

Some Naive Thoughts About Justice and Mercy

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A longstanding philosophical puzzle surrounds the relationship between justice and mercy. For example, a judge sentencing a convicted defendant is under an obligation to impose a just sentence. At the same time, it is thought proper—indeed, meritorious—for the judge, in an appropriate case, to show mercy, taking account of special factors present in the case to conclude that she should impose a sentence more lenient than what “strict justice” would call for. But doesn’t this mean that her merciful sentence must be unjust? The present paper, after reviewing the problem, suggests what might be a solution—at least for the use of “mercy” in judicial contexts—and examines some of the difficulties it faces.

The puzzling relationship between justice and mercy has bedeviled philosophers since Aristotle.¹ Mercy is ordinarily conceived as a virtue, as a free gift rather than something to which one has a right or entitlement, and as something distinct from justice (to which, of course, one *does* have a right). In appropriate cases mercy “tempers” justice, producing a different outcome than justice alone would call for. Yet isn’t a deliberate departure from the requirements of justice an *injustice*? Jeffrie Murphy summarizes the puzzle well:

[I]f 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 . . . justice. It thus becomes obligatory, and all the talk about gifts, acts of grace, supererogation, and compassion becomes quite beside the point. If, on the other hand, mercy is totally different from justice and actually requires (or permits) that justice sometimes be set aside, it then counsels injustice. In short, mercy is either a vice (injustice) or redundant (a part of justice).²

This puzzle about justice and mercy arises most naturally in legal settings: e.g., a judge imposing sentence, an executive granting a pardon, a prosecutor deciding whom

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¹ “[W]hen we reason it out, it seems strange if the equitable, being something different from the just, is yet praiseworthy; for either the just or the equitable is not good, if they are different; or, if both are good, they are the same.” Aristotle, *Nicomachean Ethics*, bk. V. 1137b1–6, in *THE COMPLETE WORKS OF ARISTOTLE* 1729, 1795 (Jonathan Barnes ed., 1984). For a discussion of Aristotle’s use of the word translated here as “equity,” and its close relationship to mercy, see Martha Nussbaum, *Equity and Mercy*, 22 *PHIL. & PUB. AFF.* 83, 92–97 (1993).

² Jeffrie G. Murphy, *Mercy and Legal Justice*, in *JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY* 169 (1988) [hereinafter *FORGIVENESS AND MERCY*].

to prosecute and for what offenses, or a police officer responding to a minor offense with a verbal warning or a full-scale arrest.³ Yet mercy, we should remember, is not a concept confined to the universe of law.⁴ I display mercy, for example, by stopping to assist an elderly man who has fallen on a busy New York street and is unable to get up. I also act mercifully when, though believing I would be safer if I killed the victim of my robbery, who might otherwise identify me, I stay my hand because he is a fellow human being, likely with a family, who has already suffered enough at my hands.⁵

On the other hand, “justice,” though not necessarily confined to legal contexts, does seem most at home there.⁶ We can, I suppose, say that a businessman who breaks a contract, a swindler who cons old people into giving him their life savings, or an armed robber or rapist behaves “unjustly,” works “injustice” on his victims. But that is a rather artificial mode of speaking, little used outside of philosophical discussions. Ordinary people would be much more likely either to use the word “unfair” or to use some stronger or more precise term: the businessman is unfair; the swindler is callous and despicable; the armed robber and the rapist are “brutal” or “hateful” or “loathsome.” Accordingly, justice and mercy appear to conflict most often in a legal context.⁷ Consequently, this article will focus (perhaps too exclusively) on legal situations.

We can narrow our focus even further by noting that justice and mercy are most often alleged to clash when it comes to questions of *punishment*. Should we insist on punishment that gives each offender what she deserves? Or may we, in certain cases,

³ See *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (arrest for misdemeanor punishable only by fine is constitutional).

⁴ Some writers have claimed that mercy *is* at home only in legal contexts. N.E. Simmonds, for example, insists that mercy is “inseparable from the framework of juridical thinking, exhibiting its distinctive and autonomous character only in the specific context of judgment.” N.E. Simmonds, *Judgment and Mercy*, 13 OXFORD J. LEGAL STUD. 52, 52 (1993). Yet Simmonds himself refers to George Orwell’s compassionate refusal to shoot a fleeing fascist soldier as “his act of mercy,” despite the complete absence of a legal or juridical framework in the heat of battle in the Spanish Civil War. *Id.* at 62.

⁵ Some would insist that my second example is not one of mercy at all. They contend that “one man shows mercy to another when he waives his right over that person”—and, of course, I had no *right* to kill my victim. P. Twambley, *Mercy and Forgiveness*, 36 ANALYSIS 84, 86 (1976). See also KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 188–89 (1989). I see no reason, however, to deviate in this manner from ordinary usage, in which “mercy,” as the Oxford English Dictionary tells us, means “[f]orbearance and compassion shown by one person to another who is in his power and who has no claim to receive kindness; kind and compassionate treatment in a case where severity is merited or expected” (emphasis added). See John Kleinig, *Mercy and Justice*, 44 PHIL. 341, 341 (1969).

⁶ “Perhaps the first point that strikes us when we reflect upon our notion of Justice is its connexion with Law.” HENRY SIDGWICK, *THE METHODS OF ETHICS* 265 (7th ed. 1907).

⁷ Observe, for example, that my assisting the fallen man is quite unlikely to be thought to conflict with justice at all (unless, say, my assistance will make me miss a friend’s wedding, at which I have promised to be best man and am carrying the rings).

have mercy on the offender and inflict less punishment than she deserves? Punishment itself, of course, has long been a source of contention—why is it ever justified? The principal answers that legal philosophers have given are either consequentialist (deterrence, reform, or incapacitation) or retributivist (focused on giving the offender what he deserves). There is a widespread consensus that the relationship of mercy and justice is a problem primarily for retributivists.⁸

The paradox arises only if we regard justice and mercy as virtues that are equally autonomous and non-derivative. If each virtue were to be regarded as derived from some more fundamental value common to both, the relationship between them would be one of competition but not paradox. For example, a utilitarian might regard the value of justice as a subordinate value concerned with the general advantages of rule-following; mercy might then be seen as expressing the desirability of parsimony in the use of coercive sanctions to enforce rules.⁹

Accordingly, this article will concentrate on a retributive theory of punishment whose central principle is that justice requires giving each offender what he deserves.

One might object that the very existence of a difficulty here assumes that justice cannot be trumped—that it must prevail over any conflicting considerations. Otherwise the assertion that mercy, in appropriate contexts, can override justice would hardly appear problematic. Yet in actual practice we do *not* invariably adhere to the notion that the claims of justice cannot be overridden—certainly not if we equate justice to “giving people what they deserve.” Joel Feinberg pointed out more than forty years ago that “a person’s desert of X is always a reason for giving X to him, but not always a conclusive reason,” and “that considerations irrelevant to his desert can

⁸ See Claudia Card, *On Mercy*, 81 PHIL. REV. 182, 183 (1972) (stating that Smart “has argued convincingly that mercy . . . makes good sense only on a retributive, or partially retributive, theory of punishment”); R.A. Duff, *Justice, Mercy, and Forgiveness*, 9 CRIM. JUST. ETHICS 51, 58 (Summer/Fall 1990) (stating that “on a full-blooded retributivist view . . . to show mercy to a criminal . . . is to act unjustly and thus wrongly”); Stephen P. Garvey, *Is it Wrong to Commute Death Row?: Retribution, Atonement, and Mercy*, 82 N.C. L. REV. 1319, 1321 (2004) (“Mercy is typically defined in relation to retribution.”); Jeffrie G. Murphy, *Mercy and Legal Justice*, in FORGIVENESS AND MERCY, *supra* note 2, at 166 (noting “widely held” view that mercy “requires a generally retributive outlook on punishment and responsibility”); Alwynne Smart, *Mercy*, 43 PHIL. 345, 356 (1968) (“The notion of mercy seems to get a grip only on a retributivist point of view.”).

⁹ Simmonds, *supra* note 4, at 53. As this quote indicates, the justice-mercy conundrum *could* arise for some consequentialists—those who are “value pluralists” and do not believe that both justice and mercy are derivative from one common value. Moreover, note Joel Feinberg’s claim that “[t]he claims of justice are hardly exhausted in the vacuous principle that everyone ought, *ceteris paribus*, to get what he deserves.” Joel Feinberg, *Justice and Personal Desert*, in DOING AND DESERVING 80 (1970). The counterexample he gives is a case in which desert and *entitlement* clash—a conflict “between one claim of justice and another.” *Id.* As we do not speak of an “entitlement” to punishment, I will put Feinberg’s objection aside for the time being.

have overriding cogency in establishing how he ought to be treated on balance.”¹⁰ If Richie Rich leaves the bulk of his vast fortune to his unworthy, profligate son and only a pittance to the self-sacrificing daughter who looked after him during his prolonged final years of illness, we might well assert that she *deserves* the fortune but that her brother is *entitled* to it—and that his entitlement will prevail over her desert.¹¹ Another illustration is afforded by the post-1945 treatment of German functionaries who had been complicit in the Nazi persecution of Jews. While they might *deserve* to be barred from public office, that would have deprived the new, democratic Federal Republic with a desperate shortage of trained civil servants. So a number of the highest Nazi officials and their most outrageously vile underlings were sent to prison or to the gallows, but expediency (“utility,” if you will) ensured that many Nazi officials went unpunished or even participated in the new government.¹² And on a completely different note, our legal system’s principle that it’s “better that ten guilty men go unpunished than that one innocent be convicted” is certainly not aimed at maximizing the extent to which defendants are given their “just deserts.”

Various responses to such an objector might be made—e.g., that instances of legalized injustice or shameful expediency are troubling precisely because they violate the fundamental priority of doing justice. For present purposes, however, it should suffice to note that those who believe justice can be overridden by mercy do *not* appeal either to law, to overwhelming practical needs, or to the necessity of minimizing convictions of the innocent. It would normally be considered a legitimate (even praiseworthy) display of a virtue rather than a concession to necessity.

Those who believe that mercy and justice conflict take care to explain that the conflict arises only with regard to a *genuine* act of mercy. Many situations that would commonly be characterized as displays of mercy are actually instances of justice itself—a more individualized, context-sensitive form of justice than what might *prima facie* be viewed as the meting out of “just deserts.”¹³ Genuine mercy, by contrast, “is understood as the partial or complete remission of deserved punishment.”¹⁴ In

¹⁰ FEINBERG, *supra* note 9, at 60. The essay from which the quotation is taken (“Justice and Personal Desert”) originally appeared in 1963.

¹¹ See David Dolinko, *Some Thoughts About Retributivism*, 101 ETHICS 537, 544 (1991).

¹² Consider, for example, Hans Globke, an Interior Ministry official in the Third Reich who drafted various decrees pertaining to “Jewish names”—for instance, requiring all German Jews to take “Israel” or “Sarah” as their middle name—“as well as technical decrees for the introduction of anti-Jewish measures in newly annexed regions.” RAUL HILBERG, *PERPETRATORS, VICTIMS, BYSTANDERS: JEWISH CATASTROPHE 1933–1945* 25 (1992). In postwar West Germany, Globke served as State Secretary—head of the Chancellor’s Office—to Chancellor Konrad Adenauer. *Id.* See also RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS 19–20*, 703 (1st ed. 1961).

¹³ Smart, for instance, claims that most often “mercy is nothing more than a way of ensuring that the just penalty is imposed and injustice avoided.” Smart, *supra* note 8, at 349. Nussbaum likewise observes that for Aristotle and his contemporaries “no [legal] rules can be precise or sensitive enough, and when they have manifestly erred, it is justice itself, not a departure from justice, to use equity’s flexible standard.” Nussbaum, *supra* note 1, at 96.

¹⁴ Garvey, *supra* note 8, at 1321.

exercising mercy, one “decides that a particular punishment would be appropriate or just, and then decides to exact a punishment of lesser severity than the appropriate or just one.”¹⁵

One way to eliminate the apparent clash of (genuine) mercy and justice, then, would be to maintain that *all* instances of mercy—the so-called “genuine” no less than the spurious—are in reality instances of justice. Consider, for instance, some of the examples that Nigel Walker uses to illustrate genuine mercy: “[r]educing the just sentence because an equally guilty accomplice has been sentenced more leniently in error” or “as a reward for meritorious conduct unrelated to the offense” (e.g., the offender had previously saved a child from drowning).¹⁶ It is quite difficult to believe that what a judge in such a case does is first to determine that the just sentence for this offender would be (say) five years in prison, and *then* decide, “Well, but he did once save a life, so I’ll give him less than the just (or fair, or appropriate) sentence.” The judge’s behavior is far more plausibly explained as her deciding that, in view of all the relevant factors (*including* the prior life-saving), the fair, or appropriate, sentence—the one that will do *justice* in this case—is (say) only three years.

Some previous authors seem, explicitly or implicitly, to endorse the idea that what is called “mercy” in legal contexts is in reality simply a subcategory of justice.¹⁷ But more often, the idea is rejected by stressing that mercy “seems basically something we have no obligation to give, and it is difficult to recognize an action as the showing of mercy if the agent was obligated to act as he did anyway.”¹⁸ Since justice *is* an obligation owed to anyone we are treating, something to which that person certainly *does* have a legitimate claim, it follows that mercy cannot be any part of what justice in a given case requires.

How compelling is this argument? Bear in mind that “justice” is a slippery, elusive term. In particular, what counts as “doing justice” in a particular situation will

¹⁵ Smart, *supra* note 8, at 350.

¹⁶ Nigel Walker, *The Quiddity of Mercy*, 70 PHIL. 27, 34 (1995). Walker takes these examples from actual appellate cases.

¹⁷ H.R.T. Roberts, for example, says that if we are talking about judges and sentencing, “[s]urely any case in which mercy is appropriate is one in which the factor making it appropriate requires to be taken into account *before* deciding on what sentence is just.” H.R.T. Roberts, *Mercy*, 46 PHIL. 352, 352 (1971) (recognizing mercy as distinct from justice in non-legal uses.) See also Carla Johnson, *Seasoning Justice*, 99 ETHICS 553, 558, 562 (1989) (Noncomparative justice is exhibited when “our determination of what is due a person . . . is based strictly on what that person deserves,” and mercy “recognizes [desert] and includes it as a consideration in how the person ought to be treated, all things considered.”)

¹⁸ Card, *supra* note 8, at 184. See also Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY, *supra* note 2, at 161 (“[T]o be treated mercifully is to get a gift which we cannot merit.”); MOORE, *supra* note 5, at 189 (“[A] person who is treated mercifully has no legitimate claim to the merciful treatment.”); H. Scott Hestevold, *Justice to Mercy*, 46 PHIL. & PHENOMENOLOGICAL RES. 281, 285 (1985) (“[N]o act which an agent is *obligated* to perform can be an act of mercy.”); Jeffrie G. Murphy, *Mercy and Legal Justice*, in FORGIVENESS AND MERCY, *supra* note 2, at 166 (Mercy “is never owed to anyone as a right or a matter of desert or justice,” but “is best viewed as a free gift.”); Twambley, *supra* note 5, at 86 (“There is no question of mercy being unjust nor, I would contend, is it ever unjust not to show mercy.”).

generally depend on which aspects of the situation are taken to be relevant. When a criminal sentence is imposed, it is quite standard to take certain factors into consideration. What crime was committed? Was violence used? What past record does the criminal have (if any)? Depending on the degree of discretion accorded to the sentencing judge, other factors may also help determine the ultimate sentence. Did the defendant, once arrested, assist law enforcement by informing on other criminals? Had the defendant, earlier in his life, saved someone's life at considerable risk to his own? Is he remorseful, or does he regard his crime as a source of amusement? There are indefinitely many such potential relevant factors,¹⁹ ranging from those that many judges might consider—provocation by the victim, for instance, or destitution so extreme that defendant was unable to feed her children—to others that only a minority of judges would take into account in sentencing (e.g., prior military service, “borderline personality disorder,”²⁰ or “rotten social background”²¹).

My tentative suggestion is that *a judge exercises mercy when she imposes a sentence that is: (1) more lenient than what would normally be expected in a case of this sort; (2) yet just, based on consideration of a range of mitigating factors broader than what would be standard in sentencing a criminal like this one for the same crime.* On this understanding, the merciful judge *is* “doing justice”—*is* imposing a deserved sentence—in light of all the relevant factors, including the non-standard mitigating factors she believes it appropriate to take into account. Her taking account of those factors *is* the exercise of mercy. Because she has no obligation to treat those mitigating factors as relevant, this exercise of mercy is “a free gift” that she has no obligation to exercise. But because the judge *has* in fact decided that these factors are relevant, justice requires that she give them weight in determining what sentence to impose, and in *that* respect mercy is simply one ingredient in determining what a *just* sentence would be. In short, the merciful judge is not one who thinks “I see what sentence this criminal deserves—but I feel like giving him a break.” Rather, the merciful judge, like one who does not show mercy, imposes on the defendant the sentence the judge believes he *deserves*, given the relevant circumstances—but takes a more expansive view than her hard-line colleague as to precisely what those circumstances are.

Broad though a judge's discretion may be in selecting what he will count as mitigating circumstances, this discretion is not unlimited. There are some factors that would be considered utterly irrelevant by the community in which the judge holds

¹⁹ That is, assuming the law itself does not sharply limit the range of factors a judge may consider—as was done, for example, by the Federal Sentencing Guidelines.

²⁰ The DSM-IV describes borderline personality disorder as a “pervasive pattern of instability of interpersonal relationships, self-image, and affects,” characterized by such symptoms as impulsive behavior; inappropriate, intense anger; and a “pattern of unstable and intense relationships” that alternate between extremes of idealization and devaluation. AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 654 (4th ed.1994).

²¹ See Richard Delgado, “Rotten Social Background”: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9 (1985).

office. For example, an overwhelming majority of Americans would think that the particular position of Venus in the sky at the time of the crime could have no possible bearing on the appropriate sentence,²² and might well regard a judge who thought otherwise as unfit to remain on the bench.²³ At the other extreme we will find factors of the following type. Some people would oppose allowing one or another of these factors to play a part in this (or any) criminal sentencing, but many or all would agree that a judge might *rationaly*—even if wrongly—consider them appropriate. An example, likely to command widespread approval,²⁴ would be the offender's prior record of criminal convictions. In between these extremes there will be factors that many people would view as relevant but which many others would think should play no part in sentencing—e.g., whether the defendant experienced severe and continuing abuse as a child.

One problem for my suggestion is to explain just *how* certain of the characteristics of the defendant, of his past, and of his crime are excluded and others included in the set of “reasonable” factors that might be considered in sentencing. In particular, would it not be distressingly circular if the answer involved excluding those factors that it would be *unjust* for the judge to consider?

Not at all. What my view aims at is an explication of what it is for a judge to be merciful. There is no reason why such an explication cannot draw on the concept of justice. Indeed, many of the writers who have sought to dispel the *prima facie* opposition between mercy and justice have used the concept of justice in explaining what mercy is.²⁵

In addition, I believe that many of our decisions about which factors it is reasonable to consider in sentencing can be explained on the basis of societal notions of *relevance*. I stress that I am referring to societal or community notions here. It is simply a fact that almost no one in America today would think astrological phenomena ought to play any part in sentencing. I believe that an important present-day American value (though one to which all too many may pay only lip service) is the irrelevance—for *most* purposes—of a person's race or ethnicity.²⁶

²² Exceptions can be imagined in sufficiently extraordinary situations. Suppose the offender and the victim had made a bet as to where Venus would appear that evening, and although the offender was correct, the victim refused to pay up.

²³ Quite contrary opinions might prevail in a society that puts great weight on the results of astrology.

²⁴ For a dissenting view, see GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* § 6.6.2, 459–66 (1978).

²⁵ See, e.g., Card, *supra* note 8, at 182 (“In developing the mercy principle, I rely upon notions of desert and equality which are ordinarily associated with the idea of justice.”); George Rainbolt, *Mercy: In Defense of Caprice*, 31 *Nôus* 226, 226 (1997) (including in his introductory, “pretheoretic” account of mercy that “[i]t frequently modifies the demands of justice”); Smart, *supra* note 8, at 350 (In a genuine act of mercy one “decides that a particular punishment would be appropriate or just, and then decides to exact a punishment of lesser severity than the appropriate or just one.”).

²⁶ The propriety of “affirmative action” is clearly *not* a context in which we can find a broad consensus of opinion on the irrelevance of race. As a quite different example, suppose three

One curious philosophical objection to the whole notion of a “paradox of mercy”—the alleged clash between mercy and justice that we have been discussing—is that the clash depends on a concept of mercy that is incoherent, because it relies on “the notion of unique particularity,” which “is itself an empty abstraction.”²⁷ Undeniably, explications of mercy sometimes invoke the need for “regarding each particular case as a complex narrative” as to which “the search for mitigating factors must at every point be searchingly particular.”²⁸ N.E. Simmonds suggests that mercy is connected with the notion of “particularity” in the following way:

If one offers some general reason for being given lenient treatment, or one points to features of the case that support such a claim, an argument of justice has been offered, and in asking for justice one does not ask for mercy. . . .

If no *general* feature of a case will ground a plea for mercy, we may be tempted to conclude that mercy is a response to the very fact about the case that escapes all generality: its status as a unique particular.²⁹

And he goes on to argue that the idea of a “unique particular” on which mercy is based turns out to imply the existence of a particular that escapes *all* general descriptions—“a self that is prior to all of its attributes.”³⁰ Yet such a “featureless substrate” *cannot* be “the sole object of our moral concerns,” for it “escapes every act of judgment.”³¹

Despite its connections with traditional problems regarding universals and particulars, the way in which language somehow “hooks on” to the world, and similar intriguing philosophical quandaries, Simmonds’s depiction of what mercy conceptually requires seems exaggerated. In exercising mercy a judge need not somehow contemplate the defendant as a “featureless substrate” or base her decision on some species of direct intuition concerning that defendant that will forever escape capture in words. Rather, the merciful judge will base her decision on certain specifiable, articulable characteristics of the defendant or of his situation. Perhaps, for example, this embezzler experienced remorse before his arrest, by making at least a partial restitution of the money he had stolen. My contention is that the judge’s reliance on what one might think a generalizable principle does *not* entail that this

eyewitnesses testify that the robber they saw was a white man, and the defendant on trial is African-American. Race would obviously be relevant here too. (Notice, though, that neither example deals with the relevance of race in determining the proper sentence for a convicted offender.)

²⁷ Simmonds, *supra* note 4, at 52. See also Emilios Christodoulidis, *The Irrationality of Merciful Legal Judgment: Exclusionary Reasoning and the Question of the Particular*, 18 LAW & PHIL. 215 (1999).

²⁸ Nussbaum, *supra* note 1, at 103.

²⁹ Simmonds, *supra* note 4, at 59, 60.

³⁰ *Id.* at 64.

³¹ *Id.* at 66.

judge will invariably show mercy to every defendant who exhibits pre-arrest remorse or freely returns stolen goods. The judge has decided that *this* defendant's behavior is one feature to be considered in reaching her sentencing decision and that, taken together with whatever other factors she finds relevant, a sentence more lenient than the norm is the *just* sentence in this case. By treating as relevant to the just sentence a mitigating factor beyond the features routinely considered in this kind of case, she has exhibited mercy.

My suggestion faces a considerably more serious difficulty, however—one that plagues any theory that does not simply identify mercy with justice. This is the accusation that showing mercy necessitates treating equal cases unequally, thereby violating the command of justice. That justice involves treating like cases alike is a notion as deeply rooted as that justice requires giving each person his due. Indeed, they find expression in the same passage in Aristotle.³² And many of the papers that have addressed the paradoxical relationship between justice and mercy have emphasized that mercy for one offender means that he gets better treatment than other, equally culpable offenders.³³ Indeed, one critic has gone so far as to find mercy simply irrational for this reason.³⁴

It is tempting to reply that “equally culpable” offenders—identical in every respect that could be relevant to sentencing—are philosophical chimeras, and that in reality one can always find some relevant feature that will differentiate a pair of criminals.³⁵ But, as generations of utilitarians have discovered, merely contingent, empirical facts rarely allay philosophical difficulties.

More importantly, my critic could say that I have misunderstood the scope of her objection. Her point is, for instance, that Joe might receive a less severe punishment than Jim, solely because Joe's judge thought frightful childhood abuse relevant to sentencing and Jim's judge did not. The objection need not assume *identical* characteristics—perhaps Jim's childhood was even more brutalizing than Joe's.

³² In Book V of the *Nicomachean Ethics*, Aristotle cites “the principle ‘To each according to his deserts,’” and says “all men agree that what is just in distribution must be according to merit in some sense.” Aristotle, *Nicomachean Ethics*, bk. V. 1131a25, in *THE COMPLETE WORKS OF ARISTOTLE*, *supra* note 1, at 1785. He also says, however, that a just distribution gives equal shares to equals, and unequal shares to unequals in proportion to their inequality. Aristotle, *Nicomachean Ethics*, bk. V. 1131a–b, in *THE COMPLETE WORKS OF ARISTOTLE*, *supra* note 1, at 1784–85.

³³ See, e.g., MOORE, *supra* note 5, at 190; Garvey, *supra* note 8, at 1325; Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1455–56 (2004); Jeffrie G. Murphy, *Mercy and Legal Justice*, in *FORGIVENESS AND MERCY*, *supra* note 2, at 180–81; Rainbolt, *supra* note 25, at 227; .

³⁴ See Ross Harrison, *The Equality of Mercy*, in *JURISPRUDENCE: CAMBRIDGE ESSAYS* 107, 108 (Hyman Gross & Ross Harrison eds., 1992).

³⁵ Note that the “relevant feature” might even be simply which offender was sentenced first. A judge who imposes a relatively lenient sentence on a defendant in virtue of some characteristic Z might fear, when the next Z-ish defendant comes before him, that continued leniency will cause him to be seen as *making a practice* of taking Z into account. And that perception could lead to criminals *faking* Z, or make persons with feature Z more likely to commit crimes, knowing they will receive a merciful sentence.

But, the critic might continue, assume for the sake of argument that Joe and Jim are identical twins, raised together and subject to equally harrowing abuse as children. Together they hold up a liquor store and, when the proprietor does not comply swiftly enough, both brothers shoot him (with the same model handgun!), each inflicting an injury sufficient by itself to cause virtually immediate death. Suppose that the brothers' pretrial motion for severance has been granted,³⁶ they have both opted for bench trials, and have both been convicted of murder. Joe is sentenced by Judge Warmhart, who believes that the evidence of Joe's abysmal childhood is a relevant factor in determining a sentence. Taking it into account as a mitigating factor, he sentences Joe to a prison term of twenty-five years to life, with parole possible after fifteen years. Jim, on the other hand, has been tried and sentenced by Judge Ironhart, who believes the evidence of Jim's horrid childhood—the same evidence as Joe's—is irrelevant. Finding no mitigating factor, Judge Ironhart imposes on Jim the maximum sentence, life imprisonment without possibility of parole. Here we have a conceivable, albeit unlikely, scenario in which Joe has received a more lenient sentence than his brother, despite their identical culpability, simply because of the differences in what their respective judges treat as relevant factors in sentencing. Yet on my account, justice has been done to both brothers alike. Do we not have here a blatant violation of the basic requirement of justice that equal cases receive equal treatment?

This is a difficulty, I believe, whose roots go exceedingly deep, and it is correspondingly extremely difficult to resolve. To deal with it adequately, one would need to explore the concepts of justice and of equality in far greater detail than I have either the space or the ability to do here. Yet at least a provisional, sketchy answer could be proposed. Begin by noting that at least we are not confronted by the most pernicious form of inequality, in which two persons with equal qualifications (for some good or ill treatment) are treated differently on the basis of an *invidious* characteristic, such as race. Moreover, the problem exemplified by Joe and Jim is pervasive, and seemingly unavoidable, in any decision-making system in which similar, recurring issues are handled by many independent functionaries (or even just *one*) vested with significant discretion.³⁷

Examples range from the mundane—e.g., the perennially unavailing “But everyone was speeding!” defense to a traffic ticket—to decisions of great magnitude, such as whether a California jury will sentence a defendant convicted of aggravated first-degree murder to life without parole, or to execution.³⁸ (Interestingly, virtually

³⁶ Perhaps, for example, there would be Fifth Amendment problems if both brothers wish to testify at their joint trial.

³⁷ Observe that the Federal Sentencing Guidelines were aimed at eliminating this allegedly inescapable form of inequality—and the fate of Joe and Jim hardly gives one reason to doubt the unavoidable nature of the inequality.

³⁸ Under California law, a defendant is eligible for the death penalty if he is convicted of first-degree murder with at least one aggravating circumstance (of which there appear to be at least 25). See CAL. PENAL CODE § 190.2 (West 2006). At a separate penalty phase, the trial jury decides whether such a defendant is to be sentenced to death or to life imprisonment without possibility of parole. *Id.* at §

no one is impressed by the driver's complaint, whereas the belief that crucial life-or-death decisions may vary solely because of the attitudes of different decision-makers has helped fuel the opposition to capital punishment.)³⁹

In the particular situation we are considering, where Joe is shown mercy and Jim is not, we can argue that each defendant received what his judge could credibly defend as a *just* sentence, one that gives the defendant what he *deserved* in view of his wrongdoing and his culpability. Each defendant, that is, received justice of the "noncomparative" variety.⁴⁰ A noncomparative injustice has been committed (to Jim) only if the question of whether the brothers' childhood treatment should play a mitigating role in the sentencing *has a correct answer*, and that answer is "yes."⁴¹ And I would argue that our notions of what it is fitting, appropriate, or necessary to consider in determining a person's desert is simply not sufficiently clear-cut or precise enough to establish that our question *has* one single "correct" answer at all, much less what that answer is.

As for "comparative justice," it "consists in arbitrary and invidious discrimination of one kind or another: a departure from the requisite form of equal treatment without good reason."⁴² It occurs, that is, when the unequal treatment "is done for a bad reason (such as sexually biased hiring practices) [or] when it is done for no reason at all (such as firing someone 'for the heck of it')."⁴³ The difference between Joe's sentence and Jim's did not arise for no reason at all. It arose because their respective judges held different views on an issue as to which reasonable minds can differ—the role of harsh childhood experiences as a mitigating factor—views for which, presumably, each judge can give reasons. Nor was there any improper basis for the difference, such as race, religion, gender, or a longstanding hatred of Jim by the judge who sentenced him.

To sum up, I have suggested a possible way of responding to the paradoxical appearance of conflict between mercy and justice. In developing this suggestion, my attention has been narrowly focused on the situation of a judge imposing sentence on a malefactor. I *believe* that a similar approach could perhaps apply in other legal contexts. For instance, a prosecutor considering whether to file charges in a "mercy killing" case might perhaps take into consideration the defendant's motive and the

190.2(a).

³⁹ See, e.g., *Furman v. Georgia*, 408 U.S. 238, 306–10 (1972) (Stewart, J., concurring); CHARLES BLACK, *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* 22–30 (2d ed. 1981); STEPHEN NATHANSON, *AN EYE FOR AN EYE?* 44–57 (1987).

⁴⁰ See Joel Feinberg, *Noncomparative Justice*, in *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY* 265–306 (1980).

⁴¹ Were "no" the correct answer, Jim would have no *noncomparative* complaint—and Joe's getting better treatment than he deserves is not a noncomparative injustice *to him*. "[N]on-comparative injustice is not done to a person by the expression of a judgment that treats him *better* than he deserves." Feinberg, *supra* note 40, at 274.

⁴² *Id.* at 267.

⁴³ Johnson, *supra* note 17, at 554.

victim's wishes—factors not normally relevant in deciding if a killer should be prosecuted. I make no representation at all that my idea would apply to *non*-legal contexts. For instance, the armed robber who, out of compassion, spares his victim's life does not seem amenable to this analysis.

Even for the limited, narrow segment of the mercy/justice problem that has been the focus of this paper, I make no pretense of having “solved” (nor “dissolved”) any issue. I have tried only to propose a different way of looking at the problem, hoping it may contribute in some small way to the ongoing discussion.