

L aboutThe Polity of Mercy

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Mercy is a grace, but, for that reason, is a gratuity, and so a notorious problem for justice. If the quality of mercy is not to be 'strained' (constrained rather than overdone), on what basis is mercy to be urged or allowed? Can a complete and coherent system of rational justice allow for the *ad hoc* anomalies of mercy? Can justice brook adjustment? Must tempering justice always mean, as Jeffrie G. Murphy writes, tampering with it (Murphy 1988, 167)? Building on a short, earlier discussion of mercy as a mode of abstitution (Connor 2019, 16-19), I try to meditate in this talk about what psychoanalytic reading, inflected by an appreciation of the economies of fantasy and desire, might offer to the understanding of the quality of mercy, and the moral perturbation it constitutes for judicial rationality. Such a reflection might well encompass the question of the quality of mercy within reading and interpretation themselves, whether moral, juridical or psychoanalytic. Should interpretation be an extenuating circumstance?

When I was external examiner for the BA in English at the University of Kent, decades ago now, it was part of my responsibility to oversee the adjudications made in what was called the 'Mitigating Circumstances Sub-Committee'. By the time I finished my 3-year tour of duty, the deliberations of this committee, which went a long way to explain the frequent confusion of the words *mitigating* and *militating*, occupied an entire day. Over the years it became clear to the students that not to sue for special dispensation, whether on the grounds of migraine, hay fever, nerves or bereavement, for each of which a standard tariff was evolved, was to opt suicidally for self-penalisation. So the sub-committee had to conduct for almost the entire population of examinees a pre-assessment of the degree of relenting which should be available to be applied to the actual assessment that might be derived for each candidate in terms of the quality of their work, which therefore attained the status only of an opening gambit in a rhetorical barter-market. There were rumours of students who missed the deadline for informing the examinations board of their mitigating circumstances but applied for mitigation of this condition on the grounds that they had been prevented from meeting the deadline by various kinds of

incapacity (hayfever) or pressing matters beyond their control (bereavement). The effects of a bureaucracy of indemnified leniency such as this seem to be anticipated by Seneca, in his recommendations in the matter of mercy to, of all people, the Emperor Nero, in which he observes that ‘tam omnibus ignoscere crudelitas quam nulli’, which goes nicely into common measure as ‘it is as cruel to pardon all as pardon none at all’ (Seneca 1928, 364). A more formal way of putting this might be to say that mercy can only be merciful when it is kept at a distance from the workings of justice. One might as well say that nature is merciful to every culprit as say it is merciless to every victim. People may well get what is their due, or, in the negative version, get what is coming to them, but, in the sure and certain unavailability of anything that could without fraud or feverish wish-fulfilment be called natural law, nobody and nothing in nature gets what is their due *because* it is due to them.

Mercy is the refusal, perhaps in the sheering away in which the horse ‘refuses’ a fence in showjumping, of the icy-delirious dream of measure for measure. It is the refusal of moral economy. But it is a refusal that is irresistibly drawn into another kind of economy, an economy of rewards rather than penalties. Mercy has been derived from *miser*, sad, wretched, though Michael Vaan avers that ‘no acceptable PIE pedigree has been found for the word’), and the OED prefers an economic lineage, from *merce*, wages, payment, bribe, reward, or rent. The affinity of *measure* and *miseria* is merely poetic. Jacques Derrida’s reading of Portia’s speech in *The Merchant of Venice* plausibly sees the quality of mercy as a form of transaction, relating mercy, with all the daintiness one expects from Derrida, to the complex play between the merciful and the mercantile effected in Shakespeare’s play (Derrida 2001, 183). *To mercy* could mean to fine in fifteenth-century legal English, though at the same period the phrase could also mean to give thanks, making in other words the return one might make to a gratuitous act of mercy.

All attempts to account for mercy in terms of the economies are liable to be stymied by the fact that mercy is, essentially rather than merely accidentally, a form of beauty. Justice does right, but mercy is just *nice*, a word that has moved from the idea of precision to prettiness (a pretty thing is a petty or *petit* thing we feel we can pity), in precisely the same modulation as the word *cute*, which has similarly drifted from acuity to adorability.

We might say that the psychoanalytic question, unless it is the poetic question asked psychoanalytically, is ‘What does the beauty of mercy *do*?’,

or put more advantageously ‘How with this rage shall beauty hold a plea?’ One might just as well say, it means ‘what do we do when we find beauty in mercy?’ To say that the mercy belongs to, or at least acts as a kind of poetry, rather than moral reasoning, is to say that its force is phantasmatic rather than deliberative, fantasy being defined, not as the belief in falsity, but psychoanalytically, as what we want to be true (whether or not it is).

So what does it mean to say that mercy is beautiful, or is even beauty itself? Or even to see beauty itself as a kind of mercy, precious remission of the ubiquity of ugliness, as Emily Dickinson does when she writes ‘Beauty, mercy have on me’ (Dickinson 1975, 676)? To say that mercy is beauty is, among other things, to say that it is weak. Mercy has in common with beauty this at least, that it is rare and so not to be counted on: the meaning of beauty, like that of mercy, is that it is *unlikely*. And weak things seem weak because of our sense of power over them. Beauty is easy to ruin, ugliness much harder.

The affective economics on which psychoanalysis is wont to draw might understand this frailty, along with the tenderness we definitionally seem to feel toward it, as a mixture of narcissistic identification and the inhibiting defence mounted against our own aggressive instincts. Tenderness and unbendingness are sentimentally confederate: people given bubble-wrap to pop while they look at pictures of babies pop more bubbles more vigorously the cuter the tots are (Arnold 2013).

Maintaining this view of mercy as the softening sublimation of subjugation, we might see significance in the oxymoronic way in which mercy is often rhetorically represented as a kind of power, indeed as more powerful than other kinds of power against which it is ranged, as though borrowing from their force. The stronger the urge I feel to smack your silly, self-contented face, the sweeter the smile that dissimulates it. This is partly why Portia can declare that mercy is ‘mightiest in the mightiest’ (Shakespeare 2010, 347). Both aggression and defence are intensified in juridical circumstances in which the formality of law can give free rein to our desire for the guilty to be given the works. At the same time, the exercise of mercy itself requires a certain, arcane virility, the strength to set aside what law would otherwise ordain. This is why mercy has for so long not only been the prerogative of power but also a means of consolidating it. In the grandiose thoughts that Seneca sycophantically puts into the mind of the Emperor: ‘No one may break the law to kill, no one but I may break the law to save [*Occidere contra legem nemo non potest, servare nemo praeter me*]’ (Seneca 1928, 372; my translation).

In *Human, All-Too-Human*, Nietzsche offers a peculiar reading of the sensation of mercy as the misrecognition of one's own joyful sense of freedom from constraint, asserting itself in the face of the externally-imposed austerities of Christian conscience. The relief from self-oppression gains in intensity precisely for seeming to come from nowhere:

this love, this new self-valuation seems to him incredible, he can see in it only the wholly undeserved flowing down of a radiance of mercy from on high. If he earlier believed he saw in every event warnings, menaces, punishments and every sort of sign of divine wrath, he now *interprets* divine goodness *into* his experiences. (Nietzsche 1966, 72-3)

The sensation of being forgiven is really, thinks Nietzsche, the sensation of one's own power to soar beyond external restraints, and the blessing of mercy the joy of the justice-trumping prerogative of self-pardon:

he conceives his mood of consolation as the effect upon him of an external power, the love with which fundamentally he loves himself appears as divine love; that which he calls mercy and the prelude to redemption is in truth self-pardon, self-redemption. (Nietzsche 1996, 72-3)

Mercy is a god-making machinery. This is indeed why mercy, as the power of the mind to escape itself, with all the manic omnipotence that can accompany it, can indeed be associated with merciless tyranny, when remission of responsibility becomes moral disinhibition.

The logical inconsequence, or more exactly, the pseudo-reasoning of mercy even makes it a joke, even though an oxymoronically solemn one, in that it is what Derrida terms an 'incalculable equivalence' (Derrida 2001, 184) at the expense of commensurality-thinking, like Eddie Izzard's 'Death? Or Cake?' routine, or the dreaded comfy chair of Monty Python's Inquisition. Mercy might therefore be encompassed by the 'relief theory' of jokes to which Freud adhered. Freud actually includes an excellent joke about mercy in *Jokes and Their Relation to the Unconscious*. When a kindly priest commended the dying Heinrich Heine to God's mercy, encouraging in him the hope that God would forgive him his sins, he is said to have replied: 'Bien sûr qu'il me pardonnera: c'est son métier' (Freud 1953-74, 8.114). *Métier* in French means trade, craft or business – it is related to the words *mastery*, *ministry* and, in the medieval sense, *mystery* – but acquired in English, largely through the fact of being a foreign word, with a certain glitter of precision or preciousness, the meaning of a special skill or capacity. So

Heine's joke, rendered in French in Freud's original German, is actually considerably improved in English translation, which adds the implication that forgiveness is not just the Creator's stock-in-trade, but also his 'speciality' or party-trick, like the bowling of reverse swing. The suggestion of divine supererogation is found again in Samuel Beckett's *Watt*, in Mr Hackett's growling response to Tetty's pious ejaculation after hearing of his runaway mother: 'Poor woman, God forgive her, said Tetty. Faith, I wouldn't put it past him, said Mr. Hackett' (Beckett 1972, 14).

Christianity and Islam are united in seeing mercy as the preeminent virtue of divinity, the virtue that is more powerful than power because it has the power to set power aside. As Erasmus cannot prevent himself from recognising in his 1524 sermon 'Concio de immensa Dei misericordia', 'On the Immense Mercy of God', mercy is an exorbitance: 'he created the human race with the express intention of unfolding for our benefit the full magnitude of his goodness and mercy. In this way God wished to provoke not only our love but our admiration' (Erasmus 1998, 83). To wonder why God might have created mankind in such a way as for it to be impossible not to sin is enormity enough: but an even greater astonishment should be the cat-and-mouse arrangement in which mankind is made for sin *in order to make forgiveness possible*:

since everything that belongs to God is boundless. Holy Writ appears to ascribe to him mercy that is excessive and immoderate, the sort of thing that passes for a fault among humans. Be persuaded that nothing in God can be construed as a fault, and let your faithful hearts accept this turn of phrase, realizing that the Scriptures, to make allowance for mere human understanding, use this figure to convey the wondrous, unparalleled abundance of God's mercy. (Erasmus 1998, 89)

Again, we might see an unexpected rhyme with Freud's relief theory of jokes, as the sensation of release following the sudden removal of an anticipated effort of inhibition. Later, in *The Genealogy of Morality*, Nietzsche makes a similar connection between mercy and the power to set aside justice, though he focuses not on the concealed elation of self-forgiveness, but the power to forgive others that comes from growing conditions of abundance:

It is not impossible to imagine society *so conscious of its power* that it could allow itself the noblest luxury available to it, — that of letting its malefactors go *unpunished*. 'What do I care about my parasites',

it could say, 'let them live and flourish: I am strong enough for all that!' . . . Justice, which began by saying 'Everything can be paid off, everything must be paid off', ends by turning a blind eye and letting off those unable to pay, — it ends, like every good thing on earth, by *sublimating itself* [*sich selbst aufhebend*] The self-sublimation of justice: we know what a nice name it gives itself — *mercy* [*Gnade*]; it remains, of course, the prerogative of the most powerful man, better still, his way of being beyond the law. (Nietzsche 2006, 47-8; Nietzsche 1966, 2.814)

For Jeremy Bentham, by contrast, the fact that mercy is 'beyond the law' is a reason for outlawing it from the workings of justice altogether, as saltily set out in his collection of manuscript notes made between 1819 and 1820 and published in his *Works* under the title 'Radicalism Not Dangerous':

Among the advantages possessed by despotism, one is – that so long as the blindness produced by it continues, the praise of mercy may, in proportion as the despotism is pure and complete, be reaped in conjunction with the profit of tyranny. Under it, vice is at all times covered with the mantle of virtue. Rightly understood, all mercy supposes tyranny – every claim to the praise of mercy is a confession of tyranny: take away tyranny, that which is called mercy is, if beneficially exercised, nothing more than justice. The more mischief a man has it in his power to produce, the greater the quantity which he has it in his power to abstain from producing: and for every lot of evil which the monarch abstains from producing, he obtains at the hands of the prostrate multitude the praise of mercy. Monarchy is almost the only soil in which that species of vice which calls itself mercy can make its appearance. Under aristocracy, the praise being as it were lost on such a multitude – lost for want of an individual to fix upon, is seldom claimed. In a democracy, there being no person in whom any such power as that of doing evil with impunity is to be found, there is no place for mercy. (Bentham 1843, 619-20)

But ruling out mercy will still leave open to the appeal of mercy against the exclusive and exceptionless application of rule. For the particular poignancy of mercy derives from the fact that mercy and justice are in fact as difficult to peel apart as they are to piece together. This feature distinguishes mercy from compassion and forgiveness, for one can easily feel compassion for a wrongdoer, forgive them their wrong, and even regret the necessity for their punishment, without seeing any need to abate it by a jot. But mercy is specifically an abatement of punishment for wrongdoers

who would otherwise be regarded as deserving of it. It involves letting people off what they would otherwise be let in for. Compassion and forgiveness are feelings, but mercy is an action – an action having the quality that Giorgio Agamben, following Aristotle, calls *impotentiality*, an action of abstaining, withholding, or remitting (Agamben 1999, 182). The problem of mercy is that it forms part of the fabric of justice, even while threatening its central principle of applying and being required to be applied equally, which is to say without mercy. Mercy must always be a part of a system of justice which its very exercise threatens to pull apart.

Mercy is an osmotic membrane between goodness and truth, or the pleasure and reality principles. As the candying of justice with pleasure, mercy is a defence against what might otherwise be the inhuman force of truth. But, since mercy is always understood as part of the workings of justice, even as a kind of heightening of it, it is also an orthopaedic bracing of that pleasure with a force borrowed from justice. As the comfort against as well as of the rod and the staff, mercy is the ju-jitsu of justice.

But why must justice include the possibility of its self-suspension as mercy, as it has seemed to many it must? This incoherence seems to embody the conflict that belongs to every psychological subject in a psychoanalytic perspective, between the law of desire and the desire of law. Put differently, law cannot fully know what it is doing and, in the exercise of a mercy which is capable of forbidding law's own forbidding, seems to seek to extradite itself from its own jurisdiction. Law can only be of good report if it continues to be able to act in ways that cannot fail to bring it into disrepute. But, if the quality of mercy is always also a polity, mercy is moral perversity, an obscenely impetuous obstruction of due process.

Ethics and, to the degree that it aims to formalise ethical apprehensions, deliberation about justice, aim to articulate what we ought to want, in justice and from justice. Psychoanalysis sometimes aspires to this elevated grade of disquisition, but more often lies down where all the ladders start, finding its employment in the question of what we make of what we want, or what we can make out of it.

Mercy may perhaps be the repression of the triumph of the will that is involved in the exercise of justice or contemplation of that exercise. As such, it may be the outflanking of the guilt of triumph. As compassion, or suffering with the one who feels the full force of the law, it may also be a desire to disclaim the desire for revenge, or avoid the penalty due to revenge. The moral difficulty which arises with the kind of instrumental or

practical morality involved in the maintenance of law and administration of justice is not how to justify the ought, but how to justify the flagrant wrongs committed in its name. Justice is the realm of the *or else*. *Thou shalt not kill* is morality. *Thou shalt not kill, or else* is the motto of justice. 'Strike them all dead!' howls Fagin in his cell at the end of *Oliver Twist*, 'What right have they to butcher me?' (Dickens 1994, 394). Things are scarcely less absurd when the condemned meekly acts out his compliance with the law, as in the story of the words of the last man to be hanged in Crumlin Road jail as he caught sight of the scaffold: 'This, father,' he is said to have murmured to the chaplain, 'is going to be a lesson to me' (Heaney 2023, 706). Portia ends her speech saying to Shylock 'I have spoke thus much/To mitigate the justice of thy plea' (Shakespeare 2010, 348). Let us note that she does not say what she allows herself to seem to: that is, she does not say 'to mitigate the severity of thy plea', because the justice of that plea is indefeasible. It is not the sentence that calls for mitigation by mercy, it is the justice in the name of which the sentence would, and should be executed.

Striving not to be prejudicial, psychoanalysis must often be parajudicial in that it must always be slow to set aside the phantasms of justice against which justice itself must strive. Justice never appears in its own person or, as we expressively say, its *own right*. Where there is the enactment of justice, something else (not always, but too often, told-you-so gratification), is always being acted out through in and through it. Psychoanalysis concerns itself with this dramaturgy, and can rarely itself escape its force, for, if it is anything at all, the wooden O of psychoanalysis is theatre in the round. It can never escape the force of dramaturgy, as it asks what is being acted out in ideas of law and justice, while recognising, or at least making recognisable, its own forms of agency (just another word for acting, after all). This may result in the inhuman, superhuman mercifulness that J.S. Grotstein finds in the fully-attained, and perhaps even divinely-appointed, 'depressive position'.

The therapist, in other words, must have the capacity for non-retaliatory mercy for his patient, a capacity that bespeaks his/her attainment of the depressive position and, through his/her ministrations of this capacity for non-retaliatory containment, offer a model for the development for a similar capacity for the patient. (Grotstein 1994)

In a later essay, Grotstein writes of the sense of reprieve and redemption provided by, or at least looked for, in the depressive position:

The "perks" of achieving the depressive position are a reprieve and a release of responsibility in the following sense: After the infant achieves the sense of true separation and individuation, he can account for the badness of mother or father as emanating from a source that is separate from and independent of him. He can even achieve the grace of forgiveness by allowing for the fact that his mother and father can be ill in their own right. This capacity for grace and mercy is unthinkable before achieving the depressive position, at which time mutual redemption is at last possible. (Grotstein 1999, 197)

It is hard to argue for it in a society in which moral thinking routinely runs in such punitive, penalising and preventative channels, but development of the faculty of according mercy to oneself can be of considerable worth, as long as it is not reserved for one's own exclusive use. Prevention, despite the elderly, analgesic adage, is not better than cure. It is often cheaper than cure, but that is the very thing that makes cure so much better. All religions worth their salt know that what we want is not the prevention of death, but a cure for being dead. So, in a tender symposium, not *first do no harm*: but, first and last, evolve ways of doing good.

Psychoanalysis should not be looked to to exercise the force of law but rather to concern itself with the force of 'the force of law', the coercive workings of law's idea. The kind of question psychoanalysis seems equipped to ask is not 'Ought there to be mercy?' but rather 'Why mercy?', which is to say, if spread out a little more widely, 'What do we feel about mercy, and what does what we feel about mercy seem to be able to *do*?' Such questions seem suited to psychoanalysis because they concern the psychodynamics of mercy rather than its moral logic.

On the question of mercy, psychoanalysis is equivalent to prayer, as perhaps the most representative religious impulse, the one that tends to survive the dissolution of all other articles of faith. For prayer insists that we be allowed to take as true something – the infinite mercy of God – which we know for certain cannot be, since it would mean either that God would underwrite every evil in the world or would be pitilessly indifferent to them. Psychoanalysis is like religion not in the cheap sense that they are both dogmatic, though dogmatic adherence is occasionally a feature of both, but in the sense that they are both dramaturgical. One prays as if prayer could have efficacy. Every prayer is a voicing of the optative operativity of 'would that there could be prayer'. So really, there is only one prayer, the prayer that says 'let us pray', a phrase that means both, 'OK, time to pray',

cueing the shuffling of hassocks, and also 'Give us this day leave to believe in prayer'. Both psychoanalysis and religion enable the acting out of what is simultaneously impossible yet imperative, something that one can neither indulge in full nor entirely relinquish. One may call to the stand on this question no less a witness than Pope Francis, who writes in his *Misericordia et misera*, the apostolic letter of 20th November 2016 which closed the year-long 'Jubilee of Mercy' opened in 2015, 'references to mercy, far from being merely exhortative, are highly *performative*, which is to say that as we invoke mercy with faith, it is granted to us' [*in oratione Ecclesiae omnino mentio misericordiae a mera invocatione abest et summopere est ad efficaciam relata, id est quam cum fide invocamus, eadem nobis conceditur*] (Francis 2016a, 2016b, § 5). Psychoanalysis and prayer are both forms of *entertainment*, literally 'holding-between', in its earliest uses as a kind of entwining or holding-together, and sometimes in the sense of a maintaining or holding up. In their different ways, psychoanalysis and prayer are both interludes of interpretative mercy, ways of affording temporary accommodation to ideas that cannot as we say 'by rights' be admitted.

Mercy belongs to religion, in that it is the remission for the injustice of justice. Its role is to acknowledge and unreasonably condone the irrationality of reason. Mercy is the form taken by the impossibility of dispensing with the conundrum of religion, which is the form of immanent transcendence taken by the subjection of human thought to itself. It is the idea of a subject of power which makes itself subject to its own power. As such it can never fully inhere in or escape itself. And so, the incoherence of mercy is essentially the mercy of incoherence itself, as anomaly, the *anomos* or non-law, of an autonomy overriding the automaton of law. Wallace Stevens advises that 'It is a child that sings itself to sleep,/The mind, among the creatures that it makes' (Stevens 1984, 436) The idea of mercy is a clemency the mind gives itself the power of appealing for on its own behalf, trusting 'That, in the course of justice, none of us/Should see salvation' (Shakespeare 2010, 348).

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