

MERCY AND THE LAW

LECTURER

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TIMES

Tuesday, Week 5: Mercy: Concept & Virtue

Tuesday, Week 6: Mercy & Justice

Tuesday, Week 7: Mercy & Discretion

DESCRIPTION

Consider the following examples:

- Forgiving creditor. You're rich and you've lent many people money. These people are in your debt. Now one of the unfortunate debtors has fallen on hard times. He's lost his job through no fault of his own. His child has been diagnosed with a terrible illness. There's much suffering in his life already. To repay his loan to you would add to his woes. You're entitled to insist on repayment. Moved by his plight, though, you tell him to pay only when he can.
- Lenient judge. You're a judge about to pass sentence on a convicted thief. The law permits a range of punishments. It's up to you to decide which one to impose. But the thief tells you of his difficult life, of his struggle with addiction, and of his remorse for his crimes. Hearing his story, your heart softens. Aren't we all fallible, you think? Aren't we all weak sometimes? Who among us can do without the understanding and compassion of others? And so you impose a light sentence.
- Benevolent ruler. A recent case from France: Mr and Mrs Sauvage were married for 47 years, during which time Mr Sauvage regularly beat and raped his wife. He also raped the couple's three daughters. The marriage came to an end in 2012 when Mrs Sauvage picked up a rifle and shot her husband three times in the back, killing him. She was convicted of murder and sentenced to 10 years in prison. In 2016, though, President Hollande used his power under the French Constitution to pardon Mrs Sauvage.

I don't want to say that all these examples involve acts of mercy; that would assume too much. It's safe to say, though, that forgiving a creditor, passing a lenient sentence, and granting a pardon are acts that are often characterized as merciful. So these examples give us a rough sense of our topic. Moreover, they indicate its importance: where we find mercy, we find at least the possibility of punishment and suffering, praise and blame, hard choices, emotion, extraordinary acts, and power over others.

These examples also point us towards the main issues we'll look at in this mini-option. One much-debated issue is conceptual: what, exactly, *is* mercy? If these examples are any guide – and on this point I think they are – then to act mercifully towards someone is partly to make them suffer less (or perhaps to benefit them more) than you could have. Waiving payment causes less pain than insisting on payment. A light sentence leads to less suffering than a heavy sentence. A pardon leads to less suffering than no pardon. This feature is only a starting point, though. A good analysis of mercy would identify its other features. We'll take up this conceptual issue in our first class.

There's an important difference between the first example and the last two examples. In the first example, both parties – the creditor and debtor – are private actors. They don't have any relevant official duties or obligations. In the last two examples, things are different. To be a judge or a ruler (police officer, juror, prosecutor, ...) is to occupy a legal role. With these roles come responsibilities, both moral and legal. Many philosophers think that mercy sits uneasily (to put it mildly) with the responsibilities attached to these legal roles. Their concerns can be usefully grouped around two "challenges to legal mercy".

The first challenge to legal mercy has to do with justice. Mercy 'tempers' justice, Milton tells us. But if 'tempering is tampering', as Jeffrie Murphy likes to say, then mercy and justice are incompatible. To be merciful is to be unjust. This might not worry the creditor: he isn't obligated to be just, so he doesn't fall short of his obligations by showing mercy. But it should worry the judge, because doing justice is part of a judge's 'job-description' (Murphy again). Mercy, it seems to follow, ought to play no part in judging. That's the challenge. But does it succeed? We'll consider that question in our second class. We'll also consider whether the same challenge can be made with respect to rulers like the President.

In our third class we'll turn to another sort of challenge to legal mercy. Many people think that a merciful act has to be 'discretionary'. That's a slippery word, and a lot turns on what's meant by it; but on one

interpretation it means that mercy is incompatible with rules and external standards. You can beg or plead for mercy, but nothing can entitle you to mercy. Mercy, it's often said, is a 'gift' or an 'act of grace'. Thus, while Mrs Sauvage was no doubt relieved to receive her pardon, it was up to the President whether to grant it, and he could have refused at a whim. Mrs Sauvage was truly 'at his mercy'. Alarm bells should now be ringing for modern lawyers. All this talk of begging and gifts smacks of a relationship a medieval monarch might have had with his subjects, not the relationship a democratic government ought to have with its citizens. It would seem that a legal system that's opposed to arbitrariness and committed to the rule of law ought to leave no room for mercy.

Perhaps you're starting to think that the law would be better off without mercy, and that we should content ourselves with non-arbitrary justice. It may be that this austere approach turns out to be correct. But think back to the examples. Isn't there something appealing about the judge passing a lesser sentence once he comes to see the thief as a 'suffering fellow' (Duff)? Hadn't Mrs Sauvage experienced enough pain before she even began her sentence? Another thought to make you pause: no modern state has done without some form of legal mercy, except for France shortly after the 1789 revolution. It's true that mercy fits awkwardly with some cherished and hard-won legal principles; yet mercy is itself of value, and it isn't easily abandoned. If there's a theme in this mini-option, it's that it's worth thinking carefully about how, if at all, mercy can be accommodated in a legal system like ours.

A note about the reading: The material is mainly articles and books in philosophy. There's been increasing interest in mercy among philosophers since the late 1960s, and as a result most of the material is fairly recent. When we come to mercy and discretion, we'll look at some legal cases for food for thought. There's a huge amount written about mercy in other disciplines – theology, history, literature, etc – which unfortunately we're going to have to skip almost entirely, for reasons of time. If you're interested in the history of pardons, though, you could start with H Lacey's *The Royal Pardon* (2009), KJ Kesselring's *Mercy and Authority in the Tudor State* (2003), or *Qualities of Mercy* (1996) edited by C Strange. For an idiosyncratic but interesting collection of examples of mercy in film and literature, see the appendix to C Rolph's *The Queen's Pardon* (1978).

CLASS 1: MERCY: CONCEPT & VIRTUE

Core reading

1. A Smart, 'Mercy' (1968) 43 *Philosophy* 345
2. P Twambley, 'Mercy and Forgiveness' (1976) 36 *Analysis* 84
3. J Murphy, 'Mercy and Legal Justice' (1986) 4 *Social Philosophy & Policy* 1 (pay special attention to Anselm's two puzzles)
4. M Nussbaum, 'Equity and Mercy' (1993) 22 *Philosophy and Public Affairs* 83
5. A Tuckness & J Parrish, *The Decline of Mercy in Public Life* (2014), c 9 ('The Meanings of Mercy')
6. Seneca, *On Mercy*, available online

Further reading

1. Shakespeare, *The Merchant of Venice*, Act IV (especially Portia's speech)
2. N Walker, 'The Quiddity of Mercy' (1995) 70 *Philosophy* 27 (clear overview of some key early articles on mercy)
3. C Card, 'On Mercy' (1972) 81 *Philosophical Review* 182
4. A Perry, 'Mercy' (2018) 46 *Philosophy & Public Affairs* 60

Reading questions

1. How is mercy different than leniency?
2. Is compassion essential to mercy?
3. 'If punishment is impossible, so is mercy.' True or false?
4. What's the relationship between mercy and equity? Compare Nussbaum and Murphy.
5. Can it be wrong to show mercy? Is there always something good about showing mercy?
6. Why is there so much disagreement about what mercy is?

CLASS 2: MERCY & JUSTICE

Repeat reading

1. P Twambley, 'Mercy and Forgiveness' (1976) 36 *Analysis* 84 (p 87)
2. J Murphy, 'Mercy and Legal Justice' (1986) 4 *Social Philosophy & Policy* 1 (n 17)
3. Seneca, *On Mercy*, available online

Core reading

1. HS Hestevold, 'Disjunctive Desert' (1983) 20 *American Philosophical Quarterly* 357
2. CAH Johnson, 'Entitled to Clemency: Mercy in the Criminal Law' (1991) 10 *Law & Philosophy* 109
3. J Tasioulas, 'Mercy' (2003) 103 *Proceedings of the Aristotelian Society* 101
4. RA Duff, 'Mercy' in J Deigh and D Dolinko (eds), *The Oxford Handbook of Criminal Law* (2011)
5. N Markosian, 'Two Puzzles About Mercy' (2013) 63 *Philosophical Quarterly* 269 (a good companion to the pieces by Tuckness & Parrish and Bell from the first class)

Further reading

1. S Sverdlik, 'Justice and Mercy' (1985) 16 *Journal of Social Philosophy* 36
2. RG Fox, 'When Justice Sheds a Tear: The Place of Mercy in Sentencing' (1999) 25 *Monash University Law Review* 1
3. D Markel, 'Against Mercy' (2004) 88 *Minnesota Law Review* 1421
4. A Walen, 'Retributive Justice' in the [Stanford Encyclopedia of Philosophy](#), available at <http://goo.gl/rQqZZu> (those who think that mercy is opposed to justice are usually thinking of *retributive* justice, and this article is a good introduction to retributivism)
5. M Sigler, 'Equity, Not Mercy' in Flanders and Hoskins (eds), *The New Philosophy of Criminal Law* (2016)

Reading questions

1. What is Murphy's 'private law model' of mercy?
2. Johnson says that 'mercy is a way of doing justice'. Draft the response Murphy might make.
3. Hestevold says (roughly) that you show mercy when you punish someone as they deserve, when they also deserve a harsher punishment. Think of two criticisms of Hestevold's proposal.

4. If mercy is inconsistent with justice, and a judge shows mercy anyway, has the judge failed as a judge, as a person, or both?
5. Twambley says that in *The Merchant of Venice* it's alright for the Duke qua head of state to show mercy to Shylock, even though it wouldn't be alright for the Duke qua judge to show mercy to him. Is the distinction defensible?

CLASS 3: MERCY & DISCRETION

Core reading

1. R Harrison, 'The Equality of Mercy' in H Gross and R Harrison (eds), *Jurisprudence: Cambridge Studies* (1992)
2. *Reckley v Minister of Public Safety and Immigration* [1996] 1 AC 527, 539–541; *Lewis v Attorney General of Jamaica* [2001] 2 AC 50, 71–80
3. G Rainbolt, 'Mercy: In Defense of Caprice' (1997) 31 *Nous* 226
4. A Marmor, 'Should Like Cases be Treated Alike?' (2005) 11 *Legal Theory* 27
5. A Novak, *Comparative Executive Clemency* (2016), c 8 ('Legislative and Judicial Review of Executive Clemency')

Further reading

1. ATH Smith, 'The Prerogative of Mercy, the Power of Pardon and Criminal Justice' [1983] *Public Law* 398
2. J Feinberg, 'Noncomparative Justice' (1974) 83 *The Philosophical Review* 297
3. S Garvey, 'Is it Wrong to Commute Death Row? Retribution, Atonement, and Mercy' (2004) 82 *North Carolina Law Review* 1319
4. T Eisenberg & S Garvey, 'The Merciful Capital Juror' (2005) 2 *Ohio State Journal of Criminal Law* 165

Reading questions

1. Murphy (among others) claims that mercy is supererogatory. Rainbolt argues to the contrary. Reconstruct Rainbolt's argument.
2. What is an imperfect obligation? Does the law ever create imperfect obligations?
3. Suppose that the state showed mercy whenever it could. What would the practical consequences be? What would the consequences for the rule of law be?
4. Cases A and B are alike in all relevant respects. In each case you can choose between act x and not-x. You x in A. Without more, can it be inferred that there is some reason for you to x in B? Compare Harrison and Marmor on this point.
5. If the choice whether to grant a pardon is subject to judicial review, can a pardon ever be an act of 'true' or 'genuine' mercy?
6. On what grounds (if any) ought pardoning decisions to be judicially reviewable, all things considered? Compare the Privy Council's approach in *Lewis* with the Indian Supreme Court's approach in *Maru Ram* and subsequent cases (as described in the Novak chapter).