MERCY

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I

A THEORY of punishment should give some account of mercy and yet it is true to say that very little has been said about it at all. It is commonly regarded as a praiseworthy element in moral behaviour—something to be practised occasionally both for the good of the one who punishes and the one who is punished. The suffering that punishment involves is unpleasant for all concerned, and if it is possible to avoid it or lessen it without moral injustice, then it is desirable to do so. We condemn as hard and unbending the judge who never shows mercy and the suggestion is that the poor unfortunates whose lot it is to be judged by him are poor unfortunates indeed. This is reflected in the fact that the opposite of merciful—merciless—means cruel. Presumably there are occasions when it is appropriate to show mercy to an offender, and other occasions when it is not. What are the conditions for the appropriate exercising of mercy, how do we decide how much mercy is appropriate, and when is a judge[1] morally obliged to be merciful, if ever?

The contexts in which we commonly talk about and recommend mercy are many and varied, and some seem more appropriate than others. It is more appropriate to speak of mercy in respect of some murderers rather than others. This is sometimes because one kind of murder is intrinsically worse than another. Suppose, for example, that in a particular state, the penalty for murder is death or life imprisonment, with no provision for lesser penalties. Suppose a man discovers that his wife is unfaithful to him, and blind with uncontrollable anger and jealousy, he shoots her with a rifle that happens to be lying around. Now take another case—the case of a man who murders his wife for her money after weeks of careful planning. We believe that coldly premeditated murder for personal gain is morally worse than heat-of-the-moment murder and that it warrants a harsher penalty. We might consider the full penalty prescribed by the law to be the right punishment, be it death or life imprisonment. It is generally felt that heat-of-the-moment murder does not warrant the same punishment and one would expect the jury to add a recommendation of mercy to its verdict. Mercy *ought* to be exercised in such a case, even if it is difficult to reach agreement on what penalty should be imposed instead. The reasons why mercy ought to be exercised is that the penalty as it stands is too harsh for the

particular offence. To treat these two kinds of murder as being of equal gravity and warranting identical penalties would be a great injustice, one into which the crudeness of the law would force us if there was no provision for mercy riders. The reason why the premeditated murder is thought to be worse than the spontaneously committed one is presumably that the murderer is more responsible when the crime is premeditated. Similarly there seems to be a difference in moral gravity between a murder planned one week ahead and one where the murderer takes a year to plan and execute the slow poisoning of his victim. In the latter case the offender has more time to consider the morality of his actions; his decision is less likely to be influenced by particular events of the moment and the frame of mind he was in that week. The penalty ought to be less harsh in the first case, and where the law does not make this provision we often find a judge making the adjustment under the blanket term of 'mercy'.

It is appropriate to advocate mercy when one murderer acts under greater provocation than another. This point emerges if we consider another example, this time of two heat-of-the-moment murders where an unfaithful wife is shot in anger by a jealous husband, each crime committed by immigrants from different countries. The two murders are similar *in all respects* except that murderer A comes from a country where a wife's adultery causes a husband and his family great dishonour and humiliation, whereas in murderer B's homeland adultery is regarded as a regrettable lapse, but nothing more. Furthermore, in A's homeland murder in such circumstances is looked upon as a comparatively minor offence, almost excusable. Although both men are equally guilty in the eyes of the law, one is inclined to treat A more leniently than B because he acted under extreme provocation and could not have been expected to view his crime as seriously as we would. If the full penalty prescribed by the law was a just and appropriate punishment for murder B, it would be unduly harsh and unjust to prescribe the same penalty for muder A. Where the law made no provision for this sort of difference a fair judge would exercise mercy; a judge who didn't would be regarded as unjust.

Similarly, if A's wife had deliberately flaunted her continual adultery in front of A's friends, and B's wife had concealed her one lapse from everyone but her husband, we would think the greater provocation was a significant difference between the two murders and think it unduly harsh and unjust to prescribe the same punishment for A as for B. A should be treated more mercifully than B; a ten-year imprisonment may be a fair and desirable penalty for B, but unwarranted for A.

Likewise in manslaughter charges a great variety of relevant circumstances may be found, some of which would appear to constitute grounds for mercy. The following case might serve as an example of the uppermost limit of seriousness in such a charge. A motorist is guilty of killing a woman on a well-lit pedestrian crossing; it is established that he was drunk and knew that he would get very drunk if he drank seventeen vodkas; he also knew that he had no brakes and that he had to drive after drinking. He habitually ignored pedestrian crossings, drove very fast and had previous convictions for driving an unroadworthy car, drunken driving, and speeding through a pedestrian crossing. Suppose that the full penalty of twenty years' imprisonment was the appropriate and just penalty for such a case.

Compare this with a second case where the offender wasn't drunk, knew his car was in good order, and was travelling at his normal speed of thirty-five miles per hour in such areas, and it was found that this was, in fact, a safe speed for the conditions. However the motorist didn't slow down as he approached the pedestrian crossing as he should have, and didn't have time to avoid the child who ran across suddenly. Perhaps two years is the fair penalty in this case, but unfortunately our imaginary legal code prescribes ten years as the minimum sentence so the judge has to go through the necessary legal procedure to recommend mercy. Even where the law does prescribe a sufficiently wide range of penalties to cope with the cases described, the judge speaks of showing mercy where he is imposing less than the full penalty and justifies his decision by pointing out the relevant factors which make the crime much less serious than the charge suggests.

All the examples considered to date were chosen to bring out the fact that some crimes warrant sterner treatment than others because they are intrinsically worse (this is particularly so with premeditated crimes), and that we speak of exercising mercy when discriminating in favour of the lesser crimes. These cases are different from those that warrant mercy because of extenuating circumstances. Sometimes a case arises where important excuses can be made for the offender and it is appropriate to show him mercy even though the offence was not less intrinsically evil than other like cases. Take for example, the case of the motorist whose car was in good order and who was driving at his normal, safe speed. Like the previous offender he didn't slow down as he approached the pedestrian crossing and didn't have time to avoid the child crossing the road; it appeared that he had had some very upsetting news that day, and just didn't notice the child step out on to the crossing. While it might be argued that if a man is seriously upset he should not drive if there is a chance that it will

interfere with his driving, it would nevertheless be very hard to impose the same penalty as in the previous case. If we think his emotional state prevented him from giving full attention to his driving, we might also argue that it might have interfered with his judgment of his own capabilities in such a situation. In a very important sense his crime is not as great as the previous offender's, and warrants more lenient treatment. Another example of the same kind would be that of a person who was to some extent forced to commit a particular crime, for example, to provide food for his miserable children, or to avoid a threat of harm to someone else. Such cases are rarely extreme enough to be fully justified, but certainly coercion would normally be considered an extenuating factor which made the crime less grave than it would otherwise have been, all other things being equal.

We might consider now another example of manslaughter which warrants mercy for quite different reasons. This example is the case of a man who knew his car was in good condition, and was a thoroughly competent driver although inclined to speed a little. He approached the pedestrian crossing at forty miles per hour and couldn't stop in time to avoid the child who ran across suddenly. He discovered it was his only child to whom he was devoted, and apart from suffering great personal grief and condemnation, he estranged his wife's affections as a result of the accident. While it would be irresponsible to suggest that remorse was sufficient to absolve a man from the consequences of his crime there are sometimes circumstances in which it is appropriate to take into consideration the fact that the man has already suffered greatly as a result of the crime. In such a case we might consider it unduly harsh to impose what would otherwise be the appropriate and just penalty, and recommend mercy. The justification is that, the law aside, the man has already served part of what we consider a morally just punishment. It is not as though we are 'letting him off lightly', but simply that to impose the full penalty would be to impose a total amount of suffering quite out of keeping with the gravity of his crime. There was in this case, a gap between moral justice and legal justice, the possibility of which the law acknowledges when it makes provisions for recommendation of mercy; sometimes the bridging of the gap is a simple step, sometimes it is a long and complicated legal procedure which might involve appeals to government and heads of state.

It seems then that mercy is appropriate when an offence is intrinsicially less evil than another, where a person acts under provocation, and where there are extenuating circumstances such as impaired judgment, coercion and ignorance. It is sometimes

appropriate where the offender has already suffered a great deal.

In each of the examples so far discussed a recommendation of mercy was necessary to avoid an injustice because the law cannot always anticipate all the significant differences that there might be between offences that look alike superficially. In some countries where murder is classed as first, second, or third degree it is no longer necessary to add a mercy rider to ensure that a heat-of-the-moment murder is treated less severely than a coldly premeditated one.

Now although it is quite normal to talk about mercy in the sort of cases I have described, what we are actually doing is redressing a potential wrong. We say there are mitigating circumstances and what we mean is that the prescribed penalty *doesn't fit* the case in question and that it would be an injustice to impose it. Sometimes it is just a case of pointing out the mitigating facts so that it is clear that the offence falls under penalty X rather than the harsher penalty Y; more often 'mercy' is just a loop-hole to make the law more flexible and sophisticated. Obviously for the law to be completely (morally) just and sophisticated it would have to provide for every possible graduation of a crime and prescribe the appropriate penalty, and this would be impracticable; in the final analysis it would destroy the generality of the law and reduce it to a list of specific descriptions. To avoid this exceptions are provided for by the exercising of 'mercy'. This means that there mercy is nothing more than a way of ensuring that the just penalty is imposed and injustice avoided.

I suggest that most cases of mercy are of this sort and are simply misnamed. Furthermore, the possibility of weighing the just course of action against the merciful course of action does not come up for consideration, and the judge who rigorously applies the law and declines to exercise 'mercy' is not being just as opposed to merciful, but is unjust. Such cases cannot properly be called acts of mercy, and I have spoken of them at some length to avoid confusing them with real acts of mercy.

II

I have suggested in Part One that showing mercy often turns out to be merely fitting the punishment to the crime where the law is too inflexible and unsophisticated to do so. I now wish to discuss what I think is genuine mercy, and to examine some situations in which it is not appropriate.

One of the other things we mean when we talk about showing mercy, is deciding not to inflict what is agreed to be the just penalty, all things considered. The reason for advocating mercy is that it avoids suffering and this is desirable whenever it can be morally

justified. This view of mercy is a very common one and is illustrated in the Christian's cry, 'God have mercy upon us, miserable sinners'.

It is important to notice the distinctions that should be made between condoning and showing mercy. When we condone an offence we do not act merely as if it happened, but rather as if it didn't matter—in other words, as if it weren't an offence. We might ask someone in a tone of shocked disapproval, 'are you *condoning* his act?' but we should ask 'are you pardoning him?' in a quite different tone—possibly in admiration.[2] I do not wish to suggest that pardoning and showing mercy are identical—I simply mean that they both acknowledge the seriousness of the offence whereas 'condoning' doesn't. When a man exercises mercy, what he does is acknowledge that an offence has been committed, 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. He might say to the offender, 'I'm letting you off lightly this time!' and might reasonably expect that the privilege of merciful treatment should be an extra reason why the man shouldn't commit the same offence again in the future.

Although the suggestion, in cases of real acts of mercy, is that mercy is good in itself, it is quite clear that it would not be justified in all cases, and in some cases in fact, would be immoral. In the case of a habitual vicious rapist who showed no signs of repentance and reform, very clear justification for merciful treatment would have to be given for it to be permissible. If the choice in such a case was between a light fine or a term of imprisonment, only an irresponsible person would recommend mercy. To do so would be immoral because it would be endangering others and would probably give the rapist the impression that his crime was not so very serious after all. One ought not to be merciful at the cost of others—to do so would be to defeat what is thought to be the main point of exercising mercy, namely, to avoid suffering. If one's purpose is to avoid suffering, then mercy in the case described is futile because it permits greater suffering and on the part of an innocent party, which makes it an injustice as well.

Generally then, it might be said that mercy is unjustified if it causes the suffering of an innocent party, is detrimental to the offender's welfare, harms the authority of the law, or where it is clear that the offender is not repentant or not likely to reform (and he may not be *likely* to reform even though temporarily repentant). Even if it will do some good, it must be clear that it will do more good than harm before it is justifiable and some may wish to contend that if it involves injury to an innocent party this should be an overriding factor.

It might also be argued that mercy is not justified if it involves unfair discrimination against others. If a judge has before him two cases which are identical in all relevant respects, and exercises mercy in one case but not in the other, he could rightly be criticised for showing favouritism and committing an injustice. If he is going to let one off lightly he ought to let the other one off lightly too, and equally lightly. The point can be seen even more clearly if we take the case of a crime committed jointly by two men whose situations showed no relevant differences at all. To show mercy arbitrarily to one and not to the other would be grossly unjust. Possibly this case would outrage us more because in the former instance of a like offence being tried in two separate cases in the same day, we are likely to think that there must be some significant difference between them that we don't know about. However, if further examination showed they were, in fact, identical cases and the judge had no reason to think they weren't and gave no reason, there is no reason why we should be less shocked than in the other case. Now let us imagine that identical crimes are being tried in the same court in the same day, but by different judges. If the first judge imposed a penalty which every one agreed was fully just both by legal and moral standards, and the second judge, knowing the full facts of the previous case, decided to exercise mercy in the case before him, we should be inclined to ask him why he had done this. If he had no reason, we should be slightly shocked, or nonplussed, at least. One of the reasons for this is that indiscriminate exercising of mercy is considered unwise because of the possibility that it might in some way harm the authority of the law. However, even if it was clear that this is not a real possibility, we should still be puzzled and try to find some explanation for the judge's actions. Without it we should feel that his discrimination was not justified. This is borne out by the fact that we do not condemn as hard and relentless the judge who does not decide, solely through benevolence, to exact less than the fair penalty; nor should the offender sentenced by such a judge feel hardly done by.

This is a real difficulty because it can be argued that the context of like cases can be extended to limit even further the number of occasions upon which one might justifiably exercise true mercy. All other things being equal, there is no reason why felonies identical in all relevant respects should be treated more leniently by one judge than by another, or more leniently on Tuesdays than Fridays, or more leniently in country towns than in large cities. Such discrimination appears irrational. This point still holds even on an international scale. If we consider, for example, the case of Eichmann being tried in Israel, and of another and equally vicious Nazi war

criminal being tried in Frankfurt for a crime of the same kind and enormity, the point becomes clearer. If it is beyond dispute that the cases *are* identical in all relevant respects, even allowing for the differences between the Israeli and German legal systems, we feel that for justice to be done the offenders should be dealt with in a similar fashion. To execute Eichmann, and show mercy to his colleague in Frankfurt and only sentence him to fifteen years in Spandau prison, seems unjust. No matter how evil the men are and how terrible the crime, it would seem that one ought not to be discriminated against in favour of the other.

The obvious way out for those of us who feel squeamish about exacting the just penalty for both offenders rather than showing mercy to one and not to the other, is to argue that some mercy is better than none at all. However, this too is unsatisfactory, because of the basic insight of justice that if one man is going to be treated leniently then all others with identical cases should be too. If this is allowed it is difficult to see where we should stop. If all identical cases of felony type-X are treated equally mercifully in 1966, to avoid unfair discrimination we should have to extend this mercy to all like cases in 1967, and all other things being equal, in 1968 and 1969 and so on, till we might say that we had changed our opinion of what is the appropriate and just penalty for this particular offence; we would consider the penalty thought fair in 1965 and earlier to have been unduly harsh. But then if the appropriate penalty for identical cases of felony type-X was changed, to be consistent, we would have to adjust proportionally our ideas of the fair penalty for cases of felony type-W and felony type-Y. Similarly we would have to adjust the penalties for the other lesser and greater felonies and in fact, for all other offences, so that they were all brought into line with our view of justice. We would talk with regret about harsh penalties of former times and pride ourselves on our enlightenment. After this new state of affairs had persisted for some time we might again find people inclined to exercise mercy for no reason in some cases, and not in others that were the same. To remedy this sort of injustice we would have to again recommend mercy in all like cases, and the whole process would begin again and again, until finally we reached the absurd position where we imposed no penalties for offences at all. Regardless of one's view of punishment, this would be an undesirable state of affairs.

This suggests that there is something unsatisfactory about the notion of mercy as it has been discussed so far. In all the cases to date we have not found a single real example of permissible or advisable mercy. This is somewhat disquieting because it conjures up a vision of a hard, relentless judge bent on exacting the last ounce of

punishment justified and unsympathetic to the suffering that punishment, by definition, entails. If one were to ignore the first part of this paper, then quite probably this reaction would be justified, but of course in a consideration of mercy we cannot ignore the sort of cases described in the first part. I think that, if a judge conscientiously examined every case before him, and, where the law was too crude and inflexible to bridge the gap between legal and moral justice, exercised mercy, we would probably regard him as a very humane and merciful judge. The more so, too, if he took into account, on appropriate occasions, any deep suffering the offender had already brought upon himself. Such a judge is not being merciful but is merely showing a normal regard for morality and recognising that the legal code, as it stands, is not always sophisticated enough to cope with this gap. It would be quite unreasonable to regard such a man as hard and inhuman simply because he didn't on occasions, solely through benevolence, impose less than what was recognised to be a fair penalty. On the other hand, the judge who always observed the letter of the law and didn't take account of the occasional gap between legal and moral justice, *would* be unjust.

III

I now wish to consider examples where mercy is justified and the kind of reasons that make it justifiable. If one takes into account the limitations suggested in Parts One and Two, the number of justifiable instances diminishes considerably.

The kind of cases described in Part One are probably those that first spring to mind when one thinks about mercy; as we saw, they are not genuine cases. However, there are genuine cases of mercy in which the difficulties mentioned in Part Two are not serious objections. There are times, for example, where one feels obliged to show mercy not because the offender himself warrants it, but because it is necessary if we are to meet the claims that other duties have on us. The suffering of an innocent party is almost always involved when an offender has friends or family, and it is clearly not feasible to suspend punishment whenever this is so, but there are times when the suffering caused will be so great that this should be a major, even the main consideration. It might be proper, for example, to release a man on a bond where there was pretty clear indication that the warranted term of imprisonment would be the final shock that would cause his mother's breakdown. Suppose that a five-hundred dollar fine is appropriate in a certain case and there is a good indication that such a fine would teach the offender a lesson; if, however, the imposition of such a fine would impose an intolerable burden on his

wife and family, we might hesitate. If further investigation showed that the wife was an invalid and the children were frequently ill, we might, after serious deliberation, decide that out of consideration for the innocent parties we were obliged to exercise mercy and cut the fine in half. One might be tempted to think that in cases like this it might be more accurate to say we are showing mercy to the innocent sufferers rather than to the offender. But this, I feel, will not do, since there is something odd and disturbing about saying we show mercy to those who have committed no offence. In cases like these we feel that the offender is just lucky to be treated so leniently.

Let us look at another example: suppose a child does something wrong and it is desirable and proper that he should be punished in a certain manner; if it is the new step-father's job to punish and there is a very good chance that his relationship with the child might suffer as a result, he may be wiser to exercise mercy even though it may give the child the impression that the offence wasn't important. Where supervision of the punishment imposes a great burden on a third party we might be inclined to recommend mercy, too. One can also imagine without difficulty a situation where mercy is expedient—for example where a small but powerful section of the community is unreasonably antgonistic towards the existing judiciary, it might be advisable for the moment (and even imperative), to exercise mercy and thus protect the authority and stability of the law. In cases such as those described, the judge has no choice—he is obliged to be lenient in order that he may prevent other evils and injustices. They are, nevertheless, genuine cases of mercy.

The passage of time is a factor which ought to be considered in an investigation of the notion of mercy. At first glance, at least, it seems to constitute a good reason for being merciful. Recently in Australia a judge declined to convict a man of a crime he committed twenty-odd years ago. The reason he gave was that he could see no point in punishing a man for a crime committed so long ago and virtually forgotten. The passing of time does seem to make a difference in this sort of case, but only a closer examination of examples will reveal what sort of difference it makes, and why. In the case just quoted the offender is now living a contented and law-abiding life so that the punishment could have no effect on him and would probably have a bad one—one that was not commensurate with the crime committed, and which, all things considered, was unduly harsh. Some might feel that the judge ought to have imposed *some* penalty, perhaps a good behaviour bond for example, but at least one which was considerably milder than the one which would have been appropriate had the crime been committed recently. In any

event, despite the difficulties that might be encountered in trying to reach agreement on the details of the proper penalty in this case, it is clearly a case of acting 'mercifully' to avoid a potential injustice such as I described in Part One. There is no suggestion of a judge deciding, solely through benevolence, to exercise mercy.

Let us consider more closely the real significance of the passing of time. Suppose that thirty years ago Roberts robbed Smith's firm of a large sum of money; he did no damage to property or persons in doing so, and Smith died in a motor accident without hearing of the theft. Very soon after, Roberts had pangs of conscience and mailed the stolen money to the police, explaining the circumstances of the theft, but withholding his identity. He subsequently turned away from crime completely and led a normal, law-abiding life. Thirty years later he is identified as the thief, and charged. In view of the facts, the judge decides to exercise mercy. Even if Roberts had been apprehended within a few months of the crime, before the strength of his resolution to 'go straight' had had time to be tested, his case would probably have been treated with leniency. Taking all the facts of the case into account, and in view of the normal penalty when *no* restitution has been made, a one hundred dollar fine and three years' good behaviour bond might be a just sentence. So after thirty years of tried and tested good faith, the crime appears considerably less serious even than when committed. In view of the offender's reform the crime is so trivial as to warrant either dismissal, a record of conviction but no penalty, or a token good behaviour bond. The decision would depend to a large extent on one's assessment of the consequences to the authority of the law. In any event, to ignore the moral significance of the passage of time in this case would be grossly unjust.

As so far considered this example is still not a case of genuine mercy; it is once again just a question of bridging the gap between the inflexibility of the law and moral justice. It becomes real mercy when the judge benevolently decides to impose less than the just penalty. If our reformed thief Roberts really deserved and expected a three-year bond, it would be a genuine act of mercy to dismiss the case. Even here we are inclined to ask the question 'why', and one possible answer might be that it is a sort of 'reward'.

What begins to emerge out of this example is the significance of the differences between the utilitarian and retributivist positions on punishment in a discussion of mercy. Let us first look at the problem of the passage of time from a utilitarian point of view. Suppose that in the case just described, the judge *did* dismiss the charge even though recognising that Roberts really deserved a three-year bond, there are two possible reasons that the utilitarian might give to justify this

decision. He might say that it is a sort of 'reward' for the offender's sincere and successful reform and since utilitarian reasons are the only ones open to the utilitarian, this could mean something like 'the probable good resulting from this sort of encouragement to Roberts and similar offenders outweighs the amount of good that the imposition of a light penalty is likely to do'. If this is the utilitarian's final assessment of the situation, then he is bound to act on it, and the possible alternative of imposing a three-year bond is no longer a real alternative. The only justification of mercy open to him is that it is the course of action likely to produce most good.

The other reason a utilitarian might have given to justify mercy in the Roberts case, was that it would be kinder than imposing a three-year bond. What this presumably means is that it is kinder because it avoids pointless suffering, and of course only a person who was morally insensible would deny the strength and propriety of this claim. However, it does bring out the oddness of the notion of mercy in the utilitarian ethic. If the punishment, that is the suffering that the three-year bond would impose on the offender, 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 produce most good because this action is the one which will produce most good'.

The notion of mercy seems to get a grip only on a retributivist view of punishment. It is open to the retributivist (at least most retributivists), to say that a particular crime[3] warrants such and such a punishment but that other moral considerations permit or compel him to act with mercy. Such a possibility is open to him only because his ethic is a multi-principled one, or at least is not based on only one principle.

In the light of all this, let us have another look at the example involving the passage of time. What course of action is open to the

retributivist? Can he recommend mercy? Although in practice probably no one holds a *purely* retributive view of punishment (it is usually held in conjunction with deterrent and reformative considerations), the real basis of the theory seems to be that a crime is intrinsically evil over and above any undesirable consequences it might have, and as such requires vindication. The suggestion seems to be that in some way this act of requital sets things right, that it somehow erases the crime or counter-scores it in some way. Just how it would do this is not at all clear, but if this is, in fact, the basis of the theory, then it has some interesting consequences in the passage of time examples of mercy.

Although the retributivist, no less than anybody, would claim that we have a duty to avoid pointless suffering, deserved punishment can never be, for him, pointless suffering. Since it is merited on other grounds as well as utilitarian ones, absence of utilitarian reasons for its justification is not sufficient to make the punishment pointless. So merely to point out, in the Roberts case, that the offender has been a reformed character since the crime, and that it has been forgotten or disregarded to such an extent that the law will not suffer any harm if the case is dropped, is not sufficient reason for the retributivist; the crime, as a crime, still merits punishment. In this sort of situation the thinness of the utilitarian theory really shows through.

What makes the retributivist position more reasonable in cases similar to the Roberts example, is the fact that where the offender has repented and the strength of his reform has been convincingly tested, we feel it would be unjust to punish him because he was, in effect, not the same person that he was thirty years ago. This is borne out by the fact that where the offender has not repented and reformed we are not at all inclined to dismiss the case, even though thirty years has elapsed since the crime was committed. This decision might be over-ridden if it was shown that it antagonised a significant section of the community to such an extent that the authority of the law suffered greatly as a result. However, such a reaction would be unreasonable and unjustified, even though we were forced to take account of it. We would be exercising mercy in spite of ourselves, so to speak.

Further light may be thrown on the significance of the passage of time in a theory of punishment, if we look at cases of murder committed a long time ago, for example thirty years ago. In cases where the offender has committed, or attempted to commit another murder since the first one, then barring extraordinary circumstances, we would be quite unjustified in recommending mercy. Likewise we should probably hesitate to recommend mercy if it was found that

the offender had pursued a life of petty crime since the murder thirty years ago, until the present time. Where the case is one of a murderer who has genuinely repented and led a normal, law-abiding life ever since, our attitude is less clear.

Superficially perhaps, this case looks no different in nature from our Roberts case. However, there are two things which seem to make a difference and which may account for our greater hesitancy in recommending mercy. The first is the seriousness of the crime. Murder is obviously much more serious than theft and for this reason the consequences to the authority of the law are likely to be greater if we are irresponsibly lenient. This is one very important reason why we are less inclined to benevolently impose less than the just penalty. The second reason is that most murderers don't normally go around killing people every few months the way a thief might commit robberies. Most murderers commit only one murder, so thirty years free of a repeat of the offence is not nearly as significant as thirty years free of theft for a former thief. If it was found that the offender had, in fact, been placed in the same sort of circumstances again and again since the murder thirty years back, then we would indeed want to recommend mercy on the grounds that he was a new person. However, it seems clear that the passage of time is not, *per se*, grounds for mercy. A significant change of identity *is* grounds, but even then we may question whether this is really mercy. Since the real offender no longer 'exists' or fully exists, we are not in a position to show him mercy, just as we are not in a position to show mercy to someone who is not responsible for his crime, for example a man who didn't know what he was doing or who couldn't stop himself. There is something odd about being merciful to someone who is not an offender, unless we are thinking only of cases purely in a legal context where there may be a gap between legal guilt and moral guilt.

There seem to be two major ways of looking at the notion of mercy. In the majority of cases, acts of 'mercy' are simply measures by which we ensure that the punishment fits the crime. We exercise mercy to avoid an unduly harsh penalty which an insufficiently flexible legal system would impose upon the offender. In other words we exercise 'mercy' to avoid an injustice. In cases like this there can be no contrast between the just course of action and the merciful course of action. There is some impropriety in calling cases like these cases of genuine mercy.

We also think of mercy as benevolently reducing or waiving punishment. If we regard mercy as deciding, solely through benevolence, to impose less than the deserved punishment on an offender, then the answer to the original question 'when are we justified in

being merciful?' must be: only when we are compelled to be by the claims that other obligations have on us. I suggest that this is not so very shocking if we define mercy in the way that I think we must. I wish to suggest, too, that it is a concept which only makes strict logical sense in a retributivist view of punishment.

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[1]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.

[2]It should be noted that total abstention from punishment is not necessarily condoning. One may acknowledge the seriousness of an offence and decide that mercy is appropriate. The amount of mercy appropriate will vary from case to case; sometimes the punishment should be reduced, sometimes completely waived.

[3]I mean 'crime' in the broad sense which includes the motives and frame of mind of the offender and all the other relevant background information.