When Justice Sheds a Tear: The Place of Mercy in Sentencing

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For Mercy has a human heart,
Pity a human face . . .
Songs of Innocence: The Divine Image,
William Blake (1757–1827)

ABSTRACT

Though the possibility of mercy is ever-present in the sentencing system, there is little case law on when it is proper for sentencers to rely on it as a justification for reducing the amount of punishment that would otherwise be deserved by an offender. Nor is there a clear delineation of mercy from other concepts such as mitigation or executive clemency. This article explores the notion of mercy and maps its paradoxical place in the scheme of sentencing. It offers principles to guide sentencers in their application of this residual 'safety valve'.

DISPENSING WITH MERCY

While it is rare for the principle of mercy in judicial sentencing to be explicitly discussed in appellate decisions, one recent exception was *Miceli*[1] in the Victorian Court of Appeal. In that case the defendant had pleaded guilty in the County Court to defrauding the Commonwealth. After enumerating all the extenuating circumstances in the defendant's favour, counsel for Miceli made one additional submission. He urged the County Court judge 'to exercise the judicial discretion of mercy'.[2] This provoked the sentencer to say:

> When counsel say that I always say to counsel, 'I am not here to dispense mercy, I am here to dispense justice'.[3]

Thus was the Pandora's Box opened. From it, once again, emerged the paradoxical place of mercy at the judgment seat. Aquinas[4] and Shakespeare[5] were as

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1 (1997) 94 A Crim R 327; 139 FLR 309; [1998] 4 VR 588 (Winneke P, Tadgell and Charles JJA).
2 (1997) 94 A Crim R 327, 331.
3 (1997) 94 A Crim R 327, 331.
4 T Aquinas, *Summa Theologiae* (1270) Part I, Question 21, Article 3.
5 F Kermode, 'Justice and Mercy in Shakespeare' (1996) 33 *Houston L R* 1155.

much troubled by the puzzling nature of mercy as are modern theologians, philosophers and lawyers. It seems arbitrary and idiosyncratic in nature[6] and at odds with concepts of equal justice. If it permits or requires a departure from that which justice dictates, does it not produce injustice? If divine justice, or that of the law, is regarded as perfect, why should an exemption from its consequences be allowed in the name of mercy? And if the law of sentencing allows for all mitigating factors to be taken into account, why should a sentencer, having accommodated all such matters, deliberately order less than what is called for by the criminal law? If merciful action is motivated by personal feelings of pity or compassion, is it wise that it is so dependent on emotion? Does this not risk working injustice by contributing to the possibility that like cases will not be treated alike? Is mercy in sentencing law merely an unconstrained act of grace driven by sentiment, or a discretion capable of being disciplined by rules and exercised in a principled fashion?

None of these questions were resolved by the Victorian Court of Appeal in *Miceli's* case. The court allowed the appeal against sentence on other grounds. But in delivering the principal judgment, Tadgell JA reasserted that 'an element of mercy has always been regarded, and properly regarded, as running hand in hand with the sentencing discretion.'[7] His Honour used the occasion to reprimand the trial judge for claiming that the judicial function at sentencing was to dispense justice, not mercy:

> It may be an aphorism or apothegm that trips readily enough off the tongue. It is, however, if not strictly inaccurate, apt to mislead, and to mislead in particular anyone not versed in the law who happens to hear it. Moreover, it is in no way helpful in an intelligent understanding of the sentencing task.[8]

The trial judge had told defence counsel, who was seeking to refer him to case law on mercy,[9] that 'no matter how many authorities you might refer me to, I am not here to dispense mercy.'[10] In the course of the appeal counsel for the Crown argued, somewhat desperately, that these words did not mean that the judge was absolutely rejecting mercy as an element in the sentencing discretion. He might still be accepting it as a factor, but only one of a number of factors, to be included in the 'instinctive synthesis'[11] by which judges arrive at a just sentence. Such a reading of the judge's remarks was rejected by Charles JA, who observed that if that was really what was meant, his Honour's position would have been unexceptional. However, the trial judge had used language which more obviously and emphatically rejected mercy as a concept relevant to the performance of his sentencing obligations. And that was wrong.

6 'The sword of divine justice is every moment brandished over their heads, and there is nothing but the hand of arbitrary mercy, and God's mere will, that holds it back': J Edwards, 'Sinners in the Hands of an Angry God' in O E Winslow (ed), *Jonathan Edwards: Basic Writings* 1966 152 quoted by H S Haestevold, 'Disjunctive Dessert' (1983) 20 *American Philosophical Quarterly* 357, 362.

7 (1997) 94 A Crim R 327, 331, quoting Osenkowski (1982) 30 SASR 212, *R* v *Parker*, unreported, Court of Criminal Appeal, 22 June 1998 and *Carter* (1997) 91 A Crim R 222.

8 (1997) 94 A Crim R 327, 332.

9 As set out in Judges of the County Court of Victoria, *Victorian Sentencing Manual* 1991 para 4.008.

10 (1997) 94 A Crim R 327, 332.

11 *R* v *Williscroft* [1975] V R 292, 300.

> The preferred approach, according to Charles JA, was that stated in *R* v *Kane*: Justice and humanity walk together. Cases frequently occur where a court is justified in adopting a course which may bear less heavily upon an accused than if he were to receive what is rather harshly expressed as being his just deserts. But mercy must be exercised upon considerations which are supported by the evidence and which make an appeal not only to sympathy but also to well-balanced judgment. If a court permits sympathy to preclude it from attaching due weight to the other recognized elements of punishment, it has failed to discharge its duty.[12]

In emphasising the balancing exercise that the practice of mercy entails, Charles JA supported his reliance on *Kane* by reference to the warning in the New Zealand Court of Appeal's decision in *R* v *Radich*[13] that 'if a court is weakly merciful and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty.'[14]

The fact that mercy can be manifested in executive as well as judicial clemency was noted in *Miceli*, though the tension between the two mechanisms was not explored in that case. When mercy is dispensed by the executive arm of government rather than the judicial one different considerations may apply, the process is far less visible,[15] and there is a real risk that application of the various forms of executive clemency may erode the authority of the judges at sentencing.[16]

As to whether, if a suitable evidential foundation was established, an entitlement to mercy arose, Charles JA was suitably ambiguous:

> The learned judge was indeed, as he said, there to dispense justice. His Honour was also there to consider whether, on the evidence before him, a reasonable basis existed in well-balanced judgment for adopting a course which might bear less heavily on the applicant than if he were to receive his just desserts. It would be quite wrong for anyone to have thought that our system of justice did not entitle the prisoner standing for sentence to receive proper consideration of any claim he may legitimately have had to the exercise of clemency.[17]

12 [1974] V R 759, 766.

13 [1954] N Z L R 86.

14 (1997) 94 A Crim R 327, 333. But he also threw onto the scales the reminder of Windeyer J in *Cobiac* v *Liddy* (1969) 119 CLR 25, 269, that 'the whole history of criminal justice has shown that severity of punishment begets the need of a capacity for mercy.'

15 This lack of transparency was the subject of comment by a majority of the Full Court of Victoria in *R* v *Schultz* [1976] V R 325, 330:
There may be serious objections to removing the power to determine the appropriate sentence for a crime from the judicial sphere, where the sentence must be pronounced in open court, and vesting it in the Executive where neither the reasons which have led to the determination of a particular sentence nor indeed the fact of the sentence itself are required by law to be subject to public scrutiny.

16 For example, *R* v *Yates* [1985] V R 41; R G Fox, 'Pre-release Permits: Executive Modification of Custodial Sentences' (1984) 58 LIJ 542.

17 (1997) 94 A Crim R 327, 333. The general view is that mercy is not the subject of legal rights or entitlements, *de Freitas* v *Benny* [1976] AC 239, 247 per Lord Diplock 'Mercy is not the subject of legal rights [but] begins where legal rights end.' See also *Ex parte Lawrence* (1972) 3 SASR 361; A Freiberg, 'Reward, Law and Power: Toward a Jurisprudence of the Carrot' (1986) 19 *ANZJ Crim* 91, 99–101.

THE CONCEPT

Miceli's case reaffirmed that the possibility of mercy is a given in the sentencing system, but added little to an understanding of when it is proper to rely on it. In its 1988 report, the Victorian Sentencing Committee chaired by Sir John Starke, accepted that mercy was a legitimate factor in judicial sentencing, and one which resulted in 'either the lawful avoidance of punishment, or the reduction of the amount of punishment imposed.'[18] But the committee could only superficially describe the manner in which the principle was applied.[19] It made the point that it was unusual for the concept to be discussed in the cases, even when mercy was expressly being granted.[20] There was no jurisprudence of judicial mercy and very little case law on its exercise by the executive arm of government. Mercy was described in the report simply as a residual 'safety valve', the boundaries of which the committee did not wish to delineate.[21]

In terms of formal definition, the OED gives:

> Forbearance and compassion shown by one person to another who is in his power and who has no claim to receive kindness; kind and compassionate treatment in a case where severity is merited or expected.[22]

It confirms that, in general understanding and usage, mercy is regarded as a gift, not a right.[23] It is 'the clemency or forbearance of a conqueror or absolute lord which it is in his power to extend or withhold as he thinks fit'.[24] The concept is understood as deriving from God's pitying forbearance towards his creatures and his willingness to forgive their offences. It is a form of lenience. The earliest example in the Bible is the *Genesis* account of the punishment of Cain for his fratricidal behaviour. The initial sanction for killing his brother Abel was that he should become a ceaseless wanderer on earth — at risk, as an outlaw, of being killed by anyone who met him. But, on the offender's petition, this was moderated to the extent that God placed a protective mark upon Cain and allowed him, instead, to settle in the land of Nod, east of Eden.[25]

18 Victorian Sentencing Committee, *Sentencing*, 1988 Vol 1, paras 3.3.1–3.3.4.

19 There is no discussion of the role of mercy in sentencing in the Australian Law Reform Commission, (Report No 44, 1988), the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* 1987, nor the New South Wales Law Reform Commission, *Sentencing* (Report No 79, 1996). Nor can any coverage be found in works on the psychology of judicial sentencing such as C Fitzmaurice and K Pease, *The Psychology of Judicial Sentencing* 1986 and D C Pennington and S Lloyd-Bostock (eds), *The Psychology of Judicial Sentencing: Approaches to Consistency and Disparity*, 1987.

20 For example *Haleth* (1982) 4 Cr App R 178.

21 Vol 1, para 3.14.10, Victorian Sentencing Committee, *Sentencing* (1988).

22 *Oxford English Dictionary* (2nd ed) 1989.

23 Can the gift of mercy be declined? Case law on executive clemency indicates that unconditional forms of mercy, eg pardon, do not depend on the consent of the offender, but conditional forms, eg commutation (the substitution of one form of sanction for another) do require the person's agreement. See below p 20 Forms of Clemency.

24 Op cit (fn 22).

25 *Genesis* 4:12–16.

There is to be found in Jewish religious tradition the dichotomy of justice and mercy equated with that of reason and emotion — justice being the product of dispassionate reason and mercy being associated with feelings.[26] Comparisons are also made between the Old Testament God of vengeance and justice and the New Testament God of forgiveness. The strain between justice and mercy is dealt with differently in the two narratives. In the Old Testament, God sometimes acts justly and at other times mercifully. In the New Testament, there is a role division with strict justice being attributed to God and mercy to Christ. It has not escaped the observation of commentators that, though the conflict between justice and mercy is resolved in neither Testament, the Christian model has accommodated the concepts by a sort of division of function which might resonate in the modern separation of judicial and executive functions in relation to the granting of mercy.[27]

A. Power

Though traditionally portrayed as a virtuous act of forbearance arising out of compassion or pity, mercy is also an important demonstration of power. When a person is merciful, his or her potential power to harm another is being deliberately withheld. That power need not be lawful nor wholly exercised for good motive to be classed as merciful; thus a thief may be merciful in leaving the victim with enough money for the fare home.[28] And Hay has shown how the extensive employment of the discretion to pardon in 18th century England was used to justify retention of the innumerable unjust capital punishment statutes which buttressed a social order in which property rights prevailed over those of individuals. The bonds of obedience and deference which tied the common people to the gentry were reinforced by both the selective terror of the gallows and the widespread use of judicial and executive clemency.[29] But when mercy was granted by the judges to alleviate the cruelty of the criminal law, they often did so in a capricious and biased manner: 'the claims of class saved far more men who had been left to hang by the assize judge than did the claims of humanity'.[30] Acts of mercy can thus advance oppressive special interests just as well as they express paternalism, condescension and compassion.[31]

[26] S L Stone, 'Justice, Mercy and Gender in Rabbinic Thought' (1996) 8 *Cardozo Studies in Law and Literature* 139; L E Newman , 'The Quality of Mercy: On the Duty to Forgive in the Judaic Tradition' (1987) 15 *Journal of Religious Ethics* 155.

[27] J T Noonan, 'Heritage of Tension' (1990) 22 *Arizona State Law Journal* 39, 40.

[28] See discussion in A Brien, 'Mercy Within Legal Justice' (1998) 24 *Social Theory and Practice* 83, 85.

[29] D Hay, 'Property, Authority and the Criminal Law' in D Hay, P Linebaugh, J G Rule, E P Thompson and C Winslow, *Albion's Fatal Tree*, 1975 40–49. Pardons were very common, approximately half of those condemned to death during the eighteenth century did not go to the gallows, (Hay, 43) instead, through the vehicle of conditional pardons, their punishment was commuted to transportation or imprisonment: P Brett, 'Conditional Pardons and the Commutation of Death Sentences' (1957) 20 *Modern Law Review* 131.

[30] Hay, op cit (above fn 29), 44. The same complaint has been made in modern times about the enforcement of the death penalty in the United States, C L Black: *Capital Punishment: The Inevitability of Caprice and Mistake* (2nd ed), 1981.

[31] C Strange, *Qualities of Mercy: Justice, Punishment, and Discretion* (1996), 5.

B. Forgiveness

Mercy is not the same as forgiveness, though these concepts are often conflated. It is said that the former is an act and the latter an attitude. Hampton[32] describes forgiveness as a change of heart towards the offender in which the victim drops the resentful, indignant and hateful emotions towards the person and is open to the possibility of reconciliation. While the promotion of such a change of attitude is behind many of the new forms of restorative justice,[33] and may be a precursor to mercy, it is not a necessary condition:

> Whereas forgiveness is a change of heart towards a wrongdoer that arises out of our decision to see him as morally decent rather than bad, mercy is the suspension or mitigation of a punishment that would otherwise be deserved as retribution, and which is granted out of pity and compassion for the wrongdoer.[34]

Forgiveness requires no external act; it need not be communicated to the wrongdoer, nor be accompanied by any release from punishment. It is essentially an emotional response — the abandonment of resentment. But, like mercy, forgiveness is a gift to which the wrongdoer has no right.[35] In addition a person must have 'standing' to forgive another. This is why the victim plays a key role in concepts of restorative justice; only those affected by the wrongdoing can forgive:

> It is usurping — often officious usurping — for A to forgive B for injuries to C. This is why howls of protest accompanied Ronald Reagan when he symbolically forgave Nazi wrongs by laying a wreath at a German cemetery that holds the remains of Nazi SS officers: He had no right, not having been personally wronged.[36]

But if forgiveness is translated into action, the surrender of ill will towards the offender implies that the person should be released from all sanctions in respect of the forgiven conduct. This is unpalatable to the criminal justice system since it appears to condone the offence. Because mercy does not depend on forgiving the offender,[37] and the extent of its application requires a balancing of considerations, it offers the advantage of being able to support forms of partial release from punishment.[38]

[32] J Hampton, 'The Retributive Idea' in J G Murphy and J Hampton, *Forgiveness and Mercy* (1988), 157–8.

[33] For example J Braithwaite, *Crime Shame and Reintegration* (1989); B Galaway and J Hudson (eds) *Criminal Justice, Restitution, and Reconciliation* (1990); J Braithwaite and S Mugford, 'Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders' (1994) 34 *British Journal of Criminology* 139; J Consedine, *Restorative Justice: Healing the Effects of Crime* (1995); New Zealand, Ministry of Justice, *Restorative Justice: A Discussion Paper* (1995); M Wright, *Justice for Victims and Offenders: A Restorative Response to Crime* (1996).

[34] Hampton op cit (fn 32) 158. For instance in some Islamic jurisdictions it is within the power of the immediate next of kin of a murder victim to release the offender from the threat of the death penalty by accepting a monetary payment as compensation for the commutation of the sentence to one of imprisonment; it is an act of mercy, but not of forgiveness.

[35] P Twambley, 'Mercy and Forgiveness' (1979) 36 *Analysis* 84.

[36] K D Moore, *Pardons: Justice, Mercy and the Public Interest* (1989) 184.

[37] Hardship to third parties may justify mercy without the offender being forgiven, see further discussion below at p 15.

[38] N Brett, 'Mercy and Criminal Justice: A Plea for Mercy' (1992) 5 *Canadian Journal of Law and Jurisprudence* 81, 83.

C. Subversion

Merciful action can be seen as subversive of the system of justice from both within and without because:

> Mercy seems to prevent a legal system from delivering the outcomes that would result if mercy did not enter into the process ... [It] also allows outcomes to be ignored after the system has operated. Therefore, mercy seemingly nullifies the law not only in result, but as a system.[39]

This is the paradoxical nature of the concept.[40] Shakespeare's Portia argues that mercy is needed to 'season' justice — something to be added to make up for the latter's deficiencies. But modern critics, like Murphy, complain that:

> If mercy requires a tempering of justice, then there is a sense in which mercy may require a departure from justice. (Temperings are tamperings). Thus to be merciful is perhaps to be unjust ... a product of morally dangerous sentimentality. This is particularly obvious in the case of a sentencing judge. We (society) hire this individual to enforce the rule of law under which we live. We think of this as "doing justice", and the doing of this is surely his sworn obligation. What business does he have, then, ignoring his obligations to justice while he pursues some private idiosyncratic, and not publicly accountable virtue of love or compassion?[41]

He contends that the larger public good is better served by judges adhering to the legal idealism of justice rather than by giving expression to such personal feelings of pity:

> I show [pity] most of all when I show justice;
> For then I pity those I do not know ...[42]

D. Character of the Merciful

An important feature of mercy is that its exercise is as much a statement of the character, traits and disposition of the person or entity granting it, as it is a reflection on those who benefit from it. A merciful person presents as humane, generous, and one with the capacity to feel compassion for others. Such an individual is not only disposed to act upon such feelings, but also has the strength of character and personal autonomy to do so in deserving circumstances despite countervailing pressures, including those from within the law itself. Such qualities:

> becomes the throwned monarch better than his crown ... It is an attribute to God himself; And earthly power doth then show likest God's when mercy seasons justice.[43]

[39] Brien, op cit (fn 28), 83.
[40] N E Simmons, 'Judgment and Mercy' (1993) 13 *Oxford Journal of Legal Studies* 52, 53–6.
[41] J G Murphy , 'Mercy and Legal Justice' in J G Murphy and J Hampton, *Forgiveness and Mercy*, (1988) 162, 167–8.
[42] Shakespeare, *Measure for Measure* Act II, Scene II (Angelo).
[43] Shakespeare, *The Merchant of Venice*, Act IV, Scene I (Portia).

And because it derives from the God-like powers of an absolute monarch, mercy is regarded as an act of grace. The decision to grant or withhold it is a gift not subject to rules, review, or appeal ('the quality of mercy is not [con]strain'd'[44]). It comes as no surprise that there has been such limited judicial articulation of the criteria for its use.

LEGAL MANIFESTATIONS OF MERCY

A. In Substantive Criminal Law

Mercy should not be confused with substantive justifications or defences for crime, even though it may have a significant historical role to play in their emergence and acceptance. If a person has acted in self-defence, his or her acquittal on that ground is not a merciful result since the conduct was never criminal, nor deserving of punishment. Only punishable wrongdoing is the proper object of mercy. Partial defences, such as provocation reducing murder to manslaughter, are sometimes explained as ones in which 'the mercy of the law [interposes] in pity to human frailty'.[45] While it is true that defences of provocation or diminished responsibility are a compassionate concession to human weakness, they are ones available as of right to all who fall within their scope at the trial proper. Unlike mercy, they are not simply a sentencing discount offered only to those for whom the trial judge has feelings of pity.

On the other hand, because the practice of mercy allows for powerful extra-judicial considerations to come into play at the sentencing stage, such as allowing extreme disadvantage and hardship to be recognised as an excusing factor when the substantive criminal law does not, over time it can create a climate which is conducive to the acceptance of new defences and other important distinctions in the substantive law.[46] Thus justifications like self-defence and necessity and defences such as infancy, insanity and infanticide were recognised grounds for leniency and executive clemency long before they became grounds for acquittal.[47] The same evolutionary process is currently visible in the claims for new or enlarged substantive defences to apply to mercy killings[48] and killings by abused and battered women.[49]

44 Ibid

45 *East's Pleas of the Crown* (1803), Vol 1, 239 quoted by McHugh J in *Masciantonio* (1995) 183 CLR 58, 72.

46 This is particularly true of the separation of manslaughter from murder C A H Johnson, 'Entitled to Clemency: Mercy in the Criminal Law' (1991) 10 *Law and Philosophy* 109, 112–13.

47 K D Moore, *Pardons: Justice, Mercy and the Public Interest,* (1989) 18.

48 M Otlowski, 'Mercy Killing Cases in the Australian Criminal Justice System' (1993) 17 *Criminal Law Journal* 10.

49 For example J H Krause, 'Of Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women Who Kill' (1994) 46 *Florida Law Review* 699; C P Ewing, 'Psychological Self Defence: A Proposed Justification for Battered Women Who Kill' (1990) 14 *Law and Human Behaviour* 579; I Leader-Elliott, 'Battered But Not Beaten: Women Who Kill in Self Defence' (1993) 15 *Sydney Law Review* 403; G Hubble, 'Feminism and the Battered Woman: The Limits of Self-Defence in the Context of Domestic Violence' (1997) 9 *Current Issues in Criminal Justice* 113; I Leader-Elliott, 'Passion and Insurrection in the Law of Sexual Provocation' in N Naffine and R J Owens, *Sexing the Subject of the Law* (1997) 149–69.

B. In Sentencing Law

1 *Jury Recommendation to Mercy*

In trials of indictable crimes, a jury in returning a verdict of guilt is always entitled to make a recommendation that the defendant be extended mercy at sentencing, even though the jury has no function in determining or advising on sentence and will already have been discharged when that stage is reached. The status of any such recommendation for leniency has been explained by the High Court:

> The recommendation of a jury for leniency should always be treated with respect and careful attention. It is a recognised feature of our legal system. But a recommendation simpliciter is, after all, a recommendation only, and the Judge, on whom falls the sole responsibility of measuring the punishment within the limits assigned, must consider for himself how far it is consistent with the demands of justice that he should accede to the recommendation. But that is all.[50]

In *R* v *Tappy and Dewis*,[51] the Full Court regarded the jury's rider as 'surplusage' pointing out that the punishment was the province of the judge, not the jury. However, where the jury's guilty verdict is capable of being supported by more than one head of liability, or more than one version of the facts, the trial judge is entitled to treat the jury's recommendation for mercy as supporting the view of the law or the facts which is most favourable to the prisoner.[52] If this occurs, it cannot be said that mercy has been granted to reduce what would otherwise be the deserved sentence.

2 *Mitigation v Mercy*

It is accepted that all sentences, except mandatory ones, can be mitigated. This means that the punishment which would normally be regarded as commensurate to the gravity of the crime can be alleviated by reference to factors personal to the offender and his or her circumstances. The actual sentence will ordinarily be less than the sentence deserved on the basis of the objective facts of the crime.[53] Indeed it is a reviewable failure of the sentencing discretion not to take into account all relevant mitigating factors in arriving at the penalty. To this extent, mitigation is the right of a person found guilty, provided that, at the sentencing hearing, he or she can establish a proper factual basis for one or more recognised grounds of mitigation.[54] Sentencing legislation is beginning to incorporate check-lists of some of the main acceptable mitigating factors,[55] but the categories are not closed. Obviously, the relative importance of the mitigating elements will vary from case to case.[56] Yet, at the same time it is also conceded that judges and magistrates have an additional inherent right to be

[50] *Whittaker* (1928) 41 CLR 230, 240 per Isaacs J; see also *Harris* [1961] VR 236; West [1979] Tas S R 1.

[51] [1960] VR 137, 139.

[52] As to whether the trial judge should question the jury about the basis of its recommendation to mercy, see *R* v *Larkin* [1943] KB 174.

[53] *R* v *Ireland* (1987) 49 NTR 10, 23.

[54] *R* v *Storey* [1998] 1 VR 359; R G Fox, 'The Burden of Proof at Sentencing: Storey's Case' (1998) 24 *Mon L R* 194.

[55] For example *Crimes Act* 1914 (Cth), s 16A(2) discussed in El Karhani (1990) 51 *A Crim R* 123, 134.

[56] *R* v *Todd* [1982] 2 NSWLR 517.

merciful. As *Miceli*[57] attests, the existence of this latter discretion cannot be denied by a sentencer. How then does it relate to the established categories of mitigation?

In examining that relationship, it will be suggested that many cases of mercy are misnamed. Although the court uses the term in explaining how the penalty was arrived at, the reason given readily falls within an established ground of mitigation. The court has properly taken into account some legally and morally relevant feature of the situation which arguably renders some reduction obligatory.[58] This is better understood as a principled act of mitigation, rather than a pure act of mercy.[59] The concept of mitigation and its relationship to that of mercy is of greater significance in retributive sentencing in which the aim is to have the punishment fit the crime, than when sentences aim to serve therapeutic or other utilitarian goals.

(a) In a Retributive Context

The privilege of mercy is most potent when its effect is to reduce a sentence being imposed for retributive purposes below that which would be warranted were the offender to get his or her just deserts. This is regarded by some commentators as indefensible.[60] Retributivism provides a moral ground for imposing punishment without being oriented towards a particular purpose, other than attempting to redress the balance between good and evil displaced by the wrong-doing. The sanction is justified by the communal sense of its rightness or fairness irrespective of any further utilitarian benefit it might offer. What is deserved in accordance with that sense of rightness and fairness is that which is proportionate to the offender's wrongdoing. However, in its report, the Victorian Sentencing Committee rejected this pure form of retributivism:

> Retribution is a justification which provides that a person is to be punished for his or her wrongful acts simply because he or she deserves it. It is based on the ancient principle of an eye for an eye and a tooth for a tooth. Retribution in its pure form has very little application today.[61]

It noted that what has emerged is a more modern form of retribution which guides the allocation of punishment in accordance with the proposition that while the sanction should be commensurate with the seriousness of the wrong-doing, some reduction in its severity on account of mitigating factors personal to the offender should be allowed. It is this which is implied in the reference to 'just' punishment in the guidelines found in the *Sentencing Act 1991* (Vic), s 5(1), which require sentencers 'to punish the offender to an extent and in a manner which is just in all of the circumstances'. So too with the *Crimes Act 1914* (Cth), s 16A(1) which states that, 'in determining the sentence to be passed, or the order to be made, in respect of any

57 (1997) 94 *A Crim R* 327.

58 H S Hestevold, 'Justice to Mercy' (1985) 46 *Philosophy and Phenomenological Research* 281, 282.

59 For example *Kearns* (1988) 10 Cr App R (S) 344 and *Degville* (1988) 10 Cr App R (S) 488 (both cases in which reduction of the sentence on account of the good character of offender and the prior provocation offered by the victim was described as 'mercy'); *Veeraswamy* (1993) 14 Cr App R (S) 680 (reduction of sentence on account of extraordinary hardship factors not fully known to original sentencer described by the Court of Appeal as an act of 'mercy').

60 For example Murphy op cit (fn 41), 162, 166–7.

61 Victorian Sentencing Committee op cit (fn 18), 88.

person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence'.

The High Court of Australia has indicated that in the absence of a legislative direction to the contrary,[62] the concept of proportionality sets limits on the level of permissible retribution.[63] This does not mean some simplistic attempt at an exact matching of crime and punishment, but rather an effort at charting the boundaries within which the sentence cannot be regarded as unjustified.[64] The principle of proportionality operates to define the lower, as well as the upper reaches of punishment. This restrains excessively lenient as well as overly severe responses to crime. This throws into relief the manner in which mitigation and mercy work in sentencing.

The fact that a sentence falls within the upper and lower limits set by the principle of proportionality, does not mean that it is necessarily just. Mitigating factors must be taken into account in arriving at the appropriate sentence.[65] In being evaluated, they are open to being weighed in favour of the offender in a merciful fashion. Here mercy may play a role within mitigation and within proportionality. However if mercy as an independent doctrine is brought into play, it operates outside the main framework of sentencing. It can be invoked for reasons not ordinarily recognised as standard grounds of mitigation, nor as bearing on the question of proportionality. Mercy in the latter sense is capable of violating one of the central tenets of a retributive system.

(i) Mercy and Weight

In most instances, mercy operates in the former manner. It appears as a discretionary feature of the sentencing system which can be activated in determining what *weight* is to be attributed to an established mitigating factor in arriving at the ultimate sentence.[66] Though sentencers are under a duty to impose just sentences according to law and to treat like cases alike, even a purely retributive system allows them a reasonable compass of discretion as to sanction type and quantum and this allows considerable play for a charitable attitude to be expressed in merciful action.[67] As Muller has pointed out:

> Murphy sees the sentencer who is considering mercy as having two choices. He can impose the just sentence, or he can impose a sentence more lenient than the just one ... Is Murphy describing something real? And is he describing a system that a good Kantian would recognise as genuinely retributivist? Murphy has chosen to build his theory of mercy on an either/or sentencing scenario: either the judge imposes a harsher sentence (the just one), or he imposes a more lenient sentence. This is simply not an accurate model of the overwhelming majority of

62 For example *Sentencing Act* 1991 (Vic), s 6D(b).

63 *Veen* (No 1) (1979) 143 CLR 458; *Veen* (No 2) (1988) 164 CLR 465; *Baumer* (1988) 166 CLR 51, 57–8.

64 Op cit (fn 18) 122; *Veen* (No 1) (1979) 143 CLR 458; *Veen* (No 2) (1988) 164 CLR 465; *Baumer* (1988) 166 CLR 51, 57–8; R G Fox, 'The Killings of Bobby Veen: The High Court on Proportion in Sentencing' (1988) 12 *Criminal Law Journal* 339; R G Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19 *Melbourne University L R* 489.

65 See discussion of the two-stage versus one-stage approach to sentencing: id 507–509.

66 For example *Hicks* (1987) 45 SASR 270.

67 A point accepted by the court in *Miceli*.

> sentencing decisions that sentencers are called upon to make ... Rather, in most cases, the sentencer's task is to choose a sentence from within a continuum of authorised punishments.[68]

(ii) Totality Principle as Mercy

Mercy may not only affect the weight to be given to the various accepted mitigating circumstances, it also is also reflected in the principle of 'totality'. The latter permits a merciful reduction in the level of punishment as one of the rules governing the manner in which multiple sentences relate to one another. Unless prevented from doing so by statute, sentencers are required to assess whether the aggregate of all the sentences imposed is an appropriate response to the offender's criminal conduct when viewed as a whole.[69] If not, the totality principle will be invoked to restrict any excessive cumulative effect. In the High Court, in *Postiglione*,[70] McHugh J explained this principle in these terms:

> The totality principle of sentencing requires a judge who is sentencing an offender for a number of offences to ensure that the aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved.[71]

His Honour went on to quote from the unreported judgment of the Chief Justice of South Australia in *Rossi*,[72] which had later been adopted in the Federal Court:

> ... the principle ... enables a court to mitigate what strict justice would otherwise indicate, where the total effect of the sentences merited by the individual crimes becomes so crushing as to call for the merciful intervention of the court by way of reducing the total effect.[73]

The result will be an effective sentence which is less than the sum of its parts because some components have been made concurrent or partially concurrent. Those components will not only include the offences for which the offender is then being sentenced, but also any ones for which the person is already serving time.[74] The principle of totality is the product of proportionality and mercy. Crockett J in *Nguyen* explained the proportionality link:

> What the principle of totality stands for ... is that, after orders have been made for concurrency or cumulation, the effective sentence which is left as that to be served by the prisoner must be one which bears a due proportion to the total content of the criminality of the offender being sentenced, having regard to the part played

68 E L Muller, 'The Virtue of Mercy in Criminal Sentencing' (1993) 24 *Seton Hall L R* 288, 302–3. See also P. Twambley, 'Mercy and Forgiveness' (1976) 36 *Analysis* 84; N. Brett, Mercy and Criminal Justice: A Plea for Mercy' (1992) 5 *Canadian Journal of Law and Jurisprudence* 81.

69 *Smith* (1983) 32 SASR 219; *Blake* [1962] 2 QB 377; *Lowick and Crawford* v *McDonald* (1988) 46 SASR 537. See also A Ashworth, *Sentencing and Criminal Justice* (1995) 209.

70 (1997) 189 CLR 295.

71 (1997) 189 CLR 295, 307–8. See also Gummow J at 321 and Kirby J at 340.

72 Unreported, Court of Criminal Appeal, South Australia 20 April 1988 per King CJ.

73 *Kelly* (1992) 33 FCR 536, 541.

74 (1997) 189 CLR 295, 308, per McHugh J; *Gordon* (1994) 71 A Crim R 459, 466 per Hunt CJ. There is statutory recognition of the totality principle in the sentencing of federal offenders in *Crimes Act* 1914 (Cth), s 16B(a)&(b) and s 19AD (sentencer to have regard to existing sentences including non-parole periods).

> by him in each of the offences and the respective degree of gravity which ought to be assigned to each of those offences.[75]

The tie with mercy is indicated in the reference by McHugh J to 'the merciful intervention of the court'.[76] Notwithstanding that sentencing ordinarily demands that unconnected offences be punished separately and cumulatively, and despite each of the individual sentences falling within an appropriate range for like cases, mercy requires that some adjustment be made to the sentence, if its aggregate effect will be the 'crushing' of future hope.[77] That adjustment takes place through a direction as to concurrency.

(iii) True Mercy

The true privilege of mercy is to be found in the residual discretion vested in each sentencer which allows a downward departure from the principle of proportionality outside the principles of mitigation. It can be utilised in exceptional circumstances to allow weight to be given to factors which are ordinarily not regarded as relevant mitigating considerations.[78] It allows sentencers to give effect to significant, but as yet unaccepted, circumstances which, in their opinion, warrant leniency. To this extent, this manifestation of mercy has been described as unprincipled.[79]

The difficulty of unpicking the relationship between the various manifestations of mercy and the concept of mitigation is illustrated by the Victorian Sentencing Committee's coverage of the topic.[80] Drawing on Smart's views regarding mercy in sentencing,[81] the Committee appeared to accept that it was appropriate in at least two situations. One related to cases in which the present offence was intrinsically less evil than the normal manifestations of that crime. The other was where the imposition of a less severe sentence than normal was being offered as an additional incentive towards the offender's reformation.[82] The Committee also added a further example of a court showing mercy by allowing an offender to be released on a non-custodial order for a relatively serious offence because the person has made a 'significant contribution to the community over a long period of time, for which the court believes it is appropriate that he or she receive recognition'.[83]

[75] Unreported, Full Supreme Court of Victoria 24 October 1991; *Taylor* (1992) 58 A Crim R 337; *Everett* (1994) 73 A Crim R 550, 558.

[76] *Postiglione* (1997) 189 CLR 295, 308; also see *Mill* (1988) 166 CLR 59, 63; *Griffiths* (1989) 167 CLR 372, 393.

[77] *Mickelberg* (1984) 13 A Crim R 365, 371 per Brinsden J; *Holder and Johnston* (1983) 3 NSWLR 245 per Street CJ; *Moyse* (1988) 38 A Crim R 169, 170 per Jacobs J; *Brett* (1987) 140 LSJS 343, 345 per King CJ; *Everett* (1994) 73 A Crim R 550 ('mercy' principle applies equally to sentences imposed for single offences); *Sheppard* (1995) 77 A Crim R 139, 145 per Dowsett J (totality principle is 'more a reflection of common humanity than of strict legal principle, but is no less compelling for that.')

[78] For example *Lowery* (1992) 14 Cr App R (S) 485 and commentary [1993] Crim L R 225. There the catastrophic consequences suffered by a policeman as the result of his conviction for false accounting were rejected as sufficient 'exceptional circumstances' for the purpose of being granted a suspended sentence, but were accepted as exceptional enough to justify extending him mercy in the form of a reduction in the prison term sufficient to allow his immediate release.

[79] *Bernard* [1997] 1 Cr App R (S) 135. See further discussion below p 23.

[80] Op cit (fn 18), paras 3.3.1–3.3.4.

[81] A Smart, 'Mercy' (1968) 43 *Philosophy* 345.

[82] By calling forth feelings of gratitude and indebtedness in the offender and by the implied threat of a more severe penalty if the person re-offends.

[83] At para 3.3.3.

As Smart herself concedes,[84] the first two examples are ones which can be fitted within the framework of existing general principles of proportionality and mitigation. They are a not a qualification on what the standard rules of justice in sentencing dictate. First, differing degrees of punishment according to the nature of the crime and the circumstances in which it is committed are not only permitted, they are required. Second, in the interest of attempting reformation, the rules can accommodate sentencers engaging in a degree of experimentation to test the offender's response to different forms of sanction without losing control over the person.[85] Nowadays, the multiplicity of sanctions available to the courts results in a statutory or de facto hierarchy of sentencing orders. A number of these are designed to subject the offender to a degree of supervision in the community on conditions which, if breached, permit the court to re-sentence the person for the original offence using a more punitive sanction within the hierarchy, as well as imposing any further punishment for the conduct which constitutes the breach. It need not be regarded as a merciful departure from established sentencing principles to start with the least restrictive sanction, knowing full well that the level of punishment can be increased, if needs be, at a later stage.

The Sentencing Committee's third example of an appropriate occasion for mercy, ie credit for previous communal service, is a better instance of an act of pure mercy. Ashworth has raised questions about the problematic status of certain matters as mitigating factors at sentencing.[86] The example given is one of them. He argues that earlier positive social contributions are irrelevant since they do not reflect on the gravity of the immediate wrongdoing, nor on the offender's immediate culpability for it. He also rejects the proposition that it is enough that the earlier heroic behaviour might be indicative of the offender's rehabilitative potential. The latter was partially the basis of the decision in *Reid*[87] where the English Court of Appeal accepted that the offender's earlier bravery in trying to rescue children from a burning house might justify the conclusion that he was a better person as well as a more valuable member of society than his criminal activities indicated.

A clearer cut case is one in which the past meritorious service is not treated as having any predictive value, or where the traumatic circumstances of that service is seen as contributing to a higher risk of recidivism. Apparently, in post-war Australia, it was common to extend mercy in sentencing to WWII veterans who had fallen into crime on the basis that the community was indebted to them and should be willing to tolerate a higher risk of re-offending in them than in offenders who had not served in the armed forces.[88] Military service was a positive social act which was taken to partially offset the need for community protection through incarceration. It was not regarded as an instance of judges being 'weakly merciful'. Supererogatory acts of mercy such as these can best be understood as having more to do with retaining public confidence in the humaneness of the courts than with repairing a weakness in the sentencing system. As has already been pointed out, the practice of mercy reflects

[84] Smart op cit (fn 81), 349 & 358.
[85] *Osenkowski* (1982) 30 SASR 212.
[86] A Ashworth, 'Justifying the Grounds of Mitigation' (1994) 13(1) *Criminal Justice Ethics* 5.
[87] (1982) 4 Cr App R (S) 280.
[88] I am grateful to the anonymous referee for this example.

as much upon the character of those who grant it as upon the merits of those who benefit from it.

It is sound public relations to be merciful in telling cases. The courts would appear to be acting mercilessly and out of tune with public opinion if they did not allow earlier significant socially acclaimed behaviour by an offender to be accounted favourably at sentencing from time to time even if unrelated to the instant crime. Here mercy is a form of 'reward'. It gives effect to the compassion and communal feeling upon which mercy depends by allowing the offender a credit for contributions to the community not ordinarily recognised in sentencing as a point of mitigation.[89] Because the circumstances are exceptional and the occasion for its use is rare, it does not significantly undermine the sentencing rules which would ordinarily exclude this evidence. Such merciful action maintains the acceptability of the judicial system by demonstrating that courts can act with humanity. Nigel Walker[90] offers, as similar examples, the merciful reduction of a 'just' sentence because the offender has served what seems to have been an excessive sentence for an earlier crime, or because an equally guilty accomplice has already been sentenced more leniently.

(iv) Mercy and Hardship

Mercy is most commonly sought to relieve or compensate for dire hardship which has resulted from the offence, or is expected to follow from the sentence. Though, in theory, mercy could be extended to alleviate some minor consequences of a sanction, it would demean the special nature of the discretion to draw on it for trivial purposes. Despite it being well understood that a criminal sentence is intended to produce hardship for the offender by way of punishment, any significant extra burden to be borne by the person through economic, social or other disability as the result of the sentence (or which the offender may already be suffering because of significant injury when committing the crime) is often acknowledged to bear upon the choice of sanction and its duration as a matter of mitigation.[91]

But courts are divided regarding the weight, if any, to be given to particular forms of hardship.[92] One line of cases considers that, in principle, where an offender's physical or psychological infirmities or old age did not contribute to the commission of offence, they are not proper matters to be given mitigating weight in sentencing even if the person has already suffered greatly, or is likely to experience exceptional hardship in prison. Thus in Australia in recent times, cases can be found where judicial mitigation of sentence has been refused where the offender suffered injuries in a car accident, had Hodgkinson's disease, was claustrophobic, was shot while

89 Cf *Sentencing Act* 1991 (Vic), s 6(c).

90 N Walker, 'The Quiddity of Mercy' (1995) 70 *Philosophy* 27, 34.

91 See R G Fox and A Freiberg, *Sentencing* (2nd ed, 1999), paras 3.901 – 3.906.

92 For instance in determining what account, if any, is to be taken of the fact that an aboriginal offender may be subject to tribal punishment in addition to any sanction the court might impose, see Fox and Freiberg op cit (fn 91) para 3.716. So too with collateral forms of civil or quasi-criminal forfeiture to which the offender is subject because of the offence, see A Freiberg and R Fox, 'Forfeiture, Confiscation and Sentencing' *The Money Trail: Confiscation of Proceeds of Crime, Money Laundering and Cash Transaction Reporting,* (B Fisse, D Fraser and G Coss, eds) 1992, 106.

resisting arrest, suffered from self-inflicted injuries as a result of the commission of the offence, or had contracted a venereal disease from the victim he sexually assaulted.[93] If mercy is then called for on that account, the courts are just as likely to advise that amelioration of the prison conditions, or remission of all or part of the penalty, is a matter for the executive to attend to under the royal prerogative of mercy, rather than for the courts in the exercise of their discretion.[94] The same is true of unanticipated hardship which occurs after the sentence has been imposed and which then makes the sentence appear excessive when it comes to the attention of judges ruling on an appeal against its severity.[95]

On the other hand, the fact that the function of investigating the propriety of the original conviction and sentence is ordinarily regarded as a function of the courts, and not of the executive, suggests that appellate courts should not take too narrow a view of which is the appropriate entity to exercise mercy when evidence of a significant change in the offender's circumstances after being sentenced, or fresh evidence of the true circumstances at the time of sentence, warrant reconsideration of the sanction.[96] Thus instances can be found of appellate courts awarding a lesser sentence because of additional hardship or danger in prison,[97] especially where the offender is in need of protection because he or she is young, a sexual offender, an informer, or a former member of the police force. Whether this is an outright act of mercy because of the exceptional and extraordinary circumstances of the case, or one accommodated within established general sentencing principles of mitigation is not always clear.[98]

Third party hardship is thought to provide a better justification for an act of pure mercy since it arises less out of compassion for the offender than pity for those he or she has directly or indirectly harmed.[99] But if mercy is extended in such

93 See cases cited in Fox and Freiberg, op cit (fn 91) para 3.901.

94 For example *Leballeur* [1996] 2 Cr App R (S) 181; cf *Hunter* (1984) 36 SASR 101; *Braham* (1994) 116 FLR 38.

95 For example *Munday* [1981] 2 NSWLR 177, 178 (the claim that some subsequent event has made a sentence, appropriate when passed, excessive is a matter for consideration by the executive in the prerogative of mercy, not by an appellate court); *Babic* (1997) 93 A Crim R 254 (injury to back after sentence not admissible as fresh evidence to make sentence, appropriate when passed, excessive; the new facts were a matter for consideration by the executive in the exercise of the prerogative of mercy); *Prideaux* (1988) 36 A Crim R 114 (if there are difficulties in evaluating the worth of the assistance offered by an informer by way of mitigation of penalty, it should be left to the executive to exercise the prerogative of mercy if and when the quality of the information can be assessed) cf *Anderson* (1997) 92 A Crim R 348 (though, in general, review of a sentence in the light of subsequent events is a matter for the executive government, and not one for the Court of Criminal Appeal, extraordinary circumstances producing an unusual measure of hardship which probably would have altered the sentence had it been known at the time of sentencing, warrants the exercise of the discretion to mitigate the sentence).

96 For example *Eliasen* (1991) 53 A Crim R 391 (HIV infection); *Jones* (1993) 70 A Crim R 449 (HIV infection unknown at time of sentence); *Brander* (unreported), Full Supreme Court of Victoria 19 September 1994 (heart attack after passing of sentence); *Morgan* (1996) 87 A Crim R 104 (evidence of spread of cancer).

97 *Linou* v *Hayes* (1988) 47 SASR 172; *Sellen* (1991) 57 A Crim R 313, 318 (significant physical disabilities); *McDonald* (1988) 38 A Crim R 470, 474–5 (AIDS); *Perez-Vargas* (1986) 8 NSWLR 559 (informer); *Astill* (No 2) (1992) 64 A Crim R 289 (informer under strict protection); *Everett* (1994) 73 A Crim R 550 (strict security regime); *Gooley* (1996) 66 SASR 380 (sexual offender under protection).

98 Cf *Bernard* [1997] 1 Cr App R (S) 135.

99 Smart op cit (fn 81) 353–4.

circumstances, it produces the paradoxical result that the guilty person benefits in order that the innocent should suffer less. The third parties most affected by the sentence are ordinarily those who are dependent on the offender in some fashion. Distress, reduced financial circumstances and loss of emotional support for family members are the usual consequences complained of, especially if the sentence is a custodial one. In *Miceli*, for example, reference was made to the effect of the prison term on the offender's wife, children and aged parents. Likewise, to impose a custodial rather than a non-custodial sentence on the proprietor of a business will affect its viability and thus have an impact on its employees. However, unless the sentence is seen as producing extraordinary hardship,[100] the appellate courts advise sentencers not to give that factor significant weight in arriving at the sentence. Their fear is that to grant preference to offenders with dependants will defeat the appearance of justice.[101] In such matters the Victorian Supreme Court has indicated that there is very little leeway even for mercy to relieve the third party effects:[102]

> ... when one appeals for mercy on the grounds of hardship to a wife or family that the accused ought to have had regard to that before embarking on a life of crime, and the Court cannot be blamed because it deals with an accused on the merits having regard to the gravity of the offence, the past circumstances, and so on. The Court is not so inhuman as not to be very sorry for those placed in the position of this wife and child because of the criminal activities of the husband, but our task it not to yield to pleas based on sentiment or emotion. However humane we may be we have a duty to perform, and that duty we perform as a Court of Appeal in allowing sentences to stand unless we see something has gone wrong in the sentencing.

This accords with a concentration on the personal responsibility of the offender, especially where the offence involved is a serious one.[103] Even when the *Crimes Act* 1914 (Cth), s 16A(2)(p) calls for a court to have regard to 'the probable effect that any sentence or order under consideration would have on any of the person's family

[100] *Spiers* (1983) 34 SASR 546; see also *Hodder* (1995) 15 WAR 264 (victim and offender had reconciled and very considerable hardship would be imposed on family if offender imprisoned; matters raised must be exceptional, or 'cogent and weighty', per Murray J at 284); *Boyle* (1987) 34 A Crim R 202; *Nagas* (1995) 5 NTLR 45; *Mawson* v *Nayda* (1995) 5 NTLR 56.

[101] *Wirth* (1976) 14 SASR 291; *Amuso* (1987) 32 A Crim R 308, 313; *Burns* (1994) 71 A Crim R 450; (premeditated and wilful offence and persistent course of conduct overshadowed the fact that the applicant/mother would be separated from her children aged ten and four); *Stewart* (1994) 72 A Crim R 17.

[102] *Polterman* 2 August 1974 (unreported), Full Supreme Court of Victoria; see also *Tilley* (1991) 53 A Crim R 1, 3 (mother of two-and-a-half-year-old imprisoned for corruption offences: offender cannot shield herself under the hardship she creates for others, and courts must not shirk their duty by giving undue weight to personal or sentimental factors); *Le* [1996] 2 Qd R 516 (hardship or stress shared by the family of an offender cannot be allowed to overwhelm factors such as retribution and deterrence).

[103] *Mitchell* [1974] VR 625, 631; *Wayne* (1992) 62 A Crim R 1 and see cases cited in Fox and Freiberg, op cit (fn 91) para 3.904.

or dependants',[104] it has been held that this provision does not alter the common law in terms of the weight to be given to such matters.[105]

Yet the authorities do support the proposition that where hardship goes far beyond the sort of burden which inevitably is placed upon a family of an imprisoned bread-winner, the courts will intervene if 'a sense of mercy or of affronted common sense imperatively demands that they [the sentencing judges] should draw back'.[106] For 'it would be, in effect, inhuman to refuse to do so'.[107] This is a clear example of mercy as a meta-principle operating outside the confines of standard sentencing rules. Even so, to establish such exceptional hardship justifying mercy, the defendant must produce 'cogent evidence' of exceptional hardship.[108]

A striking example of mercy at work in a third party situation is when the third party adversely affected by the sentence is the victim. This can arise in many contexts, especially ones of domestic violence and sexual abuse. But it need not be the immediate family of the accused who are suffering. In *Nunn*,[109] where the accused had killed his best friend in a drunk-driving incident, the term of imprisonment for the crime of causing death by dangerous driving was reduced as an express act of mercy in favour of the victim's mother and sister who had given evidence that its length was adding to their grief, anxiety and suffering as a consequence of the death. The English Court of Appeal stressed that the opinions of the victim, or the surviving members of the family, about the appropriate sentence were not relevant to the level at which it should be set, but this was quite removed from the court being informed of the anguish and suffering inflicted on the victims by the crime and, 'in mercy to them' reducing the sentence.[110]

(b) In a Utilitarian Context

Most discussions of mercy tend to be set in the context of a retributive approach to punishment. Instances can be found of mercy being drawn upon to defend the choice of a rehabilitative measure over retributive one and a willingness to take higher risks with the offender. As the South Australian Chief Justice explained in *Osenkowski*:

[104] See also *Criminal Law (Sentencing) Act* 1988 (SA), s 10(n). However the *Criminal Law (Sentencing) Act* 1988 (SA), s 13(1)(b) prohibits a court from requiring a defendant to pay a pecuniary sum if the court is satisfied that compliance with the order 'would unduly prejudice the welfare of dependants of the defendant'.

[105] *Adami and Adami* (1989) 51 SASR 229; *Sinclair* (1990) 51 A Crim R 418, 420–1; *Stewart* (1994) 72 A Crim R 17, 27; *Burns* (1994) 71 A Crim R 450; cf *Muanchukingan* (1990) 52 A Crim R 354, 360 (court constrained by legislation to take it into account); *Smith and Martin* (1991) 52 A Crim R 447, 457 (reference to probable effect on family and dependents of loss of income and collapse of companies); *Walsh* v *Department of Social Security* (1996) 67 SASR 143 (international instruments relating to the rights of children, though not part of Australian law, underscore the importance of such provisions).

[106] *T* (1990) 47 A Crim R 29, 40, citing *Wirth* (1976) 14 SASR 291, 296 per Wells J. *Wirth* has been re-affirmed in South Australia, *Adami* (1989) 51 SASR 229 and approved in New South Wales, *Edwards* (1996) 90 A Crim R 510, 516–7.

[107] *Wirth* (1976) 14 SASR 291, 296 per Wells J.

[108] *Mawson* v *Nayda* (1995) 5 NTLR 56, 57.

[109] [1996] 2 Cr App R (S) 136 and commentary [1996] Crim L R 210.

[110] It was reduced from four years to three years imprisonment.

> There must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender's life might lead to reform.[111]

But mercy as a means of avoiding treatment or other utilitarian-based responses to crime is almost never argued. It is one thing for the doctrine to be invoked to palliate sanctions motivated by retribution, but quite another for it to be relied upon to undermine orders with more utilitarian aims such as treatment, incapacitation, or reparation.

Can there be any justification for a special act of mercy depriving an offender of the benefits of treatment? The answer is that utilitarian sentencers may not always know what sort of sentence will achieve the rehabilitative effect they are seeking, nor will they necessarily be pursuing it at all costs. Treatment aims are often tainted by retributive ones[112] and some experimentation with what works is a feature of sentencing. Faced with the risk of ineffectual treatment and a number of different possible sentencing measures, a request to select the least restrictive or intrusive one (though possibly the least effective), may well appear to be a request for mercy. But the better analysis is that the doctrine of mercy need not be drawn upon by the sentencer to meet this request. The result sought can be achieved by reference to the more utilitarian principle of parsimony. It directs that sentencers are not to utilise a measure that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed.[113]

But if a rehabilitative measure is the sanction of first choice and is being seriously pursued, e.g. hospital orders or special forms of supervision for children and young offenders it makes little sense for it to be ameliorated by reference to mercy. If the aim of the sanction is to achieve some reformative gain for the offender's personal long term benefit, mercy which exempts the person from the sanction, or which reduces the time to be applied to rehabilitation, or which releases the offender from necessary, though intrusive, conditions would be counterproductive from a utilitarian point of view.[114]

JUDICIAL MERCY v EXECUTIVE CLEMENCY

Tradition identifies the prerogative of mercy with the executive arm of government,[115] but its origin in the sovereign as the source of all three branches of

[111] (1982) 30 SASR 212, 212–3. Approved in *Miceli* (1997) 94 A Crim R 327, 333, *Carter* (1997) 91 A Crim R 222, 228 and *Clarke* [1996] 2 VR 520, 523.

[112] For example Victoria's new 'combined custody and treatment order', *Sentencing Act* 1991 (Vic), s 18Q–18W.

[113] As represented by statutory provisions such as *Sentencing Act* 1991 (Vic), s 5(3) and *Penalties and Sentences Act* 1992 (Qld), s 9(3)(b).

[114] See J G Murphy, *Retribution, Justice and Therapy: Essays in the Philosophy of Law* (1979).

[115] D T Kobil, 'The Quality of Mercy Strained: Wresting the Pardoning Power from the King' (1991) 69 *Texas L R* 569.

government, explains why the judiciary also has residual powers of mercy. The executive claims that it may, in mercy, exercise some form of constitutional or prerogative power to suspend or remit punishments which have been imposed by the courts in accordance with principles of justice framed by the legislature.[116]

A. Forms of Clemency

Executive mercy is usually framed in terms such as 'pardon',[117] 'remission',[118] 'reprieve'[119] and 'commutation'[120] in the exercise of the royal prerogative of mercy,[121] but this is a too narrow conception of the executive's capacity to be merciful. As Brien points out:

> On the other side of the Bench there is 'prosecutorial mercy', in virtue of the discretion that prosecutors have in the cases they prosecute, the charges they bring and the evidence they present. In addition, prosecuting agencies have the discretion to offer indemnities and immunities and, like other representatives of the Crown, amnesties and ex gratia payments. Parole boards can exercise their discretionary powers of release mercifully. Juries can acquit despite the law or in face of the evidence, that is, return so-called 'mercy verdicts'. They have the power to convict someone of a lesser offence even though in doing any or all of these things they may be untrue to their oaths.[122]

[116] L Sebba, 'Clemency in Perspective' in S F Landau and L Sebba (eds), *Criminology in Perspective* (1977), 221–40; L Sebba, 'The Pardoning Power — A World Survey' (1977) 68 *Journal of Criminal Law and Criminology* 83; A T H Smith, 'The Prerogative of Mercy, the Power of Pardon and Criminal Justice' (1983) *Public Law* 398.

[117] A pardon is the 'solemn act by which the Sovereign, either absolutely or conditionally, forgives or remits for the benefit of the person to whom it is granted the legal consequences of a crime he has committed', *Milnes and Green* (1983) 33 SASR 211, 237 per Legoe J. However the conviction itself remains formally unreversed, *Cosgrove* [1948] Tas S R 99; *Foster* [1984] 2 All E R 679; *Re Royal Commission on Thomas Case* [1980] 1 NZLR 602. See also W L Stuart, 'The King's Pardon' (1907) 4 *Commonwealth LR* 241; *Re Walsh* [1971] VR 33, 43. An absolute pardon is not dependent on the offender's request or consent and therefore cannot be declined. A pardon is not designed to undo the judicial or jury function of finding guilt, only the execution of the sentence by the executive. Because the conviction itself survives a pardon, an appeal can be taken against it and an appellate court may, in an appropriate case quash it, *Foster* [1984] 2 All E R 679. For pardons under federal law, see *Crimes Act* 1914 (Cth), s 85ZR.

[118] The reduction of the amount of a sentence or penalty without changing its character.

[119] The temporary postponement or suspension of the execution of a sentence. It may be granted by the executive in the exercise of the prerogative of mercy, or by the court empowered to order the sentence to be executed. Either can come to the offender's aid if the other declines to do so, and each can proceed upon a different view of the facts of the particular case, *Ryan* v *Attorney-General for Victoria* [1967] VR 514.

[120] The substitution of a different punishment for the one imposed by the court. Except where permitted under statutory authority, the executive cannot commute a sentence from one form of sanction to another (eg the death penalty to life imprisonment) without the consent of the offender even if the substitution of the lesser sentence is intended as an act of mercy; *Ex parte Lawrence* (1972) 3 SASR 361, 368 & 371; P Brett, 'Conditional Pardons and the Commutation of Death Sentences' (1957) 20 *Modern L R* 131. See also *Schultz* [1976] VR 325, 328–9.

[121] Expressly recognised in *Crimes Act* 1914 (Cth), s 21D; *Defence Force Discipline Act* 1982 (Cth), s 189; *Transfer of Prisoners Act* 1983 (Cth), s 24; *Crimes Act* 1900 (NSW), s 474P; *Criminal Appeal Act* 1912 (NSW), s 27; *Fines Act* 1996 (NSW), s 124; *Sentencing Act* 1989 (NSW), s 53; *Criminal Code* (Qld), s 18; *Corrective Services Act* 1988 (Qld), s 205; *Criminal Law Consolidation Act* 1935 (SA), s 369; *Crimes Act* 1958 (Vic), s 584; *Sentencing Act* 1991 (Vic), s 106 & s 107; *Criminal Code* (WA), s 21; *Fines, Penalties and Infringement Notices Enforcement Act* 1994 (WA), s 53(9).

[122] Brien op cit (fn 28), 97.

Ironically, conditional forms of the royal prerogative of mercy have been used in the past to craft new forms of punishment.[123] Offenders facing the death penalty were granted a pardon conditionally on agreeing to be transported to the colonies. Only later did legislation allow courts to order transportation as a direct sanction. The use of capital punishment as a sanction gives executive clemency a particular prominence in those jurisdictions which retain the death penalty.[124] Until the establishment of a Court of Criminal Appeal in the U.K. in 1907 and the adoption of similar legislation in Australia, the prerogative of mercy was the main remedy for those who claimed to have been wrongly convicted. Nowadays an elaborate appeal structure reduces, but does not obviate, the need for the operation of the prerogative.

The Governor's common law power to pardon or remit penalties under the prerogative of mercy is supplemented by statute. The Governor may release prisoners at any time, either on giving an undertaking (which may include conditions regarding good behaviour and supervision), or on parole, in the exercise of the prerogative of mercy.[125] There is no requirement that before releasing an offender on parole, the matter be referred to the Parole Board. The Governor possesses statutory powers which enable him or her to mitigate, stay, or compound proceedings for penalties[126] and, apart from any other specific statutory authority which may exist permitting the remission of monetary penalties imposed under specific Acts, the Crown has a general power to remit monetary penalties even though they are not directly payable to it.[127]

B. Role of Expediency

Though the executive shares with the courts the power to exercise mercy, executive clemency under the prerogative of mercy may be granted for reasons unrelated to the offender's merits, or to any sense of compassion for his or her situation. An example is the release by the executive of a convicted person in order to undertake in an exchange of spies,[128] or as part of a bargain with hostage takers, or to relieve prison overcrowding. Such 'leniency' is motivated by political or other forms of expediency. Similarly, the use of the *nolle prosequi* and witness indemnities for those willing to give evidence on behalf of the Crown, though not identical to a pardon under

[123] P Brett, 'Conditional Pardons and the Commutation of Death Sentences' (1957) 20 *Modern L R* 131.

[124] For example *Reckley* v. *Minister of Public Safety and Immigration* (No 2) [1996] 1 AC 527; *Ex parte Lawrence* (1972) 3 SASR 361. In the latter case the offender had been sentenced to death for murder, but the sentence was commuted by the Governor in Council to life imprisonment with hard labour. Lawrence claimed that the commutation was an improper exercise of the royal prerogative of mercy because his consent had not been obtained. His application for an order that the Sheriff execute the sentence of death was denied because a statutory provision obviating the need for the offender's consent was held to have retrospective effect.

[125] *Sentencing Act* 1991 (Vic), s 107; See *Williamson* v *Inspector General of Penal Establishments* [1958] VR 330; *Governor of Pentridge, Ex parte Arthur* [1979] VR 304.

[126] For example *Land Tax Act* 1958 (Vic), s 87(2).

[127] For example *Fines Act* 1996 (NSW), s 123; *Sentencing Act* 1991 (Vic), s 108.

[128] A T H Smith, 'The Prerogative of Mercy, the Power of Pardon and Criminal Justice' [1983] *Public Law* 398, 399.

the royal prerogative,[129] is a device by which the executive can offer exemptions and rewards to induce informers and others to assist in the prosecution of crime. Of course the power of the prosecutor not to initiate or to discontinue a prosecution may also be applied to less political and more obviously merciful purposes, such as when a decision is made to abandon a prosecution in favour of alternative forms of disposition. These may include civil commitment under mental health legislation, formal cautioning of young offenders, or special arrangements for defendants with disabilities.[130]

Because it is doubtful whether any court has power to actually review the exercise of the royal prerogative of mercy in a particular case,[131] there has been little opportunity for the development of principles according to which this form of mercy is to be exercised: either as an act of genuine and compassionate mercy; or in order to rectify judicial errors; or to achieve larger political objectives such as the maintenance of discipline within institutions by remitting portion of the sentence as a reward for compliant behaviour.[132] The view that mercy is inherently extra-legal in nature and is therefore not subject to judicial review is truer of the exercise of executive mercy under the prerogative than when mercy is exercised judicially in the course of arriving at a sentencing judgment.[133]

Furthermore, due to the fact that executive clemency can be based on expediency and pragmatism it is understandable that appellate courts are likely to refer events occurring after sentence, or extraneous to the offence to the executive to remedy under the prerogative of mercy. Nonetheless, in most states, the Attorney-General on a petition for the exercise of the royal prerogative of mercy may refer the matter to the Court of Appeal for its determination as on an appeal, or to the judges of the Supreme Court for their opinion.[134] The latter is wider in that it allows the judges to base their opinion on the plea for mercy on grounds that they, sitting as an appellate court, could not accept.[135]

[129] A T H Smith, 'Immunity from Prosecution' (1983) 42 *Cambridge L J* 299; *Director of Public Prosecutions Act* 1983 (Cth), s 9(6).

[130] See Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (2nd ed), 1990.

[131] B V Harris, 'Judicial Review of the Prerogative of Mercy' [1991] *Public Law* 386; F Wheeler, 'Judicial Review of Prerogative Power in Australia' (1992) 14 *Sydney L R* 432, 453; C. Gelber, 'Reckley (No 2) and the Prerogative of Mercy: Act of Grace or Constitutional Safeguard?' (1997) *Modern L R* 572; *Reckley* v *Minister of Public Safety and Immigration* (No 2) [1996] 1 AC 527. Cf *Burt* v *Governor-General* [1992] 3 NZLR 672; *R* v *Secretary of State for the Home Department; Ex parte Bentley* [1994] QB 349.

[132] For example the discretion to grant 'emergency management days' as a reduction in a prison sentence because of disruption or deprivation on account of industrial disputes, emergencies, or other unforeseen circumstances, *Corrections Act* 1986 (Vic), s 58E. As to illegitimate uses of the pardoning power, see K D Moore, *Pardons: Justice, Mercy and the Public Interest* (1989) Chapter 17, 'How to Abuse the Pardoning Power'.

[133] L Blom-Cooper, 'Justice and Mercy in the Caribbean' [1997] *Criminal L R* 116, 118.

[134] A C Castles, 'Executive References to a Court of Criminal Appeal' (1960) 34 ALJ 163; *Crimes Act* 1900 (NSW), s 474C; *Criminal Code* (Qld), s 672A; *Criminal Code* (Tas), s 419; *Criminal Code* (WA), s 21; *Crimes Act* 1958 (Vic), s 584(a)&(b).

[135] *Re Ratten* [1974] VR 201; see also *Ratten* v *The Queen* (1974) 131 CLR 510; *Lawless* v *The Queen* (1979) 142 CLR 659. Similar powers are available in other states, for example *Criminal Code* (Qld), s 675; *Criminal Code* (WA), s 705.

PRINCIPLED MERCY

Mercy in sentencing is not unlike equity in that it claims to supersede the justice offered by law by virtue of its superior sanctity.[136] While sentencing is governed by the intellect, the emotions also have their proper part to play.[137] This includes pity for the offender as well as revulsion. If mercy does no more than assist in determining the weight to be given to particular accepted mitigating factors, it is simply working within the existing sentencing system. But when judges and magistrates, in response to their feelings of compassion, offer leniency to offenders on the basis of conditions that are generally regarded as irrelevant to sentence, mercy, like equity, is serving an independent function in sentencing. It gives voice to humanitarian considerations which are apparently still lacking within the system.

For Brien, who strongly supports this role, mercy is not merely a characteristic of particular action, but also of judicial officers and the 'culture' of the law:

> Through its relationship to discretion and the place of discretion within the legal system, mercy is essential to the functioning and workability of the law, and, more generally, to the culture of the law. No theory of law, therefore, can be adequate without an account of mercy, both as a particular action and as a virtue of the system's officials. Not only has mercy a place within legal justice, but it must be maintained as a possibility and actively promoted, if the law is to operate in a morally acceptable manner and carry out the various functions that it has in our social arrangements. Therefore, rather than being in tension with the law as a system, mercy is an essential component of it.[138]

A. Unprincipled Mercy?

But though an essential component in sentencing, the proposition that mercy is available to be offered to offenders as an 'unprincipled' (ie unconstrained and unreviewable) act of pity or compassion can no longer be taken for granted. Harrison argues that if the system strives to be rational, consistent and impartial, mercy must submit to some rules.[139] The *Victorian Sentencing Manual* states that 'mercy cannot interfere with the application of proper principles ... Compassion and sympathy cannot detract from giving due weight to relevant factors. However, in deciding what weight to give factors, mercy has its place'.[140] If this is true, mercy in sentencing does no more than explain how recognised mitigating factors have been allowed for in satisfying the principle of proportionality and has little else to add to the sentencing process. But the truth is, that in exercising the discretion to be merciful, sentencers can and do take account of matters which go beyond the limitations of accepted mitigation. In doing so they are likely to detract from the weight given to other relevant factors and thus the result does interfere with 'proper principles' such as proportionality.

[136] M C Nussbaum, 'Equity and Mercy' (1993) 22 *Journal of Philosophy and Public Affairs* 83. Also see Brien, op cit (fn 28), 90.
[137] *Coulston* [1997] 2 VR 446, 463.
[138] Brien op cit (fn 28), 105.
[139] R Harrison, 'The Equality of Mercy', *Jurisprudence: Cambridge Studies*, (H Gross and R Harrison. eds), 1992, 107.
[140] Judges of the County Court of Victoria, *Victorian Sentencing Manual, Melbourne* (1991) para 4.010.

B. New Precedents for Leniency

Why should such judicial subversion be permitted to persist? As Nigel Walker[141] explains, the less common, but more significant function of mercy is as a catalyst for the creation of new precedents for leniency, particularly ones based on ethical, practical or humanitarian considerations rather than a fixed set of rules. The doctrine of mercy serves as a vehicle though which sentencers, almost by way of dissent from the established principles of sentencing, advance considerations which may come to be accorded the status of a precedent, or later evolve into guidelines regarding what constitutes a valid mitigating factor. This is similar to United States practice of allowing 'departures' from sentencing guidelines when the circumstances can be justified, such circumstances falling outside established statutory sentencing principles. If, following appellate review, those departures are accepted, they are converted into new sentencing guidelines and principles.

For this reason it is important that the mercy being applied in difficult cases first be that of the judges rather than of the executive. More refined principles of mitigation and individualisation of sentences can only evolve through judicial decision making in the common law tradition. It is true the process is idiosyncratic and unpredictable, as with any line of dissent, but if the features which make a case sufficiently extreme to warrant relying on the residual discretion to justify departure from existing rules are consciously articulated by sentencers, the doctrine of mercy can serve to perfect the catalogue of recognised mitigating considerations[142] and thus further reduce the need to rely on it as means of remedying apparently unjust sentencing outcomes.[143]

C. Suggested Principles

Despite the impression that mercy is an unprincipled discretion, particularly because of the immunity from judicial review enjoyed by prerogative acts of clemency,[144] the exercise of judicial mercy is not immune from review. A refusal of a judicial officer to acknowledge the possibility of mercy, or its inappropriate or excessive use, is certainly open to appellate challenge on an appeal against sentence at the behest of the defendant or the D.P.P. Though few of the following propositions have crystallised into rules, it is submitted that these are the emerging principles:

[141] N Walker, op cit (fn 90) 35–36.

[142] To rely on mercy to produce justice in this fashion is said to give the state a perfect excuse to leave structural injustice unaddressed, C Strange, *Qualities of Mercy: Justice, Punishment, and Discretion* (1996), 17.

[143] In defending the short-term injustice which mercy produces in the course of contributing to the evolution of new and more compassionate sentencing principles, Pearn offers the example of the individual discretionary acts of mercy which, in medieval times, developed into codes of knightly chivalry and which, in modern times, have evolved into the various conventions, and protocols relating to the conduct of war, crimes against humanity, and the treatment of prisoners, J Pearn, 'The Quiddity of Mercy — A Response' (1996) 71 *Philosophy* 603.

[144] The manner in which statutory powers of remission are exercised may well be subject to review under general administrative law principles.

1. Though an offender cannot call for mercy as of right, sentencers cannot deny they possess an inherent discretion to be merciful, nor may they refuse to hear a submission on whether leniency under the head of mercy is warranted.[145]
2. Mercy operates both within established principles of mitigation to allow them a charitable latitude of operation and outside them as an over-riding doctrine.
3. The discretion to extend mercy to reduce a sentence below that which would ordinarily be regarded as appropriate to the wrongdoing (the sentencer having already incorporated all relevant mitigating circumstances), should only be exercised sparingly and in exceptional circumstances.[146]
4. A sentencer may not rely on the doctrine of mercy to avoid imposing a mandatory sentence if the legislation is uncompromising in prescribing it as a minimum penalty.[147] If the sanction appears to be overly harsh, or to work injustice, mercy is not excluded. The sentencer's option is to advise the offender to seek executive clemency under the royal prerogative of mercy, or statutory forms of remission.
5. Mercy cannot be used to strike down legislation. If legislation calls upon sentencers to impose cruel and unusual mandatory punishments, constitutional doctrines other than mercy can be called in aid to resist the making of sentencing orders which defy all generally accepted humanitarian principles.[148]
6. The exceptional circumstances which are said to justify exercising the judicial discretion to be merciful must be based on a proper evidential foundation.[149]
7. Judicial mercy is more confined than executive mercy. Judges cannot grant mercy for purposes of political, administrative, or correctional expediency, as may occur in the exercise of executive clemency.[150] Compassion and the avoidance of excessive suffering must be the main motives for the exercise of judicial mercy.[151]
8. It follows that sentencers have no power to extend mercy for whimsical reasons. There is no judicial equivalent of the merciful reductions in sentence granted by the executive in certain jurisdictions on account of events such as the sovereign's birthday, a religious festival, or other symbolic events such as the arrival of a new millennium.

[145] *Miceli* (1997) 94 A Crim R 327.
[146] *Cobiac* v *Liddy* (1969) 119 CLR 257, 269 per Windeyer J.
[147] As is often the case in respect of repeat drink driving offenders, or under the latest 'three strikes and you are in' legislation, see discussion of Northern Territory legislation in K Warner, 'Sentencing Review' (1998) 22 *Criminal L J* 282, 284–5.
[148] *Kable* (1996) 189 CLR 51; *Moffatt* (1997) 91 A Crim R 557.
[149] *Storey* [1998] 1 VR 359.
[150] As exemplified, for example, by President Gerald Ford's 1974 'full, free and absolute' pardon of President Richard Nixon, after the latter had resigned following the Watergate scandal.
[151] This and the next two principles have been derived from Nigel Walker's important analysis of the possible grounds for mercy, in 'The Quiddity of Mercy' (1995) 70 *Philosophy* 27, 31–2. See also N Walker, *Aggravation, Mitigation and Mercy in English Criminal Justice*, London, Blackstone Press Ltd., 1999, ch. 14.

9. The discretion must be exercised in a considered manner, not arbitrarily.[152] In accordance with general principles, an appellate court will find error in the exercise of the discretion if it is found to involve arbitrary, improper decision-making or unfair procedure.
10. It follows that mercy ought not be granted in such a way as to appear to discriminate between offenders on the basis of irrelevant considerations such as ethnicity, gender, colour, etc.[153]
11. Any penalty reduction in the name of mercy must not be so great as to lead to the impression that the offence is being condoned by the courts. The proper exercise of mercy requires both that the language in which it is expressed by the sentencer, and the degree of reduction granted, be not such as to devalue the seriousness of the wrongdoing.[154]
12. Unconditional manifestations of mercy in sentencing do not require the consent of the offender; conditional ones do.
13. Since the primary reason for relying on the doctrine of mercy in reducing a sentence is to avoid excessive suffering as the result of the penalty imposed (whether in the offender, or in others as a direct consequence of the punishment), a sentencer ought not to be merciful if its effect is to create greater suffering on the part of an innocent party or other harm than that avoided:

> generally then, it might be said that mercy is unjustified if it causes the suffering of an innocent party, is detrimental to the offender's welfare [or] harms the authority of the law ...[155]

THE CAPACITY FOR MERCY

The practice of mercy requires a sentencer with the character and capacity to do so. In his contribution to *Forgiveness and Mercy*, Murphy complains that it is improper for a judge to apply his or her own personal and 'sentimental' conceptions of mercy:

> The cases we have explored represent either unjustified sentimentality, virtuous behaviour that is simply a matter of justice, or situations where the demands of justice are thought to be overridden by the demands of utility. Hence some scepticism about mercy seems in order. Judges in criminal cases are obligated to do justice. So too, I would argue, are prosecutors and parole boards in their exercise of discretion. There thus simply is no room for mercy as an autonomous virtue

[152] Pannick has asked: 'suppose the Attorney-General or the Governor-General were to exercise their responsibilities in a perverse or improper manner: by tossing a coin to decide whether a prisoner should die; or by refusing clemency because of the murderer's race, religion or political views, or because the officials have been bribed by the relatives of the victims?' D Pannick, 'Comment: Tempering Justice with Mercy' [1996] *Public Law* 557, 558.

[153] This is also where the idiosyncratic nature of mercy comes up against the principle of equality in treatment. Smart op cit (fn 81) 351–2, says: 'The obvious way out for those of us who feel squeamish about exacting the just penalty for both offenders rather than showing mercy to one and not to the other, is to argue that some mercy is better than none at all. However, this too is unsatisfactory, because of the basic insight of justice that if one man is going to be treated leniently then all the others with identical cases should be too'.

[154] This is why mercy normally produces a reduction rather than an exemption from punishment.

[155] Smart op cit (fn 81), 350.

> with which their justice should be tempered. Let them keep their sentimentality to themselves for use in their private lives with their families and pets.[156]

Yet Dressler wonders whether any political system 'that denies the possibility of a tear in the eye of justice' is worth commending to others.[157] He holds that people want those in power over them to have the capacity for compassion and pity. Though mercy is based on feeling and emotion, that judicial emotion need not be manifested in irrational ways, nor need it arise out of some special relationship with the defendant beyond that observed in court. Sentencers can give effect to their compassion in a disinterested and objective manner.[158] The continuing opportunities for mercy in sentencing, whether in evaluating mitigation, in applying the totality principle, or as an overarching discretion, carries an expectation that those who are appointed to judge others are selected not only for their legal knowledge, but also for their possession of traits which allow them to express benevolence and concern for others in acts of mercy.

The concern that judges and magistrates have the personal capacity for mercy is not new. In Henry de Bracton's thirteenth-century treatise, *On the Laws and Customs of England*,[159] he refers to two types of mercy. First, the 'mercy of remission', which is the simple act of reducing a sentence. Second, the 'mercy of compassion'. The latter is unrelated to action. It refers to the attitude the judge should bear toward all those being sentenced. It does not imply that leniency should be granted to all, since it would be unjust to extend it to those who do not deserve it:

> Yet though there is greater safety in having to render a final account for mercy rather than judgment, it is safest that ... judgment not become uncertain through unconsidered discretion nor mercy debased by indiscriminate application ...[160]

Nevertheless, he asks that judges always be merciful in the sense of being able and willing to feel compassion for those who appear before them:

> And let him not in judgment show mercy to the poor man, that is, the mercy of remission, though to him there ought to be shown, as to all men, the mercy of compassion.[161]

Consideration of the place of mercy in sentencing must thus also attend to the personal qualities of those in the judgment seat. A merciful sentencer is one with the capacity and willingness consciously but impartially to consider the impact of the possible penal measures from the defendant's perspective.[162] This serves as a restraining and balancing influence in sentencing. It provides a check against the risk that, in attending to the impact of the crime on the victim, the sentencer has underestimated all the consequences of the sanctions to be imposed on the offender. This mercy of compassion is, or ought to be, a constant element in the deliberative process

156 Murphy op cit (fn 41) 173–4.
157 J Dressler, 'Hating Criminals: How Can Something That Feels So Good Be Wrong?' (1990) 88 *Michigan L R* 1448, 1472. See also T R Tyler, *Why People Obey the Law* (1990).
158 J Adler, 'Murphy and Mercy' (1990) 50 *Analysis* 262, 263.
159 *Bracton On the Laws and Customs of England*, G E Woodbine ed, (Vol 2 1968), 306.
160 Ibid.
161 Ibid.
162 E L Muller op cit (fn 68) 335–9.

of sentencing and should be revealed in the judge's remarks at sentencing to maintain confidence that the process is a balanced act of justice.[163] The mercy of remission will always be the rarer act since it is called for only in exceptional circumstances but, as Bracton counselled some 500 years ago, the mercy of compassion is a duty which every sentencer owes to all those who appear before them for sanction. That is the larger place of mercy in sentencing. To discharge that duty the community must:

> Fill the seats of justice with good men [and women]
> But not so absolute in goodness as to forget what human frailty is.[164]

[163] See 'Conference of Association of American Law Schools: Panel on Compassion and Judging' (1990) 22 *Arizona State L J* 13–52.

[164] Sir Thomas Noon Talfourd (1795–1854), *Ion V*, iii.