensurate'.[50]

If this is correct, legal rules governing the exercise of mercy in cases where natural reason underdetermines any decision may exact from officials a significant price in terms of their personal integrity. So there is a conflicting expressive reason to confer discretion on officials to act with respect to mercy as their moral character demands that they act. It is not obvious that the latter price is off-set by allaying the concern about subjection to the inevitably inconstant 'personal' dimension in institutional decision-making. Nor can the conflict be avoided by drawing a sharp line between a judge's moral character and their institutional role, since any acceptable institutional role must not exert undue pressure on its occupants' integrity. Nor will it necessarily suffice to point out that people need not choose to become judges, or to ensure that judges are able to excuse themselves from sitting on criminal cases. How this conflict should be resolved at the level of institutional design will depend in large part on the nature of different legal traditions and of the societies they serve. In some cases, the proper response to the problem may itself be underdetermined by reason.[51]

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[50] Raz, *op. cit.,* p.243.

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