USE OF THESES

This copy is supplied for purposes of private study and research only. Passages from the thesis may not be copied or closely paraphrased without the written consent of the author.
MERCY

The Concept and its Moral Standing

by

Andrew James Brien

A thesis submitted for the degree of Doctor of Philosophy

of

The Australian National University

March, MCMXCI
Statement

This is to certify that, unless otherwise indicated, this thesis is entirely my own work. It is the result of research carried out by me while a candidate for the degree of Doctor of Philosophy, in The Division of Philosophy and Law, Research School of Social Sciences, at The Australian National University.

Andrew Brien.
Acknowledgements

In the course of writing this dissertation I have incurred many debts of gratitude that it is now my honour to record. In small and great ways the people I mention here have all contributed to the realisation of this project. I record my thanks to Associate Professor David Londey who first suggested an examination of mercy to me. His suggestion led to my (1986) honours thesis which was an analysis of Seneca's De Clementia. The present work grew directly out of that thesis. While writing my honours thesis I discovered that, with the exception of Seneca's essay and apart from short papers, no extended discussion of mercy had occurred. The topic was ripe and inviting of examination, and without Londey's initial suggestion I would not have been so fortunate as to have found a field so fertile yet largely untitled.

I commenced research for this thesis in 1987 at the University of New England. Dr Fred D'Agostino, my supervisor there, and Professor Peter Forrest assisted me in many different ways. I would also like to record my thanks to the Department of Philosophy at the University of New England who, in two successive years, conferred upon me a grant from the Professor D.R Grey Foundation in Philosophy. While at the University of New England I made frequent use of the Inter-Library Loans Unit. I thank the staff there, especially Mrs L. Wiseman and Ms Debora Close, for their painstaking location of sources.

In late 1988 I transferred my studies to the Australian National University. There is most likely no other place in the World that could accommodate and encourage a dissertation such as this. The bulk of the research and all the writing was done there and thus there are many people who must be thanked. My fellow students have always provided a source of inspiration, most notably amongst them, Dawn Partridge, Robin Davies, and Joe Mintoff. I would also like to thank the following members of staff who discussed ideas with me: Bob Goodin, Michael Tooley, and Frank Jackson. As well, Kathinka Evers, Richard Hall, Roy Perrett and especially Graham Oddie (all visitors to the Department) all at one time or another discussed with me issues raised in this thesis. I should also like to thank Loraine Hugh for typing a large portion of the dissertation so efficiently and graciously; for proof reading and suggestions, I am pleased to thank Dawn Partridge, Debbie Trew and
Andrew Gleeson; in the Menzies Library, Ms M.A. Jones of the Inter-Library Loans Unit, tracked down many hard-to-find sources. I owe a special thanks to Dennis and Debbie Trew for all that they did when I was preparing the submission copy of the dissertation; and Charles Bako for last minute assistance.

I would also like to thank the Research School of Social Sciences which provided me with a rental subsidy that augmented my research scholarship, and thereby removed many of the financial pressures that face a young family attempting to live on a scholarship.

My greatest debt, however, is to my supervisory panel: Dr John Braithwaite, Professor Philip Pettit, and Dr Bob Moles. Each of them contributed to my research and thoughts on this topic in so many different ways that it would be futile to attempt to list them; however, merely saying ‘thank you’ seems insufficient. I would especially like to record the my gratitude for the careful reading that the thesis received from John Braithwaite, the many valuable suggestions he made and constant encouragement he gave. Chapter Six received especial attention from Bob Moles who set right many of the mistakes that a non-lawyer makes when he attempts to discern order in the apparent confusion of the law. Philip Pettit read thoroughly the thesis, made many valuable suggestions, prevented me from making a number of theoretical errors, and in discussion clarified many of my confused ideas. It remains only to say that I am responsible for the deficiencies that remain.

I would also like to thank my parents, but can only now thank my mother, for the various forms of assistance they gave in the inevitable moments of family crisis. As well, I want to thank my aunt and uncle, Mrs G. and Mr M. Coy who provided at various times much appreciated assistance.

Finally, and most importantly, I want to thank my family. They have had to contend with a father and husband distracted by a seemingly interminable project. Through being who they are they have provided the encouragement to continue. They give content and meaning to the personal and particular values that I have attempted to understand philosophically. Without them this project while philosophically interesting would have been meaningless.
Abstract

Despite its high moral evaluation in both secular and religious worlds, philosophers have surprisingly paid relatively little attention to mercy. The discussion that has developed has produced an image of mercy that is to say the least, equivocal. Moreover, the contemporary discussion rests upon a number of problems that have a long and venerable philosophical pedigree. Unfortunately, these problems have neither been clearly identified nor the issues they raise clearly set out. Further, mercy has always been examined in relation to justice, in a broad retributive and deontological context. Mercy's relationship to consequentialism and its moral standing have received next to no attention. The aim of this dissertation is, through an analysis of the concept and an examination of its relationship to other moral entities, to remedy these omissions.

In Chapter One I motivate the project. The problems are introduced and solutions offered by others are examined. As well, I set out the approach that will be followed in the remainder of the thesis.

Chapter Two consists of an extended analysis of the concept of mercy. I conclude that mercy is both a particular sort of action and a property of agents. As a property of agents, it is a sensitivity to the great need of another person that produces a responsive attitude of concern and care for their welfare. As an action, it is a response to the great need that another agent possesses. In both cases this arises from the perception of the beneficiary's powerlessness and vulnerability to the acts or omissions of the person holding the power. Thus, mercy rests upon a number of beliefs that agents have, as well as specific relationships between, and properties that, the actors within a merciful context possess. Finally, I distinguish mercy from some of its near relatives.

In Chapter Three I examine mercy's relationship to deontology, through an examination of three types of justice: retributive, comparative and consensual. I conclude that, although mercy is sometimes incompatible with some forms of justice, this poses neither conceptual nor moral problems. More importantly, I conclude that mercy is compatible with deontology.
Chapter Four is concerned with an examination of mercy's relationship to consequentialism. I conclude that mercy is compatible with consequentialism. If mercy is to achieve wide compatibility with this outlook, however, certain extensive modifications must be made to the traditional account of consequentialism, modifications so radical that many consequentialists would find them unacceptable.

Chapter Five contains an account of how deontology and consequentialism can accommodate mercy when it is supererogatory. As well, I examine the apparently incoherent claim that mercy is both required, as shown by the arguments in Chapters Three and Four, while also being in some (attenuated) sense supererogatory, a gift and optional. I conclude that, although mercy is often morally required, it is sometimes still supererogatory, a gift and morally optional.

In Chapter Six I move from the theoretical examination of mercy to an examination of it within a practical context. I examine mercy within its most typical practical context — the legal justice system. I recast the problems examined in Chapter Three within this practical context. I conclude that there are no barriers, in principle or in practice, to incorporating mercy into a practical context, of which the legal system is a paradigm example. Thus, it is a permissible act-option for, and property of, institutional agents. I also set out the notion of mercy within legal justice and explain how it is possible and justified.

With Chapter Six I conclude the negative case for mercy. The general conclusion of Chapters Three to Six is that mercy is a coherent concept and that the difficulties that have been traditionally raised against it can be overcome. Therefore mercy is capable of being part of our moral pantheon.

Chapter Seven contains the positive case for mercy. After examining some further problems I set out mercy's moral standing. I argue for its adoption and the cultivation of an attitude of mercy as a part of what it is to live a good life. I suggest that the moral standing of mercy rests upon the importance placed upon relationships between people and our valuation of traits of character, in particular those traits that dispose a person to care for and be concerned with the well-being of other people who are in need. As such, it is a disposition to be cultivated and an action to be practised in today's world.
In Chapter Eight I explain briefly why the problems discussed in the foregoing chapters arise. Then I conclude the thesis with a short review of the country traversed in the preceding seven chapters.
Dedication

For

Jane, Elizabeth, and Isaac.
Contents

Statement iii
Acknowledgements iii
Abstract v
Detailed Table of Contents x
Abbreviations xiv
Preface xv

Chapter I: Introduction 1-31
Chapter II: The Concept of Mercy 32-67
Chapter III: Mercy and Deontology 68-103
Chapter IV: Mercy and Consequentialism 104-135
Chapter V: Mercy, Supererogation and Moral Criticism 136-169
Chapter VI: Mercy Within Legal Justice 170-231
Chapter VII: The Moral Standing of Mercy 232-276
Chapter VIII: Conclusion and Summary 277-284
References 285-306
# Detailed Table of Contents

## Chapter I: Introduction

§1.1. Introduction  
§1.2. The Problems and the Debate – an Overview  
§1.3. Why are there Problems?  
§1.4. The Solutions of Others  
  §1.4.1. Alwynne Smart  
  §1.4.2. Claudia Card  
  §1.4.3. Lyla O'Driscoll  
  §1.4.4. John Kleinig  
  §1.4.5. K.G. Armstrong  
  §1.4.6. H. Scott Hestevold  
  §1.4.7. Jeffrie Murphy  
§1.5. Aims  
§1.6. Structure and Conclusions

## Chapter II: The Concept of Mercy

§2.1. Introduction  
§2.2. The Contexts of Mercy  
§2.3. The Nature of Mercy  
§2.4. The Elements of Mercy  
  §2.4.1. A Power Structure  
  §2.4.2. A Target  
  §2.4.3. The Beneficiary Must Prompt Mercy  
  §2.4.4. A Prompt  
  §2.4.5. It Must Address the Needs of the Beneficiary  
  §2.4.6. Responsive Act or Attitude  
  §2.4.7. It Must be Voluntary  
  §2.4.8. Certain Beliefs  
§2.5 The Springs of Mercy  
  §2.5.1. The Act of Mercy  
  §2.5.2. The Virtue of Mercy  
§2.6. Types of Mercy  
§2.7. Mercy Distinguished From Some Near Relatives  
  §2.7.1. Coercive Treatments  
    (a) Amnesty  
    (b) Excusal/Acquittal/Exculpation  
    (c) Clemency  
    (d) Condoning
(e) Equity
(f) Leniency/lenity
(g) Pardon

§2.7.2. Caring Treatments
(a) Benevolence/Charity/Kindness/Compassion
(b) Forgiveness
(c) Grace
(d) Pity

§2.8. Some Loose Ends
§2.9. Conclusion

Chapter III: Mercy and Deontology

§ 3.1. Introduction
§ 3.2. Background
§ 3.3. The Conundrums
§ 3.4. The Compatibility of Mercy and Justice
§ 3.5. The Solutions: C1: The Conundrum of Compatibility
§ 3.6. The Solutions: C2: The Conundrum of Redundancy
§ 3.7. Mercy, Justice and Desert
§ 3.8. Conclusion

Chapter IV: Mercy and Consequentialism

§4.1. Introduction
§4.2. A Sketch of the Problems
§4.3. Consequentialism
§4.4. The Problems
§4.5. Solutions: Under-subscription
   a). Sub-maximising Consequentialism
   b). Maximising consequentialism
§4.6. Solutions: Mercy and Agent Relative Values
§4.7. The Virtue of Mercy —and Consequentialism
   §4.7.1. The Virtues and Consequentialism
   §4.7.2. The Place of the Virtues Within Consequentialism
§4.8. Conclusion

Chapter V: Mercy, Supererogation and Moral Criticism

§5.1. Introduction
§5.2. The Problems
   §5.2.1. The Problem of Accounting for Acts of Supererogation
   §5.2.2. The Conundrum of Supervenience
§5.2.3. Mercy and the Conundrum of Supererogation
§5.2.4. The Virtue of Mercy and Moral Criticism
§5.2.5. The Problem of Praise
§5.3. Solution: Accounting for Supererogation
§5.4. Solution: The Conundrum of Supervenience
§5.5. Solution: The Conundrum of Supererogation
§5.6. The Virtue of Mercy and Moral Criticism
§5.7. Mercy and Praise
§5.8. Conclusion

Chapter VI: Mercy Within Legal Justice
§6.1. Introduction
§6.2. What Mercy Within Legal Justice Involves
§6.3. The Conundrums of Mercy Within Legal Justice—Outline
§6.4. Solutions that have been Offered
  §6.4.1. John Kleinig
  §6.4.2. P. Twambley
  §6.4.3. Jeffrie Murphy
§6.5. Solutions to the Conundrums
  §6.5.1. Non-Comparative (retributive) legal justice
  §6.5.2. Comparative legal justice
§6.6. The Nature of Mercy Within Legal Justice
§6.7. Mercy, in what sense?
  a). Desert
  b). Gift
  c). Morally Valuable Action
§6.8. How is Mercy Possible Within Legal Justice?
§6.9. Objections and Justifications
  §6.9.1. Theoretical
  §6.9.2. Practical
  §6.9.3. Objections to discretion based on Institutional Role
  §6.9.4. Justifications for Mercy Within a Legal System
§6.10. Conclusion

Chapter VII: The Moral Standing of Mercy
§7.1. Introduction
§7.2. Other Likely Problems
  (a) Parentalism
  (b) The Intrinsic Wickedness of Power Differentials
  (c) The Objection from Perfect Justice
  (d) The Objection from Undeserved Hardship
(e) The Objection from Rational Policy Formulation
(f) Is Mercy Really a Virtue
(g) The Compatibility of the Virtues
(h) The Criticism of No Normative Content

§7.3. The Merciful Moral Outlook
    §7.3.1. Worries about Modern Moral Theories
    §7.3.2. The Moral Status of Mercy
    §7.3.3. The Basis of Mercy’s Moral Standing.

§7.4. Mercy and Morality
    §7.4.1. The Problems
    §7.4.2. The Resolution

§7.5. Why Mercy?
§7.6. Conclusion.

Chapter VIII: Conclusion and Summary

References
A. Table of Cases
B. Table of Legislation
C. Bibliography
Abbreviations

A. Journals
AJP Australasian Journal of Philosophy
APQ (MS) American Philosophical Quarterly, (Monograph Series)
APQ American Philosophical Quarterly
CJP Canadian Journal of Philosophy
HLJ Harvard Law Journal
JHI Journal of the History of Ideas
JP Journal of Philosophy
JSP Journal of Social Philosophy
JVI Journal of Value Inquiry
LP Law and Philosophy
PAS Proceedings of the Aristotelian Society
PASS Proceedings of the Aristotelian Society, Supplementary Volume
PPA Philosophy and Public Affairs
PPR Philosophy and Phenomenological Research
PQ Philosophical Quarterly
PR Philosophical Review
SJP Southern Journal of Philosophy
SPP Social Philosophy and Policy
YLJ Yale Law Journal

B. Books, etc.
Blackstone (Commentaries) W. Blackstone, Commentaries On The Laws of England,
Gowers' Report E. Gowers, (Chairman), Report of the Royal Commission on
SVF Stoicorum Vetorum Fragmenta
Nic. Eth. Nicomachean Ethics
Preface

I have undertaken, Nero Caesar, to write on the subject of mercy, in order to serve in a way the purpose of a mirror, and thus reveal you to yourself as one destined to attain the greatest of all pleasures. For though the true profit of virtuous deeds lies in the doing, and there is no fitting reward apart from the virtues themselves, still it is a pleasure to subject a good conscience to a round of inspection... (Seneca, De Clementia, Bk.1.1.1)

Over the past quarter of a century the concept of mercy, its justification, the relationship between mercy and other moral concepts, as well as mercy’s moral standing, has been the subject of an ongoing debate. A cursory glance at the literature, which consists of little more than two dozen articles, reveals a veritable confusion of images: some writers believe mercy to be basically supererogatory, optional,1 a gift2 or in some sense gratuitous, freely given, and a matter of grace.3 Others believe that mercy can be deserved, and when justified is in some sense required,4 or obligatory5 that it is closely related to, if not identical with some aspect of, justice;6 while others think that mercy is always unjustified.7 Some confine mercy to the realm of punishment, claiming that ‘there is something odd and disturbing about being merciful to someone who has done nothing wrong’.8 Others claim that mercy can be exercised in contexts other than purely punitive ones, such as to ‘those who are powerless to help themselves’ like ‘the widow, the fatherless,
and the destitute. Some ally mercy with charity, others with benevolence, love or compassion, while others assume it to be some sort of morally valuable action, and an independent virtue.

This diversity of opinion merely reflects the conflicting images and the diverse contexts of mercy that we discover when our pre-theoretical ideas are examined. For example, non-philosophers believe that mercy ought to be given and that it is a moral failing not to be merciful, such as in the case of a person convicted under a harsh and inflexible law, or who committed some crime in extreme circumstances. On other occasions, they believe quite the opposite: namely, that it is optional, supererogatory and a gift, such as when the winner of a hard fought duel declines to kill his adversary. Moreover, just about everyone, it seems, is in someone else’s mercy: debtors are at the mercy of their bankers, offenders are at the mercy of judges, juries, Attorney’s-General and Governors, and students at the mercy of their examiners. There are mercy flights to save a person’s life and mercy killings to end a particularly miserable one. The vanquished are at the mercy of the victor, the yachtsman at the mercy of the sea, and the general public, if one believes the popular press, are at the mercy of greedy entrepreneurs and radical unionists. The list could go on.

Further, it seems that mercy sits awkwardly with important moral notions, such as justice, supererogation, desert and consequentialism. It appears to raise difficult questions about the consistency of our values and our capacity to be rational moral agents and compassionate ones as well. J.R. Lucas put some of the problems this way:

For the retributivist, mercy is logically possible but morally wrong. A man’s crime calls for a certain penalty: we may choose not to inflict it, but if so, we are failing to do what is required...For the utilitarian, mercy is not even logically possible except as a foolish failure to do what is best for the criminal and for society as a whole....If ever it could be right to let somebody off, then it is mandatory to do so and there is no argument for any heavier penalty at all.

12. E.g., Murphy, *loc. cit.*
While James Sterba set two related but different problems out thus:

If we assume that a person can deserve mercy and that justice is giving people what they deserve then mercy would be required by justice. But then, what are we to make of the admonition to temper justice with mercy? On the other hand, if mercy is not something that a person can deserve and men have no obligation or duty to show mercy then acts of mercy would at least be supererogatory. But then it would not be possible to condemn some one as merciless.14

Mercy has a central place in our culture. It is found centre stage in Christianity;15 the concept was examined by some of the earliest philosophers;16 it enjoys a long and intimate association with secular institutions such as the law17 and the crown;18 it has long and venerable tradition in English literature.19 As well, mercy’s paradigm contexts — justice and punishment — have suffered in recent years intense examination. It has (generally) a high moral evaluation amongst ordinary moral agents. Thus, while the quality of mercy may not be ‘strained, its moral standing and nature are certainly elusive. It is surprising therefore, that mercy, compared to related notions in philosophy, has not been much examined,20 though the bonds between members of communities have increasingly been the object of attention.21

15. The Bible can be viewed as a chronicle extolling the virtue and practice of mercy. (Cf K.D. Moore, Pardons: Justice and Mercy and the Public Interest, New York, 1989, who makes a similar point.) God’s response to the fratricide Cain was that he should be banished and dwell in the land of Nod, (Gen. 4:16). Citations extolling mercy are numerous, of which this is typical: ‘...and what doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God’, (Mic. 6:8).
19. The English monarch, swears in the coronation oath to 'cause law and justice, in mercy, to be executed' in all their judgements. Blackstone, Commentaries, i.6.
20. Shakespeare, The Merchant of Venice, and other of his plays: predating Shakespeare is Piers Ploughman.
21. There are two extended discussions that I know of. The first is Seneca’s, De Clementia, op. cit. Although now little studied, De Clementia has at times been highly respected, and, a brief reading shows that this is rightly so. (For example, Calvin’s first work was an edition of De Clementia and the essay inspired Portia’s eloquent defence of mercy in the Merchant of Venice.) Vide, Seneca: Letters From a Stoic, translated by Robin Campbell, Harmonsworth, 1985, pp.24-5. The second, Carla Johnson, Mercy: Its Nature and Moral Status, (Ph.D Thesis, University of Minnesota, 1988).
Even given mercy’s high evaluation, it seems rarely practised and its exercise not actively encouraged. We are surrounded in our day to day life by a veritable orgy of revenge, vendetta, domination, violence and retribution. The streets of our towns and cities, and the belief systems of ordinary people and sadly, philosophers, are filled with these ideas. These practices are widely accepted, and the little humanity there is in our world is tempered by these feelings. Few wonder whether such ways of life are legitimate; indeed increasing numbers of philosophers argue that they can be defended. The temper of the times, socially and philosophically, is that retribution, and its near relatives are morally acceptable, and from the point of view of institutional theory, justified and necessary. An examination of mercy, and its relations, forgiveness, compromise, reconciliation and so on, is needed to present the other side of the story, the other moral option.

As Aristotle observed, in one of his most misunderstood remarks, ‘human beings are by nature political animals’, meaning only that they live in communities, in groups, and that they interact with each other. Understanding how they do interact, and more importantly, how they ought to interact, is the job of the social and political philosopher. We need not only to justify the institutions and ideas that influence our lives but understand as well, the ways in which they interact and fit together — if indeed they do — so as to allow each person to create, within known limits, their own version of the good life. This is all the more important given the enormous changes that have occurred and will continue to occur, in personal relationships, and indeed in the nature of the community itself, in advanced industrial societies. To put this bluntly,
no one can doubt the importance of the role of benevolence, care, solicitude, and love in human life, but there has been remarkably little attention paid to them, compared to other notions in social, political and moral philosophy. Therefore, an examination of mercy is indicated so as to redress some part of this neglect.

It has not always been the case that philosophy has neglected mercy or its near relatives. In fact, worries about mercy have a long and distinguished pedigree. Aristotle, perhaps, had in mind a worry when, in a well known section of the *Nicomachean Ethics*, he gives an account of how the departure from a rule, justified within a system of justice, can itself be justified — a problem that is found frequently in the contemporary discussion of mercy. Seneca, writing c. A.D. 55, in *De Clementia* was concerned with analyzing legal mercy, justifying it, distinguishing it from pardon and pity and recommending it to an absolute ruler — the Roman Emperor Nero. Moreover, Seneca’s essay was clearly part of a Stoic tradition that examined notions similar and related to mercy. For example, Chrysippus wrote a book entitled *Concerning Acts of Kindness* and his predecessor, Cleanthes, wrote a treatise on the same subject. Thus, interest in these sorts of actions can be traced almost to the very beginning of philosophy. Closer to our own times, Saint Anselm examined the apparent incoherence of ascribing Divine mercy and Divine punishment and justice to God.

This dissertation is an attempt to remedy the deficiencies in the discussion. I aim to discern some order in this welter of phenomena that surrounds mercy. I shall set out an account of mercy, its moral standing and role in the moral life a virtuous person, as well as our social institutions. Along the way we will examine, sometimes all too briefly, some of the most topical problems in moral philosophy: the importance of the virtues, feminist moral theory, the role of universalism, impartiality, supererogation, the idea that there could be a limit to the

---

actions we can be enjoined to perform, and the idea that sometimes less than the best can be morally good enough.

I do not pretend that I have told the whole story, or even a large part of it, or written the last word. The aim was rather more modest: to define the problems and suggest some answers.

The Division of Philosophy and Law,
Research School of Social Sciences,
Institute of Advanced Studies,
Australian National University,
Canberra,
February, 1991
Socrates: ‘For it is no ordinary matter that we are discussing, but the right conduct of life.’ (Plato, Republic, 352d.)

§1.1 Introduction

It's no wonder that philosophers have had such trouble with mercy; how can we make sense of a concept that seemingly licences us to depart from justice (or some other standard of rightness, such as utility), and by that challenges our commitment to what many consider the central values in social, political and personal relations? It is an unhappy impasse: we are disposed to value highly two moral entities that seemingly require us to choose between them, with the result that we either feel immoral, because we have not done justice, (or maximised utility); or cruel and wicked, because we have not been merciful. I aim in this dissertation to set out the problems that confront mercy, answer the challenge they throw-up, and finally set out its moral standing.

I shall begin by outlining the debate, and introducing the problems, or as I refer to them, the conundrums (§1.2) Then I shall examine some important contemporary contributions to the debate, amongst them, the work of Alwynne Smart,1 (whose article revived the discussion), Claudia Card2 and John Kleinig.3 In what remains of the chapter I shall set out the structure, the aims and the issues to be discussed in the chapters that follow.

§1.2 The Problems and the Debate—an overview.

The present debate that surrounds mercy is based, usually unwittingly, upon various versions of four distinct conundrums.4

4. I use the epithet 'conundrum' to be as neutral as possible in my description. These problems are, in
Although versions of the first two conundrums can be traced to antiquity, they were first deployed as a group by St. Anselm. Although best remembered by philosophers as the author of the ontological argument, the three conundrums Anselm set out concerning mercy would, if successful, destroy the belief that it is logically possible for the Christian God to be both merciful and just — perhaps the central belief of Christianity. Anselm formulates the conundrums this way:

C1: If you are entirely and supremely righteous, how can you spare the wicked? How does the entirely and supremely righteous one do something unrighteous? How can it be right to give eternal life to one who deserves eternal death? God of goodness, good to both good and wicked, how can you save the wicked, if it is not right to do so, and you cannot do anything that is not right?5

C2: Do you not then spare the wicked out of justice? If this is so, Lord, teach me how it can be so...what is not done out of justice, ought not to be done, and what ought not to be done is unjustly done. If it is not right for you to have compassion on the wicked, you ought not to do it; and if you ought not to be compassionate, it is unjust for you to be so...6

C3: ...if in some way it is possible to grasp the reason why you can will to save the wicked, reason certainly cannot comprehend why through your supreme goodness you should choose to save some, and through your supreme justice condemn others, when both are equally evil.7

6. St Anselm, op. cit., IX, 369-380. There is a suggestion of the first two conundrums in Aristotle: Sometimes we commend what is equitable and the equitable man, to the extent of transferring the word to other contexts as a term of approbation instead of ‘good’, thus showing that what is more equitable is better. At other times, however, when we follow out the line of argument it seems odd that what is equitable should be commendable if it does not coincide with what is just; because if it is something different, then either what is just or what is equitable is not good; or alternatively if both are good, they are identical. (Aristotle, Nic.Eth., 1137b 5-30).
Although Anselm's conundrums concern the Divine nature, they can be recast in a number of general secular forms. In these forms they challenge the cogency of non-Divine mercy, its moral acceptability, its moral status, its justification, and its relationship to non-divine justice. I shall have little to say about Divine mercy and the Divine nature. It is mercy in its secular contexts, with Anselm's arguments reformulated in a secular way, that is of primary concern to me, as it has been to many of the writers on mercy.8

In order to become clearer about the issues involved, a first formulation of the puzzles can be put this way:

C1: Mercy is morally right and compatible with justice yet autonomous from it. It involves not giving someone what they deserve. Anything that prevents another getting what they deserve is wrong. Therefore mercy is wrong and incompatible with justice.

C2: Mercy to be morally right is something that can be deserved. Justice is giving someone what they deserve. Therefore mercy is identical to justice. How then can we contrast the merciful course of action with the just course of action or use mercy to temper justice?

We are faced with a dilemma: either mercy is autonomous from justice, in which case it is morally wrong; or mercy is morally right, in which case it is redundant. Either conclusion is opposed to our pre-theoretical ideas about mercy. The third and fourth conundrum concern the consistency of our beliefs about mercy.

C3: The exercise of mercy on one occasion is thought not to create an obligation to be merciful on subsequent similar occasions. If mercy is given for some reason, R, to A, then \textit{ceteris paribus}, and assuming that the act of mercy was morally right, R will be a reason for any other agent like A to receive mercy. Out of consistency, if A received mercy then all agents like A in the relevant respects must receive mercy. Thus the exercise of mercy on one occasion does create the obligation to be merciful on subsequent similar occasions.

Moreover, it is believed that mercy can be deserved, that it is not morally optional, and that the agent who fails to be merciful can be

morally criticised. Yet it is also commonly believed that mercy is morally
optional and supererogatory, that it cannot be demanded, and is in some
sense a gift. For the time being this sketch of the conundrum will suffice:

C4: It is thought that mercy can be required and that failure to be merciful
leaves the merciless agent open to moral condemnation. As well, we
criticise and condemn agents who are merciless. On the other hand, it is
believed that mercy is optional, a gift and supererogatory. If mercy is
optional, a gift and so on, then it cannot be required and it is not possible
to criticise and condemn merciless agents. If, however, mercy can be
required, and we are in a position to criticise merciless agents, then it
cannot be optional, a gift an so on. Ether mercy is supererogatory, a gift
and optional and cannot be deserved and non-merciful agents cannot be
criticized or condemned; or mercy is not supererogatory, a gift and
optional, and can be deserved and the non-merciful agents can be
criticized. Which ever way our beliefs about mercy are inconsistent and the
concept appears incoherent.9

In the literature, the scope of the discussion has been limited largely
to the deontological context. The treatment there has been piecemeal.10
Usually within this context, the discussions have been limited to one or
another of these conundrums and mercy's 'paradigm contexts' — the law,
religion, medicine, punishment or justice. This debate reflects the
standard bifurcation in moral philosophy,11 since it examines the
relationship between mercy and retributive justice, and between mercy
and supererogation — notions usually only associated with, or thought
possible only within, a deontological moral outlook,12 while largely
ignoring the relationship between mercy and consequentialism. This is
because it has long been one of the cannons of the discussions about

11. There are two dominant—and some would say only two possible—moral outlooks, broadly characterised as deontological and consequentialist. (Cf. Philip Pettit, 'Consequentialism', in P. Singer, (ed.), A Companion to Ethics, Oxford, forthcoming, p.230.)
12. I am not going to argue the point, but merely assume it, that retributive justice is mostly and usually associated with deontology. Of course, the consequentialist can accommodate retributive justice, but my point is that the debate about mercy takes place within a retributive, deontological context.
mercy that it is not logically possible on a consequentialist moral outlook, but is possible only within a retributive,\textsuperscript{13} or broadly deontological, outlook. I believe that this view is false, and this deficiency in the debate will be rectified in Chapter Four. For the present, however, it is useful to sketch the problem:

C5: What option amongst a range of options is right, on the consequentialist theory, is a matter of simple calculation—what course of action will now produce the desired consequences in the future. Mercy involves not doing what it is, by some criterion, right to do. What it is right to do, for the consequentialist will be what achieves the goal one has. But mercy is a departure from some goal. So for the consequentialist, mercy is wrong, when it involves under-subscription; or logically impossible, when an act of over-subscription, (since on a consequentialist outlook, over-subscription is simply not possible). Either way, for the consequentialist, morally acceptable mercy is not even logically possible, except as a foolish failure to do what is best—in which case it would be wrong.\textsuperscript{14}

\section*{§1.3 Why are there Problems?}

The answer to this is simple. When taken all together, the way we think and talk pre-theoretically and unreflectively about mercy is, \textit{prima facie} at least, incoherent. For example it is believed that:

1. Mercy is an autonomous virtue, a trait of character. (Hence the intelligibility of the expression: 'mercy tempers justice');
2. Mercy is a gift; it is an act of grace. It is not obligatory and it cannot be demanded;
3. Mercy is, in some sense, supererogatory;
4. Mercy is always praiseworthy and morally commendable. (Hence: 'The quality of mercy is not (con)strain\'d...');
5. Mercy is compatible with justice. (So mercy is either just or non-just but never unjust);
6. Mercy is based upon reasons. Thus, it is an action that ideal moral agents and ideal rational agents can perform;
7. Mercy is always morally right and never morally wrong;

\textsuperscript{14} Lucas, \textit{op. cit.}, at p.223.
8. The criticism leveled at merciless agents is moral criticism. ('You ought to have shown him mercy - it was wrong not to do so.' 'Pinochet was a merciless dictator!');
9. Mercy tempers, seasons and humanises justice;
10. Mercy requires a generally retributive outlook;
11. Mercy can be deserved. ('He deserved mercy but being the swine you are, you shot him!');
12. Mercy is a certain sort of action, which springs from certain motives, feelings and intentions;
13. Mercy may involve feelings of sympathy, compassion and/or pity for the agent to whom one is merciful;
14. Agents can be obliged to be merciful;
15. Mercy is only possible if one agent, A, is vulnerable to the acts or omissions of another agent, B, i.e. is 'within the power of B', and B contemplates doing something unpleasant to A;
16. Mercy involves forbearing from doing something unpleasant to another agent within one's power;
17. The agent who is merciful must believe that the action forborne was unpleasant and that the agent to whom mercy was shown benefits by the action not being performed upon her.

What we say and believe about mercy, if we were to offer no further explanation or theory, would appear to be quite incoherent, for at least some of the beliefs listed above are contradictory. With this confusion of beliefs in mind, the absence of a systematic investigation is all the more surprising. It presents any agent committed to being merciful, or who values mercy, with problems. If unresolved, and if these problems prevail, then rational moral agents would be forced to abandon mercy as an option for action.

§1.4. The Solutions of Others.

In this section I shall consider some of the solutions that have been offered over the years. As we shall see the solutions are largely inadequate. The solutions offered so far can be divided into two types, although their authors were mostly unaware or only dimly aware of a distinction. The solutions considered in §1.4 were directed at various versions of the conundrums considered as general problems, typically at the moral justification for mercy, along with the problems that seemingly
arise in its relationship to justice, broadly conceived, as well as at the
cogency of the concept. The solutions that have been offered to the
problems when cast in an institutional context, will be examined in
Chapter Five. It should be pointed out, however, that almost all the
philosophers who have discussed mercy have failed not only to clearly
perceive the problems and distinguish clearly between these two broad
contexts, but have also failed to see that each context raises specific
formulations of the general conundrums and therefore different
solutions are required. Thus, it is important to make such a distinction
and it will form the basis of the division of the subject matter of the
following chapters. As we shall see the difficulties the problems
generate for moral actors are quite different from the difficulties the
problems raise for institutional actors, although in each context the
structure of each problem remains the same.

§1.4.1 Alwyntne Smart. Smart attempted to answer a single
question: when, if ever, is mercy justified within a retributive system of
justice? In reply, Smart argued that mercy is justified, 'when we are
compelled to be merciful by the claims that other obligations have upon
us'. So, Smart holds that 'it is open to a retributivist, (at least most
retributivists) to say that a particular crime warrants such and such a
punishment but that other moral considerations permit or compel him
to act with mercy'. In fact the offender himself may not warrant mercy,
but it is necessary if we are to meet our obligations, that is, our obligations
to other people.

What then are these other obligations? Smart suggests that some
such obligations arise when, for example, mercy would protect the

15. The only philosopher I know who comes close to seeing this distinction is John Kleinig, (vide,
16. Chapters Three, Four and Five examine the theoretical or conceptual problems with mercy, whilst
in Chapter Six I examine the problems that emerge for mercy within a practical context.
17. Her discussion makes reference to retributive legal justice and retributive legal punishment. Yet
Smart does not confine her discussion only to the judge's legal duty or her legal persona. Rather, she
conceives of the judge as an exemplum of a perfect, retributively motivated agent. Smart says: 'I use
'judge' loosely to mean the person with the authority to punish in a particular case. Where I mean a
judge in the legal sense, this is apparent from the context.' Smart, op. cit., p.359, n.1. Thus, the
solutions she offers are general solutions. She invokes talk about the law, legal systems and the
judiciary only to illustrate the points she wants to make.
19. Ibid., p.359.
20. Ibid., p.356.
21. Ibid., p.353.
authority or stability of the law: when mercy is expedient it is justified. Others include the obligation to avoid suffering to innocent other people, such as an offender's family or when the punishment is onerous to the punisher. Mercy, claims Smart, is not justified and so is immoral, when it would be at the expense of an innocent person, or is against the welfare of the offender, or would harm the authority of the law, involves unfair discrimination against others, or if the offender has shown no repentance or remorse. The reason for this is that mercy is exercised to avoid unnecessary suffering and in such cases it would not.

Does this solution work? We recall that one of the constraints on mercy that must be met if it is to be justified, is that it must avoid or lessen a penalty without moral injustice. In other words, it must be morally just. These obligations can be retributive or non-retributive in nature. Allow these other obligations to be retributive in nature. If they are, then mercy is not distinct from retributive justice. The fact that the object of the obligation is someone other than the offender does not matter. The point is that if the basis of these other obligations is retributive in nature then we are unable to contrast the merciful course of action with the just one. In acting mercifully one has acted retributively-justly.

Allow now that these other obligations are not retributive in nature. They must, therefore, rest upon broad considerations of justice. Again mercy fails to be distinct from justice. Broader justice may temper narrow retributive justice. But is that mercy? When we claim that mercy tempers justice we are not claiming that one form of justice is tempering another. We are claiming that something quite different from justice is tempering justice. Either way, therefore, Smart's solution fails to avoid the second conundrum.

§ 1.4.2 Claudia Card. Card like Smart attempted to say how mercy is related to retributive justice in the practice of punishment and set out the

22. Ibid., p.354.
23. Ibid., p.353.
24. Ibid., p.354.
25. Ibid., p.351.
27. Loc. cit.
moral basis of mercy. In short, how the 'initial justification [for punishment] can be outweighed by factors that make mercy appropriate, without leading to injustice'. Card begins by rejecting Smart's solution. Smart claims, we recall, that we are obliged to be merciful by the claim that other, stronger obligations have upon us. Thus, Smart overrides retributive justice with a more complete form of justice, 'moral justice'. The major problem with this solution, as Card sees it, is that mercy is not a matter of obligation; she believes that '...mercy seems to be something we have basically no obligation to give and it is difficult to regard an action as the showing of mercy if the agent was obliged to act as he did'. Card then suggests that the grounds for showing mercy are to be found partially in the offender's deserts: 'if some offenders deserve punishment it seems that some of them also deserve mercy'.

How is mercy related to retributive justice in the practice of punishing? For Card 'mercy can be construed as a moral response characteristic of justice as a virtue of persons who have the right to punish, although it is not part of the justice of the institution of punishment...'. According to Card, both punishment and mercy are deserved. Punishment is deserved as a matter of institutional justice and mercy is deserved as a matter of personal justice. In particular, mercy is deserved on the grounds of a person's particular character and misfortunes. Thus, mercy is...

being more just than it would be possible to be in some cases were we simply to act in accord with institutional justice. When we temper (institutional) justice with mercy in deciding how to treat an offender, we consider not only facts about his offense but also facts about his character and suffering which may not be revealed simply by looking at his offense. Thus, we take a broader view of his situation than we took in establishing our initial justification for punishing him.

Mercy is that act of substituting one of the finer forms of justice for one of the coarser, not out of institutional necessity but out of a concern.

29. Ibid., p.183.  
30. Ibid., p.184.  
32. Ibid., p.182.  
33. Ibid., p.189.  
34. Ibid., p.186.  
35. Ibid., p.191.
to satisfy the culprit’s personal deserts.

How is mercy to be grounded? ‘What is needed’, Card writes, ‘to
ground a case for mercy is some basis apart from our obligations on which
to override the initial justification for punishment — some grounds
which are not found in all or even most cases’. Card enunciates a
principle that sets out the desert bases for mercy. The conditions are
sufficient to ground a case for mercy — if the conditions are met then the
offender deserves mercy:

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
particular 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 have him punished).

The important point to note here is that whilst it is desert that
grounds mercy it is not any sort of desert. It is the culprit’s cosmic or
overall personal deserts. The desert that grounds punishment is based
upon the offender’s wrong action. Thus, personal desert outweighs
institutional desert. Card is, in effect making a structurally similar move
to Smart — expanding the concept of the constraining element. In
Smart’s case it was justice. In Card’s it is desert. For Card mercy is
compatible with retributive justice and justified because it is a form of
retributive justice: to be merciful is to do cosmic justice.

Card’s solution suffers a number of fundamental problems. Mercy
is, on Card’s view, nothing more than tempering one (restricted) form of
justice with another broader, more comprehensive form. Thus, mercy for
Card is a form of ‘personal equity’. This leads to an obvious charge. At a
personal level mercy and justice are identical. But that seems plainly
false. Portia was not asking Shylock to display personal justice; she was
asking him to be merciful. To put the point clearly, Card’s solution
founders on C2. Personal justice if it is anything, must be, on Card’s
analysis of justice, personal retributive justice. Yet, we predicate of
individuals, mercy. (An example might be the merciful victor in a duel.)
Now if Card’s solution is right then we could not talk of merciful
duellists — or a merciful God — as such agents would be doing nothing

36. Loc. cit.
37. Ibid., p.184.
other than personal retributive justice. But plainly we do; and we mean that they have done something quite different from justice – whether personal or institutional. Therefore, we must reject her assertion that mercy is 'being more just than it would be possible to be in some cases were we simply to act in accord with institutional justice'.

So, if mercy and personal justice are identical then Card has done nothing but relocate the autonomy problem. To be sure, mercy is distinct from institutional justice. Now however, it fails to be distinct from personal justice. Thus Card’s solution falls to the second horn of the dilemma: if it is identical with justice then it is redundant. Card’s claim is that ‘tempering justice with mercy’ merely means substituting a broader conception of justice for a narrower one. On my analysis this would mean ‘tempering institutional justice with cosmic justice’. And we do not mean that, when, for example we say that ‘James acted mercifully’. We mean ‘ignoring the claims of justice and deciding how to act on other non-justice based considerations’.

For Card, mercy is justified on the basis of personal desert and is always tied to the context of punishment. This seems wrong. Where is the personal desert in the works of mercy that Christians are enjoined to perform, or the mercy shown to the vanquished duellist?

Moreover, a person who forbears in some way as a reaction to another’s personal desert, has not displayed the virtue of mercy. Mercy is not a reaction to another’s desert; it is a reaction to their powerlessness, their need, their inability to assist themselves. We seek to reduce their suffering for the sake of reducing their suffering, and because we think that suffering is an evil to be removed whenever possible. Moreover, it is hard to see how a concern for an offender’s needs and wellbeing is consistent with a concern for his deserts. If one deserves to suffer a retributive punishment then owing to what giving him his deserts would involve the offender’s needs and wellbeing are quite beside the point.

§1.4.3 Lyla O’Driscoll. Over the years the debate about mercy’s relationship to justice centered round its justification. Mercy was either a

38. Ibid., p.191.
part, or an expression, of justice, and justified for that reason; or it was quite distinct from it, and justified upon grounds apart from an appeal to justice. O’Driscoll’s attempt to avoid this impasse was to argue for a broader conception of mercy. She argued that at least two forms of mercy could, to use her expression, ‘accord’, with justice: 1). When mercy was grounded on desert, in which case showing it can manifest personal justice and thereby ‘accord’ with justice. 2). It could also be an act of grace, a gift that need not violate the requirements of justice. In neither case, she argued, need mercy, when grounded in these ways, violate justice; one can show mercy and do justice, and throughout this mercy remains distinct from justice.

O’Driscoll claims that mercy is not an action or activity. It is an attitude and attendant modes of treatment which are the natural or conventional expressions of the attitude. In particular it is an attitude of sympathetic goodwill that generates a particular activity. Thus, mercy is the sort of activity characteristic of a merciful person. It arises in response to a hardship or a substantial evil experienced or believed experienced by another.

Moreover, mercy is a responsive attitude, not merely a feeling. The merciful person responds to another person or their circumstances. Thus, it is an activity directed at some person in need - a person who manifests a certain property, the alleviation of which is the target of the act. To be sure, the target of the act is another’s substantial hardship, or an evil experienced by them. It is in virtue of this hardship or misfortune that mercy is given. If, however, mercy is given in response to the person’s deserts rather than this hardship, it fails to be mercy. As O’Driscoll says,

The phenomenological target of mercy is another’s substantial hardship, regardless of whether that hardship is thought morally fitting...Someone who experiences fellow-feeling and the desire to prevent or alleviate

42. O’Driscoll, op. cit., p.229.
44. Loc. cit.
another's suffering or misfortune only when he believes the victim not morally deserving of the evil does not exhibit mercy, for he responds to the other person's deserts rather than his suffering or misfortune.45

Moreover, attitudes and the modes of treatment that naturally or conventionally express those attitudes can be logically or morally fitting or appropriate, (or not).46 One form of fittingness or appropriateness, (rightness), O'Driscoll argues, is that grounded in desert.47 Thus, when mercy is fitting or appropriate, by being grounded in desert, it 'accords' with justice.

Mercy is deserved if it is based upon 'a consideration which specifies the pertinent facts about or characteristics of the person in virtue of which the attitude or treatment is appropriate'.48 So it is not merely that the person experiences a hardship or evil, but rather that it is appropriate that they have this hardship alleviated. In O'Driscoll's view, we respond to the hardship and what makes the response morally fitting, from the point of view of justice, is that it (the response) is deserved.

When mercy is an act of grace it can be justly shown even when not deserved. How? Simply a person may have a right to something: restitution, reparation, the repayment of a debt or to have someone punished. There is no justice based requirement that the person possessing the right exact repayment, restitution or punishment. They are free, from the point of view of justice, to enforce their claim or not as they please. Thus, it is not unjust to forego one's right. To do this may be gratuitous or it may even be morally fitting or appropriate to forego it, though the fittingness or appropriateness may not be grounded upon desert considerations. Benefits can be appropriate even when not grounded in deserts, obligations, or rights. 'They can have a fittingness', O'Driscoll claims, 'arising from the nature of the disposition which inclines one to confer benefits greater (and sometimes other) than those called for by rights, obligations and deserts; and to do so for the recipient's sake.'49 Such acts accord with justice simply because they are permitted by not being prohibited.

45. Loc. cit.
46. Loc. cit.
47. loc. cit.
48. Ibid., p.233.
49. Ibid., p.241.
Chapter One: Introduction

There is much in O’Driscoll’s paper that is agreeable. Most of it, however, falls within her analysis of ‘mercy’. O’Driscoll has set out an account of the relationship between mercy and justice without arguing what so many have — that mercy is identical to some part of justice and deserved for that reason. She does this by distinguishing between the act or virtue of mercy and its justification. She has attempted to show what it is for mercy to be deserved, and that desert can be a justification for mercy without mercy becoming identical to some part of justice. So, O’Driscoll has managed to navigate the dilemma: show how mercy can be appropriate and morally justified without becoming redundant.

Mercy accords with justice, according to O’Driscoll, when it is an act of grace or when it is grounded on desert. Of the former I have no quarrel: given that justice permits, but does not require, a particular treatment, a person may decline to inflict it, out of grace. So, mercy accords with justice because it is does not, to use O’Driscoll’s expression, ‘violate the requirements of justice’. This does not tell us why such an act of mercy might be right; but it does show that it will not be unjust and, if one believes in the supremacy of justice, will not be wrong. It is O’Driscoll’s claim that mercy can accord with justice because it can be grounded in an agent’s desert that is problematic.

The virtue of mercy, we recall, cannot be shown in response to a person’s justice based desert — if it is then the act ceases to be an act of mercy. In this, O’Driscoll seems to be right. Now if this is the case, one wonders in what sense mercy can be ‘grounded’ in desert? What does ‘grounded’ mean? ‘Grounded’ cannot mean that desert provides a reason for mercy or an attitude, belief or value from which mercy springs — the usual interpretation of ‘grounded’. For then on O’Driscoll’s own account, if ‘grounded’ meant any of these things, then an act of mercy would fail to be mercy.

What O’Driscoll means is this: mercy is motivated by a reaction to another’s need, but what makes mercy right is whether it is appropriate

50. She has correctly identified that mercy is an attitude, a disposition. Similarly, she has seen many of the elements of mercy - that mercy has a target, a power structure, beliefs and so on. However, as we will see in chapter two, her analysis is not deep enough. She has not seen, for example, that mercy is a property of agents and their actions - though she is more than half way there.
51. Unlike some of her predecessors, such as Card, (op. cit.) who merely assumed that it could.
52. O’Driscoll, op. cit., p.229.
from the point of view of desert. Now if that is the case then mercy's fittingness, its ‘accord’ with justice, is merely accidental. It being in accord with desert is unintended. This in turn means that the rightness or wrongness of mercy is accidental to some particular display of it, and with respect to justice, the rightness or wrongness of mercy is irrelevant to the performance of the action. The fact that a person ought to be merciful, from the point of view of retributive justice, is irrelevant to the attitude, the attendant act, or the actual showing of mercy.

Now the problem is this: if acting justly is not only performing certain actions, but doing so from certain motives, then the virtue of mercy can never accord with justice. The action that is a manifestation of the virtue of mercy may be identical to an action that is a manifestation of the virtue of justice; but the motivation will be quite different — and incompatible. Mercy and justice are different actions, differentiated by their springs. Thus, from the point of view of justice, mercy so grounded is not morally indifferent since it is motivationally distinct. So mercy cannot accord with justice in a sense that matters morally. Thus, O'Driscoll has not shown that mercy accords with justice motivationally. She has shown only that mercy will accord justice when, from the point of view of desert, it happens to be the appropriate attitude, i.e. the attitude that another person deserves. This resolves its moral status only if one wants to argue that only those actions compatible with the requirements of justice are permissible. That, as I argue in the chapters to come, seems plainly false. Moreover there are many acts of mercy that seem plainly right, but which derive their justification, not from the fact that they are grounded in justice-based desert, but from the fact that they are deserved or due to an agent for non-justice based reasons. For example, an environmental protester who damages a polluter's factory in an effort to stop the pollution. From the point of view of retributive justice, they deserve punishment; from the point of view of non-justice based desert

53. What then are we to make of talk that a person 'deserves mercy'. We may mean two things. First, that in virtue of who and what a person is, they should not be treated as harshly as they might be treated, and that a particular other treatment is appropriate. Here we are thinking about actions that are appropriate or required, but not attitudes, or dispositions. Second, we may mean that a person deserves a particular attitude. For example, 'Mary deserves to be loved by her parents', or, with respect to mercy, 'Mary deserves mercy'. Now we are not saying that the people who show mercy in this circumstance are reacting to, or grounding, their attitudes upon Mary's deserts. If it is genuine mercy they will be reacting to her burden and suffering and will be unconcerned about her deserts. All we are saying is that in virtue of who Mary is, or what she has done or what has happened to her it is right and fitting that people be concerned about her.
§1.4.4 John Kleinig. Of the three conundrums concerning the relationship of mercy with justice, John Kleinig alighted on only the first, (i.e. C1). In general terms, Kleinig argues that mercy and justice can be reconciled. His reconciliation takes the form of an examination of the relationship of mercy with three types of justice: justice that would provide a benefit to someone, in virtue of them being a human being in some form of need; legal justice; and full-blown retributive justice.\(^54\)

Kleinig begins his examination of the relationship of mercy with the first type of justice by saying that it is true in some instances that mercy involves giving a person less of an ill than he deserves. It is not, however, the full story. 'The one idea running through all claims for mercy', Kleinig claims, 'is that of the charitable treatment of those who are in need, distress, debt, or under threat of some sort, and who are powerless to help themselves'.\(^55\) Thus, Kleinig's response employs an account of mercy that all the writers hitherto had ignored: mercy as not merely the lessening of a burden but the provision of a benefit.

Given this sense of mercy, Kleinig argues that mercy does not necessarily compromise justice. Take the first type of justice. To show mercy, Kleinig argues,

...to the widow, the fatherless, and the destitute is not necessarily to treat them other than they would be if treated justly. Such treatment would be merciful in that it constituted an exercise of charity towards those who were helpless and perhaps neither deserving of nor entitled to it; and just in that such charity would be their due as human beings.\(^56\)

Kleinig has clearly substituted narrow-scope retributivism, in which only the actions and immediate deserts of an agent are considered as providing a basis for just treatment, for wide-scope retributivism, in which basic 'natural' facts, such as that he is a human being, provides him with a claim that certain benefits are due to him, and it is a breach of justice not to meet these claims. The problem is that Kleinig has linked 'what is due' with justice. Now, if the merciful action is performed out of

\(^{54}\) I shall consider in this chapter only the first and the third. Consideration of Kleinig's second solution will be left to Chapter Five.

\(^{55}\) Kleinig, (1973), op. cit., p.87.

\(^{56}\) Ibid., p.88.
a desire to give another his justice-based due, the action ceases to be an act of mercy and becomes an act of justice, albeit, wide-scope retributive justice as it fails to possess those springs that identify an act as an act of mercy. If it is not performed out of a desire to give another his due, then it is difficult to see how it might be morally acceptable from the point of view of retributive justice, since it ceases to be an act of justice because it rests upon springs other than those that ground justice.

In contrast, Kleinig's examination of the relationship of mercy with the third type of justice does involve setting the deliverances of retributive justice aside; for in such cases 'acts of mercy do seem to involve less than justice being done'.57 To be sure, Kleinig argues that displays of mercy can be right when based upon non-desert considerations; in Kleinig's words, on 'wider considerations which are morally relevant to acting rightly in a particular case'.58 Kleinig claims that 'this does not show that there is some conflict between mercy and justice, such that they are opposed to each other.' He argues that...

...it is only because punishment would be just (deserved) that mercy can be said to be shown. We may put this another way...mercy which results in giving the offender less than he deserves is simply the expression of justice in a somewhat broader sense: that in which not only deserts but all relevant moral claims are taken into account in determining the distribution of punishment - claims not only of the offender, but also of others.59

Mercy is, according to Kleinig, compatible with some broader conception of justice, a conception that approaches 'moral goodness' or 'moral rightness'. If this is the case then Kleinig has not shown that mercy is compatible with retributive justice, as it is ordinarily understood, but with some other non-retributive notion. Mercy is justified with respect to that other notion, but remains unjustified with respect to retributive justice. Thus he has not provided a reconciliation of mercy and retributive justice, although he has provided a justification for mercy, that is, we shall see, mostly correct.

57. Ibid., p.89.
58. Loc. cit. He lists some of them:
   '...if a man is convicted of a crime committed in the distant past, or if the crime he has committed has resulted in intense suffering for him, or if sentencing him in a particular way would result in great distress to others, or if the offence was not a particularly serious one, and if in each of these cases he showed evidence of genuine repentance...then a successful plea for mercy might be entered on his behalf. His repentance would not render him less deserving of punishment...'
59. loc. cit.
§1.4.5. K.G. Armstrong. Another solution to the first conundrum is to doubt whether being merciful necessarily involves being unjust.\(^6^0\) Mercy, to be sure, involves not doing justice or doing something other than justice, but is that the same as being unjust? Armstrong puts the solution this way:

...justice gives the appropriate authority the right to punish offenders up to some limit, but one is not necessarily and invariably obliged to punish to the limit of justice. Similarly, if I lend a man money I have the right, in justice, to have it returned; but if I choose not to take it back I have not done anything unjust. I cannot claim more than is owed to me but I am free to claim less, or even claim nothing. For a variety of reasons (amongst them the hope of reforming the criminal) the appropriate authority may choose to punish a man less than it is entitled to, but it is never just to punish a man more than he deserves. The retributive theory is not, therefore, incompatible with mercy.\(^6^1\)

Why? Simply, departures from what is retributively just - as mercy involves - could not be licensed or justified unless an authority charged with inflicting punishment was not required to punish. If they were required to punish then such departures could never be permitted and mercy would be incompatible with retributive justice.

Does it work? For retributive justice, I think not. It is not clear that the strategy of allowing non-retributive considerations to influence the treatment that a person receives is open to a retributivist, if she remains true to her retributive lights. Retributivism restricts the features that may be considered in the assessment of a treatment, to those features that have a bearing upon the agent's desert. Thus, they are features of the agent and their actions, not the values of the assessor. (The fact that I think some student has come from difficult circumstances does not license me to award him a high mark.) So if a punishment assessor includes in her decision her values then she is including in the assessment of desert features that are, from the point of view of retributivism, irrelevant. Any inclusion of personal values or considerations irrelevant to the assessment of desert would be to base the decision on non-retributive considerations. Thus, such a decision would be, from the point of view of

\(^{60}\) David Heyd offers a similar solution, (Ethical Universalism, Justice, and Favouritism, AJP, (56:1978), pp.25-31, op. cit., p.30).

\(^{61}\) Armstrong, op. cit., p.155. This solution has attracted a number of adherents over the years. It lies, for example, behind the argument of Alwynne Smart, op. cit., John Kleinig (1973), op. cit., pp.87-88, as well as, more recently, Jeffrie Murphy, op. cit.
retributivism, illegitimate. Yet, Armstrong's solution, in effect licences such an inclusion.

§1.4.6 H.Scott Hestevold. Recently a valiant attempt has been made to overcome the apparent incompatibility of mercy with that form of retributivism that requires punishment. Hestevold sees the puzzle like this:62

(M) 1. Acts in which one agent responsible for administering deserved suffering refrains from giving another agent that deserved suffering are merciful acts.

2. Merciful acts are supererogatory.

3. Acts which are supererogatory are good to perform, but their performance is not obligatory.

4. Therefore, refraining from giving another person suffering that is deserved is good to do, but not obligatory.

(J) 1. Acts in which one agent gives another agent what is deserved are acts of justice.

2. To act justly is obligatory.

3. Failure to do what is obligatory is immoral.

4. Therefore, refraining from giving someone what is deserved is immoral.

The conclusion of (M) is clear: supererogatory acts, such as Hestevold assumes mercy to be,63 which involve refraining from giving another person suffering that is deserved, are good and morally permissible. The Conclusion of (J) is also clear: acts that involve not giving someone that which is deserved, such as acts of mercy, are immoral and bad. Mercy seems to be both good, (because it is supererogatory and all supererogatory actions are good), and bad, (because all departures from retributive justice are bad).64

Hestevold attempts to solve this dilemma by using the notion of

64. Hestevold thinks that this is a dilemma. It is not. A dilemma is a disjunction of two arguments each moving from accepted and uncontested premises to conclusions that are both unacceptable. The conclusion to (M) is not unacceptable. Hestevold's puzzle is best described as an antinomy.
'disjunctive desert'. Using this notion, along with a redefinition of mercy, he argues that mercy is both retributively just, because it is a form of retributive justice, and supererogatory; thus he meets the duty of justice while indulging in the supererogation of mercy. Hestevold writes:

...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.

Hestevold provides the following example:

...a just penalty for vandalism, say, could be constituted either by the vandal’s purchasing repair materials and making the repairs himself, or by his working at any job long enough to earn money for repair materials and labor.

Where does mercy fit into this? Against the assumption that 'the sufficient deserts for a particular improper act may vary in severity', Hestevold asserts that...

The merciful person gives people what they deserve in the way of punishment but opts for one of the less severe penalties, if the appropriate desert in disjunctive.

To show mercy, then, is to levy one of the less severe penalties of the appropriate disjunctive desert. In this way a person acts justly, for they impose upon a wrongdoer what is deserved, yet they act mercifully, by choosing to impose a less severe penalty. Thus, for Hestevold, like Card, Smart and others, mercy is compatible with justice since it involves doing justice. Since there is no obligation to choose a less severe penalty, the choice to do do so is supererogatory.

The major defect in Hestevold’s solution is that the notion of disjunctive desert is incoherent. The incoherence arises from a bizarre

68. Loc. cit.
69. Loc. cit.
71. Hestevold does not hold that mercy is a form of justice, distinct from retributive justice; rather, that mercy is retributive justice. Card (op. cit.), Smart (op. cit.), and Kleinig (1973, op. cit.) say that mercy is compatible with justice but is a different form of justice. Sterba argues that mercy is not related to any form of justice at all, (Sterba, op. cit., p.13).
false assumption. It is the assumption that the 'sufficient deserts for a particular improper act may vary in severity.' But how can deserts vary in severity for a single offence? The type of desert may vary, (boiling in oil versus defenestration), but the severity cannot without the treatment being a different desert relevant to a different level of wrongdoing.

Let me fill this out. 'Desert' is some treatment — a benefit or a burden — that a person is liable to, or must, receive in view of what they have done, who they are, or properties or characteristics that they have. Retributive punishment aims to give a person what they deserve, by way of burdens. Now, retributivism also holds that in virtue of performing a particular wrong action, an agent is said to deserve a particular level of suffering.

Now, when we seek to give someone what they deserve, in the way of punishment, we seek to inflict upon them a burden that is appropriate to their offence. A wrongdoer must receive exactly that level of suffering that he deserves, in view of the wrongness of his action. The retributively significant way in which deserts differ is not by way of their type but their severity; that is, the amount or level of suffering they inflict. Simply, a severe punishment inflicts a high level of suffering and is appropriate to a serious offence, a mild punishment a low level of suffering, and is appropriate to a minor offence.

The point of this, of course, is that the amount of suffering must, from the retributivist's point of view, accord with the wrongdoer's actions. It is on the basis of the severity of suffering that we distinguish between deserts and their appropriateness to some action.

Now the rub is this: if desert is disjunctive then we are faced with impositions, each of which is deserved, in view of some act, but each of which differs in severity. And given the analysis of desert, I provided above, which is the usual analysis, there cannot be two deserts differing in severity but appropriate to the one offence. One does not merely deserve a particular treatment but a particular level of treatment. Level of treatment is measured not in types of desert but severity. Thus,

72. Whether they are liable to receive it or whether they must receive it will depend upon one’s brand of retributivism. It is important to note at this point that Hestevold believes that retributivism requires that a person be punished. (I.P., (6:1987), op. cit., pp.250-251).
Hestevold’s point is plainly wrong. Desert is, by its nature, a treatment of a particular severity. As soon as we decide between deserts on the basis of severity, as Hestevold wants to, we are choosing not between identical deserts, but different ones that are appropriate to different actions — actions that call for different retributive responses. There cannot be disjunctive deserts that differ with respect to severity, such that they are all appropriate to a single offence. For when they differ with respect to their severity they are different deserts applicable to different offences. Therefore the concept of disjunctive desert is incoherent and it provides no solution to the problem.

§1.4.7 Jeffrie Murphy. Although Murphy’s examination of the conundrums concerns the relationship between mercy and legal justice, his solution to the third conundrum is a general solution, applicable in this chapter.

The problem, is this: agents are required, it is believed, to replicate non-arbitrary, rational actions over similar cases. In other words, act consistently over similar cases. It is believed that mercy is a rational action, based upon reasons. It would seem to follow then that there is a rational requirement that merciful actions be replicated over similar cases, if it has been shown once. It is believed, however, that being merciful once does not generate a duty to be merciful on subsequent similar occasions. Yet the very performance of an act of mercy seems to do just that. Murphy puts the worry as a rhetorical question: ‘...if I show mercy to C-bearing Jones, how can I consistently (morally?) fail to show mercy to equally C-bearing Smith?’

Murphy provides three reasons which he claims show that rational agents ‘would not want to adopt a principle of mercy that would give rational persons incentives never to show it’. They are: 1. the effect of continued displays of mercy upon the merciful agent, provide a reason for not being merciful to similar cases. Therefore, there is no duty of replication at all. 2. such a requirement is open to exploitation: a person who had been merciful once could encourage a cunning agent to try to

---

73. Murphy, op. cit., pp.182-183.
74. Loc. cit.
75. Murphy, op. cit., p.183. Murphy does not set his arguments out at all clearly. There seems to be three points that he wants to make, although with respect to two and three he does not clearly distinguish them.
exploit the practice, if they knew that the merciful agent was required, rationally and morally to replicate their merciful actions.\textsuperscript{76} 3. A general requirement to be merciful over similar cases may deter a rational agent from acting mercifully at all, for fear of setting a precedent and thereby committing themselves to acting mercifully forever. It is better not to have such a requirement, as agents will be more likely to be merciful if they believe that they are not committing themselves, in perpetuity, to acting mercifully.

Murphy's reply is defective since his arguments do not show that the performance of an act of mercy \textit{does not} generate a general duty to be merciful. Consider his first reply. It is the case that if there is some deleterious impact upon me, my interests, my life plans or someone else, of my continued performance of some action, that I am required out of consistency or fairness to replicate, then I may, without censure, cease to perform it. I have acted neither rationally nor immorally. All this 'ouster-clause' provides, however, is a justification for not being merciful on some occasion when it would cause hardship to me, or someone else, to do my duty. As soon as the hardship passes, the duty would be active again. All this 'ouster clause' is pointing to is the fact that we have no duty to perform actions that harm ourselves or are unduly onerous. It does not show that an initial action fails to create some sort of rational duty or moral constraint to replicate actions.

Consider Murphy's second response. Murphy suggests that a general duty to be merciful to subsequent similar cases would leave an agent open to exploitation. Since this is unacceptable, there can be no general duty to be merciful to subsequent similar cases. If we find that some possible beneficiary is attempting to exploit this requirement there are grounds for not being merciful to him. We can, in effect distinguish him from other agents, and the distinguishing feature is that he is attempting to exploit the practice of mercy. Thus, we would be justified in not being merciful to the exploiting agent. The general duty to be merciful to similar cases does not apply when the person seeking mercy is exploiting the benefactor, as there is a reason, the fact that he is attempting to exploit the mercy-giver, to treat him differently. What this demonstrates is that the possibility or actuality of exploitation provides no grounds to think

\textsuperscript{76}. \textit{loc. cit.}
that there is no general requirement to replicate merciful actions over similar cases. It does show that when there is exploitation involved, there is no duty to replicate mercy, in that particular case. We should note, however, that the benefactor may nevertheless decide to be merciful. In such a case we would praise them even more, as they have risen above legitimate concerns and were still able to find it in themselves to refrain from doing something that they have good reason to do.

Consider Murphy’s third response: that a rational agent would be inclined never to be merciful if they thought that ‘once having shown mercy they would be stuck with making a regular practice of it’. So, in order for mercy to be promoted, it is better that mercy not be required in subsequent similar cases. There are two points to be considered here. The first, an empirical point, is the truth of the claim that a rational agent would be inclined never to be merciful, if they thought that ‘once having shown mercy they would be stuck with making a regular practice of it’. The second, is that the fact that agents may be disinclined to perform some action, on the basis that it will set a precedent, is sufficient to prevent that action being morally or rationally enjoined over subsequent and similar cases.

Consider the empirical point first. It is certainly true that the consequences of an action affect our decision to perform it or not. It is not clear, however, that in the case of mercy the fact that the exercise of mercy on one occasion would create a precedent to replicate the action on other similar occasions, is enough to deter a rational agent. To determine the answer completely one needs to ‘go and count heads’. The following arguments, however, do lead me to think that Murphy is wrong. When a rational agent is merciful she is typically responding to the great need or hard position of another agent. They are concerned with the well-being of the person in their power. Therefore, were another person to appear, similar to the person who received mercy, the rational agent would respond to their needs or hard position. Rational agents would not be concerned in these cases with whether their action now sets a precedent for the future. They would be concerned with the plight of the person whom they have the capacity to help. So, the fact that an act of mercy does

77. loc. cit.
78. Murphy, op. cit., p.183.
set a precedent would not act as a deterrent to a rational agent, or provide an incentive to a rational agent not to show mercy, as the rational agent will be merciful anyway.

Moreover, in order to be relieved of the duty to be merciful to subsequent, similar cases, all the mercy-giver has to do is refer to some reason that lifts the obligation. For example, she might say that case B is indeed like case A but the difference now is in her capacity to be merciful, rather than in any difference between A and B. Setting a precedent should not, then, act as a psychological barrier to performing some action that sets a precedent, if there are ways out. Since agents are not likely to default on their obligations, there is no reason not to enjoin them to act mercifully in subsequent cases.

Consider the second point. Suppose that the possibility of setting a precedent does act as an incentive for rational agents not to act mercifully at all. Would this show that the action is not morally or rationally required for subsequent and similar cases? Whether we are required to treat similar cases similarly will depend upon a number of factors; amongst them, that the action is good and right, that agents are capable of performing it, that it does not require too much of the actor, or that the action is like other actions that have been enjoined or performed in the past. In other words, upon properties of the action, and the recipients of the actions, and the capacities of the actors. The fact that the agents will not act at all because they do not want to set a precedent does not determine the existence of their obligation that they must treat similar cases similarly.

Suppose a teacher is marking essays. Two essays, A and B, emerge as the best. They are very similar. A receives top marks; B should receive an identical mark. However, it was written by a student whom the teacher detests. Now, the fact that A received the mark it did sets a precedent that the teacher must follow in the case of B. The teacher does not want to do this. The obligation to treat A and B similarly does not evaporate because the teacher will not give top marks to A if he has to give top marks to B. Therefore, the fact the teacher is disinclined to give top marks on one occasion for fear of setting a precedent that would require him to give top marks to a student whom he detests, on another occasion, does not remove the obligation that ceteris paribus, he must treat similar cases
similarly. If the initial action is good and morally appropriate, then an agent ought to act, irrespective of the fact that one is required to replicate the action, *ceteris paribus*, for similar cases, that one may not, for personal reasons, want to treat that way. Not to act in the first case on the grounds that it will set a precedent smacks of moral cowardice.

The initial act of mercy may be unconstrained, but mercy is not, in all ordinary circumstances, unconstraining. This is the point that Card was trying to make when she wrote:

...we may be morally free to adopt a benevolent policy, although we are not...required to do it, and yet we may not be morally free to adopt a policy of being benevolent toward some persons and not toward others in the same situation when their cases are relevantly similar. We may incur the obligation to treat others in a certain way, even though we are not initially obligated to treat anyone in that way. Strictly, only the policy decision should be regarded as benevolent; once the commitment is made, we are obligated to others, and the commitment is made by means of the decision to be benevolent in one case.79

§1.5. Aims

In order to come to understanding of mercy and discern some order amongst all this chaos, I have adopted the following five aims:

1. analyse the concept of mercy, identify the types of mercy, explicate its nature and distinguish it from its near relatives;

2. identify and state the conundrums and the issues they raise;

3. suggest solutions to these conundrums;

4. suggest an explanation and justification for mercy as well as an account of its moral standing and motivation. I shall especially be concerned to examine mercy’s relationship to deontology, consequentialism, justice, and optional actions that are morally praiseworthy;

5. suggest reasons why the conundrums arise and provide a reconciliation apparently contradictory beliefs and ways of talking about mercy.

79. Card, *op. cit.*, p.197. I must add that I do not think that initial acts of mercy, when the cost to the mercy-giver is negligible, are morally unconstrained. This is argued in Chapters Three, Four and Five, *passim.*
§1.6 Structure and Conclusions

a). Overview. In view of the problems that seemingly surround mercy, two cases need be made. The first is a negative case; it establishes 1). the coherence of 'mercy', (for, unless 'mercy' can be shown to be coherent it can form no part of our moral life) and 2). if it is coherent, whether it can find a place in our moral life, that is within the dominant moral outlooks of the age: Deontology and Consequentialism. This is what is done in Chapters Three and Four. Chapters Five and Six continue the negative case, arguing firstly, (in Chapter Five) for the coherence of our claims that mercy is both supererogatory and optional, in some sense, while also being morally required. Then I argue, (in Chapter Six), that mercy can be accommodated in rule-governed institutions, the typical example, and the one I consider, being the law.  

In Chapter Seven I set out the positive case. It is an account of the moral standing of mercy. To understand mercy it is not enough to know that the concept is coherent and can be accommodated by the dominant contemporary moral outlooks. We must know how it fits into our moral life and where it lives in the moral landscape, why we should be merciful, and why we should cultivate the virtue of mercy.

b). In Detail. The dissertation is arranged in the following way. There are eight chapters. The first consists of this, the introduction. The last, Chapter Eight, is the conclusion where I summarise my results and arguments and say why I believe the conundrums arise.

Chapters Two through to Seven form the body of my argument. In Chapter Two I analyse and set out an account of the concept of mercy. This analysis will form the foundation for many of the answers to the conundrums in Chapters Three to Six and the argument in Chapter Seven. I argue that the central element to the exercise of mercy is a power structure and a particular mental state. In the case of merciful action, a decision, and in the case of a virtue, a disposition, either to forbear inflicting a burden upon a person in one's power, or to allow suffering to continue that one can alleviate. In both cases mercy is an example of an

80. By 'rule-governed institution' I mean any social entity that through the use of power constrains or restrains the lives of actors and does this by issuing and enforcing prohibitions, prescriptions or permissions. Some such examples apart from the law are any sort of administrative structure, (such as a department of social security, or a taxation authority), universities, clubs that have membership and behaviour rules, professional societies and so on.
ethic of care and concern for other people whose needs it is within one's power to meet.

Chapter Three is concerned with examining mercy's relationship to justice, broadly conceived, by setting out and solving C1-C3. In this way I want also to establish its relationship to deontology. I argue that, except with respect to the first conundrum in one small area, the conundrums do not arise. I argue that where the first conundrum does arise it is to be expected and that it poses neither a conceptual nor moral problem. I argue that if the conundrums are properly understood and the nature of our beliefs and claims about mercy set out clearly, then the force of the conundrums is neutralised. Consequently, the concept of mercy is cogent and one that can be accommodated by the deontologist.

In Chapter Four I examine the relationship between mercy and consequentialism. 81 I shall argue that mercy and consequentialism are quite compatible, not only as personal ideals but institutionally. In response to the former I shall argue that mercy is possible for a consequentialist as a virtue. In response to the latter, I shall argue that institutional agents whose actions are justified by consequentialism can and should be merciful.

In Chapter Five I provide an account of supererogatory actions and show that the dominant contemporary moral actions can accommodate these actions. I make sense of the claim that mercy is supererogatory and optional, in the light of the conclusions reached in Chapters Three and Four; namely that mercy can be required and can be the subject of some sort of imperative. I resolve this conundrum by arguing that mercy is supererogatory only in some restricted sense. I also explain how criticism of merciless agents is possible and show how praise of merciful agents is appropriate. As well I show how mercy can be thought not only a rational action, which entails that mercy is replicable over similar cases (i.e., constraining), but how it can also be thought unconstraining.

81. The few writers who have considered mercy's relationship to teleological theories have exclusively examined the relationship between mercy and utilitarianism, (Cf. Smart, op. cit. p.356; Lucas, op. cit., p.223). Utilitarianism is one sort of consequentialist theory, and the problems seen in the relationship between mercy and utilitarianism are general problems that dog mercy's relationship to consequentialism. I shall, in Chapter Four, examine these problems but concentrate discussion on consequentialism, as it is at present the most dominant teleological theory.
Chapter One: Introduction

The broad aim of Chapter Six is to move from the theoretical examination of mercy to a more practical context. I seek to determine whether it is possible for institutional actors to be merciful, and thereby discover whether mercy can be a part of our day to day life. I recast the conundrums examined in Chapter Three within an institutional context. (Thus, some repetition in the exegesis of the conundrums should be expected, in order to facilitate clarity. I do, however, rename the conundrums in order to reveal more clearly the issue to be considered.) As we shall see, the conundrums when deployed within institutional contexts raise different, but structurally similar, problems to the conundrums when they are deployed within purely theoretical contexts.

The institution that I have chosen is the law, as it is not only the paradigm institution in which mercy is thought to occur, but also because many of the philosophers who have discussed mercy have discussed it within this context. While I am concerned to determine mercy’s relationship to institutional justice, I hasten to add, however, that the general conclusions that I draw in this chapter apply to any rule-governed institution that has certain properties that any acceptable system must have. I argue that the conundrums do not arise.

As importantly, I argue that, given certain properties that any well-developed, though not necessarily perfect, rule-governed system would meet, it is not only logically possible, but morally possible, for the actors within the legal system, most typically the judges, to be merciful. Taking this conclusion generally, it is possible for any other institutional actor, in a structurally similar system, to be merciful as well.

By far the most contentious chapter is Chapter Seven. In this chapter I set out mercy’s moral status and motivation. Importantly also I dispose of some further objections to allotting a place to mercy in contemporary moral theories. This is the positive case for mercy. In general my argument is that while mercy can exist in both a deontological and in a consequentialist moral outlook, its moral standing is to be found in an ethic of concern and respect for persons. It springs from the dispositions that a person possesses has towards, and their sensitivity to, the needs of others. Thus its moral status is best understood against some account of virtue. Further, whilst mercy can be an action that is highly valued, it is when mercy is a virtue that it is most valued. Whatever form it takes,
however, it is to be encouraged and cultivated.

I argue, further, that it is one component of the ‘Good Life’ — not only for individual agents, but for communities. My major point is that mercy is best understood not as an impartial value, but as part of an ethic that involves personal, partial and particular responses, based upon the values of care and concern. My claim is that a genuine act of mercy springs from a disposition to value an entity for intrinsic reasons rather than instrumental reasons. In general, I would argue that the most important and valuable actions that agents can perform are of these sort. This of course runs counter to much modern and mainstream ethical thinking and is very definitely part of, what I would call, ‘the moral counter-culture’.

In this chapter my argument takes place against the background that moral philosophy has gone astray and no longer addresses, centrally, the important issues that agents want to consider. Moral philosophy of the past two centuries has been almost completely concerned with duty and obligation and has been largely concerned with providing ‘decision procedures’ to be used to ground moral judgement and so indicate an agent’s duty or obligation. As such it misses the point of morality. This orientation I call ‘moral legalism’. As a consequence, much that is of importance to ordinary moral agents, such as love, kindness, benevolence, charity, forgiveness and mercy, and the value we place upon traits of character, are merely ‘mirrored’ in the traditional approach. Since they are mirrored they loose their genuineness, that element essential to their value. Moreover, there is something more to mercy than the mere limitation, for non-retributive moral reasons, of one’s retributive emotions, or the limitation of some coercive treatment to meet the interests of public welfare. Thus, the traditional approaches, without modification can provide no way of understanding the value we do place upon acts of mercy and kindness and so on; nor can they provide an account of the moral status or motivation of these sorts of actions that captures their value and retains their genuineness. I shall sketch an account of morality in which these types of values have a central place. I shall argue that mercy is one of the foremost virtues and the attitude of mercy is central not only to civil life but to the attainment of the measure of the good life for which we all strive.
Chapter One: Introduction

Having completed a sketch of the path before us, let's begin work. It will be useful, before we consider the problematic aspects of mercy, (which I do in Chapters Three to Six) to review the salient features of the concept. So, in the next chapter I shall set out an analysis of the concept of mercy. At crucial points in the chapters that follow Chapter Two we shall rely upon various elements of this analysis to clarify the issues and dissolve conundrums.


The Concept of Mercy

Mercy is restraining the mind from vengeance when it has the power to take it or the leniency of a superior towards an inferior in fixing punishment. (Seneca, De Clementia, II.3.1)

§2.1. Introduction.

In this chapter I analyse the concept of mercy. I will begin by examining a number of uncontroversial typical instances of mercy. I will seek to discover what it is about these diverse contexts that links them. This will reveal the nature of the concept. I shall also set out the structure of the concept and distinguish it from some of its near relatives. This analysis is important as it will underpin the discussion of mercy in the remainder of the dissertation.

My aim, however, is not to provide a complete set of necessary and sufficient conditions for identifying some action as an act of mercy. That would be impossible. The concept, like many in moral philosophy, is 'open textured', and while there are a number of core ideas and unequivocal cases, circumstances could arise when two agents could quite easily describe the same state of affairs quite differently. The aim then is to identify those features that typical examples of mercy possess and in virtue of which we describe them as instances of mercy.

I must also say that I am not concerned with arbitrary or capricious acts of mercy — the sort that a demented ruler such as Gaius would display. Rather, we are concerned with rational actions, actions based upon discoverable reasons, the sorts of actions that moral exempla such as the Christian God, the Stoic sapiens or Aristotle's phronimos would perform.
§2.2. The Contexts of Mercy

People usually think of mercy in relation to two contexts, often regarded as the paradigm contexts of mercy. The first is the theological context: the mercy of God or the works of mercy that Christians are enjoined to perform. The second is the law: the prerogative of mercy, as exercised by the Crown. In particular, in this context, 'mercy' is associated with the remission of a capital sentence. Although these views of mercy are widespread and they are certainly typical examples, a little reflection reveals that mercy is frequently associated with a much wider variety of contexts: we not only talk about God or gods, judges, juries and monarchs being merciful, or acting mercifully, but bankers, terrorists, the winners of duels, along with agents who give alms to the poor and impoverished. We place mercy generally in the context of the relief of suffering, and talk of 'angels of mercy' – agents who relieve the suffering of others, often in adverse circumstances, such as war. As well, we talk of 'merciful releases', mercy dashes, flights and rescues. Reflected in some of the literature, however, is a tendency not to extend mercy to these other contexts. Some writers, for example, have restricted mercy to the province of law, and others more generally, to punishment and wrongdoing. It is fair to say, however, that there is no measure of agreement over what constitutes the typical or paradigm contexts of mercy.

---

2. There are two groups of these works: the spiritual and the corporal. Amongst the former there are seven: 1) converting the sinner; 2) instructing the ignorant; 3) counselling the doubtful; 4) comforting the sorrowful; 5) bearing wrongs patiently; 6) forgiving injuries; 7) praying for the living and the dead. Amongst the latter, also seven in number are: 1) feeding the hungry; 2) giving drink to the thirsty; 3) clothing the naked; 4) harbouring the stranger; 5) visiting the sick; 6) ministering to prisoners; 7) burying the dead. F.L. Cross, (ed), The Oxford Dictionary of the Christian Church, London, 1957, s.v., 'Corporal Works of Mercy and Spiritual Works of Mercy'.
mercy. There are few suggestions to the nature of the thread that links all these contexts. So that we might discover something about the nature of mercy, we should examine some uncontroversial cases. I propose the following as typical examples of mercy:

1. A man’s wife has suffered terribly over a long period of time from serious mental illness. Over the years, on many occasions, she has tried to kill herself. Her life was miserable. She has begged her husband to kill her or assist her to end her life. He has not. He has throughout the years steadfastly stood by her. Her illness has progressed to a point where it not only has affected her mind but physically her brain. So, after much discussion and imploring, the man, reluctantly but with his wife’s consent and with her assistance, ended her life.\(^8\) The man had relieved the woman’s suffering. His act is regarded as an act of mercy.

2. The man who has killed his wife comes to trial. He pleads guilty to murder. The Judge imposes the mandatory life sentence. However, he says that the man is entitled to the mercy of the court and imposes such a small non-parole period that the man is released immediately.\(^9\)

3. After much provocation a man reluctantly agrees to fight a duel. The aggressor loses and his life is forfeit to the other. The man who did not want to fight the duel is merciful and refrains from killing the aggressor.\(^10\)

4. A man owes another a large sum of money, that he has promised to repay on a particular day. However, the debtor strikes hard times and cannot repay the loan without being utterly financially destroyed. Struck by the plight of the debtor, the creditor forgives the debt. This involves some sacrifice to him. We would say that he has been merciful.

What links these cases and differentiates them? Why are they typical cases of mercy? To these questions we now turn.

---

8. This case is real: Q v Johnstone, S.A.S.C., 1987, [unreported].
9. Ibid. Cf. Smart, (op. cit., p.349) argues that cases such as this are not genuine acts of mercy. However it is a perfectly standard use of ‘mercy’ as she herself admits.
10. Vide, J. Conrad, ‘The Duel’, in A Set of Six, London, 1954. We can find this sense in the Oxford English Dictionary as well, s.v., ‘Mercy’: Sec. 5: ‘The clemency of a conqueror or absolute lord, which it is in his power to extend or withhold, as he thinks fit.’
§2.3. The Nature of Mercy.

When Portia implores Shylock to act mercifully, she is asking him to perform a certain sort of action. Whereas when she describes him as cruel, a synonym for 'merciless', she is saying that he is a certain sort of person who lacks a certain quality or trait of character.

This is no mere literary device. If we reflect upon the examples given in the last section, we can see this distinction at work: agents are merciful and merciful agents, but not only merciful agents, perform acts of mercy.

Often it is said that a particular person is a merciful person. The speaker is thinking of mercy as some property of a person. She is predicating it of that agent. She is saying something not only about the agent's actions but about him, his attributes, his personality, values, character and outlook, either on some specific occasion or more generally as an assessment of their on going character. Which ever way, when mercy is predicated of an agent it is a virtue. As the Bard says: 'It [mercy] is an attribute to God himself'. Now, when mercy is a virtue it is that trait of character that disposes an agent to be sensitive to the needs of others, particularly the need to be free of suffering and burdens. Such a disposition leads an agent to act in particular ways, that is, choose particular act-options. Specifically, she chooses that particular act-option from the range of options available that will alleviate a need or reduce a burden.

Certain sorts of actions are called 'merciful' or 'acts of mercy' or 'displays of mercy'. For example we might say: 'Smith acted mercifully.' In this case, mercy is considered a property of an action; to be precise, that property which has the effect of reducing the burden under which another labours or is threatened. A merciful action, (or we might say, merciful act-option) then, possesses the property of reducing a burden or meeting a need that another has. And to act mercifully is to choose the merciful act-option.

We divide our talk about mercy, therefore, into two classes: that about the properties of actions and that about the properties of agents. When our mercy talk is about agents, we are thinking of mercy as a capacity to be sensitive to the needs of others and a disposition to choose particular sorts of act-options that have the property of reducing burdens
or meeting needs. So, we might say that a merciful agent is inclined to act in particular ways in response to the needs they perceive in others, and out of concern for the other person’s wellbeing. The predicate ‘is merciful’ refers to some property of the agent – it can be an emotion, such as when we say that a person is ‘overcome with mercy’. Typically, however, when predicated of an agent, mercy is a virtue.\textsuperscript{11} Lyla O’Driscoll saw this point when she stated: ‘The term “mercy” encompasses an attitude and the modes of treatment which are the natural or conventional ways of expressing it’.\textsuperscript{12}

When our mercy talk is about actions we are predicking particular properties of an agent’s action, namely that it realises a particular act-option; thus, the predicate, ‘is merciful’ refers to some property of an act-option. A merciful action does not always spring from the expression of a trait of character. One can act mercifully without being a merciful person. In other words, without possessing the virtue of mercy. Yet if one is truly a merciful person, that is, possesses the virtue of mercy, then one typically, if the opportunity presents itself, acts mercifully.

Within our talk about mercy as the property of an action we may mean any of three things:

1. a particular type of external action with known springs;
2. a particular type of external action, with unknown springs;
3. an official action, such as the Royal Prerogative of Mercy.

Which sense we use and intend will depend upon the circumstances. For example, if we say, ‘Jones acted mercifully and decided to forgive the debt’, we are saying that there are discoverable reasons for Jones’ action. On the other hand, if we say ‘That was a merciful action’,

\textsuperscript{11} Awareness of mercy’s dual nature goes back a long way. It is found in Seneca’s \textit{De Clementia}, although, it must be pointed out, Seneca saw mercy primarily as a virtue (cf. I.i.4 and I.xii.1 with I.ii.1 and II.iii.2). It is also to be found in some of the most recent discussions: Cf. J. Adler, ‘Murphy and Justice’, Unpublished paper, August, 1988, who says: ‘The word ‘mercy’ can be used to denote either a putative virtue or a set of principles prescribing certain behaviour’, p.1; Cf. G.W. Rainbolt, ‘Mercy: An Independent, Imperfect Virtue’, \textit{APQ}, (27:1990), pp. 169-173. Surprisingly, however, the distinction has not been fully appreciated. For example, Alwynne Smart, \textit{op. cit.}, saw mercy only as an action and Claudia Card, (‘On Mercy’, \textit{PR}, (81:1972), pp.182-207) examined mercy only as an action. Jeffrey Murphy, on the other hand, was vaguely aware of this distinction. He explicitly referred to mercy as a virtue yet treated it as if it were an action, (Cf. Murphy, \textit{op. cit.}, pp.7 and p.11, n.22).
\textsuperscript{12} O’Driscoll, \textit{op. cit.}, p.232.
we may be talking more about the quality and nature of the action, rather than the motives of the agent and their act. (There is an ambiguity here as there is no locution that is solely of type 2. Rather, we divine the sense from the context.) The third sense is quite clear. 'The Queen was advised to exercise her prerogative of mercy and did so', is self explanatory: the Queen exercised one of her reserve powers.

§2.4. The Elements of Mercy.

What is it about each of the examples (in §2.2) that licences the use 'mercy' or 'merciful'? Eight elements can be identified. Consider each in turn. They are:

1. A power structure;
2. A target;
3. A prompt;
4. An apt need possessed by the target;
5. A certain option that has certain properties;
6. A responsive attitude;
7. The act must be voluntary and is in some sense optional;
8. Certain beliefs.

§2.4.1 The first, and perhaps most important feature, is that the context must be believed to have a power structure.13 This is a belief that may be held by the person evaluating the action of the allegedly merciful agent. They must believe, to be sure, that the benefactor is more powerful than the beneficiary in that particular context and in a relevant respect. Typically, this involves a belief that the beneficiary is powerless, in that circumstance, or that they are in no position, physically at least, to make or to enforce a claim, or that they have no coercive capacity and are vulnerable to the acts or omissions of the mercy-giver.

The reason for this is clear: Mercy is bestowed by one person to another.14 The assumption behind any putative act of mercy is that the benefactor is in a position to confer a benefit upon another by performing

---

13. This has been overlooked by most of the recent writers except Johnson, (op. cit.). It is such a basic point that it is hard to see how it has been avoided.
14. I leave for the present the vexing question whether one can be merciful to non-human animals. I incline to the view that one can.
some action, or not performing some action, that if performed would disadvantage, harm or impose a burden upon the beneficiary. One agent can only do this to another if they have the capacity (that is, the power) to do it. Mercy is not possible, within a context where agents are believed to have, in a given situation, equal power or where one person, who would be the benefactor, is believed to have lower situational power than the beneficiary. The slave cannot be, in ordinary circumstances, merciful to the master. If it transpires that the benefactor did not have greater power than the beneficiary, then the act of mercy misfires: ‘How can you be merciful to me? You can’t do anything to me!’ It still remains, however, a display of the virtue of mercy, if properly motivated.

This can be found in our mercy-talk. We talk of Jones being at or in, the mercy of Smith, in other words, in Smith’s power. We are saying that Jones’ fate rests with Smith’s decision about the treatment to be given to him. This sense is, moreover, also preserved in the law, though the practice is now obsolete: an agent was said to be ‘in mercy’ when they were subject to a penalty, the severity of which was at the complete discretion of some magistrate, unbound by legislation. They were said to ‘stand in the mercy of’, that is within the power of, the court. This is known technically as ‘amerciament’. In another area of the law, namely, the criminal law, there is ‘court mercy’, where the judge, within the limits prescribed by law, can remit, partially or wholly, a penalty to which a convicted person is liable.

It is not simply the case, however, that the power structure must actually exist. It need not. The person who acts mercifully must merely believe that they are in a position of power over another, or in a position to be merciful. It need not be the case that they actually are so. The

15. This feature of the merciful context has been known for a long time. In De Clementia, the earliest surviving analysis of ‘mercy’, Seneca was aware of the importance of power to a display of mercy as the quotation at the head of this chapter demonstrates. Or, in a way more familiar to our ears, the Bard makes the same point: ‘It dropeth as the gentle rain from heaven upon the place beneath...’ (Shakespeare, The Merchant of Venice, IV.I.185-6.)

16. Oxford English Dictionary, op. cit., sec.4(c): ‘At the mercy of (a person): wholly in his power, at his discretion or disposal; liable to any treatment he may choose to employ; liable to danger of harm from him.’

17. B. Jowitt, The Dictionary of English Law, Sweet and Maxwell Ltd., London, 1959, s.v., ‘amerciament.’ Cf. R. Burrows, (ed.), Words and Phrases Judicially Defined, London, 1946, s.v., ‘amercements’: ‘When a man is said to be amerced...he is to be in mercy as being liable to such punishment as may be inflicted upon him, mostly by fine, but not necessarily by fine alone.’ Taken from: Re Nottingham Corpn., [1897] 2 Q.B. 502, per Pollock, B., at 508.

following example illustrates this point. A judge is about to sentence an offender. The offender's circumstances are such, for example he is infirm, deluded or was provoked, that the judge feels justified in acting mercifully and does so act. However, unknown to the judge the offender is really quite influential and whatever sentence was imposed the offender could easily have set aside. The point is that the offender is really more powerful than the judge — although the judge does not know this. Would we say that the judge was not merciful but only thought he was? I think not. The judge's merciful action sprang from the right dispositions motives and so on. Moreover, he believed that he could be merciful.

This power relationship is not the same in all cases. Recall the examples set out above, (§2.2). Case 1 is an example of lightly-constrained and circumstantial power. The agent acts fairly independently of considerations that would ordinarily influence the performance of his action. His major concern is the wellbeing of his wife, and it is that goal which constrains his action. Thus, most of the ordinary constraints on the power of the agent, such as the law, are irrelevant to the performance of the action. Moreover, the power that the agent has is obtained in virtue of some circumstance over which the agent has little control. It is power that is not conferred by some institution. Examples of mercy in this context are: alms-givers, mercy killers, angels of mercy, merciful release, mercy flights, dashes and rescues. These benefits all involve the removal of a burden or some form of danger. They do not involve refraining from doing something unpleasant to another. Rather the performance of the merciful action is the bestowal upon the agent in need, some benefit that lifts them from deplorable circumstances — circumstances that they are unable themselves to escape, owing to their lack of power. Such merciful agents are not restraining themselves from imposing a burden; nor are they restraining another's power.

Case 2 are examples of constrained, institutional power. Here the agent acts with constraints that may influence their action. In the first case the agent can bestow a benefit - any benefit they have it in their power to bestow. They are limited only by their decision and its springs. In the third case the agent can impose any burden. In this case, there is a limit to the extent of the burden that an agent can impose. Their power is constrained and restrained. They may choose to ignore or not constraints
Chapter Two: The Concept of Mercy

that impose a minimum level of treatment. The point is that the merciful agent’s actions occur within a context that sets limits to her actions — limits that she is bound to obey in virtue of her institutional role. Judges, juries and administrators are some such agents.

Case 3 is an example of unconstrained power. This power is unconstrained in the sense that the agent acts in the way she chooses. The type of treatment is left to her own discretion. She limits herself. Hence, in this context it is the self-limitation in the use of power that makes the agent’s act unconstrained. Examples of this paradigm are the winners of duels, victors in warfare, absolute monarchs or rulers, despots, Roman Emperors or any other person who finds herself with another agent in ‘her power’, power that is constrained by nothing other than the powerful agent’s will.

§2.4.2. Mercy is directed at someone or something. It must have a target. The target must be knowable and discernible to the merciful agent. It can either be an individual or a class of individuals. One may ‘feel full of mercy’ but one is not acting mercifully, or displaying the virtue of mercy unless there is a target and the actions of the merciful agent are directed at it. In this respect mercy is like forgiveness. One forgives someone or some group, but does not merely forgive, simpliciter. The reason being that mercy, like forgiveness, involves treating another agent in a particular way. It is a person with whom one shares a relationship: victor to vanquished; debtor to creditor; mercy-killer to sufferer; judge to culprit. Without a relationship there is no target and without a target there can be no act of mercy.

§2.4.3. The target (i.e., the intended recipient) of the merciful action must actually prompt the action. That is, the merciful act must arise as a response to some property of the beneficiary, a prompt. Consequently, one cannot be merciful to A by intending to give relief to B only.19 For example, Jones has committed some crime, and is sentenced to prison. He has family circumstances that warrant mercy. It is not the case that an agent who remits the penalty on Jones because of his family circumstances has been merciful to Jones. Such an agent has been

19. Smart, op.cit., thinks that this is what mercy consists in. This issue is discussed at length in Chapter IV.
merciful to the family. Only if the penalty was remitted for Jones' own sake has the benefactor been merciful to Jones.

§2.4.4. The beneficiary must possess a prompt. It must be believed that the the beneficiary not only is in a position to receive, but needs to receive. One does not give mercy to one's inferior simply because they are inferior. They must need it because they are vulnerable to the acts or omissions of the benefactor, and mercy is a response prompted by this need. A prompt is some property of an agent in virtue of which some particular type of response is appropriate or apt.

Prompts are, typically, certain types of needs. What then are needs? A need is some requirement that an agent has in order to attain some goal, and without which they will not attain that goal. Needs are usually heavily context dependent: what I need in context C to attain nirvana may be quite different to that needed in context C*. Therefore, the goal that agents have, who stand in need of mercy, is the relief from some burden or threat under which they labour owing to their powerlessness. They may need relief from pain, suffering, oppression, poverty, illness, spiritual isolation, food, punishment and so on. This can only be provided by specific actions the relevance of which is heavily context-dependent. I propose the following schema:

A needs X in order for A to Φ in circumstances C, if and only if X is a necessary condition of A's Φ-ing in circumstances C.21

Not all needs are prompts for mercy. For example, one may need a new car because the old one is riddled with rust. One stands in need, but is the need so great that to be given a car counts as an act of mercy? No. The need must be great. It must be life or life-style threatening. Not to meet the need would be an affront to dignity an involve the destruction of the beneficiary's autonomy and capacity to pursue their own interests, goals and projects.

What needs are relevant? In general terms, for a need (i.e. a prompt) to be great enough to make a person a candidate for mercy it must arise from a person's inability to promote effectively their own

interests, ends, goals and personality. It cannot be any prompt and must be logically apt. A prompt is logically apt if it is a feature of the beneficiary that, it is believed, places the beneficiary within the benefactor’s power, and makes them vulnerable to the decisions of the benefactor. Some logical prompts might be: poverty, defencelessness, pitifulness, hopelessness, powerlessness in the face of a great threat, or illness, or physical needs, such as poverty, starvation, homelessness, severe illness, incapacity, subjugation; spiritual needs such as hopelessness, depression; it may be psychological need, such as those who are to be executed, or who face long prison sentences. These are great or serious needs. We normally associate mercy with meeting serious needs, needs so serious that if left unmet they would place the agent in need in a most undesirable and unacceptable state.

§2.4.5. An act of mercy involves not ignoring the plight of another who is vulnerable to some threat, or who presently labours under some burden that it is within another agent’s power to alleviate. This idea can be expressed in the formula: A is vulnerable to the acts and omissions of B. Typically mercy involves choosing that option, from a range of options, that will benefit the agent within the choosing agent’s power. This choice can take two forms.

First, a decision to forbear, or refrain from performing that action to which the beneficiary is vulnerable. In this case an agent decides not to act in such a way as to cause suffering to another, or decides not to act against the interests and welfare of the person in their power. They stop short of what they might, or what they have the power and capacity to do. They might ask themselves: ‘Will I Φ or won’t Φ?’ There are a number of clear examples in this group: in the case of punishment, it is forbearing or refraining from punishing. In the case of the victor of a battle, it is forbearing from killing his opponent. In the case of the creditor, it is forbearing from recalling the debt. In the case of alms-giving or mercy-

22. cf. O’Driscoll, op.cit., p.231ff makes these points too.
24. Oxford English Dictionary, s.v., ‘mercy’ 1: ‘Forbearance and compassion shown by one person to another who is in his power and has no claim to receive kindness’; Cf. Webster’s New World Dictionary, New York, 1984, s.v., ‘a refraining from harming or punishing offenders, enemies, persons in one’s power, etc; forbearance and compassion.’
Chapter Two: The Concept of Mercy

killing, it is refraining from not ignoring the plight of the beneficiary and as a consequence, acting in a beneficial manner. It is often expressed in the phrase: ‘I couldn’t sit there and do nothing; I had to act’. This can be clearly seen if we reflect upon the the examples in §2.2.

Mercy involves, and indeed, gets its value from an agent refraining from doing what they could easily do. It is a person of power controlling themselves, a self-limitation in the use of power. Often such forbearance takes place over intense emotion, such as when a victor is merciful to the vanquished or when a agent displays mercy towards another whom they believe to be thoroughly undeserving and without merit.

Second, performing some positive action towards a person in one’s power, by choosing to do to the vulnerable agent what one could choose not to do — and might be expected not to do. Many acts of mercy are like this, as a merciful agent may not take the decision to refrain from ignoring the plight of another, but rather merely act in response to the need of the person within their power. Very often this is what happens when agents give alms or when mercy-killers are prompted to act. They choose that option in a range of options that will benefit the person within their power and act for the benefit of that person. The question of not refraining from acting does not come up. They merely act so as to help. Thus, some mercy-killers choose that option which benefits the person in pain.

§2.4.6. Fullblown mercy, rather than some cynical action that is phenomenologically identical to mercy, is a responsive act or attitude.25 That is, it is a response to another’s perceived need. It is not based only on feeling, but on reasons. However, these reasons spring from values that agents have about other people as people. Specifically, they are representative of an attitude of care and concern for another’s wellbeing. I identify ‘care’ and ‘concern’ as the essential element of what it is to be a merciful person. However, one need not have ‘care’, ‘concern’ or ‘compassion’ for another in order to act mercifully. Suppose a head of state uses his prerogative power and “acts mercifully” to reprieve a person facing execution. Suppose that the head of state did this not out of

25. O’Driscoll, _op. cit._, makes this point too. The sort of action I have in mind is that which does appear to lessen some burden, but in fact does not, or which benefits and is intended to benefit the supposed benefactor more than the beneficiary.
concern for the reprieved person's welfare but because he thinks it would be wrong to inflict it. This counts still as an act of mercy, as it aims to benefit a person, but for reasons that do not spring from a concern for the beneficiary's welfare, but instead spring from the benefactor's concern for moral principles. It is not, however, a display of the virtue of mercy. It would become a display of the virtue of mercy only if the forbearance is based upon a trait of the agent's character that is sensitive to and responds to the needs of other agents or to their dire circumstances and involves a desire to alleviate their plight.

It sounds odd for a rational agent to answer the question: Why were you merciful? with: 'No reason, I felt like it!' For a rational agent there must be a reason and the reason refers to some property of the target. It need not, however, always be a personal response. A person may react to another's plight as an official in an institutional capacity. For example a judge may be merciful as a person or as a judge. Both are praiseworthy.

From this emerges an important point. Only certain reasons and motives can ground a genuine act of mercy and only certain springs can ground the virtue of mercy. In all cases they must be reasons and motives that speak to the need that the beneficiary has to have some burden lifted. One may address this need directly, and respond to it without actually being motivated by the thought that the response is right. Or one may perceive the need and respond to it because it would be right to do so. What springs cannot ground a genuine act of mercy are those that speak to the welfare of the benefactor. For example, a judge who reduces a penalty because she has been threatened is not being or acting mercifully, as she is not responding to a need that the beneficiary has but rather to her own. As I said above, only if the penalty was remitted for an agent's own sake has the benefactor been merciful to that agent.

§2.4.7. Mercy is voluntary and in some sense optional; it springs from an act of the will, a decision or a volition; mercy is unrestrained and unconstrained by external forces, such as other agents. (Though it may be constrained by values and beliefs.) An example will bring out this point. A judge is about to sentence a gangster for a particularly dreadful crime. The gangster's friends let the judge know that he should be 'merciful', (i.e., be lenient) or he and his family will be killed. The judge succumbs and is coerced into imposing a lenient sentence. He does this out of fear
and not from any concern for the target.

Has the judge been merciful or displayed the virtue of mercy? No. Why? There are three reasons. The first is that the lenient sentence does not arise as a response to some prompt in the target.

Second, the prompt — even if it had emanated not from the gangster’s friends but the gangster himself — is not apt. There are some motives and dispositions that cannot ground an act of mercy. One such class are coercive motives or dispositions that arise as a response to coercion or fear. If an act is to be a display of the virtue of mercy or a full-blown act of mercy then it must be uncoerced and unconstrained at least by other agents. It must spring from a choice.

Third, the evaluators of the action do not believe that the appropriate power relationship exists. Therefore, it no longer has the essential feature of a merciful action: the agent who is evaluating the action believing that the stronger is forbearing from acting against the interests of the weaker.

§2.4.8. Mercy also involves a set of beliefs that the merciful agent or observers must have. We have seen one already, namely the belief that the context has a power structure. In addition to this there is the belief that the forbearance will benefit the person given mercy. In other words, that the result of the forbearance will leave the beneficiary better off. Thus, the forbearance must be of a certain sort. It must be thought to benefit the beneficiary. If in the course of events the act does not, we would still say that the benefactor acted mercifully, but that the act misfired, that is it did not achieve its goal. If the act has not mis-fired, it is a benefit, through what it involves, to the person who receives it. The act, however, does not necessarily have to benefit the beneficiary, although when the act is being contemplated it must at least be thought that it will.26

The second belief is applicable in the context of conferring a benefit

---

26. There is a metaphorical sense in which one is said to display mercy even though the beneficiary will not be better off. For example, the winner of a duel could refrain from killing his opponent, leaving him instead to find his way back to civilization through alligator infested swamps. This is not really an act of mercy, for the ‘donor’ knows that his act of forbearance will not in the long run benefit the vanquished, though in the short term it does, i.e. the vanquished remains alive.
on a person in need. It is the belief that forbearance from some action would not assist the person who is given mercy. In other words, the evaluator of the action believes that the beneficiary would be worse off with the forbearance, just as a person is worse off who does not receive charity in which they may stand in need. An example of this sense is the person who is faced with the decision of mercy-killing another who is experiencing great pain and suffering. The benefactor chooses that act-option which involves not ignoring the plight of the person within their power. They believe that were they to forbear acting and not turn the life-support machines off, the person would be worse off.

It must also be believed that the beneficiary stands in need of relief of some kind from the acts or omitted acts of the benefactor or some treatment over which they have power. As well it must be believed that the beneficiary stands in need of assistance and relief from their burden and that the beneficiary’s life would be better if the burden is relieved and that the benefactor is in a position to believe it. These beliefs must be held, since mercy as we saw, is a response to a need produced by an agent’s vulnerability to the acts or omissions of another, and if it is to be considered such a response, the evaluating agent must hold these beliefs.

Another belief is that the action represents a departure from an alternative course of action open to the agent. In other words, what it is possible, or what one would normally expect or think likely to occur or to do in those circumstances; in short, mercy involves a departure from the normal and likely course of events. A nurse who has to give a pain-killing medication, as a part of the patient’s treatment, is not being merciful, when she does. Such actions only become merciful if her action represents a departure from the ordinary treatment schedule.

I say ‘departure from what is possible, or what one would normally or ordinarily expect or think likely to occur’ because all acts of mercy are, in some sense departures from what is possible or what is usually expected or thought likely to happen. In an ideal society where one would in fact expect agents to be merciful, or where one would think that mercy was the most likely response, mercy represents a departure from what is possible. In a non-ideal society, mercy occurs against a background of expectation. It must be expected that the benefactor will do or would be disposed to do something nasty and that the nastiness is in some sense
‘normal’. Merely refraining from doing something nasty to another does not count as mercy. This is so because any description of an action as ‘an act of mercy’ takes place within a context in which the agent making the description has certain expectations and beliefs about the benefactor and the beneficiary.

These points can be illustrated this way. It is not an act of mercy on my part to refrain from lacing my dinner guests food with rat poison, if I had never really intended to, as it would not be expected that such an addition to the menu is part of the normal fare, and it was not likely to happen anyway. Such forbearance would become an act of mercy only if I intended to do something nasty to another, and this burdensome intention is thought to be a ‘normal’ part of the expectations that people have about my behaviour. Suppose that I have suddenly conceived a hatred for my guests, and the usual way of expressing my hatred for people who have incurred my enmity is to act like Livia or Lucretia Borgia — to poison them. I decide to do just this; however, at the last moment, overcome with feelings of concern for their welfare, I forbear. This counts as an act of mercy because the poisoning was likely, and was a usual expression of my enmity, although the enmity was unexpected.

§2.5. The Springs of Mercy

What sorts of dispositions and motives can be counted as springs for mercy? It is clear that they must be optional, unrestrained, unconstrained, voluntary and responsive to another’s perceived need; as well it must be apt. Given this, it seems that the springs of mercy fall into two groups. Those that ground the virtue of mercy and those that ground the act. Consider the springs of merciful actions first.

§2.5.1. The Springs for Acts of Mercy. If some act is an act of mercy then it may be a manifestation of the virtue of benevolence, charity, justice, kindness or virtue of mercy. It can also spring from motives or dispositions of charity, goodwill, sympathy, empathy, benevolence, right, equity, compassion, love, care, commitment, humanitarianism, goodwill, and pity. The only constraint on the springs for an act of mercy is that the spring appears to the evaluator to aim at the probable wellbeing of the beneficiary and appear to be an actual expression of care and concern for them. All of them are suitable answers to the question: Why were you
merciful?

It is not the case, however, that merciful acts can spring only from benevolent, kind, compassionate, (and so on), dispositions or motives. Agents who have many reasons not to be merciful, who could be expected not to feel, and do not in fact feel any kindness, goodwill, benevolence or compassion towards the beneficiary, can also be merciful. So too can those who, if they acted mercifully, would involve themselves in sacrifice, danger and risk. Such agents may have to overcome personal obstacles and feelings of revenge, vengeance and hatred as well as fear and threats. It is these people, if they display mercy, whom we praise most; those people who overcome such obstacles, such passions, yet find in themselves some measure of humanity to be merciful. Such actions and agents represent a triumph of the human spirit and character over natural and understandable emotions. They serve as examples to us all. This is mercy in its purest and most admirable form, and represents the character of a moral agent overcoming one dark part of our nature, the capacity for cruelty and the temptation not to become involved in the plight of other agents. As such it represents the will limiting power and instinct.

§2.5.2. The Springs for the Virtue of Mercy. But what is the disposition that grounds the virtue of mercy? It cannot be a disposition to be benevolent, charitable, or kind and so on.27 Why? Well, if any of these dispositions grounded mercy the virtue would cease to be autonomous from them. If mercy is an autonomous virtue, as is commonly believed, then the disposition from which it springs must be quite different from the dispositions that ground benevolent and kind and charitable virtues. For if they were identical then it would not be possible to talk of a virtue of mercy and a virtue of benevolence or compassion, and so on, since they would be one and the same thing.28 Moreover, we can be merciful towards agents towards whom we have no benevolent feelings. Thus, such dispositions are not identical nor even an essential or necessary

27. As claimed by, for example, Murphy, op. cit.; O'Driscoll, op. cit.; Smart, op. cit.; Card, op. cit.; Murphy, op. cit.; Kohl, op. cit.; Kleinig, op. cit.; Roberts, op. cit.
28. This is why justice can be a motive but not a disposition for a display of the virtue of mercy. If the benefit is just treatment over unjust treatment, and all the other conditions are met, then it will be an act of mercy. If it is simply justice for the sake of justice then the act is not merciful but just. If the act is just, but for the sake of the individual, and the disposition of the agent is to assist the donee not to do justice per se then if all the other conditions are satisfied then it is mercy.
Chapter Two: The Concept of Mercy

feature of the concept of mercy, as the dogma would have it. So, what account can we give of the springs of the virtue of mercy?

The disposition to be merciful involves a person, A, with power over another, B, and to whose acts and omissions the other, B, is vulnerable, conferring, out of concern for B’s wellbeing, a benefit upon B because he is in need and powerless to help himself. So the merciful disposition or character trait is one that seeks to benefit another agent by not ignoring their plight or need, or refraining from imposing a burden as heavily as they could. Another formulation might run like this: a disposition not to ignore the plight of another and to perform beneficial actions towards them, because of a concern for the welfare of that person, which arises from an appreciation of their plight. This trait of character rests upon deeper values; values about people, relationships, human life or even life in general, the ends of life, all of which extend from the agent’s vision of the good life and vision of human nature, both as an individual agent, a social creature and as a member of a collective. Thus mercy and a disposition to be merciful are one facet of an integrated moral personality.29

§2.6. Types of Mercy

Some writers have assumed that mercy is only a gift.30 It is something that cannot be deserved or owed and perhaps not even earnt. It is something that is bestowed at the benefactor’s discretion. Hence, failing to act mercifully not only is not wrong but cannot be wrong. Nor can it be blameworthy or leave the agent open to moral censure or criticism. In this sense mercy is one sort of an act of charity, benevolence, kindness, goodwill and may on occasions even be an act of supererogation.

Yet if this view is correct then it is hard to see, as Sterba points out,31 how we could criticise the merciless agent, hold him culpable, blameworthy or think him the sort of agent worthy of opprobrium. Yet,

29. This will be argued at length in Chapter Seven.
30. Murphy, op. cit.; Twamley, op. cit., p.87 and Roberts, op. cit., p.353. Roberts takes a particularly heroic line and claims that mercy is always unjustified. But if that is so then questions of the form: ‘Why were you merciful?’ or ‘Was I right in being merciful?’ would not make sense. Clearly they do.
typically we do. Merciless and cruel are terms of opprobrium and moral condemnation. Moreover, it is no mere conceptual muddle, on our part to criticise a merciless agent by saying: 'Look, Jones really did deserve mercy' or 'You ought to have been merciful!' or, 'You acted quite wrongly in not giving him mercy.'

Further, gifts, given with a good will, while praiseworthy and inspiring gratitude in the beneficiary as well as admiration in observers, cannot provide the full story about mercy. We do not think that it is only admirable to be merciful — an evaluation of the agent — but right — an evaluation not only of the agent but their action. We do not only commend mercy to others but enjoin it as well. That is something we could not do if mercy were merely a gift.

The broad answer to this problem is simple, and will be examined in detail in Chapter Five: mercy is sometimes a gift and at other times it is required. Hence there are two types of mercy: mercy that is a gift, and morally optional; and, on the other hand, mercy that is in some sense required.32 What this does indicate, however, is that mercy being a gift or being required, is not a necessary feature of the concept, but rather one that is heavily context dependent.

§2.7. Mercy Distinguished From Its Near Relatives

Mercy is sometimes thought to be identical to clemency, condoning, excusing, pardoning, benevolence or forgiving, and so on. There is no doubt that on occasion we do use mercy interchangeably with these other notions. This occurs because they have, at times, the same results, and similar springs and phenomenology. Mercy, however, can be distinguished from them, and we should see these other notions as near relatives, rather than synonyms. It is important to distinguish mercy from its relatives: only if we can distinguish mercy from these other notions can we begin to make sense of our beliefs that it is autonomous and a virtue.

In this section I want to draw some distinctions between mercy and these other notions. The result is that, although these notions may blend

into each other at various points, we can nevertheless discern that there is a central notion of mercy, that it is an autonomous moral notion, that describes an identifiable range of behaviour patterns. The relatives that mercy needs to be distinguished from fall into two families: those that are concerned with moderating coercive treatments and those that are concerned with extending caring treatments. Consider the former first.

§2.7.1 Coercive Treatments. This family has the following members:

(a) Amnesty. An amnesty is a promise on the part of some authority not to prosecute or if convicted, not punish, a specified class of wrongdoers. By its nature, then it is general, and applies to all members of a class of wrongdoers, including classes of only one member. An amnesty does not obliterate guilt. Rather, it is a promise not to hold the wrongdoer’s actions against them. An amnesty lets the wrongdoer off. It can be given before conviction or after.33

It is true that some acts of amnesty may be motivated by merciful dispositions. Indeed some acts of mercy may manifest themselves as an act of amnesty. However we can distinguish them. Amnesties may be given to people who are in no great need. Hence they do not spring from considerations about the agents receiving an amnesty as individuals, but as members of a class. Mercy is directed at individuals not at groups. Where a group of individuals receive mercy they receive it not as a group but as individuals and out of a concern for them as individuals.

(b) Excusal/acquittal/exculpation. To excuse an agent is to accept some sort of defence for an action that attracts opprobrium and involves reducing or removing altogether the punishment. To excuse an agent is to let her off the consequences that would normally flow from the act that they performed. It is either to say they did not do it, that they performed the action but it could not be helped or that they were not responsible or culpable, or that they did it, but that it was right.34 When an agent is subject to any of these other forms of exculpation, they are held not to be responsible for the action of which they have been accused. They are freed

34. This distinction owes much to J.L. Austin’s, ‘A Plea for Excuses’ in *Philosophical Papers*, Oxford, 1979, pp.175-205.
from blame and guilt.

Moreover, these forms of exculpation, along with clemency, pardon, equity and leniency, refer to the contexts of prohibited actions. Mercy, on the other hand, has a greater range of contexts within which it can be displayed, such as those acts that do not involve blaming agents. So mercy is different from exculpation, clemency, and so on with respect to the range of its operations.

To be merciful, on the other hand, is to prevent, for other moral reasons, the person from suffering the justified consequences of her action. When one is merciful, one neither acquits, excuses nor exculpates the person. We do not say they did not perform the action, or that they are blameless or guiltless or not responsible for it. Rather, when one is merciful, one does not treat them to the extent that is permitted by their action. They are released, entirely or to some extent, from the consequences of their action. Mercy involves admitting that the agent was culpable, whereas any form of exculpation is a removal or reduction in culpability. As well, mercy is a response to, or empathy for, the need in the target. It is not based upon the agent's culpability but it may be based upon extenuating aspects of their behaviour.

(c) Clemency. Of all the concepts within an institutional framework that are similar to mercy, clemency is the closest. To be sure, 'clemency' and 'mercy' are used interchangeably: we talk of the clemency (power) of a monarch, as well as their (power of) mercy, and we mean one and the same thing. Moreover a plea for clemency is made possible only by the existence of the Royal Prerogative of Mercy. There are, however, a number of differences. Clemency has a rather more anonymous flavour about it; it is more institutional. Clemency is confined to a specific power to remit or reduce a penalty that can be imposed upon a wrongdoer. Mercy, in contrast, though the contrast is not very great, is a personal plea for intercession in the institutional process, and as such can occur anywhere in an institution, from the execution of a criminal penalty, through to the application of a rule, for which an official has discretion, governing say building regulations or payment of council rates. Thus, mercy can be exercised in any context whilst clemency can be exercised
only on offenders or wrongdoers.\textsuperscript{35} Clemency is limited to systems that have rules, offenders, and wrongdoers, such as judicial systems, administrative systems and moral systems. Mercy, on the other hand is not limited to such systems.

\textit{(d) Condoning.} When we condone an action we admit that the action that occurred was in some way untoward. However, we do not act merely as if it happened but rather as if it did not matter. We treat the action as if it were not wrong, while admitting that it was, in fact, wrong. To condone something is to ‘turn a blind eye’ and act as if the act was insignificant, whilst all the while accepting that harm was done. On the other hand, when we are merciful we acknowledge the offence, according to one metric, but deny the aptness of the response that usually attends it, by appealing to another. We respond to the offence with less of a burden than might otherwise be expected, on the ground that other considerations license or require a more moderate response.\textsuperscript{36}

\textit{(e) Equity.}\textsuperscript{37} Equity involves tailoring a general institutional rule to the features of an individual case. It involves setting aside a rule that if applied would lead to institutional justice but result in injustice with respect to a wider notion of justice. Cases that stand in need of equitable treatment are cases that fall within the purview of some law but which are morally outside it. The aim of equity is to temper the harshness of an institutional rule, a harshness that arises from the rule’s general nature. Equity involves substituting a wider, broader form of justice for the narrow form practiced within an institution. It softens institutional rules, recognises degrees of culpability that legislators cannot, owing to the fact that institutional rules must be general to be workable. It is a mechanism that enables the law to take account of individual cases that are exceptions to general and coarse rules. For example, a display of equity may occur when a lower penalty is imposed upon an offender who is guilty of some

\textsuperscript{36} Smart, \textit{op. cit.}, p.350, makes a similar point.
\textsuperscript{37} I am not here talking about equity as it is found in the law. But there are similarities. Consider this account from a law dictionary: ‘Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, harshness, and edge of the law, and is an universal truth; it does also assist the law where it is defective and weak in the constitution...and defends the law from crafty evasions, delusions, and new subtleties, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless...’ R. Burrows, (ed.), \textit{Words and Phrases Judicially Defined}, London, 1946, s.v., ‘equity’. Cf. B. Jowitt, \textit{The Dictionary of English Law}, Sweet and Maxwell, London, 1959, s.v., ‘equity’. 

53
offence, an offence that usually calls for a greater penalty. One such example is the treatment meted out to mercy-killers. A person who performs a mercy-killing is guilty, in the eyes of the law, of murder. Yet it would be grossly unjust to impose upon them a penalty similar to one imposed upon a self-interested killer.\textsuperscript{38} In fact they usually receive lower penalties. Such acts of equity are also called acts of mercy as they represent a departure from the ordinary and expected course of legal events.\textsuperscript{39} What this demonstrates is that a single action can have two evaluations: it can be evaluated as an act of mercy, since it represents a departure from the normal course of events; it can also be evaluated as equitable, meaning that it is the correct penalty, from the point of view of justice.

Whilst equity and mercy may achieve the same result, and there is an equitable sense to the notion of ‘mercy’ these concepts are, however, quite distinct. When an agent is equitable, they act out of a concern for justice, widely conceived. Their motive is to avoid injustice. And they may even be described as displaying the virtue of justice, if their action springs from a disposition to do justice.

When an agent is merciful, on the other hand, they act out of a concern to meet the need of a person in their power. They care for the other individual and it is because of this that they act, rather than respect for some principle. Now, it may well be that the best way to meet this need is to perform an equitable action. But the object of such a merciful action is not the agents deserts, but the fact that they are vulnerable to some burden and the equitable action is merely a means of addressing this need. Thus, mercy and equity have different orientations. When merciful, an agent is expressing their concern for another. When equitable, they are expressing their adherence to a principle.

Moreover, mercy is a personal response to the person within one’s power, whilst equity and justice are institutional responses.\textsuperscript{40} Moreover, one may claim equity, as all that amounts to is a claim that someone act justly. This can be pursued in the courts. However, one may only hope

\textsuperscript{39} Cf. Smart, \textit{op. cit.}, p.349; Roberts, \textit{op. cit.}, pp.352-353.
\textsuperscript{40} Thus equity and mercy are distinct and Smart’s claim, (\textit{op. cit.}, pp.348ff) that all we mean when we call a judge merciful is that they are equitable is false. Some times we do mean that they have acted equitably; on other occasions we mean that they have been merciful. And sometimes it can be an act of mercy to be equitable. Moreover, the one action may be capable of two descriptions.
for mercy. That is, hope that the judge sees the force of the prompt in cases where mercy — the virtue or the act — is applicable and needed.

(f) Leniency/lenity. In some contexts mercy is similar to leniency and lenity and is considered to some extent a synonym. Often when we talk of merciful judges we mean nothing more than they are lenient, that they impose lower sentences than other judges. Both concepts refer to a departure from what could be normally expected. For example, the imposition of a lower sentence by a judge when a higher one is permitted, a higher mark by an examiner or easier conditions on a debtor for the repayment of a loan. However, we also do at times distinguish them.

First, leniency may be given in response to no need in the target whatsoever or for reasons irrelevant to the target. For example, a lecturer may decide to mark essays more leniently, on the ground that the material is difficult, ignoring the capacity of the students to cope with it or a judge may be lenient to an offender because she has blue eyes. Thus the lecturer is satisfying no justifiable need of the students. Moreover, leniency may be displayed without reasons grounding the action.

Second, leniency is less morally and institutionally defensible and respectable. A lenient judge may be called to account and may not be praised. And if the leniency is unjustified, they will be be regarded as having performed a wrong action. A merciful judge may also be called to account, but praised. If their mercy is found to have been (legally) wrong, they will be blamed not for wrongdoing but for an error of judgement. They will be merely called misguided: the act was wrong, but the heart was in the right place. Leniency, on the other hand, has the odour of opprobrium. To say that Smith is lenient is some form of criticism. He is not doing what he should. To call Mary merciful is to predicate of her some praiseworthy quality.

Third, the lenient agent simply does not evaluate the circumstances as seriously as other agents, whilst the merciful agent does. She sees the seriousness of the action, but decided not to react to it with the

41. Cf. Webster's New World Dictionary, New York, 1986; Collins English Dictionary, Sydney, 1979; The Macquarie Dictionary, Sydney, 1982, s.v., 'leniency', 'lenient'. Excessive leniency or mercy can also be called lenity; cf., Webster's New World Dictionary, op. cit., s.v., 'mercy'.

55
accustomed, or warranted severity. Thus, there is a sense in which leniency is an impermissible or ungrounded departure from an accepted norm. And when this happens not only once, but habitually we say that the agent is lenient.

Fourth, unjustified mercy may be called leniency or if excessive, lenity. An act of mercy is justified just in case it responds rightly to a relevant need or a prompt possessed by a target. Leniency has associated with it the flavour of undeserved and unacceptable tolerance, indulgence, and permissiveness without foundation. In cases of leniency no such prompt exists. A judge who imposes upon a gangster a penalty lower than warranted by the heinousness of their crime, on the grounds that the gangster has performed many community services, acts wrongly. Here the gangster does not display a prompt that is relevant to a justifiable granting of mercy, such as age, senility, incompetence, or great suffering to name a few. Such a judge has been lenient, not merciful.

(g) Pardon. When we pardon we are freeing an agent from the consequences of their action and setting aside any claim we may have over them. We are not saying that they did not perform the action or that they were not guilty or that they did not deserve to suffer. Rather, we accept that they are guilty and that they do deserve to suffer but remit the penalty that should be imposed, and to which the person is liable, in virtue of the actions they have performed. In this sense, pardon may be, with respect to the rules, unjustified and wrong. There is a sense in which mercy is identical with pardon, for they achieve the same result, and may spring from the same motives.

In general, however, their springs are quite different. One may

42. This is argued at greater length in Chapters Three, Four, Six and Seven.
43. I am not using an exclusively legal account of pardon, as the situation in the law is quite confused: one can be pardoned before guilt is established, or for being innocent. There are disputes as to the effect of a pardon: is the recipient a novus homo, or do the disabilities that usually attend conviction remain? However, the important features of the legal notion are similar to the concept circumscribed here.
44. In law, a pardon may be granted before, during or after prosecution and conviction. Cf. B Jowitt, The Dictionary of English Law, London, 1959, s.v., ‘pardon’ and Cf. Bouvier, op. cit., s.v., ‘pardon’. Strictly, logically speaking, one can only pardon another after guilt has been established, for what a pardon involves is not taking any action against a person who is guilty. It involves letting them off the consequences that normally attend their crime.
45. As Bouvier says: ‘Every pardon granted to the guilty is in derogation of the law; if the pardon be just, the law is bad’, op. cit., s.v., ‘pardon’.
46. De Clementia, Il.vii.
pardon another because it is Tuesday or because it is the monarch's birthday. But these are not acts of mercy for the prompt of the action was not something about the beneficiary. Mercy, on the other hand, is an attempt to ensure that the correct penalty is imposed.\textsuperscript{47} Hence it is an attempt to do what is right. Pardon takes place within an institutional context only, whereas mercy can find expression in a wide variety of contexts. We should not think, as some do, that pardon is an institutional expression of mercy.\textsuperscript{48} Even within an institutional structure, they are quite distinct. Seneca knew well this distinction and set out pardon in these terms:\textsuperscript{49}

\begin{quote}
Pardon is given to a man who ought to be punished...pardon is to fail to punish one whom you judge worthy of punishment; pardon is the remission of a punishment that is due.
\end{quote}

And mercy in these:

\begin{quote}
Mercy...sentences not by the letter of the law but in accordance with what is fair and good; it may acquit and it may assess damages at any value it pleases. It does none of these things as if it were doing any thing less than just, but as if it were the justest thing were that which it has resolved upon.\textsuperscript{50}
\end{quote}

When a person is given mercy, we are saying that the original treatment was wrong, and that the law is in some way defective. When we pardon we are admitting that the law got it right but that the offender will be spared treatment that usually addends the offence for reasons that are unrelated to the properties that the recipient possesses.\textsuperscript{51}

\textbf{§2.7.2. Caring treatments.} The second family has these members:

(a) \textit{Benevolence/charity/kindness/compassion}. The first point to make is that all these actions can at times be quite indistinguishable from acts of mercy and these terms can on occasion be used interchangeably

\begin{thebibliography}{99}
\bibitem{47} loc. cit.
\bibitem{48} Primoratz, \textit{op. cit.}, p.110.
\bibitem{49} \textit{De Clementia}, Bk.II.vii.1-3.
\bibitem{50} loc. cit.
\end{thebibliography}
with mercy: a person, A, who assists another, B, to end her (B's) life can
describe her own (A's) action as an act of mercy or an act of kindness.
However, while these activities may overlap with mercy, we can
distinguish them from mercy by their springs, by elements of the contexts
in which they are performed and by the type of relationship between the
actors.

A person who acts in a kindly manner seeks the good of another
person, usually without any thought about a difference of power between
them or whether the person labours under a great need. In fact, typically,
recipients of kind actions do not labour under a great need, and in terms
of power, are level with the provider. Acts of kindness are expressions of
friendliness. They can be great or small. If the kindly person refrains from
acting in a kindly manner usually no one is going to suffer enormously
as a result. It is a minor act of kindness to let the old lady go before you in
the supermarket line; while it is a greater act of kindness to set aside a few
days to help a newly arrived family of a colleague settle in. Acts of
kindness do not usually involve the transfer of property or the provision
of goods, but rather involve certain sorts of friendly conduct, the
performance of certain sorts of actions that make life easier for others.

Kindness is similar to benevolence. However, the major distinction
is that acts of benevolence assume a power structure and this is
incorporated into the doing of the action. The action in some sense relies
upon it, and involves the benevolent actor not using his power.
Moreover, benevolent actions often involve the giving of property, goods
and so on. An employer who is benevolent is one who refrains from
using his power against his employees when they take unauthorised tea
breaks, and may even allow such breaks beyond those negotiated. Unlike
mercy, however, a benevolent person seeks another's good without
reference to their suffering. In fact, the suffering of the beneficiary makes
no difference to the doing of the action, whereas in the case of mercy,
there must be some degree of suffering or vulnerability.

The first distinction between mercy and charity is that charity
involves giving, donating, providing goods or other items of property,
whereas mercy, as we saw, can involve forbearing. Second, mercy is
directed at some specifiable target whereas charity need not be. Charity
may be general, directed only at the beneficiary's deplorable
circumstances, where as mercy is normally directed at a specifiable need. Thus, an act of charity may aim to assist the beneficiary without addressing a particular need. A display of mercy, on the other hand, springs from an identifiable concern for the agent and is directed at alleviating a particular need.

Moreover, mercy is relational, as it puts the merciful agent in a relation with the receiver and relies for its success on the existence of a relationship of power. Charity need not. Unlike mercy, charity can be displayed between agents of equal power. Mercy, as we saw above, cannot. Consequently, for its operation does not require there be or be believed to be a power structure.

Charity is concerned with the provision of benefits only, whereas mercy is more expansive. It is concerned not only with the provision of benefits but also the moderation of burdens.

The virtue of mercy involves, as suggested above, the capacity to be sensitive to the plight of others and the disposition to act in particular ways towards other agents because of this (by ministering to their needs). They are agents who are within one's power. Now the actions that spring from these dispositions and sensitivities can also be generated by other feelings and motives, such as pity or benevolence and so on. In such cases we would say that such an agent has performed a charitable, or a kind or a benevolent or a merciful act. In this case, as they describe actions, the terms are synonymous. The point is that while on the level of action they often denote the same action, with similar consequences, on a dispositional level they denote always different virtues.

Compassion involves an 'emotional dislike for the harm of others, quite irrespective of any harm to oneself'. It does not, however, involve a characteristic way of acting or acting at all. Mercy, in contrast, involves acting in such a way that the interests of the person within one's power are promoted, rather than harmed. One feels compassion, while one performs acts of mercy.

(b) Forgiveness. Again, mercy and forgiveness are used as synonyms.

For example, we forgive punishments and debts. Such acts, however, can also be acts of mercy. And forgiveness is often used interchangeably with mercy in the Bible. Forgiveness and mercy however, can be distinguished. When we talk of forgiveness we are referring to an action designed to restore a relationship believed by the forgiving agent to have been or be damaged by some untoward act performed by the forgivee. Hence, forgiveness is not concerned, necessarily, with the remission of punishment but with the dissolution of resentment and the rejuvenation of a relationship by the members of a relationship who believe it to have been damaged. Forgiveness involves not merely forbearing resentment, that is not resenting agent X for performing A, but forsaking resentment. That is, in effect, promising not to resent X for performing A. Forgiveness is concerned with the future of the relationship, whilst mercy is concerned with the future welfare of the target. Hence they have different goals.

Moreover, the forgivee need not be within the power of the forgiver. Thus, an inferior can forgive a superior or someone of equal status. Consequently, a power structure is not necessary for an act to be an act of forgiveness. An example of this is the old English custom of the condemned forgiving the headsman.

Mercy, on the other hand, is concerned with the treatment given by one person to another who is within their power and who stands in need of the benefit conferred. Hence there exists in an act of mercy elements that do not exist in the paradigm cases of forgiveness: 1. a power structure; 2. mercy is concerned with treatment given to others; forgiveness is concerned with one side of a relationship, namely the relationship or attitude of the forgiver to the forgivee; 3. forgiveness is concerned with restoring the relationship whilst mercy is concerned to relieve the needs of others.

Moreover, the dispositions that ground them are quite different. Mercy is grounded upon a disposition of concern for welfare; forgiveness on a disposition to dissolve resentment to repair the relationship.

Moreover, mercy may restore a relationship in a way that forgiveness cannot. For example, an act of mercy clearly shows who the powerful agent in a relationship is. Thus an act of mercy may deter future wrongdoing or reform the wrongdoing agent, and in this way make the relationship stronger since it is based upon enhanced respect. Forgiveness strengthens relationships and enhances respect by removing resentment and increasing understanding. Mercy involves alleviating threats and diminishing the vulnerability of one agent to the power of another.

(c) Grace. Often, grace and mercy are identified and the words can at times be synonymous. But at other times we do distinguish them. Acts of grace are often associated with one’s prerogative in virtue of who one is. Thus we talk of God’s grace, the monarch’s grace and the graciousness of the victor. However, acts of grace, unlike act of mercy, or displays of the virtue of mercy, are not necessarily responses to another’s great need or some feature that the beneficiary may have and which prompts the act of grace. An act of grace may occur for reasons totally irrelevant to the beneficiary. For example a teacher may extend the deadline on the submission of an essay because owing to a long weekend she will be unable to mark them. Moreover, acts of grace can be general and the class of recipients undefined. Hence, acts of grace may be unmerited and undeserved. Such an act of grace might involve the widespread pardoning and remission of punishment that occurs in some countries on the occasion of a monarch’s birthday or some national festival. Such actions are not acts of mercy since they are not a response to a need of the beneficiary, but some extraneous circumstance. Moreover, acts of grace can, like mercy, be a ‘holding back’ by an agent of what they could do. So, we have periods of grace — a period of time before legislation comes into force that will enable agents to become familiar with it. Such agents have no need, in the sense discussed above. If such an act of grace were required because of an agent’s need, then the act is an act of mercy. If not, then it is an act of grace.

Acts of grace, therefore, do not necessarily presuppose a need, great or small. For example, the greengrocer who ‘rounds off’ the bill or a

57. We also talk of gracious movement, gracious living and gracious manners.
shopkeeper who accepts $5.95 for a $5.99 item are both performing acts of grace. The beneficiary did not need the remission of payment. Hence an act of grace may be rather more capricious and without reason than an act of mercy: to answer the question: ‘Why did you round off the bill?’ with, ‘I felt like it’ is acceptable. But it won’t do to give that answer to the question: ‘Why were you merciful?’

Furthermore, acts of mercy presuppose a power structure. Acts of grace do not. For example, the customer is not ‘within’ the power of the greengrocer, since the customer can shop elsewhere. Moreover, the price of the produce is not a burden. (But the remission of some of the cost is a benefit.) Nor do acts of mercy presuppose goodwill or a benevolent disposition. Acts of grace do: a person who begrudgingly ‘rounds-off’ the bill has not acted graciously. If they do not have these features they cease to be acts of grace. For acts of grace may not only be capricious and whimsical but they are entirely optional, unconstrained, unrestrained and free. Moreover, acts of grace, unlike acts of mercy, may concern themselves with small things. Recall here the greengrocer. Acts of mercy, on the other hand, concern themselves most often with matters that are dramatic and serious, at least, to the beneficiary.

(d) Pity.58 Mercy has a number of similarities to pity. It is a response to another’s plight. It emanates from a sympathetic response to their misfortune. Like mercy, it may function as a spring for action; so the fact that one feels pity for another may provoke a choice of an option that involves reducing a burden under which another person labours or with which they may be threatened. So, pity like mercy is directed at some target in need, a person without power, whose very ‘personhood’ and autonomy are threatened. It springs, like mercy, from the fact that we value the target and care for them as individuals. Both mercy and pity are recognitions that the target lacks autonomy. Pity is a recognition that one is unable to do very much to alleviate the suffering; mercy is the performance of some action that attempts to alleviate the suffering.

Thus while pity may, like benevolence and kindness, be a spring for an act of mercy, it is not identical to the virtue of mercy. Unlike the

---

58. A good general analysis of pity can be found in E. Callan, ‘The Moral Status of Pity’ CJP, (18:1988), pp.1-12. Many of the points I make here concerning the nature of pity are similar to Callan’s.
virtue of mercy, pity emanates from a disposition to feel for another person’s plight whereas an act of mercy requires no such emotional involvement.

Moreover, pity differs from the virtue of mercy in that pity is an emotion that guides choices but does not in itself enjoin a particular action. Mercy is a different sort of disposition. It aims to meet the need of the person suffering by enjoining appropriate action. Pity does not presuppose a position of power. Mercy does.

Further, feelings of pity may move one to act mercifully but a disposition to be merciful, i.e. remove the burden under which another labours, will not necessarily move one to pity, i.e. feel for the plight of the other person. To feel pity one must be an agent who is sensitive to the pity-producing properties that other agents can possess, and be disposed to feel the emotion to which such a sensitivity gives rise. Thus, pity can be a spring for an act of mercy but cannot ground the virtue of mercy.

§ 2.8. Some Common Misconceptions About Mercy

In this section I want to deal with a number of claims about mercy that could not be properly dealt with in the analysis, but which are resolved by it. Consider Smart’s claim that only offenders can receive mercy.59 This is wrong. Mercy can be given to anyone in great need. This much is clear from the analysis. Kleinig puts the point nicely, ‘The one idea running through all claims for mercy is that of charitable treatment of those who are in need, distress, debt or under threat of some sort, and who are powerless to help themselves’.60

Smart claims that cases where a judge reduces the penalty that normally attends some unlawful action are not really cases of ‘genuine’ mercy although they are ordinarily called mercy. Smart is mistaken. We call such cases of mitigation mercy because the culprit is within the power of the judge and the judge has great discretion in her decision. To be sure, such actions are acts of equity, as they aim to temper a harsh law to the exigencies of the situation. But they are acts of mercy, as they represent a

59. Smart, op. cit., p. 354.
60. Kleinig, (1973), op. cit., p.87.
departure from the normal and expected course of events. Sometime, as noted above, to act mercifully is to perform an action that has the property of being equitable.

Does mercy involve sacrifice on the part of the merciful agent? Whether it does will depend upon what actions are necessary to achieve a merciful release for the beneficiary. For example, a group of people in a life boat take on board an extra person. Yet they have limited food and water. An extra mouth will mean less food all round. Yet they have acted mercifully. Here the act of mercy involved sacrifice because of the limited resources. We can imagine a case where an extra mouth makes no difference. Here the rescuers have been merciful, and ought to have been merciful, yet their act involved no sacrifice. Moreover, it is hard to see just what a Roman emperor sacrificed when he acted mercifully or what a victor on the battlefield sacrifices.

Who can receive mercy? Any agent who stands in need of it. They need not be an offender or a wrongdoer of any sort. And in what context? Any context at all. Is requital, atonement or supplication required? No. For one can be merciful toward an agent whom one knows will not recant, who cannot repay the mercy, (as a king being merciful to a traitor or an impoverished thief), or one who has not asked for it, such as a monarch who releases a conspirator who wished to be a martyr. Moreover, one can be merciful to a person not liable to punishment and whom one believes has done nothing wrong, such as the loser of a duel or a debtor.

Some writers have seen mercy as essentially involving the forgoing of a claim against another or setting aside a personal entitlement. This is mistaken. An act, if it is to be an act of mercy may involve doing this on some occasion. The occasions are usually those that would involve the imposition of a burden, such as enforced repayment of a loan or imposition of a punishment. But there are many acts of mercy that do not involve agents waiving an entitlement or a claim. For example, a soldier who is merciful to his defeated enemy; the benefactor who is merciful to the poor or the official who is merciful in her application of

61. As Roberts suggests, op. cit., p.353.
62. Amongst them: Murphy, op.cit. p176ff; Twambley, op.cit. p.85; Lauritzen, op. cit., pp.143-144.
63. Roberts, op. cit., p.353.
some administrative rule. Giving alms to the poor, which is relieving them of the burden of their plight, can be construed as an act of mercy. We also talk of mercy dashes, mercy flights and mercy killing. These too are attempts to lighten the burden that has fallen upon some person. Such actions are directed at individuals as individuals not as parts of a system. Thus, if mercy is seen as choosing to relieve a burden that a person carries, then we can see why we talk of mercy-killing and merciful releases.

Other writers have assumed that mercy only occurs within the context of the law. This too is mistaken, as our talk about soldiers and duellists and administrators acting mercifully or displaying mercy, as well as talk about mercy-killers, mercy dashes and the like, clearly demonstrates.

Still others have assumed that 'mercy seems to get a grip only on a retributivist view of punishment.' We have seen that mercy is not confined to punishment. When mercy is talked of in the context of punishment there is no reason to think that it must be confined to retributivism. A consequentialist could view merciful treatment and retributive punishment as two penal options. She chooses between the two as the circumstance demands, and in view of her consequentialist goals. Mercy rests most comfortably, not on a retributive outlook, but on an ethic that is concerned with meeting the needs of individual people. It was, we recall, an individual response to the need possessed by a person without power. Such an ethic is one that values the particular, the individual cases, the personal and traits of character. From an ordinary consequentialist's point of view, mercy is possible as it meets the needs of the community. Thus, there is no necessary connection between mercy and retributivism.

What springs can count as springs for mercy? The springs of acts of mercy can take the form of motives and intentions and dispositions. The following motives are candidates: justice, right, equity; as are the following dispositions: benevolence, compassion, love, care,

64. Lauritzen, op. cit., pp.143-4.
66. This will be discussed at greater length in Chapter Four.
commitment, humanitarianism, goodwill, beneficence, pity, sympathy, and empathy. All of them are suitable answers to the question: Why were you merciful?

§2.9. Conclusion

In this chapter I analysed the concept of mercy and distinguished it from some of its near relatives. The conclusions drawn in this chapter will underpin much of the discussion that follows. Our conclusions can be summarised this way: acts of mercy occur within many contexts. Within these contexts, mercy is both a virtue and an action. As a virtue it springs from a certain disposition towards, and a certain sensitivity to, the properties that other agents possess. As an action it springs from any combination of apt dispositions, motives and intentions. Mercy primarily is a response to a need experienced by a person who in that context possesses less power than the merciful agent. If the beneficiary is really not in need or is not powerless then the act misfires, though the act does not cease to be an act of mercy, since there is nothing in the concept of mercy that suggests that it should succeed.

‘Mercy’ describes an action that involves, or a disposition to choose that option that involves, not treating as harshly as one might another person who is ‘within one’s power’, such that the choice, it is believed, will benefit another person. This account of mercy contains many of the elements of mercy: a power structure; a benefactor and a beneficiary; the existence of strong reasons or expectations that mercy will not be forthcoming or is unlikely; a departure from the ordinary course of events; a forbearance from acting, i.e. a decision not to act, and a choice of act-option that involves performing a positive act in virtue of which the merciful agent confers a benefit upon someone who is believed to be vulnerable, and labouring under some burden; an implicit belief on the part of the benefactor that the beneficiary is “within her power” — vulnerable to her acts or omissions. An act of mercy can be characterised as consisting of:67

1. Particular motives, intentions, feelings, attitudes or actions that are

67. For a much shorter, but similar list see S. Sverdlik, ‘Justice and Mercy’, JSP, (16:1985), p.42. Sverdlik does not see that the act must be prompted by the target and that the springs for the merciful act must be apt. Nor does he clearly identify the need for a power structure. It is assumed.
prompted by the target and which are apt;

2. A number of beliefs, the most important of which are:
   a) the belief that the target possesses some property in virtue of which mercy is appropriate. Typically this is the belief that the beneficiary has a need;
   b) the belief that the beneficiary is vulnerable to the acts or omissions of the agent within whose power they are, such that if such actions are (or are not) performed the welfare of the beneficiary will be harmed;

3. A power structure — real or apparent;

4. A belief that forbearing from doing something to another in one’s power, or acting positively, will benefit the other agent;

5. Choosing some option in a range of options that
   a) if not performed it would disadvantage the beneficiary and,
   b) the benefactor has good reason not to do or would not ordinarily do or could not not ordinarily be expected to do;

6. A voluntary action.

The virtue of mercy is simply that property of an agent that is sensitive to particular sorts of needs of another, in particular, the need that an agent has who is vulnerable to another’s acts or omissions. It is a property which disposes the merciful agent to act in such a way as to alleviate this need.

We are now in a position to tackle the problems that have been seen, traditionally at least, to confront mercy. To this we now turn.
Everybody, however, understands that the fact of the case is that mercy consists in stopping short of what might have been deservedly imposed. (Seneca, *De Clementia*, Bk.2.4.1)

§3.1 Introduction

Most of the contemporary debate about the moral acceptability of mercy centres round mercy’s relationship to justice. There has been little attempt to place mercy in a broader moral outlook, and *prima facie*, at least, there are difficulties. As we saw in the Preface and in §1.2, if justice is always a morally good action, then anything that departs from justice must be morally bad. Mercy involves a departure from justice; therefore mercy, by nature, is morally bad. If on the other hand, mercy is morally good, and involves giving someone what they deserve, then it is not clear how mercy differs from justice. These difficulties, which concern the coherence and moral permissibility of mercy, must be resolved if it is even to be possible for mercy to have any (positive) moral status at all. Moreover, justice is an important part of our moral life. It is important to determine how other venerated concepts (such as mercy) relate to it.

Although consequentialists can value and can focus on justice, and often make room for it in their outlook, justice is most often associated with deontology. In fact, it is often thought to be one of the essential values, if not the primary value, of any deontological outlook. I am, in this chapter, concerned with justice when it exemplifies the deontological point of view.

The contemporary debate about mercy has by and large assumed a deontological focus on justice, and the conundrums have been cast very much against this background. Now, given that the relationship between mercy and justice seems problematic, and that justice does form an essential part of a deontological outlook, an examination of the relationship between mercy and deontology must involve focusing on
the relationship between mercy and justice. And it seems clear that if mercy cannot be reconciled with justice, then a deontologist who values justice, as almost all traditional forms of deontology do, can find no place for mercy.

In this chapter, then, I have two tasks. First, I seek to address the problems that dominate the contemporary debate about mercy; thus, I examine the relationship between mercy and non-institutional justice. Second, by doing that I shall explicate the relationship between mercy and deontology, and determine whether a deontologist can accommodate mercy.

I shall proceed in the following way. I shall, first of all, sketch the background against which the discussion takes place. This will involve setting out an account of deontology. It will be against this account of deontology that the discussion takes place. Then I shall set out the difficulties that are perceived to exist in the relationship of mercy to justice (§3.3). Then I shall set out my solutions to them. As we saw in Chapter Two, mercy can be a property of actions or of people. I shall begin with an examination of mercy and justice as properties of actions (§3.4). Then in §3.5 I shall determine whether mercy and justice are compatible as properties of people. This discussion will take place mainly in connection with the first conundrum. Then I shall examine the second conundrum. Finally, in §3.6 I shall set out my account of the relationship of mercy to justice and desert.

In broad terms, the view that I take is this: mercy and justice do conflict in some respects. But this, I will argue, is of no moral or conceptual significance. I also will suggest that mercy is one of a number of responses that one agent may make to another agent. Another response is justice. Consequently, the relationship of mercy to justice is to be seen in terms of each being a moral option. The task for the morally inclined agent is to determine what option it would be right, fitting or appropriate on some occasion to choose.

---
1. §3.2
§3.2. Background.

a). Justice. Many different kinds of things, as Rawls rightly points out, are said to be just and unjust. Amongst them, he claims, are,

...not only laws, institutions, social systems, but also particular actions of many kinds, including decisions, judgements, and imputations. We also call the attitudes and dispositions of persons, and persons themselves, just and unjust.2

Thus, in virtue of the actions they perform and the dispositions they display, agents can be said to act justly or unjustly, be just or unjust persons, and have just or unjust personality traits. Now, as we saw,3 'mercy' can refer to an action and to a disposition or a virtue. Consequently, I am concerned with the relationship of mercy not only to just actions, but to just dispositions and the just personality.

The actual property possessed by some state of affairs that is described by the epithet 'is just' can vary; but in all cases justice consists in giving a person what she is due.4 In some just states of affairs, an offender, 'gets what he deserves'. This is retributive justice. In other just states of affairs, a person receives what she is owed, as when a contract or agreement is honoured. This is consensual justice. Both these states of affairs are forms of what Joel Feinberg calls 'non-comparative justice'.5 What is due to a person is determined independently of what is due to other people. To examine the relationship of mercy to non-comparative justice, I shall consider only retributive and consensual justice.

In other just states of affairs a person receives what they are due when they receive a similar treatment to that visited upon other relevantly similar agents. An agent's due is determined only by reference to her similarity with other agents. This can be called 'justice as fairness', and is an example of 'comparative justice'.6 I shall examine the

3. §2.3.
4. J. Feinberg, 'Non-Comparative Justice', P.R., (83:1974), pp. 297-338, at p.298. One should add that not all cases of giving someone what they are due are cases of justice. Love, affection and care are 'due' to one's children, but they do not have a justice based complaint if one fails to provide. Such a parent has treated their off-spring wrongly or badly, but it sounds strange to say that they have been treated unjustly.
5. loc. cit.
6. loc. cit.
relationship of mercy to these different types of justice. I have chosen these types of justice because it is with respect to them that mercy is most often viewed and the conundrums are perceived.

b). Deontology. Deontology is one of a number of non-consequentialist theories that are proposed as alternatives to consequentialism. Consequentialism, roughly, maintains that agents are required to act in that way which is expected to promote value overall. In other words, that the only morally acceptable response to some value is to perform that action which, it is expected, will leave the world in the wake of the action with at least as much value as any alternative open to the agent. Non-consequentialists, on the other hand, take the view that agents are not required to act in that way which it is expected will promote value overall. They hold that the only morally acceptable response of agents to values is non-instrumental; that, ‘agents are required or at least allowed to let their actions exemplify a designated value, even if this makes for a lesser realisation of the value overall.’

Thus, a non-consequentialist holds that agents are occasionally allowed to act in such a way that fails to promote the values to which they are committed.

Consider this example: suppose peace is considered a value that ought to be realised. The non-consequentialist holds that the right response to such a judgment is to perform actions that exemplify this value; in other words, behave in a peaceable manner. Non-consequentialists, therefore, enjoin agents to produce states of affairs that possess or exemplify the property of being peaceable — rather than enjoin them to perform actions, which individually may not be peaceable, but whose consequences maximise realisation of that value.

Non-consequentialists who hold that agents are required to perform only those actions that exemplify or honour some value, even if this results in these values not being promoted, are deontologists. They maintain — and this is the distinguishing characteristic of their theory — that an action, or some other object-capable of evaluation, is right only in

7. I provide a much more detailed account of consequentialism in §4.3
so far as it exemplifies a certain value. Deontology, then, is the doctrine that values are to be exemplified and respected in one’s actions, whether or not a state of affairs is produced in which that value generally is manifested, or a greater level of value is realised overall. Thus agents are enjoined to act in a way that has good-making properties, rather than perform actions whose consequences maximise realisation of such values. Consider this example. Suppose some agent believes that just deserts are morally valuable. A deontologist will respond to an agent’s just deserts by honouring them, imposing or inflicting them, no matter the consequences: they are to be respected. They cannot be set aside in order to further some other goal that the agent may have. For example, depending on the case a judge could inflict less than an agent’s just deserts or more as in the case of an exemplary punishment, in order to further social harmony.

This characterisation of consequentialism and deontology rests upon the assumption that all moral theories involve at least two components: a theory of what is good or valuable — a theory of the good, and a theory of how agents should respond to good or valuable properties — a theory of the right.\textsuperscript{10} Deontologists have a particular theory of the right, and it is this that distinguishes deontology from other forms of non-consequentialism. It must be pointed out, however, that although certain deontologists, such as Kant or Ross had their own theory of the good, no particular theory of the good is linked conceptually to deontology. In principle, a deontologist could have any theory of the good.

Not every philosopher would agree with this characterisation of deontology. Some would deny that deontology has a theory of the good at all; others say that ‘deontology derives goodness from obligation’.\textsuperscript{11} It is outside the scope of this dissertation to enter into a debate about the relative merits of the various accounts of deontology. It must be noted, however, that it is difficult to see how a deontologist could maintain that she has no theory of the good. If she acknowledges universalizability, then she will be committed to thinking in terms of what sorts of actions are right for given sorts of agents to perform in given sorts of circumstances. To say that is to commit the deontologist to evaluating

\textsuperscript{10} Here I follow Philip Pettit, \textit{op. cit.}, pp.230-240 at p.230.

certain sorts of states of affairs (namely, all those states of affairs in which agents act as the deontologist prescribes) as morally preferable and commendable; in other words, good. Suppose that a deontologist says that parents ought to care for the welfare of their children. If she admits universalizability, then she is committed to saying that all those states of affairs in which parents care for their children are morally preferable and commendable, i.e., good. Were a deontologist to deny this she would be preventing deontology from possessing any moral importance.

§3.3. The Conundrums.

§3.3.1. The Conundrum of Compatibility. The most perspicuous formulation of Anselm's conundrums to date has been made by Jeffrie Murphy. Although Murphy claims he is concerned with the relationship between mercy and legal retributive justice, his formulations are general formulations and clearly concern the relationship, in general terms, between mercy and justice, broadly conceived. Murphy sets Anselm's first worry out this way:

If mercy requires a tempering of justice, then there is a sense in which mercy may require a departure from justice, since mercy involves treating a person within one's power less harshly than, in the absence of mercy, one would have treated them. Thus to be merciful is...to be unjust. But it is a vice, not a virtue, to manifest injustice. Thus mercy must be, not a virtue but a vice...13

The problem lurking in the first conundrum is clear: How can an action be compatible with retributive or consensual justice that must be, by its nature, autonomous from retributive justice14 and requires the deliverances of these types of justice to be set aside (or tempered)? An agent cannot be, at the one time, both merciful and (retributively or consensually) just. Mercy and these types of justice are incompatible in

---

12. I owe this point to Philip Pettit. Vide, Pettit, op. cit., passim.
14. Mercy must be autonomous, i.e. different from justice, otherwise mercy could not temper justice. If they were not autonomous, justice would be tempering itself.
that they cannot be realised simultaneously: to realise one is not to realise the other.

From this problem unwelcome results follow very quickly. If mercy is incompatible with retributive or consensual justice, it involves being unjust. Since these types of justice are (assumed to be) morally praiseworthy and permissible, it seems to follow that mercy is not; mercy is wrong rather than right. This contradicts some of the most important of our pre-theoretical beliefs about mercy, namely that it is morally right and praiseworthy.

Further, mercy seems to involve a departure from retributive or consensual justice. To depart from retributive justice is to act unjustly. So, to display mercy is to act unjustly. It is a vice to act unjustly. Thus, mercy is a vice, and wrong. (We can also reach this conclusion by arguing that anything that is incompatible with (retributive or consensual) justice is a vice.) We must conclude that 'mercy' is incoherent.

So far this problem has been cast in terms of non-comparative justice. What of comparative justice? It is ordinarily supposed that we are free to be merciful or not as we please. A single act of mercy does not commit us to acting fairly in similar circumstances. Yet, an act of mercy to one agent and not to another agent similar in the relevant respects, would seem to involve wrongdoing, as it would involve a breach of comparative justice. For example, what could justify a judge imposing a ten year penalty on agent A and five years on B when they committed the same crime? Mercy seemingly licences a departure from comparative justice — that is, licences injustice. Thus, mercy, apparently permits one course of action; comparative justice seems to demand another.\(^\text{15}\) From this it would follow that mercy is incompatible with comparative justice, and is on that count, wrong.

We require then a formulation of this conundrum that will expose the incompatibility problem, and from which its consequences can be

\(^\text{15}\) Now, of course, an agent can decide to be merciful to a similar agent on a latter occasion because she is identical to one who has received mercy already. But that is not the problem. The problem is that we believe that mere performance of a merciful action is not sufficient to produce a moral obligation to be merciful to subsequent and similar cases. Moreover, we also believe that the mere performance of some action, such as remitting a punishment, is enough to generate a moral obligation to repeat the action for relevantly similar cases.
easily derived. I suggest the following:

**Conundrum 1: The Conundrum of Compatibility (C1):**

1. Mercy is autonomous and distinct yet compatible with justice.
2. Mercy involves treating a person differently from the way they would have been treated if justice had been allowed to take its course. It tempers justice. (In fact mercy can only temper justice if it is autonomous and distinct from justice.)
3. Justice is treating agents as they should be treated.
4. Since mercy tempers justice, it involves a departure from justice.
5. Anything that departs from justice is incompatible with justice.
6. Therefore, mercy is incompatible with justice.

§3.3.2. The Conundrum of Redundancy. Now the response to this puzzle has been to attempt to avoid it by arguing that mercy is part of justice, or an adjustment to justice. But if we argue this, then it is difficult to see how mercy is different and autonomous from justice. And autonomous it must be. For we believe that 'mercy tempers justice', a belief which is based upon the assumption that mercy is autonomous. (And if mercy were not autonomous from justice, such expressions would have justice tempering itself; and exhortations to be merciful rather than just would be nonsense.) Moreover, the very attraction of mercy is that by its nature it involves not doing what is possible in justice, to do. This conundrum too has received different formulations over the years. Consider these two. Murphy gives this formulation:

...if we simply use the term 'mercy' to refer to certain of the demands of justice (e.g., the demand for individuation), then mercy ceases to be an autonomous virtue and instead becomes a part of (is reducible to a part of) justice.16

James Sterba makes the same point this way:

If we assume that a person can deserve mercy and that justice is giving people what they deserve then mercy would be required by justice. But then, what are we to make of the admonition to temper justice with

---

Chapter Three: Mercy and Deontology

It seems that an unintended result of attempting to justify mercy is that it ceases to be autonomous from justice. If, however, the autonomy of mercy is denied, mercy becomes part of another moral entity, typically justice. Talk of mercy tempering justice would then be unintelligible - for justice would be tempering itself and that is nonsense. Further, the autonomy of mercy is assumed as indicated by the way we talk about it. Mercy tempers justice. Mercy delivers an outcome that is different from the outcome justice would deliver. This conundrum rests upon the denial of autonomy. I suggest the following formulation:

Conundrum 2: The Conundrum of Redundancy (C2):

1. Mercy is thought to be morally right, yet non-identical with, and autonomous from, justice.
2. Mercy involves giving another person what they are due.
3. Justice involves giving another person what they are due.
4. Since mercy and justice involve doing the same thing (i.e. giving people what they are due or what they deserve) they are identical and mercy is not autonomous from justice. It is redundant.

The first two conundrums form, what might colloquially be called, a dilemma: if we assume that mercy is unrelated to justice, that it is autonomous from justice, then it seems to incompatible with justice. Thus, contrary to our pre-theoretical beliefs, the concept is incoherent and the practice is unjustified and wrong. On the other hand, if mercy is related to justice because it 'does the same work' as justice, such as individuation of treatment (in other words, it involves giving another person her due) and is because of this compatible with justice, it ceases to be autonomous from justice and a morally independent entity. This too is opposed to our pre-theoretical beliefs about mercy. Whichever horn is accepted the model of mercy in it contradicts our pre-theoretical notions about mercy. In other words, the concept of mercy seems incoherent: mercy, it seems, can only be autonomous from (unrelated to) justice at the cost of its compatibility with justice (since it is unjustified and wrong); or compatible with (related to) justice at the cost of losing its autonomy (but with the result that it is morally right).

17. J. Sterba, op. cit., p.11.
Chapter Three: Mercy and Deontology

§ 3.4. Solutions: C1: The Conundrum of Compatibility.

§3.4.1. The Compatibility of Mercy With Justice. In this section I want first of all to determine just to what extent and in what sense mercy as an action is compatible with the various forms of justice set out above.18 This is the most important conundrum. If it succeeds then we must conclude that mercy is a morally dubious entity to say the least, and the concept is incoherent. While the conundrums are directed at mercy as an action, and we shall consider these first, it will be necessary in order to determine mercy’s moral status, for us to consider the conundrums with respect to mercy as a property of agents. As we will see, there are senses in which mercy, as both an action and a property of agents is incompatible with justice. In the next section (§3.5) I shall present a solution to these problems and argue that these problems are of no moral or conceptual consequence. Before we proceed any further we must become clear about what ‘compatible’ means and distinguish a number of different types of retributive justice.

(a). Acts of Mercy and Acts of Justice: Background. The conundrum is, we recall, this: mercy is believed to be compatible with justice. When mercy is exercised, an agent departs from what it is necessary in justice to do. This is what mercy involves. Any departure from justice is morally wrong. Therefore, mercy is incompatible with justice and morally wrong.

It is clear that this conundrum can only arise if mercy is believed both to be autonomous from justice, yet compatible, in some sense, with justice. It cannot be doubted that mercy is autonomous from justice. How else, unless mercy is distinct and autonomous from justice, that is, some different sort of activity, can we make sense of the admonition to ‘temper justice with mercy’? Now, given this, the first conundrum raises three quite distinct issues: 1). the compatibility of mercy and justice from a logical point of view, 2). how, if an agent cannot both be merciful and just can mercy be morally permissible, and 3). how, if mercy is incompatible with justice, can it still be a virtue. (This last question will be answered in §3.5.)

‘Compatibility’ is at the heart of the first conundrum. What does it mean? When mercy is predicated of an action, we are signifying the fact

18. I.e., in §3.2
that the action has the property of reducing suffering or a burden of some kind, in a context where it is possible for the benefactor to ignore the plight of the (prospective) beneficiary with some degree of (immediate at least) impunity, and the benefactor would be normally expected to do so or likely to do so. Thus, the act of mercy signifies a departure from the ordinary and expected course of events.

The claim that 'mercy is compatible with justice' when used with respect to actions refers to the fact that the property of 'being merciful' and the property of 'being just' can be predicated simultaneously of the one action. In other words, an action can have, simultaneously, two separate evaluations: 'is merciful' and 'is just'. Another example of compatibility is this: we might say of the one action that it is 'lively' and that it is 'thoughtful'.

Before going on to examine the first conundrum we need briefly to examine the notion of retributive justice. Retributive justice can be of two types: soft retributive justice, and hard retributive justice.19 Soft retributive justice is the view that justice permits, allows, licences or gives a person a right, ceteris paribus, to treat another in a particular way. However, there is no requirement or obligation to do so. In other words, it is not wrong to treat the person to less of a burden than justice allows or permits - although it is wrong to treat them to more. Soft retributive justice specifies no treatment in particular - only a level which must not be exceeded. Suppose that Jones has borrowed a sum of money from Smith, promising to repay it at some specified date. Suppose also that Jones agreed that if he did not repay the debt on time that he would be liable to pay Smith a specified surcharge. Now, Jones does not repay the loan on time. He is, therefore, liable to pay the surcharge and Smith has a justice-based right not only to repayment of the loan, but to payment of the surcharge. However, Smith is not required by justice to exact the payment of the surcharge. Moreover, the surcharge cannot exceed the limit specified in their agreement.

Hard retributive justice, on the other hand, holds that a person must be treated in a particular way - nothing more, nothing less. It is a breach

19. I am not concerned here with the cogency of these notions. I criticise the notion of 'soft retributive justice' in my paper 'Saving Grace', op. cit.
of justice to fail to do so. Suppose that there exists an ideal moral agent, who always does what justice requires - the Christian God or the Stoic Sapiens are two examples. Now, hard retributive justice holds that an agent must receive exactly what they deserve. If hard retributive justice requires a particular treatment, then such ideal moral agents must inflict exactly that treatment, and it would be wrong of them not to do so. The distinction is between a treatment justice requires or obliges be imposed (hard retributive justice); and what justice allows, permits, licences or gives a right to impose, (soft retributive justice).

(b). Soft retributive justice and mercy as properties of actions. Mercy will be compatible with this form of justice, if it is never the case that an action that has the property of ‘being merciful’ is not prevented by having that property, of also having the property of ‘being just’ predicated of it. Under what circumstances is this possible?

Soft retributive justice, we recall, specifies no treatment in particular - only a level which must not be exceeded. If this is the case then a merciful agent cannot depart from soft retributive justice. Why? Simply because the operation of mercy involves imposing less than the maximum burden an action licensed by soft retributive justice. Mercy does not result in a treatment different from the treatment set down by soft retributive justice - for no level in particular - only a level which must not be exceeded - has been specified. Consequently, justice and mercy as properties of actions are compatible if justice is seen as soft retributive justice. An agent can, on this account of justice, be both merciful and just. To be sure, it is never the case that a person can perform an action with the property of ‘being merciful’ and by that be prevented from performing an action with the property of ‘being just’. So,

20. In the case of benefits, soft retributive justice will specify a level of treatment that it would be wrong to fall below. Mercy, in that case, would involve giving more of a benefit than had been specified. It involves an over-subscription of treatment. On grounds of soft retributive justice such over-subscription would not be wrong, as it is wrong only to fall below the specified level. Now it might be suggested that soft retributive justice could hold two specifications: an upper limit that can not be exceeded and a lower level that below which the treatment cannot fall. Would mercy be problematic? Only if, in the case of benefits it exceeded the upper level, or in the case of burdens, fell below the lower level. But that problem is identical to the problem of the compatibility of hard retributive justice and mercy. This is discussed below.

21. I leave open the question whether mercy can involve imposing more than the minimum benefit. But if it can - and I would argue that it can - then this solution works just as well.

22. This is the solution offered by Armstrong, op. cit., p.155, and Murphy, op. cit., pp.178-180 amongst others. As we shall see, below, it does not completely dissolve the paradox.
mercy and soft retributive justice are compatible as properties of actions.

(c). Hard retributive justice and mercy as properties of actions. Hard retributive justice specifies a particular treatment and requires that it be inflicted. An action that has the property of 'being hard-retributively just' inflicts exactly the burden or benefit required. An action that has the property of 'being merciful' alleviates burdens, threats or the suffering of another or bestows more of a benefit than hard retributive justice requires. Therefore, the goal of merciful action is different from the goal of action that honours the requirements of hard retributive justice. This is why agents are merciful. It is this difference in the goal of the actions that distinguishes acts of mercy from acts of hard retributive justice. Since the consequences are different, and would always be different, mercy and hard retributive justice as the properties of actions are always incompatible.23

(d). Consensual justice and mercy as properties of actions. 'Consensual justice' refers to obligations agents have to other agents in virtue of agreements they make. Examples of consensual justice include contracting debts, making promises, fighting duels, playing games and so on. Now if this obligation was created under just circumstances, then the person owed the obligation has a justice-based right to claim the obligation be met. However, they are not, other things being equal,  

23. There are two circumstances in which mercy and hard retributive justice are compatible. (a). When it involves imposing a burden. Suppose some judge, who is charged with inflicting hard retributive justice has before him a culprit whom he detests. He could be untrue to the duties of his office and impose a penalty that was excessive and went beyond what justice required. He knows that he may well get away with doing this. In the end he relents, in response to some misfortune that the culprit has suffered, and, acting mercifully, imposes the penalty prescribed by hard retributive justice. In this case, the judge has acted mercifully and done what was required of him by justice, yet also performed an act of mercy. His action can be described both as an act of mercy and as an act of hard retributive justice. Sometimes it can be an act of mercy to do justice — especially when there is a temptation to act harshly. (This same argument can be used to show that mercy and comparative justice can on some occasions be compatible; it can be an act of mercy to act fairly.) In these sorts of cases mercy is compatible with these forms of justice because it does not involve a departure from justice, but rather involves not doing what one has the capacity to do. When, however, agents are not faced with such temptations, and their choice is between doing hard retributive justice (or comparative justice), and mercy, then these two forms of justice and mercy as properties of actions are incompatible. (b). When it involves imposing a benefit. Suppose that hard retributive justice specifies that a particular benefit be bestowed. Suppose also that the agent charged with bestowing the benefit is tempted not to. However, they act mercifully and relent. If the action they perform involves bestowing a benefit to the same level as that required by hard retributive justice then mercy and hard retributive justice are compatible; i.e., being merciful and being hard-retributively just can both be predicated of the same action. (This seems to be the sort of solution Kleinig had in mind; vide, Kleinig (1973), p.88.) The problem with these two solutions is that there are many different types of mercy apart from this, and they are thought to be morally acceptable.
obliged or required by justice to enforce their right and they may waive their rights as they please, without acting, for the point of view of consensual justice, unjustly. Consensual justice is a form of 'soft' justice: the agent with the justice-based power has a licence to act but there is no (consensual) justice-based requirement for her to exercise her power. So, just as an act of mercy is compatible with the requirements of soft retributive justice, it is compatible with consensual justice for the same reason: there is no requirement to act in a particular way from the point of view of consensual justice, and the agent is free to choose. Mercy, in this context, is forbearing from enforcing an obligation owed, or releasing an obligated agent from a promise and freeing them of the burden of meeting that obligation.

(e). Comparative justice and mercy as properties of actions. So far only the relationship between mercy and non-comparative justice has been examined. What then of mercy's relation to 'comparative' justice? This is the problem of whether mercy allows an agent to escape the moral requirement that relevantly similar cases be treated similarly. Mercy, if it is some sort of gift, would allow such differential treatment. That would be morally obnoxious, as comparative justice requires agents to act fairly, and mercy seemingly licences unfairness. Thus, it seems that mercy and comparative justice are incompatible, for an agent cannot perform an act that has the properties of being merciful and being comparatively just.

To sum up the following appears to be the case. Mercy and hard retributive justice and comparative justice are incompatible when they are properties of actions. However, mercy is compatible with soft retributive justice when they are properties of actions. These conclusions are set out in the following table:
Things look bleak for mercy. To be sure it seems that mercy is, to some extent, incompatible with justice, and if, as for Kant, all other goods are valued with respect to their compatibility with justice, [i.e. if compatible then morally acceptable; if incompatible then morally obnoxious], then mercy can find no place in a deontologist’s moral outlook.

How then can we account for mercy in our moral life? We need to do two things. 1). argue for a re-interpretation of ‘compatibility’ to show how mercy and justice can be reconciled. 2). show how, in those cases where they cannot be reconciled, that the departures from hard retributive justice that occur when mercy is exercised are not necessarily vices or wrong, and are of no moral or conceptual significance. To this I now turn.

§3.5. Dissolving the Conundrum

§3.5.1. Mercy and justice as properties of actions. The solution that follows applies equally well to comparative and non-comparative justice, although in the case of comparative justice I go into further detail in §3.5.2. We can begin by conceding that justice is not the primary arbiter of goodness and badness — or right and wrong; that objects can conflict with justice — and still be morally good and right. Then, it seems to me, we can argue that mercy, as an action is good and because of this is, like all the other goods, a prima facie duty. It is one amongst many goods, others

<table>
<thead>
<tr>
<th>Mercy and Justice as Properties of Actions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Soft Retributive Justice</td>
</tr>
<tr>
<td>Hard Retributive Justice</td>
</tr>
<tr>
<td>Consensual Justice</td>
</tr>
<tr>
<td>Comparative Justice</td>
</tr>
<tr>
<td>Compatible</td>
</tr>
<tr>
<td>Incompatible</td>
</tr>
<tr>
<td>Compatible</td>
</tr>
<tr>
<td>Incompatible</td>
</tr>
</tbody>
</table>

82
being justice, as well as other manifestations of care, such as benevolence, charity, friendship and so on, respect, courage, constancy, to name a few. Each is ‘good-making’. The problem the deontologist, (or any other theorist for that matter), faces is settling on a principle to be used to determine what his actual duty is.

It may be objected that there is a simpler solution to this. Namely, that mercy is an ‘imperfect duty’. An ‘imperfect duty’ might be defined as ‘a duty that admits of wide latitude in the time and manner of its fulfillment’. The aim of such a claim is to enable us to make sense of the pre-theoretical belief that there is some sort of ‘duty’ to be merciful, while at the same time preserving the other pre-theoretical belief that acts of mercy are unconstraining. Calling something an ‘imperfect duty’, however, does not enable one to evade the rational requirement that similar cases be treated similarly. Suppose that mercy is an ‘imperfect duty’ and suppose that Lord Jim is merciful to a wrongdoer. Now if this is a rational action, then the action will be performed for particular reasons that relate to the properties of the beneficiary. And any other agent, ceteris paribus, who has these properties must — rationally and morally must — enjoy an identical treatment. The fact that Lord Jim was merciful once is enough to generate a rational requirement to replicate his merciful action. Thus, one cannot appeal to the notion of an ‘imperfect duty’ to avoid the apparent problem that mercy is thought unconstraining, but if a rational action, it must be.

How are we to make this choice between two incompatible actions? Again the answer is straightforward. An action, Φ, rationally and morally must be chosen when the realisation of Φ is the morally appropriate option amongst a range of options. It will be right when it is one’s reflectively chosen duty.

We can recast this solution more clearly. A just state of affairs can be distinguished from a right state of affairs in terms of the properties or features each has. A just state of affairs — a state of affairs picked out by the predicate ‘is just’ — is one of the class of states of affairs that has right-making properties. Just-making properties, then, are one of the class of

24. Murphy, op. cit., p.183.
25. Murphy, loc. cit.
right-making properties. The following definition is suggested:

'is just' =df 'has a certain set of right-making properties.'

'Merciful', on the other hand, when used to refer to a morally praiseworthy act of mercy, refers to an option that possess certain right-making properties. So we obtain:

'is merciful' =df 'has a certain set of right-making properties'.

There would, of course, be other right states of affairs apart from merciful and just ones, for example charitable ones. The point is this: merciful states of affairs are one member of the class of right states of affairs. We can set this point out diagrammatically thus:

![Diagram]

**KEY**

A: Properties that states of affairs may have.
B: The set of right-making properties.
C: The set of right-making properties that are mercy-making.
D: The set of right-making properties that are mercy-making and just making.
E: The set of right-making properties that are justice-making.

Now, to depart from justice is to choose a state of affairs that lacks at least one of the set of right-making properties that are associated with the just state of affairs, that is appropriate to the circumstances at hand.
Similarly, to depart from a merciful state of affairs, on the other hand, is to choose a state of affairs that lacks one of the set of right-making properties associated with merciful action. Such a state of affairs lacks the property of possessing that property associated with mercy that are right-making, and relevant to the circumstances at hand.

When we urge that ‘mercy should temper justice’, and claim that it is the ‘right thing to do’, we are saying that we ought to choose a merciful state of affairs over a just state of affairs, simply because it possesses those right-making properties that we, through rational reflection, or through testing by some principle, conclude it to be our duty to honour.

The supreme goal of action is not, then, to do justice — as assumed in the first conundrum. Morality consists in more than doing justice or doing one’s duty. Rather, it involves harmonising one’s values, and by that, doing what is right. Sometimes it will be right to be merciful and not just, and other times just but not merciful. Whether we should be merciful or just will depend largely upon the properties possessed by the case before us and the circumstances. On this view, acts of mercy will be incompatible with acts of hard retributive justice, if that is the only choice an agent has. However, even though simultaneously unrealisable, they are nevertheless morally permissible. Thus, mercy is not prohibited simply because being merciful sometimes involves an agent setting justice aside.

The upshot of the argument is that mercy can find a place in a deontological outlook if the deontologist allows that justice is only one amongst a range of good options and it is the task of the moral philosopher to determine which one is morally appropriate on some occasion. This view presupposes that justice can be ‘trumped’. Can it? This, we saw, could occur in two ways: either by conceding that justice involved was a permission rather than a requirement to treat another agent in a particular way; or by claiming that while justice required a particular treatment, on occasion other moral principles could outweigh the claims of justice and permit – or require - a different treatment. So the claims of justice remained – but were trumped. This can be described by using W.D. Ross’ terminology; we have a prima facie duty to act

mercifully, and a *prima facie* duty to be just, but only one duty all-things-considered, which through rational reflection we have to discover. In this vein, H. J. McCloskey, writes generally:

...the claims of justice are simply one sort among *prima facie* claims and...they may on occasion be overridden, so that it may be morally right, even though unjust to inflict various...punishments [that are] unjust but useful punishments.  

When within justice — comparative or non-comparative — is an act of mercy justified? Mercy would be justified when other non-retributive considerations are forceful. For example, in consensual justice, a debt might be remitted because the debtor is so impoverished that to press for repayment of the debt would destroy him. Here we are reacting, not to the debtor’s deserts but to them as a person, with needs and feelings. Perhaps underlying such a remission is a value judgement along the lines that an unnecessary, as opposed to undeserved, infliction of suffering is wrong.

§3.5.2. Comparative justice and mercy as properties of actions. Were we to conclude that we have a duty of comparative justice after exercising mercy on one occasion, where would this conclusion leave the belief that acts of mercy are immune to the claims of comparative justice? This is one question that needs to be answered before the conclusion set out above is acceptable. The two beliefs that generate this problem are, first, that out of fairness agents are committed to replicating the merciful action. Second, that the performance an a single act of mercy does not commit an agent to replication. In dissolving this antinomy we need to distinguish two cases. Case A: an initial act of mercy, at T1, and whether fairness requires, without exception, that such an act be replicated, subsequently, at Tn, over similar cases, *ceteris paribus*.  

---

27. *JP.*, (64:1967), p. 102. And utilitarians too argue this way: *vide*, Sidgwick [*Methods of Ethics*, Bk. III, Ch. VIII, 1930, p.32] says, We are even accustomed to praise mercy which spares even deserved punishment: because though use never exactly disapprove of the infliction of deserved punishment and hold it to be generally a duty of government — and in certain cases of private persons — to inflict it, we do not think that this duty admits of no exceptions; we think that in exceptional cases considerations not strictly relevant to the question of justice may be properly regarded as reasons for remitting punishment, and we admire the sympathetic nature that eagerly avails itself of these legitimate occasions for remission.  


29. The point of the *ceteris paribus* clause is that if a merciful agent’s circumstances change such that it is no longer possible for her to be merciful, then the principle of fairness cannot get a grip.
If it was right to perform an act of mercy, then fairness requires replication of the action. Merely acting mercifully will not create an obligation; it will create an obligation only if the initial act of mercy or was morally appropriate and it was reasonable to require it of an agent. This is merely to point to the fact that if some act is right and ought to be performed, then over similar cases, the act morally must be replicated. (It might be argued that mercy is a gift and that fairness cannot require of us that we be fair in our giving of gifts. I argue below that mercy is a certain sort of gift and, in virtue of this, it avoids this difficulty.)

Case B: two agents, Tom and Charles, are identical with respect to the action they performed, their subsequent behaviour and their general characters. At T1, Tom does not receive mercy, and receives instead P; whilst at T2, Charles does receive mercy. We are faced, it seems, with two possibilities: either it was wrong to be merciful to Charles at T2 or it was right to be merciful to him and therefore it was wrong to treat Tom to P at T1. Again the solution is simple. If mercy was the right action to perform and it ought to be performed, whether at T1 or T2, then the agent who was not treated mercifully was treated unfairly.

The moral from all this is clear: The fact that an act was described as ‘an act of mercy’ does not enable us to escape the requirement that, in ordinary circumstances, cases that are similar with respect to their morally relevant properties must be treated similarly.30 Although in extra-ordinary circumstances, when the act of mercy was more than could be reasonably expected of an agent, or if there are other overriding considerations, this requirement does not apply and partiality is morally acceptable.

This is to recognise a simple point. What we can be enjoined to do is constrained by not only our physical and psychological capacities but what it is reasonable to expect the ordinary person to sacrifice, or the lengths to which it is reasonable to expect an agent to go. We cannot morally require

---

30. Of course what will count as a similar (or dissimilar) case, will differ whether we look at the cases from the point of view of justice or from the point of view of mercy. For example, that fact that one agent may have a thoroughly evil character, whilst another agent who performed a similar wrong action, lacks an on-going evil motivational structure, would provide grounds for being merciful to the latter but not the former. Yet on many accounts of justice, this would not provide grounds for treating them differently from the point of view of justice, as it is one’s actions and responsibility for them that matter most, not one’s wickedness.
Chapter Three: Mercy and Deontology

a person to sacrifice her life, for example; and a person who fails to do so is neither blameworthy nor deserving of personal criticism. Thus a single act of mercy can be, under the appropriate circumstances, constraining. This solution involves rejecting the assertion that acts of mercy are never constraining – something that is not a pre-theoretical belief about mercy anyway.\(^{31}\)

§3.5.3. Mercy and justice as properties of agents. In Chapter Two we saw that mercy could also be a property of an agent; in other words, a trait of character, a sensitivity to particular properties of circumstances that leads to a disposition to perform certain sorts of actions. Justice, in its various guises can also be a property of agents. It involves a sensitivity to other properties of the circumstances such as another’s deserts, or those things that are due to them, and the resulting disposition to perform actions that respect these deserts or give another their due. These might be called, respectively, the virtue of mercy and the virtue of justice. It will be useful now to consider just what a virtue is and what a virtue theory involves.\(^{32}\) Unless deontology can accommodate the virtues mercy as a virtue can find no place within a deontological outlook.

There are many different accounts of just what a virtue is and what a virtue theory involves.\(^{33}\) This much, however, it seems to me is clear: a

---

31. Does this solution fall victim to the second paradox? No. The act of mercy remains distinct. All this solution shows is that an agent who has been merciful in ordinary circumstances is required out of fairness to replicate her merciful actions, i.e., perform an action that is phenomenologically identical to the initial act of mercy. But the act itself is still, in some sense, a departure from what might be expected or was likely to happen. In fact, an exhortation to act fairly shows just this - namely that we want them to depart from what we expect them to do. So, while as an external action it might be identical with what justice requires, the fact that it is a departure from what we expect, or what would be usual in the circumstances and what seemingly they have reason to do, is enough to justify the epithet of being a “merciful action”. Of course we reach a point when, if repeated a sufficient number of times, the act that was hitherto called ‘an act of mercy’ ceases to be a departure from what we expect, and ceases to justify the appellation “mercy”. But this is not a problem, since that does not demonstrate that mercy is identical with justice, but rather the fact that while an external action may remain the same, our description of it may change.

32. In what follows I do not aim to provide a complete account of the virtues or virtue theory, nor do I seek to defend it. That would be far too big a job – and extraneous to my main purpose. I provide an account that, it seems to me, is relatively uncontroversial since it incorporates many agreed elements.


88
virtue is, at the very least, a somewhat stable trait of character\textsuperscript{34} that is thought to be morally good. As a trait of character, it is, specifically, a sensitivity an agent has to the morally important properties of some situation. As well, it involves essentially, a stable and on-going tendency or disposition to respond in certain morally valuable ways towards those properties (i.e. act, feel, behave\textsuperscript{35} appropriately, or have particular motives). Thus, a virtue is not only a sensitivity to the moral properties of some situation, but a capacity to respond to them in a way that is morally appropriate given the particular circumstances. A person may possess a particular virtue without ever exercising it, since no appropriate circumstances ever present themselves. Being virtuous is not only possessing this sensitivity to the salient moral properties of some context, but it is knowing how to act appropriately — in other words, it is possessing \textit{phronesis}. What the virtuous person brings to any situation is a conception of the good life and some conception of how a rational agent ought to act and more generally live, in order to attain it. They must balance competing interests, values and sensitivities and they must navigate a path between between two vices, excess and deficiency. As Aristotle says,

\begin{quote}
Now virtue is concerned with feelings and actions in which excess and deficiency are in error and incur blame, while the intermediate position is correct and wins praise, which are both proper features of virtue. Virtue, then, is a mean, in so far as it aims at what is intermediate.\textsuperscript{36}
\end{quote}

Thus, the path of virtue is a \textit{via media aurea}, a golden mean between extremes.\textsuperscript{37}

Moreover, a person who has a virtuous character — as opposed to one who displays a virtue on some occasion only — performs effortlessly and spontaneously the actions that naturally follow from it. Such actions are not the result of, and do not involve, a direct choice\textsuperscript{38} 'if someone’s character embodies the virtues, his actions will be morally praiseworthy without his having to agonize over choice, obligation, and using will to

\begin{footnotes}
\footnotetext{34. Cf. von Wright, \textit{op. cit.}, p.144.}
\footnotetext{35. Cf. Waide, \textit{op. cit.}, p.457.}
\footnotetext{36. \textit{Nic. Eth.}, 1106b25}
\footnotetext{37. \textit{Nic. Eth.}, 1106b16-1107a3.}
\end{footnotes}
control inclination'.\textsuperscript{39} When a person 'acts virtuously' they are not acting 'on principle', that is, on some rule, irrespective of, and not in response to, the moral properties of the context — but rather acting the way they do because they are the sort of person they are.\textsuperscript{40} However, a person who is disposed to respect a principle on the occasions when it is appropriate to do so, displays at least one sort of virtue — \textit{phronesis}. As well, a person who cannot bring themselves to Φ, say a soldier who is not effortlessly brave, can still act bravely, through displaying another virtue, say constancy. The idea here is that although the brave act was not effortless, the display of constancy was. So behind certain actions performed with effort, may well lie virtues displayed effortlessly.

In the dominant forms of non-virtue ethics — deontology and act consequentialism — the object of moral evaluation is intentional, responsible action. The notions of an intrinsically right act or good state of affairs, respectively, are primitive, and form the basis of the evaluation. In a virtue ethic the primary object of evaluation is the agent, in particular, an agent’s \textit{character}, her traits and morally-important properties. In such an ethic the notions that are primitive are those of a ‘morally good person’ and the properties that go to make her such.\textsuperscript{41}

Further, character-morality focuses on the long term characteristic patterns of action and the way in which this grounds individual discrete actions in choice situations. Choice is a manifestation of the agent’s character, responding to the the exigencies of the ‘atomic’ situation, rather than mere obedience to principle or rule — for the sake of that rule or principle. Thus, practical reason is not a rigidly rule-governed exercise, applied on a case by case basis, as those cases fall into general classes; but rather one that involves an agent balancing their dispositional responses and examining the appropriateness or fittingness to each individual case.

Are mercy and justice as properties of people compatible? When used with respect to an agent, ‘mercy is compatible with justice’ refers to

\begin{itemize}
\item \textsuperscript{39} Kekes, \textit{op. cit.}, p.461.
\item \textsuperscript{40} Were they questioned, they could give reasons, and justifications, and even say that one ought to act in the way they did. But that is telling us why the action was right, not why they acted. They acted because it seemed appropriate, and an action may seem appropriate for a number of reasons. Questions of justification may not enter into the motivational picture — or the account of the springs of an agent’s actions.
\item \textsuperscript{41} Louden (1986), \textit{op. cit.}, at p.475; Louden (1984), \textit{op. cit.}, at p.228.
\end{itemize}
the fact that the property of ‘being merciful’ and the property of ‘being just’ can be predicated simultaneously of the one agent. Typically this phrase refers to the agent possessing, habitually or on some occasion, the properties of ‘being merciful’ and ‘being just’ and the sensitivity to the properties of the objects of their actions, in virtue of which such dispositions arise. So, two dispositions are compatible if they can be, simultaneously, the property of an agent with respect to the one object. For example, to predicate of Jones ‘fairomindedness’ and ‘diligence’ with respect to him performing his duties as a judge is to ascribe two different, yet compatible, properties of him — and in virtue of this they are compatible.

This, seemingly leads to a problem. When one displays the virtue of mercy, the spring for the action is not a disposition to ‘do justice’, but to care for, and alleviate the need of, another who is within one’s power. Mercy, when a property of a person, is a disposition (arising out of care and concern for other people) to choose that option amongst a range of options that would alleviate a burden, threat or some suffering to which another is exposed. The disposition springs from a sensitivity to the needs of others, their suffering, and the burdens under which they labour.

It is the disposition to give another what they deserve or what is due to them, that constitutes the virtue of retributive or comparative justice. The forms of justice we have been considering spring from a disposition to honour a particular principle, namely, that an agent be treated fairly or that she receive what she deserve and thereby give another exactly what they deserve - nothing more or less.

The dispositions are quite different; in some sense they are opposed: an agent cannot possess both dispositions purely, without having to temper them or having to abandon one of them. Thus, both properties seem to be simultaneously completely unrealizable. They are different dispositions that ‘pull’ in different directions and have different goals: mercy, the goal of caring and assisting another, attending to their welfare and reducing suffering. Thus, it involves partiality and particularity on the part of the benefactor. Justice, on the other hand, involves the disposition to respect a principle, to attend to the agent’s deserts and
respect impartiality and universality. Therefore, it seems that mercy, as a property of people, is incompatible with these forms of justice. Since mercy as a property of a person is incompatible with these forms of justice, as a property of a person, mercy appears to be a vice, and impermissible.

The assumption underlying this argument is that agents can only ever act on one disposition at a time; that they cannot act on mixed dispositions. This is false. Very often we find ourselves pulled in different directions: the claims of friendship versus the claims of office, for example. Now, sometimes the choice will be clear: we must act exclusively on this disposition rather than that, and this is what the virtuous person would do. At other times the choice is not at all clear, and so we end up tempering one disposition with another. The point is, of course, that neither disposition 'reduces to zero', that they are still there influencing our action. They remain properties of our motivational structure on this occasion. Therefore, as properties of an agent, as she is acting, these dispositions are compatible.

The claim that 'mercy and justice are compatible as properties of agents' can be interpreted in a number of ways. First, as a claim about the possibility of mercy and justice being held simultaneously as ideals, and in that way forming the springs of action. Second, we can see it as a claim about the ongoing motivational structure that an agent has. In both claims it is implicit that given certain circumstances those agents who possess these ideals, or the motivational structure of which mercy and justice are a part, will be disposed to perform actions that are characteristic manifestations of those ideals or dispositions. Given this, the solution is simple. It is the case that many, perhaps even all, of our ideals and the elements of our motivational structure can be incompatible with each other, given the right kind of circumstance. The fact that they are incompatible with each other, that they conflict, does not mean that they cannot at one point in time be both members of our motivational structure. It is also true that situations will arise, when we will have to choose between our ideals, our motives or the ways that our character disposes us to act, because we must realise one of them

exclusively and they cannot be realised simultaneously, (that is, without one tempering the other).

We can appropriate both ideals, value them equally, be committed to them both, have a disposition to perform an action that manifests one ideal, as well as a disposition to perform another action that realises the other ideal, and be quite aware that now or on some other occasion we will not be able to realize them both completely simultaneously. This does not mean that these concerns cease to be (our) ideals; it means only that they are not completely simultaneously realizable, and that on some occasions both of them cannot be completely simultaneously manifested. Nor does it imply that we ought abandon one of them, or that one of the ideals is wicked rather than right; or that we cannot, logically and morally be committed, generally, to them both or that on some occasion the action that we perform, when we a torn in different directions, does not spring from a mixture of dispositions.

This reveals the essence of the belief that mercy is compatible with justice, (of any sort): mercy and justice are compatible as ongoing dispositions, as part of a good person’s ongoing motivational structure, as ideals. We do believe that they look in the one direction - what is right and good. We do believe, also, that while agents may experience at some one time opposing dispositions, and may, on occasion, have to choose one or the other, agents do not fail to have the traits of character of which those dispositions are manifestations, as ongoing properties of their character. We can believe in them both, but must, when the occasion arises, choose between them and be prepared to do so, or at the very least be prepared to mix them. To put the point colloquially, ‘temper justice with mercy’.43

For this to be plausible we must conceive of any of the types of justice considered here, and mercy, as members of the class of virtues. Each has equal moral standing when considered apart from specific instances. Stanley Benn puts this point nicely:

---

43. It is interesting to note what a dictionary says about ‘temper’: *inter alia*, ‘to observe proper measure, mix, regulate, forbear...free from excess by mingling with something else; reduce in intensity, especially by the admixture of some other quality; moderate; assuage; mollify...to bring to the proper texture, consistency, hardness by mixing with something;...a middle course or mean’. *Webster's New World Dictionary*, (Second Edition), s.v., ‘temper’. 93
Some philosophers have meant by it, [i.e. 'justice'], an all-encompassing virtue, closer to righteous than fairness. Contact with the narrower sense, (distributive or retributive justice), is to some extent preserved, however, in that justice is thought of as apportioning to each particular virtue or excellence its proper sphere.\(^{44}\)

Justice in this broad sense involves displaying each virtue on that occasion in which it is most appropriate. Sometimes mercy will be most appropriate and narrow justice needs to be set aside. This is as much a display of virtue as is acting justly on the appropriate occasion.\(^{45}\) On other occasions, (narrow) justice will be most appropriate and mercy must take second place. This (broad) notion of justice might be closer to the Ancients’ concept of *phronesis*. Thus, ‘being merciful’ would be a part of what it is to lead ‘the good life’ and have the full range of character traits that the virtuous person has.

On a general point, it might be argued that if mercy is a virtue, then a deontologist has only a limited place for it. Robert Louden notes, ‘Virtue is important, [for a deontologist] but only because it helps us do our duty’.\(^{46}\) The right response, the deontologist believes, to some good is to honour and respect it in our actions, and the virtues are valuable only in so far as they help us do this, our duty. Therefore, the virtues are important only instrumentally — they give us ‘pro-attitudes’ towards our duties. Thus, it is conceivable that we could, on a deontologist’s view, have a duty to act in some way yet our virtue pulls us in quite another direction. The fact that some disposition is a virtue, or a display of virtue, does not contribute at all from a deontologist’s point of view to it being right. So, a deontologist cannot, it seems, value mercy because it is a virtue, but only as a means to honouring some principle.

This, I believe is correct, so long as the virtues are confined to the theory of right, i.e., are confined to the way we should respond to the good that we ought to respect — whatever way that is determined. If,


\(^{45}\) Recall at this point Plato’s Guardians, who were expected to possess a character that was at once gentle as well as full of spirit, (*Republic*, 375c), and so combine in a single personality dispositions that were considered natural opposites. To use Plato’s image, they were to be like a well bred dog, and behave with the utmost gentleness to those they knew and be dangerous only to strangers and threats, (*Republic*, 375a-376c).

however, the virtues are part of the theory of the good then, no matter how we choose between the virtues on some occasion, our response to them must be to display, honour and respect that one that the theory of good holds is morally appropriate. In this way the deontologist has room for mercy as a virtue and its value is not determined by its capacity to help us do our duty. Such a theory might be called a ‘trait-deontological theory’. This is, in effect, the solution given above to the problem of choosing between values to which we may be committed, but which are incapable of simultaneous realisation.47

§3.6. C2: The Conundrum of Redundancy.

Recall first of all the conundrum: Mercy is believed to be a moral entity autonomous from justice. It is thought to be justified because it involves giving some one what they deserve or what is due to them. Justice involves doing the same thing. If that is the case, then how can mercy be autonomous from justice? What sense can we make of the admonition to ‘temper justice with mercy’?

This conundrum rests on two points: the first is the assumption that all responses to a person’s desert or their due, they are necessarily responses of justice; (or even the more general assumption, that for a response to be morally acceptable it must be grounded on considerations of justice). The second, the obscurity surrounding the notion of ‘autonomy’. Consider each in turn.

Consider first the assumption that only those things that are related to justice are morally acceptable. This of course is false. Charity, kindness, benevolence, friendship, and love are all morally good, and are good not in virtue of some relationship to justice, but in virtue of some other criterion of goodness unrelated to justice.

Moreover, to say that ‘Jones deserves A’ or that ‘A is due to Jones’ is not to make a claim about Jones’ justice-based entitlements. It is true that all claims in justice involve something that is due to an agent, and many

47. Frankena seems to have had in mind something like this when he wrote: ...there are...trait-deontological theories, which will hold that certain traits are morally good or virtuous simply as such, and not just because of the non-moral value they may have or promote...(op. cit., p.64).
Chapter Three: Mercy and Deontology

involve things that are a matter of desert. It is not true, however, that all things due to an agent or theirs in virtue of some desert claim, are justified on the grounds of justice. Love, affection and care, as mentioned above, are ‘due’ to one’s children, but they do not have a justice-based complaint if one fails to provide.\(^48\) Such a parent has treated their offspring wrongly or badly, but it sounds strange to say that they have been treated *unjustly*. This illustration also shows that the assumption that the moral domain, i.e., those things that are right and wrong, is totally occupied by considerations of justice is false. Thus, the assumption that generates this conundrum is false. Knowing this, we can see that the conundrum cannot even arise.

Consider the second point. How can we see that mercy is autonomous from justice? The answer to this will depend upon what it is for properties of agents to be autonomous from each other, and for actions to be autonomous from each other. What is it for one action to be autonomous from another? I suggested that mercy and justice are supervenient properties. If this is the case, then an action that is *described* as ‘mercy’ will be autonomous from one another called ‘justice’ if their respective subvenient properties, the properties in virtue of which they are the actions they are, are distinct.\(^49\) The properties in virtue of which they are described as particular sorts of actions, the properties that identify them as act A rather than act B, are their springs, and various features of the context. The ‘springs’ include a vast range of things: motives, intentions, dispositions, character traits and so on. Contextual considerations include a power structure, the fact that the action is a benefit and so on.

Given this analysis of autonomy, the question is: do mercy and justice supervene upon distinct properties? It is clear that they do. For an action to be thought to have the property of ‘being an act of mercy’ the action must at least be thought to occur in a context where the benefactor possesses power over the beneficiary, where the act has particular

\(^{48}\) I argue at greater length in §3.8 that not all desert claims are justice-based.

\(^{49}\) Note, however, that a single action can have two evaluations, for example it can be just and merciful. To describe an action is to identify it as a particular sort of action in virtue of the motivational state of the agent; to evaluate it is to classify it as a particular sort of action without averring to the motivational state of the actor. So an action that treats two similar cases similarly can be evaluated as an act of comparative justice, but it can only be described as an act of justice if the agent acted out of a motive of justice.
consequences, and the agent has a particular dispositional outlook. For an action to be thought to have the property of ‘being an act of justice’, by contrast, it must be thought to be compatible with, or to honour, some principle of justice and be performed without reference to the needs of the object of the action.

Mercy as a property of an agent, supervenes upon the benefactor having the property of ‘being concerned about the person in their power’. It springs from a belief that the person’s welfare is or will be harmed if events are allowed to take their course. An agent committed to justice, on the other hand, is not concerned with ‘caring’ for others. She is concerned with ensuring that each receive their fair share, that each be treated according to what they in justice deserve, in virtue of what they have done, or who they are. An agent who acts ‘from justice’ does not seek to meet another’s need, because the other person has a need that it would be good to meet; the just-acting agent meets another’s need because it is just to do so. They are concerned to be impartial and to honour some principle, and not to be partial or to respect and care for the welfare of another person, as an individual agent. Thus, the personal qualities that constitute the virtue of mercy are opposed to those that constitute the virtue of justice.50

Given this analysis, it is clear that mercy and justice, as properties of actions and agents are quite distinct as they supervene upon different properties. If the nature of mercy and justice are understood in this way, the conundrum of redundancy simply cannot arise.

§3.7. The Relationship Between Mercy and Desert.

There are many contexts for mercy: victorious duelists acting mercifully, sea captains rescuing shipwrecked mariners, battlefield adversaries acting mercifully. In fact, the most familiar example of (would be) mercy, to many English speaking people, is to be found in The Merchant of Venice. Shylock is not punishing Antonio – after all, Antonio has not acted wrongly. Shylock is merely collecting a debt. Thus, mercy exists and, indeed flourishes, outside of retributive and desert-oriented contexts.

50. See A.D.M. Walker, op. cit., p.353 who makes a similar point.
A question arises then: just what is the relationship between mercy and desert? In my solution to the problem, I argued that mercy, for its moral justification does not, and in fact cannot if it is to remain autonomous from justice, depend on a relationship with retributivism, or justice or retributively-based desert. But it is certainly true that we say that ‘Jones deserves mercy’, and that we mean by this that it was right that Jones received mercy. In talking this way, however, we are not saying that mercy is some form of justice. So, we need to make sense of this way of talking.

It is true that desert is often, pre-theoretically at least, associated with retributive justice.\textsuperscript{51} Suppose we agree that ‘John deserves X’, and that as a matter of fact he does not receive it. If desert is tied to retributive justice, it follows that John has been the victim of an injustice. Of course, desert is not always tied to considerations of retributive justice or justice at all. If we say that ‘Mary deserved to win the foot race’, even though her running ability is natural rather than cultivated, we are not agreeing with Thrasymachus’ claim that it is just that the naturally endowed prosper.\textsuperscript{52} We are saying that in view of her talent, it was fitting – or appropriate – that she won. There is no implication that had she not won, she would have been the victim of injustice. Thus, desert claims can be divided into two broad classes: justice-based desert claims and non-justice-based desert claims.\textsuperscript{53}

Given this, what do desert claims amount to? As Feinberg and Kleinig have noted there are a number of classes and types of desert.\textsuperscript{54} In general, when we say that ‘A deserves T’ we are saying that, in some sense, it was appropriate or fitting that A receive T, or that there was a ‘certain sort of propriety’ in A receiving T.\textsuperscript{55} Appropriateness or fittingness can be moral, non-moral, justice-based or based in broader moral considerations. In other words, that ‘A deserves T’, if true, is so in


\textsuperscript{52} \textit{Republic}, 338e-337b


virtue of some characteristic she possesses, or something she has done.56 There must be a reason in virtue of which it is appropriate or fitting that A receive T but it is not always a conclusive reason.57 Thus, all desert claims or ascriptions have the form:

'A deserves T' = df 'It is fitting that A receive T, in virtue of R'.

Now R can be a reason appealing to consideration of justice, or other moral considerations, such as the relationship of the deserving person to the provider, or prudence, natural ability — and so on. A number of points must be noted. First, for an ascription of desert to have its intended illocutionary force, there must be a reason that refers to a ‘desert base’. It is absurd, as Feinberg says, to say that Jones deserves good treatment for no reason in particular. Desert without a basis is simply not desert.58 This further reinforces the point made above that mercy, if it is to be morally justifiable, must rest upon reasons — otherwise agents could not be said to deserve mercy.

Second, the reason must indicate why T is fitting. For example the claim that ‘Joe deserves to have first class honours because he was born in 1960’ seems at first-glance bizarre, unless we can show how being born in 1960 shows that the award of first class honours is fitting or appropriate.

Third, desert claims contain an implicit ‘ought’. It is not an all thing considered ought, but a pro tanto ought. All we mean is that there are reasons to give T to A, but that they are not conclusive reasons — by themselves. When the reasons become conclusive, then a person who could be merciful has a duty to be merciful, and the beneficiary has an entitlement to T — which implies that if T is not given then she has been treated wrongly.

This analysis of desert fits neatly with the analysis of the moral justification of mercy with which we have been operating. Mercy most often is a rational action.59 It addresses a need possessed by a person

56 Feinberg, op.cit., p. 58.
57. Feinberg, p. 60.
58. Feinberg, p. 60.
59. It is true, however, that mercy is sometimes capricious and arbitrary. This is the sort of mercy we see displayed by a Caligula or other demented or unpredictable despots. But it is difficult to see how capricious mercy could have any moral value, as it neither emanates from rational reflection or straight duty.
within the power of another. Mercy is a response to this need. When a person gives mercy or acts mercifully, we can always ask their reason. They may reply that they felt compelled by some value they hold — such as that they ought, where possible, reduce suffering. Or they might say that the person to whom mercy was extended deserved it; that is, they possessed some property in virtue of which mercy was a fitting or appropriate response. This, in effect, is specifying the desert base or reason for extending mercy. Thus, mercy can be deserved, but the reason in virtue of which mercy is deserved is a non-justice orientated reason. The moral justification for mercy, however, is not always based upon considerations of desert. As Feinberg notes, ‘Desert is always an important consideration in deciding how we are to treat persons, especially when we are not constrained by rules or where rules give us some discretion; but it is not the only consideration and is rarely a sufficient one’. So, there are many other considerations besides. Seneca outlined some of them:

I am sparing to the utmost of even the meanest blood; no man fails to find favour at my hands though he lack all else but the name of man. Sternness I keep hidden, but mercy ever ready at hand...I have been moved to pity by the fresh youth of one, by the extreme old age of another; one I have pardoned for his high position, another for his humble state; whenever I found no excuse for pity, for my own sake I have spared.

§3.8. Conclusion.

In this chapter I have had a number of aims. I have endeavoured to show that mercy can be accommodated within a deontological outlook so long as agents are not always required to act justly, or perform acts motivated by a concern for justice; that they are not required to act as justice licences them, and that the virtue of mercy does not possess merely instrumental value. The argument for this view centred round determining mercy’s relationship to justice, (since justice is regarded as the deontological notion, par excellence). This relationship, we discovered was complex. Depending upon the type of justice and the claim being made, mercy could be compatible or incompatible with justice. In particular, in all cases, except when an act of mercy does not involve a departure from justice, mercy is incompatible with justice. An

61. De Clementia, Bk.1.1.4
agent cannot perform an action that is both merciful and just. Moreover, mercy as a property of persons is quite compatible with the four types of justice examined. The results are summarised in the following table and refer to the situation in which an agent’s options are either to do justice or exercise mercy:62

<table>
<thead>
<tr>
<th>Mercy as:</th>
<th>Property of Actions</th>
<th>Property of Agents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hard Retributive Justice</td>
<td>Incompatible, but justifiable</td>
<td>Compatible</td>
</tr>
<tr>
<td>Soft Retributive Justice</td>
<td>Compatible</td>
<td>Compatible</td>
</tr>
<tr>
<td>Consensual Justice</td>
<td>Compatible</td>
<td>Compatible</td>
</tr>
<tr>
<td>Comparative Justice</td>
<td>Incompatible, but justifiable</td>
<td>Compatible</td>
</tr>
</tbody>
</table>

However, as noted in the preface, the conundrum concerning the relationship between mercy and justice was only one of a set of three puzzles that form the basis of the contemporary discussion of mercy. In this chapter I also sought to set out these puzzles as clearly as possible, and to solve them. This was necessary not only to determine mercy’s relationship to justice, but whether it was morally possible and whether the concept was coherent.

‘Mercy’, I have argued, is coherent. The conundrums can be dissolved and the apparent contradictions in our beliefs can be easily explained by examining ‘mercy’, and the claims being made. With respect to the second, I argued that mercy was an autonomous moral entity and that the moral justification that we provide for mercy, in terms of being one’s due or desert does not collapse the concept into a form of justice.

62. In n.23, supra, I argued that mercy and hard retributive justice could be compatible in those cases where an agent had to choose between acting wrongly, by doing more than permitted by hard retributive justice, and acting mercifully. In such cases it was an act of mercy to perform an act of hard retributive justice. Thus the action was evaluated as both merciful and hard retributively just, but had only one description, merciful, as that was the motive from which it sprang.
Moreover, I argued that the moral justification for mercy rested on reasons apart from ones of desert and being due. It might, for example, be morally appropriate.

With respect to the third conundrum, I argued that agents can be rationally required to replicate merciful action but that this is not counter-intuitive, but rather a property of it being a rational action. I argued that there was nothing to fear from this puzzle as it used a restricted concept of mercy.

Finally, I made a few remarks about the relationship between mercy and desert. I argued that mercy could be deserved, but that this was to be understood as a claim about there being certain sorts of non-justice based reasons for mercy being morally appropriate.

From this discussion it emerged that mercy is clearly one of a pantheon of moral concepts, each inviting attention and requiring consideration in our moral deliberations. It was also seen that the problems that surround mercy are purely illusory. What this chapter has shown is that the traditional problems that mercy faces can be overcome and that it can sit in our moral pantheon with other less personal virtues and values.

I have not examined in this chapter a problem that will re-emerge in the next chapter, and which will dealt with in detail in Chapter Five. This is the problem that deontology and consequentialism have in accommodating acts of supererogation. For a deontologist the problem is this. (I shall sketch the problem from a consequentialist perspective in the next chapter.) Mercy is thought to be supererogatory. That is, it is a morally right and good action that involves conferring more of a benefit upon an agent, who within one's power that one has a duty to. It is an over-subscription to one's duty. Now this raises the following difficulty. If we believe that the moral value of some action is confined to only those actions that we have a duty to perform, as say someone like Kant believed, then there is simply no deontic category of the supererogatory. If the action is right an good, then it is a duty. There are no actions that are right and good that are not duties.63 It is quite clear that if we are to

---

continue believe that mercy is supererogatory and that the deontologist is to accommodate mercy in any rich sense then she must be able to take account of supererogatory actions. Since my solution to this problem is the same for deontology as for consequentialism and it bears on the solution to C3 and C4, I shall consider it in a separate chapter — Chapter Six.

Having examined mercy's relationship to deontology and dispatched the 'traditional' problems that are deployed against the concept, it is now time to move into largely uncharted territory and examine the capacity of the other dominant contemporary moral outlook to accommodate mercy. This we do in the next chapter.
4

Mercy and Consequentialism

...Though justice be thy plea, consider this, —
That in the course of justice none of us
Should see salvation: we do pray for mercy,
And that same prayer doth teach us all to render
The deeds of mercy.
(Shakespeare, The Merchant of Venice, IV.i.)

§4.1. Introduction

A striking feature of the contemporary discussion of the moral standing of mercy is that it is conducted almost always within a broad deontological context, and specifically there within the context of retributive justice and punishment. The discussion in the last chapter reflects this emphasis. Mercy’s relationship to consequentialism, on the other hand, is mostly unexplored. It is time now to extend the investigation and examine the relationship of mercy to the other dominant moral outlook of this age.

The dominant, and largely unexamined, view of the relationship between mercy and consequentialism is that the consequentialist cannot accommodate mercy. The quotation from Shakespeare, however, shows there are good consequentialist reasons to cultivate mercy. What then is the truth of the matter? In this chapter I aim to answer this question.

Specifically, this chapter has two purposes. The first is to identify and set out the problems that allegedly dog mercy’s relationship to consequentialism; the second is to suggest solutions to them.¹ I will argue that mercy as an action can be accommodated easily within a consequentialist ethic. Modifications will have to be made to some of the elements of consequentialism, but they are modifications that

¹. There is one problem that consequentialism shares with deontology, vis-à-vis their respective relationships to mercy. It is the problem of supererogation. This problem is considered in the next chapter. I do, however, set out the problem from the point of view of consequentialism in §4.2, infra.
commonsense would dictate anyway. Mercy merely brings their necessity into the open. Mercy, as a virtue, on the other hand, is more problematic. However, consequentialism, again with suitable modifications, can accommodate it. I shall begin with a brief survey of the problems as they have appeared in the literature (§4.2). Then I shall sketch an account of consequentialism (§4.3). Having done that I shall re-state the problems, separating them and clarifying the issues (§4.4). Then after examining mercy as an action and the capacity of consequentialism to accommodate it (§4.5), I shall examine mercy as an agent-centred value and the capacity of consequentialism to accommodate these values (§4.6). Then I shall examine mercy as a virtue and its relationship to consequentialism (§4.7).

We have seen in the last chapter that mercy can be accommodated by the deontologist and that it is compatible with justice. In this chapter we shall see that the consequentialist too can accommodate mercy. We can conclude then that whatever ethic one chooses mercy will have a place.

§4.2. A Sketch of the Problems

Of those philosophers who have thought of mercy's relationship to consequentialism, all of them, bar two, have claimed that mercy could find no place in a consequentialist ethic. Indeed, most go so far as to claim that mercy makes good sense only on a retributive — or partly retributive theory of punishment — disallowing both a relationship to consequentialism and the possibility of mercy within contexts other than punishment. Speaking for the consequentialists, we find Jeremy Bentham writing:

In the import of the word mercy is included, the supposition of the existence of a power of producing pain and pleasure - of producing it in

2. The debate has centred on the relationship between mercy and utilitarianism. Since utilitarianism is a particular version of consequentialism, and the comments they made apply equally well to consequentialism, my discussion will be concerned with consequentialism, and their arguments will be suitably modified for this purpose.
cases in which production of it is not required by justice; or on any other
score, by the greatest happiness principle...In a penal code, having for its
first principle the greatest-happiness principle, no such word [mercy]
would have a place.6

More recently, J. R. Lucas expanded on this theme and was moved to write:

For the utilitarian, mercy is not even logically possible except as a foolish
failure to do what is best for the criminal and for society as a whole.
There is no independent tariff, based on the gravity of the crime, against
which we can set pleas for mercy and premises of amendment. If ever it
could be right to let somebody off, then it is mandatory to do so and there
is no argument for any heavier penalty at all. Punishment, on a utilitarian
theory, is a matter of simple calculation — what course of action now will
produce the best consequences in the future — and there is no tension, no
room for conflict between the competing ideals of mercy and justice.7

Alwynne Smart has argued in a similar vein. Moving from two
assumptions, namely, that mercy involves remitting or reducing a
punishment that is deserved and just, and that all acts of mercy take place
against a background of a conflict of two ideals, (the ideal of inflicting
deserved, just punishment and the ideal of mercy) Smart argues that such
a conflict can not arise because 'desert' and 'justice' have no moral
standing independently of their utility, since, for the utilitarian, this is the
sole criterion of our choices. Thus she argues:

If the punishment...served no good purpose, then the question of
imposing it wouldn't come up at all; nor consequently would the question
of mercy. The utilitarian has no choice; he must recommend the course of
action that produces most good, and if this means imposing a certain
penalty he cannot act mercifully and impose less than that penalty. Real
mercy is never a possibility for him because he must always impose what
is according to his ethic, the fully justifiable penalty. Even where there is
a serious conflict of interests, and punishment is suspended because the
harm it would do to others is greater than the good it will do, this cannot
properly be called mercy, because there is no significant sense in which
the utilitarian can say, 'I ought to do such and such, but special
considerations persuade me to act differently on this occasion'. For him,
the statement, 'I shall act mercifully' can only mean 'I shall impose a
penalty less than the one which will produce most good,' which in turn
can only mean 'I shall impose a penalty less than the one which will

1843, p. 529.
7. 'Or Else', op. cit., p.223.
produce most good because this action is the one which will produce most good'.

The worries raised by Bentham, Lucas, and Smart are not the only problems faced by mercy in a consequentialist landscape. The context of these conundrums was punishment, in an institutional context. But clearly, with appropriate modifications, these arguments would face any institutional actor wondering how to act – or any individual non-institutional actor wondering how to act – irrespective of what treatments he is thinking of inflicting – punishment, beneficence, charity, alms.

Moreover, these arguments are about acts of mercy, i.e., what actions are possible within a consequentialist ethic. Mercy is, as we saw, also a virtue. Can consequentialism accommodate the virtues – and in particular, mercy? If it cannot then, with respect to consequentialism, the virtue of mercy has no moral standing.

Further, there is the problem of the capacity of consequentialism to take account of particular and partial considerations and give a special place to individuals, to persons, and an agent’s particularised and deeply held values. This is a problem for anyone attempting to place mercy within a consequentialist ethic, since mercy is a particular response to an individual agent, with specific needs; it is an action which often springs from specific dispositions and values – the sorts of values that go to make life worth living and form an essential part of an agent’s personal integrity, and give shape and meaning to their life.

Finally, commonsense morality holds that mercy can be either required — or can be, in some sense, supererogatory. The problems outlined above confront mercy when it is required. But what of supererogatory acts of mercy? Can they be understood on a consequentialist ethic? This will be determined by the capacity of consequentialism to accommodate acts of supererogation. And it is by no means clear that consequentialism can: a supererogatory action is one that we have neither duty nor obligation to perform — but one that is still praiseworthy, good and right. Now, in consequentialism, the primary

8. A. Smart, op. cit., p.356.
9. This is, in effect, a variation of Bernard Williams’ famous attack on utilitarianism; Cf. his contribution, ‘A Critique of Utilitarianism’ in J.J.C. Smart and Bernard Williams, Utilitarianism: for and Against, Cambridge, 1985, pp.77-150.
tenet is that we are obliged and have a duty to maximize some telos. It is not possible for there to be an action, such that it is right — yet permissible not to perform it. Since rightness is identified with 'what best promotes the telos', it is not possible for there to be right — but non-obligatory — actions that it is permissible to refrain from performing, since through the very act of praising it we recognize that the act is useful and promotes the telos, above all other possible actions. Supererogation is a problem not only for consequentialism but, as we saw at the conclusion to the last chapter, for deontology as well. In fact, it is a general problem for any moral outlook that seeks to link comprehensively the goodness and rightness of some action with an agent's duty. The answer to this problem will be considered in the next chapter.

§4.3. Consequentialism

I shall take consequentialism to be a certain point of view about the relationship between an “object’s” rightness and the value of its consequences. Some object is right just in case the value of its consequences — the actual, likely or expected value — equal or surpass the value of the consequences of any alternative. Consequentialism is not, then, a thesis about morality per se — about moral rightness — but about what it is for an object to be right or wrong, either morally or non-morally.

However, the most important species of consequentialism and the one that concerns us here, is moral consequentialism. This is the view that the objects of moral assessment are right or wrong — or justified — in terms of the value of their consequences, in other words, how the world lies in the wake of the object occurring. Thus, any view that holds that

10. Cf. M. Clark, 'The Meritorious and the Mandatory', PAS, (N.S., 79:1978/1979), pp.23-33 at p.29; D. Heyd, Supererogation, Cambridge, 1982, p.73. This argument, is of course, similar to that of Smart and Lucas. It is, however, different in this respect. On their views, we are attempting to accommodate mercy as a required (and right) action, yet a departure from the consequentially justified course of events. For this latter argument the problem is one of an action being optional and right.
11. Cf. M. Slote, 'Satisficing Consequentialism', PASS (58:1984), pp.139-163, at p.139; Largely reprinted as Chapter Three in M. Slote, Common-Sense Morality and Consequentialism, London, 1985, at p.35. I use 'object' because it seems to me that any number of things can be right or wrong — actions, motives, intentions and other dispositional states; institutions, laws, and states of affairs.
13. How the world lies in the wake of the object, the object's outcome, can take a number of forms and consequentialists disagree over the correct one. For example, it may be the probable or the actual
the *rightness* of some object depends solely on the *goodness* of the states of affairs produced by it, (i.e., its outcomes), is a pure form of consequentialism.\(^{14}\) Understood in this way, a consequentialist *moral* theory has two elements:\(^{15}\)

1. a theory of the good, a criterion of what properties are good, and against which the states of affairs produced by various objects, the objects' consequences, are ranked and the objects' (moral) properties are determined. The theory of good not only identifies what properties are good, but also the extent to which an object possesses them - a lot, a little, not at all, for example. Thus, it is used to rank outcomes impartially, from best to worst.

2. A theory or criterion of right; namely that the rightness of an object consists solely in its promotion (in some sense) of good properties that it is reasonable to believe will be possessed by its outcomes.

To put these points another way, a theory of good is a view about which properties are morally valuable (and as a result, which, if the opportunity presents itself, we are, other things being equal, enjoined to realise through our actions, or in the world generally). Thus, the theory of good need not consist of values normally associated with consequentialism or utilitarianism.\(^{16}\) The theory of right concerns what it is about objects that is to be used to rank them. In a consequentialist outlook it is simply that the rightness of some object is dependent upon the good properties possessed by its consequences.

Another important feature of consequentialist theories is that, as

---

usually understood, the consequences are evaluated *impersonally*.\(^{17}\) It is
an impartial, impersonal theory, which counts the good properties of
consequences without reference to any particular agent’s preference, and
so, with respect to any particular agent gives no greater weight to her good
or goods than another.\(^{18}\) Thus, a consequentialist holds that states of
affairs, (outcomes, consequences) to paraphrase Slote,\(^{19}\) ‘can be objectively
or impersonally ranked according to their goodness and that any given
[object] is morally right or permissible if and only if its consequences are at
least as good, according to the impersonal ranking, as those of an
alternative [object] open to the agent — the [object] being itself included
among its consequences’.

Further, as consequentialism is usually conceived, it is a theory of
rightness, rather than a decision making procedure, or a method of
deliberation.\(^{20}\) Criteria of rightness nominate the property or properties
in virtue of which an object of moral assessment is deemed right.\(^{21}\) A
decision procedure, on the other hand, states how agents *should*
deliberate, reason and make moral decisions; how they should single out
and isolate the right alternative.\(^{22}\) It provides a *method* of assessing
moral rightness that any agent, who would claim some measure of moral
perfection, must use.

As ordinarily construed, however, consequentialism provides a
standard of rightness. It usually involves no claim about how an agent
ought deliberate. Thus, just as an agent may attain happiness by not
actively *seeking* happiness – but by pursuing some goal for its own sake,
or for properties that she finds valuable, so too an agent may perform a
right action, not as a result of deliberating about what to do, and
attempting to identify the right action, but rather by reasoning in some
non-consequentialist way, or by acting on a motive that does not aim at a
course of action that involves realizing more good than any other.
Sidgwick puts this point well, (with respect to utilitarianism):

\(^{17}\) Brink, *op. cit.*, p.430.
\(^{18}\) Cf. Pettit (‘Consequentialism’), p.230; Pettit (1989), pp.117-118; T. Nagel, ‘The Limits of
\(^{19}\) Slote (1984), *op. cit.*, p.139.
\(^{20}\) Cf. R.E. Bales, ‘Act Utilitarianism: Account of Right-making Characteristics or Decision Making
Procedure?’, *APQ*, (8:1971), pp.257-265, *passim*; Brink, *op. cit.*, *passim*; Pettit (Consequentialism),
*op. cit.*, pp.234-236.
\(^{22}\) Bales, *op. cit.*, p.263.
Chapter Four: Mercy and Consequentialism

...the doctrine that Universal Happiness is the ultimate standard must not be understood to imply that Universal Benevolence is the only right or always the best motive of action. For...it is not necessary that the end which gives the criterion of rightness should always be the end at which we consciously aim: and if experience shows that the general happiness will be more satisfactorily attained if men frequently act from other motives than pure universal philanthropy, it is obvious that those other motives are reasonably to be preferred on Utilitarian principles.23

Now to the most controversial aspect of this account of consequentialism. The traditional view of consequentialism holds that it essentially involves the claim that the rightness of some object consists in maximal goodness;24 that some object is right just in case its consequences realise the most expected value possible in the circumstances.25 While this is the standard view,26 it is not the only view. Recently, it has been argued, most notably by Michael Slote, that actions that fail to maximise the desired value, but which produce some level of the desired value are morally acceptable; in other words, actions that while not the best, but still contribute to the desired goal are nevertheless ‘good enough’ and are permissible and right from a consequentialist point of view.27

23. H. Sidgwick, The Methods of Ethics, London, 1930, p.413; Cf. Brink, op. cit., pp.421, 424; This point is better put by John Austin:

Though he approves of love because it accords with his principle, he is far from maintaining that the general good ought to be the motive of the lover. It was never contended or concerned by a sound, orthodox utilitarian, that the love should kiss his mistress with an eye to the common weal. (The Province of Jurisprudence Determined, (H.L.A. Hart, (ed.)) London, 1984, p.108, in Pettit (‘Consequentialism’), op. cit., pp.234-235).

Mill writes, (in Utilitarianism), ...It is the system of ethics to tell us what are our duties, or by what test we may know them; but no system of ethics requires that the sole motive of all we do shall be a feeling of duty; on the contrary, ninety-nine hundredths of all our actions are done from other motives, and rightly so done, if the rule of duty does not condemn them.’ (J. S. Mill, Utilitarianism, M. Warnock, (ed.), Glasgow, 1978, p.269.)

24. I must point out that I am not concerned with the distinction between satisficing and sub-optimization or sub-maximisation. This distinction has been drawn by Philip Pettit, [Pettit (1984), op. cit., p.172; ‘Slote on Consequentialism’, PQ, (36:1986), pp.399-412, at p.402]. Rather, I am concerned with the idea — however it is cashed out in detail — that:

1. It is compatible with consequentialism for an aspiration level to be set; in other words, a level that is ‘good enough’ even though less than the best, a level that must be attained if an option is to be right; [Slote, p.36]
2. It follows that if any option attains this aspiration level it will be right:
3. That it is permissible — and thus agents are free — to choose any option that reaches or surpasses this aspiration level, even though the option chosen may not be the one that directly maximises some goal, or maximises it at all. What is important is that the aspiration level be met.
4. On this view sub-maximisation down to the aspiration level is permissible.

I do not intend to distinguish between optimizing and maximizing consequentialism.


I have great sympathy for Slote's view. It does seem that it is not a necessary feature of consequentialism — at any rate as characterised above — that it be maximising. That it must be maximising must be argued for separately; since on the account given above, consequentialism was a theory, purely, of rightness, namely, that rightness is dependent upon the expected value of the object's consequences, as measured impartially. There is no necessary requirement, on this view that the level of value be the greatest or maximal amount possible in the circumstances. Thus, there is no conceptual requirement that consequentialism be maximizing. Michael Slote puts the point this way:

Could not someone who held that rightness depended solely on how good an act's consequences were also want to hold that less than the best was sometimes good enough, hold, in other words, that an act might qualify as morally right through having good enough consequences, even though better consequences could have been produced in the circumstances? The traditional or standard view that rightness depends on whether the consequences are the best producible in the circumstances will then most naturally be seen as a particular kind of consequentialism, rather than as constituting consequentialism per se.28

This 'traditional' form of consequentialism can be called 'optimizing' or 'maximising' consequentialism29 — since the right action will be that which produces the best consequences in the circumstances.30 In other words, has consequences which possess more moral value overall than the consequences of any alternative action. The former type can be called 'sub-optimal consequentialism'. This is the view that the right act will be that which contributes some value to the world and is therefore, good enough in the circumstances, but it need not be the best possible option available to the agent.

Finally, although the account of consequentialism given here is usually associated with act-consequentialism31, in what follows I consider the problems with respect to different varieties of consequentialism. I do not do this exhaustively as my aim is to show that mercy is compatible with at least some varieties of consequentialism.

29. It is mostly the form of consequentialism that I consider here. I shall indicate when I am discussing the non-traditional version of consequentialism.
30. Although as Slote points out, Bentham may have held a sub-optimising, (i.e. satisficing) version of utilitarianism. See Slote (1985), op. cit., p.162.
§4.4. The Problems

Mercy, as we saw has many facets. It can involve imposing less of a treatment, for example a punishment, than is warranted in the circumstances. In other words, an under-subscription of one’s duty. In an ethic that requires an agent to always maximise the good, such actions lack justification.

Mercy can also involve bestowing more of a benefit than a person might otherwise receive, or to which they might ordinarily be entitled. Such cases are cases of charity or benevolence, actions involving self sacrifice, or risk; or more colloquially described cases – such as ‘mercy dashes’ to the sick or mercy killings. Such cases involve morally unrequired actions and are an over-subscription to one’s duties. In such cases, a story needed to be told how such actions were possible given the pre-theoretical view that if an agent can perform some action and if that action is good, then she ought to perform it.

Further, mercy was characterised as a personal response to another’s great peril. It was directed at another agent, as an agent, and thus was an expression of favouritism and partiality, and the personal moral values of the mercy giver. If consequentialism ranks goods impersonally, or is unable to take account of the personal and the particular, then it can find no place for mercy.

Finally, mercy was seen also to be a virtue. Therefore, it needs to be shown how consequentialism can accommodate the virtues, since most consequentialists talk only about actions.

The Benthan-Smart-Lucas objection is one of the first sort: how if mercy involves an under-subscription to one’s duty, can it be justified, and thus be possible? It can’t. On a consequentialists’ account of punishment, a particular level and type of punishment is required because it will — amongst the range of punishments open to a punisher — best achieve the goals the legislator or law enforcer has. Anything less is sub-optimal and wrong, for that reason; anything more smacks of cruelty, and is wrong on that count. Mercy, for the consequentialist can never be justified, as it would involve imposing less of a punishment than required, given the goal(s) the consequentialist wants to achieve.

Moreover, as I suggested in the last chapter. a deontologist who is
not committed to justice as the primary value can justify mercy. He merely needs to argue that on some occasions it is morally appropriate to honour mercy, whilst on other occasions it is morally appropriate to honour justice. This strategy is not open to a consequentialist who is charged with, for example, inflicting a burden upon some person. In consequentialism there is only one metric, what best achieves the goal(s) that he has. Such an outlook assumes a maximising consequentialism. But mercy involves doing less than one is justified in doing, in other words, sub-maximising. Thus, mercy, from a maximising consequentialist’s point of view, is never justified. I call this puzzle the ‘under-subscription problem’, as the merciful agent is doing less than their duty.

The second objection might be named the ‘over-subscription objection’. I shall answer it, along with its deontological analogue, in the next chapter. We can, for the sake of explication, state it this way. If an action, \( \Phi \), is good and right and physically can be done, then it morally must be done. There is no option but to \( \Phi \) and an agent has a duty to \( \Phi \). This of course assumes that agents must always maximise their telos; that is, choose that option amongst the range of options before them that is best, and anything less than the best, i.e., anything less than the maximal attainment of the telos, is wrong. Acts of supererogation are actions that are morally right but nevertheless optional. Such actions involve performing deeds beyond the limits of one’s duty. Since the limit of one’s duty for a (maximising) consequentialist is the very best actions of which an agent is capable, acts of supererogation are simply not possible.\(^{32}\) There is no sense in which an action is beyond one’s duty, i.e., right and good yet morally optional. This problem is simply the old problem of accounting for supererogatory, optional but good actions within a consequentialist ethic.

The third puzzle might be called the conundrum of agent-relative values. Simply put it is that mercy seems to be the epitome, at least on some occasions, of agent-relative values and reasons – favouritism, partiality, personal integrity, and so on. Yet, as we saw, it is a common

\(^{32}\)This is a similar problem to C2: if mercy is right, then it must be identical with justice. In this context, if mercy is right, even if on commonsense morality it is thought supererogatory, then it is identical with the action that a faithful consequentialist ought to be performing anyway. So there is no sense in which mercy is a departure from the expected course of events.
view that the values that consequentialism seeks to maximise must be agent-neutral values, and rest on agent-neutral reasons. There are values that are not dependent upon this or that agent, that are values for anyone; they are reasons for anyone to do or want something. If this is the case then consequentialism can not accommodate this aspect of mercy.

The final problem concerns the capacity of consequentialism to respond to and take account of the virtues. If consequentialism is only concerned with actions, rather than stable and on-going traits of character, then the only sort of mercy that exists in such a moral outlook is a particularly impoverished sort of act of mercy. We could feel none of the admiration we do feel, nor could we praise the strength of character we do praise, when confronted by a conspicuous act of mercy.33

If mercy is to be accommodated within a consequentialist outlook an account of consequentialism must be developed that accommodates the virtues, agent-relative values and reasons. As well, it must account for the fact that sometimes a given optimal act is required — yet the act is still praiseworthy; while at other times the act is not required, but it is remains permissible and right. Such an account must also accommodate the view that it is sometimes permissible to refuse to perform some optimal act, and capture the view that when a sacrifice is not required, it is nonetheless permissible and praiseworthy to make such a sacrifice. I shall consider each of these puzzles in turn.

§4.5. Solutions: Under-subscription

a). Sub-maximising Consequentialism. Sub-maximising consequentialism would seemingly license under-subscription to some goal; for example, in the case of punishment, imposing less punishment than is justified given the goal the consequentialist has. This would be the case for any coercive treatment or policy designed to force compliance with some rule. Sub-maximising consequentialism would justify the authority, who has the duty of enforcing compliance with some rule, imposing less than that degree of coercive treatment that is necessary to attain the maximum amount of compliance. What sub-maximising consequentialism specifies is an aspiration level of compliance that the

33. This, of course is not a problem only for mercy - but any virtue.
coercive treatments must attain and this can be somewhat less than the amount of compliance that is possible.

On any consequentialist theory, however, one of the features of coercive policy formulation is that only that particular level of coercive treatment is justified that achieves the authority's goals; only the minimum amount of coercion, and no more, is licensed to attain the target specified. Any more than this would be gratuitous oppression. And any less would defeat the purpose of the coercive treatment: the deterrence from some undesired behaviour. Given this, there simply cannot be a 'good enough' or aspiration level. The aspiration level will be both the maximum and minimum amount of coercion that an authority is permitted to inflict; in other words, a single level of coercive treatment, nothing more and nothing less. In cases such as these sub-maximising consequentialism is irrational. Only maximising consequentialism, it seems, is logically and morally acceptable in such cases. Therefore, mercy as an under-subscription to one's duty cannot be justified. So if mercy is to find a place in a consequentialist coercive social theory, the variety of consequentialism assumed, it seems, must be maximising.

b). Maximising Consequentialism. Can mercy find a place in a maximising consequentialist ethic? Recall at this point that consequentialism is a theory about what it is for some object - in this case an action - to be right. It is a theory of evaluation. Recall also that 'mercy' is not an evaluative term per se, but a descriptive term. It names a particular sort of action, namely one that springs from motives other than motives of justice; and has consequences often different from the consequences attained if justice is done. As well, it refers to an action that is a departure from the ordinary and expected course of events. We are in a position now to see a solution.

Suppose a consequentialist legislator has enacted general laws — laws that will most of the time deliver the ends she seeks. These laws might deliver results that are 'just' — but the appropriateness of the law is not to be found in the fact that it is just — but in the fact that it promotes some goal. In this theory, mercy can be seen as one act-option that makes for a right state of affairs, amongst a range of act-options, (others being justice, pardon, leniency and so on) which are all directed at the social ends desired by the legislator. Whenever mercy can promote
that end more effectively than any alternative act-option, then it must be chosen. It is a duty. Thus, some action is an act of mercy by comparison with the other, severer things that an agent has the capacity do, such as justice.34

This can be put more formally in this way: an option, \( \Psi \), rationally and morally must be chosen when \( \Psi \) is the option, amongst a range of options, that it is expected will maximise the telos that an agent has. It will be right when it maximises those values appropriate to that situation. In the case of mercy, the values of care and respect for people.35

Mercy will be a problem only for that consequentialist who believes that the only relevant value, the only value that ought ever be promoted, is justice. Such an agent believes that the only right action is that action which maximises expected justice. Since mercy does not do this, mercy cannot be, by the lights of this consequentialist, morally acceptable. If, however, an agent believes that other properties, besides justice, are valuable, then this problem will not arise.

Sometimes it will be right to be merciful and not just, and other times just but not merciful. Whether we should be merciful or just or promote some other value will depend largely upon the properties we consider valuable, the properties possessed by the case before us, and the circumstances. But the point is, however, that mercy can be justified in a maximising consequentialist metric.

We need not contrast mercy with justice to see that mercy can find a justification within consequentialism. A simple example might run like this. Suppose a parent is faced with punishing a child in order to enforce compliance with some rule. Suppose also that such punishment would

---

34. Cf. Heyd, Supererogation, Cambridge, 1982, p.155. This seems to be the argument that Rashdall advanced in support of forgiveness, according to Heyd. A good example of this approach is found in this anecdote from Robert Hughes, The Fatal Shore, London, 1987. Hughes writes, George III took the exercise of the Royal Prerogative of Mercy (the King’s power to override his courts and remit a sentence at will) very seriously. The Royal Mercy showed his subjects that their monarch cared about them...The laws were the stick, mercy the carrot. There was subtlety in maintaining the hanging laws but not automatically using them. If they had merely been repealed, the effect would not have been the same. For mercy to evoke gratitude, the ruler must be seen to choose mercy, so that each reprieve is a special case, to be paid for in gratitude and obedience, never taken as a right.....Moreover, the royal Mercy and judicial commutation of sentences kept the crossroads of England from being decorated with scores and scores of corpses — a sight that could have provoked general riots. (p.36).

35. I am indebted to Philip Pettit for clarifying the discussion in this section.
work with respect to that offence in perpetuity. Suppose, however, that less than that punishment while not totally deterring repetition, would, nevertheless, have other beneficial consequences, that are more desired than eternal compliance with the rule. For example, that degree of punishment may well turn an already timid child into a positively withdrawn child. Clearly mercy is justified. It involves sub-maximising the goals of punishment, while maximising other more highly valued goals. Again it is a case of an action described as an act of mercy being justified from a consequentialist point of view, over another phenomenologically distinct act-option. As she might say ‘I was merciful because the benefits were greater than the benefits that attached to punishing’. This sort of solution can also be adopted in more institutional circumstances. A police officer in his daily work has discretion, in minor matters, as to the offences that he will officially notice. Now the police officer may be deterred in some cases, by the fact that the offender is poor or young or old and some, responding to an apt property of the offender, exercise mercy in some real sense. The police officer may also be deterred by the amount of paper-work involved from officially noticing some offence, reasoning that to do this will leave her free for more pressing duties. In some attenuated sense only has the police officer been ‘merciful’ to the offender, since she is not responding to a need that the offender possesses. It is mercy only in the sense that the offender is within the police officer’s power, vulnerable to her acts or omissions.

The problem arose simply because Bentham, Smart, and Lucas assumed that acts of mercy would be different from consequentially justified actions and because they failed to see that ‘mercy’ is not an evaluative term, but a descriptive term — a name for a particular type of action.

This problem of justifying mercy is essentially the same for both the deontologist and the consequentialist. The difference is that a deontologist holds that rightness is related to the degree to which mercy — or any other act-option — honours one’s all-things-considered duty; the consequentialist, on the other hand, holds that rightness is related to the degree to which mercy — or any other act-option — promotes some telos. If mercy were always characterised as an under-subscription to

some ‘deontic’ criterion of rightness — a consequentialist or deontological one, for example — then it would always be unjustified, and wrong by the lights of that criterion. Some have argued just this.\(^{37}\) However, as I argued, this is not the case.

How is mercy a departure from the expected course of events? Simply, that it is expected that justice will be done — after all it is probably the dominant value in our social relations. So we preserve the intuition that mercy involves in some sense, not doing what justice allows or requires, (since the law is just) and that it is a departure from the expected course of events. Of course such an act of mercy is not morally optional — but as noted in Chapter Three, in such a context it is not expected that mercy should be.\(^{38}\)

§4.6. Solutions: Mercy and Agent-Relative Values

It is the case that occasions arise when acting mercifully or being merciful would be, by the lights of commonsense morality, evaluated as good, praiseworthy, that is, appropriate — and even in some sense, right — even though on many a consequentialist metric such an act or display of virtue would be wrong, since it would not produce the maximal amount of impersonal, agent-neutral value, nor even reach the minimum or aspiration level. This is the result of a particular feature of mercy’s nature: when a virtue or when it springs from a virtue that is directed at the well-being of another agent, it is a personal response to the needs of another person, motivated by a concern for that person, rather than a desire to maximise welfare, utility or benevolence. There are many examples. Acts of mercy that involve sacrifices that do not produce value comparable to the value of the good sacrificed; decisions where the agent acts mercifully and simply refuses — as a matter of principle — to do something that, even though it is advantageous and has beneficial consequences, doing it would nevertheless violate their own principles,


\(^{38}\) There is another partial solution worth noting. Suppose that the punishment appropriate on consequentialist grounds exceeds the limit, in cruelty, that received moral opinion would find acceptable. For example, torture, mutilation and so on. Suppose that the legislator could inflict such punishment, but on the basis of ordinary morality decides not to. This would be mercy. Of course this involves accepting that there is not only an upper limit to what we can be required to do — but also, what we are permitted to do; and that this is a constraint on all moral theory.
projects and integrity. Such cases are familiar: the soldier who refuses to kill innocent civilians; the sheriff who refuses to hand his prisoner to the lynch mob; the gifted surgeon who goes to live in a leper colony. Acts of mercy in extraordinary circumstances can appeal to absolute prohibitions against certain actions that are useful in the circumstances, torture, or the killing of the innocent being two examples. All these are cases of what has been aptly be called, 'moral self-indulgence'. Such cases are problematic because their plausibility rests upon the value commonsense morality accords agent-relative and objectively sub-maximal actions, motives, or virtues rather than agent-neutral and maximal actions, motives or virtues. Thus, it seems that if mercy sometimes rests on agent-relative values and involves sub-maximal actions, then it is in direct conflict with consequentialism.

These sorts of constraints have been discussed frequently in recent times. Any discussion of supererogation, permissions, charity, courage and so on deals, in one way or another, with these sorts of constraints. And any moral theory must be able to explain why it is sometimes permissible to refuse to perform an action with good consequences — especially if the cost, in comparison, is low (under-subscription); it must also explain how performing such a good action if not required to is nonetheless virtuous and praiseworthy (over-subscription). As well, it must explain how, if a particular action is not required — it can be, nevertheless, permissible and praiseworthy to perform it. I discussed

39. Mercy is not, of course, the only value that throws a challenge at moral theories that fail to accord a place to values that have mainly agent-relative value. There is most notably, integrity, the value that is exemplified in the lives of Socrates, Seneca and Sir Thomas More. This century affords many examples too. We recall the lives of Maximilian Kolbe and Dietrich Bonhoeffer and the little known members of The White Rose, a group of Munich students who distributed pamphlets revealing the Nazi atrocities. See the diaries and letters of the leaders, Hans and Sophie Scholl, At the Heart of the White Rose: The Letters and Diaries of Hans and Sophie Scholl, (edited by Inge Jens; translated by J.M.Brownjohn ), New York, 1987; and the memoir written by their sister, Inge Scholl, The White Rose: Munich 1942-1943, (translated by Arthur R. Schultz), Middletown, Wesleyan University Press, 1983. This section is the result of my attempt to understand the lives of these exempla or as we might today say, heroes, as well as understand the agent who, even though he may have many forceful reasons not to be merciful, nevertheless restrain his power. For a discussion of 'Integrity', see L. McFall, 'Integrity', Ethics, (98:1987), pp.5-20.


earlier a particular example of one of these constraints: under-subscription. (I shall discuss another example in the next chapter — over-subscription, i.e., supererogation). It is time now to consider the issue more generally, since mercy, in some of its guises, relies for its legitimacy on these constraints. If a consequentialist cannot accommodate them then she will be unable to account for, that is justify, some displays of the virtue of mercy, and some examples of merciful actions. There are three types of cases that are problematic for consequentialism.43

1. Agent-centred Restrictions. (Also known as ‘deontological side-constraints’.44) These restrictions are categorical injunctions that forbid the maximization of impersonally considered goods. Thus, agents are enjoined not to act in particular ways towards other agents, even if so acting would yield enormous benefits: benefits far in excess of the benefit derived from observing the prohibition, and the cost of violating the restriction.45 Such restrictions are agent-centred in that they aim to preserve the autonomy and integrity of individual agents against collective desires. They protect agents from victimisation and are orientated at preserving the good of individual agents as opposed to promoting the good of others. They involve a denial that it is always required to maximise the good of all — impartially considered — but more importantly, they involve a denial that it is ever permissible to perform these prohibited actions.46

2. Agent-favouring Permissions. This is the permission we have to favour our own projects, way of life, concerns and interests over those of others; in other words, it is the permission we allegedly have to be partial to our own ‘way of being’ and not to consider it, impartially, as one amongst many. Thus, it is a permission not always to ‘seek the impersonally-judged overall best state of affairs’.47 Such permissions seemingly permit an agent to seek their own goods at the cost of

44. Slote, *ibid.*, p.11.
46. These constraints are puzzling — not only from a consequentialist but a deontological point of view. They commit an agent to the counter-intuitive view that it is ‘rational to forbid the performance of a morally objectionable action, that would have the effect of minimising the total number of comparably objectionable actions...How can the minimisation of morally objectionable conduct be unacceptable?’ S. Scheffler, ‘Agent-Centred Restrictions, Rationality, and the Virtues’, in S. Scheffler, (ed.), *Consequentialism and its Critics*, Oxford, 1988. pp. 243-260, at p.244.
47. Slote, *ibid.*, p.11.
producing a state of affairs that has less than the most good — impartially considered — that is attainable in the circumstances. The key is that morality cannot require us always to sacrifice our own projects — great or trivial though they may be.

3. Agent Sacrificing Permissions. This is a permission agents have to sacrifice their own projects, interests, prospects — and so on — even if the state of affairs that obtains as a result contains less value overall than the state of affairs that would have obtained had they not made the sacrifice.

I must say something about the notions of a ‘constraint’ and ‘agent-centredness’. A constraint is simply a limit to the operation of a policy, programme, theory, or more generally, ‘activity’. It may be internal to the theory or external. A familiar example is this: commonsense political theory – supported by the legal positivists – holds that there are some things that are not the law’s business — such as sexual morality. Thus, a constraint on the operation of the law — its ‘scope’, if you will — is that it has no business regulating people’s private lives; that is, enforcing morality. If we posit constraints on morality, we are claiming that, as in the legal analogy, there are limits to its operation, limits to the sorts of things it can require of us — and prohibit us from doing.48 Something can be too trivial for morality to require (such as brushing one’s teeth or eating a balanced diet); other things can be too much for morality to require, but we may nevertheless have a permission to do them, (such as self-sacrifice, extraordinary acts of bravery, charity and so on); still other things can be too wicked for a morality to require (such as annihilating a small village in a hostile area, in a ‘just’ war, pour encourager les autres; torture, extra-judicial killings and the like). Of this trident, the first is an example of an agent-favouring permission; the second, an agent-sacrificing permission; and the third, an agent-centred constraint.

The first two are permissions; the third a prohibition. They are all in some sense also a prerogative: something an agent can appeal to so as to provide a justification for rightly not performing, or for performing, as

the case may be, some action seemingly required or not. If there is such a prerogative, then by invoking it the agent is immune from moral criticism, opprobrium and blame. However, in the case of permissions, if they go ahead and perform the action they are the fitting objects of praise, for they have declined to use a permission they have, and have done what they were not required to do.

What makes such prerogatives 'agent centred'? It is the fact that the moral evaluation, the rightness or the wrongness, obligatoriness, or permissibility, goodness or badness of the acts in question depends, decisively — though not completely — on moral considerations about the act, that have a personalised significance, not dependent upon an appeal to overall (actual or expected ) value or disvalue as determined by an impersonal, objective moral standpoint. Thus, in the case of an agent-centred restriction, the act prohibited is prohibited, not by consequential considerations — but other, independently justified considerations that have significance in the individualised moral life of a particular agent. They are deontological, in that they impose a categorical duty upon the agent — one that admits of no exceptions or calculations, or evaluation of 'best consequences' of performing it or refraining; requiring rather that it be respected. Similarly, in the case of agent-centred permissions, they are permissions that are justified independently of a consequentialist metric.

Why are agent-orientated prerogatives problematic for the type of consequentialism sketched in §4.3? There are a number of reasons. Consequentialism, rests upon impartial, objective values, and valuations. Giving a higher evaluation to the personal and the particular simply because they are one's own projects, is excluded. Yet agent-centred constraints, and mercy in particular, are agent-relative. They assume the legitimacy and primacy of agent-relative values, an agent's integrity, the importance of, and partiality towards their own projects and their autonomy. Thus, there is, seemingly a direct conflict between them.

Moreover, consequentialism is thought to provide the sole criterion of right and wrong. Yet, agent-centred values appeal, it seems, to a non-consequentialist metric for the legitimacy of the valuations. If this is so, then consequentialism can not be the sole criterion of right and wrong.

49. This formulation is based on Scheffler (1989), *op. cit.*, p.69.
Further, such values seemingly license the promotion of sub-maximal states of affairs: a person who forgoes a brilliant medical career to minister to a small leper colony has not maximised the good, nor has, from certain consequentialist points of view, a person who remits a punishment that would maximise deterrence. Thus, these constraints undermine a central tenet of consequentialism: that the morally right is always the best (maximisation) or that the morally right is that which reaches the aspiration level (if this is understood to mean that something less than the best is good enough).

There are a number of responses that can be made to these constraints. First, we might simply say that such constraints are illusory; that there are no limits to morality, that received moral opinion is merely mistaken. This entails the view that morality is excessively demanding and that people are not, since they fail its injunctions, morally very good. We are all sinners. This does not seem plausible: for some of the properties that any system must have is that it is workable, implementable and liveable. Otherwise it would be a morality for gods – rather than humans. That "ought" implies 'can’ not only means that agents have the physical, psychological capacity and the fiscal wherewithal, but that the action enjoined is reasonable. For example, it does not seem reasonable to blame, or otherwise morally condemn someone for refusing to kill themselves to save a family of say, brilliant neuro-surgeons.

It also implies that although there is a moral theory, morality in practice, is something quite different. Morality is, it would seem, an unattainable ideal and attainable morality, since it falls far short of our aspirations, is deserving of less respect than we are minded to ordinarily give it. This too is unacceptable: it would seemingly open the door to moral anarchy. The point of morality is to influence behaviour so that all of us can achieve through voluntary action as great a measure of the good life as possible, which as Aristotle foresaw, involves living simultaneously, not only individual lives – but as part of a group. Its point is to regulate and balance in as objectionless a way as possible, through mutual consent and individual judgement and reason, individual interests against other individual interests, and individual

interests against those of the community so that each may attain their measure of the good life: the very aim of rational reflection and action.

If we are not minded then to reject completely those constraints, it seems that we must accept that they achieve what it is claimed they do: a complete rejection of consequentialism. Do they? I do not think so. The resources of consequentialism. I believe, are such that they can be accommodated within a modified theory. To be sure there are two issues that need to be addressed if mercy, conceived of as some sort of 'agent-centred' prerogative, is to be accommodated by consequentialism:

1. Agent-relative values;
2. Sub-maximization of objective good;

To begin, let's look again at what consequentialism involves. It has two components — a theory of the right and a theory of the good. Now, the actual consequential element of consequentialism is the theory of the right. All it requires is objects be judged on the basis of the value of their outcomes. It has nothing to say about the nature of the theory of the value to be used in ranking the values realised in an object's outcome, (although classic utilitarianism and consequentialism assume an objective theory of value). Given this, the possibility is open to use a theory of value that is not evaluator-neutral, but one that, on occasion ranks evaluator-relative values more highly than evaluator-neutral ones, on the basis that the maximum amount of appropriate value will be realised. Impartial benevolence or 'everyone's welfare', for example, when impartially considered cease to be the sole values worthy of promotion. In fact, the value worthy of promotion will change in accordance with the circumstances. What will not change is the fact that a particular value will be appropriate to a particular circumstance, and value will be promoted if the appropriate value is promoted in the outcome of an object.

Now, the trick for a moral agent is knowing what good is appropriate — and more pertinent to our purposes — when she should

51. In this section I am concerned only with consequentialism. By showing how a deontologist (retributivist) might account for mercy, (vide, Chapter Three). I have shown how he might account for constraints 2 and 3. I do not believe that a deontologist can accommodate constraint 1 without paradoxical conclusions. See n.46 supra.
rank more highly agent-relative goods than agent-neutral ones. Just as there is a time to every purpose under heaven, there is a time to be partial and a time to be impartial. A well-informed theory of the good would provide a basis for an answer.\textsuperscript{53}

Once an agent has decided whether partial values (values that take as their focus the agent's own projects and interests) or impartial values (values that take as their focus projects and interests other than the agent's) are appropriate, she then sets about discovering the object that will best bring this value to realisation. What consequentialism as a theory of right tells her is that the right object will have the property of producing a state of affairs in which that preferred good is brought to fruition, better than any alternative object. The right action — or motive or virtue — will be that one, the outcomes of which, it is expected, will possess as much value as any appropriate alternative open to the agent. In this way, appropriate value will be maximised.

In the ordinary course of events agents do not follow a plan such as this, nor need they in order to be true to consequentialism. Rather, the policy an agent ought to follow is one that \textit{results} in the most value obtaining, without her acting from a motive to produce the most value. For example, an agent may decide that promoting her child's welfare is an appropriate value in certain circumstances. Now, she can adopt a plan of calculating on each and every occasion what action will promote the welfare of her child. But this may well result in her seldom promoting the welfare of her child. She could adopt another strategy of always being partial to her child, in this type of circumstance, reasoning that this is most likely to produce the most value in the long run. Thus she opts for agent-relative values, focuses her attention on those things important, and those people close, to her. She acts spontaneously and without calculation. Actions, motives, virtuous behaviour are directed at promoting her own agent-relative values, such as her own projects, and special relationships and people close at hand.\textsuperscript{54} She endorses this

---

\textsuperscript{53} Indeed, many moral disputes are about this ranking — rather then whether a particular action was the right one. That is, we dispute not only the good to be realised — but also whether a means of realising it is the best one, i.e. it has the property of promoting that good better than any other option. So an action can be right, in as much as it maximises a good, but morally wrong, in so far as it maximises an inappropriate good.

\textsuperscript{54} Cf. Jackson, 'Consequentialism', Photocopy, Division of Philosophy and Law, Research School of Social Science, Australian National University, Canberra, 1989. (\textit{Ethics} - forthcoming), p.15;
strategy because she knows that it is the best way that she can achieve what she values: her child’s welfare. It simply makes sense from her own point of view to promote her own interests and those close to her, ceteris paribus. She does allow, however, that she may legitimately neglect on some occasion her child’s welfare if it is appropriate to do so. She would do so, for example, if there are good reasons to believe in a particular case, that it was not appropriate to do so. Then she must calculate and determine the ranking of her values.\textsuperscript{55} There is a good consequentialist reason to focus, on occasion, on agent-relative values and realise them spontaneously: in doing so agents have adopted a strategy that maximises appropriate value. And that presumably is one object of morality: to maximise good and minimise evil, within limits.

Now this way of looking at things has a number of consequences. First, it enables a consequentialist to include agent-relative values. Second, it allows a consequentialist ethic to accommodate sub-maximisation. Sub-maximisation then involves ‘sub-maximisation of agent-neutral values’, that is, values not directly concerned with one’s own projects and interests, but rather values that are non-particular in nature, such as the flourishing of the community. Value is still maximised, as the agent is required to maximise that value appropriate to the circumstance — only sometimes it may be agent-relative, such as an agent’s integrity or the value that they place upon their own projects.\textsuperscript{56}

Third, it permits consequentialism to recognise agent-centred prerogatives. They exist within the theory of the good. We have a prerogative to promote our own projects — or to sacrifice them — even if less objective good is created. All that must be the case is 1. It is permissible on this occasion to use one’s prerogative; 2. the amount of value created must be maximal: even if it is agent-relative value, that is, values that attach to an agent’s own projects and interests and so on. Whether an agent uses this prerogative will depend on her theory of the good, and whether on some occasion her theory holds that the value that is appropriate on some occasion is an agent-relative value.

\textsuperscript{55} Cf. Brink, \textit{op. cit.}, p.426.
\textsuperscript{56} Therefore, mercy can find a place in a sub-maximising form of consequentialism, (contra §5.4(a)), when it involves under-subscription that appeals to an agent-relative value.
Fourth, it brings into moral theory the commonsense notion of a limit to what morality can require. Limits are imported into moral theory through the theory of the good. The theory of the good not only identifies what properties are valuable, but what properties are appropriate to some occasion. Constraints on what values are appropriate to some circumstance are numerous. For example, if a person is incapable of acting in a particular way then it is logically amiss to say that it is morally appropriate for them to realise that value.

Fifth, it shows how agent-centred restrictions can be included. Sometimes it is useful to have agent-centred restrictions (such as bills of rights) — other times not. Finally, it does not involve denying that consequentialism is the sole criterion of rightness and wrongness — as seems initially to be the case when mercy is seen as an agent-centred value. Why? Simply, if an act of mercy is the good that should be realised, because it is appropriate, then there is but one response to it: promote it. The fact that some other good, if realised, might have produced more value is irrelevant. Goods are ranked in terms of their appropriateness to the circumstances and agents are enjoined to maximise only those goods appropriate to the circumstances.

§4.7. Solutions: The Virtue of Mercy — and Consequentialism

'Mercy', can refer to either an action or a virtue. So far we have examined the possibility of consequentialism accommodating acts of mercy. Now it is time to consider consequentialism's capacity to accommodate the virtue of mercy. It is quite clear that, given the account of consequentialism set out above, the virtues, and indeed any theory that holds that the primary bearers of moral epithets are agents and their properties, such as character traits and motives, dispositions, rather than their actions, can be evaluated by the consequentialist. But
that is not really the problem, although I will give an account of how consequentialism can accommodate the ‘virtues’. The problem is rather, whether the virtues, and a virtue theory, can be the sorts of entities that a consequentialist can accommodate; that a consequentialist can have them in all the virtues’ glory and nuances, in his theory, without having to modify them or dilute the concept. To a large extent — although I am not sure how much — I believe she can. That is the point I seek to make in this section.

§4.7.1 The Virtues and Consequentialism

Against the entire question it might be urged that consequentialism is essentially about the evaluation of actions. At best, all consequentialism could do, the argument runs, would be to evaluate the actions that a display of a particular virtue involves. Even then, the spring for the action would be irrelevant — so it is the action’s consequences that, from an evaluative point of view, are important, not its antecedents: an agent can do what is right, obligatory or his duty, irrespective of the motive or character trait from which it springs, or the belief, intention and so on.60

Against this, a number of points need to be made. First, it is not the case that consequentialism is essentially concerned with the evaluation of actions. There is no conceptual requirement that consequentialism only assess actions. Although evaluation of actions is the usual practice there is a veritable plethora of objects liable to moral assessment: rules, institutions, intentions, motives, traits of character, personalities, policies, decisions — to name but a few. In fact, one could evaluate any object that has consequences which themselves have value.

Second, suppose consequentialism is concerned only with the evaluation of action. How then could it do justice to the complexity and richness of moral life? It can’t. We find moral value in many things other than actions. For example, familial relationships, friendship, love, the properties of courage, constancy and kindness. Consequentialism that focused upon actions only would be deeply impoverished and the

'morally right life' would be one bereft of what we find most valuable. One is left wondering about the value of life in a world in which everyone did their duty, yet rarely wanted to, and maximised through their actions those things identified as valuable, yet whose motives made not one iota of difference to the value of the action.

All this points to a third point. Contributing to the value of any action, indeed any state of affairs that is affected by responsible human agency, is the quality (moral) of the state of mind of the agent who is bringing or would bring that state of affairs into being. An action done with a goodwill is evaluated quite differently from another that produced the same results, but done out of malice. Hume, speaking with respect to motives and praise of actions, makes in an extreme way this point:

...When we praise any actions, we regard only the motives that produced them...The external performance has no merit...all virtuous actions derive their merit only from virtuous motives.

Finally, limiting the objects of moral assessment to actions alone is not supported by the 'classic' consequentialists, (i.e. utilitarians like Bentham and Mill). Mill, for example, writes:

But does the utilitarian doctrine deny that people desire virtue, or maintain that virtue is not a thing to be desired? The very reverse. It maintains not only that virtue is to be desired, but that it is to be desired disinterestedly, for itself.

...And consequently, the utilitarian standard...enjoins and requires the cultivation of the love of virtue up to the greatest strength possible, as being above all things important to the general happiness.

§4.7.2. The Place of the Virtues Within Consequentialism

What then is the place of the virtues within a consequentialist outlook? Their value is instrumental. Any consequentialist value they

---

61. Stocker ('Schizophrenia'), op. cit., p.455.
63. Mill, for example, claimed the opposite: 'the motive has nothing to do with the morality of the action' (Utilitarianism, op. cit., p. 270), and Stocker (1973), op. cit., p.54, and Stocker (Schizophrenia) p.454.
64. Treatise on Human Nature, Bk. III, Pt. II, Sec. I.
66. Ibid., pp.291-292.
have is to be found in the value of the states of affairs they produce. The virtues themselves have the consequences of predisposing the agent to perform actions, or create states of affairs [such as another person’s pleasure at being the object of another action] which unintentionally maximises value since the agent would not be motivated by a concern to maximise value. It is a welcome, and important, side-consequence. This strategy relies upon the distinction between evaluating and justifying some object, on the one hand, and it being what it is, in this case, a virtue. The display of some character trait may be instrumentally justified, (i.e. justified on consequentialist grounds) without altering the fact that the state of affairs that obtains is a consequence of the display of a virtue, a particular trait of character. This bifurcation of motive and evaluation is a feature of consequentialism, as noted above. The virtues, then, can find a place in a consequentialist ethic. But the way is not entirely clear; some difficulties remain to be resolved.

Taking this line has an important result. In some cases, act and virtue consequentialism are, at least on some reckonings, incompatible. In other words, there may be certain traits of character, which, although they tend to maximise value, and are therefore right by the lights of virtue-consequentialism, nevertheless have a tendency to lead people to perform specific actions that, according to the lights of act-consequentialism are wrong, because they are sub-optimal. Thus, sometimes acting virtuously will be evaluated as good, praiseworthy and right (according to virtue-consequentialism) even though the display of virtue produces a state of affairs that is sub-optimal from the point of view of act-consequentialism. Thus, virtue consequentialism can, on occasion, be immoral from certain act-consequentialist perspectives, since a consequentialist must hold that it is always wrong for a person knowingly to do anything other than what she believes to be most conducive to producing maximal value. Of course, this criticism cuts both ways; it may on occasion be sub-optimal to act in a particular way, rather than display a particular virtue.

It emerges that we need a procedure to decide whether to act, and set our dispositions aside, or display some trait of character. That seems, from a practical point of view most unattractive: we might never actually

do anything. Of course, this worry is based upon a confusion. Consequentialism is not a decision procedure. Rather, as a theory of right, it reveals what properties the preferred state of affairs would, or should have, possessed. Given this, the worry dissolves: there simply is no practical difficulty, from this direction at least, for consequentialism.

Moreover, this criticism of virtue-consequentialism is based upon the assumption that agents must maximise overall value. Suppose, as suggested above, that all one is required to do is reach some specified, aspiration level. Now if both options, virtue or action reach aspiration level — then both are right. And there simply is no problem of choosing between them. The problem now is: How do we set the aspiration level? That too would be set on consequentialist grounds.

Another criticism is that this account of the relationship between consequentialism and the virtues, assumes a ‘thin’ theory of virtue: the virtues are ordinarily thought good and right independently of their instrumental value. Their instrumental value merely adds to the value they already have. In other words, limiting the virtues’ value to their instrumental worth modifies the notion and does not faithfully capture the nuances of the value of the virtues. There are a number of replies. First, one might include in the evaluation of some state of affairs the nature of the object that gave rise to it. 68 Thus, if the object that gives rise to some state of affairs is a valuable character trait, then this will affect the evaluation of consequential state of affairs — and ultimately the rightness of its antecedent. Thus, the value of the character trait is not purely instrumental, i.e. not solely the value it goes on to create, but as well, the value it possesses intrinsically — determined by some theory of the good.

Second, the virtues have instrumental value because they achieve some other goal. The goal to be maximised could be anything. Typically it would be that value — or set of values — identified by a theory of good. All consequentialism holds is that the morally right response to them is to promote them. Now suppose our theory of good identified particular character traits, virtues, or a life of virtue, and motives, as objects of value. In this case they ought to be maximised. They would cease to

have any instrumental value, as they would be the goals of life. For example, those things would be right that permitted the virtues to flourish, or a life of virtue to be attained.

What then would be the role of consequentialism? It would serve a number of purposes. First, it would identify and rank those objects that would promote the life of virtue. It would reveal the properties the right objects must have.

Third, it could be used to resolve conflicts between the virtues. From time to time the virtues can conflict – for example justice and mercy. The life of virtue involves knowing which virtue is appropriate to the circumstances at hand. And appropriateness is measured in terms of capacity of each particular virtue to promote some goal that is valued – for example, the agent’s welfare, and well-being. Now, on this view do the virtues once again only have instrumental value? No. As we saw above they have intrinsic value too, and that features in the rightness of each.

Fourth, it is precisely because we value each, apart from the consequences it produces, that we need a criterion of rightness — i.e. appropriateness. The characterisation of this state of affairs is this: they are equally valuable (from the point of view of the theory of value) and should all form, as far as possible, part of the virtuous personality — but one will be more appropriate (right) on some occasion than another. It seems then, that the virtues can be accommodated within a consequentialist moral outlook.

Finally, if the goal of an agent is to live well, or as we might say, aim for eudaemonia, then consequentialism provides a justification for the cultivation of the virtues.

The discussion thus far has assumed individual agency. But what of institutional agency – can an institutional agent with a consequentialist outlook possess the virtue of mercy? It seems to me she can. One might ask ‘What sort of traits of character would it be right for an institutional agent to possess?’ The answer would depend largely on the goal one sets them. If it is public welfare, which is, as Mill points out, the aggregate of
the good of all persons,69 pursuing their own ends without wantonly and unjustifiably infringing the good of others, then it is clear that the virtues of which mercy is one, promote this goal. Public officials displaying the vice of mean-mindedness, officiousness, rule-worship or bloody-mindedness may promote some measure of the public good — yet they detract from each person’s good by their pernicious attitudes. Thus, on promoting the public welfare, by promoting the good of each individual, the virtues have, to be sure, an instrumental value — which is precisely one reason we value them in others. That is, the virtues of public officials are valued on the basis of the way they enrich our lives. However, we also take into account in this evaluation, not only the value of the direct consequences of their exercise, but their intrinsic value. The point is, simply, when evaluated from a first person perspective, the intrinsic value of the virtues features prominently in the evaluation of their rightness. When examined from a third person point of view, the evaluation we give them, while still influenced by their intrinsic value, is largely in terms of the value of their direct consequences on others: we all walk a little easier knowing that public officials possess some measure of virtue — knowing that there are some lengths to which they will not go — and knowing this is important to the general happiness.70

§4.8. Conclusion

In this chapter I attempted to identify and set out the problems that seem to arise when we attempt to accommodate mercy within a consequentialist outlook. I provided solutions to them. Mercy as an action could be relatively easily accommodated by the consequentialist. However, if mercy as a virtue is to find a place within consequentialism. The solutions involve some substantial modifications to the usual conception of consequentialism. For example, the re-orientation of consequentialism from acts to properties of agents, and the inclusion of agent-orientated prerogatives. If such prerogatives are included, consequentialism moves from being the major component of a moral theory to being a component of a rather more complex theory, which is at its heart consequentialist, while containing the elements of common-

sense morality.

All these solutions work against a particular background: that consequentialism is primarily a theory of what is right, rather than a decision-making procedure; that, it need not assume a particular telos — and in fact the telos need not be agent-neutral; that there are limits to what morality can require of us and that these limits are part of the theory of the good: they distinguish goods that agents can be enjoined to realise, from those that cannot be enjoined.

The upshot of this was that mercy can be accommodated by the consequentialist. It remains now, having seen that mercy can be accommodated by the dominant moral outlooks of this time to see how it might appear within an institutional structure. After doing that we must also come to understand how, if mercy is the subject of an imperative, as it mostly is within consequentialism and deontology, that it might still be thought optional, a gift and supererogatory. We consider these two questions in turn in the next two chapters.
§5.1. Introduction.

Out of the last three chapters emerged the view that mercy could be, amongst other things, morally required. Since it was part of a morality of requirement, there was the possibility of moral criticism for those agents who fail to act mercifully on the appropriate occasions. But then what are we to make of the claims that mercy is optional, supererogatory, a gift, not part of a morality of requirement and that it is not possible to criticise agents who fail to be merciful? Moreover, it is believed that mercy is not only unconstrained, but unconstraining; in other words, a single act of mercy does not commit an agent to replicating her merciful action in subsequent and similar cases. Yet, if mercy is based upon cogent reasons then it would appear that an agent is rationally constrained to be merciful in subsequent similar cases; in other words, because mercy is a rational action, a single act of mercy is constraining. Apart from these apparent contradictions in our beliefs about mercy, there is another, deeper problem that must be tackled first. If it is to be possible for mercy to be supererogatory then the two moral outlooks we examined in Chapters Two and Three must be able to accommodate supererogatory actions. And it is far from clear, as we noted above, that they can.¹

In addition to these difficulties, there are two others. Mercy is believed to be a virtue. Moral criticism presupposes responsibility. If the

---

¹. Chapter Three, n.59, supra; Chapter Four, n.11, supra.
virtues are character traits then one has little or no direct control over their manifestation on some occasion. Thus, in some real sense, agents are not directly responsible for their virtues — or for that matter their vices. What then is the basis of the criticism directed at agents who fail to display the virtue of mercy?

Finally, while praise is often directed at actions that an agent has no obligation to perform, it does not seem appropriate to praise agents who are merely doing what they ought to be doing, especially if their duty is not particularly onerous. It seems bizarre to praise the postmaster for selling us a postage stamp or the municipal official for renewing our dog’s licence. However, agents who are merciful, even when such an action is required and not particularly onerous, are often praised. Such a response does not seem bizarre. What is the basis of this response?

Dissolving these problems is the task of this chapter. In §5.2 I shall set out the problems. In §§5.3-§5.7 I set out my solutions to these problems. Specifically, in §5.3 I shall show how consequentialism and deontology can accommodate acts of supererogation. In §5.4 I explain how a single act of mercy may be unconstraining, while also being a rational action, something that would normally imply that it is constraining. In §5.5 shall explain how it is possible for mercy to be part of a morality of requirement (that is, any morality that requires agents to act in a particular way towards values) yet nevertheless be optional, a gift, and supererogatory. In §5.6 I shall explain how agents who fail to display the virtue of mercy on some particular, appropriate occasion, as well as fail to have it as part of their on-going character are liable to moral criticism. In §5.7 I explain how it is that the performance of an action that is required nevertheless attracts praise, a response that is usually only reserved for morally valuable but optional actions. With this chapter concludes the first part of the promise implicit in the title: setting out the concept, making sense of the way we talk about it, and clarifying its relationship to other important moral concepts.

§5.2. The Problems.

§5.2.1. The Problem of Accounting for Acts of Supererogation. Acts of oversubscription, such as supererogatory actions, are problematic for both a maximising consequentialist and a deontologist. For a
consequentialist the problem is this: if an action is one amongst a range of alternatives that will maximise the good, then the agent is obligated to choose the action with that consequence, if it is within his power to perform the act, regardless of the sacrifice involved. A moral theory whose basic tenet is that agents are enjoined always to do the very best of which they are capable, in other words, that agents should seek always to maximise a particular telos, is incapable of showing how it is genuinely permissible to refrain from performing actions that, on an objective criterion, will maximise goodness. One facet of mercy involves an over—subscription to the duties that we ought to perform. If over-subscriptions are not possible, then this sense of mercy is impossible within a consequentialist outlook.

For a deontologist, the problem is this: Mercy is thought to be supererogatory. That is, it is a morally right and good action that involves conferring more of a benefit upon an agent, who within one’s power that one has a duty to. It is an over-subscription to one’s duty. Now this raises the following difficulty. If we believe that the moral value of some action is confined to only those actions that we have a duty to perform, as say someone like Kant believed, then there is simply no deontic category of the supererogatory. If the action is right and good, then it is a duty. There are no actions that are right and good that are not duties. It is quite clear that if we are to continue to believe that mercy is supererogatory and that the deontologist is to accommodate mercy in this sense, then she must be able to take account of supererogatory actions.

§5.2.2. The Conundrum of Supervenience. This is a problem about the rationality of action and our beliefs about mercy. Commonsense morality holds that one of the qualities of mercy is that it is not only unconstrained but unconstraining. We are free on any occasion to be merciful or not as we please. More importantly, however, it is believed that the display of mercy on one occasion creates neither the moral nor rational obligation to be merciful to similar and subsequent agents. An agent can without censure, so we believe, be merciful to Smith on

3. The sorts of cases that I have in mind are those that involve conferring some benefit upon another person who is in dire need, such as alms to the impoverished, or the various forms of assistance we might give to the impoverished, the homeless or the destitute.
Tuesday and not to Jones, on Thursday, even though they are identical in the relevant respects. It is also believed that acts of mercy are based upon good reasons; in other words, that mercy is some kind of rational action, that it is neither arbitrary nor capricious, and that it rests upon morally and logically relevant properties of the beneficiary, in virtue of which mercy is given. For example, the victorious duellist extends mercy to his opponent, because, (satisfying a logical requirement), he is in a position to do so since the vanquished is within the victor’s power and because, (satisfying a moral condition), the vanquished person, for example, has fought honourably or because there is no point in killing him.

Now, if this is the case then it must also be the case that if mercy is given to Mary because she possessed some morally and logically relevant property, P, then a merciful agent is required — morally and rationally — to show comparable mercy to any other agent who possesses P. Since there is a rational requirement that rational agents act consistently, i.e., replicate merciful actions, in similar cases, a single act of mercy seemingly constrains a once merciful agent to be merciful in the future to relevantly similar persons. This, however, is paradoxical as it runs against a pre-theoretical belief that, it is alleged, we hold about mercy; namely that it is unconstraining; in other words, that a display of mercy does not rationally commit the merciful agent to replicating the merciful act in the future.

Another way to put this problem is in terms of arbitrary and non-arbitrary action. It can be set out like this. If mercy is based on reasons then those reasons will apply to all similar cases. It is the fact that mercy is based upon reasons that makes mercy a non-arbitrary rational action. It seems that we can deny the requirement that we act consistently towards similar cases, i.e., that mercy is replicable, only at the cost of denying that mercy is based upon such universalizable reasons. This would also involve, however, denying the non-arbitrary nature of mercy. Instead of being a non-arbitrary response to some individual in need, based upon reasons that would apply to all similar cases, it would be an arbitrary response. This yields a dilemma of sorts: either mercy is a non-arbitrary action in which case a merciful agent is morally and, in some sense ‘rationally’ required to replicate it — and this is at odds with our pre-

5. A version of this conundrum was seen also by Smart, op. cit., p.351.
theoretical beliefs; or mercy is not based upon universalizable reasons, and is an arbitrary action, and therefore not replicable, but is a matter of grace a gift and so on. Thus, it fails to be morally acceptable. This too is at odds with our pre— theoretical beliefs that mercy is morally acceptable and non—arbitrary. 'Mercy' then seems to be incoherent. Jeffrie Murphy set out these worries in the following way:

If God (or any other rational being) shows mercy, then mercy must be not be arbitrary or capricious but must rather rest upon some good reason — some morally relevant feature of the situation that made the mercy seem appropriate...But once a reason always a reason. And does not the principle of sufficient reason require that if I, as a rational being, showed mercy to Jones because of characteristic C, then it is...required of me (rationally required, not just morally required) that I show comparable mercy to C—bearing Smith? But, if so, then what becomes of all this grace/free gift talk when applied to mercy? Is it nothing more than this: I am never required to show mercy; but should I slip and show it even once, then I am rationally required to show it on all relevantly similar persons?

This puzzle revolves round a single point: if there is a reason to be merciful — some feature of the beneficiary, because of which mercy is given — then all similar agents, as a matter of fairness and consistency should receive mercy. There must be a generalised reason, not tied to the emotions of the merciful agent, if mercy is to be regarded as a non—arbitrary, non—capricious action. At the heart of this conundrum is 'supervenience'. R.M. Hare has explicated the notion, with respect to 'good', this way:

First, let us take that characteristic of good which is called its supervenience. Suppose we say 'St Francis was a good man'. It is logically impossible to say this and to maintain at the same time that there might have been another man placed in precisely the same circumstances as St. Francis, and who behaved in exactly the same way, but who differed from St. Francis in this respect only, that he was not a good man.

Thus, the display of mercy, being a candidate for mercy, or mercy being required in some particular case, is supervenient upon the target

---

6. If this conundrum is successful, the compatibility of mercy with justice— as—fairness is thrown into doubt. As a consequence, so too is mercy's moral permissibility, for any action that involves the remission of a penalty, (or for that matter, the over—subscription of a benefit), yet permits a departure from fairness, must be wrong. I examined this 'moral' version of this conundrum in §3.5.2.
7. Murphy and Hampton, op. cit., p.181.
possessing certain characteristics and the merciful agent valuing those characteristics in a particular way. (Moreover, the ascription of mercy of some person or of some action is also supervenient on that action or person possessing particular properties.) The reason that mercy is given is that it would meet the need of the beneficiary. The characteristic of the beneficiary that provides the reason is their need and inability to meet it themselves. Now, it follows because mercy is supervenient, that if given in one case then, *ceteris paribus*, it must, logically at least, be given to all other cases that share this characteristic. This produces a conundrum because we believe that mercy is unconstraining; that it is like a gift or an act of supererogation, that the performance on some occasion does not commit the benefactor to replication on another occasion. Our options then are to say that mercy is a gift, that supervenience fails, but only at the cost of admitting that there are no non-capricious non-arbitrary reasons for acting mercifully. The other option is to admit that mercy is extended on good reasons, accept supervenience, but only at the cost of admitting that the replication of merciful actions is rationally required. I call this conundrum ‘The Conundrum of Supervenience’. In order to capture all these features I suggest the following formulation:

*C3: The Conundrum of Supervenience.*

1. It is ordinarily thought that mercy is a rational action and optional. As well it is thought that the display of mercy on one occasion does not create a rational obligation to perform merciful actions on other similar occasions.

2. Any display of mercy by a rational agent rests upon reasons.

3. Such reasons must be grounded in some characteristic, C, of the case.

4. If mercy is given because of C in case A then, as a matter of consistency, all other C-bearing cases must be granted mercy.

5. Therefore, mercy once shown commits the merciful agent to performing the merciful action on similar occasions.

§5.2.3. *Mercy and the Conundrum of Supererogation.* Many philosophers (and non-philosophers) who talk about mercy assert that

9. This would also involve a denial of the analysis in Chapter One as well as acceptance that rational agents, (the Christian God, Stoic *sapiens* and such like) as well as would be rational agents, (such as judges, governors and administrators who are enjoined by the duties of their office not to act capriciously), are excluded from acting mercifully.
mercy is supererogatory, or that it is morally optional, a gift, that it can neither be demanded nor required. It follows fairly closely from this that if moral criticism is possible only if an agent fails to do what they ought, then moral criticism of one’s failure to be merciful is not possible. It is commonly believed, on the other hand, that failure to be merciful is a ground for moral criticism: referring to someone as merciless, or as a Shylock, or saying that this action was wrong because it was not merciful, is about as much of moral criticism as one can find. Now, for philosophers who want to hold one or other of these views, but not both, this is not a problem. They merely need to convince themselves that their opponents are wrong. The problem arises when we look at mercy and the way we talk and think about it without the benefit of philosophical analysis. Doing that we find that we believe both that mercy is the subject of an imperative — which makes moral criticism possible — and that mercy is supererogatory — which seemingly rules this out. At this point, let us set out the conundrum. Perhaps the best formulation to date has been made by James Sterba. He writes:

To regard mercy as simply a form of justice tends to make it a strict moral requirement, and hence incompatible with the supererogatory exercise of mercy...the extent to which we praise mercy as a virtue can not be accounted for if the legitimate exercise of mercy is restricted to simply fulfilling the requirement of obligation...To consider mercy to only [be] a form of supererogation does not allow for...[the condemnation of] anyone as merciless.11

Sterba’s worry can be more clearly stated like this:

C4: The Conundrum of Supererogation

1. Acts of mercy can be required, obliged and the subject of a duty. As a consequence of this agents who refrain from acts of mercy can be morally criticised.


2. Mercy is supererogatory and optional; it cannot be demanded, it is a gift. Consequently, moral criticism is not logically possible and failure to be merciful is morally indifferent.

3. Therefore, either, mercy is optional, a gift and so on, in which case it cannot be deserved and it is not possible to criticise and condemn merciless agents; or mercy is deserved, and agents are in a position to criticise merciless agents (in which case it cannot be optional, a gift an so on).

4. Thus, whichever horn of the dilemma is accepted, we are forced to reject widely held pre-theoretical beliefs about mercy. Hence, the concept appears incoherent.

The problem then is this: how can we make sense of the apparently contradictory claims that acts of mercy are both supererogatory and the subject of an imperative? Making sense of this would also explain the contradictory practices of praising an agent who has acted mercifully, because it is not required, yet condemning another agent who has failed to act mercifully.

§5.2.4. The Virtue of Mercy and Moral Criticism. Commonsense morality holds that those agents who fail to possess particular virtues, that is, traits of character and sensitivities that are thought valuable, are the fitting objects of moral opprobrium. Yet the basis of this criticism is not at all clear. Commonsense morality holds also that those agents who fail to display such a trait of character or sensitivity when it is appropriate are also fitting candidates of moral opprobrium. Mercy is believed to be a virtue. Moral criticism presupposes responsibility. If the virtues are character traits or sensitivities then one has little or no direct control over their manifestation on some occasion. Thus, in some real sense, agents are not directly responsible for their failure to display a virtue — or for that matter their display of a vice. What then is the basis of the criticism directed at agents who fail to display the virtue of mercy and fail to possess it as part of their moral personality?

§5.2.5. The Problem of Praise. We are prone to praise those acts of mercy and those displays of the quality of mercy that would be expected and even required. How is it that we can praise someone for doing what they ought? There seems no basis for it as the act represents no departure from what we should, given our moral intuitions, be led to expect. Under normal circumstances we do not praise a teacher for marking
examination scripts, a librarian for lending the book, the other motorists for obeying the road rules. Why should mercy be any different?

§5.3. Solution: Accounting for Supererogation

A supererogatory action is an action that an agent has no obligation to perform but which is nevertheless morally permissible, good and praiseworthy. It is beyond the limit of one’s duty. Supererogatory actions spring from certain character traits, or properties of the agent, such as braveness, kindness, fortitude and so on. Therefore, evaluating some action as ‘supererogatory’ is to not only classify the action as being a member of a particular deontic category, the ‘unrequired’, but it is also to evaluate the actor, as brave, kind and so on. Thus, such an assessment is agent and act evaluative.12

How can supererogatory actions be accommodated in the moral outlooks that we have considered? The solution is simple: there is a limit to what can be required of an agent, that is, what they have a duty to do. What goes beyond that limit is supererogatory. This captures two elements of our concept of supererogation: 1. an action that is beyond the call of duty, and therefore optional; and 2. the idea that there is a limit to what an agent can be enjoined to do, in other words, a limit to morality. This limit is set impersonally; it takes account of individual variations only in so far as they have bearing upon what can be required from a particular agent. For example, what can be morally required of a disabled person is quite a bit less than can be required of an able-bodied person. This notion of a limit to duty permeates all commonsense accounts of act-morality.

Moral theorists do not often allow that there is a limit to duty, such that there are good and right actions that there is no duty to perform. Such a view is counter-intuitive. There are many right actions that are not duties, such as acts of friendship, integrity, bravery, love and certain acts of charity. These sorts of actions cannot be duties because to require them would be to destroy the identity of the action: such an action if performed out of a sense of duty would cease to be the sort of action that

is morally valued. For example, acts of friendship performed out of a concern for duty does not involve genuine friendship at all. Thus, there must be a limit to what can be required if agents are to have open to them the full range of morally valuable act-options that commonsense morality holds is available to a moral agent.

This limit may be set by any number of considerations. For example, by the magnitude of the cost or sacrifice involved, or by the capacity of ordinary agents on ordinary occasions to comply, or the duty may be outweighed by other good considerations, and can rightly be ignored, or there may be a limit to the amount of duty that is compatible with the good life; in other words, there might just be a limit to the amount of duty we can stand. It can also be limited by the fact that agents have a right to pursue their own personal projects, interests and goals — even in the face of strong reasons to sacrifice these personal projects, and adopt as their own projects the interests of others. Thus, there is a limit beyond which it is unreasonable — even morally wrong — to require an agent to sacrifice their own goals, for in sacrificing their own personal goals they are sacrificing their autonomy. Thus, we have a prerogative not to make great personal sacrifices, and an agent who performs an act of supererogation, declines to use this prerogative, whereas an agent who does not perform an act of supererogation merely decides to invoke the exemption that all duties recognise. We might argue that there is a level beyond which it is counter-productive to oblige agents to perform certain actions, and were we to do so less good overall would be realised. All this indicates that the old adage that ‘ought implies can’ can not be taken to mean mere physical capacity, but rather what can be expected, reasonably and justifiably, of ordinary agents in ordinary circumstances.

Moreover, the fact that it is an impersonal test accounts for the fact that individual agents may set their own personal standards higher than those of the vast majority of people. Such people are moral saints. For them, from their point of view, and the values that inform the life they

13. Rawls, op. cit., p.17
live, the actions they perform are required.\textsuperscript{19} This accounts for the fact that A may think that he is obliged to \( \Phi \), while other agents can rightly say that there is no duty on them to \( \Phi \). Therefore the position of the evaluator, as player or spectator, influences his evaluation of some action as permissible or obligatory. An agent can have conclusive reasons to \( \Phi \), and think that they are obliged to \( \Phi \), grounding their belief upon values and traits that are peculiar to them, without the vast majority of agents being morally or rationally required to \( \Phi \). Such an action remains optional, and \textit{not} binding on everyone. This does imply that should other people share these same beliefs and values that, if the agent’s reasoning has been correct, that they too would reach the same conclusion and believe that they have, as indeed they do have, an obligation to \( \Phi \). To see this point clearly, we need to distinguish between the way the action subjectively presents itself to the agent and the subjective constraints that arise in virtue of this, and the objective constraints upon an action.

Subjectively, an agent may believe that they are obliged to act. From his subjective point of view, given his value system, he has most reason to act in the way he does. Such a person may blame themselves — indeed given their motivational structure, they would have to blame themselves.\textsuperscript{20} Rationally and morally, from their subjective view they must act in the way they do.

Objectively, the story is quite different. Again it is a matter of determining what motivational structure ordinary folk can be expected to have. Now we may not be able to say \textit{exactly} what it is — but some actions clearly are motivated by a commitment to values that it is unreasonable to expect ordinary folk to have. Objectively then, saints do not have most reason to do what they do. This does not mean that they act irrationally or immorally — only \textit{differently} from ordinary folks. So we can say that the saint has conclusive reasons, according to his subjective outlook, to do what he does; yet say objectively, that this is not binding on everyone else — but binding \textit{only} on those who have a similar motivational structure.

\textsuperscript{20} Ibid., p.64-65.
When we say that some action is supererogatory what we mean is not that no one has a duty to perform it, but that ordinary agents have no duty to perform it. In another way, objectively there is no duty; however, given the subjective elements that certain agents have, there is such a duty on them. Saints, because of their peculiar motivational structures, are examples of such agents. This is how we can make sense of the claim that many saints make, that they feel that they must act the way they do and that they would be acting wrongly not to act. Such agent’s actions are, objectively, that is from the spectator’s (the ordinary moral agent’s) point of view, morally unrequired; from the player’s perspective, such actions are required.

The division between subjective and objective duties provides the basis for moral criticism. The basis for moral criticism is not to be found in an agent’s failure to act on subjectively perceived duties, but rather on a failure to fulfil their objectively determined duties. The reason is that one constraint of the possibility of moral criticism is that it is applicable only if the action enjoined was the sort of action that an ordinary person could perform, as objectively, and impartially determined. It simply is not reasonable to criticise an ordinary moral agent if they do not act like a saint.

Supererogatory acts can be of enormous value — such as when a person forgoes their own projects and ministers to lepers; or they can be of small moment, such as when we treat a child — not our own — to an ice-cream. In the former case, the sacrifice is great — hence it is an act of gross supererogation; in the latter, the treat is a minor act of supererogation. Acts of mercy are responses to a great need experienced by a person within one’s power. Since this is the case, it is simply not possible to perform acts of mercy that are minor acts of supererogation. Why? It seems to me that there is a minimum level of duty or obligation we owe to other people, what we might call ‘natural duties’. And it is the duty of all people to observe these requirements. In fact, I go so far as to claim that any well formed moral personality would, other things being equal, naturally perform these obligations and duties as a matter of course, that is, spontaneously. Such agents would be probably unprompted by any concern for duty, acting rather because they believe

such actions to be right or appropriate or out of concern for the object of their action. The sensitivity to the needs of others that makes the performance of such duties appropriate is part of what it is to be a virtuous person. But the point is that there is a minimum standard of behaviour to which a moral agent must rise, and ordinary acts of mercy are part of this standard. Thus we might formulate a principle along these lines:

If it is in your power to prevent something bad from happening, or within your power to meet in some way or to some extent a great need, without thereby sacrificing anything of comparable moral importance, then you ought, morally, to do it.22 Thus, if the cost or risk is less significant, than the value of the end, then the action is morally required,23 subject to other constraints on duty mentioned above.

Having set out an account of supererogation, and having seen what sorts of merciful actions are supererogatory, we are now in a position to see how consequentialism and deontology accommodate this deontic category. We might agree that consequentialism requires us to do the very best of which we are capable, but with these qualifications: namely, that an agent has a moral right to refrain from performing actions that would require an unacceptable level of sacrifice; or involve an unacceptable level of risk; or, it is beyond their capacity, or for other reasons, (such as to require it would make life miserable) or that it is unreasonable on other grounds to expect an agent to perform them. Are there such reasons? I indicated above that I thought so. Reasons cannot be enjoining reasons if they require an agent to sacrifice their own projects, personal prospects or integrity, or even if they fatally undermine these things. We may believe this, for example, on the grounds that if agents were required to sacrifice their own projects as a matter of course, more harm than good may be done. Morality may lose its authority and so such injunctions would be counter-productive; agents may become demoralised and cease to take morality seriously. Moreover, any moral outlook that is to be acceptable must place a high valuation on these things, if it is going to speak to the questions raised by life and the constant interaction of our values, projects and integrity. On this view there is a particular level of aspiration, a level to which we all have a

duty to rise, which all our actions should seek to attain. The aspiration level is set at that point which it is possible for most ordinary agents to achieve. In this way value is maximised. Anything beyond that is optional, permissible, praiseworthy and supererogatory.\(^\text{24}\) That there is such an aspiration level can be seen in commonsense morality. We do not expect — or require — soldiers to throw themselves on hand grenades, or doctors to minister to lepers or plague ravaged cities.

This reflects the commonsense view that there is a realm of right conduct beyond that which can be required, consequentialists must be prepared to set limits to duty, and admit that on occasion it can be right for an agent to refuse to perform some action that would have beneficial consequences, and in being right they escape moral criticism for this failure. What this implies for consequentialism is that maximization, limited only by the agent’s physical capacity, is untenable. It does not show that we should not maximise — but only that maximization must not be open-ended, that there must be a limit, below which compliance is required and above which compliance is morally optional, from the point of view of objective morality (although subjectively the agent may impose upon himself a personal requirement). If this is the case then a constrained maximizer has an obligation to maximize to the limit only. There is much merit in this view. If unlimited maximization was held to be the goal, then notions such as supererogation, praise, sacrifice, altruism would disappear, and be replaced with the view that we are all sinners, all imperfect moral agents, since few of us strive to do our best — all the time. It seems that it is no injunction of commonsense morality that we must always do our best. Consequently, if we view maximization in this way, then supererogation is not only possible — but a welcome part of a consequentialist ethic. For by praising an agent would go beyond her duty, we can raise the standard in the community.

For a consequentialist this is not a novel idea.\(^\text{25}\) Mill — the classic utilitarian and one sort of maximising objectivist consequentialist — wrote:

> It [Comte’s ‘Religion of Humanity’] makes the same ethical mistake as the

---


Chapter Five: Mercy, Supererogation and Moral Criticism

theory of Calvinism, that every act in life should be done for the glory of God, and that whatever is not a duty is a sin. It does not perceive that between the region of duty and that of sin there is an intermediate space, the region of positive worthiness. It is not good that persons should be bound, by other people’s opinion, to do everything that they would deserve praise for doing. There is a standard of altruism to which all should be required to come up, and a degree beyond it which is not obligatory, but meritorious. It is incumbent on everyone to restrain the pursuit of his personal objects within the limits consistent with the essential interests of others. What those limits are, it is the province of ethical science to determine; and to keep all individuals and aggregations of individuals within them is the proper office of punishment and of moral blame. If in addition to fulfilling this obligation, persons make the good of others a direct object of disinterested exertions, postponing or sacrificing to it even innocent personal indulgences, they deserve gratitude and honour, and are the fit objects of moral praise. So long as they are in no way compelled to this conduct by external pressure, there cannot be too much of it, but a necessary condition is its spontaneity; since the notion of a happiness for all, procured by the self-sacrifice of each, if the abnegation is really felt to be a sacrifice, is a contradiction.26

And Sidgwick was minded to write in a similar vein...

...it is natural to us to compare any individual’s character or conduct, not with our highest ideal — utilitarian or otherwise — but with a certain average standard and to admire what rises above the standard; and it seems ultimately conducive to the general happiness that such natural sentiments of admiration should be encouraged and developed...We may conclude, then, that it is reasonable for a utilitarian to praise any conduct more felicific in its tendency than what the average man would do under the given circumstances:— being aware, of course that the limit down to which praiseworthiness extends must be relative to the particular state of moral progress reached by mankind generally in his age and country; and that it is desirable to make continual efforts to elevate this standard.27

Thus, a maximising objectivist consequentialist can accommodate supererogation. All that is required is ‘sub-optimal maximisation’. Agents

26 J.S. Mill, The Collected Works of J.S. Mill, Vol. X: Essays on Ethics, Religion and Society, Toronto, 1969, pp.337-338. Mill makes the same point in a letter to George Grote. Mill writes, inter alia, that his and Grote’s ethical views are compatible, and, ‘...consistent with recognising the merit, though not the duty, of making still greater sacrifices of our own less good to the greater good of others, than the general conditions of human happiness render it expedient to prescribe. This last distinction, which I do not think inconsistent with the expressions about perfection attributed to Christ, the Catholic theologians have recognised, laying down a lower standard of disinterestedness for the world and a higher one for the perfect (the saints): but Protestants have in general considered this as Popish laxity, and have maintained that it is the duty of everyone, absolutely to annul his own separate existence. (Letter 525 ‘To George Grote’, ibid, Vol. 15; The Later Letters of John Stuart Mill, pp. 762-763.)
are required to maximise to the aspiration level rather than perform the best action possible. Consider this example. A certain level of fortitude is required of all members of a community. This level can be called the aspiration level. Now we are required to perform actions up to this level, but not exceeding it. In other words, maximise to this aspiration level. There are many actions that it is possible to perform that are beyond this level. Thus, the aspiration level does not represent the best actions possible but rather the best actions that can be required. An action that goes beyond this aspiration level is morally optional. Thus, a maximising consequentialist can prescribe a sub-optimal policy; that is, a policy that requires less than the best possible action, on the basis that it is believed, on the evidence available, to be a strategy likely to produce in those circumstances, a result that is of maximal value. It will be not the best possible results overall, but the best results given the circumstances, that it is reasonable to enjoin. What an agent has a duty to do is to maximise to the aspiration level. Mercy, when a supererogatory action, exists in the realm beyond the aspiration level.

There is, however, a far more contentious solution. It is, simply, to argue that consequentialism does not require agents to maximise at all, but to perform acts that are 'good enough'. This is, in effect, an appeal to sub-maximising consequentialism. The story might run like this: commonsense morality holds that there is a limit to one's duty, a limit beyond which we can not be required by morality to act. At the other end of the scale, there is a lower level — an aspiration level, a level to which all our actions must rise. Now between the lower level and upper level there is a range of act-options that all meet the demands of morality. It is within our personal prerogative what action within that range we perform. Whatever option we perform within that range, we act rightly. Sub-maximising consequentialism — permissibly doing less than the best in the range required — holds that an agent acts rightly so long as the act is within that range. Now, sub-maximising consequentialism can accommodate supererogatory displays of mercy in two ways. First, if an agent does more than the minimum required, exceeds in a sense, what has been — and can be expected of them. To do more than the minimum amount, is not itself required, only an act within the range is. Thus, to exceed the lower level is to perform a minor act of supererogation. Second, the action could even be beyond the upper level required — in which case it is clearly a major act of supererogation. In both cases, acts of
supererogation are possible — and so are supererogatory displays of mercy. It seems safe to conclude, on the basis of these arguments, that not only is supererogation possible within a consequentialist ethic, but as a result, acts of mercy that are supererogatory are possible too.

For a deontologist the barrier that prevents her accommodating acts of supererogation is the belief that only those actions have moral value, and can be morally right, that an agent has a duty to perform. Anything not a duty is, at best, morally indifferent and at worst, morally wrong. If this belief is abandoned then clearly the deontologist could accommodate acts of supererogation. This belief is suspect. There are many actions that are right, as well as morally valuable, that an agent has no duty, and can have no duty, to perform; for example, acts of friendship, bravery, love, kindness, and the like.

The reason that this belief must be rejected is that it is incompatible with the account of deontology set out in Chapter Three. While it is the case that some famous deontologists, such as Kant, held this view, it is clearly not an essential property of deontology. Deontology, as characterised in §3.2.b), was the response that an agent made to a particular value. A deontologist holds, as we saw, that the morally right response to some value is to honour it and perform actions that have it as a property. In other words, the only actions that are right are ones that respond to some value by honouring it. Now, it is possible for the realisation of some value to be appropriate to some circumstance without realisation being required. For example, bravery may be appropriate in a time of danger, but agents cannot be required to realise it. Were they to realise it, all deontology says is that they must honour this value, and they would be acting rightly by doing this. But, in this example, from the point of view of duty and deontology, agents are not required to do anything. This is a clear case of an action that an agent has no duty to perform, but which can nevertheless be right if they do perform it. In other words, a supererogatory action. Thus, the belief that only those actions have moral value and are right that we have a duty to perform is false, and the deontologist can find a place for supererogatory actions.

It is clear that the problem with the belief that only those actions are right that are duties, is that it is confusing deontology, as I have conceived it, with a theory of the good. Deontology says nothing about the
appropriateness of values. This is because deontology is not a theory about what values ought to be realised. Such deliverances are the province of a theory of value. The theory of value will determine which goods are appropriate, and thus ought be realised through action, which are not, and more importantly, which goods are appropriate, but that it is unreasonable to require be realised. Thus, the belief that I am rejecting is one about the theory of good, rather than a belief that a deontologist must hold in virtue of being a deontologist.

§5.4. Solution: The Conundrum of Supervenience.

The conundrum we recall is this: Actions having the property of 'being merciful' possess other (subvenient) properties in virtue of which they are judged merciful: the property that they would, amongst other things, alleviate suffering, a threat or some burden. Moreover, the beneficiary of a merciful action or merciful person's dispositions, must possess certain properties. It is in virtue of these subvenient properties that she was judged 'a candidate to receive mercy' and in fact actions with the property of 'being merciful' were performed and the disposition to be merciful arose. Any other agent possessing these subvenient properties must not only be judged to have the property 'candidate to receive mercy' but, so the story goes, must be treated to actions with the property of 'being merciful' — out of consistency and fairness.28

The rub is this: if 'being merciful' was appropriate in one case, because of some property P, and mercy was displayed, then ceteris paribus, it will be appropriate, and must be displayed, in all cases that possess P. In other words, it is a moral and rational requirement that actions with the property of 'being merciful' be replicated in similar cases. And that, allegedly, is counter—intuitive as it runs against our belief that merciful actions are gifts that, although they rest upon good and morally relevant reasons, nevertheless do not commit the benefactor to repeating the

28. This would be the case even if the benefactor does not have the disposition to be merciful. To be sure, the paradox does not apply to mercy as a property of a person. Mercy as a property of a person would be some sort of disposition. It is not possible for us to be required, (rationally or morally) to have a particular disposition, at some specified time. (I cannot require that you like my mother's apple pie.) All that it is logically possible to require, at a specified time, is replication of the external action — not the motive or disposition from which it springs. One can, of course, be required to cultivate a certain form of life and attendant dispositions, by making various antecedent choices, that would, over time, lead to a person possessing spontaneously, on appropriate occasions, the appropriate disposition.
action over similar cases. In short: mercy is believed to be unconstraining yet if it rests upon morally relevant reasons, it is.

The conundrum is generated by the incompatibility of two beliefs; the first that there is rational requirement to replicate action over similar cases; the second, that mercy is unconstraining and a single act of mercy generates no rational requirement at all for replication.

Before we go on we need to be clear on the type of mercy that we are discussing. We are not discussing mercy as a property of a person, that is, some sort of virtue. We are discussing mercy solely as an external action. Why? Because it is not possible for us to be required, (rationally or morally) to replicate the springs, i.e., the mental state behind any action, let alone the act of mercy. The springs of mercy are particular preferences, values and dispositions. Now if a particular dispositional state lies behind acts of mercy, then while similar cases may prompt the same dispositional state, the state itself it cannot be demanded or required of an agent. They may be talked into it, persuaded, but they cannot be required to have it. In this respect mercy is like a belief or some piece of knowledge. We cannot demand that some one believe us or know something. Dispositions, like beliefs and knowledge cannot be required. Consequently, it cannot be either a rational requirement imposed upon a merciful agent that they enjoy a similar dispositional state — and thereby exhibit the same degree of mercy — if they encounter a case similar to one that has received mercy already. (They may of course be required to cultivate circumstances that promote such mental states, but that is different.) Hence, the rational requirement that similar cases be treated similarly cannot apply to the replication of the virtue of mercy. All that it is logically possible to require is replication of the external action. And that is the context of the conundrum: whether a single act of mercy can, rationally, commit an agent to replicating it.

What of the claim that once-merciful agents are rationally required or constrained to replicate their merciful actions? Agents who fail to obey the rational requirement that they replicate their merciful actions are open to the (non-moral) criticism that they have acted irrationally. If an agent is to act as a rational agent then such a requirement will be a constraint upon their action. They must perform the action in order to be,
or remain, a rational agent.29

Why? Rational agents base their merciful actions upon reasons that relate to properties possessed by the beneficiary. In virtue of this, such agents are rationally required, ceteris paribus to replicate their merciful actions. This is simply to observe a ‘rule’ of practical rationality, a variation of the Principle of Sufficient Reason: If A \( \Phi \)s at T1 because of (a compelling reason) R and if T1 and T2 are similar in the relevant respects, then A not only has a (compelling) reason to \( \Phi \) at T2 but is rationally required to \( \Phi \) at T2 unless there is some relevant reason that distinguishes T1 from T2. Were a rational agent not to \( \Phi \) they must either have suffered from some weakness of the will, or have changed their judgement about the properties of the beneficiary in virtue of which they \( \Phi \)-ed, or the state of affairs has changed in virtue of which \( \Phi \) was the appropriate response. Therefore, it is not rationally required that mercy be replicated if it is a rational action. However an agent cannot be rationally expected to replicate her action if the context in which she acted is extreme. For example, an agent who fails to be brave, in similar circumstances, does not lose her rationality, just as an agent who fails to be merciful, in extreme circumstances over similar cases.30 In these cases rationality is preserved, as it is unreasonable to require replication. Although it must be pointed out that the rational requirement is of the form of a hypothetical proposition: If circumstances were different, i.e. not—extraordinary, then there would be a rational (and moral for that matter) requirement to replicate mercy.

Reflection upon our pre-theoretical concept of mercy indicates that we do not believe that it is always unconstraining. An agent who fails, for no good reason, to act mercifully towards a case that is similar to one that has already mercy acts inconsistently, irrationally and capriciously. That is how we would describe her action. So it is believed that mercy is

29. There are exceptions. Weakness of the will or slothfulness or idleness do not involve a failure of rationality. So, the nature of the requirement should be: “Rationally required” = “a rational agent must do A if they are to remain a rational agent, except if they suffer from some infirmity of the will”.
30. In a sense this rational requirement is hollow. A rational agent would not, typically, treat subsequent cases like the first because they were similar to it. They would treat the subsequent cases because they have particular properties, in virtue of which mercy was the appropriate and required response. The similarities of the subsequent cases to the initial cases would not function in the rational merciful agent’s calculation or be a spring for their action. At best all this rational requirement could be is a means of inducing an agent with pretensions to rationality, but who for some reason has lapsed, to acting mercifully.
constraining in ordinary circumstances. The conundrum can only arise if we employ a sense of 'mercy' that contains the belief that mercy is never constraining. Such a sense is one that is not appropriate to the circumstances. This solution involves rejecting the belief that mercy, from a rational point of view, is always unconstraining. The truth of the matter is, however, that mercy is constraining in all ordinary circumstances whilst in extra-ordinary circumstances it is not. Such a distinction must be made if our belief that mercy is a rational action is to make sense. This solution forms the basis to the solution of C4: How if mercy is supererogatory can it be possible to criticise those agents who fail to act mercifully?

There is another solution that should be noted. This problem, as noted, is generated by the fact that a single act of mercy seemingly commits an agent to replication in relevantly similar cases, which runs against the belief that mercy is unconstraining. Now, as a practical matter, it is unlikely that an agent who was merciful once would ever have to replicate her action as it is unlikely that an exactly similar case, in the relevant respects, would come along. This involves an admission that were a case, identical in the relevant respects, to present itself, that the merciful agent would be required to replicate her action. However, since this is unlikely, the merciful agent is, for all intents and purposes, unconstrained by any act of mercy that she performs. This is certainly true. However, the supervenience problem is about a conflict of beliefs: on the one hand, that a single act of mercy does not constrain in any way a once merciful agent to replicate her action, however remote a possibility that she may have to replicate her action may be; and on the other hand, the belief that if mercy is a rational action then the merciful agent will be constrained to replicate her action for relevantly similar cases. Thus, the solution considered above does not answer the conceptual point.

§5.5. Solution: The Conundrum of Supererogation.

One solution to this puzzle, that must be briefly considered, is to

31. We should note, however, that two cases are rarely the same in enough of the relevant respects to actually generate the rational obligation to replication. This is a practical limitation on the consistency rule. The point of the conundrum is, however, that mercy is thought exempt from the scope of the requirement. In other words, the requirement can not be applied to an act of mercy to test if an act ought be replicated.
argue that mercy is an imperfect duty.\textsuperscript{32} An 'imperfect duty' might be defined as 'a duty that admits of wide latitude in the time and manner of its fulfillment'.\textsuperscript{33} The aim of such a claim is to enable us to make sense of the pre-theoretical belief that there is some sort of 'duty' to be merciful, while at the same time preserving the other pre-theoretical belief that acts of mercy are supererogatory and the manifestation of virtue. It would also enable us to make sense of moral criticism of merciless agents. This solution is unacceptable. Mercy, when the property of a person, is a particular disposition. Apart from the fact that it is hard to see how we could be required to have a particular disposition at a particular time, in this case, to care for and be concerned for the welfare of another person, mercy as a property of a person could not be an imperfect duty.

Mercy, as a property of a person has a particular dispositional content. Now, if one performs an act of mercy, and claims it to be an example of the 'imperfect duty' of mercy, then it ceases to be an example of the virtue of mercy. The dispositional content is missing for the act was performed out of a concern for duty, not another's welfare. But if I act mercifully out of a concern for another's welfare then I have not performed an imperfect duty, since the act was not done out of a sense of duty. Either the act of mercy was done in order to fulfil a duty, in which case it is not a display of mercy as a property of a person; or it is done out of concern for another person — in which case the act fails to have any moral value from the point of view of a duty based morality.\textsuperscript{34} Moreover, imperfect duties are still duties; supererogatory actions, by their nature are not duties at all: one has no duty at all to perform supererogatory actions. Thus, the device of an imperfect duty cannot be employed to account for supererogatory acts.

What then is the solution to this conundrum? Given that there are supererogatory actions, how do we dissolve the conundrum? The solution is simple. Sometimes mercy is required and other times it is supererogatory.\textsuperscript{35} It will be required when it is reasonable that there is a

\textsuperscript{32} Murphy, \textit{op. cit.}, p.183. We examined in §3.5 the use of this device to dissolve the conundrum that arises because of the requirements of comparative justice and the belief that a single act of mercy is not constraining. I argued there, for different reasons, that such a move failed.

\textsuperscript{33} Murphy, \textit{loc. cit.}

\textsuperscript{34} A similar criticism is made by O.H. Green, 'Obligations Regarding the Passions', \textit{The Personalist}, (60:1979), pp.134-138, at p.135.

\textsuperscript{35} This solution is offered also by Sterba, although he does not set it out in any detail, \textit{(op. cit.)}.
general duty to perform acts of mercy, that ordinary agents can meet; it will be supererogatory when it is not reasonable to impose such a duty generally. It is through believing that mercy is always supererogatory, or always required, that the conundrum is generated.

How then are we to distinguish these two cases? When is it reasonable to impose a duty? This notion needs to be filled out. For the consequentialist the distinction between Φ being right and morally obligatory, on the one hand, and right but not morally obligatory, on the other, is drawn on the basis that it will be an obligation to Φ when it is right to proclaim Φ as a matter of obligation. It will be right to proclaim Φ as a matter of obligation when making Φ obligatory would maximise expected value. It would be right not to proclaim Φ as an obligation when not making Φ obligatory would maximise expected value, because, for example, to make Φ obligatory might demoralise agents or be otherwise morally counter-productive. A deontologist, on the other hand, would have to augment her theory of the right with other principles in order to determine a limit to duty. But the point here is that both the consequentialist and the deontologist can recognise a limit to duty and whatever goes beyond that limit is supererogatory.36

However, it is doubtful if a list of necessary and sufficient conditions could ever be given, as the number of contexts vary enormously. This is a practical barrier, rather than a barrier, in principle. We must resort to judgement and rational reflection on the exigencies of the case at hand. Some cases, it is clear, fall outside the line of duty (e.g., acts requiring great degrees of courage or sacrifice) while others do not, and still others invite debate. Just because, in some cases, it is in practice impossible to draw the line, or provide an uncontroversial answer, we should not be lured into thinking that there are not these two broad categories. What it does mean is that when we examine the borderline cases we must be especially careful in our cogitations.

The notion of supererogation clearly refers to actions. Seemingly, this concept is most at home in an act-morality. What about mercy as a

---

36. This is the point that both Mill, (op. cit.) and Sidgwick, (op. cit.) were making.
virtue? How can this outlook make sense of the claim that mercy is in some sense supererogatory? Again the solution is simple. There will be a limit to the extent to which it is reasonable to expect and require an agent to have, to cultivate and display particular virtues. If an agent goes beyond this limit then they have acted in a supererogatory manner. So, on some particular occasion a particular virtue will be clearly appropriate, yet it would be unreasonable, owing to cost, or sacrifice, to expect a virtuous person to display it. If they go ahead then not only have they acted virtuously, because the virtue was appropriate, but in a supererogatory manner, as it was more than can reasonably be expected.

Before leaving this section we must also examine the claim that mercy is optional and a gift, and not demandable. Clearly, when mercy is supererogatory, it is a gift, not demandable, and optional. In fact, as we saw, some writers maintain that mercy is essentially gift-like. Often, however, we think that mercy is optional, not demandable, and a gift in cases when it is required. How is this possible?

Acts of mercy are made possible by the existence of a power structure. To be within another’s power is to be ‘at their mercy’. When we say that mercy is optional, even though from the point of view of morality it is not, all we mean is that the mercy-giver has sufficient power to make their exercise of mercy a matter of their caprice and decision, in other words, optional and a gift. A similar sense to ‘gift’ and ‘optional’ is found in the adage that taxation is optional and a gift to the powerful. They can evade tax with impunity. To be sure, mercy is a gift and optional in the sense that the bestowal of it, or not, requires a decision on the part of the benefactor. The merciful agent is free, because of her powerful position, to be merciful or not as she pleases. They must decide to give it to you. If they decline they are immune, to some extent, in virtue of their power, from any adverse effects of them not acting mercifully.

What of mercy not being demandable? When mercy is required it is demandable — morally.37 It is not simply the case, however, that we

---

37. Here, of course we are talking of acts of mercy and not the virtue of mercy, as it is only actions that can be demanded. The virtue of mercy cannot be demanded on some particular occasion, as it is not possible to demand that another agents possess some disposition at some specific time. It makes no sense to demand that you like my dog.
think that mercy is morally demandable when it can be reasonably expected of an agent and not morally demandable when it can not be reasonably expected of them. We believe the stronger thesis: that it can not be demanded of someone — even if it is appropriate. What we mean here, is this. The agent seeking mercy is not in any position to demand anything and the agent giving mercy cannot be forced by the beneficiary to display it. Why? Simply, there is a power structure: a powerful agent, who is the benefactor, and an agent without power — the beneficiary. The beneficiary has no coercive means by which to enforce his demand. The sort of demand we are thinking of here is non-moral demand. So, a person without power can demand something of someone who has power. They can make a moral demand, that the person perform a particular action if it is what could be reasonably expected. But all this amounts to is: you will be acting wrongly and I will think you a moral louse if you do not give me mercy. Unless the benefactor is sensitive to moral demands that observation will not get anything done. Unless one has the capacity to backup one's threat, the speech act of demanding misfires. We signify such defects when, in reply to a demand we say: 'You're in no position to demand anything' or 'If I don't give you what you demand what are you going to do about it?' It is for this reason that we think it is impossible to demand mercy: simply it is not possible to back up the demand for better treatment owing to the inferior position, i.e. lack of power, of the person demanding mercy.

So, it is possible to demand mercy from a moral perspective — although it may be unwise to do so. Such a demand is nothing more than pointing out to the powerful agent that they ought meet their obligations. Such a demand is a disjunct of two statements, the first an order and the second a threat or at minimum an attempt to place pressure on the conscience of the powerful agent. In this case, if there is a threat, the threat is not a threat to force compliance by an appeal to authority or force. It is a threat to think ill of the powerful agent if they do not meet the demand; 'I demand X' can be unpacked to mean 'I demand that you do X' and either 'I will think you a moral louse' or 'you will be a moral louse'. This would not normally make any difference to a person who is in a position to give mercy — since the effect of moral considerations upon an authority is, to say the least, doubtful. Moreover, such a demand may in fact be imprudent since it may antagonise. From this it emerges that the freeness often associated with mercy has to do
with the fact that the benefactor could ignore the plight of the beneficiary, but chooses not to, rather than with the fact that mercy is often morally optional.

How, if mercy is supererogatory, can it involve the remission of a burden? To perform an act of mercy is to under-subscribe some duty; that is, do less than duty requires. To perform an act of supererogation is to over-subscribe one’s duty; that is, do more than duty requires. It seems then that an agent cannot perform an act of supererogation that involves doing less than one’s duty, as is the case when one is merciful, and inflicts less of a punishment that required. The solution is simple. Acts of mercy, when supererogatory, and involving a remission of a burden, do not involve an over-subscription to duty. They are supererogatory forbearances.38 That is, the merciful agent refrains from doing what she is licensed in justice to do, but it is unreasonable to expect her to refrain from having her due. If she nevertheless forgoes her entitlement, she has acted mercifully.

How are such actions justified? It would be permissible, of course if justice requires no particular treatment, but merely licences it. But if justice requires that penalties be inflicted, then supererogatory acts of mercy and justice conflict. Again, I would argue, as I did in Chapter Three, that other values can trump justice, and so, while justice is being set to one side, this does not imply the act is wrong, if the principle is sound. This applies both to hard retributive justice and to comparative justice. Thus, supererogation is not, for its rightness constrained by considerations of justice.39

§5.6. The Virtue of Mercy and Moral Criticism.

The problem is this: Commonsense morality holds that those agents who fail to possess particular virtues, that is, traits of character and sensitivities that are thought valuable, are the fitting objects of moral opprobrium. Yet the basis of this criticism is not at all clear. Commonsense morality holds also that those agents who fail to display such a trait of character or sensitivity when it is appropriate are also

39. As Heyd argues it is, op. cit., p.162.
fitting candidates of moral opprobrium. Mercy is believed to be a virtue. Moral criticism presupposes responsibility. If the virtues are character traits or sensitivities then one has little or no direct control over their manifestation on some occasion. Thus, in some real sense, agents are not directly responsible for their failure to display a virtue — or for that matter the display of them on some occasion of a vice. What then is the basis of the criticism directed at agents who fail to display the virtue of mercy and fail to possess it as part of their moral personality?

It might be thought that moral criticism follows closely moral requirement: failure to do what is required leaves the agent liable to moral criticism. This is certainly true, but failure to do what is required is not the only source of moral criticism. It is this fact that licences the condemnation of agents who do not possess the virtue of mercy or who fail to perform it on some appropriate occasion.

To begin, let us review the salient features of moral criticism. In its broadest, moral criticism involves a judgment. This judgment is an evaluation that something or another — a person, an action, or institution — possess properties that are morally disvalued. Moral criticism involves finding a moral flow in something (although for the present purpose I shall confine my remarks to people.) Typically we signal this by saying that the object in question a person or their action, is morally wicked, bad, wrong, or possesses some property that is.

Moral criticism can be fairly bland: ‘you acted wrongly’; or it may be rather more robust and take the form of moral condemnation: ‘You are a wicked person’. We have many ways of expressing moral criticism: reproving another, scolding them, chiding them, blaming them; we may scowl, frown, snub, shake a finger at them. All of these are expressions of our negative judgment, that there is something morally amiss, with them or their actions.

Moral criticism, that takes agents as its object, can take two forms. It can involve a negative judgment of an agent’s actions, (indirect moral criticism) or it can involve a negative judgment of an agent himself,
Chapter Five: Mercy, Supererogation and Moral Criticism

(direct moral criticism). In the former case the judgment is action centred and in the latter case it is agent centred. Action-centred criticism involves condemning an agent by condemning his action since his actions possess some property that we disvalue and he is responsible for the act or its omission, and the performance of the action, other things being equal is an indication of his character. Agent-centred criticism, on the other hand, involves condemning an agent directly because she fails to possess generally or on some occasion some property, disposition, characteristic or virtue that is valued or because she does possess some property or displays some property that is disvalued. Cruelty, meanness, jealousy, spite, malice, and vindictiveness are all properties that we disvalue and possession of them can be the basis of criticism of an agent’s character.

Moral criticism involving negative judgements of an agent’s character can be of two types. We can judge someone to be cowardly on this occasion, or cruel or unkind on this occasion. We are not making a in toto claim about his character. We are merely saying that on this occasion he acted from a motive that is morally reprehensible and that it does not form a permanent part of his motivational structure; He is sometimes wicked but not always. We may also, however, say that he is a certain sort of person. Here we are making an in toto claim about his character, his standing, traits, ideals, dispositions, motives and so on. We are claiming that he is disposed to act in the way he did as a matter of course and that this is morally reprehensible As Trianowsky says,

A judgment about the viciousness of some standing trait is a judgment about a vice, or a general flaw in the agent’s moral character. A judgment about the viciousness of some occurrent motive is a judgment only about a flaw in...the agent’s motivational structure on some occasion.42

Since it is legitimate to criticise not only the motivational structure that an agent has on some occasion, but their ongoing character, it can be seen how it is that agents who fail to display the virtue of mercy on some occasion can be morally criticised.

42. Loc. cit.
It might be objected that if the fault rests in something about a person's state of mind, on some occasion, however that state of mind comes about, then she can not be criticised. Why? Simply we can not be held immediately responsible for our 'states of mind' or what might be generally called, our emotions on some particular occasion, as we have no direct control over them. This is to reflect the accepted view that it is not fair to blame Jones for doing something wrong if he could not help doing it; if it was 'involuntary'.43 This, of course, is an old point. Aristotle wrote,

Virtue, then, is about feelings and actions. These receive praise or blame when they are voluntary, but pardon, sometimes even pity, when they are involuntary.44

Can we be responsible in some sense for our emotions? Yes. We are responsible for our emotions in virtue of antecedent choices we make, or fail to make, regarding their cultivation or suppression; and as a result we are indirectly responsible for being the sorts of people we are now, and for doing the sorts of things we do.45 R.M. Adams has put the point well:

If a state of mind is not directly within our voluntary control, it might still be indirectly within our control. That is, there might be (directly) voluntary steps we could take that would predictably, over time, affect our state of mind in ways we would choose...We are accountable [blameworthy] for wrong states of mind only insofar as they are consequences... of our own voluntary acts and omissions in the past – and thus only insofar as they were indirectly within our voluntary control. On this view I can rightly be blamed for a desire or emotion only insofar as voluntary actions or omissions of mine that led to it were blameworthy.46

So, not only can we be held liable to moral criticism for motivational failings, on some occasion, when these things are out of character, (for we might suffer from lack of self control or weakness of the will) but we can be held liable to moral condemnation for being the type of person we are, if we made various morally poor choices in the past.

44. Nic. Eth., 1109b32.
This account of moral criticism has assumed a particular moral outlook. Roughly, it is the view that all ethical principles are action guiding, that moral criticism is appropriate only on the basis of our acts or omissions and what makes a moral offender blameworthy — or one more blameworthy than another — "is something about his state of mind on that occasion when he committed his offence". This moral outlook can be called 'choice-morality' or 'act-morality'; it takes actions and choices as the primary objects of moral concern.

This tells only part of the story. This moral outlook has come under sustained — and it seems to me forceful — attack. Perhaps Michael Stocker's paper, 'The Schizophrenia of Modern Ethical Theories' is the best known, but there are others. For my present purposes, the point of this is as follows. Choice-morality would have us believe that the domain of moral criticism is exhausted by those cases where it is possible to blame, be they the more obvious acts and omissions, for the failure to carry out one's duties of moral improvement and self-culture. If it is not the case that you could do X then it is not possible for you to be held responsible for doing (or not doing) X. Thus you can not be blamed — and morally criticised. This is nothing more than a version of the 'ought implies can' principle: lack of power to act makes moral judgments inappropriate.

This is plainly false. Suppose we meet a member of the Hitler Jugend. They hold many beliefs which by most moral lights are quite heinous. It is quite morally reprehensible to continue to hold them, if the young Nazi is told of moral alternatives. (Since there seems to be some duty of rational reflection on the morality of one's beliefs and attitudes.) But can he be morally condemned, if such an alternative has not been put to him? To be sure, he is a victim of his education and that does give him a claim to be treated and regarded with mercy and not be subject to punishment — for that assumes voluntary acts and

52. R.M. Adams' example, op. cit., p.19.
53. Adams, op. cit., p.19
omissions. But does it exempt him from moral criticism? No. No matter how he came by his beliefs, they circumscribe his personality; they identify and define him. They are ‘part of who he is, morally, and make him a fitting object of reproach’. He is wicked, and that is clear. It seems appropriate to say so; that is, criticise him for being who he is, without regard to how he came to be that way.

On this view of ethics, who we are and what we are like are as much a part of moral evaluation as what we do and the choices we make. They are independent of the choices and our actions — and are logically prior to them, for even if we have not chosen to be the sort of person we are, we can still be condemned for being as we are.

What model does this leave us of moral criticism? Simply this: moral criticism can involve negative judgments of an agent’s actions or his character. When the moral criticism takes the form of moral blame — we are ascribing responsibility for some untoward action or attitude to him. Thus, our criticism rests upon a disvaluation of his choices, and the actions and attitudes consequent to it. However, we can also criticise an agent without reference to his choices — that is, criticise him as a person, for being the sort of person he is, without reference to his choices and without regard to the way he came to be the way he is. For these reasons we can criticise an agent who fails to display the virtue of mercy, and who fails to possess the virtue as part of their character, irrespective of how they came to be in this state.

§5.7. Mercy and Praise.

The problem, we recall, is this: we are prone to praise those acts of

54. Adams, op. cit., p. 21
55. Adams, op. cit., p.19
56. So some moral criticism rests upon a morally poor choice in the past, unrelated to the agent’s character. Other moral criticism rests upon the agent’s character solely. So, it is not the case that all moral criticism can be reduced again to criticism of a choice — without reference to an agent’s character. Moreover, some agents may be constitutionally disposed to do wicked things. And there is no choice there. Cf. Adams’ criticism of cowardice, op. cit., p.20.
57 Against this view of moral criticism it might be argued that if we allow or even encourage people to criticise others ‘for the way they direct their thoughts, as well as for their actions’ [Adams, op. cit., p.24, n.18 from H. H. Price ‘Belief and Will’ in S Hampshire, (ed), Philosophy of Mind, New York, 1966, p.113] and for the characters they have – irrespective of the way they came to have them, then the world would descend into a veritable orgy of moral criticism and condemnation, and ‘morality would disappear from the world’. I do not believe this to be the case.
mercy and those displays of the quality of mercy that would be expected and even required. How is it that we can praise someone for doing what they ought? What is the basis for praising an agent for doing something that is entirely morally appropriate and represents no departure from what we would, given our moral intuitions, be led to expect? Under normal circumstances we do not praise a teacher for marking examination scripts, a librarian for lending the book, the other motorists for obeying the road rules. Why should mercy be any different? There are two reasons. The first is to encourage others. By praising the merciful agent we hold them out as an exemplum — a moral ideal. We commend this person's action, and attitude, to others. Since teachers, librarians and motorists are commonplace and mercy-givers are not, and are comparatively rare, we feel justified, and are justified, in making an exemplum of them.59

Secondly, owing to the fact that there is a power structure, and the merciful agent could very easily ignore their obligation to exercise mercy, an agent who is merciful is resisting temptation, and giving rein to values that are most important to us — love, compassion, forbearance, courage and so on. 60 When we praise someone for an action they are required to perform such actions can be characterised as acts of quasi-supererogation: actions that are praiseworthy to perform but blameworthy not to perform and which there is a temptation, or it would be easy, not to perform.61

§5.8. Conclusion.

In this chapter I dealt with five issues that remain after mercy is shown to be compatible with the dominant contemporary moral outlooks. I began by providing an account of supererogation and showing how both the consequentialist and the deontologist can accommodate this deontic category. By doing this we saw that mercy, when supererogatory, could find a place within these contemporary moral

outlooks. I then went on to consider C3. I explained how mercy could be a rational action, and because of that subject to the rational requirement that it be replicated in subsequent similar cases, yet also be thought to be unconstraining and immune from this rational requirement.

After this, I considered C4. I provided an account of how it is that contradictory properties can be simultaneously predicated of mercy — namely, that it is both supererogatory and optional, yet can be required. I argued that some times it could be supererogatory and other times it was not. Mercy was supererogatory, I suggested, when it involved performing an action that was beyond what an agent could be enjoined to do. This limit could be set, I suggested, in a number of ways: it might be set on the basis of what it is rational to enjoin an agent to perform or at that level which produces maximum compliance, and therefore maximum expected value, and minimum non-compliance, through agents feeling that the obligation is too onerous; in other words, at that level at which the most value overall is produced. I argued that the conundrum arose whenever it was claimed that mercy was always supererogatory for then mercy ever being required was excluded. The true picture is that mercy was sometimes supererogatory and at the times required. But it was not essentially either of those.

I argued also that mercy is not usually an absolute gift nor always an act of supererogation. I argued that under ordinary circumstances mercy ought to be shown. This is belief that commonsense morality entertains. Therefore, on these occasions mercy is not supererogatory in any sense. Not to be merciful on these occasions is to invite moral criticism. Such criticism, I suggested is of two types: criticism of an agent or criticism of her actions. This provides a means of understanding moral criticism of merciless agents. Moral criticism of agents who fail to act mercifully would be largely unintelligible unless we felt that there was some obligation to perform merciful actions. Such a failure to act, however, is an index to the character and motivational structure of the agent, either on that occasion or as an ongoing concern or in that context.

On those occasions when mercy is morally required, and an agent has failed to act mercifully, we do condemn them. Utterances such as 'the judge acted quite wrongly and seemed to revel in his job — he displayed no mercy at all' do not merely report facts. An utterance such as this
Chapter Five: Mercy, Supererogation and Moral Criticism

involves an evaluation of the agent, and amounts to moral criticism: we are claiming, however obliquely, that the judge’s character is in some sense defective, but in an important way: morally. To be precise he suffers from the vices of mercilessness and cruelty.

I then provided an account of how failure to cultivate and display the virtue of mercy can leave an agent open to moral criticism. In effect I argued that we are subject to moral criticism not only for the wicked actions that we perform, but for being the sort of (morally) deficient people we may be.

Finally, I considered the basis for praising agents who merely do what they ought to do. I argued that we praise an agent for acting mercifully, even when they have an obligation to do so, when their action reflects a strength of character. For example, when an agent does what he ought to do even though there is a great temptation to do something quite different, we praise his constancy.

The point of all this is clear: mercy is displayed in many contexts, although a complete list would be impossible to devise. It can be said that, in general, mercy is possible where there is a power structure and one person is vulnerable to the acts or omissions of the person wielding the power. In some cases it is optional and not a matter of obligation. In these contexts it is supererogatory simply because the act of mercy involves much more sacrifice than can be enjoined because it would be counter-productive to proclaim it as an obligation or irrational to do so. (We have seen how this level is set: by, amongst other reasons, what it is prudent and useful to enjoin, without morality losing its authority; and on the basis of rational limits: an agent cannot be enjoined to perform an action that they are physically incapable of performing.) This is to reflect the logical principle that ‘ought implies can’ — that an agent can not be morally expected to perform an action that they can not be reasonably expected to perform. In these contexts, moral criticism of an agent who fails to perform a merciful action is not possible, for they have not failed to do something that they ought.

This chapter completes the negative case for mercy. My conclusions are that both the consequentialist and the deontologist can find a place for mercy, that the concept is coherent, yet it is in an important sense a gift, not demandable, and on some occasions, supererogatory.

§6.1. Introduction.

In the last three chapters we examined various theoretical difficulties that seemingly confront any attempt to incorporate mercy into either of the dominant moral outlooks. The conundrums as formulated there were abstracted from any practical context and were very much a conflict between moral ideas. The purpose of this chapter is to examine the various difficulties that confront mercy in a purely practical context. The conundrums that emerge in this context arise, as we shall see, out of a conflict between mercy, and an institutional ethic or ideology and duties that the office holders within an institution are thought to have.

The context that I have chosen for the discussion is mercy’s most typical, practical context: legal justice. I have for the sake of argument assumed that we can distinguish fairly clearly between moral contexts and institutional contexts. And this assumption is warranted. When we come to formulate the conundrums, it will be seen that they raise different issues within institutional contexts than they do in moral contexts, while retaining the same form in both.

I have chosen legal justice for two reasons. First, when we think of mercy, we usually think of the legal system. And over the years there has been much debate over whether the central actors with in the legal system, the judges, can be merciful. Thus, there are here important

questions of public policy. Second, the problems that confront mercy in all its practical contexts are structurally identical. Therefore, if they can be solved with respect to legal justice — mercy’s most typical practical context — then the same solutions can be deployed in mercy’s other practical contexts.

In §6.2–§6.5 I present the negative case for mercy. I shall begin by setting out an account of mercy within legal justice. Then I shall set out the conundrums. Although these conundrums are structurally identical to conundrums C1-C3 and therefore some repetition should be expected, they are, in important ways, quite different. The problems they raise will only be problems within an institutional context. In the fourth section I shall briefly examine the most important attempts that have been made to solve these problems. In the fifth section I provide my solutions. In effect I show that mercy is possible within legal justice and in fact within any rule-governed institutional context.

In §6.6–§6.10 I present the positive case for mercy and resolve some remaining problems. In §6.6 I set out the nature of mercy within legal justice. In §6.7 I briefly examine the different moral justifications for mercy in a rule-governed system; or as I refer to them, the different senses of mercy. In §6.8 I say why mercy is possible within legal justice, and set out the nature of its institutional justification. In §6.9 I examine various objections to mercy and set out a number of justifications for the practice. In the tenth section I summarise the argument.

§6.2 What Mercy Within Legal Justice Involves

Much confusion arises in the discussion of mercy through the failure to clearly distinguish between the many conceptually related, yet clearly distinguishable senses of ‘mercy’, and their moral justifications. For example, when lawyers talk about ‘mercy’ usually they are referring to the Royal Prerogative of Mercy – a reserve or discretionary power of the crown, or other executive authority, for example, parliament,2 (that is

---

Chapter Six: Mercy Within Legal Justice

derived, a lege suae dignitatis 3) to remit or remove a penalty imposed by a court. 4) ‘Mercy’ within the context of legal justice certainly means this; but within ordinary parlance it has a much broader meaning. On some occasions the agent who has been described as ‘acting mercifully’ has merely used in some particular way, a discretionary power that they possess. On other occasions ‘mercy’ will refer to a trait of their character, or a motive for their action. It is with these last two senses of ‘mercy’ that we are primarily concerned. In these cases ‘mercy’ refers to the act of declining to exact the full detriment that the law deems appropriate for the offence. Thus, mercy is an action that departs from the possible (and in some cases) expected course of legal events more than could be reasonably and ordinarily expected in those circumstances. 5) In other words, a detriment is not imposed that the law would ordinarily permit and would be expected and another course of action, also permitted by the law, is substituted. It is a course of action that, it must be believed, will or does benefit a person (in the legal power of another). Such an act of forbearance ensures that the agent upon whom the benefit is bestowed will not suffer the full consequences that the law usually permits for her action. 6) An agent who is disposed to forbear in such circumstances is described as merciful or displaying the virtue of mercy.

Now, the feature of a person that legitimates an exercise of mercy in some particular case, will vary from case to case. In some cases, it will be the youth of the culprit; in others, her age, or general former good character. What is important, however, is that a particular detrimental course of action is expected but not inflicted; it is this feature of the context that licences the use of the epithet ‘mercy’. Thus, it is this sense that I use in this discussion: 7)

A forbearance that involves an unexpected departure from the expected legal course of events (given the circumstances), in which an agent, A, ...

5. The exception being the exercise of the Royal Prerogative in cases where the infliction of the penalty, rather than its remission, would be unexpected; for example, in the case of mercy killers. When such a penalty is remitted, the pardoner, although said have acted mercifully, often acts as a matter of course. In this case they would not have acted mercifully, in any rich sense, but rather merely used a power called ‘mercy’.
6. Cf. K.D. Moore, Pardons: Justice and Mercy and the Public Interest, Oxford, 1989, p. 4. I am here attempting to find a formula that is applicable to both criminal and civil contexts.
7. This definition of mercy describes not only the actions of agents in criminal matters but also civil matters.
Chapter Six: Mercy Within Legal Justice

acting in an institutional capacity voluntarily relinquishes or refrains from exercising to its full extent a legal power that they possess over another agent, B, who is vulnerable to its exercise, and who, it is believed, will benefit if the power is not used to its full extent.

§6.3. The Conundrums of Mercy Within Legal Justice – Outline.

Mercy, as ordinarily conceived, involves a departure from a legal rule that would otherwise be thought to prevail in some case. It involves a departure from the course of events that would otherwise be legally expected and legally possible. If this is the case, then we are faced with the following problem. On this view mercy and legal justice appear to be different. Legal justice is what judges are required to do. Mercy, by its operation, apparently involves a departure from legal justice. How can acting mercifully or being merciful be consistent with a judge’s duty? Seemingly it is not. This is a problem for anyone who would predicate mercy of a judge, for seemingly, in acting mercifully, she would fail to do what her duty requires of her. She is torn, seemingly between two incompatible courses of action: on the one hand, acting mercifully; on the other hand, following the usual practice, the legal rule, in a case of the sort that is before her.

This way of casting the problem assumes a particular way of viewing the nature of law. We might for the sake of argument call it a ‘positivistic’ approach. The proponents of this view claim that rules (or rules and principles) are the basis of legal decision making. The leading proponents

8. The idea that I am trying to convey here is that whilst a particular institutional actor may be thought to be merciful, and mercy may be expected of him, compared to the overall context of expectations it is not reasonable to expect mercy. Therefore the merciful actor’s display of mercy is a departure from the general behaviour that one is justified in expecting and which is legally possible. This image of mercy, I have argued in Chapter Two and argue again in this chapter, is too restricted. It is an ‘open textured’ concept and the properties that it possesses in one context will be different from the properties that it possesses in some others — although there will be a threat that links them all. For example, suppose that the legal system develops to such an extent that we expect all actors to act mercifully. If mercy were only ever a departure from what we expect, then mercy would cease to exist, for ex hypothesi, there would be no departure from what we expect. To be sure, mercy, within legal justice, does often involve a departure from the expected course of legal events one expects, because we do not expect mercy from the vast majority of the actors within the system. Such a departure from what is expected is essential to an act being an act of mercy within in that context. Mercy is unexpected rather than de rigueur; in some contexts this is essential to it being a display of mercy. Essential to all contexts of legal mercy, however, is the fact that mercy is a departure from what is legally possible.

9. It would, in fact be a problem for any institutional actor charged with specific duties. For to act mercifully, is by its nature, to depart from the actor’s institutional duty.
of this view are H.L.A. Hart and Ronald Dworkin. In the case of Hart, the presumption is that the actors within a legal system are guided by determinate rules which do not require from the actors a fresh judgement from case to case. In Dworkin's case it is the view that legal rules apply in an 'all-or-nothing fashion'. ‘If the facts a rule stipulates are given', Dworkin writes, then either a rule is valid, in which sense the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision'. Mercy is problematic for such a view, as it involves, seemingly, setting an applicable legal rule (or principle) aside. (We can contrast this 'positivistic' view with that of another theorist who is often thought to be the paradigm positivist, the nineteenth jurisprude, John Austin. For Austin, law was an expression of the values and moral character — both good and bad — of a community. Moreover, the law on any particular question was continually re-shaped and re-asserted in on the basis of the changing moral perceptions of a community. As we shall see in what follows mercy can be easily accommodated by such a view.) For the sake of argument, I shall refer to the model of law expounded by Hart and Dworkin as the 'law as fact model'. I shall refer to the model of law expounded by Austin as the 'law as value' model.

We might respond to this problem by arguing that all that is involved in an exercise mercy is the making of an exception to general, insufficiently flexible, laws that do not formally allow for exceptions. This occurs when the actors within the legal system are confronted by cases

10. Dworkin is not usually considered a positivist and seems not to consider himself one. (Cf. Taking Rights Seriously, London, 1987, p.22.) There are a number of elements of his views, however, that are positivistic in orientation, hence his inclusion under this broad rubric. I have in mind especially his view that there is a perceivable distinction between the rules and principles in law and those of morality; as well as the view that the law is somehow 'out there' waiting to be discovered and that the law on any legal question can, in principle, be discovered, and thus to any legal quandry there is a 'right answer'. Stanley Fish also identifies positivistic elements in Dworkin’s view. Vide, ‘Working on the Chain Gang: Interpretation in Law and Literature’, Texas Law Review, Vol.60, 1982, pp.551-567, at p.559, 566; and ‘Wrong Again’, Texas Law Review, Vol.62, 1983, pp.299-316, at p.309.
that quite clearly satisfy the legal criterion for the infliction of a penalty, but from a moral point of view, the offence that has been committed does not warrant that (legal) response. So, mercy is exercised to avoid an unduly harsh penalty which an insufficiently flexible legal system would impose upon an offender. In this way, mercy is nothing more than an attempt, however motivated, to ensure that the (overall) just penalty is imposed and (overall) injustice avoided. Thus, mercy is consistent with a judge’s duty because it is identical with one of her duties, namely doing (legal) justice, by acting equitably.

But this stratagem gives rise to another problem. If we adopt this stratagem, it would imply that, at those times when mercy is exercised, there can be no contrast between the legally just course of action and the merciful course of action. The possibility of weighing the legally just course of action against the merciful course of action would not then exist. Nor does the possibility arise of describing a judge as merciful — if by that we mean ‘doing something different from legal justice’; ‘mercy’ and ‘(legal) justice’ are synonyms. Thus, mercy could not temper or season legal justice. So, our beliefs about mercy are contradictory and the concept seems incoherent.

There is a third problem: if mercy is in some sense related to justice, then if given once it must rationally and morally be given again — to similar cases. So whilst mercy may be a gift the first time round, should mercy be given once, thereafter the merciful agent seems to be under a rational, legal, and moral obligation to be merciful, should similar cases arise again. But this seems to run against two of our pre-

17. Smart, ibid., p.358.
18. While it seems impossible, under the usual conception of mercy, for judges in criminal trials to act mercifully, it is possible for mercy to find a niche within that part of the law that deals with civil matters. In civil law, mercy is possible because a person may choose not to proceed with a private action. In doing this they free the agent obliged to them from the burden of that obligation. In effect the merciful agent waives a right that she has that corresponds with some obligation under which another person labours or duty that they have. (Vide, Jeffrie Murphy, op. cit., pp.175-176.) Mercy removes or reduces obligations that if enforced would cause great hardship. In other words, in civil law the merciful agent has a right enforceable in law but decides, out of compassion for the plight of the person who obligated by that right, or out of a concern for their welfare, to forbear enforcing their right. Thus, in civil law, mercy is a virtue manifested by private persons, which involves forbearing full exercise of their legal rights, rather than by officials enforcing the law. Clearly then the problematic area is the criminal law. And as I have argued elsewhere, we can not use the private law model to solve this conundrum for criminal law. See my ‘Saving Grace’ Criminal Justice Ethics, Winter/Spring, 1990, pp.52-59.
theoretical beliefs about mercy: namely (1). that the display of mercy on one occasion does not commit the agent to being merciful on another occasion; and (2). that since mercy is supererogatory and a gift and not a matter of obligation, a single act of mercy cannot create an obligation to replicate the action. These beliefs about mercy, along with the belief that each individual act of mercy springs from the merciful agent examining each individual case on its merits, rather than by comparing the case to other similar cases, are incompatible with the central belief that the law-as-fact theorists hold about legal justice, namely, that legal justice consists in legally similar cases being treated similarly.\textsuperscript{19}

The third conundrum suggests that since mercy seems to be both supererogatory, optional but seemingly required, that the concept of mercy, within the context of the criminal law, as conceived by the law as fact theorists, is incoherent and unjustifiable. Judges, if they are to act in accord with their duties and rationally, within the context of the law, as the law-as-fact theorists conceive it, cannot act mercifully.

\section*{§6.4 Solutions that have been Offered.}

All the solutions that have been offered to the conundrums within the context of legal justice have assumed a particular model of the law, namely, the law as fact model. They assume, amongst other things, that legal principles and rules form a separate and identifiable class from moral principles and rules, and that the actors within the legal system are bound by the former, rather than the latter. It is these assumptions that, by and large, generate the conundrums. To see this, consider the following solutions offered to the conundrums of mercy within legal justice.

\subsection*{§6.4.1: John Kleinig.}

In law, many recommendations for mercy’, Kleinig observes, ‘are supported on grounds which constitute not so much a deviation from moral justice, but an adjustment to moral justice’.\textsuperscript{20} The reason for this is simple. Since it is one of the functions of the law, Kleinig writes,
...to give practical and efficient means of judgment, legal judgments frequently fail into adequate account the special circumstances surrounding individual cases. In such cases pleas for mercy are entered, so that all the morally relevant circumstances might be taken into account in the final sentencing.21

Therefore, mercy is justified within legal justice, and does not necessarily compromise justice. It is a justified on the grounds that it is to be used to produce a more comprehensively just result. In this, Kleinig is certainly right. Legal judgements, as Kleinig notes, are frequently unable to take full account of the peculiarities of a case and the result is a moral injustice. In such cases, various legal mechanisms are employed, such as the prerogative of mercy or judicial discretion so that all the morally relevant circumstances can be taken into account. But the fact remains that legal justice has failed, and mercy is required to produce a morally acceptable, i.e. just, result. Thus ‘mercy is not opposed to justice as such but to justice as it has been solidified in a system of rules’.22 It is in some sense an act of equity within the law. But if this is the case then a familiar problem arises: it is impossible to distinguish the just course of action from the merciful course; and this is something we frequently do when evaluating the actions of institutional actors.

In other words, this reconciliation of mercy and justice leads to the second conundrum: How would such an act of mercy be distinct from doing justice? It is certainly distinct from doing legal justice. But it is not distinct from moral justice.

§6.4.2: P. Twambley.23 The solution that Twambley offers is to deny that judges can act mercifully. Mercy is simply an action that they are not permitted to perform, owing to their judicial duties, and because mercy involves not enforcing an obligation that is due, and judges are not owed any obligation by an offender. The problem with this is the restricted notion of mercy and the incorrect conception of the duty of a judge, namely that they must do justice. This will be examined below, (§6.9.3). For the present it is enough to note two points. the first is that mercy is not only, within the context of legal justice or any other context for that

21. loc. cit.
22. loc. cit.
matter, the remission of some obligation or debt that is due. Second, judges are not charged with 'doing justice' but with administering the law in a proper manner. Consequently, Twambley’s two principle assertions are quite beside the point, and he has not proven that judges cannot act mercifully.

§6.4.3: Jeffrie Murphy. Jeffrie Murphy, who saw all three conundrums, has presented the best solution. He claims that a judge can display the virtue of mercy if a new paradigm for mercy, the private law paradigm (PLP), is adopted. In the PLP the merciful agent has a right enforceable in law but decides, out of compassion for the plight of the person who is obligated by that right, to forbear from enforcing her right. Since ‘mercy’ does not refer to some part of justice, but rather to compassionate concern for another who is within one’s power, it is not redundant.

The PLP has two features that enable it to avoid the conundrums. The first feature is the nature of the relationship between plaintiff and defendant. The second feature is the actions which are required in order to fulfill the requirements of justice within the context of private law. If these features are moved to the criminal law, judges in criminal cases will be in a position to be merciful. Murphy argues just this, namely, that it is possible for judges in criminal cases to display the virtue of mercy if the relationship between a criminal and a community is analogous to the relationship that exists between a defendant and a plaintiff in a private law case, and if the requirements of justice in criminal cases are the same as in private cases; that is, ‘hard retributive justice’ — the assumption about justice that underlies the first conundrum and the criminal law paradigm of mercy (the CLP) — must be abandoned in favour of ‘soft retributive justice’ — the assumption about justice that underlies the PLP.

Murphy's stratagem is unsuccessful and unnecessary. Consider why

25. The expression “private law” is Murphy’s. I would prefer to use “civil law,” as I believe that Murphy is referring to non-criminal wrongdoing. That is, wrongdoing pursued not by the state or Crown, but by the individual who has been injured.
26. loc. cit.
27. Murphy and Hampton, ibid., pp.179-180.
it is unsuccessful. Murphy claims that “it is analytic that mercy is based on a compassionate concern for the defendant’s plight.”29 In other words, for an act to be an act of mercy (within both the CLP and PLP), it must spring from a compassionate concern or sympathy for the defendant. Yet Murphy also claims that “a judge would be acting wrongly in principle in showing mercy on the basis of his own personal sympathy or compassion.”30 For the present purpose, the most important aspect of the first conundrum centers around how, if at all, a judge might display the virtue of mercy and act rightly.31 Now according to Murphy, a judge qua judge, cannot act on his or her feelings. Consequently, she cannot act rightly and display the virtue of mercy. To be clear: such a judge cannot act as a judge must act, and also have the feelings that Murphy claims are necessary for an action to a display of the virtue of mercy. Therefore, it is not possible for judges to be merciful and act as they must — according to Murphy — act.

Moreover, if a judge — or any other agent — is to display the virtue of mercy then she must, according to Murphy, be grounding her merciful act in a “compassionate concern for the defendant’s plight.” Such a judge would violate a requirement of retributive justice, as Murphy himself admits. It is the requirement “that a judge would be acting wrongly in principle in showing mercy on the basis of his own personal sympathy or compassion”32 since he would be basing his decision upon features of the case that are, from the point of view of retributive justice, irrelevant. A judge qua judge, if this requirement is observed, is in no position to be merciful and act as a judge dispensing retributive justice must act. Why? Simply because such a judge must lack the feelings and emotions that Murphy claims are necessary for an action to be an act of mercy. A judge

29. Ibid., p.173.
30. Ibid., p.179, and n.8.
31. The first conundrum raises two issues only one of which is important here:
   a If mercy involves a departure from justice, and judges are charged with acting justly, how is it possible for a judge to act mercifully and be faithful to the duties of her office?
   b If mercy involves a departure from justice and all departures from justice are vices, then mercy is a vice. Two conclusions can be drawn from this second: the first is that ‘mercy’ is incoherent; the second is that if judges are at all like other rational and moral agents then it is not possible both rationally (because mercy is “incoherent”), and morally (because mercy is a vice) for them to act mercifully. I consider Murphy’s solution to the first issue only (i.e., a above), as I argue that his stratagem provides no solution to that problem. As for the second issue, (i.e., b above), I believe that the stratagem does provide a solution for Murphy. Why? Because Murphy in effect argues that within the PLP mercy does not necessarily involve a departure from justice and therefore it is not a vice.
32. Ibid., p.179.
qua judge cannot act rightly and display the virtue of mercy. It is possible for judges to be in a position to be merciful only at the cost of their impartiality and thereby at the cost of their capacity to act as impartial judges. Since a judge qua judge cannot act impartially (that is, without her own feelings influencing her actions), and mercifully (in which an agent's feelings ground the merciful action), the first conundrum remains.

Perhaps the most important objection to Murphy's stratagem is that at least half of it is unnecessary. In an attempt to clear the way for the PLP Murphy concedes that justice need not be 'hard' retributive justice but merely 'soft' retributive justice. Yet if this concession is made, the first conundrum is dissolved. To be clear, 'hard retributivism' is the view that a criminal must be given a definite punishment and that it is a breach of justice to fail to do so. 'Soft retributivism' is the view that it is permissible to punish a criminal up to a certain level but that there is no justice-based requirement or obligation, to do so. A failure to punish does not necessarily result in a breach of justice, as Murphy himself concedes. The guilty need not be punished and it is not wrong not to punish them.

The conundrum can arise if and only if it is a requirement of justice that wrongdoers must be punished, that is, if justice is hard retributive justice. In other words, remitting punishment will only be significant if punishment (to some determinate level) is required by justice. And justice can require punishment only if it is hard retributive justice. Yet Murphy's stratagem requires a denial of hard retributive justice. Since Murphy must abandon hard retributivism (and thereby the only interpretation of 'justice' that will lead to the conundrum) for his solutions to work, he dissolves the conundrum at that point. The rest of his stratagem, namely the new relationship between the wrongdoer on one side and the victim and the community on the other, — is not required. Why? Because when he adopted soft retributive justice Murphy conceded enough to dissolve the conundrum. On Murphy's own (new) terms there can be no conundrum.

Murphy is in a bind. Either he retains hard retributivism, the conundrums remain, and he loses any hope of saving grace for judges in criminal trials; or he adopts soft retributivism and dissolves the conundrum at that point, in which case most of his stratagem is
unnecessary. Murphy does not need to rewrite the relationship between the offender, on the one hand, and the victim, society, and judge on the other.

What then of the second conundrum? Surely mercy is still redundant with respect to justice? The answer is simple: it is not. We are driven to the second conundrum only because the assumptions underlying it seem to salvage grace. The first conundrum seemed to show that mercy was a vice and incompatible with a judge’s duty. The assumption upon which the second conundrum rests is that mercy involves doing justice — and is therefore a virtue. This is in effect a rejection of the conclusion of the first conundrum.

Now, if the first conundrum no longer persists, and it would not if soft retributivism were adopted, then mercy is not a vice. As a result, there is no reason to try to save grace. We do not find ourselves driven into the arms of the second conundrum by assuming that mercy involves doing justice. Moreover, if soft retributivism is adopted, the way that “mercy” is usually understood in the CLP is identical to the view of mercy in the PLP. ‘Mercy’ refers to the act of treating, or the disposition to treat, a person differently from the way one is legally justified in treating her by departing from what is legally justified but not required, and doing so out of compassion for, or in response to, her hard position — and not out of a concern for legal justice. Given this, the assumption that generates the second conundrum — that mercy is, in some sense, a part of justice — is not made, and the second conundrum does not arise.

If the first conundrum is dissolved, and the second does not arise — as it would if we allow that legal justice involves ‘soft retributive’ justice — then the other half of the PLP becomes unnecessary. That is, the relationship between the plaintiff and the defendant that Murphy wanted to import into the criminal law is not required for the solution to the conundrums.

§6.5 Solutions to the Conundrums.

§6.5.1 Non-Comparative (retributive) legal justice. We require formulations of these conundrums which bring out the issues. I shall formulate each conundrum and deal with it in turn. The issue central to
the first is that mercy is wrong for a judge, because it involves a departure from a judge’s duty. I suggest the following formulation:

Conundrum 1: The Conundrum of Judicial Duty (Cl)

1. Mercy tempers justice. It involves imposing upon a culprit a burden less than he should receive in view of his action.
2. Justice involves giving agents only what they are liable to receive in view of the culpability of the act.
3. Since mercy tempers (legal) justice, it involves a departure from (legal) justice.
4. If a judge departs from (legal) justice she fails to do her judicial duty.
5. Therefore judges can not act mercifully and be faithful to her judicial duty.

This argument is ambiguous. Judges administer and dispense legal justice. If mercy is to temper anything, when it is given by a judge, then it must be legal justice. Similarly, if judges depart from anything when they are merciful, it must be legal justice.

Before we go on to the reformulation of C1, we need to clarify the claim that mercy involves a departure from legal justice. What is ‘legal justice’? What constitutes a departure from it? And what do we mean when we say that ‘A has been merciful’ or that ‘mercy involves a departure from legal justice’?

‘Legal Justice’ is a rather amorphous notion. H. L. A. Hart, has suggested that legal justice is a matter of treating legally similar cases similarly – and legally dissimilar cases differently.\(^33\) It also involves, however, administering the laws without fear or favour and irrespective of the agent’s non- legally recognised dissimilarity to others, and inflicting burdens usually associated with a particular offence, if there are no reasons not to. As well, it involves following and applying impartially the procedural rules that govern the operation of the court. Thus, ‘legal justice’ not only refers to the burdens that the law would impose upon legal wrongdoers, but also a consistent and unwavering application of the laws and procedural rules. It is contrasted with substantive justice, which refers to the morality of law and the procedural rules themselves.

Now, mercy is said to involve a departure from legal justice. This

means, most often, that laws or treatments that clearly apply to a case are not applied, or that legally similar cases are treated differently; in both cases, a departure from the ordinary and expected course of legal events occurs. In other words, procedural justice is not followed. So when we say that ‘A has acted mercifully’ we mean that she has departed from procedural legal justice. Now for the arguments. C1 can be reinterpreted in two ways:

C1': 1. Mercy tempers legal justice.
   2. Legal justice involves giving agents what they are liable to receive.
   3. Since mercy tempers legal justice, it involves a departure from legal justice.
   4. Judges are not permitted to depart from legal justice.
   5. Therefore, judges cannot act mercifully.

C1": 1. Mercy tempers legal justice.
   2. Legal justice is giving agents what they are liable, in justice, to receive.
   3. Since mercy tempers legal justice, it involves a departure from justice.
   4. Judges are not permitted to depart from justice.
   5. Therefore, judges cannot act mercifully.

The claim in each case is quite different. In C1' mercy is impermissible for a judge, only if judges are not permitted to depart from legal justice. In C1" mercy is impermissible for a judge only if departures from legal justice involve departures from justice and judges are not permitted to depart from justice.

C1, (and C1' and C1"), assumes non-comparative justice in the form of ‘hard retributivism’; that is, judges are required to inflict the punishment to which an offender is liable - nothing more, nothing less. This, of course, is false. The legal system does not wholly assume hard retributivism. ‘Legal justice’ is not a matter of imposing upon offenders the penalty to which they are liable. To be sure, judges may, for some crimes, be required to impose a specific penalty. For most crimes, however, they are merely required to impose a penalty that falls within a particular range specified by law.34

As well, often where a particular penalty is specified, the judge is

34. Vide, N.S.W Crimes Act, [1900, as amended, §442, §556.
allowed to set the non-parole period. Thus, the actual penalty that a convicted person receives is left, for the vast majority of crimes, to the judge's discretion. Now, since the law specifies no particular penalty that the convicted person must receive, a merciful judge, so long as the penalty imposed falls within the range specified, neither departs from the law nor fails to do his judicial duty. The argument fails because premise 3 of C1 is not necessarily true. Hence C1 (and its variants) fails in these cases.

Consider now C1' and the assumption underpinning it: Judges are not permitted to depart from legal justice. This is false. When no specific penalty has been legislated, the specific penalty to be imposed is left, within often vaguely specified limits, to the discretion of the judge. The aim of discretion is to permit departure, within limits, in particular cases, from widely observed and enforced penalties for a particular crime even though the action performed by the offender fulfills the legal definition of that crime. For example, mercy killers and murderers have performed actions that satisfy the legal definition of murder. Strict observance of one of the principles of legal justice, namely that legally similar cases be treated similarly, would indicate an identical sentence for both. Yet judges, using their discretionary powers may in these cases depart from the penalty that is normally imposed for murder. They impose much lower sentences on mercy killers.35 The very fact that judges have discretionary powers, and are expected to take into account mitigating factors, indicates that judges are permitted to depart from legal justice, in this restricted sense; that is, not treat, invariably, legally similar cases similarly. A judge who does depart from legal justice — and provides

35. For example see the cases cited in J. Rachels, 'Euthanasia', as Chapter Two in T. Regan, (ed.), Matters of Life and Death, New York, 1986, pp.35-76 at pp.61-62. From the point of view of case law, these are not identical cases. But my points are 1. from the point of view of the definition of the crime they are identical. A person who performs a mercy killing, is, from the point of view of the law, guilty of murder, since the main feature that distinguishes a mercy killing from a murder is the motive and motives are, in this type of case, inadmissible as defences to a charge of murder. (Vide, Brett and Waller, op. cit., §1.51) The law refuses to recognise the importance of motives, (except in certain defences, such as coercion, necessity, provocation and self defence. Vide, Law Reform Commissioner, Victoria, Working Paper No.8: Murder: Mental Element and Punishment, Melbourne, May, 1984, §112 ) and refuses to pay attention to them, or allow them to be pleaded as a legally recognised defence that is a bar to conviction. The law concerns itself mainly with intentions, (vide, Brett and Waller, op. cit., §150-151 and Law Reform Commissioner, Victoria, Working Paper No.8, op. cit., §96-98; and 2. it is only discretion that enables a judge to discriminate between legally identical cases (i.e., mercy killing and killing), and in effect create case law. (Cf. Brett and Waller, loc. cit; and Law Reform Commissioner, Victoria, Working Paper No.8, loc. cit.)
cogent reasons for so doing — does no legal wrong. In being merciful, such a judge has not ignored the law — as a body of rules and customs; nor has that judge necessarily wrongly applied the law. Hence $C_1'$ fails.

Consider $C_2'$ and the assumption underlying it: that a deviation from legal justice involves, necessarily, a deviation from justice, and therefore, an injustice.\(^{36}\) This assumption would be true only if legal justice was identical to justice. Clearly this is not so. We can distinguish a just state of affairs from a legally just state of affairs, in terms of the properties or features each has. A just state of affairs - a state of affairs picked out by the predicate 'is just' — is one of the class of states of affairs that has right-making properties. Just-making properties, then, are one of the class of right making properties. The following definition is suggested:

\[
\text{'is just'} =_{df} \text{'has a certain set of right-making properties'}.
\]

'Legal justice', on the other hand, refers to a state of affairs that possess certain justice-promoting properties, but only those justice-promoting properties specified by law, and to the extent specified by law. Being in accord with the law — in this respect — is justice-making. So the predicate,

\[
\text{'is legally just'} =_{df} \text{'has the justice-making property of being in accord with all those aspects of the law that promote justice'}.
\]

To depart from justice is to choose a state of affairs that lacks at least one of the set of right-making properties that constitutes a just state of affairs. To depart from legal justice, on the other hand, is to choose a state of affairs that lacks a particular justice-making property. Such a state of affairs lacks the justice-making property of being in accord with all those aspects of the law that promote justice. But it does not follow that to act this way is to act unjustly.

To use an example. One such justice-making property is that legally similar cases must be treated similarly. To treat legally similar cases

dissimilarly is to choose a state of affairs that lacks a property specified by law for a state of affairs to be legally just — namely, the justice-making property of legally similar cases being treated similarly. Although a justice-making property is absent, it does not follow that a state of affairs which lacks this property is, necessarily, unjust. Suppose that a judge treats a mercy-killer much more leniently than an ordinary killer. In law, they are identical, since they have committed the same crime. Now, if the justice-making property of legal justice, that similar cases be treated similarly was applied they would receive the same penalty. However, they do not. And it is clear that no breach of justice has occurred in ignoring the legal rule that similar cases be treated similarly. Moreover, since justice-making properties are right-making, it does not follow that if a state of affairs possesses the set of justice-making properties specified by law, (such as similar treatment of similar cases or rigid enforcement of a particular law), it is thereby the most just state of affairs. Thus, it does not follow that preferences for one state of affairs over another and departures from a particular state of affairs with justice-making properties necessarily involves a departure from justice. Consequently the assumption underlying C" — that departures from legal justice involve necessarily a departure from justice — is false and the conundrum cannot arise.

This is merely to recognise a simple point, something that judges work with constantly: one right state of affairs can override another right state of affairs if the one supplanting the other possesses right-making features that will better promote the goals of the system. To prefer, on some occasion, a just or other right state of affairs to a legally just state of affairs is to prefer a state of affairs with those right-making features that will promote some telos that an institutional actor has, over another state of affairs that possess right-making features that will not promote the same telos to the same extent. For example, the similar treatment principle might be sacrificed in order to protect the security and welfare of the community, as this is more likely to promote the well being of the community.37 So, two legally identical offenders may receive quite different penalties because one of them displays a low level of menace to the community, while the offender who received the harsher penalty, is

judged a greater menace.

Further, if, for example, such a preference is based upon the fact that, principles such as ‘similar treatment of similar cases’ are limited by what are permitted — by law — to count as similar cases,\textsuperscript{38} we are acknowledging that, in this case, the principle is constrained - and that the just state of affairs is more right than the legally just one. Limitations on the principles of justice of this sort create the possibility that cases dissimilar \textit{in fact} will, within legal justice, be treated as if they were similar. When this occurs it is only right that we should prefer that state of affairs where cases are treated differently, that are legally similar, but which are dissimilar in fact. In fact when this occurs our moral intuition is to say that justice or even ‘the right thing’ has been done and legal justice rightly ignored.

It is this discrepancy that justifies judges departing from legal justice and choosing a just state of affairs over a legally-just state of affairs and provides a means of justifying merciful actions within legal justice. An act of mercy is justified within the legal justice system if and only if the state of affairs obtained as a result of the act of mercy possesses more right-making characteristics than the state of affairs that would obtain if the judge were not merciful. It might be thought that judges do not think this way, that is, in terms of what would be most right, (or just in some sense broader than merely giving people their deserts) and preferable over what would be legally sanctioned or legally just. But often enough they do. As one judge wrote:

\ldots in a situation in which the law appears to any right-thinking person to be manifestly unfair, judges will find a way of producing a result which is fair.\textsuperscript{39}

And in 1966 the House of Lords modified their rigid practice of respecting precedent and stated (in part)...

Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case...They propose, therefore, to modify their present practice, and while treating former

\textsuperscript{38} As Hart, \textit{op. cit.}, p.156, recognised.
\textsuperscript{39} The Hon. Sir Barry Sheen, ‘Limitation of Liability: (The Law Gave and The Lords Have Taken Away)’, \textit{Journal of the Chartered Insurance Institute}, August, 1987, p.158.
decisions of this House as normally binding, to depart from a previous
decision when it appears right to do so.\textsuperscript{40}

It is clear from this that the unfairness and injustice that these
judges are worried about is non-legal unfairness and injustice. In effect
they are saying: stick to the law, but when it is morally unfair or morally
unjust, or even morally wrong, to rigidly adhere to the law, set it to one
side or adapt it and do what is (morally) right.\textsuperscript{41} Thus, judges, at a senior
level, assume at certain critical moments a licence to depart from the
usually and expected treatment.

But what of judges in lower courts? Two points need be made if it is
to be possible for judges generally to have mercy predicated of them or
their actions. The first is that judges in inferior courts have the power
to depart from legal justice (that is a rigid following of precedent); the
second is that some of these departures have such a nature as to justify
the use of the epithet ‘mercy’ to describe the departure. Take the former
first.

Do judges in lower courts have the power to do this? It seems to me
they do. This view is based upon two points. First, judges are permitted
to depart from treating legally similar cases similarly in virtue of their
discretionary powers. Judges at all stages of the legal system have a wide
range of discretionary powers, covering the admissibility of certain pieces
of evidence, determining the law applicable to some case, through to
sentencing.\textsuperscript{42} The vague rules that govern the use of a judge’s of
discretionary powers effectively permit her to depart from precedent and
treat legally identical cases dissimilarly. Second, judges are permitted to
depart from a precedent, under certain specified circumstances, without
having to invoke their discretionary powers, as indicated in these

\begin{flushright}
\textsuperscript{40} Procedure Note [1966] 3 All ER 77, [1966] 1 WLR 1234
\textsuperscript{41} Very often judges will search for a legal principle or some case upon which they base their
decision. They see a need that the defendant has and attempt to address it through using accepted legal
mechanisms. But, not always. They may merely say that the community standards are such now that
to apply some precedent that originated in another time and effectively another community would be
wrong. (Cf. Schorsch Meier GmbH V Hennin [1975] 1 All E.R. 152) Witness for example, the
gradual demise of the M’Naughten rule, and the alteration to the notions of provocation and coercion,
and the effect of illness on an agent’s responsibility, most notably pre-menstrual tension, in response
to commonsense ideas of responsibility. An extreme example of a willingness to deviate from a law
in conflict with a judge’s moral lights is Lord Denning. \textit{Vide}, §5.8
\textsuperscript{42} See R. Pattenden, \textit{The Judge, Discretion, and the Criminal Trial}, Oxford, 1982, \textit{passim}.
\end{flushright}
comments by Sir George Baker. He began by saying that...

The court is not bound to follow a previous decision of its own if satisfied that that decision was clearly wrong and cannot stand in the face of the will and intention of Parliament expressed in simple language in a recent Act passed to remedy a serious mischief or abuse, and further adherence to the previous decision must lead to injustice in the particular case and unduly restrict proper development of the law with injustice to others.

Sir George Baker then listed a number of reasons for taking this view, the most compelling for him, and for our purposes the most important, being that...

...by his judicial oath a judge binds himself to do ‘right to all manner of people after the laws and usages of this Realm’.

Given that judges can depart from legal justice, can they do so in such a way that warrants the epithet ‘merciful’. It seems so. As I characterised mercy above, within legal justice, it involves a departure from the usual, and expected course of events. A judge who acts mercifully does not do what might be expected of him. He imposes a lesser penalty, adopts a favourable interpretation of the facts, makes allowances for circumstances and misfortunes that the law as cast usually ignores.

This sense of mercy might be called the ‘equitable sense of mercy’. The aim of a merciful judge seems to be to fit the treatment to the culpability and wickedness of the crime while taking into account the character of the offender. In these cases the judge departs from the usual and expected legal treatment and imposes a lesser, and perhaps more just, penalty. It is not identical with legal justice — as that involves treating legally similar cases similarly, or merely mechanically imposing the law. In this context legally similar cases are being treated dissimilarly and laws are not being rigorously applied against all agents who, from the point of view of the legal system, are valid candidates. It is a merciful act because the judge has the capacity to ignore the moral claim that the offender has to considerate treatment. Sometimes it can be an act of mercy just to be

44. *Loc. cit.*
equitable.

Interestingly, the justification I have offered is not so novel. It is not very different to that offered by Alwynne Smart:

The answer to the question: ‘when are we justified in being merciful?’ must be: only when we are compelled to be by the claims that other obligations have upon us.\(^45\)

§6.5.2 Comparative legal justice. Before we leave this conundrum we need to consider two other, related puzzles. So far we have discussed mercy in relation to non-comparative (retributive) justice. Now I want to consider it in relation to comparative justice. The worry can be set out this way:

Suppose a judge has before him two cases which are identical in all the relevant moral and legal respects. Suppose he exercises mercy in one case but not in the other. He could rightly be criticized for showing favouritism and acting unfairly. Now if all things are equal, there is no reason why one wrongdoer identical in all relevant respects with another should be treated more leniently than his colleague. Such discrimination is irrational\(^46\)

Mercy, it seems, licences and at times may involve a departure from comparative legal justice. In those cases, mercy must be legally wrong and if the legally just treatment is morally just, morally wrong as well. The solution to this is simple. Acts of mercy do not licence an agent to evade the requirements of comparative justice - unless there are good reasons for doing so. If mercy is justified, i.e., right, then a failure to be merciful, by imposing a legally just sentence, is wrong. This holds for single cases as much as identical cases. Similarly, if the legally just penalty on some occasion was morally right, then an act of mercy that prevents it being inflicted is morally wrong, not merely legally wrong.\(^47\)

\(^{45}\) Smart, \textit{op. cit.}, p.358.
\(^{46}\) Both Smart, \textit{op. cit.}, p.351, and Hestevold (1983), \textit{op. cit.}, p.357, deploy versions of this argument.
\(^{47}\) Does this imply that if an act, that purports to be an act of mercy, is in fact unjustified or wrong, that the act ceases to be an act of mercy? I think not, for the road to hell is paved with good intentions. The rightness or the wrongness of an action - its evaluation - has no bearing on its description; that is, whether it is a vice or not. An action will be a virtue or a vice in respect of the moral value of its springs, i.e. the motivational structure of the actor, though on occasion it may be
Now suppose that two offenders, legally identical, appear before a judge. She may show mercy to one and not be required legally or morally to show comparable mercy to the other. She can do this simply because they differ in respect of their non-legal properties. And it is in virtue of this that mercy is given to one and not to the other, and she is permitted by her discretionary power to do this. Thus, different treatment of legally identical cases if founded upon relevant considerations is not evidence of favouritism. It is true then, that cases that are identical in all the morally relevant respects must, morally and legally receive similar treatment, unless there is a good reason for distinguishing them. It is also true that cases that are legally identical, if there are no moral properties to distinguish them, and the law is just, must receive similar treatment.

We can see from this how judges are permitted to distinguish between legally identical cases and precisely what a judge’s duty of similar treatment amounts to. Thus, mercy can involve a departure from comparative legal justice; that is, legally similar cases being given different treatments. If such a departure is made for the right reasons, by the proper use of judicial power - the most important of which is - perhaps the only one being - the proper use of discretion, then there can be no moral or legal complaint.

It needs to be pointed out that were an agent to act mercifully merely out of respect for the principle that similar cases be treated similarly they would not be displaying the virtue of mercy - but justice. The action performed, however, could still be described as an act of mercy because it represents a departure from the ordinary and expected course of events and involves an imposition of a lesser penalty when a more severe one was legally possible.

However, if the judge was concerned about the welfare of the culprit to the extent that she felt a need to act fairly then this would be a display of the virtue of mercy. How? Simply, that the culprit was within her power, a harsher penalty was expected and legally possible, yet she imposed a lesser one, out of concern for the offender’s welfare. It was legally possible for the judge to treat the offender morally unfairly but out
of concern for the offender's welfare she refrained from doing so. Sometimes then, the virtue of mercy can be manifested by acting fairly or justly.

There is another difficulty that needs to be considered. Suppose that mercy is shown to a murderer, then equal mercy ought to be shown to all those agents who are similar to the murderer in the morally relevant respects. If the reason for this was that the law was wrong, then legally similar agents should receive at least as much mercy — before their individual moral properties are taken into account. Now, suppose also that this leads to a penalty equal to that, presently imposed for motor car theft. Surely then there is a case for proportional mercy for motor car thieves, on the basis that their crime was not as serious as that of the murderer. So, not only does the principle of equal treatment apply laterally, to similar cases, in respect of their crimes; but it applies vertically, and proportionally with respect to more and less serious cases. Would it end with there being few if any penalties, as some have suggested?48

This conclusion does not follow. For if mercy is given because it is appropriate and right, then there is no morally defensible reason to make vertical adjustments, to the treatments that more and less serious offenders received, unless the treatments they received were morally wrong. Simply being merciful to one person does not by itself entail that we must be merciful to all similar offenders or to those who have committed more and less serious offences. It must also be the case that the display of mercy was morally appropriate, and the the other offenders were similar to the offender who received mercy in respect of properties that made mercy morally appropriate. Mercy, when justified, is given for this reason alone: it is right; the right option to choose amongst a range of options that have right-making properties. Thus, it is not the case that a vertical adjustment of penalties is warranted simply because someone in the punishment continuum received mercy.

The second conundrum is suggested by the solution to the first: if mercy is a means of achieving moral justice, or if it is simply another

name for 'equity' or some other part of justice, how does it differ from justice? It ceases to be autonomous and talk of judges ‘tempering (legal) justice with mercy is nonsense.49 This worry can be set out more clearly this way:

**CONUNDRUM 2: The Conundrum of Redundancy (C2):**

1. Within the context of legal justice, ‘mercy’ involves individuation (downwards) of a penalty, i.e. tailoring a penalty to suit the gravity of a particular offence.
2. Since individuation of penalty is one of the features of justice, a judge who acts mercifully is not doing anything different from justice.
3. The function that mercy performs is performed already by some part of justice.
4. Thus mercy does not exist as an act that is autonomous with respect to justice. Mercy is a part of justice.
5. Therefore judges cannot be merciful — if by this it is meant that the judge has performed some action distinct from a legally just act.

Like C1, C2 is ambiguous; it is not clear whether it is being claimed that mercy is not autonomous with respect to justice or legal justice. Given that our question is whether it is possible for judges to be merciful, C2 must be interpreted as claiming that mercy is not autonomous with respect to legal justice. Now mercy seems not to be autonomous because it is identical to some part of legal justice, for example, individuation or equity. The claim of C2, in other words, is this: mercy is really just another name for some constitutive part of legal justice. Hence it is neither separate nor autonomous from legal justice. C2 seems to arise simply because it is assumed that legally-just individuation, for example is identical with merciful individuation. But are they identical? How, if at all, can we distinguish individuation within legal justice from merciful individuation within legal justice?

We can make such a distinction if we examine what each act involves. When judges do not act mercifully but act in a legally just manner, they impose the penalty prescribed by law or which has been imposed in similar cases on similar offenders.50 In the latter case they

---

50. Typically, judges have the greatest opportunity for mercy when the penalty is set. Judges, however, do have some opportunity to be merciful before this point, even though up until the point of passing sentence they are rather like chairpersons of a meeting - they ensure that the proceedings are conducted in accordance with the rules set down for the conduct of a hearing. They are not permitted as much flexibility to depart from these rules. However, even amidst these procedural rules the judge has
individuate the penalty by ensuring that legally similar cases are treated similarly and legally different cases are treated differently. When judges act mercifully, on the other hand, they impose a lower penalty than the crime usually attracts. The result the merciful act delivers is intended to be opposed to the result that would be delivered if legal justice was done. Merciful penalties therefore stand in contrast to legally just penalties: we say, for example, ‘These sort of cases usually get five years but the judge was merciful and imposed only six months’. Thus, the merciful act is quite different from the legally just act. And this is why we contrast it to legally just actions.

Mercy, it is clear, involves treating legally similar cases dissimilarly, i.e. treating cases differently that are regarded as identical in law since they fall under the same definition of a prohibited act. The aim of mercy is to prevent the imposition of a legally just penalty. The result that mercy delivers, and is designed to deliver, is a comprehensive result, a penalty that is as close to morally right as possible and not a legally just result. Mercy, then, is not part of the process of imposing a legally just penalty. Therefore, mercy cannot be identical to some part of legal justice.

Although legal justice contains individuation it is constrained by the criteria that define a legally prohibited act. For example, a mercy killing is an intentional killing, one that satisfies the legal definition of murder. What distinguishes it from murder is the motive. However, the motive or inducement from which a prohibited action springs is usually regarded as irrelevant to imposing criminal responsibility. The benevolent motive of the killer is not usually allowable as a legal defence. When a mercy killer is shown mercy, typically in her plea for mitigation after conviction, the judge may take into account the mercy killer's benevolent motive, state of mind, the killer's love for the victim, the distress the victim's illness caused to the victim, the killers hitherto unblemished record and so on. This is why mercy killers may be convicted of murder yet receive, rightly, a light or even no penalty. So, merciful individuation as, for example, in the case of mercy killers, does not refer to legally-just individuation but a more comprehensive form of

some discretion as to the type and nature of the evidence and testimony allowable. 51 Vide, Law Reform Commissioner, Victoria, Working Paper No. 8, op. cit., §96-§98; Brett and Waller, op. cit., §150-§151.
Chapter Six: Mercy Within Legal Justice

individuation. This individuation is based upon reasons the law, prior to conviction, does not recognise as defences that are a bar to conviction, (but which are admissible as mitigating defences, pleaded after conviction). In effect, claiming that a judge is merciful is to state a counter-factual: the judge could legally have imposed a harder sentence and she would have been legally justified in doing so, but for reasons she was not legally required to count, she remitted the penalty.

To be sure, mercy within legal justice involves individuating a penalty much more finely than, in the ordinary course of events, the penalty would have been individuated. This is done by taking into account, when the penalty is determined, factors that cannot be admitted as part of a defence that is a bar to conviction. When mercy is legitimately exercised individuation is constrained only by the relevance of the features of the case that contributed to the commission of the crime, and which then diminish the culpability of the accused.

Does this answer the criticism that if all we mean when we call an action merciful is that account is taken of exceptional or peculiar cases so that injustice is avoided and the just penalty is imposed, then it does not seem that we can distinguish or weigh the just course of action from the merciful course of action. When we talk of judges being or acting mercifully, we are distinguishing this action from their usual actions in this type of case. In other words, the actions that they would, or would be expected, or would be legally permitted, to perform in those circumstances. So even if we cannot distinguish merciful actions from (overall) just or equitable actions, it is certainly not the case that we are unable to distinguish and weigh merciful actions from legally-just actions. And that is the issue: whether mercy is distinct from legal justice.

So, whenever we expect a particular treatment that would be regarded as the legally just treatment, and another lesser treatment is inflicted, that involves a departure from what the agent would ordinarily

52. It is true that case law provides guidance — but that is all. The way that a precedent is weighed, or the bearing that case law has, in a particular case is left largely to the discretion and expertise of the judge. Of course, if it is clear that the judge's decision is awry or wildly at variance with commonsense, then the failure to follow the case law can be used as grounds for an appeal. Moreover, sometimes there is no case law or clear precedent to guide a judge or there may be competing laws or precedents.
53. Smart, op. cit., p.349 and p.358

195
have done, or had reason to do, and we believe that they performed this lesser treatment out of concern for the agent within their power, or her particular circumstances, then we are licensed to call this action merciful. Since we can distinguish it from the legally just treatment, we can weigh it against that treatment. We can ask if it was the right thing to do, or the best thing and so on.

'Mercy', it is clear, is not used to refer to any part of legal justice that must, (or even can) be used to arrive at a legally just result — if this is taken to mean invariably treating legally similar cases similarly or the rigid application of legal rules and principles; in other words, the law-as-fact view. 'Mercy' is not therefore, just another name for some constitutive part of this form of legal justice. It is separate and autonomous from legal justice. It cannot be reduced to, nor is it identical with, for example, legally just individuation of treatment or application of equitable principles. Mercy is not part of the process of imposing a legally just penalty. It is not, therefore, redundant. Hence C2 does not arise.

But is not mercy, since it is identical to wide-scope individuation or even equity, redundant with respect to wide-scope justice? Does it not cease to be autonomous at a different level? Remember that the conundrum was about mercy's redundancy with respect to legal justice. And it seems clear that mercy is not identical with any part of legal justice.

With respect to the wider issue, mercy is autonomous from justice. When a judge acts mercifully, she may be attempting to achieve a more just result. In fact the resulting treatment may be evaluated as just or equitable. Yet the act of achieving that may be described as 'merciful' since it represents a departure from what would be the ordinary expected legal response, and it may occur against a background where the judge was thought to have, or did in fact have, reasons not to depart from strict legal justice. Sometimes, then, it can be an act of mercy to do justice, or to act equitably to a person within one’s power, when the rules of the institution would licence a harsher treatment.

Further, if performed out of a care and concern for the offender's welfare, and because of properties peculiar to her and her situation, and not primarily out of a commitment to justice, then such an action would
count as a display of the *virtue* of mercy. So not only is mercy autonomous from legal justice but from a more complete form of justice, say, ‘Cosmic justice’.

There is sometimes a temptation to think that if mercy is right, and because all right things are just then mercy must be just. This of course is false. Not all things that are right are just. The set of right actions and motives is not contained within the set of just ones: altruism, charity, benevolence, care, love and concern are just some of them. In appropriate circumstances are right; yet they do not depend upon a relationship with justice to ground their rightness.

The third conundrum is this. A simple act of mercy, as I have argued already, or display of the virtue of mercy, can create an obligation for a judge to treat similar cases similarly. If this is so, then what are we to make of the belief that mercy is supererogatory, optional and not claimable as of right — beliefs that rest not only on the belief that mercy is unconstrained but unconstraining? If mercy is supererogatory, as we believe, then there can be no obligation, or duty on the part of the judge, to replicate it. That is the nature of a supererogatory action. It seems then that the concept is incoherent and not one available to rational — or would be rational agents. This problem can be formulated this way:

**CONUNDRUM 3: The Conundrum of Replication (C3).**

1. Mercy is a rational action, optional and supererogatory.
2. Consequently, that the display of mercy on one occasion creates neither the rational nor moral obligation to perform merciful actions on other similar occasions. (If mercy did it would not be supererogatory.)
3. Judges are required to treat similar cases similarly.
4. If mercy was the right penalty for agent A then a once merciful judge is committed to acting mercifully towards similar cases.
5. Supererogatory actions do not commit an agent to replication.
6. Thus, mercy is not supererogatory, and the concept is incoherent.

C3 would be a problem for judges if the mercy they exercise was supererogatory in nature. It is not. ‘Mercy’ within legal justice describes an act of a judge, namely, the act of departing from the strict application of the law, and tailoring the penalty to the circumstances of the case by including or weighing mitigating factors. Judges do this so that the actual penalty experienced by the offender more closely approximates the
offender's overall culpability. It is justified because the statute law is too inflexible, general or crude to finely individuate the penalty. Such actions, however, are not acts of supererogation. They are actions that spring from a desire to do what is right and just. Consequently, judges may feel obliged to be merciful; they may feel that a particular offender deserves mercy.

While this contradicts the beliefs set out in C3 it does not demonstrate that the concept of mercy is incoherent or that judges are not really exercising mercy. Rather it demonstrates that the concept of mercy is rather more complex than is assumed in C3. What it indicates is that mercy is supererogatory on some occasions and at other times it is not. For example, when the victor of a duel forbears from killing his opponent or when an agent gives alms to the poor. Such mercy may be grounded in feelings of pity, compassion, sympathy or benevolence for the vanquished or the impoverished. But mercy can also be deserved and owed. It may be deserved in virtue of what an agent has done or what misfortune has befallen them. It is quite sensible to say that someone deserved mercy. It is a piece of moral criticism and indeed usually highlights a moral defect to tell another agent that they ought to have been merciful. Indeed, moral criticism of this sort only makes sense if mercy can be deserved, if it can be owed or agents can be obliged to show it. In other words, such moral criticism only makes sense if mercy is not, in this context, supererogatory.

When for a judge is mercy supererogatory? We would think that a judge was performing an act of supererogation, when being merciful, if she did more than we could reasonably expect from her when she came to set the penalty. For example, she might hold extensive psychological assessments of the culprit. She might visit the scene of the crime. She might interview the defendant in order to determine if they had a redeemable character, or if they were confronting extra-ordinary personal pressures at the time of the offence; she might think about it much more than usual, ask herself what principles she should use in setting the penalty. All judges do these things some of the time. But there is a limit to the individual diligence that we can expect of them. When a judge

54. For someone else who thinks that mercy is sometimes supererogatory and sometimes obligatory see James Sterba, op. cit., pp.13-14.
surpasses the normal standard we feel that they have ‘gone beyond their duty’ and would praise them for it. It must be pointed out that a judge who performs an act of mercy, that could be described as an act of supererogation, does not commit himself to replicating his investigation over similar cases, but does commit himself to replicating the conclusion, which is universalizable: that it is right that culprits of type X receive mercy.

Merciful judges mostly exercise non-supererogatory mercy. They are forbearing from doing what they are licensed — but not legally required — to do. That is, forbearing from inflicting a punishment that is licensed by legal justice, and which is legally possible, but which legal justice does not require them to inflict.

Acts of mercy within legal justice do not spring from the judge’s feelings of charity or benevolence. When performed by a judge merciful actions typically spring from mixed motives: a concern to do a richer sense of justice, out of a concern for what is right, a concern for the defendant, his or her right to a just or reasonable verdict, all resting on a concern for the culprit, and a concern for the status and esteem of the law. Judges who are merciful believe that they are morally obliged to impose the penalties they do, although they may not think of themselves as being or acting mercifully. They believe also that the agent to whom they display mercy has some claim to it. Such actions are not regarded by either the judge or other observers as morally optional or merely a matter of grace. They are not supererogatory. And while such actions may be evaluated in some broad sense as just, they can still qualify as an act of mercy or a display of the virtue of mercy if the judge acts justly out of a concern for the person, rather than any impersonal commitment to a principle.

The third conundrum rests upon a particular conception of mercy. It is dissolved by becoming aware that ‘mercy’ is rather more complex than assumed there. In particular, it is dissolved by realizing that ‘mercy’ refers not only to supererogatory acts of forbearance, as characterized by the beliefs that mercy is non-obligatory, a gift and so on. It is dissolved if we understand that ‘mercy’ also refers to non-supererogatory acts of forbearance — acts which may be deserved, morally required and non-optional. Since the truth of the first premise in C3 is false C3 does not
§6.6 The Nature of Mercy Within Legal Justice

While the Crown and Parliament are the only entities to possess a Prerogative of Mercy, they are not the only actors within the legal system that can be described as ‘acting mercifully’, since they are not the only actors with in the legal system that possess discretionary powers. Thus, the Royal Prerogative merely sits at the apex of a discretionary hierarchy. Below it we find the discretions that judges and other magistrates have the capacity to exercise; this is so called ‘court mercy’. All areas of law by nature contain a large number of opportunities for the exercise of discretion: the criminal law and equity being two. On the other side of the Bench there is ‘Prosecutorial Mercy’, in virtue of the discretion that prosecutors have in the cases they prosecute, (as do Directors of Public Prosecutions and Attorney’s General), and the evidence they present. In addition Attorneys-General and Directors of Public Prosecutions have the discretion to offer indemnities and immunities to prosecution, and like other Ministers of the Crown, amnesties and ex gratia payments. Parole boards can exercise their discretionary powers of release mercifully. Juries can acquit in the teeth of the law, or in the face of the evidence, that is return so called ‘mercy verdicts’. Technically this is known as ‘Jury Nullification’ or ‘Jury Mercy’, even though in doing this they are

56. Cobb, op. cit., p.400.
57. Cf Gower’s Report, op. cit., §25, where the commission reports that the Lord Advocate in Scotland has complete discretion and might well in the case of a mercy-killer prefer a lesser charge to that of murder. When law authorities are faced with similar situations in the various jurisdictions in Australia, ‘there may be a decision not to prosecute. If a prosecution is commenced a plea to a lesser offence may be accepted, or there may be a decision by the crown not to proceed.’ Law Reform Commissioner, Victoria, Working Paper No.8: op. cit., §99; See also §100-102; §107.
58. As for example, in the case of Social Security fraud and illegal immigration.
59. Brett and Waller, op. cit., §2.45.
untrue to their oaths, it cannot, in Australia at least, be reviewed.63 Such behaviour is possible in virtue of the capacity that a jury has to return any verdict they desire, except when directed to acquit by the judge.64

Outside of the criminal law a litigant has the power to raise an action, or not, as they please or to withdraw their action once it has begun. Police have the discretion to take official notice of a person’s behaviour or proceed with an investigation or a charge. There are the discretions that administrators have to withdraw parking fines, late fees and other minor matters.

These are only a few of the many actors of the legal system who have discretionary powers, and in virtue of which can be said to act mercifully. Given this, what sort of taxonomy can be developed of mercy within legal justice? The following list is suggested:

1. an ex officio power. This includes the Royal Prerogative and the Parliamentary Prerogative of Mercy. As well, it includes those discretionary powers that enable an actor within the legal justice system to reduce or remit a penalty.

2. A virtue of a person acting in an official capacity. This describes the manner in which an agent might exercise their ex officio power; in
this case, she has an ongoing disposition to be merciful and we are predicking it disposition of her.

3. A particular type of action. We might for example say that ‘Justice X acted mercifully’, and mean that she performed a particular type of action, with particular consequences. We are not in this case saying anything about Justice X’s motivational state, only the phenomenology of her action.

4. An action performed from particular motives. These merciful actions are not displays of the virtue of mercy, but they may be, nevertheless, based upon genuinely beneficent motives and directed at the welfare of the beneficiary, and motivated by a desire to help those in need. They can also be done out of a sense of duty and justice. In any case, such actions imply nothing about the actor’s on-going motivational structure.

§6.7 Mercy, in what sense?

a). Desert. I have already made some remarks on the relationship between mercy and desert, and how we can make sense of the claim that ‘X deserves mercy’ or ‘it would be just that X receive mercy’, and still claim that mercy is autonomous from justice. A similar situation exists within an institutional context. To say that ‘X deserves mercy’ or that ‘X ought to receive mercy’ is simply to say that there are good reasons, including reasons of justice, for forbearing from doing all that one is legally entitled to do by exercising a discretion so as to benefit some other person within one’s power. This does not imply that such acts are identical with an action performed out of a concern to do legal justice, (since they are motivationally distinct) even though they must, if they are to be justifiable within the legal system, accord with the (procedural) requirements of legal justice. The point is that the justification for an act of mercy can take many forms, while the actual springs can be quite different. However, when the springs are a desire to do ‘justice’ then the action ceases to be a full blown act of mercy, because the actor is valuing justice above the person whom they hold in their power. Sometimes the remission of some treatment will be motivated by considerations of

65. Vide, §3.7.
justice. This might be called an ‘equitable sense of mercy’. In these cases mercy and justice are identical. Why it might still be called an act of mercy is that the benefactor departed from some ordinary course of events out of a sense of equity, and restrained themselves from doing all that they had the capacity to do. To licence the use of ‘mercy’ there must be some standard from which the benefactor is departing. Now the point of all this is simply to reinforce the point that an agent can be said to deserve mercy, or that it would be just that they receive mercy, but that this does not imply that mercy and justice are identical. And even on those occasions when they are clearly identical, we can still explain why it is legitimate to use ‘mercy’ to describe the action.

b). Gift. There are some cases where mercy can be seen as a gift: where mercy is exercised because the ordinary processes of the law have produced an undesirable result; where there is strong public feeling against the penalty; where the penalty, if enforced, would detract from respect for and authority of the law and would provoke sympathy for the offender. Such remissions are not based upon some morally significant property of the offender, but rather on extraneous circumstances, usually considerations of public policy.66

c). A morally valuable action. Mercy is often thought to be a good thing to do — irrespective of what the offender in justice deserves. This alludes to a theme that we shall examine in Chapter Seven: the moral standing of mercy. It is enough to say at this point that there are sound, non-justice based reasons for being merciful, reasons that go beyond those of justice. Considerations of humanity, concerns for the beneficiaries’ welfare, or for the hard position in which another person finds themselves. In such cases it is morally appropriate to act mercifully; the merciful action is morally valuable on grounds other than grounds of justice or as gift.

66. A good example in Australia is the infamous Stuart case. In the 1950’s Stuart, an Aboriginal, was convicted, in South Australia, and sentenced to death for the particularly vicious murder of a little girl. The Government had decided, after appeals had failed in various superior courts, to let the law take its course and not commute the sentence. Although there were serious doubts about the propriety of the conviction, neither the government nor the courts would entertain them. Finally, the State Government was induced to commute the penalty, by the Commonwealth Government. The reason: to proceed with the sentence would smack of racism and would damage Australia’s image abroad. See Sir Roderick Chamberlian, The Stuart Affair, Sydney, 1973, p.191. For a U.K. example, vide A.T.H. Smith, ‘The Prerogative of Mercy, The power of Pardon and Criminal Justice’, Public Law, 1983, pp.398-439, at p.399, n.7 for the remission given to the Kroegers, (convicted of spying), so that they could be exchanged for Western agents.
§6.8 How is Mercy Possible Within Legal Justice?

An institutional agent can, of course, be merciful at any time – but in so acting they may step outside their powers and so act, from an institutional point of view, wrongly. The question then is how is mercy possible and justifiable for institutional agents? It is my contention that discretionary powers, when properly exercised, justify merciful actions within any system of rules. 'Mercy', refers to the manner in which an institutional actor exercises their discretionary powers and the type of action agents can perform.

Why tie the capacity for mercy to discretionary powers? It is the fact that an agent has a discretionary power that enables them to justifiably depart from the ordinary course of events, to refrain from a strict interpretation and administration of the rules, laws and principles that they are enjoined, in general terms, to implement. Such departures are what I suggested mercy was. Thus, the existence of discretionary powers makes such departures possible and enables them to be merciful in the manner in which they do their duty.

If it is to be possible for a judge or indeed any institutional actor to have mercy predicated of her, and for her to have been thought to have acted within the terms of their institutional duties then two conditions must be satisfied. The first is that the institutional actor has the power to depart from the rules in some circumstances; the second that some of these departures are considered proper and justify the epithet 'merciful'.

There is no doubting as we saw in §6.6 that many institutional actors have discretionary powers to some degree. So, what constitutes a proper exercise of discretion? When we examine cases that set out what it is to exercise a discretion improperly, we can obtain some indication of what it is to exercise a discretion properly. In Australia, the case that governs this is House v. R.67 It is stated, inter alia,

---

If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed...It may not appear how the the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure to properly exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.68

This sets out the conditions under which an exercise of discretion is reviewable. It would follow, that an exercise of discretion is not reviewable if the judge has considered relevant and pertinent matters, has taken proper cognizance of the facts of the case and weighted them fairly and correctly, and has ‘acted upon a right principle’69

What does this ‘grab-bag’ include? The short answer is anything that is relevant to the commission of the crime, and the effect upon other, innocent people of conviction and sentencing. In the area of sentencing - where mercy is usually seen — relevant and pertinent matters can include a vast range of things. In the federal and all the state jurisdictions in Australia, the ‘sentencing discretion is largely unregulated...the present law does not provide a statement of which facts are relevant to the exercise of discretion’.70 There is little statute law, but what exists is vague. A court may dismiss or conditionally discharge a person because of their ‘character, antecedents, age, health, mental condition of the person charged, or...the trivial nature of the offence, or...the extenuating

68. Per Dixon, Evatt, McTiemann JJ., at 505.
69. What does this amount to? It has been suggested that when a question of principle arises – it can only be a principle of law. [Sholl, J in Harrison v. Mansfield, [1953] V.L.R. 399 at 401 (S.C.). This, however, is open to dispute as ‘acting on a wrong principle’ seems sometimes to refer to the totality of grounds for review – and not just legal principles. [see Pattenden, op.cit., p.24 and R v. Jeffries (1947), 47 S.R. (N.S.W.) 284 at 314 (C.C.A.) amongst others. See Pattenden, op.cit., p.197, for a more complete list.] Moreover, it is quite clear in cases where the severity of sentences have been challenged, that principles other than identifiable ‘legal principles’ are at work, in justifying a reduction. Peppered throughout the judgments, are phrases such as ‘undue weight to some of the facts’ [House v. R, at 505] ‘manifestly wrong’, (loc.cit.), ‘unreasonable or unjust’ (loc.cit., at 507) (Cf. Cranssen v. R, at 520); a ‘sentence so especially severe...that this court may justly mitigate it...He is not a wicked man, but a good man who has blundered...[Cranssen v. R, (1936) 55 C.L.R. 509 at 515]
circumstances under which the offence was committed, or any other
matter which the court thinks it proper to consider...’71 This discretionary
power is the familiar power that judges have to take into account
‘mitigating factors’:

...the law fixes a maximum penalty and leaves it to the judge to give such
weight as he thinks proper, in selecting the punishment to be applied to a
particular offender, to (among other considerations) mitigating factors. It
is here that the barrister makes his ‘plea in mitigation’.72

This not only applies to the discretion a judge has in sentencing.
Judges have an enormous range and degree of discretions — and it is
always open to them, if the features of the case before them are such — to
depart from the usual and customary practice,73 constrained always by the
possibility of appeal, which affects different judges in different ways.

So, a judge can legitimately depart from legal justice, (the sort that
involves treating similar cases similarly) by exercising her discretion —
treating legally similar cases dissimilarly, or not applying a law or
treatment to a case, that clearly falls within its ambit, if they can adduce
reasons for so doing.74 They may do this in an attempt to obtain a
decision that is perceived as just,75 or in accord with the moral
sentiments of the community or its conception of humanity76 —
principles which it has been claimed underpin the law.77 So, mercy is

71. New South Wales Crimes Act, 1900, (as amended), Sec.556A. Similar powers exist in every
other state of the Commonwealth. (For example, in Queensland the court may, before passing
sentence, ‘receive such evidence as it thinks fit in order to inform itself as to the sentence proper to be
passed’. Queensland Criminal Code, 1899, (as amended), Sec.650; A similar provision exists in
Western Australia. See Western Australia Criminal Code, 1913, (as amended), §565; (Quoted in
Sentencing, §167, n.19;) Such powers exist in the United Kingdom, (vide, Pattenden, op. cit.), and in
the United States, (vide, M.R. Kadish, and S.H. Kadish, Discretion to Disobey, Stanford, 1973,
pp.85-86).
72. H.L.A. Hart, ‘Prolegomenon to the Principles of Punishment’, in Punishment and
mitigation’ which is nothing more that the law recognising the existence of certain states-of-affairs, in
the commission of a crime and thus, providing a means whereby ‘the presence of that state-of-affairs
shall always remove the offence into a separate category carrying a lower maximum penalty, (p.15). A
familiar example is that provocation will ‘reduce’ or mitigate a charge of murder to manslaughter. In
such cases it is not an act of mercy on the part of the judge to reduce the charge, as, if the evidence
warrants it, the judge really has no option but to reduce the charge and would be acting, judicially,
wrongly not to.
73. Vide, Pattenden, op. cit., for an examination of the enormous number of discretions that a judge
has - at least in the United Kingdom and all the jurisdictions in Australia.
75. Cf. Davis v Johnson, op. cit., at 863
p.653 at p.716

206
justifiable within the legal system, and indeed any institution, if the actors charged with administering the system have discretionary powers.\textsuperscript{78}

We should be mindful that not all cases of discretion involve acts of mercy. We need now to ask: How do cases which are treated mercifully differ from other cases that are not treated mercifully? The answer to this is that it requires the use of judgement and each interlocutor’s criterion of ‘mercifulness’. Sometimes it will be simply that one penalty is clearly indicated, since the action meets the legal criteria for some crime, but the judge imposes a much smaller one in response to various customary mitigating circumstances. A good example is the person convicted of murder although in (non-legal) fact it was a mercy killing. Legally the judge is entitled to impose the penalty for murder; in reality they do much less.\textsuperscript{79}

Other times it can involve a judge departing from a precedent that clearly governs the case in hand. He may justify his departure by appealing to various features of the case that would not ordinarily be counted. An example is the judge who sets aside an archaic (but legal) insurance rule that limits the amount of compensation payable to the families of the victims of some disaster. He might do this by taking a ‘liberal’ interpretation of the notion of negligence and applying it to the actions of the defendant - or plainly saying that the precedent is wrong and should be abandoned on that ground alone.\textsuperscript{80} Perhaps the best known exponent of this position is Lord Denning. He said just this:

\textsuperscript{78} It should be clear that the solution I advance here assumes that conception of the law that I described above as the law-as-value view. In §6.9 I present, albeit obliquely, a defence of this view when I defend the existence of discretionary powers and discuss the role of judges.
\textsuperscript{79} Vide, Queen v Johnstone, S.A.S.C. 1987, [unreported]. Johnstone was convicted on his own confession of murdering his wife of thirty-five years, who had for almost a quarter of a century suffered miserably from various mental illnesses. She had pleaded with her husband on many occasions, including the occasion on which she died, to help her end her life. The trial judge said that Johnstone was entitled to the mercy of the court and he imposed a nominal non-parole period so that Johnstone walked free from the court. The trial judge’s reasons for acting mercifully was that the principles of punishment, (public welfare, deterrence and reform) would not be served by punishing Johnstone. Moreover, Johnstone had cared for his wife for many years, throughout her illness and in quite deplorable circumstances. Johnstone had never failed to do his utmost to help his wife. Further, Johnstone was a man of good character, high principle and religion, and that the act of murdering his wife was an act motivated by love, pity and care rather than greed or malice.
\textsuperscript{80} See The Hon. Sir Barry Sheen, 'Limitation of Liability: (The Law Gave and The Lords Have Taken Away)', Journal of the Chartered Insurance Institute, August, 1987; Procedure Note [1966] 3 All ER 77, [1966] 1 WLR 1234;
Chapter Six: Mercy Within Legal Justice

Denning: If I may say so I'd like to think I was following that philosophy of Alfred the Great in which [he] chose the laws that seemed to him to be the rightest and discard the rest. Well, I hope that I have been doing something of the same kind. It would please me much if that was the result.

Boulton: Is that the proper function of a judge — to pick and choose between what he considers good and bad laws?

Denning: Well, its my idea, but not other peoples' idea! Because, err, so many people say you ought to take the laws as they are, not distinguish between the rightest and the worst. Take 'em as they are — good and bad. But I say, "Oh no. A judge ought to have more freedom than that; he ought to be able to choose those which are the rightest." And you know a lot of lawyers say you must go by precedent, you mustn't alter it at all. And I say, "No. If the precedent is wrong you must put it right!"81

Or it may involve the judge taking into account circumstances that have hitherto not been considered as mitigating or gives customary mitigating factors more weight than they have, hitherto received. Examples here include the effect of domestic violence, incest, poverty, unemployment, racism, ethnic background and various physical ailments and disabilities, on the agency and culpability of the accused. It may also refer to the fact that a judge has imposed a more lenient penalty upon some offender out of a feeling of humanity or pity; that is as a response to their pitiable circumstances and to them as a person in need and dire straits. In this way the judge is bringing into the legal system those human values that underpin society and inform the law. In all cases, within the imperfect world in which we live, mercy is a departure from the ordinary and expected course of legal events, in which the person does not suffer the legal consequences that normally, or would be expected to attend their action. Some uses of discretion are what we would expect. That is not mercy. But when the discretion is used to do much more than we could expect, has taken into account factors not normally taken into account, even in the usual use of discretion, then we say that the judge, or other official, has acted mercifully.

§6.9 Objections and Justifications\textsuperscript{82}

If there is some objection to the existence of discretionary powers within the legal system, such an objection will also constitute an objection to mercy. This question we must now consider concerns the objections and defence of discretionary powers within the legal system.

It is a widely-held view that discretionary powers are indispensable to the operation of the legal system\textsuperscript{83}. After remarking that the persistent use of the Royal Prerogative, 'brings about a result which is the opposite of legislative policy', the one Royal Commission wrote:

This result, although striking in the present context [i.e. Capital crimes], because human life is involved, is not unique or basically remarkable. It is merely the consequence of including in the correctional system a mechanism for varying the sentence in cases where, in the opinion of the government of the day, the ordinary processes of the law have produced an unjust or undesirable result. It is a grave defect in any correctional system not to have such a mechanism...\textsuperscript{84}

Since the Enlightenment, however, objections have been raised about discretion\textsuperscript{85}. These criticisms are of two types: theoretical and practical.

§6.9.1 Theoretical. There are four objections under this head. First, discretionary powers – especially those like the Royal Prerogative – are inimical to the twentieth century conception of constitutional and responsible democracy\textsuperscript{86}. In the case of the Royal Prerogative, it seems to conflict with the separation and independence of the various elements of the state, as it involves an interference in the operation of the judicial

\textsuperscript{82} The purpose of this section is to signal possible objections and gesture at solutions. To deal with them comprehensively would involve a thesis in itself. Thus the treatment must needs be cursory.

\textsuperscript{83} Writing about the most famous of discretionary powers, the Royal Prerogative of Mercy, we find in the report of the Royal Commission on Capital Punishment that, owing to the mandatory nature of the law (with respect to murder) the legal system relies heavily upon the Royal Prerogative:

The effective instrument in adapting this branch of the criminal law [i.e. that part in which capital sentences are lawful] to the demands of justice is thus the exercise of the Royal Prerogative [of mercy]... (Gowers' Report, op. cit., p.11 and p.209).


\textsuperscript{85} The most famous attack being made by K.C. Davis. See his books, Discretionary Justice in Europe and America, Urbana, 1976, and Discretionary Justice: A Preliminary Inquiry, Baton Rouge, 1969.

process and the due course of the law. Moreover, in all cases where
discretion can be exercised it is inimical to any claim to open and
responsible government – allegedly one of the cornerstones of
democracy. In countries such as Australia and the United Kingdom
reasons for exercising discretionary powers are seldom, and in many cases
need not be, given and they tend to operate invisibly, out of the sight of
public scrutiny; thus it is difficult to effectively review, test or examine
the manner of a discretion’s exercise.

None of these criticisms seem to me to be forceful enough for us to
conclude that discretionary powers are anti-democratic. It is certainly true
that discretionary powers involve, by their nature, an interference in the
operation of the judicial process and the due course of the law. The
questions surely are a), whether such interference can be justified and b),
whether unwarranted interference can be checked, and c). can such
control be exercised in a public manner. In all cases an affirmative answer
can be given.

a). Such intrusions can be justified on the grounds that the law, by
its nature, is general and novel cases are always going to ‘slip through’. It

87. This seems to be the point that Mr Justice Humphries and Lord Justice Denning were attempting
to make. See Gowers’ Report, p.16 and p.110.
88. Vide, A. Rosett, ‘Discretion, Severity and Legality in Criminal Justice’, in B. Atkins and M.
89. It is a moot point, whether the exercise of the Royal Prerogative can be reviewed, not only on
theoretical grounds, since it is a prerogative, but because the reasons for its exercise are regarded as
confidential. (See Gowers’ Report, §47; Sebbia, op. cit., p.229). In fact legal authorities are divided on
this point. That it is unreviewable, see Horwitz v Connor, (1908) 6 CLR, 38; Hanratty and Another v
Lord Butler of Saffron-Walden, Solicitor’s Journal, 21 May, 1971, pp. 386-387; Ex parte Lawrence, 3
op. cit., p.433, n.86. However, it is an administrative rather than a judicial action, (Gowers’ Report,
§600), exercised on the advice of a minister of state. The growth of Administrative law has made
administrative decisions subject to judicial review, and it would appear given Prerogative’s
administrative nature that the prerogative can be reviewed. Second, the mere fact that some power is
prerogative in origin will not automatically confer upon its operation immunity from judicial review.
In this matter, Lord Denning asserted that since ‘the prerogative is a discretionary power to be
exercised for the public good, it follows that its exercise can be examined by the courts just as any
other discretionary power which is vested in the executive...’, in Laker Airways Ltd V Department of
Trade, (1977) Q.B., 643, at 705, cited in Smith, op. cit., p.433, n.86. Moreover, the fact that various
acts of Parliament, have controlled the Royal Prerogative in various ways, and established tests as to
the validity of some exercise of this prerogative, would indicate that it can be reviewed. (e.g., Habeas
Corpus Act, 1679; Bill of Rights, 1689 and Act of Settlement, 1701; 27 Hen. VIII, c.24; 25 Geo. III.
Cap.37 (1752); 1 Vic. Cap.77 (1837); 13 & 13 Vic. Cap.27 (1849); 7 & 8 Geo. II Cap.28 (1827); 2
Ed.III Cap.2 (1328); 13 Rich.II Stat. 2, Cap.1 (1389). and the instructions given to the colonial
governors; cf. R v. Cosgrove, Tas. S.R., (1948), p.99, at pp.104-105) and there have been cases that
have reviewed the exercise of the prerogative, (In the Matter of a Special Reference from the Bahama
Islands, A.C., (1893) and Ex parte Lawrence, 3 S.A.S.R., (1972)). Putting that to one side, however,
the problem is really a practical one: can a person who has been disadvantaged by the exercise or not
of some discretion afford, given the high cost of legal actions, to have it reviewed?

210
is in everyone’s interest if these novel cases can be taken care of in the most expeditious manner possible. It is not worthwhile making the law more complex in order to account for rare cases, since in law, complexity can have unintended and undesirable consequences. If the novel cases become frequent then a change is indicated. But until then, in the interests of economy, such a power is needed. On these grounds such interference in the operation of the law is needed.

b) and c). Such powers can be checked if they are reviewable and public. In this way unwarranted interference can be removed, supposing that an impartial method of selection is employed for constituting the membership of the body of review, its actions are public and wrongdoers can be brought to account. Such bodies of review already exist; for example, in Australia, there is the Administrative Appeals Tribunal, a major function of which is to review disputed uses of discretionary powers,90 courts of appeal in each state and territory, a federal court for commonwealth matters, and above all these courts the High Court. There is also the Social Security Appeals Tribunal and Police Complaints Tribunal, amongst others.

Moreover, extra-legal interference in the functioning of the law, if conducted by a public and responsible body is not necessarily anti-democratic. In fact, bringing accountability into the legal system, and in fact any administrative system would be a very democratic institution indeed. Thus, while the independence of the law may be constrained, on occasion, it is not the case that intrusions endanger its integrity, or are undemocratic. All that is needed to make the existing discretionary powers more responsive to democratic ideals are changes in the manner of operation. Discretionary powers are not, therefore, by their nature anti-democratic and it is only through practice that they operate ‘invisibly’.

Second, the wide discretions accorded so many actors within the

---

90. In many of the States in the United States, the Governor is required to make a report on his clemency activity, (S.P. Stafford, Clemency: Legal Authority, Procedure and Structure, Williamsburg, 1977, p.2) although public, his grants are not reviewable by the legislature, (Rosett, op. cit., p.17). In some states, however, the decision to grant pardon is taken after public hearings, in open session; thus, its exercise is not confidential, (Vide, Sebba, op. cit., p.237, n.12). L. Sebba, (‘The Pardoning Power - A World Survey’, Journal of Criminal Law and Criminology, (68, 1977), pp.83-121), in an extensive examination of world-wide pardon practices, sets out the multitude of ways in which pardon powers are structured, controlled, reviewed and so on. Cf. Moore, op. cit., passim.
legal system are inimical to the rule of law.91 This might be so for a number of reasons. Discretions are arbitrary in nature, the contents of the laws are unknown and this injects into the legal system uncertainty, discretions mitigate the laws' deterrent effects.92 The legal system becomes ineffective. All these faults are properties that modern legal theories claim the law should reduce or eliminate.

This concern is unfounded and is based upon a confusion about the meaning of 'the rule of law'. All the phrase 'the rule of law' means is that there are definable, discoverable, and public institutions, whose function is to deal with conflicts and disputes between agents in the system. Further, the operation of these institutions is governed by relatively set procedural rules, and these procedural rules are followed and the substantive rules, where applicable, are imposed. Nothing in the nature of a discretionary power is opposed to this. It is not arbitrary, since the users of a discretionary power can be called upon to provide reasons to justify the manner in which they exercised it on some occasion. Discretionary powers need not undermine the deterrent effect of a law, if the power is used to prevent the application of a law to a case for which it was not intended or is otherwise inapplicable. Nor are the contents of the law unknown. An agent knows that should he be found guilty with no extenuating circumstances then he will feel the full force of the law for that offence. And likewise, if found guilty, but with extenuating and mitigating circumstances, the penalty will be tempered. For these reasons also discretionary powers need not introduce uncertainty into the proceedings. They are powers that, it is true, can lend themselves to abuse, in the first instance; however, proper reviewing procedures would reduce that. In fact, the very existence of reviewing procedures, such as the Administrative Appeals Tribunal, State Supreme and the Commonwealth High Courts, and in other jurisdictions various forums of review, and the fact that these bodies have recognised guidelines to test the proper exercise of a discretionary power, demonstrates the rule of law and its strength, rather than a weakness.

Third, given the theoretical basis to punishment, discretionary powers, are philosophically unacceptable. Kant’s objection is the best known here:

The Penal Law is a Categorical Imperative; and woe to him who creeps through the serpent-windings of Utilitarianism to discover some advantage that may discharge him from the Justice of Punishment or even from the due measure of it...93

There are no exceptions. Any departure from the treatment that the law prescribes and requires, any failure to punish, is an act of injustice and is on that basis wrong. Hence there is – and can be – no justification for mercy.

The assumption is, of course, that that law is retributive in nature and concerned only with ‘doing (hard retributive) justice’. This, it seems to me is wrong. While it is certainly true that the law contains components that are often identified with retributivism, such as the maxim that only the guilty should be liable to the treatment the law prescribes, it is not the case that these components are retributive by nature. For example, no law would successfully deter, in a public system, that punished the innocent; nor would such a law long retain respect and general effectiveness. It seems, then, to be some sort of rational, rather than retributive, test that only those agents who are responsible and have offended are liable to the treatment the law prescribes.

Moreover, the aim of law, as an institution, is not solely retribution – as Kant assumes. It is civil harmony, order, an affirmation of values, restitution, minimisation of further offences; it aims to provide a mechanism to enable people to resolve disputes with other people. This, of course, is highly contentious; however, this is the function of the law in society and has been traditionally so.95 Some argument is needed to

94. Now one way of achieving harmony, affirming values and so on, is to make some classes of wrongdoers suffer through punishment; this might be called the ‘emphatic denunciation’ and ‘expressive function’ of punishment. But it is only one way and is no more than giving vent to a community’s retributive emotions in order to meet some short term sociological goal. Such measures ought be resisted, for they rest upon gratification that people derived in the suffering of others — and that is an emotion that society can do without.
95. What I mean by ‘traditionally so’ does not refer to the Anglo-Saxon and Norman origins of our legal system, but through history. One need only look at the purpose of the law in Ancient Rome, Greece, Babylon and indeed, Hebrew law in the scriptures, to see that it was an institution the aim of
move the aim of the law away from this sociological goal towards the more esoteric single goal of ‘doing justice’. It cannot be simply that such a change moves from an archaic, irrational system to a rational system, as I believe Kant would say. Self-preservation, which the ultimate aim of the law seems to be a rational goal.

The point of all this is that Kant’s conception of the law is flawed. While it is true that acts of mercy require justification if they are to be morally acceptable, it is not the case that they can be, *a priori* ruled out – as Kant’s theory requires. Thus, Kant’s theory offers no challenge to discretionary powers or to mercy within legal justice.

Fourth, the type of discretion necessary for mercy to be possible in the law, simply does not exist; and if a judge were to act this way, he would be acting *ultra vires*. This might be called the ‘Dworkin Objection’

Dworkin identified three senses of discretion – two weak senses and one strong sense. One weak sense simply is that a particular decision is final and cannot be reviewed by another superior authority. This sense is not important to our present purposes. The other weak sense is this: the discretion involved in *interpreting* a given standard in order to apply it to some case. Although different reasonable agents may interpret the standard differently and identify and weigh the circumstances of a case differently, there is, in principle a ‘right’ answer. In contrast, the strong sense refers to that discretion an actor has to *create* his own standards; he may choose the standards by which he makes his decision and he has that choice only when it is clear from the terms of his power that the nature of the case is such that no given standards apply. Thus, the standards do not impose a duty as to any particular decision.

The distinction can be illustrated this way: Suppose a sergeant is ordered to select five men, but is given no criteria upon which to base his
decision. He has strong discretion, in that he sets the standard or criterion of selection himself. Suppose, however, that he is ordered to select the five most experienced men. He has discretion in the (second) weak sense, in that a criterion has been provided, [i.e. experience] but it is left up to the selector how to apply it. What governs its application is certain contextual peculiarities; in other words, there will be a right way to exercise this discretion, determined, in this example by the exigencies of the context.

Dworkin’s analysis of discretion was introduced in the course of a discussion about how judges should and do make decisions in hard cases; that is, in cases in which there are apparently no definite rules to appeal to and which cannot, seemingly, be brought under a clear, settled rule of law. Dworkin’s point is that in this situation judges do not have strong discretion; that ‘hard cases’ can, if one looks carefully enough, be brought under an established rule of law; there are legal standards that apply. Therefore, there is a right answer and, from the point of view of the law, one side or other in the action is entitled as a matter of legal right, to win; and it is the duty of the judge to try to discover this.

Now in the case of a so called ‘merciful’ use of discretion, Dworkin’s position will be something like this: Judges do not have ‘strong’ discretion. They only have ‘weak’ discretion. Given this, for some case where a judge must use discretion, there will be established legal principles to govern the judge’s use of her discretionary power. These will be filled out given the peculiarities of the circumstance so that one particular answer will be the right one and the lawful one. Thus, the sense of mercy being a departure from the ordinary and expected course of legal events, in which the person does not suffer the legal consequences that normally, or would be expected to attend their action, makes no sense. The treatment the offender receives is what should be expected; it is the normal course of events in this case. There is a departure from no legal principle at all as the judge is merely discovering what principles apply to this case.

---

There are two responses to this. The first, is to argue a number of related but general points. It is true that some cases — the ones that Dworkin cites — do show that judges have acted in this way. But one — or even a small flight — of.swallows do not a summer make. The quotations from Sheen, Denning and the Procedure Note mentioned above, show that it is by no means a foregone point that judges — even good ones — act as if they do not have strong discretion. Moreover, they do not always assume that there is a legally right answer to the case before them.102

Further, to think that this ought to be the case is to assume that the law contains a rich supply of principles that can be deployed at the appropriate moment, on the appropriate occasion. It does not. For example, it does not seem that the law contains principles that reflect accurately the moral beliefs or received moral opinion about coercion, madness, responsibility, duress and necessity. It required legislative changes in Australian jurisdictions to admit these ordinary moral conceptions to the purview of the law, and so prevent the victims of domestic violence, for example, from going to prison after they had murdered their tormentors.

The basic problem is that Dworkin imagines the law to be a rich tapestry of related panels, the structure of each panel and its relationship to the whole waiting to be discovered through rational reflection. Enticing as this image is, it is not true to reality. The law is in fact a hotchpotch of only partly related ideas, principles, rules, with no definite over all structure. The law...

'...stumbles along in fits and starts at the hands of an uncoordinated body of officials on a piecemeal and incremental basis, patching and sewing as the need arises. In practice there is no grand tapestry of principles, and it is difficult to imagine how there could be in a mature and complex legal system.103

Second, even if this is true of the law in general, when it comes to the exercise of discretion in sentencing, there is no set of principles that the law regards as complete and as setting out the only considerations

103. Ibid., p.17.
that must be taken into account. All the law says is that a judge’s discretion must be exercised properly. In sentencing, as in all other areas where discretion is exercised, this means that the adjudicator cannot take bribes or act corruptly and that he must take certain matters into account, as a matter of custom, and the other matters he takes into consideration are suggested to him by the circumstances and they must be relevant. But, with the conditions noted above, the actual content of his decision making procedure, the matters to include and the weight to give them, is left to the judge. It is not, wholly a matter of law. D.J. Galligan puts the point well: 'The law defines the extent of the power and may require compliance with standards of rationality, fairness, and effectiveness, but within these constraints, whose content is not elaborated, the substantive choices are discretionary and uncontrolled by legal standards.' Since what to include is left very often to the judge’s own moral lights, she can be said to act mercifully or be merciful, and this will be legally defensible so long as she exercised her discretion properly. I conclude, therefore, that the ‘Dworkin objection’ is unsuccessful.

§6.9.2 Practical. In addition to the theoretical objections to discretion there are five objections under this head. First, given the sophistication of which modern legislation is capable, there is no longer any use for discretionary powers. For example, if a reason can be identified for exercising a discretionary power, then it can be set down in legislation. Moreover, if the use of a discretion is right, then the law from which it departs is wrong and should be modified. Beccaria makes the point well:

As punishments become more mild, clemency and pardon are less necessary...Clemency...should be excluded in perfect legislation, where punishments are mild, and the proceedings in criminal cases regular and expeditious...Let...the executors of the laws be inexorable, but let the legislator be tender, indulgent and humane...Clemency is a virtue which belongs to the legislator, not to the executor of the laws; it is a virtue which ought to shine in the code...
This is not so much an argument against discretion as an institution, but the continued use of discretion to do a job that could be more easily done by modifying the law. With that I agree. If discretion is used over and over again, to take into account the same mitigating factor, (that is, discretion is used to recognise a factor as a moral defence after conviction, since the law does not recognise it as a defence to the charge), then the law ought to be changed to allow that mitigating factor to be deployed before conviction as a legally recognised defence. Legal opinion, history, and practice supports this view. Until the past two hundred years or so, the Royal Prerogative was used extensively, to temper rigid laws, that held a person guilty of some crime, such as murder, but who was clearly not culpable, because his action was accidental, lacking malice, or the death occurred through misadventure or self-defence; they are people who today would not incur criminal liability. Thus, the Royal Prerogative was used to recognise a defence invisible to the law, that is a defence that is not legally recognised as a bar to conviction.

In those cases where the law becomes more humane, and recognises as lawful defences reasons for actions that were once formerly mitigating factors, then discretion will no longer be appropriate. However, we should not conclude that because legislators become clever at framing laws, that all discretion must disappear. The imprecision of language, the multitude of diverse circumstances, and the fact that official purposes are not always clearly defined, lead to the situation in which the standards which determine atomically the use of power, is is left largely to the official exercising it, and thus ensure discretion a continuing place in any workable system of rules, and make its elimination impossible. Human institutions are fallible and imperfect. It would be wrong to think that a legislator can, as Chitty eloquently puts it,

...anticipate the various temptations which may urge a man to the commission of an offence; or foresee all the shades in the circumstances of a case which may extenuate the guilt of the accused. An offence may be

within the letter, but foreign to the general scope and spirit of the law.112

Does it follow that if a reason can be given for the exercise of discretion then it can and must be set down in legislation? It is true that such a reason could be set down in legislation. But this would result in an almost incredibly complex law, as there is an infinite variety in the circumstances surrounding any particular crime. Thus, there is no reason to think that a legislator could get all the possible mitigating circumstances and their relationship to one another down on paper. Would it be worthwhile to do this? Except in the case of clearly defined mitigating factors (which have over time come to be recognised by the law as mitigating defences, and where it streamlines the system to permit them to be pleaded against conviction) such a move would be likely to make the law cumbersome and unwieldly. Moreover, when discretion is exercised it is often for a complex combination of reasons, each weighted differently. It would be extremely difficult to set down how they were to be weighed.113 It requires judgement and it is difficult to explain judgement clearly, concisely and intelligibly. This argument does not point to the weakness of laws that permit discretion, or the unacceptability of it but rather to the complexity of human affairs and the futility of attempting an exhaustive categorization of culpability criteria.

Finally, is it the case that if it is right to exercise discretion then the law is wrong? No. The law is constructed for the general case and the use of discretion merely recognises that it does not wholly apply to this, novel case. It is not the law that is wrong, but the attempt to apply it to this particular case.

Second, discretionary powers expose the officers of the system to the temptation of bribery and corruption and the possibility of indiscriminate use.114 Moreover, discretionary powers benefit vested interests. They can be abused; for example, they can be used to oppress powerless groups. In this vein Lord Camden said:

The discretion of a Judge is the Law of Tyrants; it is always unknown; it is different in different Men; it is casual and depends on Constitution,

114. Bentham as reported in Crimmins, op. cit., pp.69-70.
Temper, and Passion. In the best it is oftentimes Caprice, in the worst it is every Vice, Folly and Passion to which Human Nature is liable.\textsuperscript{115}

In order to remove this possibility, discretion needs to be reduced if not eliminated.\textsuperscript{116} Third, different officers will exercise their discretions in differing ways. Thus, similar cases will be treated differently, violating the first principle of institutional life — justice as fairness.

These criticisms have less force and perhaps even evaporate entirely if a satisfactory system of review is adopted. We can imagine some of its features.\textsuperscript{117} Such a system, while having the coercive powers of the law must always be reasonable and humane; it must not be overly legalistic and bound by precedent; it must be public, so that its activities can be monitored — unless there are very good reasons for it not to be, in which case the decision to place its activities in camera must be discussed publicly and be reviewable. At all stages of its operation, it should be a requirement reasons should be given for its decisions. As well, appointments to the reviewing body should be made by lot (so that corruption and political appointments can be minimised) from a pool of appropriate humane candidates, whose candidature is examined in a public forum. With safeguards such as this, abuses of discretion can be minimised.

Fourth, if the law is certain, then it is a better deterrent; people know where they stand.\textsuperscript{118} Discretions are arbitrary in nature and inject into the legal system uncertainty and mitigate against the laws deterrent effect\textsuperscript{119} Discretions therefore detract from the 'majesty of the law and [are] dangerous to society.'\textsuperscript{120} This is an empirical claim that is not always verified by deterrence research.\textsuperscript{121} What is true is that if a law is inflexible, perceived as unjust or compassionless then the law falls into disrespect. Moreover, it is not clear how the deterrent effect of the

\begin{itemize}
\item \textsuperscript{115} Doe v. Hindson v. Kersey (1765) Lincoln's Inn Library trial pamphlet no. 204. f.128, cited in Pattenden, \textit{op. cit.}, pp.172 and 257 n.17.
\item \textsuperscript{116} Vide, American Friends' Service Committee, 'Discretion' in B. Atkins and M. Pogrebin, (eds.), The Invisible Justice System: Discretion and the Law, [Second Edition], Cincinnati, pp.24-30, at p.25; Rosett, \textit{op. cit.}, at p.21.
\item \textsuperscript{117} It is outside the scope of this dissertation to engage in a detailed debate on this matter.
\item \textsuperscript{118} Bentham, as reported in Crimmins, \textit{op. cit.}, p.67; Vide, Beccaria (1770) \textit{op. cit.}, p.176.
\item \textsuperscript{119} Bentham as reported in Crimmins, \textit{op. cit.}, p.68.
\item \textsuperscript{120} Gowers' \textit{Report}, p.16; Cf. Beccaria, \textit{op. cit.}, p.176.
\end{itemize}
certainty of a law is defeated by the existence of discretionary powers that prevent the law being imposed. The deterrent effect is found in its application to cases for which it was intended and appropriate — not in cases for which it was not intended. Discretionary powers do not dilute that desideratum because they are used to defeat application of a law to cases for which it was not intended.

§6.9.3: Objections to discretion based on Institutional Role. Discretion cannot only be challenged on theoretical and practical grounds, but on the alleged role that institutional actors have and the constraints this imposes upon their actions. P. Twambley argued that mercy 'is not the prerogative of a judge: on the contrary, a judge has no right to be merciful. In accepting his office a judge places himself under an obligation to impose just sentences and to treat like cases alike'.122 'Judges have no right to be merciful because it is not to them that any obligation is due'.123 For Twambley, 'one man shows mercy to another when he waives his right over that person, and thus releases him from his obligation, cancels the debt'.124 Moreover, they have an obligation to impose the sentence the law prescribes.125 H. R. T. Roberts raises similar objections. Mercy, for him, involves, necessarily, 'the factor of sacrificing a personal entitlement'. But since judges are 'never required to pronounce on one due to himself he can never exercise real mercy'.126

Clearly, for Twambley and Roberts, one only has a right to be merciful, if one is owed a debt — one is in the relationship of creditor to a debtor. Judges are not in that sort of relationship with an offender. Now that judges are not in this relationship is certainly true. What is not true, however, is this characterization of mercy. Mercy does not always involve releasing a person from a debt, or sacrificing a personal entitlement; it involves, just centrally, relinquishing a power over another, tempering and moderating it. Now one may have that power in virtue of some right or entitlement — as Shylock does over Antonio. But one may also have a power over some one in virtue of one's capacities — or position. Terrorists have power — though not legitimate

122. Twambley, op. cit., p.85
123. Ibid., p.87.
124. Ibid., p.86.
125. Ibid., p.87.
power — over their hostages, victors over the vanquished, the well-off over the needy and impoverished — and so on. To be sure Twambley agrees that ‘people ask for mercy from brigands, gunmen and assailants, etc., people who have no rights over them’.127 But he goes on to suggest that should the brigand accede to this plea, he surely has not been merciful — ‘for he had no right to injure his...victim’.128 This is a non sequitur; Twambley assumes what he needs to prove: that genuine mercy is only possible if one has a right over another. Calling the forbearances of terrorists and so on mercy is not merely metaphorical — it is a legitimate and central sense of the word. Whether such agents have displayed the virtue of mercy depends on their motives for acting mercifully. But there is no, in principle, objection to them displaying the virtue of mercy. The upshot of this is that Twambley’s argument fails — simply because his concept of mercy is not true to the naturally occurring one.

What of Twambley’s and Roberts’ other argument that in accepting his office, a judge places himself under an obligation to impose just sentences and to treat like cases alike. That is true — but with important qualifications — as we saw above. Judges are not charged with imposing legally just sentences — but lawful, (and just and right) ones. That is, sentences in accord with the law. One aspect of a lawful sentence is a penalty decided upon by the lawful, i.e. proper, use of discretionary powers. If a judge has used his discretionary powers properly, i.e. lawfully, in sentencing, then he will have imposed, a lawful and legally-just sentence. Secondly, judges are charged with treating like cases alike, however, as noted above, all this means is that legally identical cases ought be treated alike, unless, through the use of his discretionary powers, properly used, they can be distinguished. What judges are required to do here, is treat morally identical cases alike.

Jeffrie Murphy raises another objection. Murphy describes ‘The judge’s job’ as upholding the rule of law. That is, the...

...upholding legal rules that meet certain standards of justice, not the mechanical upholding of any legal rules at all no matter how unjust they

127. Twambley, op. cit., p.87.
128. Loc. cit.
may be... If the rules are unjust, then — if the judge has discretion — he should use that discretion to do justice. (If the judge has no discretion and if the rules are terribly unjust, then such drastic acts as resignation or civil disobedience may be in order.) These complexities, however, do not show a need for a special virtue of mercy; and only a highly impoverished view of justice (i.e., that it is simply the mechanical following of rules) would make one think that these complexities could not be dealt with in terms of a sophisticated theory of justice...

This calls for a number of comments. First, Murphy claims that if the judge has discretion, then he should use that discretion to do justice — and by implication, not mercy. Now, if Murphy is claiming that as a matter of fact the law requires this of judges, then at least with respect to Australia and the United Kingdom, he is mistaken. (And if I read Kadish and Kadish correctly he is mistaken about some states in the United States too.) As we saw above, the guidelines which govern the proper use of discretion, and thus the latitude that courts have in the nature of the evidence they can consider when sentencing, do not imply that discretion must be used only to do justice in some broad or absolute sense — it is used to right a wrong, replace unjust and wrong decisions with ‘reasonable or fair decisions’. Moreover, legal systems that are

129. Murphy, op. cit., p.168, n.3.
130. My emphasis. Ibid., p.168.
131. The quotation is this: ‘...the judge’s discretion in sentencing convicted offenders is often subject to defined constraints, such as a rule that he may not grant probation to prior offenders. If the judge departs from this rule because he thinks it unjust, and if the context in which he makes such judgments suggests that he does not violate his role obligation by doing so in certain cases, we may properly speak of legitimated interpositions by the judge...the legal system extends to the judge a liberty to interpose his own judgment in place of the rule...’ (Kadish and Kadish, op. cit., pp.85-86).
132. Vide, House v K 55 C.L.R., (1936)
133. Vide, House v K 55 C.L.R., (1936)
part of the English legal heritage are concerned not only with what is just, but what is moral and what is humane.\textsuperscript{134} And humanity and our broad notions of morality are brought into the legal system by, amongst other means, the exercise of judicial discretion. So, while the balance may be wrong in particular decisions, the fact remains that there is no moral or legal obligation on judges to only do justice.

On the other hand, if Murphy is claiming that judges ought to exercise discretion so as to do justice, then he must provide some argument for it, as this is a claim about the theory of judicial duty. It is not clear to me that any plausible legal theory would require that judges only do broad justice: what plausible legal theory would allow Shylock to enforce his contract? Moreover, if the law is an expression of a communities moral sentiment, as the law-as-value outlook holds, then many other values besides justice must be considered. This emerges from the fact that the law has a social role. Thus, it reflects, and should reflect, the values of our society. Those values include not only a commitment to justice in some expansive sense, but also humanity and compassion, benevolence — and mercy. Judicial decisions must, to quote Lord Edmund-Davies, (re-affirming Lord Diplock’s observation)\textsuperscript{135} pay ‘due regard to those “contemporary views of what is just, what is moral, what is humane”’ for these values it seems to me, not only under lie the common law, as these judges claimed, but also statute law.\textsuperscript{136}


\textsuperscript{135} D.P.P. v. Lynch, loc. cit.

\textsuperscript{136} This solution also diffuses another argument that is sometimes deployed. It is thought that since judges cannot base their decisions on compassionate grounds, and mercy is essentially tied to compassionate concern for another, judges cannot act mercifully or display the virtue of mercy. (Vide, Murphy, op. cit., pp.167-168.) In response, I would suggest that not all acts of mercy are based on compassionate concern for another’s welfare or well-being. Such concerns can be based upon other things, such as values about people. Such acts of mercy are not excluded from a judge’s possible list of actions. I would also say that it is false to assume that judges can not take into account considerations of compassion, or partly ground a decision on such a basis. Why? Simply, in virtue of being allowed to count considerations of humanity and community values, they would be permitted to base to some degree, their decisions on compassionate considerations, if appropriate to the case before them. Thus, Murphy’s claim, (op. cit., p.174, n.8,) that ‘The focus of a judge...is to be on the question of what is required by justice — not what he may be prompted by compassion to do’...Since he ‘sits as a representative of the rule of law, not as a representative of his own feelings’, is false. A judge sits as a representative of the community, its desire for security, law and order, and its reflective moral values, which include compassion. All this talk about judges being representatives of justice is a fiction. If Murphy wants judges to sit as enforcers of the rule of law and as doers of justice - and nothing else, then he must provide a theory. Moreover, if a judge exercises her discretion properly, she will not have departed from ‘the rule of law’. Since the ‘rule of law’ allows judges to act on their feelings of compassion when they exercise their discretion, if the cases warrants it.
Moreover, as we saw above, legal justice (understood as the practice of not departing from the course of action taken in previous decisions) can licence a harsher treatment than is warranted given the circumstances of the case. It can easily (on the law-as-value model) be an act of legal justice on the part of a judge (and even a display of the virtue of mercy — if performed out of concern for the welfare of the offender) to perform an action that is in some comprehensive sense just but also be a departure from one sort of legal justice - the law-as fact model.137

Murphy also claims that there is no need for a special virtue of mercy,138 since the injustice of a law or lack of discretion could be dealt with by a sophisticated theory of justice. This invites two responses.

First, no workable139 legal system could be based upon a theory of cosmic or complete justice. For with completeness necessarily comes complexity — and complex systems are notoriously difficult to administer, implement and enforce. Laws must speak to the general case if they are to be useful, as Aristotle well knew.140 Moreover, no matter how complex a system becomes there would always be novel cases that the legislator failed to take into account, and which would receive under such a complex system a treatment that was not appropriate. Since this is so discretion and mercy - as acts available to, and a virtue of, judges - are necessary to temper a potentially harsh system, which consists of general, and from the point of view of moral justice, potentially unjust laws.

Second, Murphy assumes that the legal system, based upon a sophisticated theory of justice would make the virtue of mercy unnecessary. That is only the case if one believed that justice – which on

137. If mercy can be an act of legal justice in the law-as-value model, is it then not redundant with respect to legal justice. No. A single action can have two descriptions. It can be an act of legal justice, in the sense of being an action performed by an actor within the legal system, yet also be an act of mercy, since it represents a departure from the ordinary and expected course of legal events and because the judge acted on particular moral motives that are typically associated with an action being an act of mercy.
138. Murphy, op. cit., p.168.
139. This is a vague notion and only one of the desiderata of what it is for a system to be an acceptable social system. But the idea seems to be a system at lowest cost — financial, moral, social, times-wise, and in terms of individual rights and liberties — that produces to the greatest extent the various goals a society sets it. There are other desiderata that a workable system must have: for example, it must be knowable, and understandable, the inter-relationships of the various elements must be perceptible. Urmson listed the desiderata of a moral code in his paper, ‘Saints and Heroes’, in Feinberg, J., (ed.), *Reason and Responsibility*, Dickenson Publishing Co, Encino, 1971, pp.515-523 at pp.521-522.
a sophisticated theory, must approach moral justice – occupied the entire domain of right actions and what was morally valuable. It does not. There are, apart from just actions, benevolent, kind, caring and merciful actions and the dispositions which they represent. Since justice does not exhaust the moral domain, it is just plainly wrong that a sophisticated theory of justice makes the virtue of mercy unnecessary - even in social institutions. Moreover, that does not imply that mercy finds no place within morality or a legal theory. One may choose, for example, to base one’s legal or moral theory on any number of things apart from justice: for example, mercy or compassion or utility, or even the word of God.

Thus there are no in principle objections to having mercy as one of the act-options for judges. As we noted above, ‘mercy’ also could refer to a character trait of a judge, in other words a virtue. Is it possible for a judge, given his institutional obligations, to display the virtue of mercy? It seems to me that it is.

So far we have discussed the possibility of mercy as an action being consistent with a judge’s duty and so being one that judges can lawfully perform. I have said little about the capacity of judges to display the virtue of mercy and still remain true to their duties and within the ambit of the law. It seems to me that they can.

In order for a judge to display the virtue of mercy, she must (1) not only perform an action with a particular property, namely, benefiting another person by alleviating a burden they are suffering or that is threatening them. Such an action must represent a departure from the ordinary course of events; (2) that action must spring from certain dispositions. In the case of mercy it is a disposition of a judge to be concerned for the welfare and well-being of another within her power.141 Quite clearly from the point of view of the law, what matters is the act performed — in other words, the lawfulness of the judge’s exercise of discretion, not the motivational structure that lies behind the decision. A judge may hand down a lawful and thus legally unimpeachable decision — from the vilest and most evil of motives. Given that a judge’s motive does not matter to the law — if the decision is lawful, a judge can quite

141. This is why Shylock, when he forgoes his claim does not display the virtue of mercy — but performs an act of mercy.

226
easily display the virtue of mercy. And this can be manifested by a judge
doing what he is permitted to do — bring some measure of ordinary
moral sentiment and humanity to his decisions — an element of which is
surely a concern for an accused person’s plight and welfare, and a
sensitivity to their needs, and their particular and peculiar situation.

It might be objected that a judge acts on a wrong principle if he
bases his exercise of discretion on a concern for the welfare of the accused.
This is misguided. If a judge is permitted to introduce some measure of
humanity into his thinking and decision making, as I suggested above he
has, then surely a well-founded concern for an accused person’s welfare
and their treatment, is legitimate? It seems that a proper, lawful use of
discretion would require it.

§6.9.4 Justifications for Mercy Within a Legal System. What sort of
reasons can be adduced to indicate that the display of the virtue of mercy
is appropriate on some occasion or to justify a particular act of mercy? In
the case of actions, there are many, and all we can hope for are broad
categories. In the case of the virtue of mercy, it will be appropriate to
display this virtue when it appears to be the virtue most fitting to the
circumstances. What ‘fittingness’ involves is fairly elusive; all one can do
is set out the considerations that could or might influence one’s decision,
and the way that one might weigh them in typical cases, with the rider
that this list is not exhaustive and the weighting not immutable. Thomas
Nagel sets this point out nicely:

...I contend that there can be good judgement without total justification,
either explicit or implicit. The fact that one cannot say why a certain
decision is the correct one, given a particular balance of conflicting
reasons, does not mean that the claim to correctness is meaningless.
Provided one has taken the process of practical justification as far as it will
go in the course of arriving at the conflict, one may be able to proceed
without further justification but without irrationality either. What makes
this possible is judgment — essentially the faculty Aristotle described as
practical wisdom, which reveals itself over time in individual decisions

142. In this section I gratefully acknowledge the advice of John Braithwaite. The deficiencies remain
mine.
rather than in the enunciation of general principles.\textsuperscript{143}

This indicates, as we shall see when we come to consider the moral status of mercy,\textsuperscript{144} a constant theme through all of mercy’s contexts: that the justification for some particular display of the virtue of mercy and for some particular act of mercy is to be found, not so much in immutable principles but in practical wisdom or judgement, in other words the Aristotelian notion of \textit{phronesis}.

Having said this, we can identify a number of contexts in which, \textit{ceteris paribus}, mercy would seem to be an appropriate response. They are contexts that bear general properties, to which an agent imbued with even a small measure of practical wisdom, could not fail to be sensitive. It must also be said that a decision to be merciful must be made on a case by case basis and the examples given here are general cases only and are presented as cases where mercy is at least prima facie appropriate. The list, of course, is not complete.

An act of mercy, a simple action of remission of some kind, is not appropriate if inspired by corruption, extortion, or other self-seeking motives of the benefactor, where the aim is not primarily to benefit the beneficiary but the benefactor. This would be true even if the beneficiary needs mercy. Although the external action is identical in both cases, the act that springs from self-seeking motives lacks moral justification, while the action that springs from a concern for the beneficiary does not.

A merciful use of a discretionary power, will be, \textit{ceteris paribus}, appropriate at least on the following occasions:

1. when it is used to recognise mitigating circumstances,\textsuperscript{145} other ‘moral’ defences, certain sorts of excuses, justifications and so on, which are invisible to the law before conviction, (and thus, the law is incapable of taking account, owing to the way it is framed (since only some things commonsense morality recognise as defences are permitted as defences in

\textsuperscript{144} Chapter Seven
\textsuperscript{145} Such as various forms of coercion and provocation that the law will not allow as a pre-conviction defence; pitiable circumstances, such as mercy-killing, infanticide; temporary mental collapse, insanity and so on or circumstances that the law has not normally counted as mitigating, such as pre-menstrual tension.

228
Chapter Six: Mercy Within Legal Justice

law) or which are excluded owing to its generality and rigidity.\textsuperscript{146}

2. when used to address the needs of any group (or individual) who have a history of oppression, victimisation or deprivation (\textit{that contributed to the commission of the offence with which they are charged}) and which reduces their culpability, or who may suffer from some sort of endemic bias within the legal structure that is proving difficult to eradicate and which results in treatments different from those ordinarily dispensed.\textsuperscript{147}

3. when used to remove the disabilities, lawful or not, that persist after a punishment has been completed.\textsuperscript{148} Some include prohibitions on the holding of public office, or working in certain professions.\textsuperscript{149}

4. when used to correct manifestly unjustified and excessive penalties, if superior courts will not do so; or to otherwise adjust a treatment that an offender would receive, in an expeditious manner, because to impose it would be cruel, (i.e. ill health, age, deplorable prison conditions) or the offender has suffered enough, or is out proportion to his deserts or was not responsible for the offence, through circumstances outside his control.\textsuperscript{150}

5. when used to correct a conviction of an innocent person, that has occurred through a failure in the legal process, and that the law will not, or is incapable of, taking account of, or that it would take too long to alter.\textsuperscript{151}

6. when used to remove a conviction of a person who, even though the law does not appear to have miscarried, there is sufficient cause for


\textsuperscript{147} Again there are exceptions. If the treatment ordinarily dispensed is inappropriate, then the disadvantaged group should not, for this reason receive that treatment. Rather, the appropriate treatment should be imposed upon all.

\textsuperscript{148} Cf Foote, \textit{op. cit.,} p.5.

\textsuperscript{149} The exceptions here are people who have occupied a position involving great trust, but who have betrayed it, such as a doctor convicted of sexually assaulting his patients.

\textsuperscript{150} See Moore, \textit{op. cit.,} p.11; Bonaparte, \textit{op. cit.,} p.605; Foote, \textit{op. cit.,} p.5. Examples here range from the reduction in a penalty by a superior court to the anonymous administrative official who by exercising their discretion, decides to withdraw a parking fine.

\textsuperscript{151} See Foote, \textit{op. cit.,} p.4; Bonaparte, \textit{op. cit.,} p.605; Moore, \textit{op. cit.,} p.11.
believing that the verdict is unsafe.\textsuperscript{152}

There are other acts of remission that are justified on pragmatic grounds. For example, when a punishment is remitted so as to further the good and welfare of the community or promote public policy,\textsuperscript{153} or the welfare of particular interests that cannot be otherwise assisted. Some such examples are amnesties, wide-spread pardons, such as to ‘draft evaders’, and pardons to produce evidence. While these are made possible by the use of the Royal Prerogative, they are not acts of mercy, since they do not address the needs of the beneficiary but the benefactor. They are in fact acts of pardon.\textsuperscript{154}

§6.10. Conclusion

In this chapter I had two aims. The first, to set out and dissolve the conundrums that seemingly cloud the relationship between mercy and legal justice. The case I presented in the first part was largely a negative case – an attempt to show it is possible for a judge, as a typical example of an institutional actor, to be merciful – yet faithful to her judicial duty. Second, I attempted to show how mercy can be justified within an institutional context, with any system of rules, so long as the actors possessed discretionary powers. I defended this view against some obvious criticisms. I argued that they all failed. I then set out a number of justifications for the exercise of discretion on particular occasions.

I also attempted to provide an account of what we mean when we say that this or that institutional actor ‘acted mercifully’ or ‘displayed the virtue of mercy’; as well, I provided an account of mercy within an institutional context and argued that institutional actors cannot only act mercifully but display the virtue of mercy.

I also attempted to answer the most important question: should judges be merciful? I believe they should, and that a community should encourage in its judges the virtue of mercy. In saying this, I am well

\textsuperscript{152} Foote, \textit{op. cit.}, pp.4-5; Moore, \textit{op. cit.}, p.11.
\textsuperscript{154} Vide, §2.4.4 and §2.7.1.
aware that judges suffer, to quote Paul Cobb, Jr.,

... a mindset that is not well suited to applying the equitable concept of mercy. It simply may be impossible for judges to apply procedural rules with one hand and to be merciful with the other: given human psychology, rules normally will trump the much vaguer notion of mercy. Such rules squeeze out the essentially personal, compassionate element inherent in being merciful. 155

But this is not a problem in the legal system, as such, but rather in the psychology of its administrators. Given this, what reasons can there be for mercy? The obvious ones: to temper general laws to specific circumstances; to introduce some element of humanity into a cold, formal system; make the law responsive to community moral sentiment, of the sort that promotes civilized values – and reduces the influence of an often unthinking retributive response. Harsh laws induce contempt for the law – mercy, when appropriate, promotes confidence. Moreover, mercy, as an act-option for judges, finely tunes the courts response to a law breaker. Thus, it promotes one of the essential principles of punishment: that a wrongdoer should only be punished to the extent warranted by the (moral) seriousness of his action.

Thus, mercy would encourage a humanizing and civilizing effect in a world in which the inhabitants are almost continually surrounded by violence. Mercy would reveal the other side of the coin, and so temper, in some small way the incessant orgy of retribution with which we are faced. Society needs not only exempla to look down upon – but exempla to look up to, and the state (through its agents and agencies) should be an exemplum of compassion tempering the call for justice.

155. Cobb, op.cit, p.399.
That no one of all the virtues is more seemly for a man, since none is more human, is a necessary conviction not only for those of us who maintain that man is a social creature, begotten for the common good, but also for those who give man over to pleasure, whose words and deeds all look to their own advantage. For if a man seeks calm and quiet, he finds this virtue, which loves peace and stays the hand, forthwith suited to his bent. (Seneca, De Clementia, Bk.1.3.2)

§ 7.1. Introduction

In the preceding four chapters (i.e. Chapters Three to Six) I attempted to show that mercy could be accommodated within the dominant contemporary moral outlooks, (i.e. Deontology — Chapter Three; Consequentialism — Chapter Four) and within institutional structures that possess elements from each of these outlooks, (i.e. Chapter Six). I also attempted to show that the disparate ways we think and talk about mercy can be easily explained, (i.e. Chapter Five). It might be thought that the present chapter is unnecessary since, from the conclusions of the preceding chapters, we know mercy’s moral standing, i.e., possible. This would be superficial and hasty. Merely showing that mercy is possible does not explicate its moral standing, nor show why it is so venerated and so very much a feature of commonsense morality.

The discussion so far has been very much of the form of a large hypothetical proposition: If one is willing to modify deontology or consequentialism, or interpret our utterances about optionality and so on in a particular way, then mercy and our mercy-talk can be accommodated happily in our moral life. Suppose, however, that one is not so disposed? That is the rub. Arguments must be given to show that such modifications to the standard accounts of deontology and consequentialism are required.

Moreover, I want to give some indication of the foundation for mercy as well as reasons for promoting it. I shall explore the possibility of developing a foundation for mercy within a consequentialist outlook. I
have taken this approach as it seems to provide a better prospect for providing a foundation for mercy. The reason for this is that it seems that deontology can show only that agents are permitted or allowed to be merciful and then only on the basis that it will result in an agent being treated in a more morally acceptable manner. Prima facie at least, the deontologist would find difficulty providing reasons apart from these for the veneration mercy is accorded in ordinary moral life. He would find difficulty explaining for example, in deontological terms, the enormous appeal one feels for mercy listening to Portia's speech. Consequentialism, on the other hand, seems more promising. It may be possible to explain mercy's venerated status and find some deeper foundation for mercy in terms of the projects and goals of ordinary moral agents. This much is clear from Chapters Three and Four.

Further, mercy cannot be understood in isolation from other values. Our values form a complex and dynamic web, interacting with each other to form our moral judgements and give shape to our lives. The structure of this web of values and the relationships between the values is not properly understood. The account provided in chapters Three and Four assumed, in contrast, that morality was relatively clearly structured. If that is the case then we should be suspicious of the account of mercy's moral standing given there. There seems to be something more to mercy than merely the limitation of justice or the attainment of some goal. Mercy and these other values, such as forgiveness, charity and benevolence, add something to our lives beyond the mere feeling that we have acted rightly. I must, if we are to get some idea of mercy's moral standing, argue for a moral outlook that finds a place for mercy as a central value, giving it the importance that commonsense morality accords it. That, in general terms, is one task of this chapter. I shall also deal with some additional objections to mercy. These are possible objections that may face us when we attempt to incorporate mercy into our moral life.

First of all I shall examine the remaining problems that confront mercy. I shall argue that these problems are mere illusions. Then, I shall set out the structure of the moral outlook that gives a central place to values like mercy, forgiveness, charity and benevolence. In general terms, my argument will be that while we have much to learn from the dominant moral outlooks, they paint a misleading picture of moral life.
Only when we redraw this picture — and come to an understanding of the proper relationship between the elements, will we come to an understanding of mercy's true moral status. In coming to understand this we will better understand moral life in general, and the importance of concepts like mercy. Then I shall consider a number of difficulties that the view I favour encounters. I shall argue that they are only apparent. Finally I shall make some suggestions as to mercy's foundations and the basis of the respect accorded this virtue.

§7.2. Other Likely Problems.

This section should be seen as a ground-clearing move, to prepare the way for the more important matters of this chapter. These problems do, however, have some measure of importance as they are the only non-conundrum objections to mercy of which I am aware. These problems question the morality of mercy. There are also objections that emerge from the characterisation of mercy (in §7.3) and the apparent conflict of this characterisation of mercy with the nature of morality. I consider those problems in §7.4. Now to the objections from within morality. There are eight:

(a). Parentalism and the denial of autonomy;
(b). The Wickedness of Power and the Humiliation of the Beneficiary;
(c). The Objection from Perfect Justice;
(d). The Objection from Undeserved Hardship;
(e). The Objection from Rational Policy Formulation;
(f). Is Mercy a Virtue?
(g). The Compatibility of the Virtues
(h). The Criticism of No Normative Content

(a). Parentalism and the denial of autonomy.¹ I take 'parentalism' to involve a certain attitude towards another person; a particular valuation of the validity and importance of their own projects to them; a related

¹. I have chosen this term in preference to 'paternalism'. Both men and women can exhibit this behaviour; and the ideas evoked by the term, as we shall see, describe well the relationship.
behaviour pattern towards them, and a particular sort of relationship.

Parentalism assumes a power relationship: a capacity of one person to control or influence greatly the life direction of another, in virtue of the power they have over another. It involves an attitude, a belief that one person, call them A, with power over another, call them B, knows the good of B better than B does, and can on this basis direct B’s life. They can, in effect ‘second-guess’ B’s choices. Parentalism involves doing good things to others, or things that the ‘parent’ believes are good or in the interests of the subject. To take an extreme example, it would be odd indeed to call the behaviour of the Nazis towards the Jews a manifestation of ‘parentalism’. The person with the power, A, is rather like a parent: controlling, censoring, censuring, punishing sanctioning the behaviour of B, and deciding on the nature and direction of B’s life, without ultimate or necessary reference to B’s choices, preferences and so on.

Not all parentalism is bad. We display such an attitude towards our children when they are young and towards people who are thought to be incompetent; both for the same reason: we do not believe that they can make fully informed decisions. Parentalism can also be objectionable morally, since it involves an implicit denial of the responsibility, competence and autonomy of the agent who is within the power of the ‘parent’. To be sure, in liberal societies, such as those in which we in the Western world live, adults are believed to be responsible, and it is believed should be allowed to be responsible, for their own affairs and destiny, unless there are very good reasons for this not being the case. Parentalism is the denial of this.

It is also a denial of the belief that agents should be allowed to pursue their own interests and projects as they see fit, without interference, (and interfering greatly with other’s doing the same). In short, parentalism that is objectionable, is objectionable because the parent presumes to know the good of another adult better than that other adult does. Thus it is an attitude that involves a denial of the other’s autonomy, agency and responsibility.

Now, mercy can be seen as a manifestation of parentalism. The mercy-giver has power over another; she controls the other’s destiny and can ‘second-guess’ their choices. Mercy seemingly involves a display of
Chapter Seven: Moral Standing

parentalism in that the life-direction of the beneficiary rests with the decision of the benefactor — as the life-direction of the child rests with the parent. Such a relationship is wrong, it is claimed, because no competent adult should have their life plan and directions at the fiat of another, to that extent. If the relationship between the actors is morally wrong, anything that depends upon it must be wrong. And mercy — whether an action or a trait of character rests upon a morally objectionable basis: the denial of the autonomy and the responsibility of another. Therefore, mercy is morally objectionable, as it is parentalistic in nature, and rests on and perpetuates a morally unacceptable power structure — one of superiority and inferiority.

This objection is confused. To be sure, mercy does share a number of features with parentalism: it does assume a power structure, and to a large extent, even completely, the beneficiary’s well-being does depend upon the fiat of the benefactor. There is, however, a basic attitudinal difference: the benefactor does not presume to know, of all other people, the good of the beneficiary. Mercy, does not rest upon an assumption that the beneficiary does not know what is in their interests, or would not know, given an appropriate change in circumstances. Moreover, mercy when a genuine expression of the virtue, seeks to destroy power structures, rather than perpetuate them; it seeks to raise the person, by alleviating the burden under which they labour.

Parentalism, on the other hand seeks to perpetuate the power structure. It is self-perpetuating, for if it is successful, the relationship remains unchanged and further occasions occur when parentalism can flourish. In contrast, if an act of mercy has been successful then the beneficiary is free from that particular threat.

Moreover, mercy does not involve a denial of autonomy, separateness, or responsible agency that characterises a parentalistic action.

2. I am thinking here of a mercy-killer, A, who kills a person in a coma, B, acting on instructions that B gave A for this sort of case.
3. The mercy of a king toward a knight, for example, may place the knight further in the king’s debt and power. This is true. However, it would not be thought an act of mercy in any rich sense. In a full-blown act of mercy the king can not aim for such subservience or requital, as the aim of mercy is to liberate a person from a threat by removing a burden. Placing a person further within one’s debt does not liberate the person nor does it address their need. It merely replaces one burden with another. Such an action is an act of mercy in an attenuated sense, but it fails to be a display of the virtue of mercy.

236
or the attitude of parentalism. On the other hand, the virtue of mercy is a reaffirmation that the beneficiary exists independently of the will of the benefactor; that the beneficiary has interests, projects, goals and desires — i.e. a personality — that is worthy of consideration and which exists independently of that of the benefactor.

Further, mercy involves benefiting another by removing some burden. It is a response to this burden. Parentalism involves simply doing good to another, whether or not they are suffering some burden, and does not involve such a responsive attitude.

Finally, mercy involves an abdication of power whereas parentalism involves a reassertion of power. When parentalism is unjustified this power is wrong. Since mercy is removing a power over another, it represents moral progress, a movement from a morally dubious state of affairs to one more morally acceptable.

(b). The Wickedness of Power and the Humiliation of the Beneficiary. This leads to another criticism of mercy: since mercy is based on a power differential, are not such power differentials essentially wicked? Moreover, do they not involve a humbling, a humiliation of the beneficiary; a loss of dignity on their part and thereby generate an attitude of grovelling gratitude and dependence? I think not. Power differentials are not 'essentially wicked' — they are morally neutral, but they must be justified, since power, even unexercised, is a threat to an agent's autonomy.4 They become morally charged as a result of the states of affairs they bring into being. In any case, a judge who dispenses mercy has used her power for the benefit of the beneficiary. If justified, a good state of affairs has come into being. Now, if the power differential was essentially immoral then such an evaluation is not possible.

The question then is: does mercy involve a humbling and humiliation of the beneficiary? Need it involve 'grovelling' gratitude, a loss of dignity, or a relationship of dependence? No. I distinguished above between acts of mercy and the virtue of mercy. While acts of mercy

4. In this respect the holders of power must explain the fact that they have power to those over whom that have power. Moreover, whichever way a power is going to be used it must be justified, as the use of power involves the infringement of another's autonomy and capacity to pursue their own life and projects without interference. Cf. Bruce Ackerman, Social Justice and the Liberal State, New Haven, 1980, p.4.
may (but need not) have these consequences — and some ‘benefactors’
may even demand such responses — we neither admire such acts of
mercy nor such mercy-givers. They are acts of mercy in an attenuated
sense only: a forbearance from doing something unpleasant to another
within one’s power.

The mercy-givers we admire most are those who are merciful
without such requital; who, as we say, display the virtue of mercy or
perform acts of mercy solely for the benefit of the beneficiary. Such a
virtue, (or an action) is based, as we saw, on respect and care for those
people within one’s power, people who labour under some enormous
burden, and are incapable of helping themselves. Genuine respect and
care requires nothing in return, no reward, no requital, no humiliation,
gratitude, loss of dignity and no relationship of dependence. The virtue
of mercy empowers the powerless, restores their dignity, treats them as an
autonomous, responsible individual, who is valuable, and whose needs
must be met. Thus, a display of the virtue need not perpetuate the power
structure, and, in fact, goes some way to attenuating it. It tempers, or
dilutes power, and ultimately humanises it.

Giving mercy to the felon, the poor, the hostage and the sick, the
homeless and indebted, revalues their lives, their goals and projects.
They get another chance and can move forward through their
misfortune. But the genuinely merciful person does not require — or
even want the beneficiary of their action to be humbled, humiliated and
so on. In fact, such a response defeats one purpose in being merciful: the
recreation of an autonomous empowered individual.5

(c). The Objection from Perfect Justice. Another objection runs like
this: in a world of ‘perfect justice’ mercy would find no place. So,
ultimately mercy is redundant. This criticism assumes that the point of
view of justice is the only point of view that is morally acceptable.
Shylock was within his justice-based rights, and Antonio had no justice
based defence: one could say neither, that he did not deserve what
Shylock proposed to do, or that it was ‘unfair’. Yet Shylock’s insistence on
his ‘pound of flesh’ is wrong. This was the Bard’s point:

5. Even though the felon may feel humbled, this can not be the intended result of acting mercifully,
(Vide, n.3, supra.), as then the action would not achieve its goal, the recreation of an autonomous
empowered individual.
...Therefore, Jew,  
Though justice be thy plea, consider this -  
That in the course of justice none of us  
Should see salvation: we do pray for mercy,  
And that same prayer doth teach us all to render  
The deeds of mercy.6  

To be clear: an action may be right by the lights of justice – but quite wrong by different, yet equally important and morally acceptable moral lights. Justice is not the whole of morality7 and it is a gross distortion of morality to assume it is – as this objection does.8 Further, this challenge is purely theoretical. Morality is a practical system: it must be workable, liveable, understandable,9 and take into account the capacities (and frailties) of the actors. Perfect Justice is not attainable and, thus, has no place in such a system. The best we can have is imperfect, realizable justice, and as a consequence, mercy is required to temper its excesses; it takes account of individual cases – cases not readily subsumed under general workable rules; rules that if rigorously applied would have morally unacceptable consequences.  

Moreover, not all mercy is a response to a mis-application of justice, or its inappropriateness (as in Antonio’s case). Mercy is given to the poor, the unfortunate and unlucky: none of them ‘victims’ of justice.  

(d). The Objection from Undeserved Hardship. A retributivist, such as Kant, might argue that all sincere acts of mercy involve the benefactor forgoing some benefit to which they have a right, and perhaps even a duty to extract. By acting mercifully they experience some undeserved hardship and are unjust to themselves. If a hardship is undeserved, then the action or virtue that produces it is wrong. Thus mercy is wrong. The problem with this argument is two fold. First, not all acts of mercy involve sacrifice or hardship on the part of the benefactor. Therefore, this criticism, if true, would be limited only to those cases where the benefactor suffered some loss through his act of mercy. Second, it fails to distinguish between what it is permissible — or not — to do to another and what it is permissible to inflict upon oneself. One cannot — morally

---

6. Merchant of Venice. Act IV.1. 196-201  
7. As we saw in Chapter Three.  
8. An alternative view to justice is discussed in §7.3.  
cannot — inflict an undeserved hardship upon another — or a hardship that lacks justification. There must be a morally defensible reason for it; it cannot be gratuitous. However, when it comes to what individual agents are permitted to do themselves, that is a different matter. I cannot force Jones to shave his own head, give money to charity and so on without good reason. Yet, I require no such good reason to do these things to myself.

Similarly, if an act of mercy involves some degree of hardship undeserved, though it may be, that in itself is not sufficient to make it wrong for me to act mercifully. I am permitted to infringe my own projects, interests and so on, since such an infringement amounts to an expression of my autonomy.10

(e). The Objection from Rational Policy Formulation. The first objection runs like this: mercy involves some sacrifice — especially those merciful actions that involve gifts to the poor — and so on. Now, it is rational for an agent to plan with an eye to their long range interests. Mercy, if it involves sacrifice, does not seem to be consistent with a rational agent’s long range interest: he may sacrifice something today, of which he will stand in need in the future. Thus it does not seem possible to incorporate mercy into a rational planning strategy. Second, a rational agent will attend to his own needs first: ‘he must live before he can act’. Unless he cares for himself, he cannot care for others. Thus, he will, if he is rational, first address his own needs and then those close to him, slowly moving to address the needs of those more distant. From a rational agent’s point of view, however, it does not seem that mercy can be given any priority in his ‘deliberations’ if it is rational for an agent to address his own needs or those close to him first. The agent who received mercy would in a sense be jumping the deliberative queue unless he was someone close to the benefactor. If an agent does adopt a merciful outlook, then he seems to forfeit some measure of his rationality.11

10. There are limits of course: mania or other psychotic disturbances, since they involve a loss of responsibility — seem to temper this general permission. The permission is also tempered by foolish actions or unnecessarily self-destructive actions and the like. So a foolish act of mercy would be wrong. But the point is that usual cases of mercy — involving a sacrifice — are not wrong.
Take the second argument first. It is certainly rational for an agent to consider his own needs first, but he need not always consider them first or solely. A rational agent will have many projects, goals, and values. Some will be egocentric, some other-regarding. The rational agent balances them all and acts accordingly. There is no rational 'obligation' for him to choose his own projects over those of others, as the objection assumes, nor consider his own projects first in his deliberations. A rational agent may have adopted a policy of considering other's needs first. If he has done this after reflection, rather than impulse, and if he acts on this ranking in an appropriate manner, then he can be called 'rational'. To be rational is not to be egoistic – as the second argument presupposes.

Now to the first argument: does it make sense to sacrifice something today which you may need in the future? It is certainly true that it does not make much sense to sacrifice some good today that you know you will need in the future and do not have much hope of replacing unless there are very good reasons for doing so: a sailor adrift in a life-boat who uses the flares for entertainment is not acting rationally if there is no promise of rescue. If, however, the flares can be used to increase his visibility when he sees a ship passing by, then using the flare is a rational act.

However, it seems to me that thinking that one may need X in the future is not a good enough reason for not using X, irrespective of the difficulty of replenishment. We should not let vague or remote possibilities dominate our lives to the extent that we become inert. One would not eat, lest this be one's last meal; or do anything else for that matter. One would be compelled to cart around a vast juggernaut of odds and ends on the vague assumption that one might need one of them one day. The point is: one must indeed plan for one's long term prospects, but must do so in the light of what is likely to happen, and in the light of the possibility of resupply of the resources being used, together with the exigencies of the circumstance and our own other projects. This does not preclude the rationality of the sacrifice of resources that one may need in the future. Whether such an act is rational will depend upon a range of factors that are properly known only from the circumstances.

(f). Is Mercy a Virtue? One possible objection to revisioning moral
theory so as to incorporate mercy as a virtue, is to argue that mercy is not a virtue and, therefore, such revisioning at least with respect to mercy, is unnecessary. If mercy is not a virtue then all this talk about ‘accounting for mercy as a virtue’ is quite irrelevant.

Now, it is certainly true that mercy does not appear in any of the ‘traditional’ lists of the virtues, modern or ancient. Nor does mercy appear as a distinct virtue in the list of Christian virtues, or in the extensive lists of virtues that have been compiled by some recent writers. Answering this question is important for another reason. Up to now I have largely assumed that mercy is a virtue and have offered no argument for this view. The time has come to defend it.

It is true to say that some types of merciful actions could be conceivably derived from some of the accepted virtues or combinations of them. That it seems to me would obscure important facts. To begin, mercy would cease to be an independent and autonomous virtue – something it has been long thought to be, not only in civil life, as a part of commonsense morality, but also by philosophers. We find Seneca, for example writing (c.55 AD), that mercy was not opposed to strictness...
because 'no virtue is the opposite of a virtue', indicating that the belief that mercy was a virtue was an entrenched part of the moral ideas of the late Stoa, of which Seneca was a part. Moreover the majority of modern philosophers regard mercy as a virtue.

Further, although mercy does not figure in the list of Christian virtues cited above it is nevertheless, a central virtue of that faith as well as its progenitor, Judaism. As well, it is considered autonomous, independent and not merely derived from the other virtues (although it is often expressed as 'forgiveness'). Why? Because it is a property of the Judaeo-Christian God, and as such it is a property all believers are enjoined to cultivate, appropriate, imitate and manifest.

All this really demonstrates is that mercy is considered a virtue. Is it really a virtue? Whether it is or not will depend on the sort of character trait it is — and on what it is about a particular character trait in virtue of which it is a moral virtue. What is that?

There are three properties. The first is that it must be the sort of property 'the possession of which will enable the individual to achieve eudaemonia, and the lack of which will frustrate his movement forward that telos' The second is that it is a trait of character that is beneficial, not only to the welfare of the holder, but to others as well [depending on the particular virtue]. As Philippa Foot says...

...human beings cannot get on well without them [i.e. virtues]. Nobody can get on well if he lacks courage, and does not have some measure of temperance and wisdom, while communities where justice and charity are lacking are apt to be wretched places to live...Virtues are in general

17. '... nulla virtus virtuti contraria est.' De Clemencia, Bk. II.4.1.
beneficial characteristics, and indeed ones that a human being needs to have, for his own sake and that of his fellows.23

The third property is that these traits of character must be ‘morally good’ — they must have the potential for adding value to the world — not just any sort of value, in the way that beauty does — but moral value. Not only must they enrich our lives, in the way that the earth, the wilderness, philosophy or history and the like do, but they must have the potential if exercised on the appropriate occasion to justify the epithet of ‘morally good’ to (amongst other things) one’s person, actions or life.24 It is clear from the foregoing that mercy is a virtue. An exercise of mercy, when appropriate, does justify the epithet ‘morally good’. Being in accord with reason it promotes eudaemonia in the benefactor; while it promotes the good of the beneficiary. It is twice blessed.

(g). The Compatibility of the Virtues. There is an ancient belief about the virtues that was held by the likes of Plato, Aristotle, Aquinas, as well as the Stoics. This is the view that if the virtues form a unity (that is, an agent cannot possess one virtue without possessing all the virtues,25 simultaneously) then the virtues cannot, logically cannot, conflict. (In fact they must be compatible if they form a unity.) Indeed, if one putative virtue conflicts with another, then according to the doctrine of the compatibility of the virtues, one of them is not a virtue.26 As Seneca says:

24. Now it is outside the scope of this dissertation to expound a theory of the good — or, more particularly, a theory of what it is that would make some character trait good, and thereby a virtue. One suggestion is that the theory of the good would take as primary observation about human nature — that we are social creatures with natural capacities and needs. The virtues may be those capacities that promote those capacities and needs. Christine Korsgaard, (Ethics, (96:1986), pp.488-505), discusses a rationalist account of the goodness of ends: ‘an object or state of affairs is good if there is a sufficient practical reason for realizing it or bringing it about’. Such a position is midway between a subjectivist account, which includes the various forms of hedonism and objectivism, as represented by G. E. Moore, (Ibid., pp.486-88). Lawrence Becker, on the other hand, has intimated that we might ‘justify the list of virtues in a utilitarian way’ (‘The Neglect of Virtue’, Ethics, (85:1975), pp. 110-122, at p.118, n.15). I leave this question undecided
25. It must be noted that even if the virtues are act-incompatible this does not tell against the general thesis that the virtues are compatible as traits of character: an agent could have a disposition to be merciful and just, yet the circumstances are such that it is impossible to perform both merciful and just actions.
26. The compatibility of the virtues thesis must not be confused with the (related) thesis of the unity of the virtues; that is, the Aristotelian view that if an agent possesses one virtue, she possesses them all, that an agent can not have some moral virtues and not others. The unity of the virtues thesis presupposes the compatibility of the virtues, but the compatibility of the virtues does not presuppose unity. I do not agree with the unity of the virtues thesis, as I believe that there can be a fragmentation of the virtues. This is supported by observation: most moral agents possess some of the virtues, few possess all and the fact that they fail to possess some does not mean that they fail to fully possess others. Though, of course, the ideal moral agent would possess all of the virtues. Elizabeth Telfer has argued for the unity of the virtues thesis, (‘The Unity of Moral Virtues in Aristotle’s Nicomachean
'no virtue is the opposite of a virtue'.

Recently the compatibility thesis has come under attack. Philippa Foot has argued that '...so far from forming a unity...the virtues actually conflict with each other: which is to say that if someone has one of them he inevitably fails to have some other.' This is indeed very troubling; for if the virtues conflict then it would seem to follow that an agent '... can only become good in one way by being bad in another'. The virtues are, according to Foot, incompatible. The point is that necessarily any display of a virtue involves a display of vice. This, of course, is problematic for would-be mercy givers; it would seemingly follow that even though the display of the virtue of mercy might be good — the agent would by that manifestation of virtue also be acting unjustly, i.e., viciously. It would be impossible for agents to attain moral perfection.

We have encountered a version of Foot's problem before: mercy and justice, as actions, can sometimes conflict: on some occasions it is simply not possible to perform both a merciful action and a just action. That is, the virtues are act-incompatible. This is just a manifestation of a general phenomenon: it is sometimes the case that actions that spring from particular virtues may not, in particular situations, be simultaneously realisable because particular considerations indicate incompatible courses of action. When faced with such a situation we feel that we are confronted by a painful moral dilemma, since we have to choose between deep-rooted motives and values and in choosing one we will be in some sense immoral by not choosing the other.

This conclusion, which is the same as Foot's, is deeply counter-intuitive. It does not seem that in being virtuous, even if some other virtue is trumped, that we are thereby wicked. How can we explain this? The solution is simple. Wickedness (and acting morally wrongly) is not a...

27. De Clementia, Bk.II
28. 'Moral Realism and Moral Dilemma', JP, (80:1983), pp. 379-398, at p.397. Although Foot does not clearly distinguish the two theses, it is clear that she has the 'compatibility thesis' in mind.
29. loc. cit.
31. Philippa Foot, solves this problem by saying that justice 'limits the scope' of other virtues, (Virtues and Vices, op. cit.), p.3. For reasons that will emerge shortly, this is unacceptable, assuming, as it does the primacy of justice.
matter of not displaying one virtue that could be displayed, because another is more appropriate, as Foot assumes. Wickedness — and acting morally wrongly — involves not displaying the virtue that is appropriate to the circumstances in which one finds oneself. Thus, trumping justice with mercy is not a manifestation of moral turpitude. One has not done good by doing wrong, simply because justice was not the morally appropriate virtue to display — although one may have been moved to some extent by the circumstances to act justly.

Still, this does not explain how, if the virtues are act-incompatible they can be thought compatible. We have encountered this solution before.\(^ {32}\) It is certainly true that some of the virtues are act-incompatible, mercy and justice, for instance. Thus it is impossible to simultaneously realise both of them in action. However, these virtues can be some of the elements of a single moral personality and can be realised as parts of the dispositional structure of a single individual. In other words, they can be at the one time, traits of character and dispositions to act, of the one person. Mercy and justice are compatible then as traits of character. It is in this way that the compatibility thesis makes sense. In order to accommodate these disparate traits the virtuous agent would develop some means of deciding what trait to express in what circumstance, in other words, develop a sense of acting appropriately. Thus, these virtues, although they ‘pull’ in different directions, and an agent requires some means of deciding which is appropriate, they can both form part of the one personality.

This points to the Aristotelian point that acting virtuously is to display appropriate virtues on the appropriate occasions and exercise practical wisdom — *phronesis*. Such a person — to use Aristotle’s term, the *phronimos* — is practically wise. They develop and cultivate all the virtues to a high degree, yet also cultivate a capacity for moral insight, that is, knowing what virtue it is appropriate to display through action on what occasion. In doing so, one virtue does not threaten or set limits on the development of the others, nor does such cultivation lead to the paradoxical conclusion that one can only become good by being bad. The virtues do not conflict. Foot’s challenge comes to nothing: an agent can cultivate a merciful disposition and display it without without at the

---

32. In Chapter Three.
same time being wicked. Her challenge raises no ‘in principle’ objection to a doctrine of the virtues or their moral compatibility.

\[(h)\]. The Criticism of No-Normative Content. Over the years there have been a number of criticisms of the virtue approach. I do not intend to examine all of them and mount a comprehensive defence of virtue theory. There is, however, one particular criticism that needs to be addressed if mercy as a virtue is to be part of our moral life, and if we are to make sense of the fact that not only is mercy a virtue, but that it has essentially an imperative nature. In a virtue ethic the central question is: what sort of life is morally best? Part of this question is: what sort of person ought I to be? Now, what is not part of this outlook, it is claimed, is a concern with what one ought to do on this or that occasion. Such an approach is not concerned with action-guiding principles (‘Always act fairly’) or with the resolution of moral quandaries.

In the past two centuries, it has been believed that all moral theories must have some normative content, that is, rest upon particular values as well as prescribe and proscribe actions, and enjoin people to behave in particular ways. Agents have expected a moral theory ‘to tell them something about what they ought to do’. In fact it is sometimes taken as a defining feature of moral theory that it has normative content; that it tells us what is required, prohibited — or permitted. Since a virtue theory does not do this, it fails to be a moral theory. And even if we take the weaker view and allow that moral theories need, necessarily, have no normative content, it still follows that a virtue ethic would be quite weak in proffering advice in matters of applied ethics and casuistry — areas in which moral theories have, traditionally, been thought to offer guidance.

The weakness in the argument of course, is the view that virtue theories have no normative content. They do; however, normative content is not the focus of attention. The normative component is instead a consequence or manifestation of certain traits of character. Thus, it takes account of action-guiding rules and principles only in a derivative

---

manner. And there is no reason why the normative content need be the central concern of moral theory; it is only since Kant that it has been. How then does a virtue theory have a normative content?

We recall that a virtue is a stable tendency to feel and act in particular ways in particular situations. It is through perceiving the moral properties of some circumstance that an agent comes to feel about it in the way she does and ultimately respond to it through actions. Throughout our life, this is how we mostly live. We are seldom faced in the ordinary course of events with the need to reflect on our propensities to act this way or that, or wonder what we should do. As John Kekes says:

...when a person has a well-formed character, the actions he performs effortlessly follow from it. Normally, acting in moral situations is not a matter of choosing, but doing what comes naturally. A person of good character spontaneously does what is right, in the normal course of events.

They perceive the relevant moral properties, the morally salient features of the circumstance, because they have a reliable sensitivity to them. Such agents act appropriately, by responding to the requirement which the situation imposes upon their behaviour (and to which they are sensitive) without reflecting if this or that is their obligation, or is permissible. Such agents do not act, I hasten to add, without reason. The context requires a certain sort of response and this is one way of expressing the agent’s reason for so acting. Thus, the agent may only be aware post facto of the properties in virtue of which they acted.

Discerning the morally salient features of a situation is part of what it is to display virtue, and part of the morally appropriate response. Nancy Sherman’s comment about most moral situations is right, it seems to me, when she claims that on Aristotle’s view, ‘Pursuing the ends of virtue does not begin with making choices, but with recognising the circumstances relevant to specific ends’. Thus, agents evaluate, judge, and as Aristotle would say, exercise practical wisdom – phronesis. This surely is the truth in Bernard Williams’ famous remark that the man

who pauses to wonder if it is permissible to rescue his wife is burdened with 'one thought too many'.\textsuperscript{41} The 'one thought too many' is simply the question 'What ought I to do?' or 'Is this my duty?' or 'Is this permissible?'. For a person who possesses a well formed character, and who possesses the capacity for evaluation of the moral properties of contexts — in other words \textit{phronesis} — such a thought is unnecessary and redundant.\textsuperscript{42}

What I am suggesting is that the morally good person will do what is right — as a matter of course; as an expression of their 'well formed personality', and their sensitivity to the exigencies of the context. This is what we educate our children to have and to feel, and why we point with admiration to positive moral \textit{exempla}, heroes and saints and contrast them, with opprobrium, from negative moral \textit{exempla}, moral cowards and devils.\textsuperscript{43}

Now it might be the case — and in the case of mercy it usually is — that the virtuous person does not herself regard her behaviour as merciful. She simply thinks it the 'right thing to do'. This is the idea behind the view that 'mercy is a silent virtue' since those who possess it and display it, may not think and typically do not think, at the time of acting, that they are being merciful.

So while the virtuous agent will be sensitive to the particular features of a situation that make a particular response appropriate — and it is upon this basis that we evaluate them — they will feel that their action is the right thing to do, that it is appropriate, although they will not have paused (assuming the context is unproblematic) to ask themselves 'ought I to do X?'. Thus, an agent displaying the virtue of mercy will be driven to act as they do by the suffering — actual or potential — of the person within their power, rather than a feeling of obligation.

It remains the case that were they to reflect on the matter, presuming

\textsuperscript{42} This describes moral contexts — rather than contexts in which an agent is acting in some official capacity. In such contexts to act morally; to display the virtue of dutifulness and conscientiousness, is to ask these sorts of questions.
\textsuperscript{43} In fact, such moral philosophy until the last two centuries was taught this way; consider Plutarch's \textit{Moralia}, Tacitus' \textit{Annals}, Thucydides' \textit{History}, and the works of Shakespeare, De La Fontaine and Montaigne.
they have some degree of moral insight, they would discover the imperative to act mercifully. Upon questioning they may even express their reason for acting in a way that assumes an imperative: ‘he was suffering and I just could not leave him there. It would have been wrong. I had to act.’

All this may seem to suggest that in a virtue ethic there is no normative content, no capacity to guide action positively. This is mistaken. Constitutive of being virtuous is knowing how to act appropriately, that is, knowing what one ought to do on some specific occasion and acting appropriately. ‘Virtue’, says Aristotle, ‘...is a state that decides consisting in a mean, the mean relative to us and which is defined by reference to reason; to the reason by reference to which the intelligent, [i.e. practically wise] person would define it. It is a mean between two vices, one of excess and one of deficiency’. Without phronesis, we can never be fully virtuous, and we cannot have phronesis without virtue of character.’ Can this be cashed out in modern ideas?

It is certainly true that we can be faced with situations in which the ‘morally salient features’ are obscured or where there are many of them; sometimes we may be inspired to act on conflicting dispositions — since we perceive a range of morally salient features. This, in effect, is what a moral quandary involves; sometimes we are faced with morally novel situations — the important moral features of which may inspire conflicting traits of character. In such cases, we do have to choose, and the agent of practical wisdom, the phronimos, reflects on the context as well as the salient moral features and decides what it is right to do — what ought to be done. The act of doing that is inspired by a trait of character that is a virtue — deliberation, reflection, conscientiousness, prudence — that comes into play when faced with moral quandaries. One such paradigmatic case is the decision between mercy and justice when the claims of each is so evenly balanced. The result of the deliberation will be

44. However, on occasion an agent may not be disposed to act appropriately, as a matter of course. But if his moral education has been extensive, his moral educators will have attempted to activate in him the virtues of steadfastness, constancy, courage, resistance to temptation. And although the morally salient features of the situation may not have prompted the appropriate action, the appropriate action will still be forthcoming as a manifestation of these now appropriate virtues — virtues appropriate given the agent’s failure to act, initially, appropriately.
45. Nic. Eth., 1107a
46. Ibid., 1144b31; Vide, Sherman, op. cit., p.11.
Chapter Seven: Moral Standing

It seems that a virtue ethic can and must have a normative content. Discovering the normative content of some complex and problematic context is as much a work of virtue as is discerning the morally salient features in morally mundane contexts. Moreover, in both contexts, the imperative of mercy exists. In the latter it will not feature in an agent's choice of action, unless he faces some failure of moral discernment or will to act. In these cases it fuels the virtues of constancy and resistance to temptation. In the former complex case the point of reflection is to discover the imperative, and once discovered, act on it.

§7.3. The Merciful Moral Outlook

In the preceding chapters I discussed mercy as action or a virtue. As an action mercy can easily be accommodated by, and justified within, consequentialism and deontology. Often agents are required to perform merciful actions. This is to be expected, as both deontology and consequentialism are usually thought of as act-orientated moralities. Mercy as a virtue found a place within such outlooks. What value the virtues, or good motives or other dispositional states had is derived from their capacity to function as the springs for morally valuable actions.

Such a re-orientation, however, may not be welcome and many moral philosophers might reject it, preferring to retain the traditional emphasis on actions. To do this it seems to me would be to reject an important, and I shall argue, the dominant facet of the nature of mercy and indeed morality. If we neglect the virtues and valuable motivational structures, we cannot do justice to the richness and complexity of our moral lives; we are unable to evaluate (morally) things we do value – and which define our lives and give them direction and meaning.

The moral status of mercy will be revealed, and mercy as a virtue will have moral standing in its own right, and not merely be treated as a possibility, only on an ethic that places these things centre stage. To do this, I begin with a review of the nature of the dominant view of moral philosophy – and its shortcomings. Then I go on to suggest the 'personality' I believe morality requires in order to accommodate mercy in all its richness. Finally, I make some remarks about the place of mercy.
in contemporary life, and why it is still a virtue to be cultivated and an action to be enjoined.

§7.3.1. The Worries About Modern Moral Outlooks. That there is something deeply amiss with the traditional moral outlooks is a view that has gained much currency over the past three decades or so. Beginning with G.E.M. Anscombe’s now classic paper, ‘Modern Moral Philosophy’, the trickle of dissent has become a flood. It is now a major movement the traditionalists cannot ignore. What has developed, in effect, is a moral counter-culture, a movement that aims to undermine the traditional law-like moral codes, or what I call ‘moral legalism’.

While the moral counter-culture has quite disparate programmes, it is united by a general skepticism of moral legalism and the rejection of the view that actions and choices are the primary purveyors of moral evaluation. Rather, it promotes traits of character, motives, and dispositions as the preferred objects of moral evaluation. Thus, we find members of the counter-culture arguing against the primacy of justice in all moral contexts, against universalizability, impartiality, universalism, maximisation and in favour of care, charity, partiality, favouritism, personal relationships and attachments. Perhaps the single most obvious theme in the counter-culture is the renewed interest in the virtues as the fundamental objects of moral thinking, with actions and choices having only derivative importance. To understand why this is so, we need to 1. review the salient features of moral legalism, and 2. examine briefly its genesis.

1. It is a common and popular belief since Kant, at least, that moral philosophy concerns what we ought to do, how we ought to act, and how we ought to live. Thus, it primarily concerns the evaluation of, and value given to action, even when evaluating the action involves evaluating the agent’s springs, the motivational basis for the action. Undoubtedly, there is something to be said for this view. We relate to the world by way of our actions – and others know us – our personality and who we are and what we are like – and likely to do – through our actions. We need to know what to do and what acts to forswear, praise and

condemn. This might be characterised as the first tenet of moral legalism: that morality is concerned fundamentally with action, and reduces to the search for duties and obligation and imperatives that are analogous to laws. As a result of this, morality is thought to be basically concerned with the resolution of moral quandaries or moral dilemmas.

The second tenet is that one particular value is the fundamental value applicable in all circumstances. Thus, they are unitary. For a Kantian, all values reduce to conscientiousness, or dutifulness; for the Utilitarian it is generalised benevolence.

The third tenet is that distinctive characteristics or individuating features of individuals, do not matter in themselves. This is reflected in the adherence to ‘principles’ of impartiality, universality, maximisation and universalizability. This is necessary because the theories outline generalised codes of behaviour and the rules and principles of the codes must be capable of being known, workable and used by everyone, and applied to all situations.

The final tenet is that as a result of being directed at featureless individuals, moral codes are concerned only with general moral duties, and therefore, the lowest common moral denominator. This finds expression in the adage that ‘ought implies can’. It is clear from the forgoing that the major elements of moral legalism are inimical to a virtue approach to moral thinking.

2. What is the genesis of ‘Moral Legalism’? It is essentially a product of the Enlightenment, that is, the eighteenth century. As European society developed at this time, ideas current in science spread throughout the intellectual community, (such as the Newtonian image of the universe being governed by discoverable laws). At the same time legislative institutions as we know them today developed and their power became more widespread. The promulgation and enforcement of laws governing many more aspects of life became widespread. Constitutional, social and legal theory evolved, as did the notions of right and duty in order to provide some foundation to the changes that were occurring in the nature and elements of the community. The most important features of all of these developments was the notion of a law, and in civil contexts, duties, rights, obligations. As these changes occurred, the legislative and legal model of morality developed, and replaced a more axiological...
model. In an age in which science — and the methodology of science — was developing and becoming part of the intelligensia’s conceptual framework — the call for clear, obvious answers to moral questions went out. This was based upon the assumption that there were discoverable, right answers ‘out there’ to be found — if only we had the right theory: and those answers would take the form of laws, prescriptions and so on. They would be like the laws of nature. The purpose of ‘Ethical Science’ or ‘Moral Science’ was to discover these laws — in the same way that a scientist discovered the laws of nature. A moralist was another kind of scientist. Thus, out of this cultural *melieu* was born ‘moral legalism’ of which deontology and consequentialism are the prime examples. The aim of this project was ‘to provide a theory which specified the domain of the moral and which ordered goods and obligations within that domain in a way that gave rise to a general procedure for resolving moral issues’.49 Thus, it was a decision procedure, aimed at solving moral quandaries, that proceeded on realist assumptions.

Gone were the virtues, character, emotion, and other vague notions. Introduced were the notions of duty, power, obligation and legislation. One need look at the writings of the early moral legalists — Kant, Bentham and Mill — to see how frequently those terms appear. Far from being a temporal, universalistic and so on, moral legalism is part of a particular world view and cultural outlook. We must be aware of this, for often the theories of moral legalism are presented as if they were culturally agnostic. They are not.

Nor are they agnostic from the point of view of acceptance and adoption, for to adopt them is to assume a particular view of morality: that morality is concerned with what we ought to do; what ought and ought not be the case. It is to assume that it concerned primarily with the evaluation and valuation of actions — and their justification.

Although philosophers took this view, commonsense morality never abandoned the old notions. The new ideas of duty, obligation and so on were incorporated into the commonsense outlook. But this caused difficulties for moral legalism. Mill and Kant attempted to provide a formal structure to commonsense moral intuitions. However, in doing

Chapter Seven: Moral Standing

so they were confronted by concepts from the older moral outlook—mercy, forgiveness, charity, supererogation and the like. They had to find a place for them. Very often they did—but as ‘marginal comments’—rather than central elements of their theory. Thus, mercy and its peers became what I call moral marginalia: concepts to be accounted for after the theory has been settled. Kant for example, attempted to account for these moral entities by creating a specific deontic category, that of the ‘imperfect duty’. Looking at his solution one develops the impression that the solution is very much ad hoc, and one is left feeling that Kant never quite succeed and indeed, as argued in the last section, could not succeed in accommodating the moral marginalia, of which mercy is one. Mill’s solution, one the other hand, and as we saw in Chapter Five, is rather more convincing, and I believe largely correct.

The point is, however, that it is a serious defect of any moral theory to treat the moral marginalia as marginalia. Rather than being confined to the margins and discussed in an ad hoc manner, they are central elements of morality, and the most important feature of its practice. To ignore them is to live a life that is emotionally and morally impoverished. It should be clear now from this section and the preceding ones that I reject the view that morality is essentially about action and choice, and advocate the view that it is about character and other properties of agents. The time has come to sketch more fully the moral standing of mercy.

§7.3.2. The Moral Standing of Mercy. I have suggested that mercy is to be understood as a virtue. Therefore, if mercy is to have moral standing, the virtues must have a place in moral theory. So far I have assumed a ‘moderate approach’; 50 namely that in our moral cogitations the virtues (as well as some other entities) should not be forgotten, since without them it is not possible to do justice to the complexity and richness of our moral lives. 51 Few philosophers would dispute this; after all, the only change required is an expansion in the domain of objects liable to moral evaluation. No longer are actions alone to be evaluated, but motives, traits of character and so on. Just as particular actions can be enjoined, so too can the cultivation of certain virtues. However, most

51. Loc. cit.
would still maintain that, although a consideration of the virtues has a place in moral thinking, their value is only instrumental, and the focus must remain on the evaluation of action and moral agents must continue to emphasise choice, obligation, and requirement.

This view it seems to me is mistaken. I am inclined to a far more radical view. On this view the central concepts, in fact the fundamental concepts, of moral theory and the primary objects of moral concern are agents and their characters rather than their actions and their choices. The primary bearers of moral epithets (and therefore the bearers of moral evaluations) are agents and, in particular, their characters; in other words, their virtues, (and to a lesser extent, their motives, and dispositions), rather than an agent’s actions or the consequences of an agent’s action. My claim is that the fundamental questions of morality are concerned with the type of person we want — or should want to be. The answers we give when faced with moral quandaries will depend upon the sorts of persons we are. 'The question', as Edmund Pincoffs succinctly puts it, ‘is not so much how we should resolve perplexities, but how we should live'.

Whatever moral value an action has, on this view, is dependent primarily upon the moral properties of the agent, her virtues, dispositions, springs for action, at the time of acting. Thus, I deny that evaluations of character and motives can be reduced to an evaluation of the types of actions that are characteristic manifestations of that trait or motive. On this view, what is of central concern to moral thinking are the virtues and their cultivation, rather than the performance of specific actions that have particular properties, such as respecting a principle or promoting some end. By encouraging the cultivation of the virtues the actions that are morally appropriate will follow naturally.

Having said this, I now outline my objections. The first objection to moral legalism concerns the way that morality is practised. When agents reflect upon their actions they do not ask only whether they have done the right thing, but whether, at the end of the day, they are a good person.

53. An action can be right, because it is appropriate, or achieves some goal, but it will only be morally good if the disposition that grounds the action was good, i.e., springs from good values. Cf. M. Stocker, 'Act and Agent Evaluations', The Review of Metaphysics, (27:1973), pp. 42-61, at pp.58, 60.
As Lawrence Becker has argued:

...not what my act was, but whether it was an index to my character. If I am satisfied that I am a fundamentally a good person, then it is hard for me not to think I ought to be excused, because I will regard my wrongful acts either as necessary evils or a blunders, mistakes [that are] essentially out of character.54

Given the way morality is practiced, character-appraisal is central to moral evaluation, and not evaluation of atomic actions or particular choice-contexts.

Second, moral responses to other agents are grounded not on their actions, but their character, as manifested either, on some occasion with this action in this context, responding to a particular non-permanent property of the agent’s personality; or as a manifestation of an ongoing and permanent or semi-permanent property that may be exhibited in certain contexts or in many contexts. Their actions are merely an index of their character, on this occasion, and if forming an ongoing tendency to behave in particular ways in particular circumstances, their character generally. When confronted by some bloody-minded civil servant we do not only think his action wrong — and leave it there. We rail against him — his attitudes, his beliefs, in short, his defective character, as a civil servant. That is the key to the moral assessment of his actions. It is not merely that wrong-making properties inhere in the act itself. Disapproval of his actions depends ultimately upon disapproval of some aspect his character.55

Moreover, for the virtuous person the question ‘What ought I to do?’ plays little role in their moral life. A person imbued with virtue will have identified the salient moral properties of some context and formed the appropriate disposition to behave in the appropriate manner. They would not ask themselves this question. Or they have come to understand that the context is rather more complex, and the question is an expression of this recognition and realisation that the identification of the salient moral properties will require rather more conscious effort. In this case, it is merely the beginning of moral reflection, and other virtues have come into play. In both cases character informs and directs practice,

54. Becker, op. cit., p.112.
and if an agent’s character possesses the virtues, her actions will be morally praiseworthy. They do not trouble themselves with choice, obligation and so on as the last step in moral thinking.56

Finally, the sources of value of the elements in a moral context are often quite different. It does not seem to me that there can be set — or discoverable — universal principles of commensurability, either within a single class of objects — or between classes. Conflicts between values are ubiquitous; moreover, the number and variety of contexts is unlimited, and so the quest for general, universal principles, that infallibility yield the right result, is doomed to failure.57

The most important objection to this view is that it leads to moral skepticism. We simply do not know what is right or wrong, what we ought to do or not do, since no rules are derivable, there is no common currency, and the conflicts of values, the stuff of which quandaries are made, are not resolvable. I believe this to be mistaken. It seems to me — and I agree with Nagel here — that although we may lack total unassailable justification, we can still practice good judgement against the background of the rationally-reflected-upon values we do have and our practical judgment — our appraisal and balancing of the salient moral features of the context.58 The only way to make sense of this is within a moral outlook that is centred round character and virtue. There are a number of consequences of this approach that need to be noted. First, since appropriateness of response is determined by the moral properties of the context, one can not formulate principles in advance — or legislate beforehand.

Second, conflicts of values are inevitable. Two quite different values may speak to the one situation, for example, justice and mercy, and it is impossible to realise them both, simultaneously with respect to the one state of affairs. Such conflicts are not merely illusory, and whichever way

57. This is not to say that it is never the case that all rational agents ought not to reach the same evaluation. For example, all rational, moral agents ought to reach the decision that genocide is wrong, as is unprovoked aggressive war, persecution, racism and the like. Not to reach this evaluation reveals not only a gross defect in an agent’s character, but in his rationality. This is so because there is a core set of values that the members of a community must possess, however individually they may augment them, if it is to flourish. Such moral obscenities attack those values. Given that an individual’s own capacity to flourish is tied that of the community, it would seem rational for him to hold those values central to community life and reject those that threaten it.
they are resolved agents may be left feeling guilty and uneasy, while knowing that they did the right thing as far as they could determine it. This is because the properties of the context upon which a particular value — and response in the agent — supervene, do not disappear when a choice is made. They still call to that other value and that sensitivity in the agent.\textsuperscript{59} One task of moral philosophy is to cultivate in agents the capacity to think as clearly as possible about such conflicts, but also be sensitive to them.

Third, owing to the enormous numbers and types of considerations that bear on some issues and the fact that different agents weight various considerations differently, an agent can, in the vast majority of cases, never know for certain what the right course of action is. In fact, owing to the incommensurability of value, there may not even be a ‘right course of action’. All she can do is do her best in thinking and assessing the options before her. Of course, some answers will appear more certain than others, and some courses of action will be morally obnoxious by any criterion and allow no compromise. But in many cases uncertainty still lurks and agents must be aware of this and be open to re-examination of their evaluations and judgments.

§7.3.3. The Basis of Mercy’s Moral Standing. It remains now to set out a characterisation of mercy that give mercy moral standing. I want also to explicate, albeit briefly, the features of an outlook that will most naturally accommodate this virtue. The most important element is the dispositional framework in which the virtue of mercy resides. It is, I argued above an attitude of care, a sensitivity to the needs, misfortunes and sufferings of others. The moral outlook in which mercy resides must take these properties as central and as imperatives.

In recent years, this moral orientation has received much attention from philosophers. Although a number of books have appeared discussing an ‘ethic’ of care,\textsuperscript{60} it is the work of Carol Gilligan that has received the most attention. I shall, in what follows, draw upon her insights. First, some background.

Over the past three decades there have been two important

developments in moral theory. The first is a re-examination of the virtues and as a result of that, a reconsideration of the broader issues of the acceptability of agent, character-centred moralities. There are few philosophers now who would fail to see some importance in this approach, and incorporate these considerations into a 'mature' and fully expressive mercy outlook. This development had the effect of expanding, within morality, the objects of evaluation and concern.

The other development has occurred to morality itself. It has centred round doubts about and ultimately a rejection of, canonical features that morality was thought to have: the pre-eminence of a normative content, impartiality, universalism, maximisation, universalizability, the pre-eminence of rights, duties and obligations and justice. Although the virtue approach has been very much part of this development, it can also be associated with the rise of a 'feminist' version of moral theory, the main example being the work of Carol Gilligan.61

Gilligan found empirical evidence for the existence of a moral orientation that is distinct from an outlook that is based on impartiality, justice, impersonal values, universal principles and so on. There is, she claims a 'different voice'. On this view, an agent is embedded within a 'network of connection, a web of relationships that is sustained by a process of communication'.62 An agent's orientation is towards care and responsibility within that web, and maintaining those personal relationships. Morality, importantly, consists in attention to, promotion and preservation of these relationships, of responsiveness to them and understanding of them, and to the other individuals in these 'networks'. Moreover, since morality rests upon connection and direct response between agents, these connections and responses exist prior to any moral beliefs that they may have, beliefs about what is right or wrong or the moral value of particular principles.63

On Gilligan's view, moral problems are not the result of a conflict of

rights, to be resolved by a ranking of claims. Moral problems are embedded in a contextual framework. This framework defies abstract, deductive reasoning. For Gilligan’s agents, moral reasoning involves a strategy that aims to maintain relationships with other members of the network without sacrificing personal integrity, or deeply held values.64 This is revealed well in this quotation from *In a Different Voice*. Gilligan writes,

...the moral problem arises from conflicting responsibilities rather than from competing rights and requires for its resolution a mode of thinking that is contextual and narrative rather than formal and abstract. This conception of morality as concerned with the activity of care centres moral development around the understanding of responsibility and relationships, just as the conception of morality as fairness ties moral development to the understanding of rights.65

This ‘care orientation’ involves a ‘sensitivity to the needs of others and the assumption of responsibility for taking care’66; it has an ‘overriding concern with relationships and responsibilities’67 and views attachment and connection,68 intimacy69 and compassion70 as central moral concerns.71 To use Gilligan’s words:

...The moral imperative that emerges...is an injunction to care, a responsibility to discern and alleviate the ‘real and recognizable trouble’ of this world. For men the imperative appears rather as an injunction to respect the rights of others and thus to protect from interference the rights to life and self-fulfillment.72

Thus, to fully participate in a network of mutual concern, an agent must understand the needs, interests, welfare – and projects – of others, as well as oneself, and this requires an attitude to other agents informed by care, love, sympathy, empathy, compassion and sensitivity.

Now, it must be pointed out that Gilligan does not claim that the partialist outlook should be seen as supplanting or replacing impartiality as the basis of all morality. Gilligan’s view is that partiality and

impartiality are appropriate in different contexts – and their appropriateness is context-dependent, and informed by the particular case. Thus, the notions of care and responsibility provide non-subjective standards, and they allow one to say that a certain response was the appropriate response for that individual to take – but that this does not imply that the agent can know that it was the right action in that situation.

It is not difficult to see why such an outlook as this is attractive. It provides a clear account of the moral status of mercy. To be sure, Gilligan's emphasis on 'care' and the attendant rejection, within that outlook of impartiality, universalism, maximisation and justice are hallmarks of mercy and required in a moral outlook if mercy is to have moral standing.

It is worth emphasising this point. Mercy as a virtue, or more generally, a trait of character and sensitivity to the needs of others, shows that in our moral deliberative practice we ought not to reason or deliberate about how to act. We should respond, in ordinary circumstances, to the needs of another spontaneously, without stopping to think. We should act and react to others on the basis of partial concerns, our particular values, and the value we place on our relationships with others. We cannot, if we are to be merciful, focus our attention on impartial, universal and maximising considerations. Mercy, after all, is a personal, partial response to the needs of an individual agent. Such a response will only be possible if we cultivate certain dispositions that will lead to these sort of partial, particular responses. They are manifestations of person-centred, particular, non-maximising values.

Second, it is compatible with the Aristotelian influenced position I advocate: the fact that certain modes of action and attitudes are appropriate to certain circumstances, yet still leave room for uncertainty and debate, along with the emphasis on sensitivity to the interests of others and the considerations that bear on some circumstances or some particular circumstances. This view also takes as central the idea that acting morally involves a type of moral perception,73 as well as the fact

that the notion of ‘appropriateness’ involves ‘ judgment’ and phronesis.

Third, mercy is concerned with respect for individuals as particular, identifiable agents — not as faceless, anonymous individuals. The ‘care’ perspective has this as a central theme, along with the view of agents are part of a web of relationships to which they should have certain types of responses, depending on the circumstances. They should, in some cases, pay attention to the relationship, to the needs of the other agent, or respond to them; or promote and preserve their relationship with them.

This web can consist in relationships with other people who are close to the agent, such as family and friends, or people who are more distant, such as subordinates. It can consist in a social hierarchy, for example, an aristocracy, of judges and felons and so on. Sometimes agents will not be concerned to promote and preserve a relationship, but the point is that in virtue of being part of the web they must respond. Therefore, for mercy to operate, one must assume such a web of relationships and attachments. Moreover, to be merciful is to promote, preserve and extend such relationships, not only directly with the beneficiary but those who see the display of the virtue. Their lives are enriched too.

Fourth, to truly ‘ care’ for another, their welfare, interests and wellbeing and be sensitive to their needs, and thereby be capable of being merciful, one must possess a certain on-going dispositional framework. That is, one’s personality and character must be imbued with the virtue of care and concern and the attendant sensitivities. That is central if one is to display the virtue of mercy. In fact, the notion of a virtue of mercy only makes sense against a general moral stance of care and concern.

Fifth, this outlook preserves other features of mercy that were thought problematic: its optional nature, (since it is optional whether one cares for another, in the sense that a specific act of caring cannot be demanded of an agent); its imperative nature, (since one feels an imperative, feels compelled by one’s attachment to be concerned and interested in other people with whom one shares a relationship. Not to feel this way reveals a deep malady of the spirit, as it would indicate a defect of character and a certain lack of genuineness in one’s care). Finally, just as one can care more than one can be expected to in the circumstances, and thus act in a supererogatory way, one can display the
virtue of mercy, in such a way that is clearly an act of supererogation.

§7.4. Mercy and Morality

The image of mercy as a virtue, as well as the account that I have given of its nature, and the revisioning of morality that I have advocated, raises the question of mercy's relationship to two features of moral theory that, it is held, are tests of the adequacy of any moral idea: neutralism and maximisation.74 Mercy, as a virtue, seemingly challenges both of these; in fact, the characterisation of mercy that has been employed up to now has involved an apparent rejection of these features. If one remains committed to these as features of contemporary moral systems, then no place can be found for mercy as I have characterised it. I shall set out the problems that mercy seems to raise, and then provide a resolution.

§7.4.1 The Problems. Mercy, as we saw, is a personal, particular response to some agent in need. It is, on one level (when the display of a trait of character) an emotional response to their plight, an emotional response grounded in values that the benefactor holds about people and their welfare, and which result in certain typical actions. Mercy is particularistic, concerned with the particular case. Thus mercy is reactive. That is, the benefactor's act of mercy is a reaction to the plight of the beneficiary. Thus, the springs of mercy are very often non-cognitive; that is the agent will not think about being merciful but will be overcome by a desire to be merciful. Mercy emanates from the way one agent feels about another, however these feelings may be grounded in values. The display of the virtue of mercy, even in ordinary circumstances, is an example of a partial response to an individual in need. To display the virtue of mercy is to experience a disposition to behave in a certain, beneficial way, because one has perceived the salient moral features in some context.

features to which one has been sensitised and come to value in a particular way. Thus, displaying the virtue of mercy is to act from, express and give special weight to one's own values, projects and outlooks, give a special place to them above those of other people, as well as according a special place to the needs of the beneficiary.

(a). Neutralism. It is a standard claim in moral theory that to act morally agents must act neutrally and act optimifically. What does this mean? Moral Neutralism, as I shall refer to it, is characterised by two related theses: to act neutrally is to act impartially and to act universally. Impartialism is the thesis an agent must give no special weight to any agent's projects, interests, loyalties, friends, kith and kin; she should adopt a neutral standpoint, detached from her own life's interests as well as those of others. Impartialism holds that one's interests are no more important than any other agent's interests when one is evaluating options. From this it follows that to be impartial, in our moral calculation, is to give the same weight and importance to the interests of others, as one's own. The fact that these interests are my interests does not licence me to count them more than the interests of anyone else.

The related thesis of moral universalism holds that the various distinctions between agents are morally irrelevant to any evaluation. They must play no part in the evaluation of actions. Who performed A, according to universalism, is not important to its evaluation. Responsibility for A — no matter who you are, is. Universalism, then, is a thesis of act-choice morality.

(b). Maximalism. To aim maximally is the aim for the best result possible in the circumstances. Moral maximalism holds that agents ought to aim for the best result that it is possible to achieve in the circumstances. Anything less is not only not good enough, but morally wrong. Thus, moral maximalism holds that agents are enjoined to choose

---

75. All the prominent philosophers of the past two centuries — Kant, Bentham, Mill, Sidgwick, Moore, Rawls, and Singer — have been moral neutralists.
76. I shall discuss them as if they were identical.
78 Cf. Heyd (AJP), op. cit., p.25; Stocker (AJP), op. cit., p.206.
79. Moral Neutralism grows out of the attempt — beginning with Kant — to set out a general, law-like prescriptive code of morality; or as I call it 'moral legalism'. Imperatives are not addressed to this agent or that agent; nor do they take this particular agent as object — or that agent; instead they are enjoined of and directed towards all agents similar in the relevant respects. In other words, the anonymous, featureless, inter-changeable individual.
that option, from the range of options open to them, that will better than any other option maximise their goals. We have discussed this thesis already. Maximisation is particularly prominent in consequentialist discussions of the morally correct response to some good. Writing about 'classic utilitarianism', Rawls explains the deep intuitive appeal of maximisation:

It is natural to think that rationality is maximising something and that in morals it must be maximising the good. Indeed, it is tempting to suppose that it is self-evident that things should be arranged so as to lead to the most good.

It is not merely the fact that maximisation has a deep intuitive appeal. The fact that consequentialism maximises the good is part, no doubt, of the intuitive appeal of that doctrine. Moreover, maximisation is closely identified with what it is to be a rational actor: to settle for less is to act irrationally.

It is not difficult to see how mercy might be thought to conflict with moral neutralism and moral maximalism. Take the former first. When an agent displays the virtue of mercy, the benefactor as we saw displays a partial response to the beneficiary. She ceases to act on an impartialist outlook, as she gives special weight to her own projects and values and to the interests of the other person. Mercy, as a virtue, is a personal response to the individual needs of some agent. While it is a response to the 'salient moral features' of the situation, they are features that a particular agent has, this agent as an individual, rather than an anonymous exemplum of individual agents. Thus, when one agent is responding to another mercifully, the response is partial and particular; they are paying attention to the features of the 'concrete instance' rather than this case being an exemplum of some featureless generality.

80. In §5.3.
81. However, it is not a notion only restricted to consequentialism. Deontologists are enjoined to do their duty, and nothing short of their duty, that is, do their best always. In the discussion that follows, because I am concerned to develop an account of the foundation of mercy based in a consequentialist outlook, for the reasons given in the introduction to this chapter, I shall not discuss moral neutralism or moral maximalism with respect to consequentialism.
83. In fact, it would seem to be impossible for a person committed to the social virtues and to living in accord with them, to be also committed to acting in accord with universal impartialism, since so many of the virtues we display have moral value and are possible only because they are expressions of partiality.
Chapter Seven: Moral Standing

It is quite clear, also, that the identity of the actor is important to the evaluation of the act: *Et tu Brute?* Moreover, ‘whose good’ as affected by some action, is important to the moral evaluation of an action, and what we can be enjoined to do.\(^{84}\) parricide is far more heinous than murder — even though, on a universalist’s account they are the same action. Thus, mercy and universalism seem to conflict. Moreover, mercy, since it is a product of practical wisdom (*phronesis*), is concerned with particular cases. In this respect mercy is like any virtue that concerns itself with particular individuals. If these other virtues — such as courage, certain sorts of benevolence, charity, individual love, friendship, generosity — are to have a place in moral theory then universalism needs, it seems, to be abandoned.\(^{85}\)

The troubles for mercy do not end there. Mercy, when an act of forbearance, involves settling for less. An agent who mercifully forgives a debt, settles for less [assuming they have no other projects that will benefit]; a duellist who refrains from dispatching his vanquished adversary settles for less satisfaction than he is entitled to, and capable of procuring. Mercy — and any other action that involves sacrifice — would be, if maximisation is enjoined morally and rationally, wrong and irrational. Moreover, the adoption of a moderate, gentle life-style, a part of which is the cultivation of the virtue of mercy, cannot be defended on the ground that such a life style will yield more or equal pleasure than a more opulent one, only delivered in a different coin. Acts of heroism, steadfastness and bravery usually involve a nett loss of pleasure at least in the short term. The point of all this is that supererogation, mercy, charity, benevolence, in fact any virtue that involves cost to the benefactor and

\(^{84}\) This is the point of one of Bernard Williams’ famous attacks on Utilitarianism: It is absurd to demand of...a man, when the sums come in from the utility network which the projects of others have in part determined, that he should just step aside from his own projects and decision and acknowledge the decision which utilitarian calculation requires. It is to alienate him in a real sense from his actions and the source of his own convictions. It is to make him into a channel between the input of everyone’s projects, including his own, and an output of optimific decision; but this is to neglect the extent to which his actions and his decisions have to be seen as the actions and decisions which flow from the projects and attitudes with which he is most closely identified. It is thus, in the most literal sense, an attack on his integrity. (B. Williams, in J.J.C. Smart & B. Williams, *Utilitarianism: For and Against*, Cambridge, 1985, pp.116-117).

\(^{85}\) This is not to say that in some circumstances some form of universalism is not important. For example, when a legislator comes to frame laws, universalism is necessary: since if the law is to be workable, and comprehensible, it must be a general and universal. (Cf. Urmson, *loc.cit.*) This is not to say that in its operation it must remain universalistic. As Aristotle was aware, and as commonsense (and commonsense morality) requires, on the appropriate occasions universalism should be abandoned – and particularism practiced. In other words, the law should be tailored to individual cases. *Vide,* *Nicomachean Ethics,* Bk.V.10

267
sacrifice, all seem to run against maximisation of the good through action as an all encompassing policy.

§7.4.2 The Resolution. We can resolve this apparent impasse quite simply. First let us make a distinction between justification and deliberation. Justification, within moral theory, is no more than providing the reasons why some states of affairs should be, the case. That is, the reasons why some state of affairs is morally right and ought to be realised. Justification is objective, in the sense that the reason why something will be right will not take as an essential component any particular agent's wants and desires. Deliberation, on the other hand, is concerned with how agents think about some state of affairs, what reasons function as a spring for their actions, and what values are important to them and bear upon the situation at hand. Deliberation is essentially subjective, springing from a particular agent's own interests, projects desires and so on. This distinction has a long and venerable pedigree in teleological thought. We recall, two of the classic utilitarians: First, John Austin:

Though he approves of love because it accords with his principle, he is far from maintaining that the general good ought to be the motive of the lover. It was never contended or concerned by a sound, orthodox utilitarian, that the lover should kiss his mistress with an eye to the common weal.86

And J.S. Mill writes, in Utilitarianism,

It is the system of ethics to tell us what are our duties, or by what test we may know them; but no system of ethics requires that the sole motive of all we do shall be a feeling of duty; on the contrary, ninety-nine hundredths of all our actions are done from other motives, and rightly so done, if the rule of duty does not condemn them.87

Given this distinction, a solution is clear. Consequentialism is concerned with results: how the world appears after the enjoined action has been performed. It is not concerned with the motivation of the agent in bringing that world into being, but with only the value in the world after the enjoined action has been performed. Now, if that is the case then the way the actors deliberate is of no importance to the action's justification, to it being right, so long as the world that results is at least as

valuable as the world that would have resulted if the agents had acted on
a principle of impartiality or universalism. An agent's deliberative
process will be important in the action's evaluation only in so far as it
affects the value of the state of affairs produced.

With respect to mercy we can see how this works. Mercy's partial,
particular nature, in other words the springs for mercy, are important to
its justification only in so far as they affect the value of the action. The
value of the action, its justification, is determined neutrally. As I said
above, the way the actors deliberate is of no importance to the action's
justification, to it being right, so long as the world that results is at least as
valuable as the world that would have resulted if the agents had acted on
a principle of impartiality or universalism. So there is no conflict between
the characterisation of mercy that I have developed here, as being
something that springs from personal and particular deliberative
processes, and the moral neutralism and moral maximalism that provide
its justification. Each speaks to a different aspect of the notion of mercy.

Moreover, if agents deliberate in a universal, impartial way they
may well undermine the values that they want realised and so produce
less value overall. In other words, they will fail to meet the other
desideratum of moral theories: maximisation of the appropriate value.
The best thing for them to do, in order to maximise the value appropriate
to their circumstances, is not to deliberate in a universal, impartial way
but to deliberate in that way that will realise those values as a natural
consequence of acting. In this way, given the goals that an agent has, the
maximum amount of value will be created. We can illustrate this with
the following examples.

1). It is believed that parents should love and care for their children.
This is a universal, impartial value. Now if the all parents attempted to
pursue this value in a universal, impartial fashion, then it would not be
as well produced as if every parent were to pursue it on partial, non-
universal motives.88 That is, the value that they want instantiated will be
better produced if they pursue it on non-universalist, partialist motives.

88. I owe this example to Philip Pettit. He and Geoffrey Brennan take a similar view of the
relationship between motivation and right action in 'Restrictive Consequentialism', AJP, (64:1986),
pp.438-455.
2). Suppose that I want to use my time efficiently.\textsuperscript{89} I can do one of two things. The first is to examine every option, every choice and see how this or that way of doing things will take up my time, in other words, justify my actions. This would be very time consuming and would defeat the purpose of trying to conserve my time. The second thing I could do would be to adopt various policies, methods of deliberation, that I have good reason to believe are time-efficient, and then in my day to day life act on those. Thus, I cease to monitor the cost in time of my every single activity and instead act upon various policies that I believe are time efficient. In this way I attain my goal: efficient use of my time.

3). Suppose we say, as I would in fact argue, that agents ought to be merciful, that mercy is a value that ought to be realised in the world. The consequences of acting mercifully, (some of which I will set out in the next section) are extremely valuable to individuals and to the community. Now, were an agent to deliberate she would undermine this value: it is an essential feature of mercy that it is non-deliberative. That is, that it is a spontaneous display of concern for another agent. One simply cannot, given the logical structure of mercy, deliberate over displaying it. One can choose not to express one's merciful feelings in action, but the having-of-the-attitude is spontaneous. Moreover, there is great value to be derived from a person spontaneously displaying mercy. The fact that it is spontaneous adds more value to the direct consequences of the act, which is the alleviation of the burden. So while there may be a justification for mercy like actions, the only way to realise these actions, so as to attain maximal value is to deliberate on a basis other than a concern to produce maximal value. Sidgwick with his characteristic eloquence puts the point this way from a Utilitarian perspective:

\begin{quote}
It is not necessary that the end which gives the criterion of rightness should always be the end at which we consciously aim: and if experience shows that the general happiness will be more satisfactorily attained if men act from other motives than pure universal philanthropy, it is obvious that these other motives are reasonably to be preferred on utilitarian principles.\textsuperscript{90}
\end{quote}

Now, this has an important consequence for mercy. In order to instantiate in the world, some sorts of values (for example, mercy, love,

\textsuperscript{89} Philip Pettit's example, Pettit (1986), \textit{op. cit.}, p.408.
friendship, forgiveness, loyalty in other words, what might be called the social virtues) an agent has to act and deliberate in a partial and non-universal manner. This leads to the conclusion that a consequentialist who would value the social virtues must adopt a policy not of maximising value but of cultivating the virtues. In this way, her goals of the maximum amount of value overall will be realised. What this shows is that consequentialism can be compatible with mercy, since the practice of mercy ‘delivers the goods’, produces on certain occasions more value in the world than any other option available to an agent. Thus, the characterisation of mercy that I have developed here, is not only quite compatible with consequentialism but it emerges that mercy is a practice that a consequentialist would encourage.

It may well be the case that the cultivation of social virtues in general will lead to more value in the world. If that were the case, then not only would a consequentialist encourage cultivation of these virtues, since they are sometimes useful, but she would be required to encourage their widespread cultivation. But that is a thesis that is outside the scope of this dissertation.

§7.5. Why Mercy?

We saw in the last section that a consequentialist account of mercy can be provided if we make a distinction between justification and deliberation. But can we find reasons that are peculiarly consequentialist that justify mercy not only as a practice but as a practice that springs from a particular dispositional basis? I believe that we can.

When we think about mercy we typically think about enormous power differentials and grave contexts — weighty matters, life or death situations, or situations in which there is a great need. Ordinary moral agents do not usually find themselves in such landscapes, although from time to time they do: for example, war service, being cast adrift in the ocean after a shipwreck, and the like. The time when we are most often confronted by a context in which mercy is asked of us is when we meet the impoverished and destitute. If ordinary folks so seldom take the

opportunity to perform acts of mercy, why then is it so highly valued?
Recall Shylock and why we think him a fitting object of opprobrium.
Shylock appears to us so wicked for two reasons. The first is that he is
cruel, and this is a vice in itself. The second is that not to value mercy, as
Shylock does not, is to reveal a gross defect of character. Even if Shylock
were not cruel, he would still appear, in some important way, morally
defective because he does not value mercy, and as a consequence, he does
not value other people. He does not understand what it is to live with
and amongst others, as part of a community; and as a result he fails to
have a value that enables civil life to flourish.

Moreover, it is not true that mercy no longer has a role to play in
life. The purpose of mercy, especially when displayed in a context in
which the benefactor has been injured by the beneficiary, is to oil those
parts of society that are subject to the most stress and wear – interpersonal
relationships. This is especially the case when the agent with power
makes some concession that restores relations and improves the lot of the
person within their power. In this respect mercy is like forgiveness. But
mercy does not only repair relationships; it builds them too. Being
merciful to the impoverished and the vanquished reunites them with
their community.

Further, mercy enables vaguely specified social institutions such as
the law to function and to retain respect. It tempers a necessary social
institution so as, at the one time, the community may derive benefits
from its existence, enable it to work by allowing it to be general, while
being sure that individual cases will be treated with the casuistry required
— and expected.

As well, the moral status that mercy has is closely related to our
conception of the ‘good person’. It is simply not possible to be a good
person without some degree of compassion, sympathy – and mercy.
Without the virtue mercy, an agent would be incapable of acting
appropriately on certain occasions – when such action is called for. As
well, intricately involved as it is with an ethic of care, one could not
adopt and realise that ethic unless one possessed the virtue of mercy. If
the ethic of care is morally commendable, then a merciless agent would
be incapable of living it. Thus, mercy is highly valued because it is an
essential feature of projects, attitudes and outlooks that are regarded as
good — and because it itself instantiates properties that are intrinsically good: respect, care and the like.

Furthermore, although ordinary moral agents may not find many opportunities to exercise mercy, they do find opportunities where the quality or virtue or attitude of mercy is appropriate and may ground some minor benevolent action.\textsuperscript{92} The creditor who forgoes repayment of a loan because enforced repayment it would cause great hardship, displays such an attitude. Similarly, the burglar who decides not to steal the widow’s life savings, because he sees the hardship such a theft would inflict, exhibits a similar attitude. This returns us to the basic distinction made in Chapter Two. When mercy is a property of person, a virtue, it is an ideal that encapsulates an ethic of care and concern and respect for those within one’s power — in other words, those who are ‘at one’s mercy’.

This also shows what we concluded above, that acting mercifully is not a matter of principle — but character. Since character is valued, its manifestations that we find valuable and laudable will be valued too. A person’s character is valued because we can if we come to know facets of it, what they are like, what they are likely to do; in other words, we can predict and plan our lives if we know something of other people.

Related to this point is another: a person who persistently enforces their rights, who claims that they are owed this or that — in justice — is intolerable. Civil life is possible only if there is flexibility in our dealings with others, only if we forgo justice-based claims and behave as sensitive human beings, aware of the needs and concerns of others. This is one point of the parable of the prodigal son: the son had squandered all he was, in justice, entitled to — yet the father never ceasing to care for his son took him in upon his return — although he had no justice based obligation to do so.\textsuperscript{93} Good Samaritanism is another work of mercy of which we are all capable. In all these things an attitude, and sometimes the virtue of mercy is displayed. This leads to another important point. Mercy represents an abdication of power and control. Not only is such an abdication difficult and praiseworthy because of that, since there is a

\textsuperscript{92} Loc.cit., with whom I agree.
\textsuperscript{93} Luke 15
temptation to hold on, but it is praiseworthy because of the elevation out of powerlessness of the beneficiary. Power without purpose, as bad forms of parentalism involve, is morally objectional. Mercy dissolves such power.

These reasons, or justifications for the practice of mercy are teleological in outlook: the world will be a better place if people cultivate an attitude of mercy. This, in fact points to a much broader thesis at which I can only gesture; it is the thesis that more good will come to a community if the social virtues are promoted and people base their lives on those, than if we calculate and become obsessed by principles.

The reasons to cultivate mercy are also reasons to cultivate the social virtues; that is, cultivate an attitude of forgiveness, compassion, toleration and so on. I mentioned in the preface that increasingly people, philosophers included, are advocating a renaissance for the retributive emotions: hatred, revenge and so on. These are destructive forces for a society. Far from promoting harmony and cohesion, essential elements of a peaceable life, they promote antagonism and disharmony. If that is true, then it is in our own interests not only to cultivate an attitude of mercy, but cultivate all the social virtues, and base our lives around them.

The widespread adoption of an attitude of mercy represents, Nietzsche argued, the final stage in the development of human society, (with justice being the penultimate stage). It is the ‘self-overcoming’ of justice, and ultimately revenge and all the retributive emotions that form the psychological, if not the theoretical foundation of justice. In being merciful we ignore the cries of the eumenides for revenge and justice. David Cartwright94 puts Nietzsche’s outlook well:

Mercy, as the self-overcoming of justice, transcends the spirit of revenge which always accompanies justice. For this reason, it is an attitude which expresses a more powerful and self-confident state of being than that of justice – freedom from the spirit of revenge and mastery over attitudes dispositions and feelings associated with revenge, e.g., fear, malice, vengeance, envy. And if being delivered from revenge is one of the bridges to Nietzsche’s highest hope for humans, this deliverance is found in mercy and not justice.

Chapter Seven: Moral Standing

There is an element of truth in Nietzsche’s point. Our moral outlook deserves the epithet ‘Dolittle’ morality:95 we have the morals and the moral theory we can afford and that is appropriate to our circumstances. However, we should, as Sidgwick pointed out, try all the time to elevate these standards.96 Adopting an attitude of mercy and valuing mercy, is part of this process. In other words, it is an essential element in moral progress. An attitude of mercy is superior to that of universal justice, and should be aimed for both socially and individually. When we set aside unremitting and incessant justice-based claims and address each other’s needs — as we would our own — we adopt and cultivate an attitude of mercy, and we make moral progress.

§7.6. Conclusion

In this chapter I have attempted to indicate what I believe the moral standing of mercy to be. I began97 by examining some problems that would seemingly tell against the virtue of mercy finding a place in moral theory. I argued, amongst other things, that mercy was a virtue, that it did not involve humbling the recipient, nor did it involve a denial of autonomy, or reinforcing a power structure that was inherently evil.

In the remainder of this chapter I detailed further my misgivings about the dominant moral outlooks. I examined their history, and indicated their limitations. I suggested that they were very much a part of a cultural melieu, that they failed to describe the domain of moral thinking and were for this reason inadequate. Then I set out, albeit vaguely, an approach to moral thinking that centred upon the properties of agents. This account gave great importance to values such as mercy. Then I indicated how mercy fitted into this account. I suggested that it was part of what it is to be an effective agent, who seeks to flourish in a community. I then went on to examine some the claim that such an approach was unacceptable as it was incompatible with the elements that a plausible moral theory has to possess: neutralism and maximisation. I argued that there was no incompatibility. I then concluded the chapter by suggesting why mercy was so highly valued, and why it should be so

95. After Eliza Dolittle’s father in Pygmalion.
96. Methods of Ethics, p.493.
97. §7.2.
highly valued. I suggested that mercy as an action or as an attitude was an essential element in community life.
Conclusion

The big lie, the great false conjecture, is a potent creator of philosophy. Around us are unproblematic tables and chairs. Unproblematic, that is, until philosophy gets to work. Then we get memorable and massive simple claims such as that we might all be dreaming or that tables are ideas in the mind of God. That is all highly unlikely. (R. Harrison, ‘Punishment No Crime’, PASS, (62:1988), pp.139-151, at p.139.)

We have reached the end of the road. Before we review the journey, two final points must be made. First, why do these problems arise? The reason is simple. The philosophers who have perceived problems in the relationship between mercy and justice, or more broadly, deontology as well as consequentialism, have worked with a number of assumptions and based their arguments upon uncontested, and to them incontestable, premises. These include the primacy of justice, the importance of retributivism, certain images of consequentialism, or some image of the moral life and the end of human existence. All the while they failed to remain aware of the direction that road upon which they are travelling was taking them, or perceive clearly the country through which they are passing. As we discovered, mercy is not problematic, and although the landscape is sometimes confusing, in the end nothing but simple solutions are necessary. The debate about mercy is like other many other debates in philosophy. It involves ‘massive simple claims’ and exemplifies, to use Harrison’s phrase, ‘the big lie, the great false conjecture, [the] potent creator of philosophy’.

Second, what features of our collection of concepts ensures that these sorts of problems are sure to arise? It is not enough to remark, as I did in §1.3 that our beliefs about mercy appear, as a matter of fact, confused. We need to know why. The collection of concepts that we have consists of concepts that find their origin in different times of the development of human society. Not all the ideas from one time ever totally disappears. They remain part of our systems of belief and are part of our shared ‘moral baggage’. They are an important part of what is ordinarily known as our commonsense morality. That is why we find in
Chapter Eight: Conclusion

our collection of ordinary moral notions ideas about honour, integrity, the good life, the value of friendship, and the importance of character: they are ideas most often associated with a timocratic society, one rich in inter-personal relationships, and societal obligations, the response to which, through the manifestation of her ongoing character traits, defines an agent's moral personality and her position in the community. They sit alongside other moral notions, those of duty, law, obligation and contract.¹ Timocratic ideas can be traced through Roman Civilization to the Greeks. Ideas of duty, law, obligation and contract, on the other hand, can be traced not only to the Judaic tradition (which underpins much of Western civilization) but importantly, to the Stoics as well. These notions received, however, fullest expression in, and became dominant in moral thinking only with, the Enlightenment.

The importance of this is clear. Since the collection of moral concepts with which we work is derived from different historical periods in the development of Western Civilization, is not surprising that they do not fit together easily. Conflict is inevitable. The apparent difficulty of accounting for mercy within a duty-orientated morality is a case in point. It is simply a concept that does not naturally live in such surroundings. This is why the conundrums arise: a concept from one period in moral history is valued and retained as part of our moral outlook, yet the dominant moral outlooks of this time do not naturally find a place for these concepts, and they do not sit easily with them. A.W.H. Adkins put this point well with respect to the conflict between traditional Homeric morality and the emerging 'new' morality (the germ of which can also be seen in Homer) that found fullest expression with the early Philosophers:

Systems of values, however, persist while societies develop; and the Homeric system conflicts violently with any form of society which attempts to allot reward or punishment to an action simply on the basis of the characteristics of that action, irrespective of any other claims to consideration that an agent may possess.²

Moral philosophy has turned the full circle. Once again there is a dispute over the properties of the world that are to be taken as fundamental to moral evaluation. It is a conflict between accepted and valued moral notions, as well as being a conflict within moral theory

---

itself. As in Homer's time the conflict is the same: personal, particular considerations, centred round the valuation of the properties of agents versus impersonal, impartial obligations centred round the valuation of their actions. Mercy and its neglected study, and its apparently equivocal status in our moral life, is both a symptom of this conflict and a victim.

It is time now to briefly review our voyage. I began in the preface by attempting to motivate the project in a number of ways: 1. I suggested that mercy was an important concept and worthy of attention for this reason; 2. That it had been little studied, that given the contradictory things that philosophers had said about mercy the concept appeared incoherent, and its moral status was not at all clear; 3. That it raised important questions about accepted and valued moral notions, such as justice, and indeed the adequacy in general of certain popular moral theories.

In the first chapter I presented some further reasons to motivate the project. These took the form of a brief introduction to the problems, a first suggestion as to why the problems arise, and an examination and rejection of some of the major contributions to the debate that surrounds mercy. These 'motivating reasons' provided the aims for the thesis. To recall, my aims were: provide an account of the concept; identify and set out the problems; provide solutions to them; reveal mercy's relationship to the dominant moral outlooks of this time; and explain the often contradictory ways we think and talk about mercy; and finally, set out its moral status.

In the second chapter this task began. I set out an account of mercy, arguing that it could be a property of persons — or of actions. In both cases mercy aimed to lift a burden under which another was labouring or with which they were threatened. Thus, it was an attitude of an agent, or an action that aimed to benefit another — usually by forbearing from acting in particular ways or by choosing some option, amongst a range of options that involved not ignoring their plight, so that the action performed would benefit the person 'within one's power' who laboured under some burden. So, essential to mercy was the existence of a power structure, and the conferring of a benefit by either positive action (the provision of some good, or by the removal of some burden) or by negative actions, forbearing or refraining to act.
Chapters Three to Six were concerned with an examination of mercy's relationship to various moral entities and were in effect taking up the negative case for mercy: showing that it was possible, that it could be justified within the popular moral outlooks of this time, that the concept was coherent, and that any problems that it faced could be surmounted. Throughout all these chapters I showed also how the seemingly contradictory ways we talk and think about mercy could be reconciled and explained. The purpose of this was to demonstrate that there was no incoherence in the ways we think and talk about mercy.

The themes of each chapter were: Chapter Three: deontology (through an examination of mercy's relationship to justice); Chapter Four: consequentialism; Chapter Five: supererogation and moral criticism; and Chapter Six: the possibility of mercy within institutional contexts. Throughout these chapters ran three claims: 1. that mercy was, in the senses that were important, quite compatible with deontology, justice and consequentialism and that our seemingly contradictory beliefs that mercy was both supererogatory and required could be reconciled. Thus, mercy was part of our moral pantheon; 2. that since mercy as an action found a place within the dominant moral outlooks, it was, when morally justified in normal circumstances, an imperative. This was the case because deontology and consequentialism, as traditionally conceived, are, what might be called 'act moralities'. The primary bearers of moral epithets in these moral outlooks are actions rather than their springs. These outlooks are concerned with enjoining or prohibiting, as well the assessing, actions for the most part apart from their springs; 3. that both deontology and consequentialism could, with suitable modifications, accommodate mercy as a trait of character. Therefore, it was possible for mercy as a virtue to find a place within the dominant moral outlooks of this age.

The specific concerns of each chapter are as follows. In Chapter Three I examined mercy's relationship to justice. This was, in effect a roundabout way of examining its relationship to deontology. For justice is considered primarily a deontological notion par excellence and if mercy was incompatible with it — then a deontologist would have no time for mercy. I argued that in almost all cases mercy was compatible with justice — and thereby deontology. In those cases when mercy could not be reconciled with justice, I argued that a deontologist could invoke other
principles so as to choose between mercy and justice. I argued that if deontology was conceived as a way of responding through action to one’s values or dispositions then the deontologist could accommodate mercy as a virtue. Thus the deontologist could accommodate mercy, in all its various splendours, as one amongst a range of duty options open to him. I argued, also in this chapter, that while the quality of mercy was not constrained, acts of mercy certainly were. Therefore, mercy could be the subject of an imperative and the belief that it could never be required was false. With this chapter we left territory that had been, in various degrees, explored in the debate over the past three decades, and headed for terra incognita.

In Chapter Four the relationship between mercy and consequentialism was examined. I argued that there was no incompatibility between the two, and in fact mercy sat quite comfortably within a consequentialist outlook. This conclusion could only be drawn, however, if we were prepared to make certain modifications to consequentialism. These modifications, we saw, were ones that must be made if this theory is to be morally acceptable. Most notable amongst the changes were the recognition of agent-favouring permissions, agent-centred restrictions and agent-sacrificing permissions and a reorientation of consequentialism away from a focus on the value of actions to a focus on traits of character.

In Chapter Five I examined the possibility of moral criticism, mercy’s alleged supererogatory nature and the claim that mercy is a gift and optional in the light of the conclusions to Chapters Three and Four. From those chapters it would seem that mercy could be the subject of an imperative. If that was so then mercy could not be, from a moral point of view, supererogatory, a gift or optional. Nor could the conclusions of those chapters be seemingly easily reconciled with the belief that mercy was something an agent basically had no obligation to give. I argued first of all for the coherence of the supererogatory deontic category. I then suggested that there was a limit to morality, not only in terms of the upper level of actions that it could enjoin but in the lower level of triviality to which it could sink. I then argued that mercy was supererogatory only in specific circumstances and that the truth of the belief that mercy was optional and a gift was true only in specific senses of those terms and in all cases was heavily context-dependent. Roughly, it
was that mercy was completely optional and a gift only in extreme circumstances. In ordinary circumstances it was considered a gift and optional because to the benefactor had such enormous power that the display of mercy was really up to his decision, in the same way that tax paying is a gift and optional, in a metaphorical sense, to the wealthy and powerful. I also explained moral criticism of agents who failed to act or be merciful and the praise of agents who were merciful, as we expected them to be. I also showed how mercy could be thought unconstraining (normally associated with an action not being rational) while also being a rational action. This chapter concluded the negative case for mercy.

In Chapter Six I examined mercy’s relationship to institutional justice, and in so doing, institutional agency in general. I did this within the paradigm context for institutional mercy — the legal system. Conundrums C1-C3 were reformulated for the context of legal justice. This reformulation revealed clearly the issues that needed to be discussed. I also revealed that the discussions of mercy within legal justice had, hitherto, been based upon particular assumptions concerning the nature of law. I called this view the ‘Law as Fact’ outlook. I argued, in effect, that this view was mistaken. I proposed an alternative view, in which law was seen as a manifestation of the values of the actors and their community, which were backed by the coercive powers of the state. Such a view, I argued, easily accommodated mercy.

I suggested that since legal justice was a paradigm instance of mercy within an institutional context, the conclusions reached here would provide a strong indication of the possibility of mercy in other institutional contexts. I argued that there were no theoretical or practical barriers to judges being justified in exercising mercy — the paradigm examples of institutional actors — so long as they possessed discretionary powers. For the same reasons, any other institutional actor who possessed discretionary power could act mercifully or display the virtue of mercy. What ‘mercy’ referred to in this sort of context was the way in which they used their discretionary powers; thus, mercy would be justified if they used their powers properly. I also set out the concept of mercy within legal justice and examined some non-conundrum based objections that could be deployed against mercy. I argued that they all failed. The overall conclusion to this chapter was that institutional actors, especially judges, had the capacity to act mercifully and display the virtue of mercy, even
though their capacity for autonomous moral action was constrained by the duties of their office. Thus, the problems that had often been deployed against mercy within an institutional context did not arise.

In Chapter Seven, the positive case for mercy was presented, as was an account of its moral standing. I began by dealing with some plausible objections to mercy: that it involved a power structure that was morally objectionable, that it had paternalistic elements in it, that it involved humbling, embarrassing and subjugating the beneficiary and thus involved an intrinsic loss of dignity on their part. I argued against the view that mercy created relationships of dependence and involved a loss of autonomy, with the beneficiary becoming a slave to gratitude, forever knowing that his benefactor, in some sense, controlled his being. Then I argued that mercy could be only fully understood by adopting an agent-centred moral theory; in other words, a theory that paid attention to agent-centred values and inter-personal relationships. I argued that the moral theory best suited for this was a modified form of consequentialism; specifically, one that held that the primary bearers of moral epithets were traits of character rather than actions. Such an outlook replaced its traditional concern for the rightness of actions only with a concern for the rightness of any object (actions, laws, dispositions, motives and so on) that would promote the value held by the theory of good to be appropriate in this case.

Finally, I suggested in agreement with Nietzsche, that the stage of a community’s moral progress (from moral barbarism, which based its responses to agents upon the retributive emotions, to a reflective morality, aimed not only at conflict and quandry resolution but at empowering each person to build, within certain limits, their own conception of the good life) was reflected in the amount of mercy it extended and the value that this virtue had in morality. It involved in communities and individuals the ‘self-overcoming of justice’, a denial of the retributive emotions and strict rules, and the substitution in place of that, of a particularised response to individual agents and their needs. Thus, mercy was a constant reminder of a brutal past – and a promise of a kinder future; it represented moral progress from the bad to the better.

Looking back, it seems to me now that when mercy is genuinely motivated it is, as the poets say, twice blessed. It not only reveals a
magnanimity of character, (and thus contributes to the benefactor's attainment of the good life) but is an expression of love and respect. It involves a selflessness that represents a triumph of the best part of the human spirit over a darker side that finds persecution and cruelty all too easy. Taking all this together, it seems to me now that Shakespeare understood well and put eloquently what has taken me an entire dissertation to elucidate — the concept of mercy and its moral standing:

The quality of mercy is not strain'd,
It droppeth as the gentle rain from heaven
Upon the place beneath: it is twice bless'd;
It blesseth him that gives, and him that takes.
'T is mightiest in the mightiest, it becomes
The attribute to awe and majesty,
The throned monarch better than his crown:
His sceptre shows the force of temporal power,
The attribute to awe and majesty,
Wherein doth sit the fear and dread of kings;
But mercy is above this sceptred sway,
It is enthroned in the hearts of kings,
It is an attribute to God himself,
And earthly power doth then show likest God's
When mercy seasons justice. Therefore, Jew,
Though justice be thy plea, consider this, --
That in the course of justice none of us
Should see salvation: we do pray for mercy,
And that same prayer doth teach us all to render
The deeds of mercy.3

References

A. Table of Cases

Bushells's Case, E.R. CXXIV, [Vaug. 135], (1670).
Davis v. Johnson, [1978] 1 All ER (C.A.)
Ex parte Lawrence, 3 S.A.S.R., (1972).
Harrison v. Mansfield, [1953] V.L.R. 399
Horwitz v Connor, (1908) 6 CLR, 38.
In the Matter of a Special Reference from the Bahama Islands, A.C., (1893).
Laker Airways Ltd V Department of Trade, [1977] Q.B.
R v Hyam, (H.L.(E.)), [1975] A.C.
R v Ward, 1 Q.B., (1956).
Schorsch Meier GmbH v Hennin [1975] 1 All E.R. 152
Ward v. James, [1966] 1 Q.B.

B. Table of Legislation


1 Vic. Cap.77 (1837): An Act to assimilate the Practice of the Central Criminal Court to other Courts of Criminal Judicature within the Kingdom of England and Wales, with respect to offenders liable to the Punishment of Death.

13 & 13 Vic. Cap.27 (1849): An Act to remove Doubts concerning the Transportation of Offenders under Judgment of Death to whom Mercy may be extended in Ireland.

7 & 8 Geo. II Cap.28 (1827): An Act for further improving the Administration of Justice in Criminal Cases in England.

2 Ed.m Cap.2 (1328): In what Cases only Pardon of Felony shall be granted.

13 Rich.II Stat. 2, Cap.1 (1389): In a Pardon of Murder, Treason or Rape, the Offence committed shall be specified.


New South Wales Crimes Act, 1900, [as amended to 1990], N.S.W. Government Printer, Sydney.

Habeas Corpus Act, 1679.

Bill of Rights, 1689.

Act of Settlement, 1701.

C. Bibliography


Adler, J., 'Murphy and Justice', Unpublished Paper, August, 1988


American Friends' Service Committee, 'Discretion' in B. Atkins and M.
References


287
Vol. 20, 1910-11, pp. 131-137.


— ‘Gilligan and Kohlberg: Implications for Moral Theory’, *Ethics*, Vol. 98,
References


— ‘Can Judges Be Merciful?’, Unpublished Paper, Division of Philosophy and Law, Research School of Social Sciences, Australian National
References

University, Canberra, 1990.


Donagan, A., ‘Consistency In Rationalist Moral Systems’, *Journal of
References


References


References


References


Kant, I., The Philosophy of Law, (translated by W. Hastie), Clifton, N.J., Augustus M. Kelley, 1974


— (ed.), *Beneficent Euthanasia*, Prometheus Books, New York, 1975,


McCarty, R., 'The Limits of Kantian Duty, and Beyond', *American
References


— and Hampton, J., Mercy and Forgiveness, Cambridge University Press,
Oakley, J. 'Responsibility for Emotions', Photocopy, Department of Philosophy, Monash University, 1990, [This is a revised version of chapter 4, Morality and the Emotions, PhD thesis, 1988, La Trobe University, and which appears in revised form in Morality and the Emotions, Routledge and Kegan Paul, 1991, (forthcoming)]


— Quandries and Virtues, University Press of Kansas, Lawrence, 1986.


Rainbolt, G.W., ‘Mercy: An Independent, Imperfect Virtue’, American
References


Schefflin, A.W., 'Jury Nullification: The Right to Say No', *Southern
References


References


References


