

# Questions of Mercy

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## I. INTRODUCTION

My aim in this brief introduction is to organize the Symposium articles around two questions, recognizing that doing so means ignoring other important questions to which the articles attend. I also aim to paint in broad strokes, thus also ignoring much of the argumentative subtlety and nuance contained in the articles. With those caveats on the table, the questions are these: First, does mercy have any legitimate role to play in the administration of the criminal law of a liberal state? Second, if mercy does have some such role to play, for what reasons, or upon what grounds, can mercy legitimately be granted?

## II. MERCY'S ROLE

Although mercy is usually considered a virtue, it appears on reflection to conflict with the demands of justice and equality, demands a liberal state presumably must heed, and these conflicts call into question mercy's status as a virtue, or at least its status as a virtue for state actors like judges and governors. Defending a role for mercy in the criminal law of a liberal state therefore requires one to offer some response to these conflicts—or else accept the conclusion that mercy has no role to play in the public life of a liberal state.

### A. *Mercy and Justice*

In light of the apparent conflict between justice and mercy, at least four different responses are available.<sup>1</sup> First, one could argue that the conflict is indeed only apparent. Theorists who take this position might be called no-conflict theorists. These theorists point to various ways in which one might dissolve the putative conflict between mercy and justice. For example, if doing retributive justice means nothing more than imposing no more punishment than an offender deserves, then mercy and justice can peacefully coexist. Mercy does not entail injustice, since *ex hypothesi* an

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<sup>1</sup> The reference to justice here is to retributive justice, and in particular to what Jeffrie Murphy would characterize as “grievance retributivism,” according to which an offender’s just deserts is a function of the wrong he has done or risked and the culpability with which he has done or risked it, in contrast to what Murphy would characterize as “character retributivism,” according to which an offender’s just deserts is a function of the “inner viciousness” of his character. See Jeffrie G. Murphy, *Remorse, Apology, and Mercy*, 4 OHIO ST. J. CRIM. L. 423, 443 (2007) (discussing the distinction between grievance retributivism and character retributivism).

injustice can arise only when an offender receives more punishment than he deserves, and not if he receives less. Or if giving mercy means imposing the punishment that equity requires, then again, mercy and justice can coexist, at least insofar as equity is the name justice goes by when it attends to all the particulars to which it should attend. Mercy is nothing but a form of justice.

David Dolinko's contribution offers another way to dissolve the apparent conflict between justice and mercy. According to Dolinko's novel thesis, a

judge exercises mercy when she imposes a sentence that is: (1) more lenient than what would normally be expected in a case of this sort; (2) yet *just*, based on considerations of a range of mitigating factors broader than what would be standard in sentencing a criminal case like this one for the same crime.<sup>2</sup>

Thus, on this analysis of mercy, nothing stops a judge from being at once both merciful and just.

Second, one could argue that the conflict between justice and mercy is real: giving mercy means doing injustice; to wit, the injustice of undeserved leniency. One might nonetheless argue that doing justice is not the only game in town. When justice and mercy conflict, justice should sometimes prevail, but not always. Sometimes mercy should. Justice and mercy are independent values regrettably locked in a zero-sum game. A liberal state should nonetheless do its best to honor both. Theorists who take this position might be called mercy-inclusive theorists. For them, doing mercy should openly and unapologetically be included on a liberal state's criminal-law agenda. John Tasioulas most clearly represents this point of view. As he puts it, the "point of punishment is not merely the communication of *deserved blame*, but of *justified censure*. The retributive norm is the fundamental norm in determining what is justified as censure, but it is not the only one. There is also a norm of mercy. . ."<sup>3</sup> Justice and mercy each belong to the public domain, and when conflicts between them arise, state actors must do their best to resolve them.

Third, one could argue that the conflict between justice and mercy is real, but that justice and mercy belong to different domains: justice belongs to the public domain; mercy belongs to the private domain. When justice and mercy conflict, they do so when and because the public and the private come into conflict. Antony Duff analyzes the relationship between justice and mercy in this way.<sup>4</sup> For him, mercy does have a role to play in the criminal law of a liberal state, and as such, Duff may fairly be classified as a mercy-inclusive theorist. Nonetheless, his analysis differs from that of Tasioulas, for whereas Tasioulas treats mercy as an internal competitor of

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<sup>2</sup> David Dolinko, *Some Naive Thoughts About Justice and Mercy*, 4 OHIO ST. J. CRIM. L. 349, 354 (2007) (italics omitted).

<sup>3</sup> John Tasioulas, *Repentance and the Liberal State*, 4 OHIO ST. J. CRIM. L. 487, 499 (2007).

<sup>4</sup> See R.A. Duff, *The Intrusion of Mercy*, 4 OHIO ST. J. CRIM. L. 361, 376-77 (2007).

justice, Duff treats it as an external competitor. In the battle between justice and mercy, Duff sees mercy as an invader in a conflict between sovereigns, while Tasioulas sees it as a combatant in a civil war.

Fourth, one could argue that the conflict between justice and mercy is real, that mercy and justice belong to different domains, but that mercy never constitutes a justified intrusion of the private into the public. We might call such theorists justice-exclusive theorists. Heidi Hurd takes this position. For her, the criminal law has one and only one job to do: retributive justice. State actors therefore have no business being merciful. “[I]nstitutional acts of mercy . . . are,” she argues, “morally (and therefore legally) indefensible, at least on grounds consistent with a retributive theory of punishment.”<sup>5</sup> Nonetheless, she goes on to argue that mercy is not just a virtue properly confined to the private domain of friends and loved ones: it is *constitutive* of that domain. Moreover, because it would be unreasonable to expect state actors always to succeed in cordoning off their private selves from their public selves, mercy will on occasion spill over into the public domain. Thus, whereas Duff treats mercy as a sometimes-justified intrusion of the private into the public, Hurd treats it as a never-justified intrusion. Instead, mercy’s appearance in the public domain is the inevitable, and presumably regrettable, price we pay for the existence of the private domain itself.

### B. *Mercy and Equality*

Another argument against giving mercy any role in the administration of the criminal law holds that mercy should be excluded, not because it conflicts with justice, but because it conflicts with equality. This argument takes at face value the pre-analytic idea that the nature of mercy is such that it defies equality’s injunction to treat like cases alike. Mercy, so the argument goes, is never an entitlement; it is always a “gift.” It is by nature arbitrary and capricious, and a liberal state ought not to keep company with a putative virtue whose exercise ends up treating citizens arbitrarily and capriciously.

One response to this problem is to say that mercy, contrary to popular belief, *is* subject to the demands of equality, or at least that it should be. We should simply reject altogether the pre-analytic idea that mercy is associated with caprice, and insofar as our ordinary idea of mercy is so associated, we should reject that idea. Consequently, if mercy is granted in one case because the offender is, for example, repentant, then mercy should also go to any other offender who is likewise repentant. Mercy may well conflict with the demands of justice, but properly understood, it conforms to those of equality. Duff suggests an approach along these lines.<sup>6</sup>

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<sup>5</sup> Heidi M. Hurd, *The Morality of Mercy*, 4 OHIO ST. J. CRIM. L. 389, 398 (2007). See also Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1425 (2004) (“It is sufficient to be a liberal, that is, committed to the principle of equal liberty under law, to be against mercy.”).

<sup>6</sup> Duff, *supra* note 4, at 380.

Another response is to qualify or clarify, not our understanding of mercy, but our understanding of equality. For example, Dolinko suggests that, as between two similarly-situated offenders, one of whom receives mercy from Judge Warmheart on the basis of  $\phi$  and one of whom is denied mercy by Judge Ironheart, the offender who is denied mercy has no ground for complaint, provided that Judge Ironheart reasonably believed that  $\phi$  is not a good reason to grant mercy, and provided that his denial of mercy was not based on an otherwise invidious reason, such the offender's race or religion.<sup>7</sup> In other words, perhaps equality does not require treating like cases alike. Instead, maybe all it requires is not treating like cases unlike for no reason or for an invidious reason.

### III. MERCY'S REASONS

Assuming that mercy and justice do conflict, and assuming that mercy does have a legitimate role to play in the criminal law of a liberal state, upon what grounds can mercy legitimately be granted? What reasons are good reasons for granting mercy? Among the reasons discussed in the Symposium contributions are an offender's suffering, his history, and his repentance.

#### A. *Suffering*

Imagine a case in which an offender's reckless driving kills his own child. Or suppose an offender's spouse dies in the interim between conviction and sentencing.<sup>8</sup> Does the suffering and emotional pain the actor thereby experiences constitute a good reason to grant mercy? According to Duff, it does, at least in cases where the offender's loss is not the result of his own wrongdoing, as in the case of the offender whose spouse happens to die between conviction and sentence. The underlying idea is that an offender who has suffered a serious loss prior to being sentenced, especially if the offense for which he is being sentenced is a comparatively minor one, is a good case for mercy, because such an offender, distracted by his own loss, may be in no position to appreciate the censure the state would be trying to convey when it imposes on him the punishment he deserves. Nor, under the circumstances, should the state be so keen on trying to deliver that message.<sup>9</sup> Better, therefore, to remit his deserved punishment in the name of mercy.

Hurd likewise argues that an actor's present suffering might constitute a reason to reduce the punishment otherwise imposed on an actor, but any such reduction would,

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<sup>7</sup> Dolinko, *supra* note 2, at 358.

<sup>8</sup> Duff is careful, as I am here not, to draw a distinction between cases in which the actor's wrongdoing causes his suffering and those in which his suffering is unconnected to his wrongdoing. Duff limits his discussion to the latter case, though he does say that "it is hard to see how [the suffering associated with the former case] could serve the ends of communicative punishment." Duff, *supra* note 4, at 367 n.16.

<sup>9</sup> *See id.* at 370.

she argues, constitute doing justice, not mercy. “Our claim [in such cases] is that while the legal system does not, and cannot, formally recognize ‘in-kind punishments[,]’ . . . such punishments count in satisfaction of the obligation of suffering acquired by the person through his or her wrongdoing.”<sup>10</sup> Thus, with respect to some facts, mercy-inclusive theorists and justice-exclusive theorists can find common ground to mitigate the punishment the offender would otherwise receive, but they travel different paths to reach that ground.

### B. History

Next imagine a case in which the offender has suffered a tragic history of abuse and neglect as a child. Criminal-law theorists have famously debated whether such a history—generally described as a “rotten social background”—should form the basis for a full or partial excuse,<sup>11</sup> one the criminal law does not now recognize. Assuming that it should not, does it nonetheless constitute a good reason for mercy? Does an actor become a candidate for mercy if he has already borne the burden of a rotten past? Duff believes that it may, though he stops short of saying that it does.<sup>12</sup> “Faced by a sufficiently serious, tragic case of disadvantageous upbringing, a sentencer might,” he says,

reasonably feel that she cannot—as a matter of conscience and humanity—see the defendant as the criminal law requires her to see him: not because that requirement is itself unjustified, but because this case lies outside the realm of ‘normal’ or ‘ordinary’ cases for which the system is aptly designed.<sup>13</sup>

Once again, Hurd offers a different take. She observes that a sufficiently rotten social background might well cause a sentencer to pity the offender. Moreover, “[t]o pity is to feel charitable and forgiving toward one who is not thought of equal ability or circumstance.”<sup>14</sup> But for Hurd, “if one . . . waives punishment because a wrongdoer is deemed pitiful, it would seem that one is not granting mercy, but merely adjusting the penalty to the genuine deserts of the offender.”<sup>15</sup> Thus, once again, mercy-inclusive theorists and justice-exclusive theorists might be able to find

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<sup>10</sup> Hurd, *supra* note 5, at 401.

<sup>11</sup> Compare Richard Delgado, “Rotten Social Background”: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 *LAW & INEQ.* 9 (1985) (supporting such a defense), with Stephen J. Morse, *Deprivation and Desert*, in *FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF THE CRIMINAL LAW* 114 (William C. Heffernan & John Kleinig eds., 2000) (criticizing such a defense).

<sup>12</sup> See Duff, *supra* note 4, at 377.

<sup>13</sup> *Id.*

<sup>14</sup> Hurd, *supra* note 5, at 395.

<sup>15</sup> *Id.* at 395–96.

common ground for different reasons. Still, it seems to me that while mercy-inclusive theorists would insist upon an offender's background being rotten before countenancing it as a reason for mercy, justice-exclusive theorists would probably insist on it being *very* rotten before countenancing it as a reason for mitigation in the name of justice.

### C. *Repentance*

Finally, imagine a case in which an actor comes to realize the wrongfulness of his conduct, experiences the pain of guilt and perhaps of shame, apologizes, accepts his punishment as a deserved penance, and commits himself to self-reformation. In other words, he repents.<sup>16</sup> Keeping in mind that repentance so understood involves hard work and commitment, and accordingly comes in degrees,<sup>17</sup> does the requisite repentance provide a good reason to grant mercy? Here the most interesting disagreement is not between mercy-inclusive and justice-exclusive theorists, but among mercy-inclusive theorists themselves.

The idea that repentance, or one or more of the sundry components of it, constitutes a good ground for granting mercy is commonplace. All else being equal, it makes sense that an offender who repents should be treated less severely than one who remains defiant and doggedly unrepentant. Tasioulas argues that this commonplace is not only common, but true. Indeed, he goes further, arguing that a liberal state, while duly observing suitable limits designed to protect an offender's privacy and freedom from disproportionate punishments, should encourage and foster repentance. Stephanos Bibas concurs. He regrets the current state of criminal procedure in the United States, which discourages face-to-face interactions between offenders and victims, and as a result discourages repentance on the part of offenders, and hence forgiveness on the part of victims.<sup>18</sup> In this connection, he offers a number of helpful suggestions for reform.<sup>19</sup>

Two objections can be interposed to repentance as a ground for mercy. One is normative; the other epistemic. Duff raises the normative objection. Repentance should not be a ground for mercy, he argues, because a truly repentant offender will eschew any sentence less than that which he deserves, and he will eschew any sentence less than that which he deserves because he will understand that the only way he can expiate the guilt of his wrongdoing is to serve the full measure of his deserved punishment-qua-penance.<sup>20</sup> Accepting anything less would not only be self-

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<sup>16</sup> On the meaning of repentance, see Murphy, *supra* note 1, at 430–32; Tasioulas, *supra* note 3, at 488–89.

<sup>17</sup> Tasioulas, *supra* note 3, at 488–89.

<sup>18</sup> Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329 (2007).

<sup>19</sup> *See id.* at 333–44.

<sup>20</sup> *See* Duff, *supra* note 4, at 386. Tasioulas acknowledges this objection. Although he does not attempt a full-blown answer to it, he

not[es] . . . in passing that a starting-point for its resolution consists in the following

defeating, it would also cast doubt on the depth, if not the sincerity, of his repentance. For Duff, repentance might, if anything, serve as a basis for reducing an offender's sentence in the name of justice, not mercy.<sup>21</sup>

Jeffrie Murphy presses the epistemic objection. Assuming that repentance can in principle constitute a good reason for mercy, either at the time sentencing, or later when the offender seeks executive clemency, Murphy emphasizes that repentance, unlike being the victim of misfortune or a rotten social background, can readily be faked.<sup>22</sup> Consequently, because we can be more confident that an offender's repentance is genuine if it has been sustained over time, repentance might give a governor a reason to exercise executive clemency in mercy's name, but it should ordinarily not be countenanced as a reason for mercy at sentencing. Indeed, as Mary Sigler reminds us, even if mercy is confined to clemency, its exercise might in retrospect turn out to have been misguided, for even the truly repentant can backslide into their old ways.<sup>23</sup>

#### IV. CONCLUSION

As I mentioned at the outset, the articles collected in this Symposium contain rich insights addressed to questions ranging well beyond the two I have mentioned here. On these other questions, the articles must speak for themselves. All I should say in conclusion is that I am very grateful for having had the opportunity to serve as the Symposium's guest editor, and to the authors for their contributions. I trust that the reader will enjoy what follows as much as I have.

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observation: on the pluralist account of punishment I defend, making a claim for *mercy* on the basis of repentance does not commit one to the belief that one *deserves* to be punished less in virtue of one's repentance. Hence, one can believe that one deserves a certain punishment yet also enter a plea for mercy on the grounds of repentance.

Tasioulas, *supra* note 3, at 522 n.43.

<sup>21</sup> See Duff, *supra* note 4, at 385.

<sup>22</sup> See Murphy, *supra* note 1, at 440.

<sup>23</sup> Mary Sigler, *Mercy, Clemency, and the Case of Karla Fay Tucker*, 4 OHIO ST. J. CRIM. L. 455, 474 (2007).

