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A STRATEGY FOR MERCY

ROBERT L. MISNER*

The criminal justice system has taken on a very cold edge. The public's determination to view crime as a moral issue rather than a utilitarian issue¹ has caused the debate on punishment to shift from the rhetoric of utilitarianism and the individuation of punishment² to the language of retribution³ and just deserts.⁴

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1.

Even now . . . many educated people still discuss the drug problem in almost every way except the right way. They talk about the "costs" of drug use and the "socioeconomic factors" that shape that use. They rarely speak plainly—drug use is wrong because it is immoral and it is immoral because it enslaves the mind and destroys the soul. It is as if it were a mark of sophistication for us to shun the language of morality in discussing the problems of mankind.

WILLIAM J. BENNETT, *THE INDEX OF LEADING CULTURAL INDICATORS: FACTS AND FIGURES ON THE STATE OF AMERICAN SOCIETY* 42 (1994) (former "drug czar" Bennett quoting James Q. Wilson of UCLA).

2. "In the course of a decade, perhaps less, the rehabilitative ideal suffered a precipitous decline in its capacity to influence American penal practice and, more important, in its potency to define commonly held aspirations in the penal area." FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* 1-2 (1981). For a history of the development of the criminal justice system over the last 25 years with particular emphasis on sentencing, see MICHAEL TONRY, *SENTENCING MATTERS* 6-13 (1996). A key factor to be considered in sentencing under the Federal Sentencing Guidelines (Guidelines) is the need for the sentences "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A) (1994).

3. John Rawls has defined "retribution":

What we may call the retributive view is that punishment is justified on the grounds that wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing . . . and the severity of the appropriate punishment depends on the depravity of his act. The state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not; and it is better irrespective of any of the consequences of punishing him.

John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3, 4-5 (1955).

4. The term "just deserts" is attributed to Immanuel Kant. See IMMANUEL KANT,

The shift has been more than symbolic: With the overwhelming support of the electorate, the criminal justice system has embraced sentencing guidelines,⁵ mandatory minimum sentences,⁶ broader prosecutorial discretion,⁷ public humiliation of certain offenders,⁸ less tolerance of juvenile crime,⁹ the demise of parole,¹⁰ and a renewed dedication to capital punishment.¹¹ These changes, which are intended to reflect the public's moral outrage at crime,¹² have resulted in more persons being incarcerated¹³ for

THE METAPHYSICAL ELEMENTS OF JUSTICE 99-107 (John Ladd trans., Bobbs-Merrill Co. 1965) (1797). For a summary of Kant's position on just deserts, see Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 455 (1997).

5. See *infra* note 51.

6. See *infra* note 61.

7. See *infra* note 58.

8. See *infra* note 60.

9. See *infra* note 59.

10. See Victoria J. Palacios, *Go and Sin No More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567, 573-79 (1994) (explaining that despite the restrictions on parole by mandatory sentencing statutes and sentencing guidelines, both intending to create determinate sentencing systems, parole continues to be the most common means of releasing prisoners).

11. During 1996, 19 states executed 45 prisoners. See KATHLEEN MAGUIRE & ANN L. PASTORE, U.S. DEPT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1997, at 528 tbl.6.78 (1998) [hereinafter SOURCEBOOK]. At the end of 1996, 34 states and the federal system held 3219 prisoners with death sentences including 1820 whites, 1349 African Americans and 259 individuals of other races. See *id.* California (454), Texas (438), and Florida (373) accounted for 39% of all condemned prisoners. See *id.* At the end of 1980, 691 prisoners awaited execution; by the end of 1990, that number had risen to 2356. See *id.* at 531 tbl.6.82. But see John T. Whitehead, "Good Ol' Boys" and the Chair: *Death Penalty Attitudes of Policy Makers in Tennessee*, 44 CRIME & DELINQ. 245, 245 (1998) (claiming public support for capital punishment is "spurious," and that the public is concerned mainly with true incapacitation for murderers).

12. In 1982, when asked the question, "What do you think is the most important problem facing this country today?," 3% of those polled by *The Gallup Report* answered that crime or violence was the most important issue. See SOURCEBOOK, *supra* note 11, at 100 tbl.2.1. In 1998, public response nominating crime and violence as the most important problem had increased to 20%. See *id.* For a discussion of sampling procedures for the public survey sampling used in creating the *Sourcebook*, see *id.* at 580-83. For a historical look at the public view about crime and the politicization of crime beginning with Barry Goldwater and running through the Bush-Dukakis presidential campaign, see KATHLYN TAYLOR GAUBATZ, *CRIME IN THE PUBLIC MIND* 2-10 (1995).

13. In 1990, the total number of persons held in state or federal prisons or jails was 1,148,702. See DARRELL K. GILLARD & ALLEN J. BECK, U.S. DEPT OF JUSTICE, BULLETIN: PRISONERS IN 1997, at 2 tbl.1 (1998) [hereinafter PRISONERS]. By June 30, 1997, the number had risen 50% to 1,725,842 persons. See *id.* From 1990 to 1996,

longer periods of time¹⁴ and at very high costs.¹⁵

But what if a legislator, whose personal value system stresses the virtue of mercy, is at odds with his political savvy that tells him crime will continue to be debated as a moral issue? What if he were to conclude that the criminal law has gone beyond the limits needed to respond to legitimate societal concerns about crime?¹⁶ What strategy might a legislator employ, armed with the harsh data of the criminal justice system,¹⁷ to introduce the

there was a 43% increase among males and a 65% increase among females in the number of sentenced prisoners per 100,000 U.S. residents. *See id.* at 1. On December 31, 1997, 1 in every 117 male U.S. residents was under the jurisdiction of the state or federal correctional authorities. *See id.* The trend for incarcerating more persons continues; in 1997, prison and jail populations had increased 5.2%. *See id.* at 3 tbl.2. This increase comes at a time when the FBI Crime Index had decreased 10.5% per 100,000 inhabitants between 1991-95. *See U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES: 1995 UNIFORM CRIME REPORTS* 7 (1996). Much of the growth of the prison population can be attributed to the effect of sentencing legislation on prosecutorial discretion and judicial decisions to incarcerate persons who previously would not have been incarcerated. *See U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, THE ROLE OF GENERAL GOVERNMENT ELECTED OFFICIALS IN CRIMINAL JUSTICE* 10-15 (1993).

14. The U.S. Department of Justice has reported recently that the average time served for violent crimes has risen from 43 months in 1993 to 49 months in 1997. *See PAULA M. DITTON & DORIS JAMES WILSON, U.S. DEP'T OF JUSTICE, TRUTH IN SENTENCING IN STATE PRISONS* 9 tbl.8 (1999).

15. Direct expenditures for correctional activities of state governments increased 348% from \$4.3 billion in 1980 to \$19.1 billion in 1993. *See SOURCEBOOK, supra* note 11, at 11 tbl.1.9. Direct and intergovernmental corrections expenditures for all governments increased 363% from \$6.9 billion in 1980 to \$31.9 billion in 1993. *See id.* at 3 tbl.1.2.

16. Many commentators share this sentiment:

"There is no liberty whenever the laws permit that under certain conditions man ceases to be a person and becomes a thing." I never tire of repeating this sentence of Cesare Beccaria at every opportunity, because it seems to me that in these apparently simple words there lies the hope of mankind and the program of the future.

SANFORD H. KADISH, *BLAME AND PUNISHMENT* 255 (1987) (quoting CALMANDREI, *PROCEDURE AND DEMOCRACY* 103 (1956)). Norval Morris expressed a similar thought:

It is the cardinal defect of those who see desert as defining punishment, as distinct from defining its proper outer limits, that in their understandable anxiety to preclude the exercise of discretion in punishment—which has so frequently in the past been exercised on an unjust racial or class discriminatory basis—they create systems of justice insufficiently responsive to the compelling need for mercy in all human relationships, but most particularly in the relationship where the social collectivity is imposing punishment on the wrongdoer. If we all get our deserts, who escapes the rack?

NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* 155 (1982).

17. For example, 1 of every 117 American men were in prison in 1997. *See PRIS-*

virtue of mercy into the debate on crime in order to recapture a sense of humaneness while respecting the broad public support for retribution-based punishment?¹⁸ Can a legislator, for example, convince other legislators that mercy permits the issue of drug control to focus primarily on treatment while at the same time acknowledging the general political pressure imposed by the public to go to the upper limits of punishment?¹⁹

The development of any political strategy generally includes a return to the topical debates of past battles. Because mercy plays such a prominent role in religion,²⁰ literature,²¹ and philosophy,²² one might anticipate that mercy, as it affects the value systems of the country, would have impacted the public debate on punishment. Nothing could be further from the truth. Mercy is discussed rarely in legal literature,²³ and mercy as a topic for public policymakers, such as legislators²⁴ and prosecutors,²⁵ is

ONERS, *supra* note 13, at 1. One of every 14 African American men in their twenties and thirties were in prison in 1996. *See id.* at 11.

18. In 1996, 78% of respondents believed that their local courts did not deal harshly enough with criminals. *See* SOURCEBOOK, *supra* note 11, at 135-36 tbl.2.50. This figure has remained relatively constant for the past 10 years. *See id.* at 134-35 tbl.2.50.

19. *See* MORRIS, *supra* note 16, at 158.

20. *See infra* notes 65-67 and accompanying text.

21. *See infra* note 68.

22. For a bibliography of sources discussing mercy, see Stephen P. Garvey, "As the Gentle Rain from Heaven": Mercy in Capital Sentencing, 81 CORNELL L. REV. 989, 991 n.9 (1996); Malla Pollack, *The Under Funded Death Penalty: Mercy as Discrimination in a Rights-Based System of Justice*, 66 UMKC L. REV. 513, 555-58 (1998).

23. *See, e.g.,* Garvey, *supra* note 22, at 990 n.8 (citing capital cases in which the Supreme Court made reference to mercy and concluding that "the Court's members tend to use the concept of mercy without great care").

24. For a general discussion of religion as a source of inspiration for the legislator, see Jan M. Broekman, *Justice as Equilibrium*, 5 LAW & PHIL. 369 (1986).

25. Mercy is tolerated readily in prosecutorial decision making, particularly in charging decisions. For example, a study commissioned by the Arizona Legislative Counsel reported on felony sentences for a 12-month period:

1. Approximately 10% of defendants who were eligible in fact for three of the state mandatory minimum sentencing statutes received the mandatory sentence;
2. Over 50% of defendants eligible for mandatory sentences under dangerous offender statutes served only probation;
3. Approximately 26% of those eligible for a mandatory life sentence served probation;
4. Many offenders who did not receive mandatory minimum sentences committed offenses that were equally serious as those offenses com-

virtually nonexistent.²⁶ The development of a strategy for mercy requires the policymaker go elsewhere.

If one assumes that the various strands of philosophical thought on retribution and mercy are likely to have counterparts in the world of public opinion, a legislator can gain valuable assistance in creating a strategy for mercy by turning to the rich literature of the philosophy of punishment, supplemented by the

mitted by offenders who received the mandatory minimum.

INSTITUTE FOR RATIONAL PUBLIC POLICY, INC., ARIZONA CRIMINAL CODE AND CORRECTIONS STUDY: FINAL REPORT TO THE LEGISLATIVE COUNSEL 27-33 (1991). For a discussion of the unreviewability of prosecutorial decisions, see Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 749-50 (1996).

26. There is a large body of legal literature on related areas. Mercy is one of the President's constitutional powers. See U.S. CONST. art. II, § 2. In *Biddle v. Perovich*, 274 U.S. 480 (1927), Justice Holmes commented that the Constitution contains the power to pardon on the grounds that "the public welfare will be better served by inflicting less than what the judgment fixed." *Id.* at 486. Much has been written on the pardoning power of the executive. See, e.g., KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* (1989) (chronicling the history of the pardon power and concluding that it is necessary to correct judicial errors). The pardoning power is referred to in the English tradition as the prerogative of mercy. See, e.g., Sir. Louis Blom-Cooper Q.C., *Justice and Mercy in the Caribbean*, 1997 CRIM. L. REV. 116, 116-18. In *Regina v. Dudley & Stephens*, 14 Q.B.D. 273 (1884), the Crown commuted prisoners' sentences from death to six months imprisonment. See Michael G. Mallin, *In Warm Blood: Some Historical and Procedural Aspects of Regina v. Dudley & Stephens*, 34 U. CHI. L. REV. 387, 406-07 (1967) (citing *TIMES* (London), Dec. 15, 1884, at 6). Much has also been written on the power of the jury to nullify a criminal statute by refusing to convict the defendant despite the strength of the prosecutor's case. See, e.g., *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920) ("[T]he jury has the power to bring in a verdict in the teeth of both law and facts."); see also David C. Brody, Sparf and Dougherty Revisited: *Why the Court Should Instruct the Jury of Its Nullification Right*, 33 AM. CRIM. L. REV. 89, 89-90 (1995) (reporting that in the first half of 1995 at least 10 states introduced legislation or sought constitutional amendments that would have required juries to be instructed on their power to acquit despite the strength of the prosecutor's case); Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 254 (1996) ("In terms of raw power, nullification has few parallels: rarely can a public entity make such a critical decision with no obligation to justify its action and with no recourse for the aggrieved party."). The trial judge can exhibit some degree of mercy at trial through the authority to acquit or reduce charges. For a controversial decision in which the trial court reduced a jury verdict from murder to involuntary manslaughter, see Carey Goldberg, *In a Startling Turnabout, Judge Sets Au Pair Free*, N.Y. TIMES, Nov. 11, 1997, at A1 (reporting the judge's decision in the trial of Louise Woodward). Other processes, such as expungement, might be seen as merciful if they limit the consequences of conviction. See, e.g., Julian V. Roberts, *The Role of the Criminal Record in the Sentencing Process*, 22 CRIME & JUST. 303, 339 (1997) (exploring the arguments in favor of expungement).

more limited literature on mercy, to discover what political dangers may be lurking when advocating a strategy for mercy.

Because mercy requires a retributive theory of punishment,²⁷ a strategy for mercy must first contend with the realization that retribution is more complicated than simply distributing just deserts to offenders.²⁸ Voters and fellow legislators are likely to entertain multiple meanings of retribution. Some retributionists emphasize the emotional aspect of retribution,²⁹ while others stress the value-setting role that retribution plays.³⁰ For some, retribution confirms that people are fundamentally economic agents, and punishment is the method society uses to enforce a theory of mutual burdens and benefits.³¹ Still other retributionists center on punishment as a societal method for reestablishing the inherent worth of the victim.³² Some retributivists blend retribution and utilitarianism.³³ A strategy for mercy must take these differences of emphasis into account.

27. See, e.g., Alwynne Smart, *Mercy*, in *THE PHILOSOPHY OF PUNISHMENT* 212, 212-27 (H.B. Acton ed., 1969) (explaining that mercy is punishing to a degree less than that which is deserved to avoid unnecessary punishing).

28. Although it is possible to argue for a purely utilitarian theory of punishment, it is more likely that a person claiming utilitarian justifications for punishment is actually professing an inclusive theory of punishment that blends together retribution and utilitarian justifications. See LIONEL W. FOX, *THE ENGLISH PRISON AND BORSTAL SYSTEMS* 15 (1952); JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 308-09 (2d ed. 1960); GORDON HAWKINS, *THE PRISON: POLICY AND PRACTICE* 32-33 (1976); Kent A. Wilson, *Vengeance and Mercy: Implications of Psychoanalytic Theory for the Retributive Theory of Punishment*, 60 NEB. L. REV. 276, 277 n.5 (1981). Plato and Hobbes rejected a purely retributive theory of justice. See ALLEN, *supra* note 2, at 119 n.24. Many commentators are skeptical of finding one theory that is totally satisfactory. See, e.g., RICHARD A. WASSERSTROM, *PHILOSOPHY AND SOCIAL ISSUES* 146 (1980) (arguing that retributivist theories, at least as currently constructed, are not "sufficiently sound" to support "general justifiability of punishment"); see also Jean Hampton, *The Moral Education Theory of Punishment*, in *CRIMES AND PUNISHMENTS* 494, 494-95 (Jules L. Coleman ed., 1994) (advocating the moral education theory of punishment, which includes elements of deterrence, rehabilitation, and retribution).

29. See *infra* note 137 and accompanying text.

30. See *infra* note 170 and accompanying text.

31. See *infra* note 206 and accompanying text.

32. See *infra* note 158 and accompanying text.

33. See Nathan Brett, *Mercy and Criminal Justice: A Plea for Mercy*, 5 CAN. J.L. & JURISPRUDENCE 81, 93-94 (1992) (arguing that once culpability is established, utilitarian notions can be considered in the penalty phase); see also Robinson & Darley, *supra* note 4, at 498-99 (claiming desert distribution of liability is the distribution that has the greatest utility). It is a tribute to the centrality of retribution that it

Second, a strategy for mercy must recognize that mercy is a concept that contains apparent contradictions. At the heart of any debate on mercy are the paradoxes of mercy noted by the eleventh-century philosopher, St. Anselm of Canterbury.³⁴ Anselm's first paradox captures two thoughts. If justice is punishment actually deserved, and mercy punishes less than that which is deserved, then mercy appears to be injustice and therefore a vice.³⁵ Alternatively, if there are merciful factors that should be taken into account in judgment, mercy is part of justice and therefore a redundancy.³⁶ Anselm's first paradox, when discussed with the various strands of retribution, raises strong political issues of justice from a normative, noncomparative point of view centering upon justice to a particular person without concern as to punishment afforded others. A strategy for mercy must contend with the political attraction that claims of noncomparative justice have for voters.

Anselm's second paradox poses the difficult question whether mercy, which is undeserved and therefore discretionary, naturally results in the unequal application of the law.³⁷ The second paradox raises the difficulty of discretion in a diverse society and centers on the fairness of the individuation of punishment from a comparative point of view. Therefore, a strategy for mercy must also contend with the political attraction that equal application of the law has for voters.

This Article concludes that a strategy for mercy can minimize public opposition if the strategy recognizes a few guidelines. First, some objections to mercy in decision making will be less

has survived the hostility of recent times and survived "doubts about the moral autonomy of humans." ALLEN, *supra* note 2, at 69.

34. Anselm, Archbishop of Canterbury, died in 1109 after a life as pastor, abbot, philosopher, and co-founder of the school of scholastic theology. See F.S. Schmitt, *Saint Anselm of Canterbury*, in 1 THE NEW CATHOLIC ENCYCLOPEDIA 581, 581 (1967). Anselm is best known for *Proslogion*, in which he set forth his ontological argument for the existence of God. See *id.* at 582. In the years following his death, Anselm's work was overtaken by new methods of thought stimulated by the rise of Arabic and Aristotelian philosophy. See *id.* Anselm's ontological argument for the existence of God favorably influenced Descartes and Hegel but was rejected by others such as St. Thomas Aquinas and Kant. See *id.*

35. See *infra* text accompanying notes 259-60.

36. See *infra* text accompanying note 337.

37. See *infra* text accompanying note 369.

forceful if mercy is exercised in areas of nonviolent crime that do not also create strong emotional responses by society against the offender and in those in which utilitarian concerns of deterrence and incapacitation are not overwhelming. Likely candidates for merciful treatment include areas in which the criminal conduct is fairly widespread so that some ambiguity exists as to the degree of moral culpability of the wrongdoer as well as in those areas in which issues of poverty, illiteracy, and unemployment often engender a degree of general compassion.³⁸ Second, some objections to mercy in decision making will be less forceful if mercy is extended to offenders whose criminal conduct does not create particularized victims who have suffered compensable damages and who can readily compare their cases to similar cases. The particularization of victims can result in strong, vengeful reactions that also call into play issues of injustice and inequality of treatment for both the offender and the injured person.³⁹ Failure to punish an offender to the fullest may be seen as an act of indignity and disrespect to the victim.⁴⁰ Third, objections to mercy will be lessened if mercy is shown to offenders who not only fail to gain socially or economically from their conduct, but rather who, through their conduct, place themselves in socially disadvantageous positions. In the long run, the exercise of mercy may alter beliefs of some socially estranged offenders who have concluded that they are not likely to share equally in the benefits of society even if they refrained from illegal conduct.⁴¹ Fourth, a strategy for mercy must lead to judgments that do not appear to condone criminal conduct. A strategy might not forego punishment in its entirety but rather opt for reduced or alternative punishments to avoid the conclusion that persons can violate certain laws with impunity.⁴² Fifth, because mercy is necessarily a derivative of guilt, a strategy for mercy must be careful to first respect the procedural rights of the alleged offender.⁴³ Finally, to avoid the appearance of inconsistency with

38. See *infra* text accompanying note 169.

39. See *infra* text accompanying note 156.

40. See *infra* text accompanying note 158.

41. See *infra* text accompanying note 220.

42. See *infra* text accompanying note 193.

43. See *infra* text accompanying note 296.

justice, a strategy for mercy should focus on those areas of decision making in which society willingly tolerates "soft retributivism."⁴⁴ Objections to mercy will be less forceful if the strategy distances itself from particularized facts of individual cases and focuses instead upon mercy as a legislative factor affecting whole categories of crime.⁴⁵ Because the legislature stands as the final arbiter of what constitutes a crime and what factors, if any, will be considered in sentencing, a focus on mercy at the legislative level also counters any objection that mercy and justice are simply redundant concepts.⁴⁶ By centering a strategy for mercy upon legislative decision making, there is an opportunity to lessen the most compelling objection to mercy: that mercy is inconsistent with the equal administration of justice.⁴⁷

Initially, the challenge facing a strategy for mercy may be to create a merciful system that avoids showing mercy in the individual case,⁴⁸ thus precluding the appearance of injustice and

44. See *infra* text accompanying note 268.

45. See *infra* text accompanying note 394. There are philosophers who would question whether action taken by a legislature could be considered "merciful." For them, "mercy has its most natural home" in the context of judicial decision making with judgments made about individuals in individual fact patterns. See, e.g., N.E. Simmonds, *Judgment and Mercy*, 13 OXFORD J. LEGAL STUD. 52, 53-55 (1993).

46. See *infra* text accompanying note 337. On February 3, 1998, the State of Texas executed Karla Faye Tucker. See Steve Duin, *Blinking at Death*, PORTLAND OREGONIAN, Feb. 8, 1998, at D1, available in 1998 WL 4180596. Prior to her execution, nationwide appeals were made by Pat Robertson and Jerry Falwell asking Governor Bush to act mercifully and spare Tucker's life because Tucker had renounced her prior life and had become a born-again Christian. See *id.* The call for mercy sparked a debate on equal justice issues centering upon the fact that 37 men were executed in Texas in the prior year.

47. See *infra* text accompanying note 369.

48. Norval Morris illustrates the point in the context of sentencing the mentally ill:

If sentences are known in advance, adjusted to the severity of the offense and the criminal record of the accused, and modulated not at all by the individual personal psychological or social circumstances of the accused, then there is no room for mercy . . . One could thus have a merciful system, but not the expression of mercy in the individual case.

MORRIS, *supra* note 16, at 157. Morris opts for a system in which the upper and lower limits of punishment are set, thus permitting mercy. "I thus find myself forced to argue against the widely accepted precept that treating like cases alike is a governing rule of justice." *Id.* at 160.

inconsistency given credence by a history of racial and class discrimination in the criminal justice system. It may be that the criminal justice system must rely on a kind of "prospective mercy;" the legislature anticipates certain conduct, understands the general profile of offenders, and chooses to act mercifully toward the whole set of offenders because of comparative justice issues. In choosing to be overinclusive, some offenders will be treated mercifully even though they exhibit no traits and can present no circumstances that otherwise would stimulate the punisher to be merciful. A strategy for mercy attempts to create a political climate in which alternatives to incarceration may be explored. The practical details become relevant only after legislatures, engaging in mercy, decide to forego the full measure of punishment.

One context into which the infusion of mercy into criminal law policymaking may result in a more humane system, while retaining public support, is in the area of the use of proscribed drugs. This Article considers numerous factors, particularly utilitarian concerns regarding deterrence of future drug crimes, the widespread experimentation with drugs by the general population and the existence of treatment programs for those who can afford it, the hopelessness and inhumanity of treating drug addicts within the prison environment, and the fact that drug crimes often have no immediate victims. This Article ultimately concludes that legislators should decide a merciful response to drug addiction is one that relies more on a public health perspective of addiction than punishment for punishment's sake.⁴⁹ Such an approach can satisfy the various demands of retributivists while confronting the political attraction of Anselm's paradoxes. This strategy takes heed of the issues of inequality, injustice, and the fear that mercy may be seen as condoning certain conduct; it also incorporates the public support for a criminal law that has de-emphasized the individuality of the offender.

The reassert of retribution over rehabilitation certainly reflects the public attitude toward crime, but "[t]he weakening of penal rehabilitationism . . . is an era that has as yet produced

49. See *infra* notes 397-471 and accompanying text.

few theoretical innovations."⁵⁰ Mercy, while still reflecting the underlying justification of punishment as "just deserts," might well be an approach to punishment that encourages greater creativity on the part of policymakers.

I. A FEW ASSUMPTIONS

I have chosen to discuss the role mercy plays in criminal justice decision making through the views of a hypothetical legislator. Particularly, my legislator believes, first, that it is time to reconsider recent trends that have evolved in the criminal law over the past two decades. My legislator does not want to return to either indeterminate sentencing or to the standardless sentencing schemes that preceded the movement in the 1970s toward sentencing guidelines.⁵¹ Certainly the decline in reported

50. ALLEN, *supra* note 2, at 65.

51. The Sentencing Reform Act of 1984 established the United States Sentencing Commission, which drafted guidelines to become effective on November 1, 1987. See Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. § 3551 (1994)). The Guidelines have been roundly criticized as unnecessarily harsh and rigid. See, e.g., KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUSTICE* 170 (1998) (arguing for a return to greater judicial discretion). The importance of the Guidelines has generated much discussion, some of which has occurred in symposia. See, e.g., *Federal Sentencing Guidelines Symposium*, 29 AM. CRIM. L. REV. 771 (1992); *Symposium, Making Sense of the Federal Sentencing Guidelines*, 25 U.C. DAVIS L. REV. 563 (1992); *Symposium on Federal Sentencing*, 66 S. CAL. L. REV. 99 (1992); *Symposium, Punishment*, 101 YALE L.J. 1681 (1992). Federal judges often have been outspoken in their criticism of the Guidelines. See FEDERAL COURTS STUDY COMM., *REPORT OF THE FEDERAL COURTS STUDY COMMITTEE* 133-43 (1990) (reporting that the great majority of judges, defense counsel, and probation officers hold views highly critical of the Guidelines). States have also adopted sentencing reforms to meet criticisms of sentencing disparity. See, e.g., Kay A. Knapp & Denis J. Hauptly, *State and Federal Sentencing Guidelines: Apples and Oranges*, 25 U.C. DAVIS L. REV. 679 (1992) (arguing that state sentencing reforms are more creative and more likely to be successful than their federal counterpart); *A Symposium on Sentencing Reform in the States*, 64 U. COLO. L. REV. 645 (1993) (comparing federal and state sentencing reforms). Most commentators criticize the shift of discretion in sentencing from the court to the prosecutor. The debate has included lengthy discussions of the role of the prosecutor in the era of sentencing guidelines. Most commentators believe the sentencing guidelines decrease judicial discretion in sentencing. See Albert W. Alschuler, *Monarch, Lackey, or Judge*, 64 U. COLO. L. REV. 723, 723 (1993) ("[A] policy of restricting judicial but not prosecutorial discretion is incoherent."); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 502 (1992) ("[W]hen judicial discretion at sentencing is constrained, there is a concomi-

crime, particularly violent crime,⁵² is not wholly unrelated to the enormous national increase in prison populations over the past twenty years,⁵³ or to the increase in the length of prison sentences as a factor in reducing crime rates.⁵⁴ My legislator understands the pressures that have turned the system away from individuation. Pressing resource issues for the police, prosecutor, defense, and courts have contributed to a vision of the need for assembly-line justice.⁵⁵ Fear of crime, sympathy for victims, and disgust at a lack of personal accountability all make it fashionable to argue for summary justice resulting in the quarantine of those convicted.⁵⁶ But my legislator also sees that the majority of state prison and jail inmates are serving time for nonviolent crimes.⁵⁷ He is worried about the apparent inconsistency in sentencing that now exists in an undetected way because of the shift of sen-

tant increase in prosecutorial charge bargaining."); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1506 (1993) (claiming the decrease in judicial discretion has given the prosecutor greater power in the plea bargaining process).

52. The crime rate for serious crime has decreased for the past six years. See Michael J. Sniffen, *Serious Crimes Drop for Sixth Straight Year*, PORTLAND OREGONIAN, May 18, 1998, at A6, available in 1998 WL 4206758 (reporting Attorney General Janet Reno's release of the FBI Uniform Crime Report statistics).

53. See TRACEY SNELL, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1992, at iii (1995) [hereinafter CORRECTIONAL POPULATIONS] (reporting a 142% increase in the number of adults in jail between 1980 and 1992); PRISONERS, *supra* note 13, at 1 (reporting a seven percent average annual growth from 1990 to 1997).

54. It is very difficult to show a causal relationship between increased incarceration rates and decreased crime rates due to such factors as the aging of the general prison population and the difference in motivation for crimes. See Fox Butterfield, *Inmate Count Swells as Sentences Lengthen, Report Says*, PORTLAND OREGONIAN, Jan. 11, 1999, at A1, available in 1999 WL 5309548.

55. In 1993, total justice system expenditures were \$97.5 billion, with \$44 billion for police, \$21.6 billion for courts, and \$31.9 billion for corrections. See SOURCEBOOK, *supra* note 11, at 4 tbl.1.3.

56. See, e.g., FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 3, 171-72 (1995) (claiming that incapacitation is the principal justification for imprisonment although for financial reasons incapacitation may become more selective as further expansion of prison budgets becomes more difficult).

57. In 1992, 52.4% of state prisoners were serving prison sentences for nonviolent offenses. See CORRECTIONAL POPULATIONS, *supra* note 53, at 52 tbl.4.9. The data account only for the crime under which the prisoner was convicted, but this does not always reflect whether violence was used.

tencing discretion from the court to the prosecutor.⁵⁸ The explosion of juvenile offenders tried as adults,⁵⁹ the public shaming of sex offenders,⁶⁰ mandatory minimum sentenc-

58. Three major trends have enhanced prosecutorial power: criminal codes with broad definitions and overlapping provisions; dependency of the system upon plea bargaining; and, sentencing reforms that have created sentencing guidelines and mandatory minimum sentences. See Misner, *supra* note 25, at 741-59. Sometimes the expansion of prosecutorial power has come under the guise of increasing victims' rights. See, e.g., *Armatta v. Kitzhaber*, 959 P.2d 49, app. at 71-72 (Or. 1998) (stating that rights given to the victim by Ballot Measure 40 with the purpose "[t]o ensure crime victims a meaningful role in the criminal and juvenile justice system" are to be exercised by the prosecutor (quoting Ballot Measure 40)).

59. For example, between 1985 and 1994, the number of juvenile cases transferred from juvenile court to criminal court increased by 71% from 7200 cases annually to 12,300 cases annually. See JEFFREY A. BUTTS, *DELINQUENCY CASES WAIVED TO CRIMINAL COURT, 1985-1994*, at 1 (1997). Cases involving black youth were more likely to be transferred to criminal court. See *id.* at 2. For a brief history of the juvenile court system with an emphasis on the trend in juvenile courts to focus on retributive justice, see Marygold S. Melli, *Juvenile Justice Reform in Context*, 1996 WIS. L. REV. 375, 390-95. For a discussion of current trends in juvenile punishment and the argument that less severe punishments for juveniles, when compared to adult sentences, can account for most of the increase in the rate of juvenile crime, see Steven D. Levitt, *Juvenile Crime and Punishment*, 106 J. POL. ECON. 1156 (1998). For a discussion of youth violence, see *The Unprecedented Epidemic of Youth Violence*, in 24 CRIME AND JUSTICE: A REVIEW OF RESEARCH 27, 35 (1998) ("In 1994, about one in six arrestees for homicide, rape and aggravated assault were juveniles.").

60. The most widely used alternative to incarceration is probation. In 1994, approximately 58% of persons sentenced to "custody" of a correctional agency were sentenced to probation. See SOURCEBOOK, *supra* note 11, at 464 tbl.6.1. It has become more common, in the past ten years, to include "scarlet letter provisions" as a condition of probation. See, e.g., Leonore H. Tavill, Note, *Scarlet Letter Punishment: Yesterday's Outlawed Penalty Is Today's Probation Condition*, 36 CLEV. ST. L. REV. 613 (1988). Sometimes the condition of probation is a "shaming sign," either on property or on the person who announces the offender's status. Sometimes a sex offender is required to post a sign warning neighbors that a sex offender lives in the house. See, e.g., *State v. Bateman*, 771 P.2d 314 (Or. Ct. App. 1989) (dismissing appeal as moot without reaching the legality of the probation condition). Georgia has upheld a probation condition requiring a convicted drunk driver to wear a pink bracelet announcing that he is a "D.U.I. Convict." See *Ballenger v. State*, 436 S.E.2d 793 (Ga. Ct. App. 1993); see also *Goldschmitt v. State*, 490 So. 2d 123 (Fla. Dist. Ct. App. 1986) (upholding sentence provision requiring convicted drunk driver to affix bumper sticker to his vehicle indicating a D.U.I. conviction). For additional examples of shaming, see Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 734-39 (1988) (explaining how shaming punishments can be found in two varieties: those that rely on public exposure to shame the offender and those of a private nature with the intent to educate the offender). For a recent analysis of modern shame punishment as an alternative to incarceration, see Aaron S. Book, Note, *Shame on You*, 40 WM. & MARY L. REV. 653, 681-86 (1999) (arguing for an

es,⁶¹ and the use of sentencing guidelines⁶² all point to a continued escalation of punishments.

My legislator lives in the world of the possible, however. He knows that although retribution is at the heart of the debate on crime, utilitarian issues of deterrence, incapacitation, and reha-

embrace of shaming as an effective alternative and providing substantive factors for improving the efficacy of shame punishment).

Sometimes shaming punishments are associated with sex offender registration statutes and sexual notification laws. In 1994 Congress required all states, at the risk of losing federal crime-fighting funds, to adopt a sexual offender registration law. See 42 U.S.C. § 14071 (1994) (often referred to as the "Jacob Wetterling Act," named after a young boy who was kidnaped and sexually abused); see also Jessica R. Ball, Comment, *Public Disclosure of "America's Secret Shame": Child Sex Offender Community Notification in Illinois*, 27 LOY. U. CHI. L.J. 401, 409-14 (1996) (examining types of community notification laws). Sex offender registration often is tied with state "Megan's Laws," which require local authorities to notify the community that a convicted sex offender is living in their midst. See, e.g., Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 788, 861-62 (1996) (concluding that sex offender registration laws give the community a false sense of security, although one can understand the development of registration laws due to the highly emotional nature of the underlying crimes); Kenneth Crimaldi, Note, *"Megan's Law": Election-Year Politics and Constitutional Rights*, 27 RUTGERS L.J. 169, 200-04 (1995) (discussing the history of Megan's Law and arguing for civil commitment or longer sentences as alternatives to community notification);

61. Mandatory sentences have had some draconian effect. For example, in 1990, 54% of all offenders sentenced to a mandatory minimum punishment had no prior record. See BARBARA S. MEIERHOEFER, *THE GENERAL EFFECT OF MANDATORY MINIMUM PRISON TERMS* 14, 29 (1992). For a critique of mandatory sentencing schemes claiming that mandatory sentences are one cause of prison overcrowding, see LOIS G. FORER, *A RAGE TO PUNISH: THE UNINTENDED CONSEQUENCES OF MANDATORY SENTENCING* 151-53 (1994). For a critique of Forer's book, see Book Note, *Determinate Sentencing and Judicial Participation in Democratic Punishment*, 108 HARV. L. REV. 947 (1995) ("Forer largely ignores the importance of democratic participation in the administration of criminal justice."); see also Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 67-73 (1993) (concluding that determinate sentencing reform, which centers on multiple factors for sentencing, is undercut by mandatory sentences that often focus on one factor). Most states adopting "three strikes and you're out" statutes in the 1990s have used the statute for sentencing in six cases or less. See Michelle Boorstein, *"Three Strikes" Laws Are Mostly Ignored*, PORTLAND OREGONIAN, Dec. 11, 1998, at A39, available in 1998 WL 20392148. California has used its statute more than 40,000 times—of those, 4400 were sentenced for terms between 25 years and life. Georgia has sentenced more than 2000 under its statute. See *id.* For a discussion of mandatory sentencing in Arizona, see *supra* note 25.

62. See *supra* note 51.

bilitation are likely to play a role. He remembers the sentencing inconsistency that preceded the move to sentencing guidelines, which currently dominate sentencing.⁶³ He worries about equality in the criminal justice system, particularly in the areas of race and ethnicity.⁶⁴ Finally, he understands that the public is seri-

63. Sentencing disparity was at the heart of the creation of sentencing guidelines. See, e.g., Marvin E. Frankel & Leonard Orland, *A Conversation About Sentencing Commissions and Guidelines*, 64 U. COLO. L. REV. 655, 658 (1993) (arguing that uncontrolled judicial discretion in sentencing is "lawlessness"). For a general discussion of state and federal sentencing guidelines, see *supra* note 51.

64. Wherever one turns in the criminal justice system, one must be struck by the number of African Americans who have been involved in the system. For example, in 1996, 49.4% of all prisoners under state or federal jurisdiction were African American—94% of whom were males. See PRISONERS, *supra* note 13, at 9 tbl.11. It is estimated that seven percent of black males in their twenties and thirties were in prison in 1996. See *id.* at 11. Of all African American males ages 25 to 29, 8.3% were in prison, compared to 2.6% of all Hispanic males and 0.8% of all white males. See *id.* During the twenty years between 1977 and 1996, 5154 persons entered federal and state prisons under a sentence of death, among whom 51% were white, 41% African American, 7% were Hispanic, and 1% were other races. See TRACY SNELL, U.S. DEPT OF JUSTICE, CAPITAL PUNISHMENT: 1996, at 2 (1997). African American inmates serve longer terms for all kinds of crimes when compared to white prisoners. See Louise D. Palmer, *Federal Prison Sentencing Unequal, Report Concludes*, PORTLAND OREGONIAN, May 10, 1998 at A12, available in 1998 WL 4204824 (citing a University of Georgia study analyzing federal criminal cases). For drug trafficking, African Americans are sentenced on average to an additional 11.5 more months than whites. See *id.* For bank robbery, African Americans are sentenced to an additional 12.3 months. See *id.* Similar discrepancies exist in state criminal cases. See Butterfield, *supra* note 54, at A8 (noting that in state rape cases, African Americans serve on average 70 months whereas whites serve 56 months). In juvenile cases, the percentage of African Americans detained prior to juvenile court disposition is twice that of whites. See SOURCEBOOK, *supra* note 11, at 441 tbl.5.76. Almost one-third of all young African American men are in prison, on probation or parole, or awaiting trial. See Paul Butler, *(Color) Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 1270, 1270-71 (1998) (book review) (citing MARC MAUER & TRACY HULING, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 3 (1995)). More young African American men are in prison than are in college. See *id.* at 1271. For a discussion of the impact of race upon sentencing, see MICHAEL TONRY & KATHLEEN HATLESTAD, SENTENCING REFORM IN OVERCROWDED TIMES 217-48 (1997) (collecting short articles on the issue of race and sentencing). But see Patrick A. Langan, *Racism on Trial: New Evidence to Explain the Racial Composition of Prisons in the United States*, 76 J. CRIM. L. & CRIMINOLOGY 666, 683 (1985) (concluding that if racism exists in the criminal justice system, it explains "only a small part of the gap between the 11% black representation in the United States adult population and the now nearly 50% black representation among persons entering state prisons each year in the United States" and that differential involvement has a much greater impact).

ous in its collective decision to turn away from individualized treatment of offenders. Therefore, my legislator knows that a return to broad, judicial individuation of punishment is unlikely and unwanted.

Second, my legislator has some definite views about mercy. He believes that the virtue of mercy is an important component of his own value system. My legislator has been influenced in this regard by his own beliefs within the Christian tradition,⁶⁵ but he understands that those who adhere to other traditions⁶⁶ might also reach his conclusion about the central role that mercy plays for all believers.⁶⁷ Mercy, he believes, is also a part of the

65. Mercy is a central concern in all Christian traditions. In the Book of Sirach 28:1-6, we are asked: "Should a man refuse mercy to his fellows, yet seek pardon for his own sins?" MICHAEL CROSBY, *SPIRITUALITY OF THE BEATITUDES* 140 (1981) (quoting *Sirach* 28:1-6). Similar thoughts exist in Matthew 18:23-35, Parable of the Unforgiving Debtor, who refused to free others from debts owed to him, Matthew 18:1-20 (Jerusalem), and in Luke 10:29-37, Parable of the Good Samaritan. The Fifth Beatitude, in Matthew 5:7, which promises God's mercy for those who show mercy, see *Matthew* 5:7, expresses a spirituality that manifests "compassion, concern, and care for every human being," enabling a person "to become a brother or sister to everyone in the world in such a way that [they] share God's very blessedness." CROSBY, *supra*, at 145. See, e.g., Krister Stendahl, *Judgment and Mercy*, in ALEXANDER J. MCKELWAY & E. DAVID WILLIS, *THE CONTEXT OF CONTEMPORARY THEOLOGY* 147 (1994). Mercy, at times, is seen as a rather simple part of daily life. See, e.g., CROSBY, *supra*, at 190-91 (arguing that mercy affects the manner in which a person interacts with all others). Seeking mercy from God is a part of many prayers such as the "Kyrie Eleison" ("Lord have mercy"), which is the only Greek in the traditional Latin Mass. Mercy is also a complicated issue that is "organically connected" with the application of law. Myriam Wijlens, *Salus Animarum Suprema Lex: Mercy as a Legal Principle in the Application of Canon Law?*, 54 *JURIST* 560 (1994). In the Catholic tradition, "mercy" often refers to "works of mercy," which includes visiting the imprisoned and feeding the hungry. This reference to mercy is not necessarily connected to concepts of retribution and desert. See J.M. Perrin, *Works of Mercy*, in 9 *THE NEW CATHOLIC ENCYCLOPEDIA*, *supra* note 34, at 676, 676-78.

66. See, e.g., Louis E. Newman, *The Quality of Mercy: On the Duty to Forgive in the Judaic Tradition*, 15 *J. RELIGIOUS ETHICS* 155, 155-72 (1987) (examining how forgiveness is viewed in classical Judaic sources); Suzanne Last Stone, *Justice, Mercy, and Gender in Rabbinic Thought*, 8 *CARDOZO STUD. L. & LITERATURE* 139 (1996) (examining rabbinic texts in order to present "alternate visions of justice"); see also Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 *RUTGERS L.J.* 671, 699-700 n.130 (1988) (referring to mercy in Genesis).

67. The exact content of "mercy" and its relevance to personal conduct is ultimately an issue of faith. Cf. Broekman, *supra* note 24, at 369 ("[T]he question to be raised here is whether or not justice can be understood without invoking the process of dogmatization."). The role of religious faith in the public arena has been a source

Western cultural tradition that has been dominant in the development of our country and points to the classics of literature—the lay scripture—to support his conclusion.⁶⁸ Mercy, for

of a great deal of controversy. For example, in a tribute to Professor Harold J. Berman, Professor Witte summarized Berman's scholarly impact:

Every society, says Berman, needs both law and religion. Law helps to give society the structure, the order, the harmony, the predictability it needs to "maintain inner cohesion. Law fights against anarchy." Religion helps to give society the faith, the vision, the destiny, the telos it needs "to face the future. Religion fights against 'decadence' and malaise. Law and religion also need each other. Law gives religion its order and stability as well as the organization and orthodoxy it needs to survive and flourish. Religion gives law the spirit and vision as well as the sanctity and sustenance it needs to command obedience and respect. Without religion, law tends to decay into empty formalism. Without law, religion tends to dissolve into shallow spiritualism.

John Witte, Jr., *A New Concordance of Discordant Canons: Harold J. Berman on Law and Religion*, 42 EMORY L.J. 523, 529-30 (1993) (footnote omitted). Other commentators warn of religion's "dark side":

This dark side, moreover, has the potential to be a powerfully destructive political force. It may, for example, harm the process of political decisionmaking. A believer who sees those who oppose or question her beliefs as aligned with the "powers of chaos" is likely to treat the public square as a battleground rather than as a forum for debate. Religion, if unleashed as a political force, may also lead to a particularly acrimonious divisiveness among different religions. Those religions that are accused of representing the powers of chaos are likely to react with similar vehemence in denouncing their attackers. Finally, and most problematically, religion's participation in the political process can produce dangerous results: Fervent beliefs fueled by suppressed fear are easily transformed into movements of intolerance, repression, hate, and persecution. There are, in short, substantial reasons for exercising caution with respect to religious involvement in the public square.

William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L.J. 843, 859 (1993) (footnote omitted). For a criticism of Marshall's position that the public square generally should be off limits to religion, see Sheldon H. Nahmod, *The Public Square and the Jew as Religious Other*, 44 HASTINGS L.J. 865, 868 (1993).

68. In the *Merchant of Venice*, act 4, scene 1, Portia speaks the famous lines regarding mercy:

The quality of mercy is not strained;
It droppeth as the gentle rain from heaven
Upon the place beneath. It is twice blest:
It blesseth him that gives and him that takes.
'Tis mightiest in the mightiest; it becomes
The throned monarch better than his crown.
His scepter shows the force of temporal power,
The attribute to awe and majesty,
Wherein doth sit the dread and fear of kings.

my legislator, is often more noble than justice;⁶⁹ and he believes that justice without discretion can be "an intolerable engine of tyranny;"⁷⁰ yet he knows that the safety of others can be needlessly endangered if mercy is used indiscriminately.⁷¹

But mercy is above this sceptered sway;
It is enthroned in the hearts of kings;
It is an attribute to God himself;
And earthly power doth then show likest God's
When mercy seasons justice.

WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* 72-73 (David Bevington ed., Bantam Books 1988) (1600). For an interpretation of Portia's speech as an example of mercy in its proper place in the private sphere, see Ross Harrison, *The Equality of Mercy*, in *JURISPRUDENCE: CAMBRIDGE ESSAYS* 107, 107-09 (Hyman Gross & Ross Harrison eds., 1992). Many commentators use Shakespeare to make their arguments regarding mercy. See, e.g., Shael Herman, *Legacy and Legend: The Continuity of Roman and English Regulation of the Jews*, 66 *TUL. L. REV.* 1781, 1837-38 (1992) (examining oppression of England's Jewry); Jeffrie G. Murphy, *Mercy and Legal Justice*, in *CRIME AND PUNISHMENT PHILOSOPHIC EXPLORATIONS* 454, 455 (Michael J. Gorr & Sterling Harwood eds., 1995) [hereinafter *CRIME AND PUNISHMENT*] (explaining that Shakespeare's sentiments regarding mercy "have attained the status of clichés"); Pollack, *supra* note 22, at 513-15 (arguing that Portia's speech is grounded in a duty-based system whereas Western democracies are rights-based systems). For additional literary resources on mercy, see Paul Whitlock Cobb, Jr., Note, *Reviving Mercy in the Structure of Capital Punishment*, 99 *YALE L.J.* 389, 391 n.10 (1989); see also GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 808-09 (1978) (using Shylock and Antonio's relationship to distinguish mercy and excuse).

69.

The experience of the past and of our own time demonstrates that justice alone is not enough, that it can even lead to the negation and destruction of itself, if that deeper power, which is love, is not allowed to shape human life in its various dimensions. It has been precisely historical experience that, among other things, has led to the formulation of the saying: *summum ius, summa iniuria*. This statement does not detract from the value of justice and does not minimize the significance of the order that is based upon it; it only indicates another aspect, the need to draw from the powers of the spirit which condition the very order of justice, powers which are still more profound.

MORRIS, *supra* note 16, at 156 (citing POPE JOHN PAUL II, *DIVES IN MISERICORDIA* (1980)); see also ST. THOMAS AQUINAS, 5 *SUMMA THEOLOGICA*, pt. 1, Q. 21, art. 4 (Thomas Gilby ed., 1967) ("It must be that in every one of God's works justice and mercy are found."); Lucia Ann Silecchia, *On Doing Justice and Walking Humbly with God: Catholic Social Thought on Law as a Tool for Building Justice*, 46 *CATH. U. L. REV.* 1163, 1172 (1997) (claiming charity is essential to justice).

70. MORRIS, *supra* note 16, at 155.

71. See, e.g., HALL, *supra* note 28, at 307 ("We should not shut our eyes to these aspects of the problem [elementary needs of survival] and, regardless of social responsibilities, advocate the substitution of *agape* for criminal law."); see also J.L.A. Garcia, *Two Concepts of Desert*, 5 *LAW & PHIL.* 219, 230 (1986) ("That a person de-

My legislator has consulted extensively the philosophical literature on mercy only to conclude that "the literature is sparse, and scholars rarely agree."⁷² My legislator has found that the philosophers do not "provide definitional and conceptual clarification of the term 'mercy'"⁷³ and, as such, the literature is of little help to "practical persons."⁷⁴

Just as members of my legislator's community hold a myriad of views regarding retribution,⁷⁵ my legislator understands that the community holds fast many different conceptions of mercy. My legislator is cognizant of these views and attempts to find common ground in the political arena by *describing* "mercy" rather than *defining* it.⁷⁶

serves punishment implies no obligation to punish her. Such an obligation might arise for special external reasons, e.g., a pledge or the public's need to be protect[e]d.").

72. Stephen J. Morse, *Justice, Mercy, and Crazyiness*, 36 STAN. L. REV. 1485, 1507 (1984). It has been noted that some philosophers maintain internally inconsistent thoughts about mercy. See, e.g., Andrew Brien, *Saving Grace*, CRIM. JUST. ETHICS, Winter/Spring 1990, at 52, 56 (concluding that Murphy's private law paradigm, which admits to a form of "soft retributivism," is unnecessary because "soft retributivism" itself dissolves the conundrum).

73. Morse, *supra* note 72, at 1507.

74. *Id.*; see also R.A. Duff, *Review Essay: Justice, Mercy and Forgiveness*, CRIM. JUST. ETHICS, Summer/Fall 1990, at 51, 59 (noting philosophical debates on punishment "tend too often to remain at an abstract level utterly divorced from the actualities of our penal practices").

75. For a discussion of the various strands of retribution, see *infra* text accompanying notes 122-257.

76. It would appear that most philosophers writing in the area of mercy see their positions as "works in progress." As one commentator writes:

Because my current thinking about external foundational questions is in such a state of flux, it is with some anxiety that I turn to the "internal" questions that motivate the present essay, i.e., questions that accept "our" ordinary framework of evaluation as a given and seek to explore certain tensions and puzzles within that framework in order to see to what degree that framework is internally coherent. The goal is to attain, if possible, that nirvana of moral epistemology that John Rawls calls "reflective equilibrium." In spite of my increasing skepticism about the value of reflective equilibrium in foundational moral theory, I am still inclined to believe (a) that internal coherence is relevant to external evaluation and (b) that questions of an internal nature, if properly explored with an appreciation of their limits, can be interesting and important in their own right. Thus, I shall temporarily suppress my initial anxiety and plow ahead on the matter at hand.

Murphy, *supra* note 68, at 454 (footnotes omitted); see also Pollack, *supra* note 22,

Mercy can be described as an autonomous virtue "not reducible to some other virtue—especially justice."⁷⁷ Mercy is a part of the larger notion of "charity,"⁷⁸ which teaches that "justice alone is not enough."⁷⁹ Mercy entails a decision by the injured party either to forego a right to punish⁸⁰ or to reduce punishment because of compassion.⁸¹ Mercy mitigates the punishment that an offender deserves⁸² and, as such, mercy is dependent upon a retributive theory of justice.⁸³ Mercy is not earned or deserved but is given freely.⁸⁴

at 520-21 n.29 (summarizing the many definitions of mercy proffered by Seneca including "mercy" defined as "self-control by the mind when it has the power to take vengeance"). Apparently, Seneca viewed mercy as a subset of justice. *See id.*

77. JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 166 (1990). The recent debate on mercy can be traced in part to Jeffrie G. Murphy and Jean Hampton. They write alternating chapters that are intended not to be "the final truth on the matter at hand," *id.* at 186, but instead to stir readers to reflect on issues of punishment, retribution, mercy, and forgiveness. Many have accepted Murphy and Hampton's challenge to join the debate. *See, e.g.,* Brett, *supra* note 33, at 82 (suggesting punishment is not wholly retributive and therefore mercy can be balanced against justice); Brien, *supra* note 72, at 57 ("Hard retributive legal justice . . . is neither feasible nor desirable."); Duff, *supra* note 74, at 57 (arguing that mercy is a proper consideration for the sentencing authority); Carla Ann Hage Johnson, *Entitled to Clemency: Mercy in the Criminal Law*, 10 *LAW & PHIL.* 109, 111 (1991) (arguing that mercy has always been understood as individuation in criminal cases); Harrison, *supra* note 68, at 108 (noting that although individuals may be merciful, institutions, which are bound by reason, may not); Sterling Harwood, *Is Mercy Inherently Unjust?*, in *CRIME AND PUNISHMENT*, *supra* note 68, at 469 (arguing that there is a right to punish, not an absolute duty); Herbert Morris, *Murphy on Forgiveness*, *CRIM. JUST. ETHICS*, Summer/Fall 1988, at 15, 19 (suggesting that Murphy has put too little emphasis on the benefit of forgiveness to the forgiver, "forgiveness is one mark of benignity in the universe, for it is a virtue that benefits both the giver and the receiver"); Simmonds, *supra* note 45, at 68 (concluding that the paradoxes of mercy result from an adherence to the juridical thought of the "unique particularity"). For other aspects of Murphy's approach to mercy, see Jeffrie G. Murphy, *A Rejoinder to Morris*, *CRIM. JUST. ETHICS*, Summer/Fall 1988, at 20, 21 (finding sometimes a "pro-occupation with self" is justified); Jeffrie G. Murphy, *Forgiveness, Mercy and the Retributive Emotions*, *CRIM. JUST. ETHICS*, Summer/Fall 1988, at 3 [hereinafter *Murphy, Retributive Emotions*] (exploring the retributive emotions).

78. *See* Claudia Card, *On Mercy*, 81 *PHIL. REV.* 182 (1972).

79. Silecchia, *supra* note 69, at 1172 (quoting Pope John Paul II, *Dives et Misericordia* (Nov. 30, 1980)).

80. *See, e.g.,* Murphy, *supra* note 68, at 455.

81. *See, e.g.,* Brien, *supra* note 72, at 53; Duff, *supra* note 74, at 57-58.

82. *See, e.g.,* Duff, *supra* note 74, at 57-58.

83. *See, e.g.,* Smart, *supra* note 27, at 224-25 (explaining that a utilitarian looks only to one value, utility, whereas mercy is "multi-principled").

84. *See* MURPHY & HAMPTON, *supra* note 77, at 10; *see also* Brett, *supra* note 33,

Likewise, mercy is not simply the decision to mitigate punishment,⁸⁵ for it requires an attitude that reduces punishment out of respect for the humanity of the offender.⁸⁶ Because justice is demanded of everyone, the obligation to do justice does not depend upon the character of the justice giver;⁸⁷ however, because mercy is not an entitlement, the exercise of mercy gives insight into the underlying character of the mercy giver.⁸⁸

Mercy is more than simply a character trait, however. The virtue of mercy directs my legislator to act with mercy.⁸⁹ Mercy benefits the giver of mercy as well as the recipient.⁹⁰ It is the act

at 83 ("[M]ercy is not something [that] an offender [can] demand."); Garcia, *supra* note 71, at 230-31 (noting that mercy is supererogatory and "belongs to the injured party to bestow or withhold," and "since it is normally morally permissible to inflict deserved suffering, declining to inflict it out of benevolent consideration for one who, in virtue of [his] crimes, has but little right to such consideration is going beyond one's duty").

85. Mercy requires a judgment and commentators center their attention on the judgment of the sentencing judge. Judgments regarding punishment are made at other levels as well: the decision to prosecute, the decision to prosecute for a crime of a certain severity when other charges are possible, the decision to parole, and the decision to pardon. The legislature makes the initial judgment regarding punishment prospectively. The legislative decision is neither individual in nature nor is it responsive to a highly particularized set of facts; nonetheless, it is the community's response setting the parameters of punishment. Legislative determinations of punishment do become more particularized if the legislation is rather narrow in its scope.

86. See Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 SETON HALL L. REV. 288, 298 (1993) ("[M]ercy . . . is a way of acting, not a way of thinking or feeling."); see also MURPHY & HAMPTON, *supra* note 77, at 167 (noting mercy requires not only a change in how one feels but requires action as well).

87. The case of Karla Faye Tucker, executed in Texas on February 3, 1998, brought together persons of all political persuasions seeking mercy from Governor George W. Bush. See Gustav Niebuhr, *Texas Case Might Prompt Christians to Re-think Views on Death Penalty*, PORTLAND OREGONIAN, Feb. 5, 1998, at A9, available in 1998 WL 4179582.

88. See Garvey, *supra* note 22, at 1015.

89. See, e.g., Murphy, *supra* note 68, at 456. In Catholic catechetics mercy is referable both to charity and justice. In one's life the virtue of mercy directs a person to perform corporal works of mercy: to feed the hungry, to give drink to the thirsty, to clothe the naked, to harbor the harborless, to visit the sick, to ransom the captive, and to bury the dead. See generally Perrin, *supra* note 65, at 676-78 (discussing examples of mercy). In addition, one is to perform spiritual works of mercy: to instruct the ignorant, to counsel the doubtful, to admonish sinners, to bear wrongs patiently, to forgive offenses willingly, to comfort the afflicted, and to pray for the living and the dead. See *id.* For a discussion of mercy as a character trait and as a set of principles that determine how a person should act, see Pollack, *supra* note 22, at 519 n.21.

90. Shakespeare remarked that:

of a reduced punishment that distinguishes mercy from forgiveness.⁹¹ Mercy must also be distinguished from excuse and justification.⁹² Mercy assumes that the offender is in a position of "powerlessness and need."⁹³

[Mercy] is twice blessed:

It blesseth him that gives and him that takes.

SHAKESPEARE, *supra* note 68, at 72.

91.

Forgiveness is trickier. [As I have argued above], forgiveness is primarily a matter of changing how one feels with respect to a person who has done one[self] an injury. . . . It is . . . particularly a matter of overcoming, on moral[ly] [acceptable] grounds, the resentment a self-respecting person quite properly feels when [he has] suffer[ed] such an injury. Mercy, though related to forgiveness, is clearly different in at least these two respects. First, to be merciful to a person requires not merely that one change how one feels about [the] person but also [requires] a specific kind of action (or omission)—namely, treating that person less harshly than, in the absence of the mercy, one would have treated him. Second, it is not a requirement of my showing mercy that I be an injured party. All that is required is that I stand in a certain relation to the potential beneficiary of mercy. This relation—typically established by legal or other institutional rules—makes it appropriate that I impose some hardship upon the potential beneficiary of mercy.

MURPHY & HAMPTON, *supra* note 77, at 10. For a critique of Murphy's views on forgiveness, see Cheshire Calhoun, *Changing One's Heart*, 103 ETHICS 76, 83 (1992) (stating that the fear of condoning wrongdoing by forgiving the offender is overrated); Morris, *supra* note 77, at 19 (espousing that forgiveness is the one mark of benignity in the universe). But see Jeffrie G. Murphy, *A Rejoinder to Morris*, CRIM. JUST. ETHICS, Summer-Fall 1988, at 20 (arguing that a person who ignores real moral injuries may be embracing the vice of servility).

92. See FLETCHER, *supra* note 68, at 799 ("[E]xcusing conditions . . . preclude an inference from the act to the actor's character."); Dressler, *supra* note 66, at 699 ("A wrongdoer has a moral right to be excused if he does not deserve to be punished."); Joshua Dressler, *Hating Criminals: How Can Something that Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448, 1468 n.82 (1990) (book review) (stating that often it is difficult to determine whether mercy or justice is involved).

93. Johnson, *supra* note 77, at 117; see also FLETCHER, *supra* note 68, at 808 ("Mercy is appropriate only when the subservient recipient, viewed in his entirety, deserves it."). Perhaps the most obvious place of mercy in the criminal justice system is in the law of pardons. See MOORE, *supra* note 26, at 211 (stating that the pardoning power should be used only when punishment is not justified); Janice Rogers Brown, *The Quality of Mercy*, 40 UCLA L. REV. 327, 332-37 (1992) (outlining a personal account of the clemency hearing of Robert Alton Harris in California). In *Ohio Adult Parole Authority v. Woodward*, 523 U.S. 272 (1998), a plurality of the Court, joined by other Justices in the result, concluded that "the defendant in effect accepts the finality of the death sentence for purposes of adjudication, and appeals for clemency as a matter of grace." *Id.* at 282. For a compilation of state law on pardon, clemency, and commutation, see *id.* at 293 n.4 (Stevens, J., concurring and

Mercy, for my legislator, is "big mercy;" he views mercy more than just a means to fine-tune justice,⁹⁴ limited to the act of a judge choosing the least restrictive punishment from a limited choice of options.⁹⁵ My legislator sees mercy as both a religious⁹⁶ and humanitarian⁹⁷ imperative, and he believes that if he were behind Rawls's "veil of ignorance," he would opt for a criminal justice system that valued mercy.⁹⁸

Not only is my legislator moved by concerns of mercy in his private life,⁹⁹ he agrees with Garcia that mercy is an appropriate

dissenting). For a discussion of the English system, see B.V. Harris, *Judicial Review of the Prerogative of Mercy?*, 1991 PUB. L. 386, 407, 439 (arguing that there should be minimal procedural guarantees because of the importance of the individual interests involved, and that the prerogative of mercy is a "safety net" and thus new machinery to advise the home secretary is required); A.T.H. Smith, *The Prerogative of Mercy, The Power of Pardon and Criminal Justice*, 1983 PUB. L. 398, 408-22 (discussing the scope of pardons in England and their effects); see also Blom-Cooper, *supra* note 26, at 119-20 (noting that the prerogative of mercy should not be used as a substitute for due process of law).

94. See Garvey, *supra* note 22, at 1014 (noting that mercy is not a part of justice whose purpose it is to ameliorate the strict application of rules); Harrison, *supra* note 68, at 120-21 (examining Aristotle's claim that the law must permit exceptions in order to prevent injustice in the individual case and noting that this requires flexibility to consider the appropriate facts—facts that should lead to the same decision if the pattern replicates itself in another case); Smart, *supra* note 27, at 227 (stating that mercy must not be misconstrued as a vehicle to avoid the results of an inflexible law). But see Dressler, *supra* note 66, at 700 ("[W]e should retain a sentencing system with sufficient flexibility to allow lenience whether we identify the lenience as an effort to be 'just' or 'merciful.'").

95. See H. Scott Hestevold, *Justice to Mercy*, 46 PHIL. & PHENOMENOLOGICAL RES. 281, 290-91 (1985) (suggesting "disjunctive desert" hypothesizes that justice permits a number of acceptable punishments and mercy permits the decision maker to choose the least severe from the range of possibilities); Pollack, *supra* note 22, at 529 (arguing that disjunctive desert does not allow for mercy in a rights-based system). But see MORRIS, *supra* note 16, at 159 (stating that mercy "can provide the fine-tuning of sentencing essential to a just system").

96. See *supra* note 65 and accompanying text.

97. See, e.g., Simmonds, *supra* note 45, at 55 n.5 (presenting a defense of mercy from a secular perspective).

98. See JOHN RAWLS, *A THEORY OF JUSTICE* 136-42 (1971) (finding a just system is one in which a person ignorant of his own place in society would choose as being fair).

99. Duff offers an example of mercy in private decision making:

I go to see a friend who has done me down, intent on remonstrating forcibly with him; he figures in my thought and intentions as one who has done me wrong who deserves my blame and condemnation. On arriving, however, I find him distraught with grief at the death of his wife,

consideration in public decision making as well,¹⁰⁰ and therefore

and this at one drives all thought of the wrong he has done me, and of remonstrating him, from my mind (or, if it does not do so, I realize that it should). I see him (I should see him) simply as a friend who is suffering. It is still true, I suppose, that he "deserves" to be condemned for what he did to me, but [these] are not the terms in which I should respond to him.

Duff, *supra* note 74, at 58-59.

100. See Garcia, *supra* note 71, at 231-32. The debate concerning whether mercy can be shown by the state or is appropriate only in private disputes is structured in variant ways. For some commentators, justice requires punishment and therefore the state must punish; mercy is always inappropriate. See KANT, *supra* note 4, at 102; Murphy, *supra* note 68, at 459 (stating the "job description" of a judge is to do justice). The rejoinder to Kant's "hard retributivism" is the "soft retributivism" described by Brien and Garcia that maintains that retributivism permits but does not require punishment. See Brien, *supra* note 72, at 56-57; Garcia, *supra* note 71, at 230-31.

Other commentators, who would prevent the state from exercising mercy, emphasize the inherent difference between public and private decisions. For Harrison, "we are prepared to grant individuals moral autonomy, permitting them in some cases, to act irrationally." Harrison, *supra* note 68, at 116. Because the actions of states affect other citizens, state action must be "justifiable to its citizens [that is] the state cannot be allowed pure discretion. . . . This means that the state is not allowed an area of play lying beyond any possible justification. It is not allowed mercy." *Id.* at 116-17. Card also drew the distinction between personal and institutional justice relegating mercy to "personal justice" and not "social justice." Card, *supra* note 78, at 188-93. This approach is related closely to Anselm's second paradox. See *infra* text accompanying note 369.

Other objections to the state exercising mercy center on the question of who is the victim of crime and what is the proper role of the judge. Murphy maintains that the victim of crime is the individual and therefore the judge, who represents the community, could show mercy only if the victims of the crime agreed. See Murphy, *supra* note 68, at 459. It is not within the "job description" of the judge to show mercy. See *id.*; see also P. Twambley, *Mercy and Forgiveness*, 36 ANALYSIS 84, 87 (1976) ("[J]udges have no right to be merciful because it is not to *them* that any obligation is due."). Many would conclude, however, that crime is an affront to the community and that it is the role of the judge to represent the community and dispense justice and mercy. See Garcia, *supra* note 71, at 231. It should also be noted that "mercy" is often within the job description of the state official. Many jurisdictions give powers of pardon and clemency to the executive branch. See *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 276 (1998). In *Woodard*, the Justices badly split regarding the applicability of the Due Process Clause to clemency proceedings for prisoners facing the death penalty. In dissent, Justice Stevens noted the 38 states that have both the death penalty and clemency provisions. See *id.* at 293 n.4 (Stevens, J., dissenting). Mercy, through the use of concepts such as premeditation, is apparent in some homicide cases. See, e.g., *State v. Schrader*, 302 S.E.2d 70, 75 (W. Va. 1982) ("What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy." (quoting Benjamin Cardozo,

he is willing to consider both factors independent of¹⁰¹ and relevant to¹⁰² the issues of culpability and punishment. He is aware

What Medicine Can Do For Law, in *LAW AND LITERATURE* 70, 100 (1931))). In capital cases, mercy can be shown through the inclusion of a broad range of mitigating circumstances. *See, e.g.*, *Buchanan v. Angelone*, 522 U.S. 269, 270 (1998) (discussing the role of mitigating factors in death penalty statutes).

Similar issues are discussed in regard to Anselm's second paradox. *See infra* text accompanying note 369. For a broader discussion of virtue and the public sphere, see Onora O'Neill, *Theories of Justice, Traditions of Virtue*, in *JURISPRUDENCE: CAMBRIDGE ESSAYS*, *supra* note 68, at 55.

101. *See, e.g.*, Brett, *supra* note 33, at 91. As Brett states:

It is clear that in Anglo-American law, quite a variety of factors not bearing on the question of culpability actually do play a role in the determination of sentences. Some of these are properly regarded as matters of mercy. When a defendant is severely injured in committing a crime, the injury is a factor which the court may use in mitigation. When a defendant is injured subsequent to an offense, it is also taken into account. The ill health or advanced age of an offender are other mitigating factors. So also are factors which show that imprisonment will work a special hardship on an offender. That an offender shows remorse is deemed to be highly relevant to the severity of his sentence. The grief of a convict over the death of his mother is a basis for remission of a nearly completed prison sentence.

Id. (footnotes omitted). Some of these factors are considered in executive pardons: Mercy is the quality which . . . [is] special to the offender, the convicted person's character unrelated to the offence or his criminal record, such as his present state of health that dictates leniency; or some special feature relevant to reform or rehabilitation which may lead the judge not to pass the sentence which, without the special circumstances, the criminal merits. The impact of imprisonment upon the offender's wife and children may be a factor.

Blom-Cooper, *supra* note 26, at 117.

102. In the past ten years there has been a resurgence in scholarship on the issues of excuse and justification. For example, Joshua Dressler discusses new conditions that have been proposed as excuses: "drug and alcohol addiction, brainwashing, 'battered [spouse],' premenstrual syndrome, post-traumatic stress disorder, genetic abnormalities, alien cultural beliefs and 'rotten social background.'" Dressler, *supra* note 66, at 672-73. Dressler applies his own standard for excusing conduct: "whether the offender, at the time of the offense, possessed and had a fair chance to apply a critical attribute of personhood, namely, free choice." *Id.* at 674-75. On the whole, Dressler believes that the Model Penal Code has gone about "as far as it should" in excusing wrongdoers. *Id.* at 675. Professor Wilson believes that the "abuse excuse" threatens to undermine the criminal law. *See* JAMES Q. WILSON, *MORAL JUDGMENT: DOES THE ABUSE EXCUSE THREATEN OUR LEGAL SYSTEM?* 89 (1997). Those in favor of abuse as a defense attempt to make certain wrongdoers out as attractive victims and seek to explain, not judge, their conduct. *See id.* at 109-12. For Wilson, a social science explanation of conduct should be distinguished from moral judgment. *See id.*; *see also* GEORGE P. FLETCHER, *WITH JUSTICE FOR SOME: PROTECTING VICTIMS'*

that others may see mercy as a "namby-pamby" concept¹⁰³ that is, at best, mere sentimentality to be used by persons "in their private lives with families and pets."¹⁰⁴

My legislator is particularly moved in his views on mercy by the Parable of the Prodigal Son.¹⁰⁵ The prodigal son left home

RIGHTS IN CRIMINAL TRIALS 1-7 (1996) (outlining how the criminal justice system has failed certain groups). For a critique of Wilson's book and a recall for a thorough rethinking of the theory of excuse, see Victoria Nourse, *The New Normativity: The Abuse Excuse and the Resurgence of Judgment in the Criminal Law*, 50 STAN. L. REV. 1435 (1998) (book review). For a discussion of the relationship of mercy and excuse, see FLETCHER, *supra* note 68, at 807-10. The defendant's ability to control his conduct can be relevant in considering a downward departure from the Guidelines. See *United States v. McBroom*, 124 F.3d 533, 548 (3d Cir. 1997). *McBroom* differs from the law in other circuits. See Case Comment, *Criminal Law: Third Circuit Holds that Volitional Impairments Can Support a Claim of Diminished Mental Capacity*—*United States v. Broom*, 124 F.3d 533 (3d Cir. 1997), 111 HARV. L. REV. 1122 (1998).

103. See Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 741 ("[T]he hard-nosed utilitarian objective of crime control achieved through deterrence and incapacitation . . . is a philosophical pillar of the Guidelines system."); Morse, *supra* note 72, at 1507 (criticizing Morris's use of mercy and Morris's reliance upon a papal encyclical in devising his theory of criminal sentencing). As Morse states:

Mercy is Norval Morris' "fudge factor," argued for at various stages of the exposition. It is the most mystifying part of the book because Morris never tells us what mercy is and under what conditions it should be granted. He quotes approvingly from a recent papal encyclical that movingly says, in effect, that justice should be tempered by mercy. When this sort of pronouncement comes from the Pope, it does not cause any problems, but when a criminal lawyer asks us to adopt it as a guiding principle, we are entitled to ask for more than uplifting sentiments.

Id. (footnotes omitted).

104. Jeffrie G. Murphy, *Forgiveness, Mercy, and the Retributive Emotions*, CRIM. JUST. ETHICS, Summer-Fall 1988, at 3, 12.

105.

A man had two sons. The younger said to his father, "Father, let me have the share of the estate that would come to me." So the father divided the property between them. A few days later, the younger son got together everything he had and left for a distant country where he squandered his money on a life of debauchery.

When he had spent it all, that country experienced a severe famine, and now he began to feel the pinch, so he hired himself out to one of the local inhabitants who put him on his farm to feed the pigs. And he would willingly have filled his belly with the husks the pigs were eating but no one offered him anything. Then he came to his senses and said, "how many of my father's paid servants have more food than they want, and here am I dying of hunger! I will leave this place and go to my

with his share of his father's estate.¹⁰⁶ The son, who in essence tells his father that he is better off with his father dead than alive, squanders his inheritance on a life of debauchery.¹⁰⁷ The prodigal son returns to his father's estate only after he finds himself in a foreign land—hungry, dirty, and in despair.¹⁰⁸ The father welcomes the son home unconditionally, clothing his son and ordering a feast in celebration.¹⁰⁹ The father acts mercifully and chooses to forego punishing his son by either banishing the son or forcing the son to forego his "sonship" and work as a

father and say: Father, I have sinned against heaven and against you; I no longer deserve to be called your son; treat me as one of your paid servants." So he left the place and went back to his father.

While he was still a long way off, his father saw him and was moved with pity. He ran to the boy, clasped him in his arms and kissed him tenderly. Then his son said, "Father, I have sinned against heaven and against you. I no longer deserve to be called your son." But the father said to his servants, "Quick! Bring out the best robe and put it on him; put a ring on his finger and sandals on his feet. Bring the calf we have been fattening, and kill it; we are going to have a feast, a celebration, because this son of mine was dead and has come back to life; he was lost and is found." And they began to celebrate.

Now the elder son was out in the fields, and on his way back, as he drew near the house, he could hear music and dancing. Calling one of the servants he asked what it was all about. "Your brother has come" replied the servant "and your father has killed the calf we had fattened because he has got him back safe and sound." He was angry then and refused to go in, and his father came out to plead with him; but he answered his father, "Look, all these years I have slaved for you and never once disobeyed your orders, yet you never offered me so much as a kid for me to celebrate with my friends. But, for this son of yours, when he comes back after swallowing up your property—you kill the calf we had been fattening."

The father said, "My son, you are with me always and all I have is yours. But it was only right we should celebrate and rejoice, because your brother here was dead and has come to life; he was lost and is found."

Luke 15:11-32 (Jerusalem Bible 1969). Preceding the Parable of the Prodigal Son are two parables meant to show the depth of God's mercy: The Parable of the Lost Sheep, see *Luke 15:4-7*, and the Parable of the Lost Drachma, see *Luke 15:8-10*. For a discussion of the Parable of the Prodigal Son and the lessons parables have in analyzing constitutional issues, see Robert A. Burt, *Constitutional Law and the Teaching of Parables*, 93 *YALE L.J.* 455, 467-71 (1984). For other parables related to mercy, see CROSBY, *supra* note 65, at 140-58.

106. See *supra* note 105.

107. See *id.*

108. See *id.*

109. See *id.*

slave.¹¹⁰ My legislator recognizes that the parable contains threads of comparative¹¹¹ and noncomparative justice, retribution, mercy, and the apparent condonation of unacceptable conduct; he looks to the parable for guidance as he confronts all facets of mercy. Other accounts such as the Death of the Good Thief¹¹² and the Parable of the Merciless Official¹¹³ convince my legislator that mercy is at the core of community living.¹¹⁴

110. *See id.*

111. The elder brother is not of a like mind. The elder son cannot punish his brother and therefore mercy is not at issue. However, the elder son appears to refuse to forgive his brother even when asked to do so by his father. The parable leaves the reader not knowing whether the elder son eventually relented and joined in the celebration.

112.

One of the criminals hanging there abused him. "Are you not the Christ?" he said. "Save yourself and us as well!"

But the other spoke up and rebuked him "Have you no fear of God?" he said. "You got the same sentence as he did, but in our case we deserved it: we are paying for what we did. But this man has done nothing wrong. Jesus," he said "remember me when you come in your kingdom."

"Indeed I promise you," he replied "today you will be with me in Paradise."

Luke 23:39-43 (Jerusalem Bible 1969).

113.

And so the Kingdom of heaven may be compared to a King who decided to settle his accounts with his servants. When the reckoning began, they brought him a man who owed ten thousand talents; but he had no means of paying, so his master gave order that he should be sold, together with his wife and children and all his possessions, to meet the debt. At this, the servant threw himself down at his master's feet. "Give me time," he said, "and I will pay the whole sum." And the servant's master felt so sorry for him that he let him go and cancelled the debt. Now as this servant went out, he happened to meet a fellow servant who owed him one hundred denarii; and he seized him by the throat and began to throttle him. "Pay what you owe me," he said. His fellow servant fell at his feet and implored him, saying, "Give me time and I will pay you." But the other would not agree; on the contrary, he had him thrown into prison till he should pay the debt. His fellow servants were deeply distressed when they saw what had happened, and they went to their master and reported the whole affair to him. Then the master sent for him. "You wicked servant," he said. "I cancelled all that debt of yours when you appealed to me. Were you not bound, then, to have pity on your fellow servant just as I had pity on you?" And in his anger the master handed him over to the torturers till he should pay all his debt. And that is how my heavenly Father will deal with you unless you each forgive your brother from your heart.

Matthew 18:23-35 (Jerusalem Bible 1969).

114. *See* CROSBY, *supra* note 65, at 141 (citing *Matthew*: 18 to show that mercy is

Although my legislator concludes that mercy is consistent with justice, he struggles with the comparative fairness issues raised by those who believe that in a rights-based criminal justice system, mercy becomes an injustice.¹¹⁵ My legislator worries about the potential for abuse under a system of mercy¹¹⁶—mercy consciously or unconsciously extended to one race or group to the exclusion of others.¹¹⁷

Finally, my legislator knows that although it is extraordinarily helpful for the policymaker to turn to the philosophers for assistance in setting public policy, the debate for the philosopher on punishment, retribution, and mercy is not the same debate for the public policymaker. For the philosopher, the punishment debate is an opportunity to test ideas that enable her to develop a unified explanation whether the debate is on foundational issues, or whether it assumes a certain framework, and seeks to determine whether the framework leads to consistency¹¹⁸—the “reflective equilibrium” of Rawls.¹¹⁹ For the policymaker, the punishment debate is a source of insight into the beliefs about punishment that are likely to be entertained by segments of her constituencies or by policymakers with different constituencies. The philosopher has the luxury of staking out the one particular viewpoint that seems to make the most sense in the most in-

essential to spiritual life). God's mercy and human mercy are different. For example, God is always aware of all facts, and there can be no confusing mercy and justice. For humans, what appears to be mercy may well be a determination that the trier of fact is unsure as to guilt and acquits out of justice.

115. See, e.g., Pollack, *supra* note 22, at 515 (concluding that mercy is inappropriate in a rights-based system and appropriate in a duty-based system); see also *infra* note 371.

116. See Brett, *supra* note 33, at 89 (suggesting the temptation is to abuse mercy and convert it to favoritism).

117. Professor Garvey summarizes one objection to integrating mercy into the penalty phase of a capital case: “Arbitrary grants of mercy are morally tolerable; discriminatory ones are not.” Garvey, *supra* note 22, at 1041. Garvey rejects this argument and concludes that the introduction of mercy reconfigures already-existing jury discretion. See *id.* But see Ernest van den Haag, *Refuting Reiman and Nathanson*, 14 PHIL. & PUB. AFF. 165, 174 (1985) (noting that “[n]o murderer becomes less guilty, or less deserving of punishment, because another murderer was punished leniently, or escaped punishment altogether,” because the unfairness is not in punishing the guilty but in permitting other guilty people to escape punishment).

118. See Murphy, *supra* note 68, at 454.

119. See RAWLS, *supra* note 98, at 48-51.

stances. In contrast, the public policymaker has the luxury of *not* staking out one particular viewpoint; instead, he has the concomitant need to distill core themes from the various views held in society from which the multitude of opinions derive. Although the philosopher may argue for the justification of punishment to be contained in one thought—oftentimes, it seems, a very long thought—the policymaker must weave together a policy that may appear to have conflicting elements of retribution, deterrence, rehabilitation, and isolation.¹²⁰ The policymaker needs the philosopher to assist in defining the problem and offering insights into possible solutions so that the policymaker can seek a policy that can best account for the diversity of opinions within her community.¹²¹ Legislative decisions, unlike the decisions of philosophers, are group decisions, which often represent a common end and not necessarily a common purpose. The policymaker is interested more in addressing all the issues raised in the debate in order to reach a practical consensus than in finding a solution that flows necessarily from a neatly constructed framework.

II. RETRIBUTION

Mercy itself assumes a system of punishment in which punishment is deserved.¹²² Consequently, a legislator, who believes that the public justifies punishment primarily from a retributive point of view, must understand the various forms retribution might take before he can devise a strategy of mercy. Often, the

120. "For the principle [of retribution], we have argued, is a requirement of justice, whereas deterrence, incapacitation, and rehabilitation are essentially strategies of controlling crime." ANDREW VON HIRSCH, *DOING JUSTICE* 75 (1976).

121. It is beyond the scope of this Article to argue in favor of a particular legislative philosophy. Other scholars, however, provide insight into legislative choice. *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991) (discussing the principles of public choice theory); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29 (1985) (discussing the effect factions have on the law).

122. *See, e.g.*, MURPHY & HAMPTON, *supra* note 77, at 20 ("To be merciful is to treat a person less harshly than, given certain rules, one has a right to treat that person."); K.G. Armstrong, *The Retributivist Hits Back*, in *THEORIES OF PUNISHMENT* 19, 36 (Stanley E. Grupp ed., 1972) ("It is only the retributive idea that makes mercy

claim is made that the 1970s marked the demise of rehabilitation¹²³ and the revival of retribution as the justification for punishing criminal offenders.¹²⁴ Indeed, during the 1950s and 1960s the retributive theory of punishment had fallen so far from grace that C.S. Lewis could not find a European publisher for his works on retribution.¹²⁵ The fashionable language of rehabilita-

possible, because to be merciful is to let someone off all or part of a penalty which he is recognized as having deserved."); Smart, *supra* note 27, at 358 ("We regard mercy as deciding, solely through benevolence, to impose less than the deserved punishment on an offender."). But see Brett, *supra* note 33, at 82 ("I will argue that a more plausible account of punishment which is not wholly retributive makes sense of the traditional view that justice must sometimes be balanced against mercy.").

123. "Rehabilitation," like retribution, contains many different thoughts. For some, rehabilitation centers on training the offender for return to the community:

We are dealing with persons who have to return to the life of a free community after a period which is seldom very long, and in most cases, is only a few weeks ahead. Our object, therefore, must be to restore them to ordinary standards of citizenship, so far as this can be achieved in the time at our disposal.

FOX, *supra* note 28, at 70. For others, rehabilitation connotes a modification of the offender's value system. See RUPERT CROSS, PUNISHMENT, PRISON AND THE PUBLIC 48-50 (1971). For others, rehabilitation is simply a politically expedient way to argue for humanitarian treatment of offenders while they are incarcerated. See MICHAEL SHERMAN & GORDON HAWKINS, IMPRISONMENT IN AMERICA 124 (1981) ("The defining purpose of imprisonment . . . should in most cases be incapacitation. But the rehabilitative ideal must constrain the punishment inflicted on the offender."). At least one commentator has worried that the rehabilitative ideal gave politicians the ability to claim that "something is being done." ALLEN, *supra* note 2, at 79.

124. See ALLEN, *supra* note 2, at 5. Allen recognizes the dominance of the rehabilitative ideal and that "[r]etribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." *Id.* at 5. By 1975, the California legislature had declared that the purpose of imprisonment was not rehabilitation but punishment. See *id.* at 8. "What is most significant about the 1970s, and what distinguishes it from the past, is the degree to which the rehabilitative ideal has suffered defections, not only from politicians, editorial writers, and the larger public, but also from scholars and professionals in criminology, penology, and the law." *Id.* at 8-9; see also WILSON, *supra* note 102, at 78-79 (describing how the last twenty years have seen a pronounced resurgence of interest in retribution). The shift from rehabilitation to retribution may have occurred for a number of reasons, including the view of the "new retributivists" that utilitarianism is an affront to human dignity. *Id.* at 76-77. The public, however, may have been affected by a different view: The public came to believe that offenders were incorrigibly dangerous and in need of incapacitation. See JOHN BRAITHWAITE & PHILLIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 125 (1990).

125. See Armstrong, *supra* note 122, at 19 (citing C.S. Lewis, *The Humanitarian Theory of Punishment*, in TWENTIETH CENTURY (1949)).

tion of the 1960s¹²⁶ gave way to the language of retribution as the public demanded that offenders receive their "just deserts."¹²⁷ One may wonder whether there was ever a serious attempt to implement the idea of rehabilitation¹²⁸ or whether rehabilitation could ever justify punishment,¹²⁹ but at the very

126. See *supra* text accompanying note 123.

127. See *supra* note 4.

128. See CROSS, *supra* note 123, at 108 ("We suspect that it passes the wit of man to contrive a prison which shall not be gravely injurious to the minds of the vast majority of prisoners . . . " (quoting SYDNEY AND BEATRICE WEBB, *ENGLISH PRISONS UNDER LOCAL GOVERNMENT* 248 (1922))).

129. See, e.g., D.J.B. Hawkins, *Punishment and Moral Responsibility*, in *THEORIES OF PUNISHMENT*, *supra* note 122, at 13, 18 ("[O]n a superficial view it seems kinder to think of reformation alone and to forget about retribution, but in the end this is to forget moral responsibility and to incur the danger of looking upon men in the same light as animals to be trained to any pattern which appears desirable."); C.S. Lewis, *The Humanitarian Theory of Punishment*, in *THEORIES OF PUNISHMENT*, *supra* note 122, at 301, 302 (contending that rehabilitation, "merciful though it appears, really means that each one of us, from the moment he breaks the law, is deprived of the rights of a human being . . . [because] the concept of Desert is the only connecting link between punishment and justice"). A scathing report issued by the American Friends Service Committee condemned the rehabilitative ideal as a method of repression. See AMERICAN FRIENDS SERVICE COMMITTEE, *STRUGGLE FOR JUSTICE* 147 (1971) ("[T]he law should only deal with a narrow aspect of the individual, his criminal act or acts . . . [w]henver the law considers the whole person it is more likely that it considers factors irrelevant to the purpose of delivering punishment."). The Report concluded that prison administrators supported the rehabilitative ideal as a means to increase their power over inmates. See *id.* Rehabilitation was just a way to force cultural assimilation. See *id.* at 34-47. The report noted the irony that Pennsylvania Quakers were largely responsible for the acceptance of the rehabilitative ideal: "This two-hundred-year-old experiment has failed." *Id.* at v.

Rehabilitation's most obvious effect was to increase the length of prison sentences. See SHERMAN & HAWKINS, *supra* note 123, at 71-72. For this reason and others, Rupert Cross found rehabilitation unacceptable as a justification for punishment. See CROSS, *supra* note 123, at 98-101. George Fletcher believes that criminals are not "diseased" and we have no "cures": "The goal of rehabilitation is particularly insidious because the coercive power of the state is cloaked by benevolent motives; if the suspect is 'sick' and in need of treatment, it seems totally irrelevant whether on a particular occasion he 'happened' to commit a crime." FLETCHER, *supra* note 68, at 415. Doubt is cast on the possibility of there being real reformation save in the most exceptional cases, and it is even suggested that the belief that prison could be reformatory has had a baneful influence. See CROSS, *supra* note 123, at 86. Because prisons are "cold storage depots" and not therapeutic communities, "the main aim of prison reform should be the prevention of prisoners' deterioration." *Id.* at 85-86.

One of the early calls for a return to retribution came from the Committee on the Study of Incarceration, which was established to respond to the prison riots of the early 1970s. See VON HIRSCH, *supra* note 120, at XV-XXI. The Committee rejected

least, in the past twenty-five years the rhetoric of punishment is no longer the language of rehabilitation¹³⁰ but is one of retribution.¹³¹ The policymaker who does not acknowledge the centrality of retribution, and the attraction that retribution has for the general public, does so at her own risk. Those who politically oppose rehabilitation and also embrace retribution founded on a political philosophy that expresses a desire to create a vigorous and disciplined search for moral consensus have been very successful over the past twenty-five years.¹³² As Cohen warns, retributive theory "contains an element of truth which only sentimental foolishness can ignore."¹³³

But retribution, anchored in the notion of just deserts and having its focus on what has occurred and not on some future goal,¹³⁴ is a concept with many different strands of emphasis. It is within the woven strands of retribution¹³⁵ that we find subtle

rehabilitation as a proper justification for punishment, *see id.* at 11-18, and opted for a sentencing system that attempted to limit discrepancy, *see id.* at 97-140.

130. Some commentators have called for the abolition of rehabilitation as the justifying purpose of punishment and renewed emphasis on incapacitation. *See, e.g.,* NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 58 (1974); *see also* ZIMRING & HAWKINS, *supra* note 56, at 157-58.

131. There are many critics of modern retributivism. *See, e.g.,* Nigel Walker, *Modern Retributivism*, in *JURISPRUDENCE: CAMBRIDGE ESSAYS*, *supra* note 68, at 73, 73-94 (stating that modern retributivism is not intellectually supportable and is "a disillusioned reaction from utilitarianism").

132. *See* ALLEN, *supra* note 2, at 62-64 (arguing that often the language of criminal justice has become filled with the terminology of war).

133. Morris R. Cohen, *Moral Aspects of the Criminal Law*, 49 *YALE L.J.* 987, 1011 (1940).

134. *See* WASSERSTROM, *supra* note 28, at 112 (stating that retribution is backward-looking in its emphasis).

135. Commentators have organized subcategories of retribution in myriad ways. For example, Dressler divides retribution into negative retribution, which requires just deserts as a necessary condition for punishment, and positive retribution, which demands that a guilty person be punished. *See* Dressler, *supra* note 92, at 1451-52. Positive retributivism is either assaultive, which concludes that it is morally right to hate a criminal, or protective, which concludes that criminals have a right to be punished based upon a principle of reciprocal benefits and burdens. *See id.* For H.L.A. Hart, discussion of retribution was best organized into discussion of retribution as a general justifying aim, including concepts such as "espiation" and "reprobation," and retribution directed to the question of distribution of punishment. *See* H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 8-11 (1968). Garvey believes the discussion of punishment can best be organized into two dimensions: expressive and justificatory. *See* Garvey, *supra* note 60, at 740-43. For Wilson, retribution can be

policy implications for a strategy of mercy.¹³⁶

A. *A Strand of Emotion: Vengeance and Expiation*

"Vengeance" is described often as a natural and, therefore, expected public and private response to a criminal act.¹³⁷ Additionally, the notion that it is a good, or at least an expected response, to hate the offender, strikes a strong chord for many persons.¹³⁸ This "pre-philosophical intuition"¹³⁹ to respond on an emotional level finds its way into the retributive theories of Kant¹⁴⁰ and Hegel.¹⁴¹ St. Augustine attempted to channel the

viewed at the individual or psychological level as a desire for personal vengeance in response to the loss of an object or a relationship; at the historical level as a process that moved from retribution as an issue of individual right and duty to the realm of state action; and at the philosophical level as a process of restoring societal balance. See WILSON, *supra* note 102, at 84-85. For a discussion of the breadth of the concept of retribution, see John Cottingham, *Varieties of Retribution*, 29 PHIL. Q. 238 (1979).

136. See HART, *supra* note 135, at 2-3 (explaining that one obstacle to assessing the institution of criminal law is the temptation to underestimate the complexity of punishment).

137. For a history of the evolution of punishment, see HANS VON HENTIG, *PUNISHMENT: ITS ORIGIN, PURPOSE AND PSYCHOLOGY* 17-116 (1973).

138. It would appear that a broad consensus of Americans believe that courts are "not harsh enough" with criminals. GAUBATZ, *supra* note 12, at 2-3.

139. Duff, *supra* note 74, at 52 (predicting that the recent discussions of retributivism will be seen by some as "futile attempts to rationalize intuitions or feelings which we should rather and finally dismiss as irrational, disreputable, or at least irrelevant to the proper concerns of the state"). For others who "have more respect for our pre-philosophical intuitions," the new approaches to retributivism will be welcome attempts "to uncover and explicate the moral understandings which those intuitions and feelings may (imperfectly) express." *Id.* at 53. Although Duff sees this intuition to punish as "natural or deep-rooted," he does not believe this intuition can justify a system of criminal punishment. See R.A. DUFF, *TRIALS AND PUNISHMENTS* 197-99 (1986). For Duff, the difficulty is bridging "[t]he gap between 'the guilty deserve to suffer' and 'it is right for us to impose the suffering.'" *Id.* at 200. In his attempt to justify punishment with respect for the autonomy of the individual, Duff centers on punishment as restoring the balance disrupted by crime, see *id.* at 205-32, and punishment as enabling the criminal to expiate or atone for crime, see *id.* at 233-66. Reluctantly, Duff concludes that our imperfect legal system is incapable of addressing "the criminal as an autonomous moral agent whose consent and repentance we seek." *Id.* at 295. Because the system will not stop punishing until the behavior is reformed, punishment must be justified as a deterrent. See *id.* at 298.

140.

When, however, someone who delights in annoying and vexing peace-loving

natural emotion away from a hatred of the offender toward a hatred of the offense.¹⁴² It is Stephen, however, who has given voice to the emotional draw of retribution:

I think it highly desirable that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression to that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it.¹⁴³

Stephen's emphasis on moral indignation and hatred of the criminal was part of his general denunciatory theory of criminal punishment,¹⁴⁴ a theory supported in more recent times by such notables as Lord Denning.¹⁴⁵ In Hart's words, it is a "natural"

folk receives at last a right good beating, . . . everyone approves of it and considers it as good in itself even if nothing further results from it; nay, even he who gets the beating must acknowledge in his reason, that justice has been done to him, because he sees the proportion between welfare and well-doing.

IMMANUEL KANT, *Critique of Practical Reason*, in *CRITIQUE OF PRACTICAL REASON AND OTHER WRITINGS IN MORAL PHILOSOPHY* 118, 170 (Lewis White Beck ed. & trans., Univ. of Chicago Press 1949) (1797).

141. For Hegel, punishment was necessary to annul the crime. See GEORGE WILHELM FRIEDRICH HEGEL, *PHILOSOPHY OF RIGHT* § 220 (T.M. Knox trans., 1952). The offender had a right to be punished. See *id.* at 70. For a criticism of Hegel, see TED HONDERICH, *PUNISHMENT: THE SUPPOSED JUSTIFICATIONS* 47-51 (1969); see also D.J.B. Hawkins, *Punishment and Moral Responsibility*, 7 *MODERN L. REV.* 205, 207-08 (1944) (distinguishing the retributive theory of Plato and Thomas Aquinas from Kant and Hegel).

142. SAINT AUGUSTINE, *ON FREE CHOICE OF THE WILL* 123 (Anna S. Benjamin & L.H. Hackstaff eds. & trans., 1985) ("[T]he ugliness of sin is never without the beauty of punishment."). However, Augustine, at least in the context of the "household" saw punishment as rehabilitative: punishment allows the offender to "be readjusted to the family peace from which he had broken away." ST. AUGUSTINE, *THE CITY OF GOD AGAINST THE PAGANS* Bk. 19, Ch. 16 (Elizabeth Clark trans., 1984). Similarly, Thomas Aquinas found "fraternal correction" to be an act of charity. See AQUINAS, *supra* note 69, at 2-2, Q.33, A.1.

143. SIR JAMES FITZJAMES STEPHEN, 2 *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 81-82 (1883).

144. See *id.* at 81. For a criticism of Stephen, see HART, *supra* note 135, at 170-73 (including his observation that in a pluralistic society one may not necessarily find a single, homogeneous social morality).

145. See *THE ROYAL COMMISSION ON CAPITAL PUNISHMENT*, Cmd. 8E32, ¶ 53, cited in HART, *supra* note 135, at 170.

view that leads English judges to claim that the judiciary is "the mouthpiece of the moral sentiments of society."¹⁴⁶

Stephen believed crime creates visceral reactions that simply cannot be sublimated,¹⁴⁷ a view held by others as well.¹⁴⁸ Some commentators have agreed with Stephen, emphasizing their belief that the visceral reaction to crime is such an integral part of human nature that the emotional reaction to crime is not likely to dissipate, even as our understanding of the causes of crime become more sophisticated:

Scientific insight will sooner be thrown overboard than the gratification of an emotional drive. A better understanding of the criminal [law] may in a number of cases change the nature of the general sense of justice, but it will not remove the emotional demand that crime must be expiated.¹⁴⁹

Many have written on the danger of falling prey to this "retributive emotion,"¹⁵⁰ arguing the barbarism of such an approach.¹⁵¹

146. HART, *supra* note 135, at 170. Similarly, Professor Kahan points out that those who argue for alternatives to incarceration often miss the social meaning of punishment. See Dan M. Kahan, *Punishment Incommensurability*, 1 BUFF. CRIM. L. REV. 691, 693-94 (1998). "The message of condemnation is very clear when society sentences an offender to prison," *id.* at 693, but the same social message is not as strong when alternatives to incarceration are used: not all punishments are "commensurable."

147. See JAMES F. STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 152 (1991) (stating that the "feeling of hatred and the desire [for] vengeance . . . are important elements of human nature which ought . . . to be satisfied in a regular and legal manner").

148. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring) ("The instinct for retribution is part of the nature of man."). For the contrary argument that retribution cannot justify the death penalty, see *id.* at 231 (Marshall, J., dissenting). This view should be distinguished from "revenge utilitarianism," which justifies punishment on the ground that if the state did not punish, private individuals might take it upon themselves, thereby leading to disorder. See MICHAEL S. MOORE, *LAW AND PSYCHIATRY* 233-43 (1984).

149. FRANZ ALEXANDER & HUGO STAUB, *THE CRIMINAL, THE JUDGE, AND THE PUBLIC* 211 (1931). Some have viewed expiation in a different manner: an offender must atone for his own acts but the offender also is a vicarious expiator; "[i]n paying his debt to society, the [offender] is also . . . atoning for society's failure to provide a milieu in which crime is not . . . rewarded." John F. Else & Keith D. Stephenson, *Vicarious Expiation: A Theory of Prison and Social Reform*, 20 CRIME & DELINQ. 359, 359 (1974).

150. The term is used by Murphy to describe "institutionalized vengeance." See MURPHY & HAMPTON, *supra* note 77, at 2-3.

151. See, e.g., WILSON, *supra* note 102, at 193 (admitting that his view that prisons

Some have seen revenge-based retribution as an unworthy justification for punishment: punishment can no more be identified with revenge "than love can be identified with lust."¹⁵² Others have countered the barbarian argument by noting that vengeance is a natural response that follows the "deprivation of a cathected object."¹⁵³ Still others have seen retribution as the only justification that respects the autonomy of the individual.¹⁵⁴ Anyone who has been a victim of crime (especially a violent crime), however, or who has attended a sentencing hearing when evidence from the victim's family has been introduced,¹⁵⁵ can

are intended to punish would "strike many enlightened readers today as cruel, even barbaric"; see also David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1650 (1992) (arguing that retribution conflicts with the need to respect all persons including the offender). But see Jeffrie G. Murphy, *Getting Even: The Role of the Victim*, 7 SOC. PHIL. & POL'Y 209, 210 (1990) (discussing the assumption that revenge in the criminal law is "either unambiguously evil or unambiguously sick" and proving no basis has ever been given for that assumption).

152. FLETCHER, *supra* note 68, at 417.

153. WILSON, *supra* note 102, at 292.

154. This is Duff's position, but a position that he reluctantly concludes is untenable currently because there is not the existence of a genuine community within which the criminal has his place, and from which crime threatens to exclude him. See DUFF, *supra* note 139, at 295. Without a community, there cannot be "an authentic system of communicative and redemptive punishments." *Id.*

155. The often devastating impact of victim and victim-family testimony initially caused the Supreme Court to limit the admissibility of that testimony in capital cases. See, e.g., *South Carolina v. Gathers*, 490 U.S. 805, 810-11 (1989); *Booth v. Maryland*, 482 U.S. 496, 508 (1987). In *Payne v. Tennessee*, 501 U.S. 808 (1991), the Court overruled both *Gathers* and *Booth*, finding it unfair for the victim to remain "a faceless stranger" while the defendant was afforded the opportunity to humanize himself. See *id.* at 825 (quoting *Gathers*, 490 U.S. at 821 (O'Connor, J., dissenting)). For a summary of the debate that followed *Payne*, see Garvey, *supra* note 22, at 1018-22. For a discussion that advocates the broad use of victim narrative in criminal trials, see Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863 (1996). For a criticism of the role of victims in sentencing, see, e.g., Robert C. Black, *Forgotten Penological Purposes: A Critique of Victim Participation in Sentencing*, 39 AM. J. JURIS. 225, 240 (1994) (arguing that victims should be provided necessary "services," not new "rights").

For a discussion of possible reforms in the criminal justice system to produce a greater role for victims, see FLETCHER, *supra* note 102, at 180-201, 247-50. But see Lynne Henderson, *Whose Justice? Which Victims?*, 94 MICH. L. REV. 1596, 1601-04 (1996) (book review) (criticizing Fletcher's view of the history and breadth of the victim's rights movement); cf. PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 76 (1982) (recommending financial assistance from the federal government to the states for victim compensation and assistance programs).

testify to the instinctive emotions that crime elicits.¹⁵⁶ Indeed, the central role the victim has occupied in American politics in the last three decades is mirrored by the expanded role the victim has attained in the philosophical rethinking of retribution, particularly by those who would nudge the debate on retribution away from an economic model back in the direction of retribution as a moral response to an immoral act.¹⁵⁷ Jeffrie Murphy, for example, justifies the resentment that a crime victim feels on the ground that a proper respect for "the moral value incarnate in my own person" requires a response to the crime,¹⁵⁸ although Murphy retains a possible role for forgiveness of the offender by the victim.¹⁵⁹ Jean Hampton elaborates on the role resentment plays in the victim's mental reaffirmation of her proper rank and value.¹⁶⁰ For Hampton, indignation at wrongs done to myself and others is a natural and acceptable response to crime.¹⁶¹ Resentment and hatred are also natural responses to the victim's fears that the offender's act demeans the value of the victim herself and may be a true appraisal of the victim's worth.¹⁶²

The community's desire for emotional satisfaction has found its way into the political fabric of our country in other ways related to victim-centered issues. Emotion-laden crimes such as drunk driving¹⁶³ and child abuse¹⁶⁴ have spawned national orga-

156. See Murphy, *supra* note 151, at 209-10 (asserting that victims' complaints often come in areas of criminal law where compensation seems inadequate). But see Julian V. Roberts, *American Attitudes About Punishment: Myth and Reality*, in TONRY & HATLESTAD, *supra* note 64, at 250-55 (arguing that most Americans, when asked their opinion in a nonsimplistic way, will choose alternatives to incarceration).

157. See Duff, *supra* note 74, at 52.

158. See MURPHY & HAMPTON, *supra* note 77, at 18. Mercy for the offender can be offset by victim impact statements. See Murphy, *supra* note 151, at 221.

159. See MURPHY & HAMPTON, *supra* note 77, at 23-25.

160. See *id.* at 60-61.

161. See *id.*

162. See *id.* However, Hampton urges victims to overcome resentment and hatred through forgiveness by separating the victim's act from the offender's inherent decency. See *id.* at 86-89. For criticism of Hampton's analysis of wrongdoing as inherently involving a demeaning of a victim, see Duff, *supra* note 74, at 54-55.

163. For a description of the national organization, Mothers Against Drunk Driving, see MADD: *Mothers Against Drunk Driving* (visited Feb. 28, 2000) <<http://www.madd.org>>.

164. See generally Earl-Hubbard, *supra* note 60, at 794-814 (discussing the sex abuse cases of children such as Jacob Wetterling and Megan Kanka and the result-

nizations that have made certain that their cases remain in public view.¹⁶⁵ Increased leverage of the prosecutor in plea bargaining, due to the implementation of sentencing guidelines in particular, seems, at least in part, to make punishment of the offender more certain and more expeditious even if doubt exists as to whether the changes are likely to result in more reliable judgments.¹⁶⁶ There is the overriding public concern that protection for defendants' rights has come at the cost of either delaying or denying the public's right to punish offenders. There seems to be a widespread view that the criminal justice system prefers defendants over victims.¹⁶⁷ Yet, with the public emphasis on vengeance, one may ask legitimately where is the public discussion on mercy and forgiveness that are "the popularly conceived antitheses of vengeance?"¹⁶⁸

Any attempt to create a strategy for mercy must be made knowing that unpunished or underpunished crime may not satisfy the societal requirement for emotional catharsis. Whether the attention on revenge is a natural response or whether the attention on revenge as retribution comes by default from skepticism of utilitarian justifications of deterrence, rehabilitation, and incapacitation, a strategy for mercy must account for this strand of retributivism. Consequently, a successful strategy for mercy must find areas of criminal conduct that do not create strong emotional responses against the offender. Areas of crime in which offenders exhibit the effect of such nonretributive factors such as poverty, illiteracy, and unemployment, or any other factor that engenders a degree of general compassion, are candidates of merciful treatment. Therefore, crimes of violence and crimes with particularized victims are not primary candidates.¹⁶⁹

ing development of federal and state registration statutes).

165. See, e.g., MOTHERS AGAINST DRUNK DRIVING, CBBB PHILANTHROPIC ADVISORY REPORT 3 (1997) (stating that all national MADD chapters combine to spend \$48 million each year to prevent drunk driving).

166. See, e.g., Misner, *supra* note 25, at 759-63 (detailing the shift of power to the office of the prosecutor and away from the courts).

167. See generally FLETCHER, *supra* note 68, at 416-17 (arguing that criminal trials have become politically influenced proceedings at the expense of the victim).

168. WILSON, *supra* note 102, at 293.

169. See *id.* at 301 ("If one is willing to assess the extent of an injury in order to

B. A Strand of Moral Outrage: Social Order and Denunciation Theory

Often it is difficult to distinguish the visceral reaction to crime from its better-dressed, intellectual cousin that claims that retribution is necessary for social organization.

[W]ithout a sense of retribution we may lose our sense of wrong. Retribution in punishment is an expression of the community's disapproval of crime, and if this retribution is not given recognition then the disapproval may also disappear. A community which is too ready to forgive the wrongdoer may end by condoning the crime.¹⁷⁰

The plurality decision in *Furman v. Georgia*¹⁷¹ embodied this sense of retribution. After noting the instinctiveness of retribution, Justice Stewart concluded that retribution "serves an important purpose in promoting the stability of a society governed by law."¹⁷² Similarly for Durkheim, the passionate and nonreflective reaction to crime served the useful role of maintaining social cohesion; retributive punishment guards against the breakdown of social solidarity that crime threatens.¹⁷³ For Kant, retribution is a "categorical imperative."¹⁷⁴ Retribution conserves

fix punishments, one should also be willing to assess the possible non-existence of an injury in order to negate the need for punishment."). These factors also relate to the wisdom of criminalizing the conduct.

170. A.L. GOODHART, *ENGLISH LAW AND THE MORAL LAW* 93 (1953). For a criticism of Goodhart's view that "law serves simultaneously as external authority and internalized norm," see Elizabeth Mensch & Alan Freeman, *The Politics of Virtue, Animals, Theology & Abortion*, 25 GA. L. REV. 923, 972 (1991).

171. 408 U.S. 238 (1972).

172. *Id.* at 308 (Stewart, J., concurring). Justice Stewart continued with his description of retribution to include utilitarian concerns as well: "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law." *Id.* (Stewart, J., concurring); see also MOORE, *supra* note 148, at 233-43 (reviewing arguments for punishment and retributivism).

173. See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 108 (George Simpson trans., 1933) ("It is necessary, then, that [the collective conscience] be affirmed forcibly at the very moment when it is contradicted, and the only means of affirming it is to express the unanimous aversion which the crime continues to inspire, by an authentic act which can consist only in suffering inflicted upon the agent.").

174. As Kant noted:

the moral conscience, maintains respect for law and, in the words of Lord Denning, "[p]unishment is the way in which society expresses its denunciation of wrongdoing."¹⁷⁵ Other commentators have used different terminology. For Hyman Gross, the need to prevent impunity justifies law enforcement.¹⁷⁶ The criminal law is enforced "because we cannot tolerate letting people get away with their crimes."¹⁷⁷ Others have labeled the societal revulsion to crime a "disgust" that is claimed not to be "an instinctive and unthinking aversion but rather is classified as a thought-pervaded evaluative sentiment" that embodies a judgment that the object of disgust will "compromise our own status" unless the community responds.¹⁷⁸ In Stephen's words, "the sentence of the law is to moral sentiment of the public in relation to any offence what a seal is to hot wax."¹⁷⁹

Those who emphasize "the interdependence and interpenetration of law and morals"¹⁸⁰ are not without their critics. Retribution in the sense of a denunciation theory, H.L.A. Hart concluded, may result in stultifying the advance of morals in the community because present values take on a sacrosanct character.¹⁸¹ Hart

The law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it—in keeping with the Pharisaic motto: "It is better that one man should die than the whole people should perish." If legal justice perishes, then it is no longer worth while for men to remain alive on this earth.

KANT, *supra* note 4, at 100.

175. Lord Justice Denning, Royal Commission on Capital Punishment: Minutes of Evidence, Ninth Day, Dec. 1, 1949, in SANFORD KADISH & STEPHEN SCHULHOFER, CRIMINAL LAW 140-41 (1995).

176. See Hyman Gross, *Preventing Impunity*, in JURISPRUDENCE: CAMBRIDGE ESSAYS, *supra* note 68, at 95, 95 (arguing that "preventing impunity" is the only reason to enforce law—the "possibility of being allowed to get away with it" is what really matters).

177. *Id.* at 95. Gross finds other forms of retributivism, such as making the perpetrator pay for his crime and forcing the offender to give up ill-gotten gains, to be insufficient. See *id.* at 98-101.

178. Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621, 1656 (1998) (book review) (reviewing WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* (1997)).

179. STEPHEN, *supra* note 143, at 81.

180. HART, *supra* note 135, at 169.

181. See *id.* at 170-71.

also criticized that denunciation fosters the naive view that there exists in society "a single homogeneous social morality."¹⁸² Finally, he believed that denunciation, particularly after a rise in the frequency of a particular crime, can justify a harsher than normal sentence and violate the principle of fairness that like cases should be treated alike.¹⁸³

Andrew von Hirsch's criticism of retribution to preserve "intact the collective conscience"¹⁸⁴ centers on the use of the offender as a means to achieve a social order. This type of utilitarian justification for the contemporary retributivist is inherently unfair because the offender does not receive that which he deserves, but rather that which is useful for the whole society.¹⁸⁵ Other criticisms of the denunciatory theory of retribution challenge it as an outdated theory overly concerned with enforcing "a criminal law that is highly religious in content"¹⁸⁶ and too willing to punish conduct that is not harmful in itself and is not likely to cause harm.¹⁸⁷ Despite his criticism of the denunciatory theory, Hart concluded that denunciation is a view "likely to commend itself to most English judges."¹⁸⁸

Denunciation seems to be equally attractive to the American legal and political systems as well. This is not surprising to Francis Allen:

The theories of just punishment strongly reaffirm the reality of moral values at a time when much in contemporary thought appears to challenge the conception of moral as well as legal responsibility; when the modern anarchy of values breeds feelings of loss and anomie; and when dwindling confidence in the future is obviously related to the erosion of the moral verities of the past.¹⁸⁹

182. *Id.* at 171.

183. *See id.* at 172.

184. RALPH D. ELLIS & CAROL S. ELLIS, *THEORIES OF CRIMINAL JUSTICE* 61 (1989). For a summary of criticism of the denunciatory theory, see *id.* at 60-66.

185. *See* VON HIRSCH, *supra* note 120, at 46.

186. ELLIS & ELLIS, *supra* note 184, at 61.

187. *See id.* at 60-66. Often those critical of the denunciatory theory find themselves in the company of Rawls and others centered on fairness and supporting a "non-utilitarian, yet systematic and philosophical theory of ethics." *Id.* at 60.

188. HART, *supra* note 135, at 170.

189. ALLEN, *supra* note 2, at 67; see Joseph R. Gusfield, *On Legislating Morals:*

A denunciatory approach to retribution is politically popular because it affirms the beliefs of those who believe themselves to be in the majority or those who conclude that their beliefs should be in the majority. The fact that the denunciatory theory can be seen as utilitarian in nature is precisely why the theory may be attractive to some voters who subscribe to an inclusive theory of punishment, here blending retribution and deterrence.¹⁹⁰ A strategy for mercy must account for the attractive-

The Symbolic Process of Designating Deviance, 56 CAL. L. REV. 54, 57 (1968) ("Law is not only a means of social control but also symbolizes the public affirmation of social ideals and norms.").

190. In his classic article, Johannes Andenaes summarizes the relationship of deterrence and the moralizing effect of punishment generally:

The effect of the criminal law and its enforcement may be *mere deterrence*. Because of the hazards involved, a person who contemplates a punishable offense might not act. But it is not correct to regard general prevention and deterrence as one and the same thing. The concept of general prevention also includes the *moral* or *socio-pedagogical* influence of punishment. The "messages" sent by law and the legal processes contain factual information about what would be risked by disobedience, but they also contain proclamations specifying that it is *wrong* to disobey. . . .

The moral influence of the criminal law may take various forms. It seems to be quite generally accepted among the members of society that the law should be obeyed even though one is dissatisfied with it and wants it changed. If this is true, we may conclude that the law as an institution itself to some extent creates conformity. But more important than this formal respect for the law is respect for the values which the law seeks to protect. It may be said that from law and the legal machinery there emanates a flow of propaganda which favors such respect. Punishment is a means of expressing social disapproval. In this way the criminal law and its enforcement supplement and enhance the moral influence acquired through education and other non-legal processes. Stated negatively, the penalty neutralizes the demoralizing consequences that arise when people witness crimes being perpetrated.

Deterrence and moral influence may both operate on the conscious level. The potential criminal may deliberate about the hazards involved, or he may be influenced by a conscious desire to behave lawfully. However, with fear and moral influence as an intermediate link, it is possible to create unconscious inhibitions against crime, and . . . illegal actions will not present themselves consciously as real alternatives to conformity, even in situations where the potential criminal would run no risk whatsoever of being caught.

Johannes Andenaes, *The General Preventative Effects of Punishment*, 114 U. PA. L. REV. 949, 950-51 (1966).

ness of the denunciation theory. If an offender is seen to act with impunity when he is treated mercifully, and if the criminal law is seen as the glue that binds society, mercy will be seen as undermining social cohesion.¹⁹¹

Yet there is another dimension of the social cohesion argument. Social cohesion is also likely to suffer if denounced conduct is pervasive and the decision to prosecute a subset of offenders appears to be made on factors such as race, ethnicity or class. For example, in the federal prosecution for cocaine possession, offenders who possessed even very small amounts of crack cocaine were treated much more harshly than those who possessed powder cocaine. Those prosecuted for crack cocaine possession, and therefore prosecuted most severely, were almost exclusively African Americans.¹⁹² Exhibiting mercy to all persons

191. The denunciatory theory may be one reason why the so-called "abuse excuses," such as post-trauma syndrome, that tend to deflect personal responsibility away from the offender have been so controversial. See FLETCHER, *supra* note 102, at 140-46. Certainly the denunciatory theory conflicts with the Marxist view that in a properly designed society, all criminality would be a problem "for the physician rather than the judge." Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217, 242 (1973) (citing William Bonger, a Marxist criminologist).

192. The Anti-Drug Abuse Act of 1986, and the Guidelines promulgated in 1987 set quantity thresholds that would trigger mandatory minimum sentences. The sentencing threshold for powder cocaine was set at one hundred times the threshold amounts for crack cocaine. Over 90% of all federal crack defendants in 1992 were African American. See David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1286-90 (1995). Some argued that heightened penalties for crack cocaine benefitted the African American community. See, e.g., Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1269 (1994) (stating that "blacks as a class may be helped by measures reasonably thought to discourage" crack dealing and use). Resistance to the 100:1 ratio was expressed by prosecutors, juries and even Justice Kennedy. One federal judge resigned from the bench rather than apply the Guidelines. See William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1279-83 (1996). Eventually, the Guidelines were amended. In 1995, the Sentencing Commission adopted an amendment to the Guidelines that equalized penalties for similar amounts of powder cocaine and crack cocaine. See 60 Fed. Reg. 25,074, 25,076 (1995). The change came, in part, because of the "high percentage of blacks convicted of crack cocaine offenses." See United States Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* 162 (Feb. 1995). See generally David H. Angeli, A "Second Look" at Crack Cocaine Sentencing Policies: One More Try for Federal Equal Protection, 34 AM. CRIM. L. REV. 1211 (1997) (arguing for a reconsideration of crack cocaine cases from a heightened equal protection awareness).

possessing all forms of cocaine may be seen as a means of correcting a form of racial discrimination and thereby promoting, not splintering, social cohesion.

No strategy for mercy can ignore the fact that a large segment of society places strong emphasis on incarceration as the premier method of expressing community condemnation of certain conduct.¹⁹³ Yet an analysis of the demographics of the current prison population certainly should give any policymaker pause to consider the role that race and economic status play in the decision to incarcerate.¹⁹⁴ In the search for classes of crime to introduce a strategy for mercy, a policymaker may seek an area of conduct in which society can seek to show its disapproval without the need to incarcerate for long periods of time, or perhaps to incarcerate at all. A strategy for mercy may seek an area of criminal conduct whereby exhibiting mercy can affect social cohesion positively by altering past prosecutorial strategies that have had disparate racial effects. In this way, the centripetal force to coalesce society through the enforcement of the criminal law also accounts for "the centrifugal forces of a pluralistic society which produce widely differing estimates within the community of the blameworthiness of behavior and the seriousness of the harms committed."¹⁹⁵

A strategy for mercy concerned with issues of social cohesion must also recognize the ascendancy of judicial minimalism as

193. There is always the risk that the public will view any alternative sanction to prison as insufficient punishment. Even though short terms of imprisonment do not appear to deter more effectively than fines or community service, the public does not see incarceration and alternatives to incarceration as being commensurable:

Punishment is *not* just a way to make offenders suffer; it is a special social convention that expresses moral condemnation. Not all modes of suffering express condemnation or express it in the same way. The message of condemnation is very clear when society sentences an offender to prison. But when it merely fines him for the same act, the message is likely to be different: you may do what you have done, but must pay for the privilege. Because community service penalties involve activities that conventionally entitle someone to respect and admiration, they also fail to express condemnation in an unambiguous way.

Kahan, *supra* note 146, at 693-94.

194. *See supra* note 64.

195. ALLEN, *supra* note 2, at 70.

evidenced in such cases as *Romer v. Evans*¹⁹⁶ and *Vacco v. Quill*,¹⁹⁷ which means that it is likely that the arena in which majority and minority rights are resolved will be the legislature rather than the courts.¹⁹⁸ For the legislative policymaker, punishment as denunciation ultimately must face questions of fairness, including aspects of the classical problems of majoritarian rule.

C. A Strand of Fairness: Mutual Benefit and Distribution

Modern retributivists, who oftentimes are disillusioned refugees from utilitarianism,¹⁹⁹ have coalesced around the belief that punishment can be justified only under a nonutilitarian, but highly sophisticated concept of fairness.²⁰⁰ In an attempt to distinguish this justification for punishment from earlier justifications of revenge²⁰¹ and denunciation,²⁰² some commentators have insisted on jettisoning the term "retribution" and substituting the language of "desert."²⁰³ Modern retributivists have been influenced by the writings of John Rawls, particularly his emphasis on liberty centered on a policy of noninterference²⁰⁴ and also by his rejection of punishment based on utilitarian, consequentialist reasons.²⁰⁵ The fairness aspect of retribution does not enjoy the same identifiable popular attraction as revenge-based or value-affirming retribution. Yet the nuances of fairness do shed light on additional problems inherent in devising a strategy for mercy.

196. 517 U.S. 620 (1996).

197. 521 U.S. 793 (1997).

198. See Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 7 (1996).

199. See Walker, *supra* note 131, at 73.

200. For a general discussion of the variations of modern retributivism, see ELLIS & ELLIS, *supra* note 184, at 55-66.

201. See *supra* text accompanying note 137.

202. See *supra* text accompanying note 170.

203. See ELLIS & ELLIS, *supra* note 184, at 60.

204. See RAWLS, *supra* note 98, 195-257.

205. See ELLIS & ELLIS, *supra* note 184, at 58; see also FLETCHER, *supra* note 68, at 417.

1. *Issues of Mutual Benefit*

For some retributivists, justification for punishment can be found by analyzing the way in which communities are formed and maintained. If one is to live in a society free of violence and deception, then all individuals must be deemed to have accepted a burden of exercising self-restraint over certain inclinations. As Herbert Morris concluded:

If a person fails to exercise self-restraint even though he might have and gives in to such inclinations, he renounces a burden which others have voluntarily assumed and thus gains an advantage which others, who have restrained themselves, do not possess. This system, then, is one in which the rules establish a mutuality of benefit and burden and in which the benefits of non-interference are conditional upon the assumption of burdens.²⁰⁶

Fairness dictates that benefits and burdens are distributed equally and any person gaining an unfair advantage must have the advantage "in some way erased," thus restoring a sense of equilibrium,²⁰⁷ or, in Kant's terminology, "rectifying the balance" skewed by criminal conduct.²⁰⁸ The advantage gained by the offender is not the "consequential profit" of the armed robbery but rather the "avoidance of the burden of self-restraint."²⁰⁹ Punishment imposes "an extra burden on the criminal, [and] restores the balance which her crime disturbed."²¹⁰

R.A. Duff contrasts this form of "legal retributivism" of the 1970s with Stephen's morality based retributivism:

The picture is not that of moral beings whose wrongdoings rightly attract the forceful condemnation of their community, but of rational economic agents whose social relations are structured by social contract; the law's penal provisions are the penalty clauses in that contract.²¹¹

206. Morris, *supra* note 77, at 33.

207. Duff, *supra* note 74, at 51.

208. Kant's position can be compared to Hegel's notion that right, because it is an absolute, cannot be negated by crime, and it is "therefore obligatory that the nullity created by crime be annulled." WILSON, *supra* note 102, at 282.

209. DUFF, *supra* note 139, at 207.

210. *Id.*

211. Duff, *supra* note 74, at 52.

The "exact nature of the imbalance created by a criminal act"²¹² is unclear; the imbalance may be one between the offender and the victim²¹³ or between the offender and society.²¹⁴

Critics of the mutual benefits theory target their criticism on the confusion of the concepts of "retribution" and "restitution."²¹⁵ They also challenge proponents to detail the proper way to rectify the imbalance caused by crime in areas such as homicide, rape, and arson.²¹⁶ The metaphor of a debt owed to society fails with regard to the notion of inchoate crime.²¹⁷ As George Fletcher points out, all of society is burdened when violent crimes occur.²¹⁸ Correspondingly, criminal law prosecutions are brought in the name of the community and not in the name of the particularized victim.

An additional criticism of the mutual benefits theory is more telling in our attempt to develop a strategy for mercy. Ultimately, the policymaker must face the issue whether all members of society share in the mutuality of benefit and burden—the issue of what to do with the concept of just deserts in an unjust society.²¹⁹ Duff eloquently summarizes the criticism:

For my obligation to obey the law is an obligation of justice; I owe it to my fellow-citizens to pay by my self-restraint and obedience for the benefits which I receive from their self-restraining obedience to the law. But insofar as I do not receive a fair share of the benefits and burdens in question, I

212. WILSON, *supra* note 102, at 283.

213. ARISTOTLE, *THE NICOMACHEAN ETHICS*, bk. V, ch. IV at v. 120-23 (Ostwald trans. 1962).

214. See MORRIS, *supra* note 130, at 77.

215. See, e.g., ELLIS & ELLIS, *supra* note 184, at 60.

216. See, e.g., HONDERICH, *supra* note 141, at 47 ("Marriages, considered as contracts, can be annulled. Crimes cannot be, in any ordinary sense. My death or imprisonment, after I have killed a man, does not make things what they were before."); Walker, *supra* note 131, at 88 ("Certainly in the case of theft or criminal damage it is usually possible for restitution to undo virtually all the harm, if one ignores fear and outrage; but nobody can be unmurdered, unraped, or unmugged."). For a discussion of the difficulty with using the metaphor of "debt" in regard to retribution, see *id.* at 88-90.

217. See Walker, *supra* note 131, at 88.

218. See FLETCHER, *supra* note 68, at 417-18.

219. See VON HIRSCH, *supra* note 120, at 143.

cannot owe this debt of obedience to my fellows; and insofar as my crime is motivated by a need which itself results from my unjustly disadvantaged position, or by a greed which is itself instilled and fostered in me by the very structures of my society, I cannot be accused of *wilfully* seizing an unfair advantage for myself in breaking the law. My punishment is then unjustified: it does not deprive me of a profit which I have *unfairly* gained, or restore a *fair* balance of benefits and burdens; and the state which treats me unfairly cannot claim the right to punish me in the name of fairness.²²⁰

Murphy phrases the same fundamental criticism in terms more likely to be heard in the political arena. As Murphy notes, retribution from a reciprocity perspective supposes a "picture of an evil person who, of his own free will, intentionally acts against those just rules of society which he knows, as a rational man, benefit everyone including himself."²²¹ But, for Murphy, the "paying debt to society" perspective fails if we think of the offender as sometimes being

an impoverished black whose whole life has been one of frustrating alienation from the prevailing socio-economic structure—no job, no transportation if he could get a job, substandard education for his children, terrible housing and inadequate health care for his whole family, condescending—tardy—inadequate welfare payments, harassment by the police but no real protection by them against the dangers in his community, and near total exclusion from the political process.²²²

220. DUFF, *supra* note 139, at 209. Ultimately, Duff rejects retribution as an acceptable justification for punishment because of a lack of community respect for the autonomy of all individuals. *See id.* at 295; *see also* VON HIRSCH, *supra* note 120, at 143-49 (noting difficult issues that arise when one considers social justice); Walker, *supra* note 131, at 87-88 (making the related point that even for Christian theologians, who justify punishment as a means to promote spiritual improvement, improvement is unlikely unless the person accepts the justice of his suffering). Few commentators would take their thought as far as Michael Foucault who argued that a bourgeois society creates crime as a tool to stifle political dissent. *See* MICHAEL FOUCAULT, DISCIPLINE AND PUNISHMENT 24-26 (1977). For a criticism of modern political interpretations of criminal justice, *see* ALLEN, *supra* note 2, at 37-41.

221. Murphy, *supra* note 191, at 242.

222. *Id.*

Certainly, neither Duff nor Murphy believes that all offenders are socially or economically disadvantaged; but one need only look to the demographics of America's prisons to know that the issue of mutual benefits and unequal benefits is a real one.²²³ The policymaker who looks to justify punishment on the grounds of reciprocity of benefits and burdens faces a complication of the real nature of society. A strategy for mercy may attempt to look for areas of crime in which offenders are less likely to share in the benefits and more likely to assume the burdens of society.²²⁴ This approach is reinforced by another side of the mutual benefits theory—concern for the personal autonomy of the offender.

In balance restoration there is a danger for the retributivist to justify punishment on the consequentialist ground that failure to punish may lead those who are law-abiding to lose their allegiance.²²⁵ For the retributivist, this rationale does not give the state the right to impose punishment on the individual offender.²²⁶ Harkening back to the writings of Kant,²²⁷ Hegel,²²⁸ Rawls,²²⁹ and Morris,²³⁰ Duff hypothesizes that a rational observer "would opt for a system . . . which secures and preserves a fair distribution of benefits and burdens by punishing criminals; and in opting for—in willing—such a system she wills her own punishment should she break the law."²³¹ The state has the right to punish the offender and the offender has the right to be punished;²³² failure to punish the offender may indicate a lack of re-

223. See *supra* note 64.

224. This point inevitably leads into Anselm's first paradox, which questions whether mercy is an autonomous virtue or whether merciful factors are a part of justice. See *infra* notes 259-367 and accompanying text.

225. See DUFF, *supra* note 139, at 208.

226. See *id.*

227. See *id.* at 202.

228. See G.W.F. HEGEL, PHILOSOPHY OF RIGHT 70, 92-100 (T.M. Knox trans., 1942), cited in DUFF, *supra* note 139, at 203. For a discussion of Hegel's views on annulment, see HONDERICH, *supra* note 141, at 47-51.

229. See DUFF, *supra* note 139, at 208.

230. See Morris, *supra* note 77, at 80 ("[T]here is some plausibility in the exaggerated claim that in choosing to do an act violative of the rules that an individual has chosen to be punished.").

231. DUFF, *supra* note 139, at 208.

232. Morris notes that this position is not one that people would immediately consider:

spect for the offender's rational autonomy. Punishment shows respect for the choices made by the offender²³³ and "affirms the bond between the offender and the punishing authority."²³⁴ Punishment expresses repentance by the offender and allows the offender "to regain a proper concern for the law and his proper place in the community."²³⁵

The bind in which we place the criminal justice system is obvious. To punish an offender shows respect for the person. To punish on the basis of balance restoration, where there has been an imbalance to begin with, seems unfair.²³⁶ Certainly a strategy

The immediate reaction to the claim that there is such a right is puzzlement. And the reasons for this are apparent. People do not normally value pain and suffering. Punishment is associated with pain and suffering. When we think about punishment we naturally think of the strong desire most persons have to avoid it, to accept, for example, acquittal of a criminal charge with relief and eagerly, if convicted, to hope for a pardon or probation. Adding, of course, to the paradoxical character of the claim of such a right is difficulty in imagining circumstances in which it would be denied one. When would one rightly demand punishment and meet with any threat of the claim being denied?

Herbert Morris, *Persons and Punishment*, in THEORIES OF PUNISHMENT, *supra* note 122, at 77.

233. *See id.* at 85.

234. FLETCHER, *supra* note 68, at 417 n.24.

235. DUFF, *supra* note 139, at 234; *see also* Walker, *supra* note 131, at 87-88 ("Some Christian theologians justify punishment on the ground that it may promote spiritual improvement. This is not necessarily Benthamist utilitarianism: it is the offender's immortal soul they have in mind, not his temporal future. Yet spiritual improvement is highly improbable unless he accepts or can be brought to accept the justice of his suffering.").

236.

But insofar as the society in which the offender lives does not constitute a genuine community, united by shared values and mutual concern and respect; insofar as the laws which claim to bind her cannot be adequately justified to her: neither her crime nor her punishment can have the meaning which this account ascribes to them. If the social relationships and shared concerns which constitute a community do not exist, or are not reflected in the law, then her crime cannot be destructive of those relationships, and her punishment cannot restore them. And it is surely true that our own society falls far short of constituting such a moral community: we do not, and this includes both law-abiding and criminal citizens, have the kind of concern for each other which the idea of a community requires; and our laws too often cannot be plausibly justified by reference to a genuinely common good.

DUFF, *supra* note 139, at 292-93.

for mercy will avoid economic crimes in which criminal conduct results in an obviously unfair allocation of burdens and benefits.²³⁷ Additionally, however, a strategy for mercy might well gravitate to areas of crime in which one has serious doubts that offenders have shared fairly in benefits and burdens. A strategy for mercy might seek out those areas in which an offender, through his crime, creates additional burdens on himself. Within this context, a strategy for mercy may be able to prepare an offender to participate more fully in society and to accept more readily its burdens and rejoice in its benefits, thereby not regaining his place in the community but perhaps gaining that place for perhaps the first time.²³⁸

2. *Issues of Distribution*

In traditional discussions of punishment, retribution as just deserts is seen as a justification for punishment and also as a limitation upon the power of the state.²³⁹ Retribution permits the

237. For a retributivist, restitution that results in the status quo ante is insufficient. See, e.g., Armstrong, *supra* note 122, at 32.

238. Whenever a state intervenes into an individual's life "for the good of the individual" there is the risk that the intervention will be used to manipulate the individual and take more control over the individual than otherwise would be justified. See AMERICAN FRIENDS SERVICE COMMITTEE, *supra* note 129, at 39-40. As Duff concludes, however, we seem to be directed toward very pessimistic conclusions at every turn in the justification of punishment. For Duff, the dilemma is what to do if we conclude that we cannot justify punishment until society accepts the criminal "as an autonomous moral agent whose consent and repentance we seek," DUFF, *supra* note 139, at 295, and there exists "a genuine community within which the criminal has his place," *id.*, yet "to forswear punishment would therefore be disastrous for our very survival," *id.* at 296. Although some would conclude that all values must be interpreted consequentially, and the price of attaining justice may be to maintain institutions which are now unjust, see *id.* at 297, Duff concludes that he is driven back to a deterrent theory to justify punishment even though previously he had rejected deterrence as "improperly manipulative." *Id.* at 299. Nigel Walker reaches a similar conclusion. See Walker, *supra* note 131, at 93.

239. Hart distinguishes retribution as a "General Justifying Aim" from retribution in "Distribution":

Much confusing shadow-fighting between utilitarians and their opponents may be avoided if it is recognized that it is perfectly consistent to assert both that the General Justifying Aim of the practice of punishment is its beneficial consequences and that the pursuit of this General Aim should be qualified or restricted out of deference to principles of Distribution which require that punishment should be only of an offender for an of-

state to punish only those who deserve to be punished²⁴⁰ and the state may only punish in a manner that is proportional to the harm caused.²⁴¹ As a requirement of justice, retribution is seen as a check upon tyranny.²⁴²

In the political sphere, the concept that only those who deserve punishment should be punished is not controversial and should not detain us in our development of a strategy for mercy.²⁴³

fence. Conversely it does not in the least follow from the admission of the latter principle of retribution in Distribution that the General Justifying Aim of punishment is Retribution though of course Retribution in General Aim entails retribution in Distribution.

HART, *supra* note 135, at 9.

240. *See id.* at 11. The strength of retribution in this distributive sense is apparent in many common law concepts such as the common law preference for mens rea over strict liability and the defenses of insanity and lack of capacity due to age. *See ALLEN, supra* note 2, at 68. The assumption exists that the offender is a responsible moral agent, and that without personal culpability, a person cannot be used as an example to benefit the larger societal interests in crime prevention. *See HART, supra* note 135, at 160.

241. Although rehabilitation may justify an indeterminate sentence until the offender is "cured" and deterrence may justify whatever sentence may have the desired effect, retribution requires that "punishments for different crimes should be 'proportionate' to the relative wickedness or seriousness of the crime." HART, *supra* note 135, at 162. This equivalence principle is not without practical problems, such as how one measures equivalence. Wilson has summarized neatly a few of the approaches to equivalence:

Aristotle would seek to equate the punishment with the "gain" accrued by the offender; Morris would seek to remove the "advantage" gained; Hegel would have the evil "annulled;" Kant would require repayment "like with like;" Stephen would seek "satisfactions" sufficient to placate the victim's grievance.

WILSON, *supra* note 102, at 284. Hegel saw the impossibility of trying to determine whether an offender deserved 39 or 40 lashes and concluded that, within limits, the most important thing was that "something be actually done." HEGEL, *supra* note 141, at 3. Although Kant argued that all murderers should be executed, he was less clear as to the equivalent punishment for rape, or even how execution is the equivalent punishment for a provoked homicide. *See Hawkins, supra* note 129, at 15-16; HONDEREICH, *supra* note 141, at 49-50 (arguing that crime, in any ordinary sense of the word, cannot be "annulled"). Thomas Aquinas considered wrongdoing as a misuse of a power that was created to permit a person to attain good. *See Hawkins, supra* note 129, at 17.

242. This distributive principle is not necessarily a principle to be claimed only by retributivists. *See HART, supra* note 135, at 11 ("[T]hat restriction of punishment to offenders is a simple consequence of whatever principles (Retributive or Utilitarian) constitute the Justifying Aim of punishment.").

243. *See Walker, supra* note 131, at 91. From time to time this concept does seem to be eroded. For example, in *North Carolina v. Alford*, 400 U.S. 25 (1970), the de-

Twin aspects of distribution are more problematic: the nature of conduct that deserves to be punished and the attempt to relate the degree of punishment to the degree of harm caused.

A recapitulation of the debate on the nature of punishable conduct is beyond the scope of this Article.²⁴⁴ Hopefully it will suffice to acknowledge that we may not be certain just how we conclude that punishment is due. Certainly there is conduct—whether an affirmative act or an omission—that historically has called for punishment and that claims to punish merely because of the harm caused by the act itself.²⁴⁵ Yet as Fletcher points out, we also seem willing to punish for character traits as well.²⁴⁶ For example, we punish for murder, but we punish less for provoked murders and more for premeditated ones. In devel-

fendant sought postconviction relief on the ground that he pleaded guilty to avoid the death penalty and that he was, in fact, innocent of the crime. *See id.* at 29. The Supreme Court held that as long as there was a factual basis for the plea, the trial judge did not err in accepting Alford's plea despite Alford's protestations at the time of the plea that he did not commit the crime. *See id.* at 38.

244. *See generally* HART, *supra* note 135, at 6-8; Walker, *supra* note 131, at 86-88 (discussing what conduct deserves blame and punishment).

245. *See* Walker, *supra* note 131, at 86-88.

246.

An inference from the wrongful act to the actor's character is essential to a retributive theory of punishment. A fuller statement of the argument would go like this: (1) punishing wrongful conduct is just only if punishment is measured by the desert of the offender, (2) the desert of an offender is gauged by his character—i.e., the kind of person he is, (3) and therefore, a judgment about character is essential to the just distribution of punishment. . . .

If we accept this legalistic limitation on the inquiry, then the question becomes whether a particular wrongful act is attributable either to the actor's character or to the circumstances that overwhelmed his capacity for choice. . . . We begin to interweave the two when we argue, for example, that the defendant's background of deprivation excuses his wrongdoing. It goes without saying that a person's life experience may shape his character. Yet if we excuse on the ground of prolonged social deprivation, the theory of excuses would begin to absorb the entire criminal law. If we seriously believe that disadvantage causes crime, then we should have to argue that excessive advantage—witness Loeb & Leopold, Mitchell & Ehrlichman—also induces criminal behavior. The argument leads us into the cul-de-sac of environmental determinism. Now it may be the case that all human conduct is compelled by circumstances; but if it is, we should have to abandon the whole process of blame and punishment and turn to other forms of social protection.

FLETCHER, *supra* note 68, at 800-01 (footnote omitted).

oping a strategy for mercy, we must face the character issue. If character evidence mitigates punishment, is the result one of justice or mercy? This leads us into Anselm's first paradox.²⁴⁷ If character can aggravate punishment, is this done out of justice or cruelty? Must we determine for purposes of denunciation theory or because of notions of expiation, what are the causes of the character flaw? Again, are we in the realm of justice or of mercy?

The second problematic aspect of distribution is the issue of proportionality of punishment. Within the philosophical sphere, the debate on proportionality has centered on the definition of "punishment,"²⁴⁸ the appropriateness of certain types of punishments,²⁴⁹ and the difficulty in measuring whether the punishment to be inflicted is commensurate with the harm associated with the crime.²⁵⁰ In the political sphere, distribution issues are different. As to types of acceptable punishments, legislatures generally have limited punishments to incarceration, fines, community service, release with restrictive conditions, and death in a restricted range of crimes; by these self-imposed limitations, controversy has been avoided.²⁵¹ Even the ambiguous meaning of punishment itself is of little concern to the Supreme Court. Indeed, the Court has found the legislature's decision as to whether a sanction is a criminal punishment or a civil sanction to be virtually conclusive.²⁵²

247. See ST. ANSELM, PROSLGION 125, 127 (M.J. Charlesworth trans., Oxford Univ. Press 1965); *infra* text accompanying note 259.

248. See, e.g., HONDEREICH, *supra* note 141, at 108-16 (linking punishment and freedom); see also HART, *supra* note 135, at 72 ("[T]heories' of punishment are moral claims as to what justifies the practice of punishment.").

249. See *supra* note 60 (citing articles discussing the appropriateness of sex offender registration).

250. See, e.g., Walker, *supra* note 131, at 83-85.

251. Recent developments in sentencing, such as shaming of sex offenders, are controversial. See *supra* note 60 (citing articles discussing appropriateness of sex offender registration laws).

252. See, e.g., *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) ("We must initially ascertain whether the legislature meant the statute to establish 'civil' proceedings. If so, we ordinarily defer to the legislature's stated intent."); see also Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1348-64 (1991) (explaining why courts must defer to the legislative determination of whether a proceeding is "criminal" or "civil").

Equivalently balancing the crime and the punishment poses an obstacle to any mercy strategy. The problem stems from the fact that courts have been extraordinarily reluctant to second-guess legislative criminal punishment determinations; only in a modest number of situations have courts used such legal vehicles as the cruel and unusual punishment provision of the Eighth Amendment to strike down a particular punishment as disproportional and therefore unconstitutional,²⁵³ even though the methodology shared by the Federal Sentencing Commission²⁵⁴ and the Model Penal Code,²⁵⁵ which groups crimes by comparative seriousness, could lend itself to such an approach. The great majority of courts also have approved legislative attempts to limit judicial sentencing discretion through sentencing guidelines and mandatory sentences.²⁵⁶ When the public becomes involved in setting punishments through the initiative process, generally more severe penalties result than those prescribed by the legislature.²⁵⁷

253. In *Rummel v. Estelle*, 445 U.S. 263 (1980), the Supreme Court indicated that challenges to the length of sentences under the Eighth Amendment were not likely to succeed. See *id.* at 284-85. In *Solem v. Helm*, 463 U.S. 277 (1983), the Court seemed to broaden proportionality review by adopting a three-prong objective test that linked the constitutionality of a particular prison sentence to the gravity of the offense and harshness of the penalty, sentences imposed on criminals in the same jurisdiction, and sentences imposed on criminals in other jurisdictions. See *id.* at 290-92. In *Harmelin v. Michigan*, 501 U.S. 957 (1991), the Court, in a number of separate opinions, limited the potential impact of *Solem*. See, e.g., *id.* at 966-75 (Scalia, J., concurring) (arguing that *Solem* was incorrect in deciding that the cruel and unusual punishment provision embodies a right to be free from disproportionate punishment); *id.* at 996-1005 (Kennedy, J., concurring) (limiting the application of *Solem* to provide proportionality oversight only rarely in noncapital cases). For a discussion of proportionality review, see Garvey, *supra* note 22, at 1009-12; Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107 (1996).

254. For a discussion of the theory behind the goals of the United States Sentencing Commission, see U.S. SENTENCING COMM'N, GUIDELINES MANUAL, ch. 1, pt. A (1999) [hereinafter SENTENCING GUIDELINES].

255. MODEL PENAL CODE, arts. 6 & 7, introduction at 1-30 (1985).

256. See, e.g., *State ex rel. Huddleston v. Sawyer*, 932 P.2d 1145, 1152-64 (Or. 1997) (upholding Oregon's sentencing statutes against federal and state constitutional challenges).

257. See, e.g., Kevin Mannix, *Measure 11 Reduces Crime*, 1 OREGON'S FUTURE 15, 25 (1998) (highlighting that backers of an initiative measure, that increased penalties for certain violent crimes claimed that the measure would prevent 11,000 violent crimes per year).

For the policymaker, judicial reluctance to oversee equivalence decisions and the tendency for public opinion to tolerate harsh punishments seemingly is good news. The broad discretion retained for the policymaker enables him to decide that certain subsets of crime should be treated in a very serious manner whereas other conduct should no longer be considered criminal. The difficulty with this position in developing a strategy for mercy is obvious: If a legislature is virtually free to impose any sentence it wishes on whatever crime it deems fit to create, is it not possible to say that a legislature acts mercifully whenever it imposes a sentence on a crime that is less than life imprisonment? As we will see in the next section, mercy requires discretion, but mercy is not simply an act; mercy requires a particular attitude. So a legislature that sets a low penalty for a criminal act because of a lack of prison space is not acting out of mercy but out of straightforward utilitarian concerns. The legislature that sets low penalties for drug use because the legislature understands the allure that drugs may have for certain persons, may be said to exhibit mercy. Beyond the issue of motive, however, equivalency of punishment to "wickedness" of the conduct goes beyond merely a legal notion of equivalency and rests finally on a moral judgment of equivalency. Even though a court permits a legislature extraordinary discretion in setting the sentence guidelines, acts of the legislature are still guided by external moral constraints.

III. THE PARADOXES OF MERCY AND LESSONS FOR THE POLICYMAKER

The first task of the legislator seeking to develop a strategy for mercy is to understand that the disagreements surrounding the content and role of retribution are not limited to philosophical scholarship, but are likely to be reflected in the beliefs of the community as well. If a legislator could cease his philosophical analysis of retribution, and move directly into developing a concrete program for mercy, he would enjoy wide-ranging options. Yet, it is not that simple. The legislator must go beyond the retributive justification for punishment and investigate the philosophical underpinnings of mercy *within* the context of retribution. Therefore, a second task of the legislator is to understand that mercy may be an attractive notion for some; but for

others, mercy may be in conflict with justice as well as with notions of equal application of the law. These objections are reflected in Anselm's two paradoxes of mercy and the responding philosophical commentary. Anselm's timeless lessons for the policymaker permit the legislator to anticipate, and minimize public objections, thereby allowing the legislator to find a path that advocates mercy in selected areas of criminal justice decision making, while maintaining constituent confidence. The policymaker is well-advised to heed Simmonds's advice: "A dilemma may sometimes be more significant than the solution, serving to remind us that our own thought is a historical project: poised, conditional, and perpetually incomplete."²⁵⁸

This Part first discusses Anselm's paradoxes and then continues the process begun in Part II, highlighting certain factors that a legislator might use to identify appropriate areas in which mercy might be incorporated.

A. *Anselm's First Paradox*

St. Anselm's first paradox of mercy arose in the context of the nature of God:

[W]hat kind of justice is it to give everlasting life to him who merits eternal death? How then, O good God, good to the good and to the wicked, how do You save the wicked if that is not just and You do not do anything which is not just?²⁵⁹

Murphy rephrases St. Anselm's first paradox and alerts us to the two-part nature of the first paradox:

If mercy requires a tempering of justice, [then] there is a sense in which mercy may require a departure from justice. . . . Thus, mercy must not be a virtue, but a vice—a product of morally dangerous sentimentality. . . . If we simply use the term "mercy" to refer to certain of the demands of justice (e.g. the demand for individuation), then mercy ceases to be an autonomous virtue and instead becomes a part of (is reducible to a part of) justice. . . . In short: mercy is either a vice (injustice) or redundant (a part of justice).²⁶⁰

258. Simmonds, *supra* note 45, at 54.

259. ST. ANSELM, *supra* note 247, at 125, 127.

260. Murphy, *supra* note 68, at 456-57.

Unlike Anselm, who ultimately resolves his first paradox by reference to the nature of God, many scholars conclude that justice and mercy indeed are inconsistent concepts, at least as to public justice and public mercy. The debate on mercy as an injustice examines the nature of retribution, the role of the victim in the criminal justice system, and the perceived requirement that the state act only in a reasoned manner. All three perspectives on mercy and injustice add valuable insights into the creation of a strategy for mercy.

1. "Hard" v. "Soft" Retributivism

For some, the dilemma posed in the first prong of the paradox is created by an insistence on "hard retributivism," that is, society's duty to punish each offender to an equivalent measure of the harm caused.²⁶¹ For Kant, "a judge who *pardons* is quite unthinkable."²⁶² Assuming a constant moral obligation to punish offenders,²⁶³ even a society about to disband is required to execute its last prisoner "so that the blood-guilt thereof will not be fixed on the people."²⁶⁴ Kant's hard retributivism seems to leave no room for mercy. Hard retributivism, whether justified from the perspective of vengeance, denunciation, or rectifying the balance skewed by criminal conduct, finds mercy to be a vice, not a virtue.²⁶⁵ Punishment is obligatory; society demands nothing less.

For many philosophers, a justice system without mercy is unacceptable.²⁶⁶ For them, Kant's view of justice leads "to the bizarre conclusion that mercy as it is ordinarily understood not

261. See, e.g., Brien, *supra* note 72, at 53-57; Garcia, *supra* note 71, at 224-26; Harwood, *supra* note 77, at 464-65.

262. IMMANUEL KANT, LECTURES ON PHILOSOPHICAL THEOLOGY 127 (Allen W. Wood & Gertrude M. Clark trans., 1978). For a criticism of Kant's strict view of retributivism, see Harwood, *supra* note 77, at 466-67 (arguing that there is only a *prima facie* duty to punish, not the absolute duty Kant advocated).

263. See Garcia, *supra* note 71, at 225-26.

264. KANT, *supra* note 4, at 102.

265. See *Retributive Emotions*, *supra* note 77, at 10; see also VON HIRSCH, *supra* note 120, at 51-55 (justifying punishment in spite of the resultant increase in human suffering).

266. See Garcia, *supra* note 71, at 228-30.

only is not virtuous, as the Western tradition has long held, but is somehow immoral."²⁶⁷ Because Kant's view of mercy is dependant upon hard retributivism, those who attempt to resolve the first prong of Anselm's first paradox do so by positing the alternative of "soft retributivism":

"Soft retributivism" is the view that it is *permissible* to punish a criminal up to a certain level but that there is no justice-based *requirement* or obligation to do so. . . . The guilty need not be punished, and it is not wrong not to punish them.²⁶⁸

Garcia reaches this same conclusion by comparing positive and negative deserts: A person acquires a right to a positive desert, such as the return of stolen goods, but there is no right to a negative desert.²⁶⁹ "The insistence that the criminal deserves to be punished is not likely to come, as a rights claim . . . from the criminal's side; . . . [i]t comes from the side of the punishers in order to rebut the charge that there would be injustice in punishing."²⁷⁰ Punishment is a negative desert that is not obligatory.²⁷¹ As a result, "mercy always belongs to the injured party to bestow or withhold and here it is not the official but the community that the criminal has injured."²⁷² Understood in this way, there is no necessary conflict between justice and mercy.²⁷³

Soft retributivism answers Anselm's first paradox by recognizing that a "determination of what is due a person on the basis of rights and deserts is not logically affected by what others may deserve or have a right to."²⁷⁴ Feinberg refers to this as "non-comparative justice;"²⁷⁵ however, there is no noncomparative in-

267. *Id.* at 228-29.

268. Brien, *supra* note 72, at 56.

269. See Garcia, *supra* note 71, at 227.

270. *Id.* at 225.

271. Some may argue, however, that an obligation to punish may arise from an external reason, such as a utilitarian need to protect society from the offender.

272. *Id.* at 231.

273. This traditional view of the criminal justice system is one that relegates the injured party to the civil courts for a private remedy. The injured party is simply a witness—just a member of the victimized society who felt the brunt of the crime in a particularized and personal way. The prosecutor is society's elected representative who makes the decision as to the role that the injured party will play.

274. Carla Johnson, Essay, *Seasoning Justice*, 99 ETHICS 553, 554 (1989).

275. Joel Feinberg, *Noncomparative Justice*, 83 PHIL. REV. 298 (1974) (defining

justice when a person is treated "*better* than he deserves."²⁷⁶ For Andrew Brien, soft retributivism not only "dissolves" Anselm's conundrum²⁷⁷ but permits the criminal law to be "more conducive to the greatest degree of moral justice."²⁷⁸

Another response to Kant's hard retributivism can be found in H. Scott Hestevold's works that resolve Anselm's first paradox by converging mercy and justice into a system of disjunctive punishments.²⁷⁹ Hestevold urges that judges be given a choice of sentences;²⁸⁰ for example, a judge is authorized to sentence a defendant for a particular crime to one year or two years in prison. In this way, a judge may impose the lesser sentence but is not obliged to do so. Some critics of Hestevold claim that a punishment that is sufficient cannot at the same time be too much.²⁸¹ For others, Hestevold's concept of mercy is vastly underinclusive.²⁸² The majority of Hestevold's critics, however, have complained that this attempt to reconcile mercy and justice is little more than an acceptance of *de minimis* variations in judgments among judges and, perhaps, is better viewed as an attempt to assure due process by recognizing that no two cases are identical.²⁸³

One certainly cannot dismiss out-of-hand Hestevold's resolution—a limited amount of judicial discretion currently is reflected

noncomparative justice as giving a person his "due," determined independently of other people).

276. *Id.* at 306; see also Brett, *supra* note 33, at 92 ("Considerations of mercy which might lessen the sentence of the offender have no bearing on the question of what is deserved.").

277. See Brien, *supra* note 72, at 56.

278. *Id.* at 57. Brien also notes that soft retributivism is found in many of the world's legal systems and is the model most easily implemented. See *id.*

279. See H. Scott Hestevold, *Disjunctive Desert*, 20 AM. PHIL. Q. 357, 360-62 (1983). Hestevold would seem to be comfortable with many current sentencing statutes that permit the sentencer to choose from a range of options.

280. See *id.* at 360.

281. See Steven Sverdlik, *Justice and Mercy*, 16 J. SOC. PHIL. 36 (1985).

282. See Harwood, *supra* note 77, at 465.

283. See generally WELSH S. WHITE, *THE DEATH PENALTY IN THE EIGHTIES* 127 (1987) (discussing racial prejudice in death penalty sentencing and clemency hearings). For a criticism of this notion of unique particularity as an empty abstraction, see Simmonds, *supra* note 45, at 52 ("The idea of a moral persona that is prior to and irreducible to all general categories is wholly dependent upon the abstract form of juridical thought; it therefore provides no point of leverage from which an anti-nomian critique might be mounted.").

in the sentencing schemes of most states. Remember, however, that once one adopts soft retributivism, one does not need Hestevold's "disjunctive desert" concept to resolve Anselm's first paradox.²⁸⁴

Sterling Harwood suggests one additional middle ground between hard and soft retributivism. Harwood reconciles mercy and justice by concluding that there is only a *prima facie* duty to punish, and that this duty can be overcome by strong "moral factors."²⁸⁵

Whether one sides with Kant²⁸⁶ or Garcia²⁸⁷ on the nature of retribution, or whether one attempts to find a middle ground as Hestevold has done,²⁸⁸ there are lessons to be learned for the policymaker seeking a strategy for mercy. First, society seems to be of two minds regarding the nature of retribution. On the one hand, as society has awakened to the full emotional experience that crime imposes on the victim, the victim's family, and to the community itself, the public has called for "harder" retributivism when the court is the actor-punisher.²⁸⁹ Sentencing guidelines²⁹⁰ and mandatory sentencing statutes²⁹¹ have been the primary means to limit the range of acceptable judicial responses during sentencing.²⁹² Certainly, one might add to this list sex offender notification and registration statutes, which impose additional punishment for certain offenders through public humiliation.²⁹³

284. See Garcia, *supra* note 71, at 229-30. We will return to the issue of sentencing options within the context of Anselm's second paradox. See *infra* text accompanying notes 381-82.

285. Harwood, *supra* note 77, at 466.

286. See *supra* text accompanying notes 262-64.

287. See *supra* text accompanying notes 266-72.

288. See *supra* notes 279-80 and accompanying text.

289. See *supra* text accompanying notes 163-66 (pointing out that sometimes legislation has resulted from the efforts of victims' organizations).

290. See *supra* note 51 (discussing sentencing guidelines and their effect on judicial discretion).

291. See *supra* note 61 (discussing the harsh impact of mandatory sentencing).

292. Sometimes the limitation of judicial discretion has come through the initiative process or a state constitutional amendment. See, e.g., *State v. McCoy*, 486 P.2d 247, 251 (Idaho 1971) (holding that a legislative act mandating minimum sentences violated state constitutional provisions on separation of powers). In 1978, Idaho voters adopted an amendment to the Idaho Constitution that expressly provided for mandatory minimum sentences. See 1978 Idaho Sess. Laws 1032-33.

293. See *supra* note 60.

At least as to judicial decision making, the public is suspicious as to the individuation of punishment; even in a noncomparative way, mercy may be seen as inconsistent with justice. On the other hand, the public has been very tolerant of softer retribution in the day-to-day operations of the prosecutor's office. For example, attempts to curb plea bargaining have been sporadic and mostly ineffective.²⁹⁴ Although the public has required the courts to increase punishments under "three strikes and you're out" legislation, the public seems unconcerned that such legislation, outside of California and Georgia, has largely been unenforced by prosecutors.²⁹⁵ The public, either through expediency or conviction, is content with a system that has very few controls over the exercise of prosecutorial discretion.²⁹⁶ The strategic lesson for the policymaker is that the public appears more obliged to tolerate discretion when discretion is lodged in decision makers other than the court.

Second, the debate whether retribution is hard or soft raises issues of procedural fairness. There is always the fear, as expressed by Justice Marshall in *Powell v. Texas*,²⁹⁷ that merciful treatment may be seen to justify fewer procedural guarantees.²⁹⁸ Whether retribution is hard or soft, any system of retribution requires that the person deserves to be punished.²⁹⁹ A push for mercy cannot justify a relaxed attitude toward the need to prove that this person deserves to be punished for specific acts that he has committed.³⁰⁰ In addition, one must recall that an accep-

294. See, e.g., Misner, *supra* note 25, at 750-55.

295. See *supra* note 61.

296. See, e.g., CANDACE MCCOY, POLITICS AND PLEA BARGAINING: VICTIMS' RIGHTS IN CALIFORNIA 89-128 (1993) (discussing the futile attempt by California voters to limit plea bargaining).

297. 392 U.S. 514 (1968).

298. See *id.* at 529 (1968) ("Thus we run the grave risk that nothing will be accomplished beyond the hanging of a new sign—reading 'hospital'—over one wing of the jailhouse.").

299. See *supra* note 122.

300. The risk of diminished procedural guarantees is real. Under current law, the clear message from the public is that the community is not interested in the procedural plight of the offender. For example, often citizen initiatives have attempted to curtail defendant's rights. See, e.g., *Armatta v. Kitzhaber*, 959 P.2d 49, 70-72 (Or. 1998) (striking down an initiative that sought to limit certain defendants' rights including the right to a jury trial and the right to be free from illegal searches and

tance of any form of soft retributivism does not in itself answer objections when justice is viewed in a comparative way—when issues of equal application of the law come to the fore.

2. *Victims and Mercy*

Some philosophers, while rejecting Kant's view of hard retributivism, also believe mercy is inconsistent with justice because it ignores the need to punish an offender in order to reaffirm the dignity of the crime victim.³⁰¹ Murphy accepts the distinction between the permissive and obligatory aspect of justice, but concludes that judges should not exercise mercy because mercy is appropriate only to victims whose rights have been violated.³⁰² For Murphy, a judge may not act on her emotions:

A judge in a criminal case has an *obligation* to do justice—which means, at a minimum, an obligation to uphold the rule of law. Thus, if he is moved, even by love or compassion, to act contrary to the rule of law—to the rules of justice—he acts wrongly (because he violates an obligation) and manifests a vice rather than a virtue. A criminal judge, in short, has an obligation to impose the just punishment; and all of his discretion within the rules is to be used to secure greater justice (e.g., more careful individuation). No rational society would write any other “job description” for such an important institutional role.³⁰³

seizures). Another example is the ability of a defendant to “sell” his rights in a plea bargain, often in a situation in which the defendant's lawyer has a strong, personal incentive to terminate the case as soon as possible and even when the defendant has maintained his innocence. See, e.g., Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1988-90 (1992) (maintaining that defense counsel have strong personal incentives to avoid trial).

301. Hegel seemed to bridge the gap between Kant's hard retributivism and the emphasis by others on the side of the victim. For Hegel, the offender had a right to be punished. See GEORGE WILHELM FRIEDRICH HEGEL, *THE PHILOSOPHY OF RIGHT* ¶ 100, at 37 (T.M. Knox trans., 1952). Duff reluctantly finds that retribution is an unacceptable justification for punishment because of the failure of society to respect the autonomy of all its citizens. See DUFF, *supra* note 139, at 295.

302. See Murphy, *supra* note 104, at 13. But see Simmonds, *supra* note 45, at 54-56 (criticizing Murphy's resolution).

303. Murphy, *supra* note 68, at 459.

For Murphy, mercy is an autonomous virtue only in the private paradigm where an individual, with an enforceable right, may forego that right out of compassion because there is no obligation for a private party to enforce her right.³⁰⁴ The lesson, in Murphy's view, to be learned from the private law paradigm is that a judge in the criminal law may not be merciful in her own right but can be merciful only if

it can be shown that such an official is acting, not merely on [her] own sentiments, but as a vehicle for expressing the sentiments of *all* those who have been victimized by the criminal and who, given those sentiments, wish to waive the right that each has that the criminal be punished.³⁰⁵

If this condition is not met, judges should "keep their sentimentality to themselves for use in their private lives with their families and pets."³⁰⁶

Hampton generally agrees with Murphy that judges must reconfirm the victim's dignity.³⁰⁷ Hampton, like Murphy, would permit a victim to waive the right to exact a certain level of punishment if the victim concluded that she did not require punishment in order to defeat the criminal's false claim of superiority.³⁰⁸ Whereas Murphy would not allow mercy without the agreement of all victims, Hampton would permit a judge to weigh the competing claims of justice and mercy should there be conflict.³⁰⁹ For Hampton, generally justice will trump mercy: mercy is appropriate if the punishment would be "highly damaging to the criminal."³¹⁰ The centrality of the injured party in Murphy's and Hampton's discussion of punishment reflects some

304. See *id.* For a criticism of Murphy's private law paradigm, see Brien, *supra* note 72, at 54-57.

305. MURPHY & HAMPTON, *supra* note 77, at 179-80 (emphasis added).

306. Murphy, *supra* note 68, at 458. At this point, Murphy's argument begins to blend with the argument that the state may only act in a reasoned way. At most, the state may act as the agent of the victim. For an additional perspective, see Brien, *supra* note 72, at 54.

307. See MURPHY & HAMPTON, *supra* note 77, at 114-17.

308. See *id.* at 125.

309. See *id.* at 160; Duff, *supra* note 74, at 59.

310. MURPHY & HAMPTON, *supra* note 77, at 160. For a critique of Hampton's view, see Duff, *supra* note 74, at 59.

of the same values found in the victims' rights movement of the past twenty years.³¹¹

There are those who are critical of Murphy's insistence in defining the judge's role to exclude love and compassion. By claiming that "[n]o rational society"³¹² would include these factors for consideration by the sentencing judge, Murphy seems to claim that a judge can represent the community in certain issues when the premium is on reason but cannot represent the community when the premium is on compassion.³¹³ In fact, many jurisdictions—all "rational" societies—permit the sentencer to consider factors of compassion.³¹⁴ Certainly, sentencing statutes that permit a sentencer to consider all factors—including merciful factors—would be deemed to pass federal constitutional muster.³¹⁵

Others criticize Murphy's insistence that the injured party is the victim of criminal conduct. Traditionally, the state has been seen as the aggrieved party and decisions regarding prosecution, trial, and sentencing, have been made by the state's representative.³¹⁶ The particular victim is relegated to the civil law for

311. See *supra* text accompanying notes 155-62.

312. Murphy, *supra* note 68, at 459.

313. See *id.* Duff criticizes Murphy's conclusion:

Such an official [judge] will of course need to act not merely on the basis of her own private feelings but a "vehicle" for the community's views or wishes. But if state officials can ever rightly act, not on the basis of what the members of the community actually want, but rather on the basis of what they should want or of what accords with the community's fundamental values, this will be as true in the exercise of mercy as of any other situation.

Duff, *supra* note 74, at 59. Simmonds concludes that Murphy's attempt to detach mercy from judgment contradicts the Christian view of God's mercy where God is a judge and not one who waives certain rights. See Simmonds, *supra* note 45, at 54-55. For Simmonds, Murphy may be avoiding the paradox, but in doing so, has altered the definition of "mercy." See *id.*

314. Canadian courts emphasize that imprisonment is a "last resort," and to make that determination, courts look to many factors beyond the culpability factors included within the definition of the crime itself. See CURT T. GRIFFITHS & SIMON N. VERDUN-JONES, CANADIAN CRIMINAL JUSTICE 405-57 (1989). For proposed changes in the Canadian sentencing process, see Julian V. Roberts & Andrew von Hirsch, *Statutory Sentencing Reform: The Purpose and Principles of Sentencing*, 37 CRIM. L.Q. 220 (1995).

315. For a discussion of the constitutionality of considering individualized facts in capital sentencing, see Garvey, *supra* note 22, at 995-1009; see also *supra* note 100.

316. Even in jurisdictions that have chosen to emphasize victims' rights, control of

compensation. In this traditional view of the criminal justice system, a judge can be merciful in the same way that a private party may be merciful in Murphy's private law paradigm. Murphy, for some critics, resolves Anselm's paradox through his use of the private law paradigm only by fundamentally altering what historically has been defined as "mercy."³¹⁷

The objection that mercy denigrates victims reinforces the lessons suggested in the earlier discussion of retribution as vengeance.³¹⁸ There is a general public perception that the criminal justice system prefers defendants over victims.³¹⁹ For some, this perception is reinforced by the constitutional restrictions upon police conduct, expensive prosecutions, "country club" prisons, and court-appointed attorneys. The public seems unwilling to view the offender as the victim and any sympathy generated for an offender is easily overborne by the sufferings of the crime victim. Again, a strategy for mercy should avoid those crimes in which there is an easily identified victim. If one chooses a crime with an identifiable victim, one should choose an area where the denigration of the individual is not the primary motive for the crime.

Two other strategic points are clarified by the victim-objection to mercy. First, until the guilt of the offender is proven, there should seem to be no conflict between the offender and the victim. Included in some victims' rights bills is the unstated belief

the prosecution remains in the hands of the prosecutor. See, e.g., *Armatta v. Kitzhaber*, 959 P.2d 49, 72 (Or. 1998) (illustrating a victims' rights initiative that seemed to give some control of the prosecution of the case to crime victims, but in fact preserved prosecutorial discretion by authorizing the prosecutor to assert various rights on behalf of the victim).

317. See Brien, *supra* note 72, at 56 (reasoning that because Murphy adopts a form of soft retributivism, he "does not need to rewrite the relationship between the offender . . . the victim, society, and the judge" in order to resolve Anselm's first paradox); see also Simmonds, *supra* note 45, at 53-54 (noting Murphy's shift from a focus of the position of the judge to a focus on the role of the victim to solve Anselm's paradox).

318. See *supra* text accompanying note 137.

319. See, e.g., Michael Ira Oberlander, Note, *The Payne of Allowing Victim Impact Statements at Capital Sentencing Hearings*, 45 VAND. L. REV. 1621, 1622 (1992) ("Today's criminal justice system focuses on the defendant and on the criminal act against society. . . . Not surprisingly, victims of criminal acts have expressed dissatisfaction with the criminal justice system, which they perceive as inequitably focusing on the defendant.").

that a defendant's procedural rights come at the cost of the victim's rights; if only it were easier to convict an offender, victims would feel that the system were more in their favor.³²⁰ Whether punishment is viewed as merciful to the benefit of the offender or harsh to the benefit of the victim, a punishment system based on retribution requires procedural guarantees so that we can conclude safely and with confidence that the person to be punished deserves to be punished.³²¹ Second, although an early strategy for mercy should avoid victim-dominated crimes, later strategies may not so easily avoid the issue. Later strategies may require an explanation of the traditional view that society is the victim of crime and sometimes the individual interest of the injured party must be sublimated to the larger good. At this point, it may be necessary to make further financial accommodations for victims.

3. *State as a Reasoned Actor*

For the third group, the dilemma posed by the first prong of Anselm's first paradox is created by the supererogatory nature of mercy. We permit individuals to act randomly in their private lives because of the emphasis we place on individual autonomy. An individual, in most areas of life, has no need to justify her acts. States, however, must not be permitted to act randomly.³²² "All acts of state should be justifiable; that is, should be such that they can be supported by reason."³²³ Justice, defined in this

320. See, e.g., *Armatta*, 959 P.2d at 71-72 (detailing the victims' rights initiative and equating victims' rights with a narrowing of defendants' pretrial and trial rights). Fletcher advocates giving victims a veto power in plea bargaining. See FLETCHER, *supra* note 102, at 247-48; see also Robert P. Mosteller, *Popular Justice*, 109 HARV. L. REV. 487, 492-95 (1995) (reviewing GEORGE P. FLETCHER, *WITH JUSTICE FOR SOME: VICTIM'S RIGHTS IN CRIMINAL TRIALS* (1995)) (arguing that the current practice to consult victims during the plea bargaining is sufficient participation for victims).

321. See *supra* note 300 and accompanying text.

322. See Harrison, *supra* note 68, at 115-17 (positing that a person may bet on a longshot in a race and we may conclude that his decision is wholly irrational, yet we permit the individual to make the bet, and concluding that although we are willing to allow "whim, discretion, [and] play" for individuals, we should not tolerate such action by government).

323. *Id.* at 107.

way, does not permit the state or its agents to be merciful: "Only by forgoing mercy can we enable the state . . . to behave like a rational entity, accountable for all its actions to the people over whom it has power."³²⁴ Mercy belongs to the realm of "personal justice," not social or institutional justice which is defined by rules which delineate rights.³²⁵ Justice demands an impartiality that mercy cannot provide.³²⁶

The response to this criticism of mercy relies on two related points. First, from a practical and historical point of view, we have come to expect our judges to reflect the community's fundamental values, including mercy.³²⁷ Second, and perhaps more telling, a merciful decision is not necessarily a decision that is unexplainable. As Harwood notes, because mercy is supererogatory, the criminal may never claim a right to mercy, nor can a case be seen to require mercy; but "[s]ome criminals are more deserving of mercy than others."³²⁸ In a similar vein, a judge who has a range of punishments from which to choose and who always metes out the severest punishment permitted by statute can be said to be "merciless" even though there is nothing immoral in the judge's action.³²⁹

The objections to mercy from this noncomparative justice perspective appear weak. By treating a person better than he deserves, the justice system has created no noncomparative object of injustice³³⁰ unless one is not worried about specific instances of injustice and sees an act of mercy as an instance of a "cosmic

324. *Id.* at 118.

325. *See id.* at 112; *see also* Murphy, *supra* note 104, at 12 (describing mercy as a sentimentality to be used only in one's private life).

326. *See* Harrison, *supra* note 68, 115-17.

327. *See, e.g.,* Dressler, *supra* note 92, at 1471 ("It strikes me as at least plausible that people can, do, and should delegate to government officials the power to act mercifully, even at the expense of justice, at least in those cases where the majority believe that justice should be subordinated to mercy."); Duff, *supra* note 74, at 59 (arguing that it is to be expected that judges will reflect the underlying values of the society she represents). A judge out of step with community values might be voted out of office.

328. Harwood, *supra* note 77, at 466.

329. *See* Garcia, *supra* note 71, at 230-31.

330. *See* Feinberg, *supra* note 275, at 306.

injustice."³³¹ These objections to mercy seem to add nothing to the debate not already broached by the discussion of the hard or soft nature of retribution³³²—the risk that mercy will be seen as condoning the underlying act³³³—and the discussion that lessened punishment may have an impact on such pragmatic issues as deterrence.³³⁴ For the policymaker, however, the objection that mercy is an act beyond government and reserved for private decisions precedes what is the strongest objection to mercy; mercy is likely to offend our strong predilection to treat like cases in a like manner.³³⁵ As discussed below, the comparative justice concerns about mercy go to the heart of the rules of government,³³⁶ and it is the strength of these comparative justice concerns that strongly shapes the strategy for mercy.

4. *Mercy as Redundant to Justice*

The dilemma posed in the second part of Anselm's first paradox implicates both noncomparative and comparative aspects of justice by questioning whether mercy is an autonomous virtue at all. Murphy argues that mercy is a redundant call for justice.

A basic demand of justice is that like cases be treated alike and that morally relevant differences between persons be noticed and that our treatment of those persons be affected by those differences. This demand for individuation—a tailoring of our retributive response to the individual natures of the persons with whom we are dealing—is part of what we mean by taking persons seriously as persons and is thus a basic demand of justice. . . . Judges or lawmakers who are unmindful of the importance of an individualized response are not lacking in mercy; they are lacking a sense of justice.³³⁷

331. *Id.* at 309.

332. *See supra* text accompanying notes 261-300.

333. *See Johnson, supra* note 274, at 562 ("For showing mercy when a debt is truly owed or a punishment truly deserved might be thought to deny the rightness of that punishment or debt.").

334. *See supra* note 28.

335. *See, e.g., infra* text accompanying note 373.

336. *See Harrison, supra* note 68, at 112-13 (explaining that the impartiality required of the state is a demand of a rights-based system).

337. Murphy, *supra* note 104, at 12; *see also KADISH, supra* note 16, at 252-53 (arguing that consideration of the particular defendant and the particular crime are

Murphy argues further that he has yet to find one case in the criminal law of "genuine mercy as an autonomous virtue."³³⁸ Cases that appear to be merciful really are poignant examples of justice being overridden by utilitarian concerns,³³⁹ that is, "unjustified sentimentality."³⁴⁰ Respect for the individual imposes the noncomparative requirement that justice be "sensitiv[e] to the particular case," and reason imposes the comparative requirement that justice be "sensitive to the possible implications of that judgment on other cases."³⁴¹ For Harrison, "it is reason which squeezes out mercy, not rules."³⁴² For Murphy, it is only within the private law paradigm that mercy is possible without offending justice.³⁴³

Comparative justice concerns will be considered in the discussion of Anselm's second paradox.³⁴⁴ Until then, attention remains on the noncomparative justice issues. Responses to the objection that mercy is a redundancy have a number of themes. Some commentators conclude that Murphy's approach to mercy is mostly an issue of semantics. What Murphy calls "individuation,"³⁴⁵ history has called "mercy."³⁴⁶ Others have responded to

necessary for justice).

338. *Id.*

339. *See id.* Murphy is responding to hypotheticals created by Alwynne Smart. *See* Smart, *supra* note 27, at 215-16. For Murphy, the fact that a person convicted of vehicular homicide of his own child is a morally relevant factor that justice requires be considered. Similarly, the young age of a criminal and the reformation of a criminal after years of incarceration are matters for justice. *See id.* at 11-12.

340. *Id.* Again responding to Alwynne Smart's hypotheticals, Murphy concludes that punishing a criminal less than deserved because of the unacceptable impact to the criminal's family or because there will be serious civil unrest if the criminal is punished, represents a utilitarian departure from defendant-centered mercy. *See id.* at 12.

341. Harrison, *supra* note 68, at 122. For Murphy, the redundancy argument merges with the argument that the state may only act in a reasoned manner. *See* Murphy, *supra* note 104, at 13-14.

342. Harrison, *supra* note 68, at 122.

343. *See* Murphy, *supra* note 104, at 13-14.

344. *See infra* text accompanying note 369.

345. *See* Murphy, *supra* note 68, at 457-58.

346. *See* Garcia, *supra* note 71, at 228-29. This is particularly clear in homicide cases in which the concept of "premeditation" permits the trier of fact to exhibit mercy. *See, e.g.,* State v. Schrader, 302 S.E.2d 70, 75 (W. Va. 1982) (citing Cardozo for the proposition that through the doctrine of "premeditation" a jury is offered the ability to be merciful). It is also clear in the sentencing phase of a capital case. *See,*

Murphy by harkening back to Aristotle's observations about the futility of attempting an impersonal and universal response to misbehavior.³⁴⁷ Every punishment system must allow some discretion to the sentencing judge in order to recognize the uniqueness of all human events.³⁴⁸ Duff responds in a third way, believing that a victim, whether an individual or a community, is interested not only in the wrong that the offender committed, but also by the suffering that the offender has undergone: "I may forgive someone who has wronged me because 'he has suffered enough.'"³⁴⁹ Duff uses the example of a friend who has wronged him. When he goes to confront his friend with the wrong, he finds out that his friend's wife has died.³⁵⁰

"I see him . . . as a friend who is suffering" and respond to him on those terms. This private model for mercy is one that the criminal law should follow. But if a criminal is suffering seriously (if he is grievously ill, perhaps, or recently bereaved—the suffering need not itself be a result of his crime), we might, and perhaps should, come to see him from the perspective of compassion and mercy rather than from that of retributive justice. What we see and respond to is not his criminal desert but his suffering. If such a shift of perspective can be appropriate for us as individual citizens, should we not make room for it in the criminal law by empowering judges, or some other official, to show mercy to criminals?³⁵¹

e.g., Dressler, *supra* note 92, at 1471 n.89; Garvey, *supra* note 22, at 1009-12.

347. See ARISTOTLE, *supra* note 213, at 133-36.

348. Dressler makes the observation:

If sentencing provisions deny judges the ability to mitigate punishment on compassionate grounds, pressure will increase to load the substantive penal code with new full and partial excuses. Yet, if issues of nondesert have a place in the criminal justice system, as I assert that they do, such issues ought to arise after responsibility—guilt or innocence—has been determined. Commingling factors of desert and mercy in the guilt phase not only confuses the purpose of the guilt determination, but such front-loading of penal codes would inefficiently require juries to consider claims more easily treated during the less formal sentencing hearing.

Dressler, *supra* note 66, at 701 n.136; see also Johnson, *supra* note 77, at 116 ("[L]egal justice may fall short of moral justice in . . . [distinguishing] between relatively different cases.").

349. Duff, *supra* note 74, at 58.

350. See *id.* at 58-59.

351. *Id.* at 59.

It is not clear what Murphy's response would be to the Duff hypothetical. In response to a related hypothetical by Alwynne Smart in which a father was convicted of the vehicular homicide of his child,³⁵² Murphy concluded that by punishing the father, the state would have inflicted more punishment on the father than the father deserved.³⁵³ It is justice, and not mercy, that requires this result.³⁵⁴ In the Duff hypothetical, however, the suffering of the wrongdoer is unrelated to the cause of his suffering. The wrongdoer is a pathetic figure because of an extrinsic event, just as the wrongdoer might be a pathetic character because of a myriad of other factors, including parental influence and the collapse of social status. Murphy's private law paradigm would permit the wronged friend to forego punishment, but it may be that Murphy would only allow the state to do likewise with the wronged friend's concurrence.³⁵⁵

Whether one finds more satisfaction in the redundancy argument or the responses to that argument, practical issues overshadow the debate. Under Murphy's account, justice demands that all morally relevant factors be considered.³⁵⁶ Judges must uphold the rule of law by which Murphy means "upholding legal rules that meet certain standards of justice," not just enforcing legal rules without concern for how unjust those rules may be.³⁵⁷ If the rules the judge must enforce are highly unjust, the judge must resign or disobey the unjust rules.³⁵⁸ In practice, however, it is the legislature that initially determines what relevant factors may be taken into account on issues surrounding both questions of guilt and questions of punishment. It is the legislature that defines whether a particular crime requires a mental state of intent, knowledge, recklessness, negligence, or no mental state at all.³⁵⁹ It is the legislature that determines what justifi-

352. See Smart, *supra* note 27, at 215-16.

353. See Murphy, *supra* note 68, at 457.

354. See *id.*

355. See *id.* at 458-59.

356. See *id.* at 457-58.

357. *Id.* at 461 n.8.

358. See *id.* at 462 n.8.

359. See MODEL PENAL CODE § 1.13(11)-(15) cmt. at 210-11 (1985); see also Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J.

cations and excuses can be argued by a defendant.³⁶⁰

In recent times, the legislature has limited severely what morally relevant factors may be considered by a sentencing judge. Mandatory sentencing laws say, in essence, that there are some crimes for which there are no relevant factors that justify a sentence below a prescribed level,³⁶¹ whereas sentencing guidelines restrict the impact that any articulated relevant factors may have in a particular case.³⁶² Duff may say that the legislature has constrained the ability of the court to exercise mercy; in contrast, Murphy would conclude that the legislature has prevented the court from doing justice.

815, 852 (1980) (arguing that legislatures may authorize certain distinctions in criminal behavior that may result in the mitigation of punishment). In his criticism of the redundancy of mercy, Murphy makes this point, albeit sarcastically: "One might as well protest strict criminal liability offences by saying that they are unmerciful." Murphy, *supra* note 104, at 12.

360. Dressler warns that it is often difficult to determine whether justice or mercy is involved in a decision. See Dressler, *supra* note 92, at 1468 n.82. For example, if a judge sentences a young offender less severely than the judge would sentence an adult offender because the judge believes that the age of the offender "renders him less deserving of punishment," this is justice, not mercy. *Id.* The issue becomes more complicated if the legislature permits the court to consider extenuating circumstances such as the choice of evils defense of the MODEL PENAL CODE § 3.02(1) (Proposed Official Draft 1962), or when the court is instructed by a mandatory sentencing statute that no extenuating circumstances may be considered. See *supra* note 61. For a discussion of the role of justification and excuse in the criminal law, see, e.g., FLETCHER, *supra* note 68, at 759-69; Joshua Dressler, *New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Re-thinking*, 32 UCLA L. REV. 61, 65-66 (1984).

361. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991) ("There can be no serious contention, then, that a sentence which is not otherwise cruel and unusual becomes so simply because it is 'mandatory.'"). See generally Lowenthal, *supra* note 61, at 67-73 (indicating that determinate sentencing reform, which centers on multiple factors for sentencing, is undercut by mandating sentences that often focus on one factor).

362. The Guidelines are constitutional. See *Mistretta v. United States*, 488 U.S. 361, 412 (1989). But cf. Ira Bloom, *The Aftermath of Mistretta: The Demonstrated Incompatibility of the United States Sentencing Commission and Separation of Powers Principles*, 24 AM. J. CRIM. L. 1 (1996) (arguing that the sentencing Reform Act threatens the federal balance of power by removing from the judiciary its discretion in sentencing, as granted under Article III of the Constitution). For a discussion of state sentencing guidelines, see generally Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 JUDICATURE 173, 173-77 (1995) (offering a comparison of 22 state sentencing guidelines); Kevin R. Reitz, *Sentencing Reform in the States: An Overview of the Colorado Law Review Symposium*, 64 U. COLO. L. REV. 645 (1993) (presenting examples of state sentencing guidelines over the last fifteen years).

Once the legislature has codified criminal conduct and identified any additional relevant factors, the decision regarding individualized justice or mercy does not fall on the court but rather on the prosecutor. It is the prosecutor who determines who will be prosecuted at which level of seriousness. It is the prosecutor through the charging decision, who determines, in great measure, the amount of discretion the sentencing judge will have. It is the prosecutor, through plea bargaining, who often determines whether the court will participate effectively in the sentencing decision at all.³⁶³

Simply put, although the injustice prong of Anselm's first paradox teaches us that a strategy for mercy must account for the public's commitment to various strands of retribution, the redundancy prong teaches us more of a lesson in strategic process. Whether Murphy is correct in understanding justice to require the consideration of individual factors that some may refer to as mercy,³⁶⁴ or whether Duff is correct in believing that a society should consider all aspects of the offender's life out of mercy,³⁶⁵ the practical conclusion is that the public has registered its belief, manifested by mandatory sentencing and sentencing guidelines, that the courts cannot always be trusted with individuation. The movements toward less judicial discretion in sentencing were prompted by the public's belief that attempts at individuation of punishment resulted in sentencing disparities and lenient sentences that did not respond to the public outcry against crime.³⁶⁶

The lesson from the redundancy argument is that a successful strategy for mercy must be directed initially at the legislative role in the criminal justice system. The public is not prepared to reinstitute the old regime of broad judicial discretion. At the same time, there is no indication that either the legislature or

363. The depth of prosecutorial prerogative is seen in the "hands-off" attitude that courts take toward prosecutorial discretion. See Misner, *supra* note 25, at 743-55 (noting that most prosecutorial decisions such as charging and plea bargaining are unreviewable). This policy continues despite the fact that only 12% of prosecutors' offices in 1992 had written criteria governing negotiations, see *id.* at 736, and that 91% of those found guilty in 1990 had pled guilty, see *id.* at 723.

364. See *supra* text accompanying note 337.

365. See Duff, *supra* note 74, at 59.

366. See *supra* note 51.

the judiciary is anxious to regulate prosecutorial decision making.³⁶⁷

B. Anselm's Second Paradox

St. Anselm's second paradox, which shifts from a noncomparative to a comparative perspective on justice, has been called the "equal protection" paradox.³⁶⁸

But if it can in some way be grasped why You can will to save the wicked, it certainly cannot be understood by any reason why from those who are alike in wickedness You save some rather than others through Your supreme goodness, and damn some rather than others through Your supreme justice.³⁶⁹

At the core of the second paradox lie the same difficult concerns encountered in the first paradox—the nature of punishment, the concern for victims, the state as a reasoned actor, and mercy as a redundancy. In the case of the second paradox, however, the focus is on the practical issue of the equal administration of justice, encompassing the knotty issue of race and ethnicity in the criminal law, which will determine, to a great degree, the strategy for mercy.

Murphy updates the language of Anselm's key inquiry:

If God (or any other rational being) shows mercy, then the mercy must not be arbitrary or capricious, but must rather rest upon some good reason—some morally relevant feature of the situation that made the mercy seem appropriate. . . . And does not the Principle of Sufficient Reason require that if I, as a rational being, showed mercy to Jones because of characteristic C, then it is presumably required of me . . . that I show comparable mercy to C-bearing Smith?³⁷⁰

Shifting to the comparative justice perspective is critical. For example, in a noncomparative justice universe, we may agree with Garcia that an offender should not be heard to complain

367. See Misner, *supra* note 25, at 741-55.

368. See, e.g., Murphy, *supra* note 68, at 460.

369. ST. ANSELM, *supra* note 247, at X.

370. Murphy, *supra* note 68, at 460.

that he has received deserved punishment or has even received a lesser punishment than deserved.³⁷¹ In a comparative justice world, it is not enough to conclude that the offender received no more than what he was due.³⁷² There is the additional requirement that the offender be treated in a like manner to those similarly situated and that the state be able to explain why one case is unlike another.³⁷³ In a noncomparative universe, it may be sufficient to tell the crime victim that his personal feelings must be subordinated to the rights of the community as a whole.³⁷⁴ In a comparative justice world, not only may the crime victim feel as if society is uninterested in reestablishing his dignity when his offender is treated mercifully, but the crime victim may feel revictimized when he learns that society is even less interested in him than it is in other victims whose offenders were not shown mercy. In this way, Anselm's first and second paradoxes are cumulative in their political importance. Not only will the particular offender and the particular victim measure justice in a comparative way, but other offenders, other victims and the general public will view justice as requiring consistency. It is not enough, from a political perspective, to agree with Stephen Garvey that although "[a]rbitrary grants of mercy are morally tolerable; discriminatory ones are not."³⁷⁵

371. See Garcia, *supra* note 71, at 230-32; Brien, *supra* note 72, at 56-57. But see Pollack, *supra* note 22, at 515 (arguing that mercy is inappropriate in a rights-based system unless exercised as a component of justice).

372. Professor White has argued that mercy should first and foremost assure that due process exists before concerning itself with issues of justice. See WHITE, *supra* note 283, at 115-28.

373. Even though every case is in some way idiosyncratic, for the comparativist "this does not mean that reasons should not be used in reaching these answers So the decision, if correct, should fit in with other decisions." Harrison, *supra* note 68, at 121.

374. See *supra* text accompanying note 314.

375. Garvey, *supra* note 22, at 1041. For example, in January, 1999, Pope John Paul II visited Missouri where he preached his opposition to capital punishment. See Gustav Niebuhr, *Pope's Appeal Saves Killer in Missouri*, PORTLAND OREGONIAN, Jan. 29, 1999, at A1, available in 1999 WL 5315052. When the governor of Missouri, Mel Carnahan, met the Pope, the Pope asked the governor to commute the death sentence of Darrell Mease who was to be executed in a few weeks time. See *id.* The Governor commuted the death sentence. See *id.* The Governor received accolades and criticisms for his action. See *id.* Some criticized him on a noncomparative justice perspective—the Governor failed to do justice. See *id.* The most compelling compara-

Although philosophers and commentators may argue how central consistency in punishment should be to a system of justice,³⁷⁶ the public and the courts have elevated equality of treatment above most other concerns.³⁷⁷ The frustration of the general public with inconsistency in sentencing was a major impetus for the sentencing guideline movement in both federal and state jurisdictions.³⁷⁸ The general concern for consistency, however, was complicated by the reality that the criminal justice system has never engendered great confidence that the system can function on a race-neutral basis.³⁷⁹ The fear was that certain

tive justice argument came from James Edward Rodden—the next Missouri prisoner in line to be executed. Rodden did not complain that the Governor treated Mease unjustly. His comment centered on why Mease would be spared and not him: “I think if you do it for one person, you should do it for all . . . I’m happy for [Mease], but I think I’m just as good a person.” *Missouri Killer Doesn’t Expect Pope’s Aid*, PORTLAND OREGONIAN, Jan. 30, 1999, at A2, available in WL 5315267.

376. See Kenneth W. Simons, *Overinclusion and Underinclusion: A New Model*, 36 UCLA L. REV. 447, 452 (1989) (noting that a “person ordinarily has the right to demand a plausible, nontautological explanation for why she has been treated differently from another . . . or for why she has been treated the same as another whom she believes is different”); see also Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Weston*, 81 MICH. L. REV. 575, 589 (1983) (discussing the link between equality and rationality). But see MICHAEL DAVIS, *TO MAKE THE PUNISHMENT FIT THE CRIME* 90-92 (1992) (positing that retribution is only appropriate at the guilt or innocence stage of proceedings and not at the sentencing stage); HART, *supra* note 135, at 172-73 (positing a more “modest place” for the notion of fairness between different offenders); MORRIS, *supra* note 16, at 158 (“The data we now have would seem to support the proposition that the black street criminal is slightly more severely treated. . . . But if we are to move to a system of fixed sentences, without room for mercy in the individual case, it is certainly true that even if one could achieve relative balance between white and black criminals, black offenders would be treated very much more severely than they now are.”).

377. See, e.g., ALLEN, *supra* note 2, at 68 (“There is no circumstance of American life in the past two decades more striking than the ascendancy of the value of equality in contemporary thought and political movements.”). As noted by Philip Kurland, the new frontier of the Warren Court came largely in the “development of the concept of equality as a constitutional standard.” PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 98 (1970). As Allen notes, equality also served as a starting point for the influential work of John Rawls. See ALLEN, *supra* note 2, at 118 n.22.

378. See, e.g., U.S. SENTENCING COMM’N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 17-19 (1991) [hereinafter MANDATORY MINIMUM PENALTIES]; U.S. SENTENCING COMM’N, 102ND CONG., THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING (1991).

379. See *supra* note 64; see also Akhil Reed Amar, *Three Cheers (and Two Quib-*

characteristics of the defendant—wealth, race, citizenship, age, and gender—coupled with the personal and political philosophy of the judge and the quality of legal representation, had resulted in sentences that could not be reconciled with one another.³⁸⁰ With the advent of sentencing guidelines came mandatory sentencing,³⁸¹ limitations on probation eligibility,³⁸² and changes to the juvenile justice system,³⁸³ all of which were intended to lessen judicial discretion and promote consistency,³⁸⁴ and implemented with the full awareness that the court's ability to individualize punishment would be curtailed.³⁸⁵ The public disapproval of inconsistency, when coupled with its belief that lenient sentences

bles) for Professor Kennedy, 111 HARV. L. REV. 1256, 1257 (1998) (book review) (reviewing RANDALL KENNEDY, RACE, CRIME AND LAW (1997) ("Even today, judges allow race to be used as a proxy for criminal suspiciousness in various cases.")).

380. The United States Sentencing Commission in its Guidelines (U.S.S.G.) section 5H1.10 (1999) dictates that gender, race, and national origin are not relevant to sentencing. Section 5H1.6 (1998) also asserts the general inappropriateness of considering "[f]amily ties and responsibilities" in sentencing. See SENTENCING GUIDELINES, *supra* note 254. For a view that these provisions make no sense in the real world, Jack B. Weinstein, *The Effect of Sentencing on Women, Men, the Family, and the Community*, 5 COLUM. J. GENDER & L. 169, 181 (1996). The Guidelines do, however, permit the sentencing judge to consider certain characteristics of the defendant. For example, U.S.S.G. section 5H1.4 (1999) permits a judge to consider the "extraordinary physical impairment" of the offender but not "[d]rug or alcohol dependence or abuse." For an example of a proposed extraordinary physical impairment, see James C. MacGillis, Note, *The Dilemma of Disparity: Applying the Federal Sentencing Guidelines to Downward Departures Based on HIV Infection*, 81 MINN. L. REV. 229, 260-61 (1996).

381. See *supra* note 61.

382. See *id.*

383. See *supra* note 59.

384. See, e.g., Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 189 (1993) (demonstrating congressional rejection of more discretionary sentencing guidelines); MORRIS, *supra* note 16, at 155 ("If we all get our deserts, who escapes the rack? A system of criminal justice that is not infused with . . . clemency . . . creates an intolerable engine of tyranny. Discretion in quantifying punishment may well be highly susceptible to abuse, but it cannot be exorcized.").

385. See FORER, *supra* note 61, at 56-57 (suggesting that society can be protected while treating offenders in an individualistic, humane manner). Apparently, Murphy does not believe that individualized justice is beyond the ken of judges. See Murphy, *supra* note 104, at 12. In contrast, it appears that Duff questions whether judges can appreciate fully the lack of fairness for all members of society, and doubts that they can take into account the reality that all persons do not have an equal chance to be crime-free. See DUFF, *supra* note 139, at 295.

were contributing to a high crime rate, resulted in lengthier sentences for all offenders.³⁸⁶ Sentencing guidelines were intended to produce sentences that were harsh, yet consistent.³⁸⁷

Public concern for equality of treatment, however, has not exhibited itself in a wholly consistent manner. Although judges have lost discretion in sentencing, and parole prison officials have been constrained in early release decisions, there have been no similar constraints on prosecutorial discretion. For example, in order for mandatory sentences to be applicable, a prosecutor must charge a crime for which there is a mandatory sentence. For a sentence to be enhanced in many jurisdictions on the grounds that the defendant is a career criminal, often the prosecutor must choose to plead prior convictions.³⁸⁸ Generally, there are few restrictions upon prosecutorial conduct in plea bargaining.³⁸⁹ Similarly, there have been no constraints placed upon legislative discretion. Courts have rejected arguments that would require proportionality review of sentences and have allowed the legislature to authorize very lengthy sentences for what appears to be very minimal harm.³⁹⁰

The attraction of comparative justice may be the most influential factor affecting a strategy for mercy. Just as the redundancy concern in the discussion of Anselm's first paradox led to a strategic choice to introduce mercy at the level of legislative or prosecutorial decision making,³⁹¹ the same conclusion is dictated by similar concerns for equal justice under Anselm's second paradox. Assuming every individual criminal case will be viewed by the defendant and the injured party as *sui generis*,³⁹² and also assuming that the public is unlikely to broaden judicial

386. See *supra* note 14.

387. See, e.g., MANDATORY MINIMUM PENALTIES, *supra* note 378, at 17.

388. See, e.g., CAL. PENAL CODE § 667(e)(2)(A) (1998) (offering enhancement of a sentence if the defendant's prior felony convictions "have been pled and proved").

389. See Misner, *supra* note 25, at 743-44 (demonstrating that a prosecutor's discretion to prosecute is virtually unreviewable).

390. See, e.g., Harmelin v. Michigan, 501 U.S. 957 (1991) (upholding a life sentence without parole for possession of approximately 650 grams of cocaine).

391. See *supra* text accompanying note 367.

392. See KANT, *supra* note 4, at ix.

discretion,³⁹³ it makes sense to pinpoint a strategy for mercy at a locus of discretion where personalized judgments need not be made. Legislative decisions determining what conduct is criminal and what penalties are permitted are less likely to engender issues regarding equality of justice than are decisions giving broad discretion to sentencing judges or parole boards. A legislature might make decisions regarding the merciful treatment of a cognizable class of offenders at the legislative stage without the usual worry that its decisions are likely to be suspect on racial or ethnic grounds. There must be vigilance even in this strategy, however, because certain crimes, such as crack cocaine use, have disparate racial effects.³⁹⁴

IV. SUMMARY OF THE HALLMARKS FOR A STRATEGY FOR MERCY

The literature on retribution and mercy has convinced my legislator that mercy can be introduced as a legitimate concern for the criminal justice system. Mercy can be politically acceptable if legislators are careful to choose areas of criminal conduct as candidates for mercy that have certain hallmarks.

A. *Nature of the Prohibited Conduct*

Conduct is a candidate for mercy if it is nonviolent, and therefore generates a lessened emotional response, and is conduct about which society has an equivocal moral commitment. Conduct that may be clearly related to such factors as poverty and unemployment, and thereby generates a degree of compassion for the offender, may also recommend itself to a legislator. Mercy may be most appropriate in areas of conduct where society has serious doubts on whether criminalization has positive utilitarian effects and in areas where society concludes that criminalization actually promotes additional criminal conduct; in both areas, the costs of mercy are low.

393. See *supra* note 377-87 and accompanying text.

394. See *infra* note 471.

B. Victim Impact

Criminal conduct that has no particularized victim is also an important consideration for the legislator. The existence of a particularized victim can result in a stronger emotional response by society and create a cause around which to rally for political gain. Society may be less willing to be merciful where there is an obvious indignity inflicted upon a victim that is readily comparable to the indignities suffered by similarly situated victims.

C. Impact of the Illegal Conduct upon the Offender

Mercy may be more acceptable in those areas of conduct where the offender has not clearly gained an economic or social benefit by his conduct. If the criminal conduct actually disadvantages the offender over the long haul, mercy may be politically acceptable. Indeed, to show mercy in certain situations does not break down social cohesion by failing to punish; instead, mercy under these circumstances can be seen as a catalyst for greater social cohesion by signaling to an offender that society cares for all of its members, including those who find themselves in lives with limited opportunities.

D. Nature of Society's Response

Mercy may be politically unacceptable if mercy is equated with impunity. Where a crime has been committed, many in society follow Kant's vision and demand a proportionate response.³⁹⁵ A strategy for mercy must look for areas of conduct in which punishment of some degree can stave off the conclusion that the offender is getting away with something.

E. Proof of Underlying Conduct

Mercy is inappropriate unless punishment is deserved.³⁹⁶ Attempts at reform should not lead to a lessening of the procedural rights of the offender under even the well-intentioned guise of helping the offender. Because mercy bears on the subject of pun-

395. See *supra* note 241 and accompanying text.

396. See *supra* note 27.

ishment as opposed to culpability, guilt must be established before mercy comes into play.

F. Position of the Mercy Giver

Most jurisdictions have moved to constrain the authority of the sentencing judge. Issues such as sentencing disparity have caused criminal justice systems to relocate discretion from the judge to the prosecutor, the legislature, and the police. A strategy for mercy must consider in whom the discretion necessary for mercy should reside. A strategy for mercy must also consider which decision maker is most trusted to exercise mercy in a manner unaffected by race, ethnicity, or other unacceptable factors.

V. MERCY AND DRUG LAWS

For more than thirty years, the American criminal justice system has been fighting its "war on drugs."³⁹⁷ Despite the billions of dollars allocated for drug interdiction and prosecution, incarceration and treatment of drug offenders,³⁹⁸ there is an

397. Although militaristic language has been associated with crime control for many years, the term "war on drugs" is most closely associated with the Reagan presidency. In 1988, President Reagan signed the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of U.S.C. (1988)), repealed by 21 U.S.C.A. §§ 1501-08 (West Supp. 1999). The Act established the Office of National Drug Control Policy, which was given the task of developing a national drug strategy. See *id.* § 1003. For a discussion of drug policy in the United States during the latter part of the century, see DAN BAUM, *SMOKE AND MIRRORS: THE WAR ON DRUGS AND THE POLITICS OF FAILURE* 206-91 (1996); Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 25 (stating that the war-time slogan of "[t]ake no prisoners" has its equivalent in the war on drugs: "make them all prisoners"). But see John P. Walters, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 107, 119-34 (arguing that the Bush Administration's drug policy was a success). For the case that prosecutors should be forbidden from using the phrase "war on drugs," see Mark S. Davies, Note, *Enlisting the Jury in the "War on Drugs": A Proposed Ban on Prosecutors' Use of "War on Drugs" Rhetoric During Opening and Closing Argument of a Narcotics Trial*, 1994 U. CHI. LEGAL F. 395, 406-12.

398. The Office of National Drug Control Policy (ONDCP) within the Executive Office of the President reported that the federal drug control budget increased from \$1.5 billion in 1981 to \$17 billion in 1999. See Bureau of Justice Statistics, U.S. Dep't of Justice, *Drug and Crime Facts 1999* (visited Mar. 1, 2000) <<http://www.ojp.usdoj.gov/bjs/dcf/dcb.html>> [hereinafter 1999 FACTS]. ONDCP also reported that state and local governments spent \$15.9 billion on drug control in 1991, up 13%

uneasiness about the policy,³⁹⁹ including a fear that drug enforcement has focused on "low level dealers in minority neighborhoods."⁴⁰⁰ Are drug crimes candidates for a legislative policy of mercy? If so, what conclusions can we draw from applying the hallmarks for a merciful strategy to drug crimes?

A. A Number of Caveats

Drug crimes and drug programs create difficult problems for those who wish to generalize. Different drugs have distinct effects and dangers for addiction⁴⁰¹ and the current trend appears to be to polydrug addiction.⁴⁰² If one targets drug-use crimes, one is faced with the reality that many drug users sell relatively small amounts of drugs, or commit other crimes such as burglary, to support their drug habits.⁴⁰³ Some drug users are

from similar spending in 1990. *See id.* For a far-reaching summary of state and federal resources dedicated to enforcing drug laws, see *id.*; see also Office of Nat'l Drug Control Policy, Executive Office of the President, *Fiscal Year 1999 Drug Budget Program Highlights* <<http://www.whitehousedrugpolicy.gov/policy/budget99/overview.html> [hereinafter FISCAL YEAR] (recommending a budget of \$17.1 billion for drug control funding for fiscal year 1999).

399. *See, e.g.,* John T. Schuler & Arthur McBride, *Notes From the Front: A Dissident Law-Enforcement Perspective on Drug Prohibition*, 18 HOFSTRA L. REV. 893, 893 (1990) (arguing that the continued policies involved in the "War on Drugs" inevitably will lead to the death of innocent children, civilians, and law enforcement personnel). The uneasiness of drug policy does not simply end with the substantive policy issues. Many commentators believe that drug enforcement has resulted in the diminution of federal constitutional guarantees, particularly in the area of Fourth Amendment jurisprudence. *See, e.g.,* Steven B. Duke, *Drug Prohibition: An Unnatural Disaster*, 27 CONN. L. REV. 571, 589-90 (1995); Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1396 (1993); Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L. REV. 889, 891 (1987).

400. André Douglas Pond Cummings, Comment, *Just Another Gang: "When the Cops Are Crooks Who Can You Trust?"*, 41 HOW. L.J. 383, 408 n.191 (1998) The arrest rates of African Americans for drugs at the height of the "war on drugs" in 1989 were five times higher than the arrest rates of whites, even though drug use was at approximately the same level. *See id.*

401. *See* ERICH GOODE, *BETWEEN POLITICS AND REASON: THE DRUG LEGALIZATION DEBATE* 157-63 (1997).

402. *See* OFFICE OF NAT'L DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, PULSE CHECK: NATIONAL TRENDS IN DRUG ABUSE 7 (Summer 1998).

403. *See generally* Office of Nat'l Drug Control Policy, *Drug Treatment in the Criminal Justice System* (visited Mar. 1, 2000) <<http://www.whitehousedrugpolicy.gov/drugfact/treatfact/treat1.html>> [hereinafter DRUG TREATMENT] (summarizing drug use and the way in which it is linked to crime). The reality of the link between drug

violent.⁴⁰⁴ Others use drugs alone, while still others entice minors to use drugs.⁴⁰⁵ Drug use for some leads to violations of probation or parole restrictions.⁴⁰⁶ Some use drugs despite their receiving intensive and continuing treatment.⁴⁰⁷ Others use drugs, and by doing so, endanger human life.⁴⁰⁸ If a legislature were to decide to adopt a merciful strategy toward drug users, it is not clear how inclusive the definition of "drug user" should be. It is important to recognize that discretion, in some measure, is constant in any system of mercy, despite very particularized planning on the part of the legislature. Legislative oversight and common sense can start and maintain a direction of merciful treatment.

A policy of drug treatment, rather than one of lengthy incarceration, may be less costly in the long term;⁴⁰⁹ in the short

use and the sale of small amounts of drugs to support the seller's habit has been noted by many who have been charged with revising criminal codes. *See, e.g.*, MODEL CRIMINAL CODE OFFICERS COMMITTEE OF THE STANDING COMMITTEE OF [AUSTRALIAN] ATTORNEYS-GENERAL DISCUSSION PAPER: MODEL CRIMINAL CODE, CHAPTER 6 SERIOUS DRUG OFFENSES 7 (1997) [hereinafter CODE COMMITTEE], "[A] habitual user who sells a small quantity of a controlled drug to another habitual user for personal use should escape liability for trafficking." For a discussion of linkages of changes in drug policy and patterns of other criminal activity, see FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SEARCH FOR RATIONAL DRUG CONTROL* 137-57 (1992).

404. *See generally* BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, FACT SHEET: DRUG-RELATED CRIME 1, 3 (1997) (discussing the link between violence and drug use).

405. Most jurisdictions use the fact of the sale of drugs to minors to be an aggravating factor in sentencing. *See, e.g.*, CODE COMMITTEE, *supra* note 403, at 3-5. Some jurisdictions have created a separate crime of selling drugs to a minor. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3409 (West Supp. 1999) (stating that a person who sells certain drugs to a minor is guilty of a Class 2 felony).

406. *See, e.g.*, DRUG TREATMENT, *supra* note 403. *See generally* DOUGLAS S. LIPTON, U.S. DEPT OF JUSTICE, THE EFFECTIVENESS OF TREATMENT FOR DRUG ABUSERS UNDER CRIMINAL JUSTICE SUPERVISION 51-53 (Nov. 1995) (proposing that treatment of drug offenders within the criminal justice system is effective in reducing recidivism).

407. Although long-term residential treatment for former prisoners has, in certain studies, lowered recidivism rates from approximately 80% to approximately 30%, the 30% failure rate is still substantial and creates additional policy problems. *See* Office of Nat'l Drug Control Policy, *New Studies Find Drug Courts & Drug Treatment of Prisoners, Parolees & Teens Cut Crime & Drug Use* (visited Mar. 1, 2000) <<http://center.butler.brown.edu/plndp/Nov98-3.html>> [hereinafter NEW STUDIES].

408. For a discussion of the governmental interest in protecting persons from the effect of drug use in certain industries, see *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 606-08 (1989).

409. *See, e.g.*, FISCAL YEAR, *supra* note 398. "For heavy users of cocaine, treatment

term, a shift to a policy of treatment will cause costs to spike as jails, prisons and community treatment systems expand their staffs to include many more programmatic staff. Clearly, treatment programs will disrupt budgets, particularly when one aggregates both the large number of inmates currently serving time for drug⁴¹⁰ or drug-related crime⁴¹¹ and the number of inmates for whom illegal drugs were a part of their preincarceration lives.⁴¹² Sunk costs for facilities, often financed through bonds, and recurring expenses for security staff will continue with the need for supplementary funds for treatment programs.

The specifics of any treatment program will mirror the community in which it is established.⁴¹³ Some jurisdictions have extensive treatment programs,⁴¹⁴ including drug courts,⁴¹⁵ al-

interventions would cost one-seventh as much as enforcement to achieve the same reduction in cocaine use." *Id.* at 3.

410. In 1997, more than 277,000 offenders were in prison for a drug violation—21% of all state prisoners and 60% of all federal prisoners. See Bureau of Justice Statistics, U.S. Dep't of Justice, *More Than Three-Quarters of Prisoners Had Abused Drugs In The Past* (visited Jan. 5, 1999) <<http://www.ojp.usdoj.gov/bjs/pub/press/satsfp97.pr>>. Of the state prisoners, 70% of drug offenders were serving time for drug trafficking or possession with intent to distribute, whereas 86% of federal prisoners incarcerated for drug crimes fell within these categories. See *id.*

411. In 1997, 33% of state prisoners and 22% of federal prisoners said they had committed their current offense while under the influence of drugs. See *id.* About 15% of both state and federal prisoners said they committed their current offense in order to buy drugs. See *id.*

412. In 1997, 57% of state prisoners and 45% of federal prisoners said they had used illegal drugs in the month before their offense, while 83% of state prisoners and 73% of federal prisoners had used illegal drugs at some point in their lives. See *id.*

413. In some cities, a high percentage of male arrestees will test positive for any drug at the time of arrest (82% in Chicago), whereas in other cities the test results are very different (48% in San Jose). See Office of Nat'l Drug Control Policy, *Fact Sheet: Drug Use Trends: Criminal Offender Populations* (visited Mar. 1, 2000) <<http://www.whitehousedrugpolicy.gov/drugfact/drugtrends/criminal.html>>; see also 1999 FACTS, *supra* note 398 (detailing the different statistics of drug use at arrest in differing cities).

414. For a summary of drug treatment programs in a number of jurisdictions, see LIPTON, *supra* note 406, at 18-45; DRUG TREATMENT, *supra* note 403.

415. Drug courts are an alternative to the courts of general jurisdiction that hear criminal cases and oversee the processes of drug treatments. The first drug court was established in Dade County, Florida, in 1989. See William D. Hunter, *Drug Treatment Courts: An Innovative Approach to the Drug Problem in Louisiana*, 44 LA. B.J. 418, 419 (1997). By 1997, there were over 371 drug courts in operation or in various stages of planning. See DRUG TREATMENT, *supra* note 403. See generally U.S. Gen. Accounting Office, *Drug Courts: Overview of Growth, Characteristics, and Results* (visited July, 1997) <<http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress>>.

ready in place. Other jurisdictions have very few drug-specific policies or procedures.⁴¹⁶ A strategy for mercy permits the legislature to move beyond the political bias favoring overincarceration but also to build upon the current efforts of communities.

Finally, the debate on the continued criminalization of drug use is a long-standing one with strong advocates on both sides.⁴¹⁷ Some jurisdictions have effectively decriminalized most drug use⁴¹⁸ whereas some have partially decriminalized the use of marijuana.⁴¹⁹ Although the criminalization debate continues, there seems to be little chance of a broad shift in political attitudes on criminalization;⁴²⁰ the political rhetoric remains too

=162.140.64.21&filename=gg97106.pdf&directory=/diskb/wais/data/gao> (citing insufficient data as the reason for an inconclusive evaluation of drug courts).

416. "While two-thirds of probationers have had serious drug and alcohol problems, only 17% of these probationers have access to substance abuse treatment once they leave prison and return to their communities." NEW STUDIES, *supra* note 407.

417. Often arguments in favor of drug decriminalization center on the ineffectiveness of current laws to limit use because current laws ignore market forces. George P. Schultz, former Secretary of the Treasury in the Nixon administration and former Secretary of State in the Reagan administration, remarked in an address after he had left office:

These efforts [of drug interdiction] wind up creating a market where the price vastly exceeds the cost. With these incentives, demand creates its own supply and a criminal network along with it. It seems to me we're not really going to get anywhere until we can take the criminality out of the drug business and the incentives for criminality out of it.

George P. Schultz, *Schultz on Drug Legalization*, WALL ST. J., Oct. 27, 1990, at A16, cited in RUSSELL FOX & IAN MATHEWS, DRUGS POLICY: FACT, FICTION AND THE FUTURE 256 (1992); see also THOMAS SZASZ, OUR RIGHT TO DRUGS: THE CASE FOR A FREE MARKET 95-110 (1992) (illustrating how the current drug debate betrays the ideals of the market); ZIMRING & HAWKINS, *supra* note 403, at 82-110 (stating that issues of decriminalization must be made on a drug-specific basis). Opponents of decriminalization argue that decriminalization will encourage additional drug use. See, e.g., Mathea Falco, *Toward a More Effective Drug Policy*, 1994 U. CHI. LEGAL F. 9, 22-24.

418. For a discussion of Dutch drug measures by a member of the Netherlands Ministry of Health, see Eddy L. Engelsman, *Overseas Experience: Netherlands*, in FOX & MATHEWS, *supra* note 417, at 196, 197-98 (stating that the drug problem is principally a public health issue).

419. It is reported that nine states—California, Colorado, Maine, Minnesota, Mississippi, Nebraska, New York, North Carolina, Ohio—have partially decriminalized possession of small amounts of marijuana. See GOODE, *supra* note 401, at 48.

420.

Given the dense entanglement of the issue of legalization in ideological and political considerations, it is unlikely that it will be decided on empirical or consequentialist grounds alone. It is unlikely that any of the more radical proposals laid out by the legalizers will be adopted any

heated.⁴²¹ A strategy for mercy may or may not portend a long-range, fundamental shift in political attitude toward drug use; a strategy for mercy must begin with more limited goals and avoid, if possible, the rancor of the decriminalization debate.

B. Applying the Hallmarks for a Strategy for Mercy to Drug Crimes

The analysis of retribution and mercy leads to the question whether current policy choices regarding the use of prohibited drugs might be candidates for merciful reconsideration. Earlier analysis suggests examining six related issues.

1. The Nature of the Prohibited Conduct

There is great ambiguity in public opinion as to the moral culpability of illegal drug users.⁴²² Certainly drug use is wide-

time in the foreseeable future.

Id. at 156.

421. In testimony to the Senate Judiciary Committee, Darryl Gates, former Chief of the Los Angeles Police Department testified that casual marijuana smokers "ought to be taken out and shot" because, he said "we're in a war." William Bennett, former federal drug "czar," speculated on a nationwide radio talk show that perhaps anyone who sells illegal drugs to a child should be *beheaded*. "Morally," he said, "I don't have any problem with that at all." *Id.* at 50 (citations omitted).

422. Answers to a Gallup poll question as to what is the single most important problem facing the county have shifted dramatically:

<u>Date of Poll</u>	<u>Drug Abuse</u> <u>Most Serious Problem</u>
January 1985	2%
July 1986	8%
April 1987	11%
September 1988	11%
May 1989	27%
November 1989	38%
April 1990	30%
July 1990	18%
March 1991	11%
March 1992	8%
January 1993	6%
January 1994	9%
August 1994	9%
January 1995	6%
May 1996	10%
January 1997	17%
April 1998	12%

spread in society.⁴²³ Almost forty percent of the American public admit to experimenting with illegal drugs at least once in their lifetimes, eleven percent report use of a drug within the past year, and six percent report use of a drug within the past month.⁴²⁴ Although long prison sentences are authorized for drug use,⁴²⁵ in the workplace, drug use is often viewed as the personal problem of the user, which lends itself to medical intervention. Most social institutions have evolved internal processes to respond to drug use. In private institutions, drug use often results in mandatory treatment, often at the employer's expense.⁴²⁶ Drug use by a fellow worker just does not engender the strong, emotional responses that other crimes (such as theft) with comparative penalties as drug use engender.⁴²⁷ Most workers would not be scandalized when a co-worker returned to work after completing a drug rehabilitation program; indeed, completion of a drug rehabilitation program may create a sense of compassion for a person attempting to set out on a new path. Even drug use in public institutions most often does not result in the drug user entering the criminal justice system. One need only recall that

SOURCEBOOK, *supra* note 11, at 100 tbl. 2.1.

Few Americans, however, favor decriminalization of drug use. See John C. Lawn, *The Issue of Legalizing Illicit Drugs*, 18 HOFSTRA L. REV. 703, 714 n.75 (1990) (citing Gallup poll). Though not favoring decriminalization, only 32% of Americans believe that harsh criminal penalties for drug use are an effective means of prevention. See The Gallup Organization, *Consult With America: A Look at How Americans View the Country's Drug Problem*, 33 (Mar. 1996) <<http://www.ncjrs.org/pdffiles/gallup.pdf>> (under contract for the ONDCP, 1996).

423. Contrary to popular opinion, it seems that "[d]rug usage is not significantly greater in the black community than in the white community, but drug enforcement is." Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 456 (1997).

424. See 1999 FACTS, *supra* note 398 (citing the 1997 Substance Abuse and Mental Health Administration National Household Survey on Drug Abuse). Furthermore, there has been a marked increase in marijuana use. See *id.* Between 1992 and 1998, past-month use of marijuana increased from: 4 to 10% among eighth graders; 8 to 19% among tenth graders; and 12 to 23% among high school seniors. See *id.*

425. See, e.g., ARIZ. REV. STAT. ANN. § 13-3410 (West Supp. 1999).

426. Many employers institute employee assistance programs (EAPs) to help employees conquer addiction. See AMERICAN BAR ASSOCIATION, ATTORNEY'S GUIDE TO DRUGS IN THE WORKPLACE 1 (Tia Scheider Denenberg & R.V. Denenberg eds., 1997).

427. This may be attributable to the perception that theft is a crime of dishonesty, while substance abuse is not perceived as such.

in *Vernonia School District 47J v. Acton*,⁴²⁸ the results of mandated, random drug tests performed on athletes were not made available to law enforcement.⁴²⁹ Within the criminal justice system itself, drug use by lawyers and judges most often leads to treatment outside of the criminal justice system.⁴³⁰ Moreover, the Americans with Disabilities Act (ADA)⁴³¹ gives certain protections to those who have been drug users.⁴³² The undeniable fact, however, is that in the great majority of these cases, the worker, the student, or the lawyer has committed a drug crime.

If the public's reaction to drug use is one of some degree of understanding for those who have treatment options outside of the criminal justice system, it would be tragic to conclude that the public's attitude was different as to those who had no access to private treatment. A consistent public opinion would approach all drug use from the medical model regardless of whether the drug user was insured or uninsured, rich or poor.⁴³³ At the very least, one would hope that many in society would have a general sense of compassion for those who enter the criminal justice system because they may have little or no access to private treatment due to such factors as poverty, illiteracy, or race discrimination, all of which are obstacles to securing employment and medical insurance.⁴³⁴

428. 515 U.S. 646 (1995).

429. See *id.* at 658 ("[T]he results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function.").

430. See generally Blane Workie, Note, *Chemical Dependency and the Legal Profession: Should Addiction to Drugs and Alcohol Ward Off Heavy Discipline?*, 9 GEO. J. LEGAL ETHICS 1357, 1363-64 (1996) (discussing counseling and treatment programs for lawyers).

431. 42 U.S.C. §§ 12101-12213 (1990).

432. See Kenneth J. Vanko, Note, *In Search of Common Ground: Leveling the Playing Field for Chemically Dependent Workers Under the Americans with Disabilities Act of 1990*, 1996 U. ILL. L. REV. 1257, 1258.

433. See generally Steven Jonas, *Solving the Drug Problem: A Public Health Approach to the Reduction of the Use and Abuse of Both Legal and Illegal Recreational Drugs*, 18 HOFSTRA L. REV. 751, 758 (1990) ("[I]t is necessary to: Demonstrate that from the scientific, medical, and epidemiological points of view, the true drug problem is a singular theme.").

434. Rather recent legislation has complicated this issue. In 1996, President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 21 U.S.C. § 862(a), which denies certain welfare benefits to those convicted under a state or federal law that "has as an element the possession, use, or distribution of a

Finally, in choosing an area of criminal law for merciful treatment, one must consider whether utilitarian issues argue for or against such action. There are serious doubts regarding the specific⁴³⁵ and general deterrent⁴³⁶ effect of prison sentences upon subsequent drug use. In fact, drug treatment programs appear to be much more effective than jail or prison sentences in reducing recidivism rates.⁴³⁷ Utilitarian concerns, joined with the public's ambiguous views regarding the moral culpability of drug use, suggest that a legislature might well reconsider its approach to drug use crimes without losing public support.⁴³⁸ The utilitarian cost of mercy seems low.

2. Victim Impact

When the action of an offender directly implicates the health and welfare of another, the failure of society to punish the offender may be seen in itself as a further offense against the

controlled substance." *Id.* If the only drug treatment available to a person is treatment after conviction, the offender may have a difficult time trying to begin a sober life. See Recent Legislation, 110 HARV. L. REV. 983, 983-88 (1997) (criticizing the policy choices underlying the act).

435. For the three-year period of 1986-89, among drug violators released from prison, 24.8% were re-arrested for a drug offense. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DRUG AND CRIME FACTS 1994, at 26 (1995).

436. For a discussion of deterrence and drug laws, see BARBARA S. VINCENT & PAUL J. HOFER, THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS 11 (1994) ("[C]onventional assumptions of deterrence theory may not apply to drug traffickers"); Michael Tonry, *Mandatory Penalties*, in 16 CRIME & JUSTICE: A REVIEW OF RESEARCH 243, 244 (Michael Tonry ed., 1992) ("[M]andatory penalties [have] either no demonstrable marginal deterrent effects or short-term effects that rapidly waste away"); Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 873 (1997) ("[A]t best 5% of the variance in law-related behavior can be explained by variations in the perceived certainty and severity of punishment"); David I. Shapiro, Note, *Sentencing the Reformed Addict: Departure Under the Federal Sentencing Guidelines and the Problem of Drug Rehabilitation*, 91 COLUM. L. REV. 2051, 2072 n.144 (1991) (citing studies that conclude illegal drug use is among the least deterrable crimes).

437. For a summary of the impact of drug courts, see James R. Brown, Note, *Drug Diversion Courts: Are They Needed and Will They Succeed in Breaking the Cycle of Drug-Related Crime*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 63, 83-98 (1997); see also *supra* note 415.

438. For a discussion of the utilitarian concerns of incapacitation and drug use, see ZIMRING & HAWKINS, *supra* note 56, at 162-64.

victim. A victim also may feel revictimized if the punishment inflicted upon the offender falls short of punishment inflicted upon offenders in like situations.⁴³⁹ Drug use by itself has no typical victim around whom the criminal justice system can rally.⁴⁴⁰ Sometimes drug use is accompanied by violence, and the fact of violence may create a very traditional victim.⁴⁴¹ Certainly, drug users often commit crimes to support their habits,⁴⁴² and caution should be exercised not to underestimate, for example, the impact that a burglary can have upon a homeowner's sense of privacy and security. The nondrug crime committed by the drug user argues for a retributive response, even when the underlying motive for the crime is also to support a drug habit. Drug use has collateral effects on family members,⁴⁴³ co-workers,⁴⁴⁴ and others.⁴⁴⁵ In addition, drug use endangers others; for instance, the child of the user-parent and the co-workers of the user-worker certainly are at risk, but usually we do not view the child or co-worker in the same emotional vein as we view the victim of an assault. It may be that this belief needs to be changed, and it may be that this attitude is responsible for decades of the tolerance of family violence, but we rarely turn to the criminal law to reestablish personal relationships.⁴⁴⁶ Arguably, those who are collaterally affected by an offender's drug use may be better off if the offender successfully completes a drug rehabilitation program rather than being incarcerated for

439. See *supra* text accompanying note 374.

440. In his criticism of Hampton, Duff reminds us that some crimes do not demean anyone. See Duff, *supra* note 74, at 54-55.

441. See generally BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FACT SHEET: DRUG-RELATED CRIME 1, 3-4 (1997) (discussing statistics on drug-related homicide rates and the frequency of specific factors).

442. See *supra* text accompanying note 403.

443. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, A NATIONAL REPORT: DRUGS, CRIME, AND THE JUSTICE SYSTEM 9 (1992).

444. See, e.g., *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 606-08 (1989).

445. For a discussion of crime and its impact upon the structure of individual communities, see Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 194-98 (1998).

446. For a discussion of restorative justice and its attempt to affect relationships, see Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1251-52 (1994).

drug use. In any event, a strategy for a merciful approach to drug-use crimes should not draw the ire of victims' rights supporters as long as treatment for the underlying drug habit is not seen as immunity for the commission of other nondrug crimes.

3. *Impact of the Illegal Conduct upon the Offender*

For many crimes, including both violent and economic crimes, an offender acts on the motive that he will be socially or economically advantaged by his conduct. For some drug users, who are also drug sellers of significant quantities, drug activity allows them to live a more expensive lifestyle than they otherwise could afford; but for others, drug use becomes a trap that ultimately places the user in a socially and economically disadvantaged position, which may include the permanent denial of certain welfare benefits.⁴⁴⁷ Through addiction, the user may create additional burdens for himself; punishing the drug user on the ground that fairness dictates that an offender disgorge advantages that have been taken by his criminal conduct simply is inappropriate.⁴⁴⁸

For some drug users, treatment may not be a way to regain his place in society but to gain his place for the first time. The disproportionate temptation to commit certain crimes by those seemingly shunned by society led Duff to denounce retribution as a legitimate justification for punishment.⁴⁴⁹ If society were to include within its mercy the poor, who are particularly susceptible to drug use,⁴⁵⁰ then mercy might be a catalyst for more social cohesion and not a cause of social disintegration. Mercy indicates that society is concerned with the individual's plight in life⁴⁵¹ and to show mercy to the drug user does not fail to redress

447. See Recent Legislation, *supra* note 434, at 983.

448. See *supra* text accompanying note 207.

449. See DUFF, *supra* note 139, at 295 (rejecting retribution, albeit reluctantly, in favor of deterrence because retribution requires societal respect for each individual and this is not evident in today's society).

450. A great amount of research over the past 40 years indicates that the poor are the most susceptible to drug use. See ELLIOTT CURRIE, RECKONING: DRUGS, THE CITIES, AND THE AMERICAN FUTURE 75-77 (1993).

451.

It has been argued that when society criminalizes behavior, one of the

an unearned advantage. Mercy is a recognition of the worth of the offender and signals society's desire to invest in the offender's future.

There will be persons for whom treatment is either unwanted or ineffective. Society needs different strategies to overcome these obstacles, but these inevitable marginal cases call for a different answer and should not distract attention away from those cases in which the drug user seeks change or at least consents to change.⁴⁵²

4. *Nature of Society's Response*

Despite utilitarian claims that the war on drugs has been a fiasco,⁴⁵³ claims that the poor are dragged into the criminal justice system, in part because they do not have access to treatment programs,⁴⁵⁴ and claims that drug enforcement has caused bad law to cascade down throughout the entire criminal justice system,⁴⁵⁵ a merciful strategy for drug users must heed Kahan's

messages entailed is that the values and preferences of anyone convicted of such behavior are not important in the social equation. This view, that drug offenders are not worthy of being counted as political persons, is reflected in the typical forfeiture of political rights, particularly voting, upon conviction of a crime in many jurisdictions.

Dwight L. Greene, *Foreword to Symposium, Drug Decriminalization: A Chorus in Need of Masterrap's Voice*, 18 HOFSTRA L. REV. 457, 479 n.62 (1990) (citations omitted).

452. For a discussion of policy questions regarding compulsory drug programs, see Franklin E. Zimring, *Drug Treatment as a Criminal Sanction*, 64 U. COLO. L. REV. 809 (1993).

453. See, e.g., Falco, *supra* note 417, at 10-14 (arguing that supply side reduction is an inferior strategy to demand reduction).

454. All facts point to a conclusion that many arrestees who need or want drug treatment are not in treatment at the time they are arrested. It has been estimated that the number of arrestees needing drug treatment, relative to those in treatment, is 16 to 1 for arrestees testing positive for cocaine, 10 to 1 for opiates, and 12 to 1 for injection drugs. See GREGORY P. FALKIN ET AL., *DRUG TREATMENT IN THE CRIMINAL JUSTICE SYSTEM* 31, 32 (Nat'l Institute of Justice, U.S. Dep't of Justice 1994). Similar problems exist after an offender leaves incarceration. See *supra* note 416. The United States Department of Justice reported that although drug and alcohol counseling was available in nearly 90% of state and federal facilities, only 20% of prison inmates participated in treatment during their incarceration. See 1999 FACTS, *supra* note 398. The majority of jails provide some form of drug treatment or counseling. See *id.*

455. See Francis A. Allen, *The Morality of Means: Three Problems in Criminal*

warning that the public is skeptical that alternatives to incarceration are commensurable to incarceration in expressing moral condemnation of the underlying act.⁴⁵⁶ Consequently, legislators must reject, as a current part of a strategy for mercy, an attempt to decriminalize drug use. First, decriminalization shows no opprobrium toward the underlying conduct; for a majority of the public, this is not the message it wishes to send.⁴⁵⁷ Second, decriminalization may result in a prosecutor seeking convictions for more serious crimes than drug use, such as conspiracy to sell a prohibited substance, if the individual prosecutor believes that there will continue to be societal condemnation of drug users by his constituents.⁴⁵⁸ Finally, decriminalization of an existing act, such as drug use, sends a different message than the decision not to criminalize in the first instance—a message of social approval.⁴⁵⁹

A merciful strategy must convince the public that the drug user has not violated the law with impunity. In some communities it may be necessary to maintain a traditional form of incarceration to enforce the message that drug use is wrong despite the criticism directed toward treatment programs in prison settings.⁴⁶⁰ In other communities, it may be sufficient to incarcerate offenders in treatment facilities, whereas in other communities, drug rehabilitation might be conditioned upon a successful completion of a jail sentence, particularly in those situations in which other crimes have been committed in order to support the offender's drug habit. For others, it may be sufficient that the offender be sentenced to a rehabilitation program or that drug treatment be a part of a probation program.⁴⁶¹ The goal is not to

Sanctions, 42 U. PITT. L. REV. 737, 748-49 (1981) ("Nor can it be doubted that the practical difficulties encountered by law enforcement in these areas [including drug offenses] have induced courts to relax constitutional restraints on police powers.").

456. See Kahan, *supra* note 146, at 693-94.

457. See Falco, *supra* note 417, at 23. There is a danger that legalization of drugs would reflect social acceptance. See *id.*

458. See generally Misner, *supra* note 25, at 732-36 (describing the office of the local prosecutor and its role in local politics).

459. See, e.g., Falco, *supra* note 417, at 22-24 (arguing that legalization conveys a message of social approval).

460. See generally HAWKINS, *supra* note 28, at 46-55 (summarizing recent criticisms of rehabilitation within a prison environment).

461. See, e.g., ARIZ. REV. STAT. ANN. § 13-3408(H) (West Supp. 1999) (requiring

determine how each community must respond to the issue of incarceration, but rather to avoid the tendency to equate mercy with impunity.

5. *Proof of Underlying Conduct*

Without the existence of guilt, there is no need for mercy.⁴⁶² In the past, rehabilitation as a justification for punishment has been criticized as a source of more evil than good: Rehabilitation has been used to justify longer prison sentences and greater control by administration over the lives of prisoners.⁴⁶³ A similar problem can exist if the criminal justice system becomes the gateway for drug treatment in a community. The danger is that the perceived benefit to the drug user of a rehabilitation program may lead to a lessened concern that the prosecution prove its case beyond a reasonable doubt.⁴⁶⁴ If the criminal law is society's response to crime, care must be taken to see that the procedural rights of the offender are scrupulously honored. Closely related to this fear is the danger that drug treatment programs will lead to even greater power for the prosecutor in plea bargaining.⁴⁶⁵ The tendency of defense counsel, and even the tendency of the alleged offender, may be to justify a guilty plea, not because the offender is guilty, but because the long-term consequences of the treatment program outweigh the immediate harm to the offender.⁴⁶⁶ But if the justification for the state's involvement in the lives of its citizens is that the citizen deserves to be punished, there can be no acceptable shortcuts

drug treatment for certain probationers). It is likely that programs must be tailored to meet the specific needs of members of specific groups. See, e.g., Kelly S. Croman, Note, *One Size Does Not Fit All: The Failure of Washington's Licensing Standards for Alcohol and Drug Treatment Programs and Facilities to Meet the Needs of Indians*, 72 WASH. L. REV. 129, 130 (1997).

462. See *supra* note 27.

463. See *supra* note 129.

464. The risk might be even greater in jurisdictions that have created drug courts. The risk is that the court might see itself as a treatment provider and not as a judicial officer.

465. See Misner, *supra* note 25, at 741-59 (discussing trends that have enhanced prosecutorial power).

466. See generally *id.* at 759-63 (critiquing the role of the prosecutor in plea bargaining).

permitting the state to intervene on anything less than proof of the underlying act. A different process for intervention, one that does not express community disapproval of the conduct but centers solely on the future of the individual, should be made available to those not guilty of the charged offenses.

6. *Position of the Mercy Giver*

Claims of unequal application of the law are potentially explosive and could doom any attempt at a strategy for mercy. Individualized sentencing in both federal and state jurisdictions has been limited severely, sometimes with the participation of the electorate⁴⁶⁷ after political campaigns stressing claims of unequal treatment.⁴⁶⁸ Therefore, the soft retribution⁴⁶⁹ needed for mercy is not to be found in all courts, but in the legislature and in the office of the prosecutor. In addition, mercy risks future criticisms that race will become a determining factor in who receives mercy. To overcome claims of inequality based on race, ethnicity, and age, a strategy for mercy first should be a strategy for legislative mercy.⁴⁷⁰ Mercy, when it is prospective in nature, is less likely to be abused, although the federal experience with crack cocaine sentencing shows that a degree of vigilance is still necessary.⁴⁷¹ There still will be actual unfairness if those who are financially advantaged have access to drug treatment outside of the criminal justice system while the poor must wait for a conviction in order to receive treatment; but the nature of the political solu-

467. See, e.g., *State v. Sarabia*, 875 P.2d 227, 229 (Idaho 1994) (discussing the process by which the electorate adopted a constitutional provision that permitted the legislature to provide for mandatory minimum sentences).

468. See *supra* note 51.

469. See *supra* text accompanying note 268.

470. The issue of mercy and the office of the prosecutor is for another day. Executive mercy is not a realistic option, because it is unavailable in all jurisdictions, and in those jurisdictions with executive power, the power often is limited and rarely used. See *supra* note 26.

471. A disproportionate number of African Americans have been convicted and incarcerated for crack cocaine use. See Meares, *supra* note 445, at 192. Penalties for cocaine and crack cocaine were meted out on a 100:1 ratio, that is one must possess one hundred times as much powder for cocaine to reach an equal penalty level for crack cocaine. See Andrew N. Sacher, Note, *Inequities of the Drug War: Legislative Discrimination on the Cocaine Battlefield*, 19 CARDOZO L. REV. 1149, 1149-50 (1997).

tion often is to reduce unfairness in manageable lots. Because an individual prosecutor may still defeat almost any legislative policy by charging crimes more serious than simple drug use, such as conspiracy to sell prohibited drugs, the legislature must exercise a degree of oversight to be sure that the legislative policy has not been undermined.

CONCLUSION

In the political world, where crime is viewed through a moral prism, those who wish to see a more humane criminal justice system must come to the debate with insights from moral philosophy. Mercy, carefully used to respect the retributive instincts of the electorate, will permit legislators to move away from the current trend of spiraling incarceration rates with ever-lengthening sentences toward a system that recaptures a semblance of humaneness.