Justice and equity v mercy

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Introduction

This paper will attempt to demonstrate that there is no conflict between mercy and justice. Both are virtues but mercy is aspirational, as opposed to the essential nature of justice. The common belief that one cannot be merciful and still be just will be shown to be mistaken; similarly with the position that mercy is not relevant to the judicial process. This paper will outline the arguments for and against and demonstrate the nature of misapprehension of ethical conflict. In particular it will take the existing case for civil mercy and expand it to show how mercy could take a place in the criminal sphere.

Popular tradition celebrates the merciful act, especially when it is used to temper blind justice. According to Rainbolt, mercy has the following characteristics:

1. Mercy is a virtue.
2. Mercy is thought to temper justice.
3. No one has a right to mercy.¹

However, over the past few decades a number of articles have argued that a merciful act does not imply a just result and is therefore unjust.² Their argument can be summarised as follows:

1. Mercy tempers justice thus creating an unjust result.
2. It is unjust to be merciful.
3. It is virtuous to be just.
4. Being merciful must not be virtuous.³

This logic clashes with our notion of mercy as a desirable trait.

In response some have proposed that justice must be tempered by ‘equity’ (viz taking into account all facts and circumstances of a case and avoiding blind justice) rather than mercy. They do not deny the existence of mercy, but rather propose that it has no direct relation to justice. They posit that the former authors mistake equity for mercy. This reply has not resolved the issue and new articles still pursue the conflict.⁴ This difference of opinion centres on the applicability of justice in a criminal matter. The former see judges as having the power to exercise mercy, while the latter say that mercy is only relevant between the parties, and therefore in civil actions, rather than between adjudicator and defendant.
Definitions of justice and mercy

Since the basis of this paper is a question of mistaken definitions, it is worthwhile setting the groundwork by reference to the *Oxford English dictionary* (OED).

The OED defines ‘justice’ as:

1. The quality of being (morally) just or righteous; the principle of just dealing; just conduct; integrity, rectitude (one of the four cardinal virtues).

Leaving righteousness to one side, the dictionary also defines ‘just’ as follows:

2. Upright and impartial in one’s dealings; rendering every one his due; equitable.

Based on these definitions a just person should:

- consider every situation impartially; and
- punish in accordance with the circumstances of the case.

‘Equity’ at first seems to have the same meaning:

1. The quality of being equal or fair; fairness, impartiality; evenhanded dealings.

But it also has an additional meaning:

3. The recourse to general principles of justice … to correct or supplement the provisions of the law. Equity in a statute: the construction of a statute according to its reason and spirit, so as to make it apply to cases for which it does not expressly provide.

Thus equity achieves fairness by avoiding a literal reading of the law; it has to ‘correct or supplement’ the law by considering the individual circumstances of the case, which the original drafters could not hope to accommodate. As such equity allows the use of reason to bring justice to the law and allows the spirit of the law to override the letter of the law. On this basis equity includes considering circumstances that reasonably obligate leniency.

Mercy, on the other hand, is defined as follows:

1. a. Forbearance and compassion shown by one person to another who is in his power and who has no claim to receive kindness; kind and compassionate treatment in a case where severity is merited or expected.

This definition of mercy has three characteristics:

- One person has another in his/her power.
- The person in their power has no claim to receive kindness: ‘severity is merited or expected’.
- Forbearance and compassion are given nonetheless.
This is fundamentally different to equity. Firstly, equity has no consideration of power. Equity is an obligation of reason, and not related to power. Secondly, equity is only raised when a person does have a claim to ‘kindness’.5

Nonetheless mercy still appears to be applicable to a judicial hearing; a judge has a person in their power; determines a just outcome; and forbears the handing down of the due sentence in favour of leniency. However, this view is mistaken as a judge has no ‘power’ over anyone, and does not have the ability to exercise forbearance before the law and justice. Mercy is exercised by people who own a right over another, who can waive their claim to enforcement. Judges, conversely, exercise discretion as agents of a sovereign power; this includes decisions made by a public official empowered by the state to decide how a matter should be resolved usually in accordance with guidelines to ensure objectivity and fairness. Justice demands that judges give each case equitable consideration and not apply the law blindly. The question for mercy is whether it will be given, while that for justice is when it should be given.

Civil mercy/private law

According to Twambly, mercy is only an option in civil law.6 He emphasised the supererogatory nature of mercy, namely, noone can have a right to mercy; there can be no precedent for being merciful; thus mercy must be entirely gratuitous. To Twambly the ‘exercise of mercy consists in the plaintiff waiving his right over the defendant and thus releasing him from his “bond”’.7 He refered to Act IV, Scene I of The merchant of Venice, where Shylock seeks to enforce his bond over Antonio. In this case Antonio gave a bond to Shylock that he would pay 3000 ducats by a due date or forfeit one pound of his flesh.8

Twambley listed three characteristics of mercy.9 Firstly he noted that you do not have to be in a position to punish another person to show them mercy. For example, seeking the fulfilment of an existing obligation is not a sanction. The only party who could be injured by a merciful act is the successful party to the action; the party who has it in his/her power to be merciful. Thus if this party decides to be merciful he/she must do so on the basis that any negative effects resulting from that decision will be acceptable. Also, such an act does not undermine the authority of the law because no precedent will result from any such decision.

Secondly, the person receiving mercy need not have offended the merciful person as in a criminal act. Civil actions concern the enforcement of both social and contractual rights. They arise only when one party is unable to meet his/her duty and the other party can legally enforce an obligation. Although it could be said that Antonio had on many occasions offended Shylock, it was not the offence that created the enforceable legal right, but the failure to meet his contractual obligation to repay the bond.

Thirdly, according to Twambley, it is neither just to be merciful nor unjust to be merciless; refusal to grant mercy is the enforcement of one’s rights. The only question of justice is whether the right can be enforced. That being already decided the court has no further role to play and cannot interfere to relieve the onerousness of the terms of the agreement.10
In contrast Tasioulas says that civil matters are not merciful as they ignore his requirement that the mercy alleviate punishment. Thus, since civil matters relate to compensation and not retribution, they do not fall under mercy but would presumably be simple charity. While this is based on the common usage of mercy, the sort of situations Tasioulas discusses relate to equity, as will be shown below.

In Twambly’s argument, the merciful agent must be a person with no one above them to reverse their decision; in this matter at least it could be said that they have sovereignty. Extending this argument, a person with sovereignty could also then be merciful in relation to their sovereign jurisdiction. Similarly, the persons that mercy can be shown to are those who owe a duty or obligation to the sovereign, viz, their subjects. The enforcement of a sovereign power over a subject is a right, which meets Twambly’s third argument. In a modern liberal-democratic society sovereignty lies with the people, who, individually, are also the subjects. The exercise of sovereignty is performed by elected representatives operating the legislative and executive responsibilities of government as agents of the community. Judges are agents of the sovereign, and hold no sovereign power of their own. Despite their inability to be merciful they are still the target of many articles claiming a conflict between justice and mercy. But this is merely a question of semantics. Judges must be just, should be equitable, but can never show mercy.

**Mercy in criminal law: the case for conflicting virtues**

This section will present the case made by the proponents of moral conflict. At the heart of the argument is the nature of their definition of mercy and what it entails in practice. This discussion is based on sentencing and not on guilt. In the most recent article, Tasioulas sees the common notion of mercy (and therefore his definition of it) as being concerned with punishment. He offers the following argument:

1. We only punish offenders.
2. Only those who are punishable are candidates for mercy.
3. Only someone authorised to punish can give mercy.
4. There must be an independent determination of the amount of punishment that is just.
5. Mercy will temper this justice.

Further Tasioulas claims that mercy relies on reason and is not just relief due to pity or other irrational causes. From this perspective mercy is tied to punishment rather than misfortune; a person who is to receive mercy must offend, rather than place themselves in a detrimental circumstance through hubris, negligence or ignorance.

As will be seen below, most authors follow a similar theory, and provide varying but related cases under which mercy should be given. Four major arguments are presented: individuation, extenuating circumstances, disjunctive desert and communicative justice.
Individuation

Individuation is the ability of judges to place themselves in an accused’s position so that their perspective is shifted and they can understand the circumstances that will justify leniency. Nussbaum thinks judges should expand judicial considerations by taking a ‘novelist’s view’ of the accused’s character. Referring to Aristotle’s concept of *suggnome* or ‘seeing things from the accused’s point of view’, she says that a judge could identify with the accused in the same way as a spectator to a tragedy forms a sympathetic bond with the hero. This perspective would provide a level of understanding of the accused’s motivations which may mitigate the sentence. A deep understanding of a person’s history and nature will inspire ‘identification’, compassion and understanding.

This technique is intended to overcome the natural inclination of individuals to judge others more harshly than themselves. In *Measure for measure*, Shakespeare pointed out that people see greater guilt in others’ actions than they do in their own, especially when the others are seen as belonging to another group.

> We cannot weigh our brother with ourself:  
> Great men may jest with saints; ’Tis wit in them,  
> But in the less foul profanation...  
> That in the captain’s but a choleric word,  
> Which in the soldier is flat blasphemy.15

The judge has to transcend prejudice and presumption, and take on the other’s perspective. From there a person will see the circumstances that support mercy and empathise with the accused. According to Nussbaum, however, there is a breakdown between the self and the other:

> This however, presupposes that to a certain extent I have become identified with the other, and consequently that the barrier between the ego and the non-ego is, for the moment, broken down. It is then and then only, that I make his interests, his need, his distress, his suffering directly my own.16

Nuyen sees mercy as extending beyond the facts into the feelings of the accused:

> To be merciful is to find it within oneself a willingness to be lenient. To be sure, the merciful judge is often moved by the offender’s circumstances, but the source of mercy is not in those circumstances; it is in the judge himself or herself. Indeed, when such circumstances are lacking, the merciful judge must rely entirely on his or her feelings.17

These claims to mercy have two characteristics flowing from empathy:

1. Firstly, the judge can understand the circumstances of the accused and thereby have a better comprehension of the factors that ought to be considered as weighing in his/her favour.  
2. Secondly, by empathising, the judge can share the feelings of the accused and thereby develop sufficient sympathy to warrant mercy.
In reply to the first point, Murphy and Hampton raised concern about confusing identification/individuation with mercy: defining such action as being outside justice would remove a person’s right to fair treatment:

This demand for individuation – a tailoring of our retributive response to the individual natures of the person with whom we are dealing – is a part of what we mean by taking a person seriously as person and is thus a basic demand of justice ... [any attempt to make individuation mercy would be] dangerous because it might lead us to suppose that individuation is not owed to a person as a right and is thus somehow optional as a free gift or act of grace.\(^{18}\)

Through equity all accused should benefit from such understanding. It is equitable because it is concerned with identifying factors within the specific case that mitigate guilt.

The second point would definitely be unjust as it ignores the facts and produces an outcome out of sympathy alone. As will be shown below, this would be a fruitless pursuit for a judge or any public official exercising discretion.

**Extenuating circumstances**

Smart took a different tack by trying to identify specific circumstances in which justice would be denied but mercy deserved. Having accepted the existence of equity, she attempted to identify a point in a criminal matter at which equity is exceeded and becomes mercy. Smart pointed out that, while there may be extenuating circumstances in a case that mitigate the seriousness of the offence,

\[\text{[i]t seems that mercy is appropriate when an offence is intrinsically less evil than another, where a person acts under provocations, and where there are extenuating circumstances such as impaired judgement, coercion and ignorance. It is sometimes appropriate where the offender has already suffered a great deal.}^{19}\]

She defined mercy as ‘deciding not to inflict what is agreed to be the just penalty, all things considered.’\(^{20}\) The reason behind this is Smart’s basic premise: ‘The suffering that punishment involves is unpleasant for all concerned, and if it is possible to avoid it or lessen it without injustice, then it is desirable to do so.’\(^{21}\)

Smart listed three reasons to be merciful:

1. when one is compelled by the claims of others, eg the family of an accused;
2. where a person is given the opportunity to reform, ie a second chance; or
3. a large duration of time has passed between when the crime is committed and the sentence is passed.

However, all of these are questions of equity. Firstly, the interests of a third party are covered by natural justice.\(^{22}\) The rules of natural justice apply whenever the rights, property or legitimate expectations of an individual are affected.\(^{23}\)
It is a deep-rooted principle of the law, however, that before anyone can be punished or prejudiced in his person or property by any judicial or quasi-judicial proceeding he must be afforded an adequate opportunity of being heard.²⁴

If it is assumed, for example, that an offender’s dependants would be prejudiced by the sentence the offender receives then, under this principle, they should have the chance to state their case for support prior to a sentence being given. It would be unjust for a judge to condemn the innocent dependents to poverty for the actions of another. Therefore, all the questions involved in this form of discussion relate to justice and not to mercy.

Smart’s last two reasons require consideration of circumstances relating to the offender that demand that he/she receive more lenient treatment than is otherwise justified. However, these matters are normally considered as part of the equitable determination of a fair sentence.²⁵

Smart was also concerned that merciful actions should be a precedent for further mercy in the same circumstances. However, the creation of a precedent for mercy is the same as claiming it would be unjust to not receive mercy in the same circumstances in which others have been given leniency. Her argument is essentially that mercy is unjust but as a point of justice must be open to all in the same situation. This would convert the act of mercy into one of justice.

Card distinguished between mercy complementing justice and ‘pseudo mercy’ or equity:

we can obviate confusion between genuine and pseudo mercy by pointing out that real mercy reflects justice solely as a virtue of persons. It complements the justice of the institution of punishment, whereas pseudo mercy is intended to correct injustice in the rules.²⁶

But still she considered that there were situations where mercy ought to be shown:

Mercy ought to be shown to an offender when it is evident that otherwise (1) he would be made to suffer unusually more on the whole, owing to his peculiar misfortunes, than he deserves in view of his basic character and (2) he would be worse off in this respect than those who stand to benefit from the exercise of their right to punish him (or to have him punished). When the conditions of this principle are met, the offender deserves mercy. Although desert of mercy does not give rise to an obligation, it can present a case sufficiently strong to outweigh the initial justification for punishing and allows us to discriminate among offenders without violating the rule of justice.²⁷

These considerations are simply a variation of those put forward by Smart. Hestevold²⁸ pointed out that Card and Smart fall into the same paradox: they both claimed that if certain circumstances exist we ought to show mercy but they also claimed that mercy is not obligatory. The provision of an obligation would change the character of mercy:
If supererogatory actions are those good actions which are ‘beyond the call of duty,’ then it is counterintuitive to say that an agent is morally obligated to act supererogatorily on some occasions. Consequently, the person is not immoral who performs only those good actions for which he has a duty to someone to perform (since there are no general duties for him to violate).

Additionally, the introduction of an obligatory nature would raise questions of application and fairness, effectively changing the action to one of justice rather than mercy.

Card’s second point presents a new problem in so far as she referred to a person’s ‘right’ to punish. Judges do not have such a right. Sentencing is a function of a judicial officer. If they had a right it would be within their power to waive the exercise of that right and also to enforce the right. No judge has the ability to waive the sentencing function, and as the adjudicators they have no ability to seek enforcement from another. To have a right over a person they would also need to have some relationship with that person. The judicial officer is presented with a case on an almost random basis depending on location and the judicial workload. Their lack of a relationship is the very thing that qualifies them to hear the matter. Rather than a right they have a duty to sentence within the boundaries of the law.

Disjunctive desert

Hestevold tried to break the impasse between the obligation to show mercy and the obligation to act justly by appealing to the doctrine of disjunctive desert, ie a judge is merciful if he/she chooses the lesser of a range of penalties:

for some, if not all improper actions, there exist disjunctions of penalties, each disjunct of which could alone serve as the sufficient desert for the improper act in question; and, the sufficient deserts may be of varying severity. To show mercy is to levy one of the less severe penalties of the appropriate disjunctive desert. Such a solution to the problem implies that the merciful person is one who acts justly, since he levies a penalty deserved; yet, he is also praiseworthy for his supererogatory choosing of one of the less severe penalties.

However, in the same way as a judge has a duty not to sentence beyond the range stipulated by law, the sentence given must be appropriate for that case. If it is not it can still be the subject of an appeal. Thus the disjunctive argument does not resolve the dilemma.

Communicative theory of justice

Tasioulas says that, if mercy is simply the beneficial side of equity (as opposed to the equitable ability to increase the apparent just punishment due to aggravation), then it is not a virtue distinct from justice, but simply a part of justice. He then discusses the ‘communicative theory of justice’, that is, ‘the essential point of punishment is to communicate society’s emphatic condemnation of criminal wrongdoing’. Some
people face such existing bad circumstances that the addition of punishment would be a severe hardship upon them.\textsuperscript{33}

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.\textsuperscript{34}

He provides the following examples:

1. a person has grounds for mercy because of their social position; they became a criminal due to systematic oppression in an unjust social order;
2. battered wife syndrome;
3. where the person has already suffered from the consequences of their action and any further punishment would be superfluous;
4. a case of sincere remorse and reform.\textsuperscript{35}

In response to these, firstly, the question of social victimisation is contentious. While the majority of offenders come from bad backgrounds, the majority of people from such backgrounds are not offenders. Secondly, battered wife syndrome is now an accepted defence forming part of the law. Thirdly, penalties do not exist solely to punish. They also include rehabilitative qualities as well as considerations of protection of the community. Suffering on the part of an individual is not the sole consideration. Finally, and similarly, remorse and reform are considered in sentencing.

Each of Tasioulas’ points must fail as they are questions of social justice because they weigh on the fairness of a penalty. In addition, they have a quality of necessity which will reinvoke the problems of maintaining the supererogatory nature of mercy.

Public officials and discretion

As has been stated above, a merciful act requires a person to have power over another person. A judge does not have a person in his power because he is not free to wield power. The judge is an independent adjudicator; an agent of the community with its delegated authority to adjudicate legal issues. A judge does not posses power over the parties. The power lies with the sovereignty of the people and the judicial process is, at least theoretically, a just means of wielding that power. When sentencing, judges do not exercise a right over the passive agent; rather they perform a duty.

In addition, if a judge is either merciful or cruel it is an empty act. A judge in a criminal case in any other country that has maintained the English legal system must apply the law to the case. If the judge were to give a sentence below the minimum sentence set down for that matter, that decision would be illegitimate. The attorney-general would commence proceedings to appeal the sentence. Even on the Continent, where precedent does not have the same weight; courts rely on legal codes for certainty. There is no room for a judge to be ‘merciful’ in this sense and any judge would be aware that such an action would be invalid and have no lasting effect. Such a judge would breach an obligation and manifest a vice and not a virtue.\textsuperscript{36}
Even when a judge has a range of discretion when imposing a sentence there is no opportunity for mercy. The intent of providing a range of sentencing options is to give judges the freedom to be equitable and not to restrict their judgement to a single sentence which may not be appropriate for all offenders. When sentencing within the range the judge must impose the just sentence; there is no room for mercy. If the sentence is too lenient the same process of appeal will commence as discussed above.

In a criminal trial the accused has a right to be sentenced fairly and other citizens have a right to expect that the accused will be sentenced in accordance with the law. The concomitant duty lies with the judge to ensure these rights are maintained. Thus a merciful judge infringes the rights and expectations of other citizens. If a judge were to attempt to be merciful and impose a sentence which he/she feels is compassionate but is manifestly unjust in the circumstances, the judge’s action would have no more force than if a minister resigns from Cabinet over a decision; while the action may be admirable it will have no effect.

The public, as sovereign, can be merciful through the exercise of the ability to pardon and legislate. The sovereign is possessor of all power, including that over individuals. Thus they hold an offender in their power. If they were so inclined, they could be merciful through their elected representatives either through the power of clemency or passage of legislation. While judges are bound not to exceed the law, parliament may alter the law as it sees fit. For example, it could set penalties that are below those that are a just reflection of the crime. This could be an act of mercy on the part of the parliament, that is, on the part of the sovereign people of the state.

**Conclusion**

This paper has shown that there is no conflict between mercy and justice. The virtue of justice is a duty to treat all fairly and equally. Mercy properly occurs after the question of justice has been settled. A merciful agent has the option of enforcing a claim, but waives that option.

I began by establishing that mercy has no place in the criminal justice system. All the attempts to draw a line between criminal equity and mercy fail because questions of sentencing consider when leniency should be shown and do not give a discretion whether it should be shown. Judges have a duty to apply the just outcome and any attempt to go beyond this will be invalidated by the criminal justice system and thus have no effect.

Mercy can be shown in a civil case because the question of justice is resolved prior to the question of mercy arising. The merciful agent is not the judge but the successful party to the action. This party has a right to enforce the contract, not a duty to do so. Therefore the merciful agent can waive that right without being unjust. No one will appeal this action as there are no other interests involved than that of the passive agent who benefits from the waiver.

Can mercy still be a virtue even though there is no obligation to act in this manner? Like charity and grace, mercy is virtuous because it exceeds obligation. By arguing that we
ought to be virtuous, we do not produce an ethical onus to act in a particular manner. It includes both characteristics that meet the minimum standard of behaviour, such as justice and honesty, as well as those that aim at excellence, such as courage and mercy. Thus virtue can be both aspirational as well as essential and this paper has shown that mercy falls into the former.

5 Mercy is, however, very similar to ‘grace’ which is defined as ‘favour or goodwill, in contradistinction to right or obligation, as a ground of a concession’. But grace is broader in application than mercy. While it contains a requirement for a concession regardless of a right on the part of the recipient to receive it, nor an obligation on the giver to provide it, severity need not be merited. So it is possible to conclude that, while all mercy is an act of grace, not all acts of grace are merciful.
6 Twambly, P, ‘Mercy and forgiveness’, *Analysis*, vol 36, 1985, pp 84–90. Rainbolt, op cit, p 172 also referred to *The Merchant of Venice* but maintained that justice and mercy conflict.
7 Twambly, ibid, p 85.
8 If you repay me not on such a day,
   In such a place, such sum or sums as are
   Express’d in the condition, let the forfeit
   Be nominated for an equal pound
   Of your fair flesh, to be cut off and taken
   In what part of your body pleaseth me.
9 Twambly, op cit, pp 86–87.
10 It must not be; there is no power in Venice
   Can alter a decree established:
   Twill be recorded for a precedent,
   And many an error, by the same example,
   Will rush into the state: it cannot be.
12 Tasioulas, op cit, pp 103–104.
13 Ibid, p 104.
15 *Measure for Measure*, Act IV, Sc i.
16 Nussbaum, op cit, p 203.
17 Nuyen, op cit, p 70.
19 Smart, op cit, pp 348–349.
21 Ibid, p 345.
24 Ibid.
25 These are enshrined in legislation in many jurisdictions. See for example the *Penalties and Sentences Act 1992* (Qld).
26 Card, op cit, p 195.
28 Hestevold, op cit, p 360.
29 Ibid, p 363.
31 Tasioulas, op cit, pp 112–114.
32 Ibid, p 114.
34 Ibid, p 119.
36 Murphy and Hampton, op cit, p 175.