When Can or Should Legal Judgment Be Merciful? An Introduction

Austin Sarat

Mercy occupies an uncomfortable position in liberal legal systems like that of the United States.[1] From everyday encounters between citizens and police to grand gestures like executive pardons, the possibilities and need for mercy and merciful judgments abound. Law needs mercy. Thus, for theorists like Martha Nussbaum mercy can and should be folded seamlessly into the operations of law.[2]

Yet almost as ubiquitous as are occasions for the exercise of mercy are suspicions and doubts about it.[3] Low-visibility police decisions, prosecutorial charging decisions, judicial sentencing in the absence of guidelines – these and other merciful judgments often seem troublingly arbitrary, prone to partiality or outright discrimination.[4] As Jeffrie Murphy puts it:

> If we simply use the term "mercy" to refer to certain of the demands of justice (e.g. the demand for individuation),

[1] For discussion of the place of mercy in liberal legal systems, see Claudia Card, "On Mercy," 81 *Philosophical Review* (1972), 182. See also Alwynne Smart, "Mercy," 43 *Philosophy* (1968), 345.

[2] See Martha Nussbaum, "Equity and Mercy," 22 *Philosophy and Public Affairs* (1993), 83.

[3] For a discussion of those suspicions and doubts, see Nasser Hussain and Austin Sarat, "Toward New Theoretical Perspectives on Forgiveness, Mercy, and Clemency: An Introduction," in *Forgiveness, Mercy, and Clemency*, ed. Austin Sarat and Nasser Hussain, Stanford, CA: Stanford University Press, 2007, 1–15. See also Daniel Markel, "Against Mercy," 88 *Minnesota Law Review* (2004), 1421, 1439.

[4] See Justice Douglas's opinion in *Furman v. Georgia*, 408 U.S. 238 (1972).

> then mercy ceases to be an autonomous virtue and instead becomes part of . . . justice. It thus becomes obligatory, and all the talk about gifts, acts of grace, supererogation, and compassion becomes quite beside the point. If, on the other hand, mercy is totally different from justice and actually requires (or permits) that justice sometimes be set aside, it then counsels injustice. In short, mercy is either a vice (injustice) or redundant part of justice.[5]

Moreover, mercy always contains something beyond the complete discipline or domestication of law, something essentially lawless. Illustrating this concern in the context of executive clemency, Coleen Klasmeier observes that "clemency's effectiveness depended on its unpredictability. . . . [T]he sovereign might grant clemency for any reason or for no reason at all."[6] The law professor Henry Weihofen similarly contends that clemency "has always been the broadest and least limited of powers. By its very nature, it could not be subject to rules or restrictions. Its function was rather to break rules, wherever in the opinion of the pardoning authority mercy, clemency, justice, or merely personal whim dictated."[7]

Merciful Judgments and Contemporary Society: Legal Problems, Legal Possibilities explores the tension between law's need for and dependence on merciful judgments and suspicions that regularly accompany them. Rather than focusing primarily on definitional questions or the long-standing debate about the moral worth and importance of mercy, this book focuses on mercy as a part of and problem for law.

[5] Jeffrie Murphy, "Mercy and Legal Justice," in *Forgiveness and Mercy*, ed. Jeffrie Murphy and Jean Hampton, New York: Cambridge University Press, 1988, 169.

[6] Coleen Klasmeier, "Towards a New Understanding of Capital Clemency and Procedural Due Process," 75 *Boston University Law Review* (1995), 1507.

[7] Henry Weihofen, "Pardon as an Extraordinary Remedy," 12 *Rocky Mountain Law Review* (1940), 112, 114. See also Victoria Palacios, "Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases," 49 *Vanderbilt Law Review* (1996), 311, 331–332.

William Blackstone long ago conceptualized mercy's complex and unstable relationship to law by saying, "There is a magistrate, who has it in his power to extend mercy, whenever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exception from punishment."[8] The idea that mercy can be given (or withheld) freely, as well as Blackstone's description of it as a "court of equity," highlights its complex and unstable relationship to law. Blackstone was undoubtedly thinking of the actual courts of equity in his time. They developed in distinction to the common law courts with their elaborate, even Byzantine, system of rules, pleadings, and writs. And although by the time Blackstone wrote the *Commentaries* equity had hardened into law, he knew well the common understanding that "chancery was not a court of law but a court of conscience . . . [and] the essence of equity as a corrective to the rigour of laws was that it should not be tied to rules."[9] Although the language of desert properly could be attached to it, the calculus of mercy cannot be governed by rules; it remains purely discretionary. There remains something in the act of mercy that invokes the ineradicable and perhaps necessary gaps between law and justice, letter and spirit, rules and discretion, gaps that have troubled and continue to trouble legal institutions.[10]

Scholars like Carol Steiker have defended mercy's place in the American legal order by pointing to two of the more salient features of the contemporary administration of criminal justice: the excessively harsh, mandatory lengths of punishment and the strong racial disparity in prison populations.[11] In such a system,

[8] William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769*, Chicago: University of Chicago Press, 1979, 4:389.

[9] *Id.*

[10] See Austin Sarat and Nasser Hussain, "On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life," 56 *Stanford Law Review* (2004), 751.

[11] Carol Steiker, "Tempering or Tampering? Mercy and the Administration of Criminal Justice," in *Forgiveness, Mercy, and Clemency*, ed. Austin Sarat and Nasser Hussain, Stanford, CA: Stanford University Press, 2007.

Steiker argues, there is a particular need for justice to be tempered with mercy.[12] Yet even as she advances this case, she acknowledges the trouble that mercy causes for law. What is the place of mercy in a system dedicated to formal equality? And even if one demonstrates the need for mercy in a rule of law system, what sort of institutional design would best accommodate it?

Other scholars think that law would be better if merciful judgments were abjured.[13] They insist that mercy should have no place in the system of law and justice. This approach, most readily associated with retributivism, insists that offenders be given their just deserts, no more and no less.[14] Ross Harrison argues that a properly run "state's system must operate both impartially and rationally. Rationality means that its impartiality must not be merely whimsical, but based on reasoning, and reasoning must lead to similar decisions in similar cases."[15] This commitment is an "uncompromising position, which finds 'no place for mercy' in the criminal justice system" because rules restrict judicial discretion, and mercy "must be unconstrained, and so cannot survive in the criminal justice system of a rationally impartial state."[16] Moreover, to the claim that mercy brings a calibration and individuation necessary for justice to be done, those skeptical of the claims of mercy, such as Jeffrie Murphy, assert that this is an incorrect understanding of mercy and justice. To carefully calibrate, to consider individual and singular circumstances, is, in his view, not to exercise mercy but rather to do justice in the first place.[17]

Steiker surveys other approaches to the disjunction between mercy and justice, such as that of the so-called social welfare

[12] *Id.*

[13] For example, Kathleen Dean Moore, *Pardons: Justice, Mercy, and the Public Interest*, New York: Oxford University Press, 1997. See also Markel, "Against Mercy."

[14] Markel, "Against Mercy."

[15] Quoted by Nigel Walker, "The Quiddity of Mercy," 70 *Philosophy* (1995), 31.

[16] *Id.*

[17] Murphy, "Mercy and Legal Justice," 139.

school, for whom mercy and legal justice are two distinct possibilities in the larger goal of promoting social welfare and deterring crime. In this view, Steiker contends, there is no conflict between law and mercy, as each is "subsumed on equal footing into the larger calculus of social welfare theory."[18] But for Steiker the problem with such an approach is that it fails to account for any intrinsic moral good of punishment at all.

Are we, then, to conclude that mercy will not only remain part of an aporia in the law, a legally sanctioned power above the rules and procedures that make up modern law, but also remain incommensurable with the rule of law? If we are only to consider the role of mercy in theories of punishment, in arguments with retributivists, this would be a perhaps inescapable conclusion. But there are at least two other possible approaches to the question of mercy and its problems and possibilities in a liberal legal order. The first emphasizes mercy not just as an act, a decision, an exception, but as a cultivated attitude among rulers and ruled. The second takes seriously the role of merciful judgments in addressing the past.

The law professor Linda Meyer makes a powerful case for the first of those approaches.[19] Arguments of various retributivists, she notes, rely on a foundational assumption that is, in the end, Kantian. She believes that thinking about mercy's relation to law should "begin in a different place."[20] To articulate this new point of departure, Meyer relies on Heidegger and his foregrounding not of reason but of being-with others.[21] Such a mode of existence is finite, practical, and based on complex and continuous interaction. Moreover, this is distinct from notions of empirical sympathy and so on. Rather, being-with, Meyer argues, is the first

[18] Steiker, "Tempering or Tampering? Mercy and the Administration of Criminal Justice," 28.

[19] See Linda Ross Meyer, "The Merciful State," in *Forgiveness, Mercy, and Clemency*, ed. Austin Sarat and Nasser Hussain, Stanford, CA: Stanford University Press, 2007, 64. See also Linda Ross Meyer, *The Justice of Mercy*, Ann Arbor: University of Michigan Press, 2010.

[20] Meyer, "The Merciful State," 81.

[21] *Id.*

condition that motivates all thinking and feeling, and, indeed, is prior to any emotional experience. Such an embeddedness has some distinct consequences for our understanding of merciful judgments. Meyer suggests that it removes the objection that mercy must be discarded on the basis of a formal equality. Rather, the grounds for arguing for or against merciful judgment shift to our daily practices of living with one another.[22]

Another way of reorienting our thinking about merciful judgment focuses on its ability to undo the past, to cancel out the continuing consequences of a previous action. Thus, from the everyday proverbial counsel of forgiving and forgetting to the etymological link between amnesty and amnesia, there is, it seems, a deep connection between mercy and remembering and forgetting.[23] Here mercy and legal justice may work in tandem, united by the common ability to bring the negative response to a past transgression to an end.

Whether one starts from a worry about rules and discretion, about the attitudes of citizens and their leaders, or about ways to undo the past, merciful judgments challenge and perplex, just as they help sustain, our legal system. Charting these possibilities and problems is the work that *Merciful Judgments and Contemporary Society: Legal Problems, Legal Possibilities* seeks to do. Here we ask, What challenges do merciful judgments pose for law? When and why do those judgments encourage and nurture legal ingenuity and resourcefulness? When and why do they precipitate crises and breakdowns in legal authority?

Merciful Judgments and Contemporary Society: Legal Problems, Legal Possibilities is the product of an integrated series of symposia at the School of Law at the University of Alabama. These symposia bring leading scholars into colloquy with faculty at the law school on subjects at the cutting edge of interdisciplinary inquiry in law.

[22] *Id.*

[23] See Adam Sitze, "Keeping the Peace," in *Forgiveness, Mercy, and Clemency*, ed. Austin Sarat and Nasser Hussain, Stanford, CA: Stanford University Press, 2007, 170.

One of the products of that colloquy is the commentary provided after each chapter.

Robert Ferguson begins our inquiry into merciful judgments by distinguishing between such concepts as mercy, forgiveness, pardon, clemency, amnesty, and equity. Frequent conflation of these terms, found as early as Sir Edward Coke, is in part responsible for current discrepancies between articulation of the concept and the meaningful practice of it. Ferguson builds on J. L. Austin's notion of performative utterance. Ferguson writes, "Austin's construct is particularly useful in a discussion of legal mercy because it outlines realization through language." He elaborates, "Everyone in the rule of law has the right to know why this special decision makes sense." As he explains, mercy in the legal process requires a fully formed locutionary, illocutionary, and perlocutionary act.

Ferguson also takes up the origins of mercy. He cites Seneca and Marcus Aurelius as exemplary thinkers in terms of the "pagan" concept of mercy. He describes six characteristics of the pagan conception and then outlines Christian views. As he notes, classical realism recognizes an "innate cruelty" in human associations and the unpredictability and lack of individual control of human existence. The pagan conception of mercy also insists that its recognition "contributes to communal security and welfare." In addition, the pagan concept takes the "whole story" into account. It gives priority to the nature of the punishers and minimizes "divine explanation."

In contrast, Christian conceptions of mercy emphasize the dignity of the individual and emphasize the punished over the punisher. Christian conceptions' reliance on the notion of a divine plan minimize the import of fortune. Christian mercy further stresses the idea of salvation and reward in the afterlife. As he lays out these ideas, Ferguson highlights the necessary separation between legal mercy and religious takes on the concept. He writes, "Religious interpolations and language skew the legal application of mercy in what remains a harsh punishment regime in the United States of America."

As Ferguson understands it, mercy in a liberal legal regime is a "special decision." In fact, when distinguishing parole from a legal act of mercy, Ferguson asserts that, whereas parole is a regular (and often "futile") process, "mercy is an exception." For him, the legal act of mercy is a "declarative statement of a *sincere* authorized punisher." Ferguson asserts that although conventional theories of justice have acted as a "straitjacket" in debates about mercy, there is much to be learned from Shakespeare's treatment of mercy in *The Merchant of Venice*, *Measure for Measure*, and *The Tempest*. He writes, "Shakespeare joins his art and his knowledge of human nature to convey the complexity of our subject as no other has done." Ferguson then relates three lessons to be gained from an analysis of Shakespearean mercy. First, "experience in authority" is essential to any exercise of mercy. Second, as Paul Robinson recognizes in his chapter, frequent grants of mercy unjustified threaten to undermine its proper nature; it becomes an expected privilege of an offender rather than a gift. Third, problems arise from the "tension between law and mercy."

Current contention over the nature of mercy and its proper place in the legal system is centered on how we characterize it, as within, outside, or beyond the bounds of legal control. Ferguson observes, "The assumed discrepancy between justice and mercy vexes so many discussions because it already implies that mercy does not belong in the legal process at all." And yet, according to Ferguson, mercy takes place only as "an exceptional remedy," a view much at odds with the argument developed by Susan Williams in her contribution to this book. Ferguson writes, "Legal mercy becomes a possibility when the law does what it *wants* to do rather than what it *must* do." He argues that mercy should be conceived of as an "independent partner alongside justice rather than a subordinated idea or a discrepancy in the system." Exception does not negatively connote abnormality.

Ferguson concludes his chapter by examining mercy in U.S. Supreme Court doctrine. He determines that this doctrine is ambivalent at best. "The jurisprudence of mercy stumbles along in no man's land." He writes, "Expansive references to mercy

without proper delineation of the concept [are] one major handicap." In this way, Austin's performative utterance construct is valuable because it "insists on total comprehension" and brings "calculated method" to the understanding of mercy in law. Ferguson argues that the effective application of mercy within the legal system may teach the public about the "nature of justice." Mercy, in his view, is about "having the courage to do the right thing openly and for the right reason."

Like Ferguson, Paul Robinson is interested in charting the proper place of mercy in our criminal justice system. If in the criminal justice context, Robinson notes, mercy is defined as forgoing punishment that is deserved, then much of what passes for mercy is not. Giving only minor punishment to a first-time youthful offender, for example, might be considered an exercise of mercy but in fact may be simply the application of standard blameworthiness principles, under which the offender's lack of maturity may dramatically reduce his or her blameworthiness for even a serious offense. Desert, Robinson argues, is a nuanced and rich concept that takes account of a wide variety of factors. The more a writer misperceives desert as wooden and objective, the more likely the writer is to mistake judgments of blamelessness for exercises of mercy.

Robinson notes that our strong interest in equality of treatment of like offenders and offenses suggests that mercy, if used, would need to be regularized in its application; punishment ought not depend on the tendency toward mercy, or lack thereof, of the particular decision maker in the case at hand. But, he notes, to institutionalize mercy is to create an expectation and right to it that may be inconsistent with its fundamental character of giving relief or mitigation from punishment to which an offender is not entitled.

Further, Robinson argues, one can imagine serious effects detrimental to the effective operation of the criminal justice system were mercy to be institutionalized. Classic arguments against it would cite its effect in undermining deterrence and the incapacitation of dangerous offenders. Although some might find these arguments unpersuasive, even the desert advocate would have

reason to be concerned. A "mercy program" would, Robinson contends, undermine both deontological and empirical desert, thus failing to do justice both as moral philosophers and as the community's shared intuitions of justice would assess it.

Robinson emphasizes that we must never confuse mercy with "true and careful justice" and that we must not misconceive, or "shortchange" desert. A utilitarian crime-control agenda does not necessarily undermine the meaningfulness of desert as a distributive principle. Mercy does not include mitigations in punishment that are already demanded by a "true conception of desert." Mercy is not the avoidance of injustice – it is the undeserved mitigation of punishment.

As Robinson sees it, the true "virtue" of mercy is "about the giver." The virtue of mercy is found in its embodiment of "practical" compassion and forgiveness. Still, Robinson questions whether this virtue can apply in a legal context, when a sentencing judge, a third party, forgives. He suggests that the virtue of mercy may not be captured by its legal institutionalization.

Robinson carefully analyzes mercy as it is conceived within two different views of the criminal justice system: (1) as designed to achieve effective crime control and (2) as designed to impose deserved punishment. Robinson argues that mercy cannot possibly be conceived of as promoting effective crime control. In addition, giving mercy is, by definition, inconsistent with giving deserved punishment. Moreover, mercy is inconsistent with the specific demands of "moral desert." The moral conception of desert is not a "vague distributive principle." But instead, it requires specific, orderly ranking amounts of punishment according to the relative blameworthiness of the offender. The exercise of mercy disrupts the specific, proportional ordering of punishment by treating like cases differently.

Nonetheless, mercy fits within a criminal justice system based on "empirical desert." In such a system it may enhance the credibility of the criminal law. In contrast to moral desert, empirical desert determines blameworthiness according to community intuitions of justice. Robinson claims that justice in this form is not "true" justice but the community's conception of justice.