

The Merciful Compassion Argument

[T]here was no doubt that she had shown genuine and substantial remorse. It was possible to extend a degree of mercy to her, so that her sentence would be reduced to one of 12 months' imprisonment.¹

THIS QUOTATION IS representative of the view that the remorseful offender is a proper object of judicial mercy. Although references to mercy are common within judicial discourse, there is disagreement amongst penal theorists about whether demonstrations of mercy are ever appropriate and, if they are, under what (presumably limited) circumstances.² Mercy appears to at best be in tension with, and at worst to undermine, the principles of justice. On such views, imposing a more lenient sentence on the grounds of mercy will mean that just deserts have not been meted out. Further, there is a common worry that demonstrations of mercy will undermine consistency in sentencing: some judges may be more inclined to show mercy than others. Indeed, it is telling that the judge quoted above says that it was 'possible' to extend mercy to the remorseful offender. The language suggests that, in this case, mercy is not deserved or required, merely permitted.

However, there are theorists who defended the view that there is a role for mercy in criminal justice,³ with some claiming that this role extends to mitigating the punishment of the remorseful offender. In this chapter, I examine one of the most developed accounts of why mercy should be shown to the remorseful offender.⁴

I contrast this account with the Responsive Censure argument put forward in the preceding chapter, showing why the latter is preferable, and note how it avoids some of the most serious challenges that the Merciful Compassion argument faces.

¹ *R v Susan Tagg* [2011] EWCA Crim 3315.

² For an overview of the different theoretical positions on mercy, see SP Garvey, 'Questions of Mercy' (2006) 4 *Ohio State Journal of Criminal Law* 321.

³ D Dolinko, 'Some Naive Thoughts About Justice and Mercy' (2006) 4 *Ohio State Journal of Criminal Law* 349; S Bibas, 'Forgiveness in Criminal Procedure' (2006) 4 *Ohio State Journal of Criminal Law* 329.

⁴ J Tasioulas, 'Punishment and Repentance' (2006) 81 *Philosophy* 279.

RESPONSIVE CENSURE AND THE EXERCISE OF MERCY

A prominent example of the Merciful Compassion argument has been developed by John Tasioulas. His central claim is that there is room within communicative theories of punishment for the exercise of mercy to be a justified judicial response to an offender's remorse. According to Tasioulas:

[M]ercy ... embraces reasons for leniency that arise out of a charitable concern with the well-being of the offender, in particular, the compassion we rightly feel towards him as a potential recipient of deserved punishment given various other facts about his life and circumstances whose salience is not captured by the retributive norm.⁵

Notably, Tasioulas considers remorse to be one such relevant fact about the offender's life. He writes: 'a decent concern with the latter's welfare can justify us in tempering the punishment deserved in order to take account of charitable reasons furnished by his repentance'.⁶ In line with the Responsive Censure account, Tasioulas sees repentance as relevant to the communicative process,⁷ yet he departs from my arguments in his claim that this justifies a merciful response which functions outside the domain of retributive justice. I am going to argue that my account is preferable.

Showing an offender mercy and engaging dialogically with his remorse are two different scenarios. As the quotation from Tasioulas above suggests, mercy stems from a charitable concern with the well-being of the offender. This involves feeling compassion towards him on the basis of his prospective punishment—compassion evoked by some relevant fact (his repentance). The first thing to acknowledge here is that it is not obvious that a concern for the well-being of the remorseful offender is even intuitively the driving force of the impulse to mitigate his punishment. The concern for the offender's well-being cannot simply be a response to the offender's impending sanction, otherwise all offenders would be candidates for mercy, since the well-being of all offenders is diminished by their punishment. There might therefore be something about the *remorseful* offender's situation that makes his experience particularly burdensome. It could be argued that an offender's punishment *plus* his painful experience of remorse diminishes his well-being to a greater extent compared to that of the unremorseful offender and consequently we are more concerned for him and therefore feel that mercy becomes justified. However, I do not think this is Tasioulas's argument. Rather, it seems that we do not have a charitable concern for the offender's well-being at all *unless* he repents, not that we have a greater charitable concern for the remorseful than the unremorseful.

⁵ *ibid*, 312.

⁶ *ibid*, 318.

⁷ *ibid*, 317.

I am going to argue that compassion and charitable concern for well-being do not adequately capture the justification for mitigating the punishment of a remorseful offender. Feeling compassion for an offender as a recipient of punishment, given facts about his life and circumstances, has strong overtones of pitying the offender. Such a conceptualisation of mercy is shared by Murphy, who claims that mercy is ‘often regarded as found where a judge, out of *compassion for the plight of a particular offender*, imposes upon that offender a hardship less than his just deserts’.⁸ A parallel perspective was present in Manson’s argument for mitigation justified by ‘cultural demands’, where *sympathy* justified leniency.⁹

Whilst such responses might be appropriate for an offender who is, say, terminally ill or very old, they are not appropriate attitudes towards the remorseful offender. We do not (or should not) pity an offender his remorse (although we might recognise that it can be emotionally very painful), rather, we expect (or at least hope for) his remorseful response as we engage with him in communication.¹⁰ Mitigating on the basis of mercy might send the message that we, to an extent, feel sorry for the remorseful offender, not that we want to be receptive to the offender’s input into the dialogue—his appropriate moral response to his wrongdoing.

In fact, we may go further and claim that certain responses such as compassion, concern, and sympathy in the face of remorse may actually devalue the offender’s response if they were the driving force for mitigation—as if remorse was simply suffering. It is true that we probably do feel more compassion towards the remorseful, in virtue of their appropriate response, which renders them more ‘likable’. However, mitigation is justified because we engage with their response per se, not because the response inspires compassion and an accompanying impulse to want to see them suffer less.

My argument is strengthened if we compare how well the contrasting accounts fit within retributive theories founded on communication and censure. Within my account, the offender’s remorseful input into the dialogue about his wrongdoing results in the mitigation of the censure he receives. I argued that the remorseful offender should be censured less severely, as the dialogical model requires engaging with his relevant input. Thus, mitigation on these grounds functions within the realms of deserved censure and retributive justice. Engaging with the offender’s remorse is internal to the enterprise of delivering censure. Mercy, on the other hand, is external

⁸ JG Murphy, ‘Mercy and Legal Justice’ in JG Murphy and J Hampton, *Forgiveness and Mercy* (Cambridge, Cambridge University Press, 1988) 166, emphasis added.

⁹ A Manson, ‘The Search for Principles of Mitigation: Integrating Cultural Demands’ in JV Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge, Cambridge University Press, 2011).

¹⁰ We might pity an offender who experiences an excessive, pathological, amount of remorse since he suffers to a degree far greater than we would consider appropriate.

to the censure the offender receives—it has nothing to do with blaming. On my account remorse mitigates censure, on the mercy account remorse justifies leniency.

Based on concern for the offender's well-being, mercy was said to temper the punishment the offender could justifiably receive. Exercising mercy does not form part of the censuring dialogue, rather, it distorts it in the direction of leniency. Whereas remorse alters the censure due from the state, mercy has no influence on the content of the deserved censure. Mitigation on the grounds of mercy might communicate that compassion is felt towards the offender, evoked by his remorse. However, this is not a substantive response on the part of the state within the dialogue (following the offender's communication of his remorse), but is an emotional, humane reaction to his upcoming suffering, given his moral distress. On my account a substantive response *is* given through mitigation: 'we hear your communication and accept that you have responded in the appropriate way to your wrongdoing. You already fully appreciate the wrongfulness of your conduct'. On the mercy account, what the offender could infer from mitigation is that his remorse has evoked the charitable concern of the judge.

The Role of Mercy

The above argument does not imply that I think there is no room at all for mercy within sentencing. Rather, I hope to have shown how it is not required within communicative theories as a justification for mitigating the remorseful offender's punishment. Mercy may be much more plausibly justified in cases where an offender is, for example, terminally ill. In such cases, the language of compassion, concern for welfare and sympathy are entirely fitting. Moreover, the message that the offender's circumstances invoke such a response *is* the appropriate message. It would be absurd for the offender's illness to influence the substance of the censure, as it is not relevant to the dialogue about the wrongdoing. In contrast, I argued that remorse, as the offender's response to his wrongdoing, is the ideal relevant contribution the offender can make. Remorse is censure-relevant; illness is not. Mercy is not the most appropriate response to remorse, but it might be to terminal illness.

However, an objector might remain adamant that remorse is a legitimate source of reasons for merciful leniency, suggesting that we might still be merciful to the remorseful offender who has independent (censure-based) reasons for mitigation. This would then have an additive effect when it came to reducing the severity of the offender's sentence. In response to this I would emphasise that receipt of mercy is not a right, and the fact that remorse already serves to mitigate the censure (and hence punishment)

that the offender deserves might remove the (compassion-based) obligation to exercise mercy (if there is one)¹¹ that would otherwise be present. If a judge were to nonetheless exercise mercy and reduce the remorseful offender's sentence further, he would still be acting within the justifications mercy provides, but without obligation. So, I would argue that my account, having justified remorse-based mitigation before a sentencer reaches external considerations of mercy, removes the obligation to further mitigate on independent merciful grounds. Whether mercy is an appropriate response to remorse is not, then, of consequence for my overall argument as, if my justification is accepted, it effectively pre-empts the need for mercy, rendering it unnecessary and without obligation.

This argument requires that my justification is indeed internal to calculations of deserved censure, and that mercy is external, so that the mitigation justified on my account is theoretically prior to that which mercy theorists propose. In what follows, I will further defend this claim to strengthen the argument that an internal account is preferable.

A CLOSER LOOK AT THE INTERNAL–EXTERNAL DISTINCTION

In a more recent paper, Tasioulas examines the boundaries of the internal–external distinction that I have employed when making a case for my account over a mercy-based account.¹² His argument is that, seemingly contrary to my claims, mercy operates *internally* to the logic of punishment. The truth or falsity of this would seem to be crucial to the success of my account. This is because I argued that one of the key strengths of my account is that it is superior to a mercy account as it provides a justification for the mitigating role of remorse that is intimately connected with the operation of censure-based desert. If mercy were to also operate thus, then my account would fail to have this advantage. However, Tasioulas is careful to explain what he means by 'internal', defining the domain to which it relates in broader terms than I do.

After carefully outlining his position, I will explain why my account provides a justification that is more intimately 'internal' than is Tasioulas's mercy account. I will also take issue with a couple of features of his account, questioning whether mercy is even as internal to his concept of penal justice as he believes, showing how his focus on remorse as a ground for mercy makes his case seem stronger than it perhaps is. Instead, the

¹¹ See Tasioulas (n 4).

¹² J Tasioulas, 'Where Is the Love? The Topography of Mercy' in R Cruft, MH Kramer and MR Reiff (eds), *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* (Oxford, Oxford University Press, 2011).

intimate connection with punishment that he establishes for remorse demonstrates its unique status within the set of potential grounds for mercy. It will be argued that the reasons for its uniqueness actually lend support to the contention that it operates differently from other potential grounds for mercy, in a way consistent with my account.

In his paper Tasioulas takes issue with Duff's positioning of mercy as operating externally to the concerns of justice. He seeks to show why Duff is mistaken, pointing to a conflation of two meanings of 'justice'—'retributive' and 'penal'. Whilst mercy *is* at odds with the former, Tasioulas argues that it is compatible with, indeed, internal to, the latter.¹³ We must be very clear about the distinction he draws between retributive justice and penal justice here. In defining *retributive* justice, Tasioulas explains that the content of the retributive norm is that 'it requires punishment when it is deserved as a way of communicating censure for wrongdoing'.¹⁴ The quantum of punishment deserved as censure is proportionate to the gravity of the wrongdoing in question, where the latter is a complex function of the harm that has been caused or risked and the degree of culpability manifested. This is the conception of retributive justice shared by most communicative theorists, including Duff, von Hirsch and Ashworth. Tasioulas then contrasts this conception of justice with a broader one, which he calls '*penal* justice' saying:

[S]ometimes 'justice' refers to the whole of morality, or the whole of inter-personal morality, or (in a more authentically Aristotelian vein), that part of interpersonal morality that may be aptly legalised. Let us, following in the precedent set by translators of Aristotle, call this the concept of 'universal justice', focussing on the third specification just given.¹⁵

He argues that it is this 'universal' sense of justice, rather than retributive justice that is alluded to in expressions such as 'criminal justice' and 'penal justice'. Penal justice extends beyond retributive desert to additional considerations that are thought to have a legitimate bearing on punishment. Thus, if mercy is apt for legal embodiment, then it falls within—is internal to—penal justice: 'for on the understanding of "justice" as interpersonal morality, mercy (like charity generally) *is* part of justice'.¹⁶

Accordingly, whilst Tasioulas agrees with Duff that mercy does not operate inside retributive justice, he wants to show that there is still an important sense in which mercy does operate internally to 'justice'—or, the

¹³ *ibid.*

¹⁴ *ibid.*, 39.

¹⁵ *ibid.*, 40–41.

¹⁶ *ibid.*, 41.

‘logic of punishment’—when justice is understood in the sense that is more naturally implied when people speak of criminal or penal justice.¹⁷

Mercy and its Relationship to Retributive Justice

In explaining his conception of mercy, Tasioulas emphasises that mercy is concerned only with the treatment of those who deserve punishment. As in his previous work (see above), he describes mercy as ‘a source of genuine but defeasible reasons, grounded in proper concern for the welfare of the offender, for leniency towards him, i.e. for punishing him less severely than he deserves to be punished according to retributive justice’.¹⁸ Crucially, in relation to retributive justice, mercy’s reasons do not affect the assessment of the punishment the offender deserves, nor do they confer on the offender a right to more lenient treatment. But, he argues, they influence our judgement of how much punishment, if any, is all-things-considered *justified*.

In order to understand mercy’s relationship to penal justice, we need to establish what it is that makes a particular value count as *internal* to the institution of criminal punishment (penal justice), and thus able to influence the judgement of how much punishment is *justified* (cf deserved).

What Makes a Value Internal to a Conception of Justice?

Tasioulas claims that we should ‘relate the idea of values internal to the institution of punishment to our best account of the justification of that institution’.¹⁹ Although retributive justice is at the core of Duff’s communicative theory, and defines its logic, Tasioulas argues that this does not preclude other considerations from playing a role within this logic (being internal to it), but only on the condition that they are appropriately related to the overarching norm of retributive justice. For Duff, this involves two dimensions: first, the other considerations must bear an ‘appropriate

¹⁷ See also A von Hirsch and A Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford, Oxford University Press, 2005) 168. Von Hirsch and Ashworth also point out a similar distinction between a narrow understanding of justice and a broader all-relevant-things-considered understanding: ‘When one speaks of the “just” sentence, this may denote either the sentence that is just according to all the normal criteria (but which may subsequently be altered to take account of exceptional considerations, such as mercy or equity factors); or else it may refer to the sentence that is just, taking account of every factor with a good claim to affect sentencing (which would include mercy or equity factors). The former is a defeasible concept of justice, whereas the latter is a conclusory concept’.

¹⁸ Tasioulas (n 12) 40.

¹⁹ *ibid*, 43.

constitutive relationship to retributive justice'.²⁰ The second dimension is that the other considerations 'do not, insofar as they pertain to the inner logic of punishment, licence punishing offenders either more or less severely than is required by retributive justice'.²¹ However, Tasioulas believes that these criteria are only true for what is internal to *retributive justice*, and sets out to show how only the former is required for a value to be internal to his broader concept of *penal justice*.

What Makes Mercy Internal to Penal Justice?

With reference to Duff's conditions for internality, presented above, Tasioulas argues that mercy satisfies the former but not the latter. It satisfies the former because mercy is a source of reasons that are dependent on retributive justice: he claims that 'mercy is not a self-standing value, but constitutively parasitic on retributive justice ... and can play a significant role *within* the boundaries set by retributive justice'.²² He argues that the reason for this is that mercy is a dependent value: it can only generate (derivative) reasons of its own when independent reasons of retributive justice to inflict a punishment already exist. If no punishment is deserved, there is nothing to be merciful over.²³

However, the possibility that mercy might justify a less severe punishment than that required by retributive justice means that mercy does not meet Duff's second condition. Tasioulas explains that this interpretation makes sense of why Duff believes that mercy is an 'intrusion' into the inherent logic of criminal punishment, and hence external to it. Such a conclusion would be valid if *retributive justice* were the domain of relevance. However, within the broader notion of *penal justice*, Tasioulas argues that only the former condition needs to be met.

Tasioulas expands on this first condition. Again, this is that considerations can play a role within penal logic (if they bear an appropriate constitutive relationship to retributive justice). He suggests that other facts can be taken into account when determining the level of punishment justified as censure provided these further facts 'display a requisite connection to the wrongful act to make them bear on the question of what is justified *as*

²⁰ *ibid*, 44.

²¹ *ibid*.

²² *ibid*, 46.

²³ I am not sure this is entirely true. I think it is not a mistake to describe the villain who spares his victim, at the last minute, in response to his pleas, as having shown mercy despite his victim deserving none of what has and could have befallen him. However, if we *specify* the context of retributive justice, then mercy only makes sense when an offender receives less punishment than he deserves, necessitating that a particular quantum was indeed deserved. I will therefore concede Tasioulas this relationship of mercy to retributive justice.

censure for wrongdoing'.²⁴ He shows how this is true for repentance as a ground for mercy, explaining that the connection is forged by the fact that repentance is precisely the appropriate personal response to the offender's wrongdoing *qua* wrongdoing. He emphasises:

Indeed, it is precisely the response that the institution of punishment should ideally elicit from criminal offenders. The upshot is that repentance has place *within* the two-way communicative process that is punishment, rather than something that intrudes upon that process from the outside.²⁵

Accordingly, for Tasioulas, the derivative relationship that mercy has to desert—one cannot show mercy unless there is deserved punishment to waive—and the role that the grounds of mercy (such as repentance) play within penal logic, both serve to make mercy internal to penal justice. He justifies the exercise of mercy more generally by emphasising its status as a virtue. According to Tasioulas, mercy is a 'manifestation of a more general value that may be called charity, compassion or impersonal love, a value that characteristically issues in reasons to advance the well-being of others, especially by ministering to their needs or relieving their suffering'.²⁶

Contrasting Mercy with Leniency

Tasioulas further demarcates mercy's internal position by contrasting it with the operation of simple leniency, which he argues occurs externally to the logic of punishment. He says that there are certain grounds for leniency—for punishing people less severely than they deserve according to retributive justice—that are not aptly regarded as forming part of the logic of punishment. Rather than being integral to the 'tailored justification for punishment', they belong to the 'diffuse class of other "all-things-considered" factors that might defeat, in whole or in part, a *pro tanto* case for punishment'.²⁷ He gives examples of possible grounds for leniency citing, amongst others, the offender's having saved thousands of innocent lives; the offer of leniency in exchange for a plea of guilty in order to avoid an expensive and protracted trial; gratitude, as when an offender's punishment is moderated in recognition of their outstanding record of community service; and even perhaps if the offender's medical research were to be on the cusp of finding a cure for cancer.

Tasioulas argues that the intuition that motivates the internalist view of mercy is that the standard grounds for mercy in criminal punishment

²⁴ Tasioulas (n 12) 48.

²⁵ *ibid.*

²⁶ *ibid.*, 40.

²⁷ *ibid.*, 45.

(which he lists as repentance, grief, disadvantaged upbringing and illness) are categorically distinct, not only from the considerations that bear on the level of punishment deserved under the retributive norm, but also from the paradigmatically extraneous considerations cited above. The reason he gives for this is that, although the grounds for mercy do not affect the punishment deserved by the wrongdoer (which on retributive theories should be proportioned to the gravity of their wrongdoing), they nonetheless appear to have an intimate connection with the logic of punishment, unlike such considerations as gratitude, avoidance of protracted trials or non-forestallment of medical breakthroughs.

DOES TASIIOULAS SUCCEED IN POSITIONING MERCY INTERNALLY?

Having mapped Tasioulas's internal–external topography, I will now show that my account still positions the justification for remorse-based mitigation more internally than does Tasioulas's. Further, I will argue that Tasioulas's account does not even achieve what it claims. I will question whether mercy is as especially internal to the logic of punishment as he believes, and show how his focus on remorse as a ground for mercy makes his case seem stronger than it perhaps is. I will argue that the intimate connection with punishment that he establishes for remorse demonstrates its unique status within potential grounds for mercy. The reasons for its uniqueness actually lend support to the contention that it operates differently from other potential grounds for mercy, in a way consistent with my account.

Whilst Tasioulas argues for the operation of mercy as being internal to penal justice but not retributive justice, I argued that remorse-based mitigation operates internally to deserved censure. A dialogical approach to censure, which I argued maximises the legitimacy of the censure, must moderate the censure delivered if an offender has communicated his remorse. Since it is *censure* that is deserved and not punishment per se (although punishment is the preferred means of communicating the censure), remorse operates within retributive justice on communicative retributive theories. Crucially, Tasioulas is not working with a different conception of retributive justice. According to him, the content of the retributive norm is that 'it *requires punishment when it is deserved as a way of communicating censure* (or, as I would rather say, more specifically, blame) for wrongdoing'.²⁸ So we are not talking at cross-purposes: for Tasioulas, too, it is actually the *censure* that is deserved and which must be proportioned to the wrongdoing, communicated through the medium of punishment.

²⁸ *ibid.*, 39, emphasis added.

Problems with Tasioulas's Account

There are problems with Tasioulas's account. Let us recall the key elements of his argument:

1. Mercy is 'internal to the logic of punishment' as it is necessarily parasitic on the concept of desert.
2. Mercy on the grounds of an offender's repentance is particularly justified as repentance is precisely the appropriate personal response to the offender's wrongdoing qua wrongdoing. Thus, it displays the requisite connection to the wrongful act as it bears on the question of what is justified as censure.

Is mercy's parasitic relationship to desert the foundation of its special internal status? Whilst Tasioulas is correct to point out that mercy does bear this relationship—the exercise of mercy to benefit an individual necessarily requires that the individual in question deserves a certain amount of punishment—I do not see that this is different from the way in which leniency in general is related to desert. After all, it seems that *any* species of leniency is parasitic on the notion of desert, since you need to know what the default severity of punishment ought to be before you can amend it in the direction of moderation. Take, for example, the guilty plea *discount*; it can only function as a discount if there is a full price.

The other option is that it is not mercy's relationship to desert that is special. Instead, it could be the relationship that the *grounds for* mercy have to retributive punishment that confer mercy's special internal status. Tasioulas makes a compelling case for the intimate relationship that repentance has with deserved censure as an example of how these grounds operate. However, on closer inspection it seems that, of all the grounds Tasioulas lists, it is only remorse that bears this intimate relationship. Whilst repentance does, as he argues, bear an appropriate constitutive relationship to retributive justice, grief, disadvantaged upbringing and illness do not.

Repentance displays the requisite connection to the wrongful act to make it bear on the question of what is justified *as* censure for wrongdoing. Grief, disadvantaged upbringing and illness, however, do not display any such connection. Perhaps arguments could be advanced in the case of disadvantaged upbringing, such that the offender is somehow less culpable or less tied to the social contract, but this is not the connection that Tasioulas has in mind. The relationship that repentance has with the wrongful act places it '*within* the two-way communicative process that is punishment, rather than something that intrudes upon that process from the outside'.²⁹ Grief and illness have no connection to retributive justice. Tasioulas provides no

²⁹ *ibid*, 48.

arguments as to how they might. He simply states that they have ‘an intimate connection with the logic of punishment’.³⁰

Further, Tasioulas generally seems unprincipled in his approach to what the legitimate grounds for mercy even are. He cites Card’s proposition of giving ‘a bit of compensatory good fortune’ to offenders who have suffered ‘extraordinary severe undeserved misfortunes’ in their lives.³¹ In relation to this consideration he states that it does not fall under mercy, explaining that ‘unlike the classic grounds of mercy, it is not a consideration integral to the logic of punishment’.³² But, it is not clear how undeserved misfortune, as a ground for leniency, is less intimately related to the logic of punishment than is disadvantaged upbringing. Indeed, the latter appears to be a species of the former.

The ‘internal’ group certainly is not homogeneous. Even though Tasioulas goes some way to accepting this,³³ it is still not clear what is special about the grounds for mercy, except, perhaps, that they tend to elicit sympathy, which corresponds with Tasioulas’s conception of mercy as concern for the offender’s welfare, born out of charity, compassion or impersonal love.

Tasioulas’s vacillation between citing *mercy* as being integral to the logic of punishment and citing the *grounds for mercy* as bearing this relationship compounds this confusion. I suggest that he makes a kind of category mistake when he relates both repentance and mercy to the first condition for internality (that the consideration must bear an appropriate constitutive relationship to retributive justice). As argued above, none of the other ‘classic grounds’ that he lists (grief, disadvantaged upbringing and illness) bear the same constitutive relationship as remorse does. So, if he wants to rely on his argument, it is the merciful response to the grounds, and not the grounds themselves that must bear this relationship to punishment. It was also argued, however, that mercy has no closer relationship to the logic of punishment than does leniency more generally.

The Unique Nature of Remorse

As argued above, remorse is the *only* one of the grounds for mercy that has an intimate connection with the logic of punishment. However, I will argue that this connection is to do with deserved censure, not reasons for mercy. Remorse might be a legitimate ground for mercy for other reasons, but it

³⁰ *ibid*, 45.

³¹ C Card, *The Atrocity Paradigm: A Theory of Evil* (New York, Oxford University Press, 2002) 192.

³² Tasioulas (n 12) 47.

³³ *ibid*, 48, n 15. In a footnote he states: ‘in an additional layer of complexity, one should allow that some grounds for mercy (e.g. repentance) might be situated closer to the core than others (e.g. disadvantageous upbringing)’.

cannot be its connection to censure that is necessary for this; if so, no other grounds for mercy would qualify.

For Tasioulas, repentance is ‘a reason for tempering the deserved punishment not on the basis of what the offender deserves or has a right to, but out of a due regard for their welfare’.³⁴ Indeed, he says that since repentance ‘does not come within retributive justice, it seems highly unlikely that it can be anything else [than a merciful consideration]’.³⁵ *Pace* Tasioulas, I have argued that repentance does come within retributive justice, within communicative theories. In fact, the unique way in which Tasioulas argues that repentance is connected to censure—being within the two-way communicative process that is punishment—supports this view. The fact that it is only repentance that operates thus—singling it out from other grounds for mercy—lends support to the idea that it might play a different, unique mitigating role.

Contra Tasioulas, my account shows that repentance is a reason for tempering deserved punishment on the basis of what an offender deserves; Tasioulas’s account seems *prima facie* plausible because of his focus on repentance. This focus on repentance makes his account seem plausible because repentance *does* have an intimate relationship with censure (and hence deserved punishment), which he wrongly extends to the grounds for mercy in general. However, I have shown that repentance is anomalous amongst Tasioulas’s grounds for mercy, and that the reasons for this also render my account particularly plausible.

Summary

I have argued that one of the key strengths of my account in comparison with mercy accounts of remorse-based mitigation is that remorse operates internally to censure-based desert. Mercy, I argued, operates externally to this domain. Tasioulas’s arguments seemed to challenge this, threatening the preferability of my account. However, I have shown that the domain to which Tasioulas argues mercy is internal (penal justice) is more extensive than that within which I situated the mitigating role of remorse (retributive justice).

Further, I have argued that his account is not as persuasive as it first seems, as he focuses on an anomalous ground for mercy and extends its unique characteristics erroneously to all the other grounds for mercy. To save his argument, he would need to show that it is mercy, and not the grounds for mercy, that bears the important relationship to the logic of punishment. I have shown, however, that this relationship is not any truer for mercy than it is for leniency in general, and that recourse to demonstrating mercy’s special relationship to the logic of punishment based on the

³⁴ *ibid.*, 50.

³⁵ *ibid.*

relationship of the grounds for mercy to punishment was circular, as neither relationship was established independently. Finally, it was argued that the anomalous nature of remorse instead invites the possibility of a Responsive Censure account such as mine, which I conclude remains preferable to arguments based on merciful compassion.

FURTHER REASONS TO PREFER MY ACCOUNT

Not only is my account theoretically preferable to the mercy account, it also avoids some of the serious objections that mercy theorists have to deal with. Mercy is often seen as a ‘soft’ response that is in tension with the demands of justice.³⁶ The general argument put forward is that if mercy operates outside the domain of justice then exercising it will produce injustice. Within retributive theories, the seriousness of the offence is set by the harm caused and the offender’s culpability. The offender is censured in relation to this offence in the context of dialogue that, I have argued, should be responsive to any relevant input from the offender. The sanction will then be in proportion to the deserved censure. Remorse, on my account, affects the overall censure deserved; crucially though, remorse does not do so on the mercy account.³⁷ Therefore, by operating to deviate from what is deserved, mercy appears to prevent retributive justice. On my account, mitigation on the grounds of remorse is required by responsive censure.

Further concerns over mercy arise when we consider its application. Whereas on my account mitigation would operate systematically (since it is required), allowing mercy to guide mitigation does not obviously produce this result. Murphy has argued that mercy, as a manifestation of an individual’s sympathy, will be exercised randomly.³⁸ The judicial exercise of mercy is seen as the pursuit of ‘some private, idiosyncratic, and not publicly accountable virtue of love or compassion’.³⁹ As a judge, I may be moved in some cases but not others, and other judges will surely differ from me in their propensities to be moved by remorse.⁴⁰ The general argument is that mitigation on the basis of individuals’ varying sensibilities is likely to

³⁶ Murphy (n 8) 162–83.

³⁷ Tasioulas (n 4) 312: ‘Mercy is a source of *pro tanto* reasons, defeasible in the context of an all-things-considered judgement, for punishing the offender less severely than they deserve. It is not a source of reasons showing that they deserve to be punished less severely’.

³⁸ Murphy (n 8) 183.

³⁹ *ibid.*, 167–68.

⁴⁰ Indeed, such idiosyncratic exercise of mercy is enshrined in the sentencing practices of some jurisdictions. For example, the sentencing manual of Victoria, Australia, cites a Court of Appeal judgment as accepted precedent on the issue of merciful discretion: *Markovic* [2010] VSCA 105, a Full Bench of the Court of the Appeal stated at [1]: ‘There must always be a place in sentencing for the exercise of mercy “where a judge’s *sympathies are reasonably excited* by the circumstances of the case”. This is a proposition of long standing and high authority, repeatedly affirmed in this Court’, emphasis added.

produce unjustified discrepancies in sentencing. Mitigation based on a consistent principle, derived from a dialogical rationale for censure, however, should be applied across the board.

Why We Need a Principle Rather than Merciful Discretion

I have argued that remorse influences the censure an offender deserves, which is established prior to considering reasons to exercise mercy. So, in relation to repentance, mercy-based reasons are redundant (even if they might be otherwise justified—perhaps non communicative versions of retributivism might have recourse to mercy to justify remorse-based reductions). Even if mercy is justified in relation to other factors, such as terminal illness, a consistent principle will always be always preferable if available.

Ashworth speaks to this theoretical preference for articulating a principle if possible. He writes: ‘The problem is that the judicial use of the concept of mercy suggests that the sentence reduction is discretionary [in a way that goes beyond the expected, fair operation of discretion]’.⁴¹ Having cited a case in which the offender suffered from a serious medical condition that was difficult to treat in prison, he argues decisively that it is wrong to regard sentence reduction as a matter that should be left to the discretion of the court. Rather, he argues, that it

must be decided whether, in principle, [a particular factor is one] that should or should not be allowed to affect sentence. If the answer is yes, it should then be for the court, as with other aggravating and mitigating factors, to assess its strength and to give appropriate effect to it. Referring to this as ‘mercy’ suggests a broad discretion, and that is only suitable for really extraordinary cases with unusual features, such as *Schumann*.⁴²

My account has provided such a principle and so, for the sentencing factor of remorse, the exercise of merciful discretion is not needed.

Could Mercy Constitute a Principle?

It could be argued that there is an *obligation* for judges to exercise mercy when faced with a remorseful offender (even though the offender would not have a corresponding right to receive mercy). It could, as Tasioulas would

⁴¹ A Ashworth, *Sentencing and Criminal Justice*, 5th edn (Cambridge, Cambridge University Press, 2010) 191.

⁴² *ibid.* In this case a clinically depressed woman jumped from the Humber Bridge, carrying her young child with her. Although her intention was to kill them both, they survived and the mother kept her child from drowning. Despite pleading guilty to the attempted murder of her child, Lord Phillips CJ held that ‘there are occasions where the court can put the guidelines and the authorities on one side and apply mercy instead’. The sentence of imprisonment was quashed and replaced with a community sentence with a supervision requirement [2007] 2 Cr App R (S) 465.

argue, be an obligation created by the virtuous nature of the charitable concern embodied in mercy; or perhaps simply in the humane concern to be less punitive whenever possible.⁴³ This would give merciful sentence reduction on the grounds of remorse the status of a principle in the sense that Ashworth requires: it should operate systematically and should not be variable from judge to judge. However, further reasons would then have to be given to justify why remorse generates an instance of this obligation. The reason could not be that remorse evokes charitable concern and compassion, as this simply bases the justification for the exercise of mercy on its antecedent feelings.

For Tasioulas, though, mercy is a source of reasons for leniency, reasons that exist for any judge irrespective of his sensibilities. On Tasioulas's account, compassion seems less of an emotion and more of a practice. Remorse provides reason for the practice of compassion. However, despite the potential universality of reasons, there may still be disagreement about whether remorse provides reasons for merciful compassion. Duff raises this concern:

But the realm of practical reasons is, in this as in other contexts, a realm of rational conflict: the claims of mercy conflict irremediably with the demands of justice. That conflict is rational, in that it is a conflict between sets of reasons each of which have proper claims on us as agents; but it does not always admit of rational solutions that leave no moral remainder of legitimate but unsatisfied claims. Justice is not served by mercy; but sometimes it is properly defeated by mercy.⁴⁴

The search for adequate reasons for systematic exercise might then lead to proposing a justice-friendly principle, such as that undergirding the practice of responsive censure. But, if this were the case, it is not clear what extra work mercy does, other than suggest that the already justified mitigation (justified by an account such as mine) might be accompanied by feelings and messages of compassion and concern which would then only serve at most to present the institution of criminal justice as less soulless (which may not be a bad thing).

CONCLUSION

My discussion in this chapter has examined the Merciful Compassion argument for the mitigating role of remorse at sentencing. In particular, I have attempted to show that, even if mercy were to justify lenient treatment of the remorseful offender, this justification is redundant due to the theoretical priority of establishing deserved censure, a claim that I have

⁴³ This is often referred to as the doctrine of 'penal parsimony'.

⁴⁴ RA Duff, 'The Intrusion of Mercy' (2006) 4 *Ohio State Journal of Criminal Law* 361, 387.

defended above. I have argued that censure is at its most legitimate when it is attentive to the offender and so should be sensitive to his communications about his offence. When it is remorse that is communicated—the response censure seeks—the quality of the censure must change in response. This is reflected in the sanction imposed to communicate the censure. Estimating the harshness of the censure deserved is prior to any considerations more external to retributive justice. Whilst merciful compassion may still have a role to play in exceptional cases, principled sentencing should be the rule, where possible. On the Responsive Censure account I have developed, the remorseful offender receives principled mitigation.

This chapter concludes the first part of the book. In the next part I examine the implications that my normative conclusions have for sentencing practice. Examining the practical implications of a normative argument serves to prompt reflection on its validity. I argue that implications of the Responsive Censure argument both reveal deficiencies in some aspects of sentencing guidance and render convincing the theoretical position itself.