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## Should We Be Merciful to the Merciless—Mercy in Sentencing

Doron Menashe

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# SHOULD WE BE MERCIFUL TO THE MERCILESS— MERCY IN SENTENCING

Doron Menashe\*

## ABSTRACT

*The aim of this Article is to present a normative argument for mercy as a legitimate consideration in judicial proceedings, defining it as a distinct and independent element not encompassed by normal concerns of justice, retribution and individuation of sentencing.*

*The Article addresses two meanings of mercy in the judicial context, both of which have—in the view of the author—a rightful part in the process of judgment and sentencing. These are “mercy” in the weak sense, i.e., a deliberative state of mind which accompanies the judicial proceedings (“Lesser Mercy”), and “mercy” in the strong sense, i.e., the judicial prerogative of taking into account, under appropriate circumstances, mercy towards the defendant once convicted, as a deviation from strict retribution (“Greater Mercy”).*

*The Article presents the different approaches one may find in academic literature pertaining to the validity of considering mercy in court, and the relationship between justice and mercy.*

*The Article begins with the basic moral intuition as to the merit of mercy. From this point of departure, the Article deals with the various criticisms raised against the legitimacy of considering mercy in the judicial context. In the normative analysis, the Article points to the need of formal justice to accommodate the particularistic circumstances of every incident. Although some have argued that this function should be met by equity, the Article argues that mercy is better suited because rational-analytical considerations may prove insufficient in this context.*

*The Article also argues that the judge’s prerogative to determine under which circumstances to employ mercy towards the defendant does not contradict*

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\* Associate Professor, Faculty of Law, University of Haifa.

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*the responsibility and duty of the judge to impartiality. On the contrary, mercy lives harmoniously with and epitomizes the social values that every judge should represent.*

INTRODUCTION .....	551
I. CONCEPTUAL DISTINCTIONS OF MERCY .....	554
A. <i>General Definition of Terms</i> .....	554
B. <i>Mercy in the Weak Sense (“Lesser Mercy”)</i> .....	555
C. <i>Mercy in the Strong Sense (“Greater Mercy”)</i> .....	557
D. <i>True Mercy in Sentencing Based on the Assumption of Specific Legal Liability (the Existence of an Incriminating Findings, their Type and their Degree)</i> .....	559
E. <i>Mercy Toward the Convicted Party Is not a Vested Right</i> .....	562
F. <i>Mercy Emerges from a Perspective Recognizing the Principle of Retribution</i> .....	563
G. <i>Mercy Serves as a Balancing and Tempering Factor in the Judicial Context</i> .....	566
H. <i>Mercy Is Neither Equivalent to Forgiveness nor Dependent upon Forgiveness</i> .....	566
I. <i>The Argument for Mercy Is Not a Call to Adopt a Blanket Policy of Lenient Sentencing</i> .....	567
II. THE EXISTING DEBATE ABOUT THE PLACE OF MERCY IN COURT .....	568
A. <i>Principles of the Legal Debate about Sentencing</i> .....	568
B. <i>The Main Approaches in the Legal Discourse on Mercy in Judicial Proceedings</i> .....	571
III. CRITICAL ANALYSIS: TENSION BETWEEN THE CONCEPT OF “JUSTICE” AND THE CONCEPT OF “MERCY” .....	573
A. <i>General Overview</i> .....	573
B. <i>The Conceptual Argument</i> .....	573
C. <i>The Argument of Arbitrariness</i> .....	578
D. <i>The Argument of the Source of Authority</i> .....	581
E. <i>The Emotional Argument</i> .....	583
F. <i>The Antinomian Argument—The Inapplicability of a Moral Imperative to Emotional Reactions</i> .....	586
G. <i>The Argument of Undermining the Principle of Guilt</i> .....	587
H. <i>The Consequential Argument</i> .....	588
I. <i>The Argument of Compassion for the Victims</i> .....	589
J. <i>The Argument of Human Pride and Dignity</i> .....	591
K. <i>Summation of Critical Analyses</i> .....	592
CONCLUSION .....	592

## INTRODUCTION

It appears that there is no better point in which to discuss the concept of mercy, its definition, its moral and social purpose, and its limits, than when a judge determines the fate of a defendant. Ironically, legal scholars seem to shun any debate or discussion on mercy's role in the courthouse setting. This is no accident. At sentencing, the judge's discretion may be quite broad, and there is a perpetual tension between the judicial system's tendency to present the verdict's result as a "correct" and "just" legal decision; a product of objective analysis; and a consequence of calculated discretion which emerges from the rule of law, on one hand, and the fact that, the work of sentencing is profoundly human, sensitive work based on particular considerations and subjective impressions on the other.<sup>1</sup> The yearning for a strict formalization of punishment criteria<sup>2</sup> as a tool for reaching certainty and legitimacy in legal decisions

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<sup>1</sup> For an analysis, see JEROME FRANK, COURTS ON TRIAL 405–07 (Anthem 1966) (1949). This tension is found in the writings of both Plato and Aristotle. In his earlier writings, Plato describes the ideal state as one in which those with superior intellect rule on the basis of rationalism. Under this perspective, differences between people and acts do not allow for the adoption of a simple universal law. Thus, he concludes that the law alone cannot determine the most proper response. In his latter writings, Plato reaches the conclusion that this ideal is not pragmatic, and so he moves to the opposing extreme: Rule by government based on irrevocable, unchanging laws. Aristotle, on the other hand, defies the strict dichotomy of governing by intellect and governing by inflexible laws. Aristotle claims that the tension may be resolved by leaving the application of general laws to specific circumstances in the hands of judges or other appointees. *Id.*

In terms of the solution that Aristotle suggests, as expressed in the Anglo-American legal tradition, the constant tension between Plato's two diametrically opposed views remains. Jerome Frank, a supporter of legal realism, writes of the "irrepressible human need for considerable personalization of justice." *Id.* at 409. His suggestion is to avoid, as much as possible, creating laws with the illusion of negating judicial discretion. *Id.* He quotes George Alger: "The question is this: How long will it be before the pendulum will swing to the other extreme—the demand for personal justice administered by the good man as a substitute for our endless barren wilderness of precedents in law and a maze of indigestible statutes? The final hope for democracy must be, not in its letter law, but in its leadership." *Id.* at 408.

<sup>2</sup> See e.g., U.S. SENT'G GUIDELINES MANUAL §3E1.1 (U.S. SENT'G COMM'N 2018). Adopted as a result of the United States Sentencing Commission under the Sentencing Reform Act of 1984, the guidelines were intended to put to rest widespread criticism of sentencing disparities in the U.S. judicial system by providing for more consistent and determinate sentencing; as opposed to indeterminate sentencing, whereby the ultimate word on time served would more generally fall on a parole commission, the guidelines abolished parole for federal offenses. *Id.* Drawing on case-law and existing state guidelines, the Federal Sentencing Guidelines sought to codify sentencing criteria already in use by state judiciaries by regulating the consideration of offense levels, criminal history and sentencing zones, *inter alia*, as well as mitigating factors and criteria for leniency. *Id.* at Ch. 1, pt. A. It is noteworthy, for the purposes of this Article, that the Guidelines were ruled unconstitutional under the U.S. Supreme Court's 2005 ruling in *United States v. Booker* and succeeding cases, which determined that binding federal judges to such criteria violated the Sixth Amendment's guaranteed right to a trial by jury. 543 U.S. 220 (2005); AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION, U.S. SENT'G COMM'N 2 (2011), [https://www.ussc.gov/sites/default/files/pdf/about/overview/USSC\\_Overview.pdf](https://www.ussc.gov/sites/default/files/pdf/about/overview/USSC_Overview.pdf). As a result, while federal judges are still required to consider the dictates of the Guidelines when sentencing, they are not considered to be bound by them in issuing their rulings. *Id.* Similar attempts to codify sentencing criteria can be seen in other countries, see generally, The Goldberg Committee Report issued in Israel (the Committee for

challenges the ideal of flexible and sensitive human judgment which does not emerge from mathematical generalizations.<sup>3</sup>

This tension between the yearning for equality in sentencing and leaving a necessary place for particularistic considerations in the verdict exists even when one's sole objective is the realization of justice. It becomes even stronger when one evokes the concept of mercy, which appeals to emotion and may have subjective understandings and applications. Even if it is not explicit, the struggle with the question of mercy's place in the process of justice is certainly relevant.<sup>4</sup>

The concept of mercy in the judicial context is described in the legal literature as a weakness, a display of sentimentality where distant rationality is required, or an indulgence when a fitting penalty is required. The judge is seen as shrugging off his social responsibility and authority in order to employ dangerous arbitrariness, or perhaps even a subversive deviation from the sublime realization of justice. Thus, it is a defect in justice.<sup>5</sup> Critics note that mercy has no role in criminal cases, because in the best-case scenario, the particularistic circumstances of the act or the defendant are subsumed under the heading of "justice," so that there is naturally no need to resort to "mercy" as a valuable consideration of independent significance. If incorporating mercy leads the court to a less severe result than that required by law and justice, it is indefensible.<sup>6</sup> There are those who go quite far in condemning mercy in the context of criminal punishment: "Let them keep *their* [private] *sentimentality* to themselves for use in *their* private lives with *their* families and *pets*."<sup>7</sup>

However, such a negative and dismissive view of mercy is interpreted by many, in a deep and intuitive way, as a deficient and simplistic solution.

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Examining the Assemblage of Judicial Discretion in Sentencing—Reckoning (Jerusalem, Tishrei 5758–October 1997), wherein limitations were established for proportionate sentencing, and *origin* and *aggravating* components were defined for specific crimes by a designated committee. Daniel Ohana, Sentencing Reform in Israel: The Goldberg Committee Report, 32 ISR. L.REV. 591, 626–28 (1998).

<sup>3</sup> The structural nature of judicial discretion in sentencing is beyond the scope of this Article. For a description of the structural nature of judicial discretion in sentencing, see e.g., HAIM COHEN, *HAMISHPAT* (1992).

<sup>4</sup> See Robert Weisberg, *Apology, Legislation, and Mercy*, 82 N.C. L. REV. 1415, 1415–16, 1421 (2003–2004). Weisberg explains that "[l]egal systems implicitly struggle with these questions rather than explicitly answering them." *Id.* at 1415–16. He states that "[i]t is possible to study a legal system by observing how it agonizes over the relationship of justice to mercy, or how it consciously or unconsciously rationalizes the relationship between the two, or how it exploits the inherent tension between them for instrumental purposes" *Id.* at 1421.

<sup>5</sup> See Jeffrie G. Murphy, *Mercy and Legal Justice*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY*, 162 (1988); cf. Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421 (2004).

<sup>6</sup> *Id.* at 174.

<sup>7</sup> *Id.* (emphasis added).

Generally, those who embrace the concept of morality see mercy as a positive human trait, certainly in the abstract.<sup>8</sup> Turning mercy from virtue to vice in the context of criminal justice, in which the individual is affected drastically and fatefully, is not self-evident, and it raises a line of conceptual and moral questions. Indeed, the tension between justice and mercy is a subject dealt with by philosophers, authors, playwrights, and thinkers, religious and secular alike.

It is perhaps ironic that in law, where the ultimate realization of this dilemma manifests, we see the most hesitation to directly address it. Other than in certain outlying cases, the discussion of mercy in law tends to revolve around two main approaches: 1) a skeptical, dubious approach to the role of mercy in judicial proceedings; and 2) attempts to resolve the tension between these concepts by proposing that legitimate considerations of mercy are already incorporated into other concepts, such as the concept of justice, and that therefore mercy can be reduced to these concepts.<sup>9</sup> While thinkers debate and struggle, the legal community for the most part avoids engaging in open, frontal contention with this important dilemma, the silence is deafening.

This Article will argue mercy is integral to criminal justice and punishment. This Article will examine two conceptual perceptions of mercy: mercy in the “weak sense,” being a deliberative state of mind which accompanies judicial proceedings; and mercy in the “strong sense,” being a judicial prerogative for committing an act of grace towards the convicted party independent of the principle of retribution. In fact, there is nothing preventing the court from accounting for considerations of mercy in judicial proceedings, and courts that adopt such an approach do so well within their authority.

In arguing for mercy in the weak sense, this Article will point to the fact that this state of mind—regarded as an effort to view the proceeding through the eyes of the defendant and to understand their position—is a matter of necessity in the criminal justice system. It is essential precisely because of the wide discretion granted to the court, and the relatively weak determinacy of legal rules. Since the court cannot be fully guided as to the appropriate result by mere analysis and the application of rules, the court must be instructed as to the appropriate state of mind required for reaching a decision.

As for Greater Mercy, this prerogative does not contradict the responsibility and the mission of the court. Instead, Greater Mercy both merges with and is derived from these principles. Mercy in this strong sense is a moral consideration

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<sup>8</sup> “[M]ercy seems to be, in the abstract, an undeniable virtue.” Weisberg, *supra* note 4, at 1417.

<sup>9</sup> See “Conceptual argument,” and the references there *infra* Section III.B.

that on the one hand does not undermine justice, while, on the other hand, preserves its independent agency and cannot be fully incorporated into the concept of justice. Indeed, this Article recognizes that taking into account certain types of circumstances as grounds for lenience on the basis of Greater Mercy often constitutes only an intermediate stage of the process that is prior to the judicial process's formal recognition of the relevance of all circumstances pertaining to substantive justice. However, it is our view that there are strong reasons to see the terms "justice" and "retribution"—when used in the judicial discourse as referring to formal justice—as distinct from substantive justice. Mercy is therefore needed as a complementary consideration to bridge the gulf between formal and substantive justice, even if one subscribes to the view that substantive justice exhausts all the morally relevant considerations of punishment.

Following the recognition of the legitimacy of mercy's considerations, this Article will advocate for an open and explicit legal discourse as to the place of mercy in the judicial process. This discourse should be aimed at developing a comprehensive normative and conceptual foundation for mercy in the legal process, beyond the lines of thought included herein. This should be an open and independent discussion. There is no reason to scorn considerations of mercy as if they were somehow inappropriate or illegitimate.

The argument posed herein will be structured as follows: in Section I, this Article will present conceptual distinctions between Greater Mercy and mercy in the weak sense. In Section II, this Article will review the relevant academic literature. Section III will be dedicated to normative law and addressing the critics of the independent status of mercy in judging and sentencing.

## I. CONCEPTUAL DISTINCTIONS OF MERCY

### A. *General Definition of Terms*

Conceptually, "mercy" may have several different meanings. It relates to a wider family of concepts, including love, grace, compassion, forgiveness, charity, generosity and the like.

The common denominator of these concepts is a difficulty to define them in deontological terms as a perfect duty though they may be laudable.<sup>10</sup> They do not support correlative rights. In Aristotelian terms, they cannot be included in

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<sup>10</sup> Some have suggested viewing it as an *imperfect duty*. See George Rainbolt, *Mercy: In Defense of Caprice*, 31 *Noûs* 226, 231 (1997).

the concept of justice (whether corrective or distributive). These characteristics create a tension between these concepts and those that have a clear deontological status such as justice. This tension is exacerbated in interactions between the state and the citizen, wherein the judge acts as a representative of the public. In this institutional context, does the judge have any right to show mercy in the name of the people, and, perhaps, even at their expense? What is the moral value of mercy granted in this way?

However, the mere existence of such tension—which raises difficult questions that will be addressed below—does not negate, in and of itself, the positive elements of these “imperfect” virtues and their power for good in the judicial context.

The focus of this work relates to mercy, the product of human empathy and compassion towards others in their distress, as opposed to pity which entails an expression of superiority over the weak.<sup>11</sup> That being said, this Article will not actively distinguish between mercy and other similar concepts such as grace or compassion, since this distinction is irrelevant to this thesis concerning the legitimacy of mercy in the judicial process.<sup>12</sup>

Instead, this Article will concentrate on the two senses of mercy, which are employed daily in the courthouse, whether openly or inexplicitly. Though there is a connection between these two senses of mercy, each is based on a different expression of the judge’s duty. The first sense relates to the state of mind the judge must seek to adopt, if only for a moment, while listening to the arguments about the defendant—an internal, almost spiritual endeavor. The second sense, on the other hand, assumes that the judge has the residual prerogative to take certain actions.

Below, this Article will sharpen the distinction between these two senses of mercy in the context of criminal jurisprudence and will clarify the scope of mercy using various conceptual distinctions.

### *B. Mercy in the Weak Sense (“Lesser Mercy”)*

As noted above, the first sense of mercy examined here is mercy in the weak sense. The essential characteristic of this definition is that mercy cannot be

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<sup>11</sup> See discussion of pride *infra* Section III.J.

<sup>12</sup> Aaron Ben-Ze’ev distinguishes between pity, compassion and mercy. AARON BEN-ZE’EV, *THE SUBTLETY OF EMOTIONS* 333 (MIT Press 2000). The first two involve sympathy for the other who is suffering, while mercy is defined as preventing the other’s suffering even when one has justification not to do so. *Id.* at 327–28.

judged by parameters of action or result. *A priori*, this does not suggest leniency, and its adoption in a certain case does not lead necessarily to a light sentence. This sense is based on the sober understanding of judgment and sentencing as a humane, delicate and complex labor. This process requires the ability to consider the defendant as a person to be understood, because the question of whether a specific circumstance falls within certain legal parameters is not merely an intellectual endeavor; it also requires a specific state of mind.

As clarified below, even at the stage preceding the verdict, mercy in the weak sense has its place. One may term this a “mercy-like” state of mind, since there is reason to assign a separate name to the stage preceding the verdict. In this stage, mercy in the weak sense entails a degree of empathy, and an understanding of the criminal proceedings’ ramifications for the defendant. In sentencing, Lesser Mercy reflects a predisposition to express a certain approach towards the defendant that allows the act of judgement and sentencing to be influenced by thoughts, presumptions and emotions of a certain type.<sup>13</sup> This perspective seeks to guarantee that one will form a more complete and humane contemplation of the situation and the offender before they take punitive action. A similar conception of mercy is proposed in the literature:

In a sentencer’s process of selecting a sentence from within a range of authorized punishments, mercy is a frame of mind induced by the imaginative effort to see both the impact of the possible sentences and the nature of the criminal conduct from the defendant’s perspective.<sup>14</sup>

This merciful approach towards the convicted criminal in proper judicial proceedings is dependent on the ability to express empathy while recognizing the offender’s accountability.<sup>15</sup> This empathy requires careful analysis of multiple viewpoints: the suffering awaiting the offender and their family members, the entirety of the circumstances under which they committed the crime, and the subjective significance of the punishment from the offender’s standpoint. Often, these considerations are ignored in the pursuit of justice, thus justifying the introduction of an additional perspective: that of mercy, which fulfills an external, complementary function, in the hopes of guaranteeing moderation and balance.

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<sup>13</sup> See Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 SETON HALL L. REV. 288, 316 (1993).

<sup>14</sup> *Id.* at 329 (presenting the American view of jurisprudence, in which guidelines are set in law which reinforces judicial discretion).

<sup>15</sup> See also Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 103 (1993).

Though it is distinguished from mercy in the strong sense, this does not diminish from the importance of mercy in the weak sense. The terminology merely reflects a lesser degree of tension between it and the concept of justice. Lesser Mercy is an obligation of the court which does not necessarily entail a deviation from the principles of retribution or justice, on the contrary, it aids in their proper application.

In light of this weakened tension, many writers have claimed that this type of mercy is effectively superfluous, since the obligation to weigh the personal circumstances of the defendant exists in any case, therefore, this suggested meaning of mercy would in fact be an inherent part of the obligation to realize justice in its full sense.<sup>16</sup> As opposed to these commentators, who have difficulty seeing any innovation in the requirement to apply mercy in the weak sense, this Article argues that this sense of mercy characterizes an autonomous moral imperative which is separate from the obligation to consider personal circumstances. There are powerful reasons to conceptualize Lesser Mercy as distinct from *individuation*. Lesser Mercy directs the court to a deliberative process which integrates rational consideration with the heart and soul—a necessary mindset for the proper utilization of the court’s discretion. Lesser Mercy emphasizes the mental basis and conscious effort needed for the act of judging, and it views the act of judging as a human interaction. Stressing the independent meaning of Lesser Mercy will yield unique insights into the judicial process derived from the meaning of mercy, as will be demonstrated below.

### C. *Mercy in the Strong Sense (“Greater Mercy”)*

What is Greater Mercy, or *true mercy*? Greater Mercy is a residual discretion of the court which allows for a departure from the accepted margin of proportionality in the direction of leniency in rare and exceptional circumstances.<sup>17</sup>

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<sup>16</sup> See discussion *infra* Section III(B)

<sup>17</sup> This definition is similar to that of Fox:

The true privilege of mercy is to be found in the residual discretion vested in each sentence which allows a downward departure from the principle of proportionality outside the principles of mitigation. It can be utilized in exceptional circumstances to allow weight to be given to factors which are ordinarily not regarded as relevant mitigating considerations. It allows sentencers to give effect to significant, but as yet unaccepted, circumstances which, in their opinion, warrant leniency.

Richard G. Fox, *When Justice Sheds a Tear: The Place of Mercy in Sentencing*, 25 MONASH U. L. REV. 1, 13 (1996).

This prerogative is based on the assumption that there is a complementary but independent function to mercy in the framework of adjudication. There are circumstances which may be taken into account when trying the defendant that are nonetheless not practically—nor appropriately—accommodated in the framework of proportionality. From a substantive, expressive viewpoint, consideration of these circumstances does not intrinsically deny the need for proportionality and retribution, but rather, stems from recognition of the unique, unusual nature of a situation in which the standard punitive result produces a *prima facie* inequitable result. This prerogative is designed to provide the judge with an independent, legitimate tool for the discretionary moderation of the retribution awaiting the offender. The judge has the authority not to apply the law to its fullest extent at times, to choose in a given case not to make exhaustive use of the full institutional power at their disposal, in light of considerations which justify accounting for the emotion of compassion aroused within their heart. The uniqueness of this type of mercy emerges, as noted above, from recognition of the residual discretion to lighten the punishment outside of the accepted margin of proportionality. Nevertheless, the use of this authority is not meant to be random and idiosyncratic, rather, the judge must rely on concrete and relevant considerations for mitigating punishment.

Distinct as they may be, it is worth noting the connection between the two types of mercy: Greater Mercy is derived of Lesser Mercy. The implementation of Greater Mercy to deviate from the accepted margin of proportionality cannot be achieved without accessing a state of mind which recognizes the place of the defendant's viewpoint in the process of sentencing, or without the arousal of compassion which comes from the abovementioned stance.

The plea for Greater Mercy inspires some contention among the authors, who see a tension between mercy, on the one hand, and the principles of proportionality and the obligation to impartial justice on the other. But while there is tension between these positions, there is also a productive dialogue between them as well. Each has both substantive and expressive significance.

This Article's criticism of the call for Greater Mercy relates to two issues: First, Greater Mercy reduces considerations of mercy into the conceptual realm of justice and equity, thus rendering mercy a redundancy;<sup>18</sup> Second, due to that same reduction, it delineates a boundary beyond which any further consideration for leniency for the defendant is understood as a weakness and as misappropriation of judicial authority. This results in anything which might be

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<sup>18</sup> This is the conceptual argument, which will be expanded in Section III.B, *infra*.

associated with mercy being disguised as a consideration of justice—even though its application remains, in practice, non-binding, and for the most part given over to the court’s discretion—avoiding any explicit reference to the value of mercy.

The first result of this conflation is that the judicial message is obscured. While the reduction of the typical considerations of mercy into the framework of justice allows one to present the ideal as consistent with objective adjudication and equality, the human element, which is affected by compassion and mercy, inevitably dominates the task of passing judgment, but is not recognized as a legitimate and explicit cause of action.

The second result of this line of reasoning concerns the second half of the argument, which negates any additional consideration for leniency that deviates from the principle of proportionality. This part of the argument may discourage the dynamism and development that considerations of mercy allow, limiting the defendant to the delineated and narrow framework of concerns absorbed over the course of time into the law. This view misses the historic dynamic process by which what was once an ad hoc application of mercy may become a precedent for the future, allowing the development of general principles of moderate sentencing in the framework of law. This dynamic begins with a feeling of discomfort at the sentence required by law, which then leads to deviating from the letter of the law as an act of grace, finally, at its conclusion, as similar cases pile up, a new norm is formed, constituting an inseparable part of formal justice. The conceptual separation in law between justice and mercy is needed in order to protect this dynamic and its flexibility.

*D. True Mercy in Sentencing Based on the Assumption of Specific Legal Liability (the Existence of Incriminating Findings, their Type and their Degree)*

The basic assumption of Greater Mercy is a finding of guilt after an impeccable judicial proceeding, leading to a verdict appropriate in its type and degree. Only in this context does Greater Mercy belong. As Nathan Brett writes:

If mercy plays any role in the determination of sentences, it is not in either of the steps which lead to the judgment of culpability. For mercy is (logically) parasitic upon a judgment of culpability. In showing that a crime was less serious than others much like it, and in arguing that a

defendant had a defense that law recognizes, one could not be arguing for mercy. These are strictly related to the question of culpability.<sup>19</sup>

There should be a distinction among the three stages in determining a sentence for a criminal act.<sup>20</sup> The first stage is diagnosing the relative severity of the offence. The second stage is to investigate the existence of mitigating factors. In these two stages, even if the court finds a reason to be lenient, it is not a case of Greater Mercy. Mercy is expressed in these stages only as Lesser Mercy, i.e., as a particular state of mind. It is forbidden for the court to ignore defenses (complete or partial) which are recognized in law and relevant to determining the degree of guilt, including the degree of mens rea, the level of involvement, the motivations and the circumstances of the defendant. The defendant has the full right to demand proportionality and equality. Leniency based on these considerations is mandatory and is part of retribution.<sup>21</sup>

It is only in the third stage, that of sentencing, that Greater Mercy may also be expressed, when the court takes into account circumstances that have not yet been recognized as relevant in the accepted margin of proportionality or weighs them in a manner deviating from their weight in the accepted margin of proportionality.<sup>22</sup>

It is worth reiterating that consideration of factors that diminish the degree of guilt is not equated with mercy, since these factors have already been assimilated into the legal framework. Further, in regard to a significant proportion of the defenses recognized by law, one may point to the historic evolutionary process. Even before concepts such as self-defense, infancy, insanity were codified, these situations were considerations for leniency or pardoning by the institutions (such as the king) vested with the power to pardon.<sup>23</sup> This grants an additional perspective on the function of mercy in

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<sup>19</sup> Nathan Brett, *Mercy and Criminal Justice: A Plea for Mercy*, 5(1) CAN. J.L. & JURIS. 81, 91 (1992).

<sup>20</sup> *Id.* at 90–92.

<sup>21</sup> See generally Mordechai Kremnitzer & Tatjana Hörnle, *Human Dignity and the Principle of Culpability*, 44 ISR. L. REV. 115 (2011).

<sup>22</sup> This Article argues that the courts make such an analysis in a certain manner. See, e.g., CrimA 32/14 Amash v. State of Israel, Nevo Legal Database (Sept. 17, 2015) (Isr.). There, Justice Sohlberg ruled that the craft of sentencing is not an exact science. *Id.* It is a difficult, personal, and delicate craft, which varies from one matter to another. The court must balance different and conflicting considerations, and give each of them its proper weight in the circumstances of the case in question—the public interest versus the interest of the individual, the principles of adequacy, retribution, and rehabilitation, and justice given the degree of mercy.

<sup>23</sup> Fox, *supra* note 17, at 8, and 47–49 (describing a similar process in terms of expanding the objective defenses for mercy killing and the killing of domestic abusers). Indeed, the origin of the concept of affirmative defense in Common Law is in a process whereby, after the defendant had been found guilty without the possibility of presenting witnesses and evidence, he could appeal to the king for some degree of clemency. For harsh penalties (capital or corporal punishment), clemency was liberally granted. With the passage of time,

justice (whether in the framework of adjudication or in the framework of the discretion of the prosecutor or of another authorized body): mercy is the residual authority to moderate the severity of the letter of the law, and it enables a process learning, evolution, and reform. Thus, some of the circumstances that, to date, can only be recognized as grounds for mercy, one day may be incorporated into the law. In this dynamic process, moderating the severity of the law on the basis of considerations outside the accepted margin of proportionality ultimately leads to moderation of the accepted margin of proportionality itself.

Mandatory considerations recognized by criminal defenses as ground for acquittal or diminished culpability, or that are recognized considerations within the framework of the accepted margin of proportionality, do not preclude an additional layer of leniency on the grounds mercy, in light of individualistic circumstances. Time and again, the legal terms prove insufficient, reflecting only general doctrinal (and sometimes utilitarian) concerns which do not give adequate response to the cognitive dissonance that arises from the sentence, or the individualistic need to rein in punishment on account of difficult and unusual circumstances.<sup>24</sup>

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legislation sought to limit this phenomenon, leading to the codification of arguments for the defense. This is how the concept of criminal culpability evolved into modern jurisprudence. For a fascinating survey, see THEODORE F.T. PLUNCKNETT, *A CONCISE HISTORY OF THE COMMON LAW*, 438, 442–51 (5th ed. 1929).

<sup>24</sup> Take, for example, a case in which a person stabs his good friend to death with no explanation and no motive, and a psychiatric evaluation determines that the assailant had no firm grasp on reality, had paranoid thoughts and was in a psychotic state due to the use of narcotics (while still understanding his actions and the difference between right and wrong). Based on his degree of mens rea, he is convicted of manslaughter, and not murder. In accordance with this argument, the author does not believe that merely seeking the lesser charge has exhausted all potential considerations for leniency in the process, given a case wherein it is deemed appropriate to seek mercy and possible reevaluation of the defendant.

An example of similarly appropriate circumstances can be found in the infamous, *R. v. Latimer*, [2001] S.C.R. 1, 3 (Can.). In this case, a father was found guilty of killing his severely disabled daughter in what he termed a mercy killing. *Id.* Initially convicted of murder in the second degree, the case was thrown out over jury tampering in the appeal, and subject to a retrial. *Id.* In the second trial, the lower court granted a sentence far below the minimum required for the charge, arguing that the special circumstances of the case warranted it. The Saskatchewan Court of Appeals overturned this verdict, increasing the sentence to the minimum ten years. *Id.* at 11. The Supreme Court upheld this ruling on appeal, arguing that considerations of the circumstances of the case had already been accounted for in the framework of the rights afforded the accused. The Supreme Court held that considerations of mercy were an inherent component of the rights that had already been exercised on behalf of the defendant, such as the reduction of the charge, the right to protection from cruel and unusual punishment, and the jury nullification that had been implemented in the initial appeal. *Id.* at 14. The Supreme Court also specifically mentioned the presidential right of clemency as a measure of last resort for exceptional cases. *Id.* Thus, it ruled out mercy as a valid consideration in further reducing the sentence.

Another relevant example can be seen in SCrimC (DC TA) 1028/06 *State of Israel v. Dolensky*, Nevo Legal Database, PM 5768(4) 2396(2007), wherein a sentence of 18 years' incarceration in practice was handed down. The district court held that, "The defendant's mental state was already accounted for as grounds for converting the charge from murder to manslaughter, not as a matter of grace, as the accuser claimed, but as a right of the defendant under the principles of Penal Law. Thus, there is no place to account for the mental state

Thus, the application of mercy does not negate the finding of guilt and the degree of culpability. In *The Merchant of Venice*,<sup>25</sup> William Shakespeare creates a situation which illustrates this dilemma well.<sup>26</sup> According to the plot of the play, Shylock acts fully in accordance with his legal rights. In Shylock's hand is a contract which allows him to collect a pound of flesh from the body of the borrower, Antonio, the sanction for not paying off the loan, and justice stands on his side. On the other hand, the execution of the law in a literal way will bring a severe injury to Antonio, who beseeches Shylock to show mercy and to waive his claim.

The stated dilemma between mercy and justice only arises once we recognize the validity and binding nature of the sanction by law. Therefore, alongside Portia's famous speech, in which she explicates "the quality of mercy,"<sup>27</sup> she utterly rejects all of the appeals to ignore the validity of the debt, since this debt is legally binding.<sup>28</sup>

In modern legal systems, one would assume that considerations of justice would cause the invalidation of the contract, since such a term runs contrary to the *Public Policy*.<sup>29</sup> However, the example brought in the play nonetheless succinctly elucidates how the application of mercy assumes the recognition of a powerful and just claim according to positive law, or in our case, the existence of guilt, which renders the defendant deserving of punishment.

#### *E. Mercy Toward the Convicted Party Is Not a Vested Right*

It is common to describe mercy as an act of grace. Greater Mercy is not characterized by a set of rights and duties. Rather, this Article argues that a fundamental characteristic and definition of Greater Mercy is that an offender

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of the defendant beyond this." *Id.* at 2409 (author's translation).

<sup>25</sup> See generally WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*.

<sup>26</sup> This play is a resource for any who write about the conflict between justice and mercy. See Fox, *supra* note 17, at 7; Muller, *supra* note 13, at 307–10; RICHARD A. POSNER, *LAW AND LITERATURE—A MISUNDERSTOOD RELATION* 93 (1988); Trisha Olson, *Pausing Upon Portia*, 19 J.L. & RELIGION 299 (2003); Frank Kermode, *Justice and Mercy in Shakespeare*, 33 HOUS. L. REV. 1155 (1996); Stephen P. Garvey, "As the Gentle Rain from Heaven": *Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989 (1995).

<sup>27</sup> SHAKESPEARE, *supra* note 25, act 4, sc. 1.

<sup>28</sup> *Id.*

<sup>29</sup> Some examples of similar statutes from around the world include "Good Morals" in German, Dutch and Italian law. *Compare* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], §§ 138, 826 (Ger.), and Art. 3:40 paras. 1–3 BW (Neth.), and 1343 C.c. (It.), with Contracts Law, 5733–1973, § 31, (Isr.); see also D.D. Prentice, *Illegality and Public Policy*, in CHITTY ON CONTRACTS 937–1056 (H.G. Beale ed., 2004); POSNER, *supra* note 26, at 93–94. By the end of the 16th century, such contractual penalties would have been anachronistic, making Shylock's claim a plot device. *Id.*

has no right to mercy and cannot demand it. At most, one may request or petition for mercy. There is never an obligation to act mercifully towards a specific person.<sup>30</sup>

This characteristic of Greater Mercy is that which gives rise to the argument that Greater Mercy is arbitrary<sup>31</sup> because law prefers to deal with a defined set of rights and duties. Since the defendant cannot claim mercy as a vested right, he cannot demand equality of results as compared to another defendant who enjoyed an act of grace. Nonetheless, while there may be no duty to act mercifully, this does not mean that the judge is free to ignore entirely the value of Greater Mercy as a moral principle.

This Article will address the critique of arbitrariness below.

*F. Mercy Emerges from a Perspective Recognizing the Principle of Retribution*

Murphy explains that to consider the possibility of issuing a reduced sentence from the “just-deserts” standard, we must first accept the validity of the principle of retribution.<sup>32</sup> Before we can deviate from the concept of retribution in the framework of Greater Mercy, we must recognize the existence and the power of the principle of retribution as a guiding consideration in punishment. This clarification of Murphy is significant. The concept of mercy presupposes the idea of moral responsibility. It is not designed to undermine the principles which direct the sentence, nor to empty them of content. The argument for the legitimacy of Greater Mercy calls for the integration of considerations outside the principle of retribution as additional, balancing, moderating concerns, but it does not come to deny the power of the principle of retribution in itself.<sup>33</sup> On the

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<sup>30</sup> See Murphy, *supra* note 5, at 166.

<sup>31</sup> See discussion *infra* Section III.C.

<sup>32</sup> See Murphy, *supra* note 5, at 166.

<sup>33</sup> By contrast, in a utilitarian theory of punishment focused on deterrence, it seems hard to argue for mercy. For an analysis, see Muller, *supra* note 13, at 291–96. To explore the utilitarian-economic analysis of this punishment, see ROBERT COTTER & THOMAS ULEN, *LAW AND ECONOMICS* 445–78 (4th ed. 2004). In this theory of punishment, accepting the defendant’s request for mercy has value only in terms of indirect consequential benefits. It is not made out of mercy or compassion. Indeed, we shall proceed to examine some beneficial consequences born of mercy. However, it is the author’s view that mercy and compassion are not quantifiable, such that calling for the integration of mercy in law cannot be based on a given consequential consideration. In this context, one should note the difference between mercy and leniency out of concern to the defendant’s rehabilitation. The considerations of rehabilitation are based (perhaps solely) on the real public interest of preventing recidivism. Mercy, on the other hand, focuses on moderating the injury to the defendant, without any compelling public interest (less the perceived interest of adhering to the norm of mercy in and of itself).

contrary, a legal system which attributes importance to the principle of retribution may recognize the important function which Greater Mercy fills as well. The retributive theory of punishment is distinguished from the utilitarian theory of punishment in that it places at its center the principle of human dignity.<sup>34</sup> The punishment is a response to a crime. It does not consider the individual a tool to advance society's goals of deterrence.<sup>35</sup> The theory of retribution is based on moral balance. At its foundation stands the central idea of protecting the unique status of a person as a free autonomous actor who can make rational choices.<sup>36</sup> The justification of punishment emerges from the requirement for moral balance and reciprocity.<sup>37</sup> The offender is seen as someone who inequitably shrugs the yoke of obedience to the law, violating the moral balance among individuals in society. However, the sentencer must take into account not only the victim's dignity and autonomy, which require retribution, but also the dignity and autonomy of the offender, this balance being expressed through the avoidance of cruel, extreme or humiliating sentences.<sup>38</sup> Even when judicial authorities act in the victim's interest, they seek to protect the human value and dignity of the offender.

Muller explains that retribution does not promote a one-sided argument for revenge, but rather, an argument for even-handed justice.<sup>39</sup> In his view:

At the very core of the Kantian notions of human dignity and autonomy is the principle of respect: no individual may be the subject of condescending, mocking, insulting, patronizing, or demeaning consideration by another or by society. . . .

Retributivism therefore demands a sentencing method that obliges sentencers to treat criminals as the unique individuals that they are. This demand necessarily goes unmet in a rigid sentencing regime that drives out discretion in favor of a blind and faceless uniformity. A true retributivist, committed fundamentally to respecting the autonomy of all human beings, cannot say to a defendant in good faith, "I will take you seriously as a human being, but I will only do so by reference to the category you occupy on a predetermined schedule."<sup>40</sup>

This argument emphasizes the importance of the individualization of punishment and avoiding a rigid categorization. Since these considerations are

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Muller, *supra* note 13, at 296.

<sup>40</sup> *Id.* at 304–05 (citation omitted).

optional and dependent on the judicial perspective—grounded on a wide expanse of possibilities in the verdict—realizing a proper and just sentence is contingent on adopting the appropriate state of mind, that invoked by the application of Lesser Mercy. This state of mind is designed to balance the scales and prevent overestimation of the pure considerations of retribution. It ignores both the weight of the possible injury of the sentence upon the defendant and the defendant's relatives, and the subjective factors which relate to the execution of the crime which must be weighed when determining punishment.<sup>41</sup> Internalizing the moderating effect of Lesser Mercy prevents the court's erroneous reliance upon a simplistic understanding of the concept of retribution. Its significance lies, among other purposes, in restraining the impact of retribution upon the autonomous status and dignity of the convicted criminal.

Nevertheless, for Greater Mercy as an act which deviates from the principle of proportionality, there would appear to be no place in the view of *pure* retributive justice. To justify employing it, an additional argument is required—namely, that despite the importance of retribution, one must recognize that it is not the be-all and end-all, but only one of a broader range of concerns in determining criminal punishment. Recognizing the existence of the judicial consideration of Greater Mercy, which allows for the reduction of the punishment even below the margin of proportionality, is based on the understanding that judges should be guided by the principle of retribution. At the same time, they must recognize values and considerations outside the principle of retribution,<sup>42</sup> and the limitations and deficiencies of the stated principle. Recognizing the possibility of being merciful in cases where a sense of compassion is aroused means realizing that neither harsh justice nor strict utilitarianism possess the means to express all the basic values of our society.<sup>43</sup> Greater Mercy qualifies the formalistic concept of justice. This also reminds us that the overarching purpose of the law is not only retribution, but the harmonious synchronization of superior values, such as conserving and nurturing normative and positive community ties and fostering a reality of mutual respect, hope, and readiness to sacrifice.<sup>44</sup>

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<sup>41</sup> *Id.* at 335.

<sup>42</sup> Brett, *supra* note 19, at 92.

<sup>43</sup> *See generally* Olson, *supra* note 26, at 309. Compare this to the approach of Posner, who sees mercy as expressing a transition from formalistic, draconian and primitive justiciability to more flexible and fair parameters based on the principles of equity. Posner does not argue on behalf of Greater Mercy. POSNER, *supra* note 26.

<sup>44</sup> *See generally* Olson, *supra* note 26, at 323. Olson writes the following about Portia's words: "Her speech on mercy . . . catches us by the throat, enkindles us in reminding us that law is, at its loftiest and highest, a living bond that requires humility, sacrifice, and risk commingled in the quality we call mercy and likely subjecting us to a bittersweet kind of suffering." *Id.* (internal citation omitted).

Greater Mercy, when it comes to qualifying the principle of retribution and proportionality, indicates that the legal system itself, in expressing justice, is not separated from society and its other elements. The system has the power to express humane considerations as well: compassion, grace, and forbearance. These in turn restrain vices—e.g., rage and revenge. Recognition of the legitimacy of Greater Mercy emerges from the existence of a possible gap between the proper results in a theoretical sense, in a world in which only the letter of the law exists and its concrete meanings, alongside the attribution of value to humanity and compassion in the heart of the judge. Even a judge, like any human, may be endowed with humane vision, and may feel distress when justice seems to demand an exaggerated or absurd result.<sup>45</sup>

#### *G. Mercy Serves as a Balancing and Tempering Factor in the Judicial Context*

Murphy denies the existence of a morally autonomous value of mercy:

[Mercy] is a virtue that tempers or “seasons” justice – something one adds to justice (the primary virtue) to dilute it and perhaps, if one takes the metallurgical metaphor of tempering seriously, to make it stronger.<sup>46</sup>

Murphy does not recognize the value of mercy, and he discusses it in a manner that trends between skeptical and cynical. Nevertheless, he inadvertently expresses the role of mercy in this context well. Depending on the perspective, mercy can be seen to dilute justice, but at the same time, to temper it.

#### *H. Mercy Is Neither Equivalent to Forgiveness nor Dependent upon Forgiveness*

There is a difference between mercy and absolution. Forgiveness is a change in attitude towards the offender. It is an expression of overcoming injury and preparedness to be freed from feelings of anger or hatred towards the offender.<sup>47</sup> It may be part of the process of restorative justice, as a step prior to taking merciful actions, but forgiveness is not a necessary condition without which

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<sup>45</sup> See generally LINDA ROSS-MEYER, *THE JUSTICE OF MERCY* 86 (2010). In her book, Ross-Meyer suggests a process of compromise designed to unite the defendant and the victim in internalizing the severity of the act and encouraging a process of remorse and caring. *Id.* Here, mercy mediates the victim-centered societal perspective of punishment and the defendant-centered perspective. *Id.* This approach advocates reconciliation at the expense of retribution.

<sup>46</sup> Murphy, *supra* note 5, at 166.

<sup>47</sup> Jean Hampton, *The Retributive Idea*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 111, 157–58 (1988).

mercy is untenable.<sup>48</sup> Forgiveness expresses a decision to overcome feelings of anger and consider the offender as a moral person who is not necessarily bad. On the other hand, mercy is applied while still holding on to the view that the offender carries responsibility and deserves retribution.<sup>49</sup> Compassion is not forgiveness for the crime but waives the severest punishment to the extent the law allows.

Forgiveness is first and foremost the issue of the victim, it expresses the victim's emotional relationship towards the offender and their willingness to forgive. It is thus questionable whether another can forgive in the victim's name. However, a person who carries an institutional role with the authority to apply sanctions and to exercise authority and control, has the status to take actions which express mercy.<sup>50</sup> Incorporating the victim into the process of sentencing, as well as advancing the process of asking for forgiveness, forgiving and reconciliation may allow for a more complete mending process, which will influence the considerations of punishment. In this process, mercy towards the offender is also based on the value of repentance and the change in the victim's emotional state. However, one must distinguish between mercy and forgiveness.

### *I. The Argument for Mercy Is Not a Call to Adopt a Blanket Policy of Lenient Sentencing*

It is appropriate to conclude this chapter by clarifying the relationship between considerations of mercy and questions of severity or leniency in the policy of sentencing.

The argument for mercy should not be seen as a suggestion for general leniency in sentencing. Indeed, applying mercy may lead to leniency in punishment, but there is a difference between the result of specific circumstances and sweeping general leniency in punishment. Determining the appropriate level of punishment in the criminal setting should be a political decision for the democratically chosen representatives of society. This decision is influenced by different factors, and it is legitimate as long as the punishment is proportional and not cruel. Greater Mercy is reserved for unique and special circumstances, and it is not applied as a sweeping policy. It is not designed to preclude severe sentences when such are warranted.<sup>51</sup> It is our belief that even one who advocates

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<sup>48</sup> Fox, *supra* note 17, at 6.

<sup>49</sup> Hampton, *supra* note 47, at 158.

<sup>50</sup> See Murphy, *supra* note 5, at 167.

<sup>51</sup> One may claim that, particularly when the sentence is moderated from the start, the judge will not need to resort to mercy. Conversely, if strict punishment is the default setting, there may be stronger conflicts and

for more severe punishment generally may recognize the importance of the prerogative to moderate the punishment in cases which arouse compassion in the heart of the judge. Recognizing the legitimacy of mercy (in both senses presented in this Article) does not mean that leniency towards the offender is the default setting. Our argument for mercy is for the legitimacy of a given kind of consideration, a kind of perspective and possible actions pursuant thereto, not an argument for a sweeping policy with deliberately lenient consequences.

## II. THE EXISTING DEBATE ABOUT THE PLACE OF MERCY IN COURT

### A. *Principles of the Legal Debate about Sentencing*

To further contextualize the discussion of the role of mercy in justice, this Article first recalls a number of prominent features of the development of the legal discourse, albeit in a limited capacity.

This Article intends to use the example provided by Israeli law, both for reasons of convenience and owing to its rough approximation of the state of affairs of other legal systems (such as that of the United States) in this regard. Under Israeli law, the order of priorities in sentencing has not been definitely determined by legislation. Indeed, there is not even a unified theoretical basis of the purpose behind sentencing: Deterrent, utilitarian, preventative, and rehabilitative aims are all important but often confused, frequently, no one consideration comes to the forefront.<sup>52</sup> The essential characteristic of the

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paradigmatic cases for utilizing mercy in specific circumstances. This is all based on the assumption that there is some ideal sentence, such that when the gap between it and the prescribed sentence appears grows, the potential for mercy also grows.

<sup>52</sup> See, e.g., CrimA 8897/99 John Smith v. State of Israel, HCP 58(3) 487, 500 (2003) (Isr.); CrimA 4890/01 State of Israel v. John Smith, HCP 56(1) 594, 601 (2001) (Isr.); CrimA 3004/98 State of Israel v. Shabtai, HCP 55(3) 577, 581–82, 585 (1998) (Isr.).

A similar divergence can be seen in US case-law. See generally Thomas Orsagh, *The Judicial Response to Crime and the Criminal: A Utilitarian Perspective*, 1 J. QUANTITATIVE CRIMINOLOGY 369, 382 (1985). The conclusions of this meta-study failed to produce a clear focus in terms of the salience of one of the aforesaid considered purposes, the utilitarian purpose, in sentencing. Similar conclusions are reached by, Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 83 (2005); Christine Chamberlin, *Not Kids Anymore: A Need for Punishment and Deterrence in the Juvenile Justice*, 42 B.C. L. REV. 391 (2001); Gordon A. Martin Jr., *The Delinquent and the Juvenile Court: Is There A Place for Rehabilitation?*, 25 CONN. L. REV. 57 (1992).

A clear retributive focus can be seen from the deliberations in *Gregg v. Georgia*, 428 U.S. 153 (1976), which seems to expressly reject the consideration of a more utilitarian mindset in applying the death penalty. See also *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008). While representing a general restriction of the death penalty, these cases also seem to link this finding to a strictly retributive interpretation, whereby capital punishment can only be justified as the just-deserts of a crime resulting in death. On the other hand, the U.S. Supreme Court has also seemed to contradict this focus by upholding the need for individuation of sentencing in capital cases—as demonstrated in *Woodson v. North Carolina*, 428 U.S.

discussion of punishment is the wide discretion which is usually given to the court for determining the verdict. For most crimes, the legislature determines a maximum sentence which the court cannot violate, but it does not set mandatory minimums.<sup>53</sup> The work of making the punishment fit the crime (or the criminal) requires a clear field of judicial discretion, which cannot be activated in a vacuum, nor arbitrarily. The judge's labor is a concrete application of the law and its spirit in fitting the punishment to the unique circumstances of the crime and the criminal, balancing relevant considerations for leniency and stringency. The judge is led by precedent—i.e. by concrete rationales and policies which have been found in prior rulings—and, similarly, by a range of considerations evaluated in light of the evidence and the specific circumstances of the case. The principle of individuation of punishment, which allows the court flexibility in weighing the concrete circumstances unique to the case, is essential in Israeli law.<sup>54</sup>

In recent years, some debate has arisen over the proposal of “originating sentences” (akin to mandatory minimums, though not specifically set as the lower limit, so much as a general reference point) to guide the judge, along with predefined considerations for stringency or leniency.<sup>55</sup> However, no legislation in connection with this dialogue has passed into law to date.

At present, there still is a wide range of discretion at the judge's disposal in respect to sentencing. However, this reality also sharpens the difficulty of distinguishing between exigent and essential considerations of sentencing in the

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280, 303 (1976), marking a departure from retributive justice. These approaches have foundations in the history of U.S. courts. “It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” *Koon v. United States*, 518 U.S. 81, 113 (1996); *see also* *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937) (“For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.”).

<sup>53</sup> Though, as noted, this approach has seen recent challenges in the efforts of some legislatures to reestablish faith in the consistency and legitimacy of sentencing. *See generally* Ohana, *supra*, note 2 (referencing the Israeli Goldberg Committee and the US Federal Sentencing Guidelines). It is also worth noting that mandatory minimums often do exist for the most severe crimes, as in Section 300 of the Israeli Penal Code, Penal Law, 5737–1977. Even in cases where Israeli law does provide for such sentencing minimums, it will usually grant the court an opening for discretion under extenuating circumstances, to be recorded. This is compared to more liberal use of such sentencing elsewhere, *see* U.S. Anti-Drug Abuse Act of 1986, 21 U.S.C. 801, and its consequences on the U.S. justice system in general.

<sup>54</sup> *See*, the important ruling of the Israeli Supreme Court in *Leave of Criminal Appeal 3173/09 Pragin v. State of Israel 1, 3* (unpublished, May 5, 2005) (Isr.) (explaining that the court negated the policy of “tariff punishments” for crimes involving illegal entry into the country while reinterring the indispensability of the principle of individuation of punishment).

<sup>55</sup> *See, e.g.*, Ohana, *supra* note 2, at 625.

framework of the conception and application of “justice,” and the considerations of sentencing which relate to concepts such as mercy or pity.

Another factor to be considered is the fact that, in recent years, the Israeli public has called, sometimes quite loudly, for harsher sentencing.<sup>56</sup> This has not gone unnoticed by legislators and judges, resulting in a noticeable trend towards severity in sentencing. This tendency finds expression in:

- 1) The assignment of greater weight to narrow retributive considerations as a point of departure for sentencing, such as by requiring an appropriate relationship between the severity of the crime (from an essentially categorical-conceptual viewpoint) and the measure of sentencing deviation due to unique circumstances for leniency;<sup>57</sup>
- 2) The significant bolstering of the discussion of victims’ rights, as expressed in the procedural integration of crime victims in presenting evidence for the issue of sentencing, and emphasis on the rationale of protecting victims and their rights in sentencing;<sup>58</sup> and
- 3) The attribution of greater importance to practical considerations of deterrence.<sup>59</sup>

Even in the Knesset, a number of draft bills have been proposed aiming to increase the severity of sentences.<sup>60</sup> The calls for stringency, and the tendency

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<sup>56</sup> See Amnon Maranda, *Mazuz: Punishment in Israel is Too Lenient in Many Cases* (Dec. 21, 2009), <https://www.ynet.co.il/articles/0,7340,L-3822927,00.html>.

<sup>57</sup> It may be that the “principle of retribution” and “proportionality” in legal discourse is not based on Kantian rationales, but rather the general tendency toward harsher sentencing.

<sup>58</sup> See, e.g., Crime Victims’ Rights Law, 5761-2001, SH 2830 (Isr.). For a review of the case-law perspectives on the law’s effect on the standing of crime victims in the criminal trial, including the impact thereof on the matter of sentencing, see HCJ 5699/07, *Jane Doe v. Attorney General*, HCP 2008(1) 2954 (2008) (Isr.); HCJ 5961/07, *Jane Doe v. State Prosecutor*, HCP 2007(3) 4611 (2007) (Isr.).

Around the same time, we can observe a parallel process developing with the legislation of the Crime Victims’ Rights Act as a part of the Justice for All Act of 2004, 18 U.S.C. § 3771. This demonstrates a similar focus on exacting a fitting restitution for the victims of crimes.

These processes can themselves be seen as a natural evolution of the national internalization process resulting from the ongoing development of these concepts in international law. See, e.g., G.A. Res. 40/34, 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Nov. 29, 1985).

<sup>59</sup> See, e.g., 3173/09 *Pragin v. State of Israel* (2009) (Isr.) (emphasizing deterrence while rejecting individual circumstances has become more prominent in recent years, but not without some resistance). For a reference of this same movement expressed in American law, see *Kennedy v. Louisiana*, 554 U.S. 407, 444 (2008).

<sup>60</sup> Beyond the general movement, there have been specific attempts to determine mandatory minimums for a wide range of crimes, including sex crimes, abuse of minors and seniors and a long list of other offenses in Israeli law. See, e.g., Israeli Penal Code Bill (Amendment- Stricter Punishment for Attacking a Medical Staff), 2018 (P/5164/20), Israeli Penal Code Bill (Amendment- Stricter Punishment for Assaulting a Minor or Helpless

to equate a fitting verdict to a “tough” verdict, form the wider context of our present effort to analyze the attribute of mercy, which possesses the promising potential to moderate and balance these inclinations.

Notwithstanding the consideration of these various factors, customary legal discussion of sentencing is characterized by rhetoric which attempts to bridge the desire to grant verdicts an objective image—expressing the idea of the rule of law and the principles of justice and equality—and the exigency of responding to specific considerations. Among these are human considerations external to the characterization of the crime and the degree of involvement and guilt in its commission. These considerations include the sentence’s effect on the criminal, their age, regret, sincerity, difficult life circumstances, unique motives, and the emotional impact of the verdict.

### *B. The Main Approaches in the Legal Discourse on Mercy in Judicial Proceedings*

In the literature, there are three essential approaches to mercy in sentencing. The first is the rejectionist approach, which argues that in sentencing, every morally relevant consideration is encompassed in the concept of justice. Therefore, any further act of leniency defies the law and represents a case of unjust and unequal treatment.<sup>61</sup>

The second common view is the reductive view, which tries to resolve the conceptual tension by creating a formulation of justice which will include mercy, thus granting more limited significance to the concept of mercy.<sup>62</sup> This approach dilutes the impact of mercy, sometimes reducing it to taking account of the particular circumstances of the offender, while distinguishing between this consideration and the exigent objective consideration of the circumstances of the crime and the level of guilt.<sup>63</sup> There are those who argue that mercy is analogous to equity,<sup>64</sup> i.e., the “*rectification of law where it fails through generality.*”<sup>65</sup> This

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Person), 2018 (P/5830/20), The Counter-Terrorism Bill (Amendment- Stricter Punishment), 2018 (P/5541/20), and Israeli Penal Code Bill (Amendment- Stricter Punishment for Assaulting Social Workers), 2018 (P/5540/20).

<sup>61</sup> See, e.g., Yaniv Waki & Yoram Rabin, *Constructing Judicial Discretion in Punishment: A Snapshot and Reflections on the Future to Come*, 2 HAPRAKLIT 413 (2013).

<sup>62</sup> Nussbaum, *supra* note 15; POSNER, *supra* note 26, at 93; H. Scott Hestevold, *Disjunctive Desert*, 20 AM. PHIL. Q. 357 (1983); H.R.T. Roberts, *Mercy*, 46 PHILOSOPHY 353 (1971); James Sterba, *Can A Person Deserve Mercy?* 10 J. SOC. PHIL. 11 (1979); Steven Sverdlik, *Justice and Mercy*, 15 J. SOC. PHIL. 36 (1985).

<sup>63</sup> Brett, *supra* note 19, at 83.

<sup>64</sup> See, e.g., POSNER, *supra* note 26, at 98–99 (arguing the source of the concept of equity, a tool for the accepted development of jurisprudence, is found in Aristotle’s approach to justice).

<sup>65</sup> Jack B. Weinstein, *Justice and Mercy—Law and Equity*, 28 N.Y. L. SCH. L. REV. 817, 818 (1984)

view leads to the distinction between legitimate mercy (within the framework of the legal system) and illegitimate mercy (vigilantism). There are also those who support the definition of mercy in the legal argument not as an act, but as a frame of mind or bearing which the judge must adopt in the context of deliberations, similar to our definition of Lesser Mercy.<sup>66</sup>

Some claim that the distinction between the former and latter approaches—the former negating the application of mercy in the legal process—is only semantic.<sup>67</sup> This author disputes that notion. Proclaiming the significance of mercy in judicial deliberation as a basic element is important in its own right. It opens the door to legitimizing leniency based on an appreciation for the defendant's viewpoint, even by showing compassion beyond the categorical, objective considerations relevant to the determination of the degree of guilt.

These approaches can provide, at best, a weakened case for mercy, rather than a comprehensive argument.<sup>68</sup> The concept of mercy remains limited in the framework of this definition. Indeed, this author believes that no conception of mercy that is limited to the role of mere equity could be considered complete.<sup>69</sup>

The third approach is the positive view, which claims that mercy functions differently from justice or equity. This approach (“true mercy”)<sup>70</sup> rests on the residual right of deliberation, which allows the court to deviate from the principle of retribution, consistent with this Article's concept of Greater Mercy. Mercy as a prerogative does not express a general policy, but is applied in specific and unique circumstances, when the otherwise ostensibly appropriate sentence arouses discomfort. People recognize the possibility of imposing on the offender a sentence more lenient than that apparently mandated by the letter of the law or the margin of proportionality.

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(citation omitted).

<sup>66</sup> Muller, *supra* note 13, at 320, 329.

<sup>67</sup> See generally Brett, *supra* note 19.

<sup>68</sup> Olson writes the following of Shakespeare:

Equity is simply a more refined application of the law to a given situation which fills in the gaps and cracks left open by the virtue of law's generality. . . .

What 'Merchant' proposes . . . is that a conflict will always remain impassive to just resolution when justice is understood to be giving each his due.

Olson, *supra* note 26, at 314.

<sup>69</sup> Which is not to negate the importance of these considerations in the framework of sentencing, even if not specifically as those elements representing the contribution of mercy.

<sup>70</sup> Fox, *supra* note 17, at 13–14.

While this Article has outlined above three salient approaches to mercy in judicial proceedings, theories in this regard are many and sundry.

### III. CRITICAL ANALYSIS: TENSION BETWEEN THE CONCEPT OF “JUSTICE” AND THE CONCEPT OF “MERCY”

#### A. *General Overview*

The moral value of mercy is intuitively inferred. Therefore, the question that must be addressed is not, what good does mercy serve?, but rather, the reverse: what is wrong with incorporating mercy (as an independent factor) in sentencing? Critics such as Murphy argue strenuously that mercy in justice is filled with paradoxes, in light of the ultimate inability to reconcile mercy with justice.<sup>71</sup>

This Article analyzes nine arguments for precluding mercy from the process of sentencing (naturally, there is some overlap among them).<sup>72</sup>

#### B. *The Conceptual Argument*

There is, firstly, a certain conceptual tension between justice and mercy. The coexistence of these two concepts creates an apparent paradox, since, if mercy allows for deviation from justice, does it not necessarily create injustice?<sup>73</sup> This paradox is not merely intuitive, but only intensifies when applied to the debate over the moral status of virtues and obligations.

The most explicit formulation of this criticism is provided by Muller, who presents the following question: “if justice is a moral virtue, and mercy” serves to constrain justice, then how can we consider mercy a virtue? For a virtuous person, a moral virtue is not a matter of choice, it presents an obligation to act in a certain way. How can one act virtuously by hedging virtue?<sup>74</sup>

In the context of justice, the judge must consider all of the relevant moral concerns, including by distinguishing between different cases on the basis of their circumstances. In Murphy’s view, when the judge chooses to be lenient

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<sup>71</sup> See Murphy, *supra* note 5.

<sup>72</sup> In that manner, it should be mentioned, first and foremost—that justice is a recognized consideration in judgment. And so ruled Justice Alon in CrimA 1399/91 Leibovitch v. State of Israel 47(1) PD 177 (1993) (Isr.): “For the scales, we are allowed as judges, to add a certain amount of mercy [. . .] but only a certain amount.” *Id.* at § 14 (authors translation).

<sup>73</sup> Fox, *supra* note 17, at 2.

<sup>74</sup> Muller, *supra* note 13, at 288.

based on these varying circumstances, they are not being merciful, but rather, applying a principle included in justice (or, in other words, preventing injustice). Thus, the further consideration of mercy reflects a redundancy. Alternatively, if, after weighing all of the relevant moral considerations, the judge chooses to be lenient for reasons of mercy, this would be an immoral act against justice because “[m]ercy is at best a redundancy, and at worst a vice.”<sup>75</sup>

To refute these seemingly convincing arguments we must first examine two basic assumptions that underpin them. One assumption is that justice includes all relevant moral considerations. This assumption is necessary to their rejection of Greater Mercy as a legitimate consideration in the judicial process. The second assumption is that there is no need to distinguish between different mental processes with different contributions to sentencing. This second assumption is what leads them to rejected Lesser Mercy as an extraneous redundancy.

Let us examine this second assumption: Even if formal justice were to include all of the relevant moral considerations in the given case, there would still be reason to distinguish among the judge’s mental processes. Alongside intellectual considerations, there is a place for being open to emotional considerations and their influence. The reason for this is twofold. First, there is an intrinsic value in Lesser Mercy, even when its application does not ultimately alter the result. Second, in most cases, the intellectual considerations are not sufficient to determine the court’s course of action in each case. After considering these possibilities, it is clear that even the proper employment of rules based on formal justice alone requires the adoption of the appropriate judicial state of mind. This would mean that Lesser Mercy is not redundant at all, on the contrary, Lesser Mercy is exigent, because it contributes something beyond rationalistic considerations. It allows the court to examine the defendant from a position that is capable of expressing identification, empathy, and compassion.

Returning to the first assumption, whereby justice includes all relevant moral considerations. This premise, as well, cannot be accepted without caveat because the assumption is only valid as it relates to substantive, absolute justice. Only with respect to substantive justice can one assume that it encompasses all moral considerations.<sup>76</sup> This is because courts do not apply substantive justice, but

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<sup>75</sup> *Id.* at 301.

<sup>76</sup> Indeed, there is room for speculation as to whether there may yet be moral considerations which, in principle, are immune to incorporation as a set rules, and therefore lie beyond the boundaries of substantive justice. This author poses that it is impossible to negate the existence of moral considerations which are immune

formal justice, which does not and cannot include all possible moral considerations. At times, deviating from formal justice may even be considered commendable.

Indeed, many of those who deny mercy in the judicial process recognize that formal justice must accommodate particularistic circumstances, but designate this as a complementary function which moderates the severity of law on the basis of equity,<sup>77</sup> which act as a certain type of charity.<sup>78</sup> Proponents of this approach assert that recognition of the moral requirement of equity in the judicial process renders mercy in justice superfluous.

However, the argument seems insufficient. Equity is ostensibly based only on rationalistic considerations, and excludes mercy being open to emotional considerations. It is our belief that Greater Mercy should fulfill the function of moderating formal justice, employing a deliberative process which integrates rational and emotional considerations. This belief is based on the recognition that there is a need for judges to have an appropriate state of mind to apply principles and considerations which have their place in formal justice because of their under-determinacy. This need only grows when the court deviates from the path of considerations recognized and anchored in law. In other words, this Article proposes that the full and appropriate realization of the function of moderating formal justice is not possible if the court's considerations are confined to the narrow limits of rational, analytical considerations. Those who sit in judgment should be open to considerations stemming from feelings of empathy, sympathy, compassion, and so forth.

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to the formulation of rules and principles, as codifying them obscures their true nature. This view has much in common with moral particularism, see Jonathan Dancy, *Moral Particularism*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed. 2017). For a deeper analysis, see JONATHAN DANCY, *ETHICS WITHOUT PRINCIPLES*, 7, 11–12 (2004); Gerald Dworkin, *Unprincipled Ethics*, 20 *MIDWEST STUD. PHIL.* 224, 225, 226–27, 228, 235–36 (1995). We would like to thank Professor Enoch for pointing this connection out to us.

<sup>77</sup> POSNER, *supra* note 26, at 98–99. Aristotle stresses equity serving as a moderating function in terms of the formulation of rules and principles. According to this view, the ideal of legalistic justice may turn out to be imperfect in terms of the ideal of absolute justice when the rule must be applied to particularistic circumstances. See Aristotle, *Nicomachean Ethics*, Book v, 1137b1–6, in *THE COMPLETE WORKS OF ARISTOTLE 1729, 1795* (Jonathan Barnes ed., 1984). See also Allan Beever, *Aristotle on Equity, Law, and Justice*, 10 *LEGAL THEORY* 33, 35–36 (2004). A legal view which demands the strict application of general principles cannot realize justice at all times. In Aristotle's view, the gap between the legalistic ideal of justice and the ideal of absolute justice is bridged by equity, a moral requirement which fixes imperfections which spring from severe applications of the requirements of justice. It has even been posited that "equity is justice's rebellion against law." See John Gardner, *The Virtue of Justice and the Character of Law*, 53 *CURRENT LEGAL PROBS.* 149, 168, 173–74. (2000). This indicates that justice itself is comprised of components that exist in tension with one another.

<sup>78</sup> See Murphy, *supra* note 5, at 162.

There is normative precedent that supports the association of the moderating function specifically within Greater Mercy, creating a kind of dualist system wherein mercy and justice exist as independent but complementary concepts. Thus, for example, associating the moderating function of formal justice with mercy reduces the danger that formal justice will be confused for absolute, substantive justice. It also allows for the dynamic process of the historical perspective, whereby leniency “beyond the letter of the law,” over the course of many years, becomes law, the norm which was determined before to be “beyond the letter of the law” transforms into a principle which is compelling and binding principle, even doctrinaire.<sup>79</sup> Recognizing the moderating function of mercy allows a developmental process of study and repair, wherein that which *ab initio* seems to be mercy external to justice may turn out to be an inseparable part of the rules employed within the framework of justice.

This dual system also allows the court, as a social institution, to consider the known categories of circumstances that are difficult to consider in the framework of formal justice, such as the defendant’s remorse. This Article will briefly digress to demonstrate the issue of the status and validity of remorse at the time of sentencing has interested many scholars.<sup>80</sup> Still others oppose the inclusion of this consideration owing to the immoral incentive to express remorse outwardly only, as part of “the new culture of apology” which encourages a justice system that functions as an assembly line.<sup>81</sup> There is no doubt that, in the framework of the existing judicial process, it is difficult to distinguish between moral, sincere remorse and utilitarian remorse, which does not spring from an internal, subjective feeling.<sup>82</sup> Scholars such as Murphy claim that the existing justice prefers style over substance in this regard, i.e. an apology

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<sup>79</sup> E.g., in Jewish law, many Ashkenazic scholars, such as Raavan and Raavya, view “beyond the letter of the law” as something which may be enforced by the court. See Mordechai, Bava Metzia, 257, New Responsa Maharil, 136, 140, 147 (Jerusalem 1977); Aguda, Bava Metzia, 34; see also Responsa Maharam Mintz, 101 (Jerusalem 5751). Even if the court does not have the power to enforce it, a punctilious person will act appropriately. Some differentiate: Generally “it is good and proper to act beyond the letter of the law,” but in appropriate cases, e.g., when a pauper finds a rich man’s lost property, and by the letter of the law there is no obligation to return it, “there is no need to act beyond the letter of the law.” Shulchan Arukh, Choshen Mishpat, 259:5. However, some disagree. See *id.* at 12:2; Saadia Gaon, Sefer Ha-pikadon. Generally, Sephardic authorities do not adopt the former view, but in some responsa there are exceptions to be found, Responsa Rosh, 107:6 (Jerusalem, 1994).

<sup>80</sup> See, e.g., Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 87–91 (2004); Jeffrie G. Murphy, *Well Excuse Me! – Remorse, Apology, and Criminal Sentencing*, 38 ARIZ. ST. L.J. 371, 374, 377–79, 382 (2006); Ralph Slovenko, *Remorse*, 34 J. PSYCHIATRY & L. 397, 397–98, 402, 406, 419 (2006); Bryan H. Ward, *Sentencing Without Remorse*, 38 LOY. U. CHI. L.J. 131–32 (2006).

<sup>81</sup> Murphy’s criticism is relevant as well. See Murphy, *supra* note 80, at 372–74, 377–79, 382, 385.

<sup>82</sup> Professor Chaim Gans uses Kantian terminology in *Iyunei Mishpat* 17, 187 (1992).

which is only an act of “cheap grace.”<sup>83</sup> As opposed to utilitarian remorse, moral remorse is not a ceremonial or verbal act which is expressed in an external display, it is supposed to reflect a mental state of internalization of the wrongfulness of the criminal act, stemming from an authentic feeling of grief and embarrassment and a sincere desire to repair and to seek forgiveness. The introspective nature of this duty makes it difficult to formulate standards for a clear examination of sincerity.<sup>84</sup> After all is said and done, any external demonstration is only a display, which leaves the suspicion of dissembling and hypocrisy.<sup>85</sup> Conversely, there is concern that, owing to excessive suspicion, one might dismiss the honesty of the defendant’s remorse based on diagnostical processes that are not always logical or fair.<sup>86</sup> Justice must strive, as much as possible, to encourage sincere and moral remorse, rather than outward displays. Remorse such as this does its work in the framework of restorative justice.

This Article proposes that considering every expression of remorse by the defendant (or alternatively, its absence) as a sentencing consideration in the framework of formal justice, retribution or proportionality would be a mistake. Automatic consideration of apologies and expressions of regret at the penalty phase sends a message that the offender will only be punished in the absence of regret. This pattern creates contempt for the concept of regret and undermines the concept of remorse. In this reality, the chance that remorse will be moral, subjective and sincere is reduced. Therefore, there is no justification to see the defendant who expresses *proper* remorse as deserving of a less severe punishment.<sup>87</sup> Moreover, regret may become, in Orwellian terms, an incentive for the defendant to perform an act which legitimates the conviction which they have decried as invalid until this point.<sup>88</sup>

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<sup>83</sup> Murphy, *supra* note 80, at 372.

<sup>84</sup> See Ward, *supra* note 80, at 167. Ward writes:

The failure of remorse is simply the failure of men to be able to read the innermost thoughts and feelings of other men—an age-old problem which plagues many of mankind’s interpersonal relationships. No one really knows what remorse is—and courts certainly don’t seem to know it when they see it. Anything that is so intrinsically unknowable cannot fairly be the basis for extended (or reduced) periods of incarceration in any system of justice.

*Id.* at 167.

<sup>85</sup> Expressing remorse depends on the defendant’s articulation, influenced by intelligence, experience and the directions received, as well as cultural values and any psychological or developmental disabilities.

<sup>86</sup> See Ward, *supra* note 80, at 190–91, for a discussion of risk of discounting remorse without legitimate concerns.

<sup>87</sup> Gans differs offering two reasons: true remorse lessens the need for deterrence, as recidivism is unlikely, and true remorse also indicates a redeemable character, which means that retribution demands that the maximum sentence not be applied. Gans, *supra* note 82, at 189. He goes on to note that true remorse can reform the offender totally, though even self-serving grief is relevant to determine specific deterrence. *Id.* at 190.

<sup>88</sup> We should distinguish between expressing remorse, on the one hand, and reparative actions, on the

It is in precisely this circumstance that we come to understand the utility of mercy—a tool best suited to examining the expression of remorse. No expression of regret can establish a *right* to lenient sentencing, while, on the other hand, the choice of a defendant claiming innocence not to express should not necessarily be counted against them.<sup>89</sup> However, evidence of a deeper process of repentance in the defendant's soul justifies the extension of grace. The link that exists between remorse and mercy allows the adoption of a non-mechanical and non-artificial perspective towards it.

Returning to our proposal to advocate for the view of mercy as a value independent from and complementary to justice, it is worth noting in, this context, that the prescribed dualist system reflects basic intuitions, the expression of which can be found in various sources. The dichotomous vision of justice against mercy is similarly expressed by Portia in Shakespeare's *Merchant of Venice*: "And earthly power doth then show likest God's When mercy seasons justice."<sup>90</sup>

### C. *The Argument of Arbitrariness*

Another argument of those who reject utilizing Greater Mercy is that it is subject to whim. Just as there is no obligation to utilize mercy, the defendant has no right to demand Greater Mercy.<sup>91</sup> This may lead one to the conclusion that the decision to employ Greater Mercy is an arbitrary act that undermines the concept of equality before the law.<sup>92</sup> Formally, the demand for equal treatment at the hands of the law in similar cases (and different treatment for dissimilar cases) negates the possibility of the existence of optional factors for lenient treatment.<sup>93</sup> While consideration of the particular circumstances of each case is a fundamental concept of justice and equity and demanded by these concepts, any further consideration for leniency beyond that prescribed by justice

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other. The latter involves returning stolen property and the like, which involves a material consideration which is appropriate for considerations of justice and reward.

<sup>89</sup> In *Mitchell v. United States*, 526 U.S. 314 (1999), the Supreme Court found that a guilty plea is not a waiver of one's Fifth Amendment privilege at sentencing. The Arizona Court of Appeals found "[a]s contrition or remorse necessarily imply guilt, it would be irrational or disingenuous to expect or require one who maintains his innocence to express contrition or remorse." *State v. Hardwick*, 905 P.2d 1384, 1391, (Ariz. Ct. App. 1995). Nevertheless, courts do in practice take a lack of remorse as a factor mitigating towards severity. See *Ward supra* note 80, at 159.

<sup>90</sup> SHAKESPEARE, *supra* note 25, act 4, sc. 1, l. 185–86.

<sup>91</sup> It appears that this characterization of mercy is definitional and that there is a consensus about it. There are those who view it as an imperfect duty in Kantian terms. See, e.g., Rainbolt, *supra* note 10, at 171; Murphy, *supra* note 5, at 183.

<sup>92</sup> Markel, *supra* note 5, at 1455–56.

<sup>93</sup> Brett, *supra* note 19, at 86.

undermines not only justice, but the principle of equality as well. If there is no right to Greater Mercy, then the act of mercy is a matter of luck, which is dependent on the random state of mind of the presiding judge in question.

Moreover, this argument can also be put forward in the context of capricious use of Greater Mercy to disguise illicit motives, such as the distinction between defendants on the basis of prejudice, discriminatory considerations, paternalism, arrogance and even oppression.<sup>94</sup> In practice, the application of Greater Mercy risks creating an opening for all manner of ulterior motives to enter the judicial equation.

The force of the argument of arbitrariness turns on this question: Does Greater Mercy apply to circumstances that are immune to formulation as rules and principles? If Greater Mercy deals with considerations of this nature, then Greater Mercy may indeed seem arbitrary and unequal.

The claim of arbitrariness appears to pose a significant challenge to the thesis of this Article, which does not preclude the possible use of Greater Mercy in cases relating to circumstances immune, in principle, to formulation as rules, and should consequently not be subject to incorporation into the law.<sup>95</sup> However, the claim of arbitrariness against our position is inconclusive, as this Article shall presently show. There are, in fact, three reasons to oppose the inequality argument.

First, consequential inequality does not mean arbitrariness. Greater Mercy places equally before all convicted persons the possibility that their punishment may be lightened, if so justified. However, no given defendant may demand a verdict which expresses grace and mercy. The inequality of results need not indicate arbitrariness, as long as the defendant has been given a full opportunity to present arguments and the court has seriously considered them. The defendants exist in parity to the extent that the moral obligation to apply Lesser Mercy applies to both of them. This is not equality of results, but substantive equality, which puts all defendants on a level playing field in terms of the nature of the court's considerations and the chance that the court may be influenced by the defendant's distress. In the decision to apply Greater Mercy, which is a

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<sup>94</sup> Fox, *supra* note 17, at 6 (relating to this argument with a historical example of from 18th-century England, where pardons were used liberally to prevent harsh sentencing, but the use of mercy as a tool for lightening the excessive cruelty of the law was often wielded capriciously and discriminatorily to secure interests of oppression and paternalism); Muller, *supra* note 13, at 307–12 (arguing that mercy must be defined as an emotional inclination or approach, and not as a simple act, because an act of compassion could mask repressive and self-interested motives).

<sup>95</sup> See Ward, *supra* note 80, at 167.

particular leniency towards the defendant as a residual step, judges grant the defendant leniency beyond the letter of the law, not arbitrarily, but for reasons of human sensitivity in the specific case. A step such as this can find support in moral considerations which are no less valuable than the call to *equality*, such as that which practically manifests as the call for law enforcement and just retribution.

Second, the claim of arbitrariness singles out mercy as an optional consideration to be applied with judicial discretion, such as may produce different results in similar cases. However, judicial rulings through and through, and particularly at the stage of sentencing, are based on many considerations and factors of various weights and applications. In this framework, uniformity of punishment is only one of many considerations, making it impossible to assiduously demand parity of results.

This reflects a wider dilemma: equality, consistency, certainty, security and the rule of law in criminal enforcement, on the one hand, exist in conflict with the recognition of human discretion and individuation of punishment, on the other.<sup>96</sup> Of course, this is not to suggest that equality is not a consideration of paramount importance to the legitimacy of any legal system. However, one must recognize that the ideal of equality cannot be absolute in any system which recognizes the principle of individual of sentencing (and, for our purposes, humanity and compassion as well), in light of the inherent difficulty of applying generalization of punishment to a complex reality, and the often unanticipated and unique circumstances this invites. The element of *luck* is not unique to the issue of mercy but is found in every stage of the criminal proceedings.

It is easy to illustrate that absolute equality in criminal proceedings is not attainable. The enforcement of justice, in a real-life setting, must have unequal results. Equality does not exist in the context of circumstantial *luck*, which is related closely in many cases to the point at which the person commits a crime; equality does not exist on account of the relatively small percentage of offenders who are caught and prosecuted, while others escape; equality does not exist in terms of a defendant's chances of acquittal (affected by uncontrollable factors, some of them human); equality does not even exist in the framework of the wide discretion of the court to weigh conventional factors in sentencing. Nevertheless, this does not indicate a failure of the system.

That we cannot, even in principle, ever attain a complete equality in the law, with its chilling connotations of implacable justice, does not

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<sup>96</sup> See generally Muller, *supra* note 13.

mean that the system has failed. On the contrary, individuality, both in society and law, is one of the noblest of human goals.<sup>97</sup>

Finally, our third rebuttal consists of the argument that, in a system which endorses great judicial discretion, there is no compelling reason to deny an act of leniency out of mercy simply on account of its inequality, when no similar outcry is heard in respect of inequality throughout the process that may lead to greater stringency (whether it is due to the judge's distaste for the offender, sympathy for the victim, or desire to promote stricter penalties as a matter of general precedent). Courts do not hesitate to write explicit justifications based on considerations such as these, which impinge on equality as much as any act of grace. Thus, it is our belief that the fact that the defendant cannot demand a verdict "beyond the letter of the law" is not a sufficient reason to dismiss the option of the system's empowerment to respond, under appropriate circumstances, to the request to be thus considered. This response does no injustice towards any other individual sentenced on more purely retributive grounds.

#### *D. The Argument of the Source of Authority*

This argument does not concern the question of *whether* there is a right to act with mercy, but rather, *who* possesses this right. This argument stresses the responsibility that the judge must assume by accepting appointment (or standing for election, as the case may be), which defines the boundaries of discretion. According to this approach, the role of the judge is to enforce the rule of law and justice,<sup>98</sup> which is defined in reference to the legalistic ideal.<sup>99</sup> This approach is expressed by Twambley:

Mercy, properly understood, has no essential connection with punishment. It is not the prerogative of a judge, on the contrary, a judge has no right to be merciful. In accepting his office, a judge places himself under an obligation to impose just sentences and to treat like cases alike . . .

To repeat: Judges have no right to be merciful because it is not *to them* that any obligation is due.<sup>100</sup>

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<sup>97</sup> Weinstein, *supra* note 65, at 822.

<sup>98</sup> Murphy, *supra* note 5, at 167–68.

<sup>99</sup> Fox, *supra* note 17, at 7.

<sup>100</sup> P. Twambley, *Mercy and Forgiveness*, 36 ANALYSIS 84, 85, 87 (1976).

Murphy explains this claim in terms of the paradigmatic place of mercy in civil law.<sup>101</sup> In civil proceedings, the plaintiff does not have an institutional role, but represents their own particular interests. There is no preliminary duty to apply the principles of the law in a harsh way, and it is the plaintiff's rights alone to do so. Therefore, choosing mercy means waiving a right, this does not violate the principles of justice.<sup>102</sup> The status of the judge, on the other hand, is totally different. The oath upon appointment is never to deviate from the duty to realize the rule of law for the sake of a personal inclination, such as love or compassion.<sup>103</sup>

In methodological terms, it is correct that one should distinguish between the morality of mercy generally, and the institutional question of the court invoking mercy in a criminal verdict. The characterization of mercy as a positive and desirable trait in regular circumstances, such as in the context of interpersonal relations, will not necessarily bring us to the conclusion that the court, as a governmental arm, should choose mercy.<sup>104</sup> However, it should be noted that in the framework of criminal proceedings, the needfulness of mercy is not unique to the courts. Similar questions may arise in terms of the discretion of the prosecution as to whether to indict, just as the indictment can be quashed, and in terms of the sentencing recommendation. This is clear in the context of granting pardons as well. If it is indeed good and desirable to employ mercy, why should we forbid this prerogative to judges specifically, and not for other institutional operators?

In order to examine the force and strength of this argument, we must examine a wider prerequisite question: What is the moral and social obligation of the judge? There is no doubt that the judge fills a role for the sake of the community and acts in its name. They are a representative, not an independent or private agent, and the role requires the fulfillment of the duties entrusted to them by the citizenry. But what precisely are the judge's duties?

The argument that the employment of mercy annuls the agency of the judge and is considered a departure from their authority begs the question of whether this is not an unduly narrow interpretation of the judge's mission, scope, and

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<sup>101</sup> Murphy, *supra* note 5, at 174–76.

<sup>102</sup> An additional argument is that employing mercy is an act of forgiveness, and the judge is not allowed to forgive in the name of the victims. While we acknowledge the parallel between mercy and forgiveness, but see *supra*, Section I(I), one may instead respond that, in the criminal context, forgiveness or leniency are societally motivated, and that this should not be confused with forgiveness in the place or name of the victims.

<sup>103</sup> Murphy, *supra* note 5, at 176–78.

<sup>104</sup> Another claim is that mercy resides in other authorities' hands, such as those of the president, who holds the power of pardon. This is M. Elon's view.

purpose.<sup>105</sup> If normatively speaking, mercy in sentencing is a virtue—and to this point much of our analysis henceforth has been devoted—there is no reason for the judges not to see themselves authorized to do so in the name of the society. It bears repeating, once more, that mercy should not be identified with forgiveness.

This Article argues that the mission, responsibility and role of the judge, as a representative of society, include protecting and advancing values beyond retribution in sentencing. The authority to choose grace and mercy is inherent, and lives in harmony with our moral expectations of the judge. The judge is not a legal technician. Their role is to apply simultaneously the rule of law and the human function of adjudication, both of which is integral. The judge, as society's representative, must give response and expression to the need for sensitivity and balance towards offenders, who are part of the society on whose behalf the court acts. Judges represent a yearning for human justice, not a justice which is mechanistic and devoid of emotions. As such, the judge is the natural address for an offender expressing regret and seeking mercy.

All who stands before the judges see them as representing society, the values and characteristics of the law of the state. They need not be seen as representing legalistic principles only, not least when we recognize the moral importance of the presentation of the human values of compassion and understanding and responding to the distress of the offender. The residual authority of a judge to act beyond the letter of the law is not presumptuous or a breach of mission. In pronouncing judgment, the judge also has fiduciary duties to the defendant. The judge has no duty to sweeten punishment on the basis of mercy, but they do have a duty not to be closed off to a sense of moderation under appropriate circumstances, allowing them the freedom to limit a penalty which seems unnecessary or unduly destructive.

### *E. The Emotional Argument*

The view that negates the place of mercy in the criminal justice process tends to see judging and sentencing as processes based on rational considerations and parameters, wherein no emotion should find expression.<sup>106</sup> Mercy is described often as an unrestrained act of compassion based on sentiment,<sup>107</sup> indicating a lack of discipline. The court is forbidden to be “weakly merciful[.]”<sup>108</sup> Emotion

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<sup>105</sup> Thanks to Professor David Enoch for pointing this out.

<sup>106</sup> See also DAVID HUME, A TREATISE OF HUMAN NATURE (P.H. Nidditch ed. 1978).

<sup>107</sup> Fox, *supra* note 17, at 2 (discussing this characteristic).

<sup>108</sup> Fox, *supra* note 17, at 3 (citing The Court of Appeal in *New Zealand in R v. Radich* [1954] NZLR 96).

is understood as a display of weakness when the law calls upon the court to demonstrate its full strength, and thus “a product of *morally dangerous sentimentality*.”<sup>109</sup>

The challenge posed by this argument is straightforward, and so is the question that it raises: What is the place, if any, of emotion in punishment, alongside logic? Do we strive for a sentence born of a purely analytical viewpoint, or should the justice system demonstrate a greater openness to human considerations and possess the capacity to reveal empathy and compassion towards those who enter it? These questions relate to the virtues of mercy and the restorative function it performs. These issues arouse a debate not only in relation to a certain type of act, but also in relation to the question of what the desirable qualities of a moral justice system and its judges are.

In this regard this Article relies, *inter alia*, on Jerome Frank, who argues that emotion has a place in law; that after all is said and done, a judge is human, influenced by the inclinations of the heart to reveal empathy and identification.<sup>110</sup> The true question is not whether emotion influences judges, but whether it must be shrouded behind a screen of legalistic neutrality and objectivity:

Rules we must have. They set limits to the discretion vested in our judges, but limits which, in many instances, can be imposed only by the judges themselves. The rules are a sort of legal machinery. But legal machinery will not suffice. The men who operate that machinery must be men keenly alive to their immense responsibilities to the citizens. We could not, if we would, get rid of emotions in the administration of justice. The best we can hope for is that the emotions of the trial judge will be sensitive, nicely balanced, subject to his own scrutiny. The honest, well-trained trial judge, with the completest possible knowledge of the character of his powers and of his own prejudices and weaknesses, is the best guaranty of justice. The wise course is to acknowledge the necessary existence of ‘personal element’ and to act accordingly.<sup>111</sup>

This view relates to all the aspects of the judicial process, including fact-finding, and gains further importance at sentencing. Like Professor Martha Nussbaum,<sup>112</sup> this Article does not argue for the integration of emotion and compassion in

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<sup>109</sup> Murphy, *supra* note 5, at 167 (emphasis added).

<sup>110</sup> FRANK, *supra* note 1, at 411–12.

<sup>111</sup> *Id.*

<sup>112</sup> See generally Nussbaum, *supra* note 15.

judgment as an evil to be avoided, but as an essential component facilitating the judge's moral choice.

Moreover, using Portia's speech, Shakespeare teaches us an additional aspect of mercy, which is not focused on the implications for the beneficiary, but rather, the giver. There is a substantial connection between mercy and *characteristics of the giver*:

The quality of mercy is not strained./ It droppeth as the gentle rain  
from heaven/ Upon the place beneath. It is twice blest:/ It blesseth him  
that gives and him that takes./ 'Tis mightiest in the mightiest. It  
becomes/ The thronèd monarch better than his crown./ His sceptre  
shows the force of temporal power,/ The attribute to awe and majesty,/  
Wherein doth sit the dread and fear of kings,/ But mercy is above this  
sceptred sway./ It is enthroned in the hearts of kings./ It is an attribute  
to God himself.<sup>113</sup>

This is important for understanding the nature of mercy. Mercy, precisely because it is not inscribed in any book and is not limited to formal discourse of rights, is a measure which results from maturity of character. Mercy is not just an *act* of moderation and balance; it expresses also mental aspects of moderation and balance. More than an act of emotion, humanity and compassion, it is the ability to personally express emotion, humanity and compassion.

While the arguments of those who deny mercy underscore the ideal legalistic view of justice and the rule of law as the key features of the legal system, the argument in praise of mercy in law states that additional features, humane and moderating features, are required, especially when considering the imposition of severe sanctions upon individuals in society.

What are the qualities and types of perspective expressed in mercy? They indicate the modesty and humility of a giving heart. They express the willingness to relinquish and to take risks.<sup>114</sup>

These elements of the deliberative process in justice stand in direct and sharp opposition to the arrogance, defensiveness, excessive severity and pettiness which sometimes characterize the law.<sup>115</sup> They restrain the spirit of anger and vengeance. They reflect moderation, the ability to cope, and restraint. So, when characterizing compassion as an emotion that may arise in the heart of the judge, it is important to carefully consider the implications of an absolute imperative to

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<sup>113</sup> SHAKESPEARE, *supra* note 25, act 4, sc. 1, l. 173–84.

<sup>114</sup> Olson, *supra* note 26, at 306–07.

<sup>115</sup> *See id.* at 309.

suppress emotion. The intuitive tendency of people to attribute positive value to the concept of mercy and to see it as a desirable capacity is no random inclination. Mercy is seen as a touchstone, a state of mind which prevents insensitivity that might, even eventually mature into cruelty. Mercy reflects the understanding—both in relation to the criminal and in relation to the judge—that we are dealing with human beings.<sup>116</sup>

When discussing compassion, one must grapple with the question of the moral character of the judiciary and the spiritual trends that society is ready to express in the area of criminal justice and criminal punishment. The discussion of such values is vitally important for us as much as a discussion of deontological concepts.

*F. The Antinomian Argument—The Inapplicability of a Moral Imperative to Emotional Reactions*

This criticism relates to Lesser Mercy. Statman argues that the moral duties should be definable without reference to the question of motivation, thus, mercy requires acting less harshly than usual, whatever the motive.<sup>117</sup> This argument is an expression of the antinomian thesis, whereby it is impossible to demand a state of mind or emotion. This can be expressed both as a principled objection to a duty to express emotions, and a practical objection to its very possibility. The principle question concerns whether moral value can be attributed to an intent or emotion at all. In practical terms, the question is whether a person is capable, even if willing, to bring themselves to experience emotions that do not arise in their heart.

There are two possible answers to this claim. One approach does indeed assign a certain moral value to intentions, aims, and moral exertion, even mandating them. The imperative is directed to the mind and consists of an expectation that the judge will invest a moral and mental effort at introspection. This stems from seeing the work of the law, judgment and punishment as not a purely rational labor.

A second response to this claim is that one may distinguish between the state of mind and emotion itself, and the judgment of the material world that is derived of that state of mind or emotion.<sup>118</sup> It is important that the judge consider the suffering of the defendant and their relatives, determine if the amount of

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<sup>116</sup> *Id.*

<sup>117</sup> Murphy, *supra* note 5, at 167.

<sup>118</sup> Thanks to Eyal Gruner on this note.

suffering as a result of the judicial proceeding is appropriate, and attempt to understand the defendant's distress and show openness to this perspective. The judge is not required to identify with the defendant or experience the emotion of compassion, as this may be out of their control. However, they are required to incorporate this perspective as an important and exigent part of the deliberation process. We are contemplating an obligation of the court to avail itself of the normative assumptions and judgments that underlie compassion. The awakening of compassion as a result cannot be commanded, thus distinguishing this application of mercy from an integral part of justice.

*G. The Argument of Undermining the Principle of Guilt*

Another argument presented by critics is that mercy undermines not only justice in the abstract, but, even more so, the principle of guilt. Mercy, it is argued, releases the offender from moral accountability.<sup>119</sup> Mercy undermines formal justice, which reflects the retributive belief in man's moral responsibility for his crimes.<sup>120</sup> Grace in this context dissolves the very fiber of responsibility.<sup>121</sup>

In response, this Article must pose the question of whether mercy undermines responsibility, and if so, to what extent. We should not necessarily identify the readiness to take account of the defendant and to be lenient therewith in light of the existence of specific circumstances, or even to deal therewith beyond the letter of the law in a time of need, with doubts as to the validity of conviction and finding of responsibility. Mercy, in the sense of compassion and grace, does not contradict the concept of responsibility, and in some cases may even strengthen it. It expresses the ability of society to show restraint and forbearance, rather than a moral stance concerning the criminal act. This is provided that mercy must be expressed openly and explicitly in sentencing considerations, so as not to conceal or disguise its mitigating activity.

The claim of impinging on the principle of guilt is relevant specifically when considerations of mercy act in a disguised manner, and without an explicit indication that the relatively light sentence is due to the decision to treat the defendant beyond the letter of the law owing to special circumstances. The integration of mercy as a legitimate, visible, and explicit factor may, conversely, prevent the misconception feared here from emerging. Indeed, our approach might often express the nature of judicial discretion as applied in adjudication

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<sup>119</sup> Markel, *supra* note 5, at 1454.

<sup>120</sup> See generally Murphy, *supra* note 5.

<sup>121</sup> *Id.*

and sentencing more accurately and sincerely than prevailing attitudes would have it.

In any event, this Article notes above that the potentially *dualist* nature of the relationship between mercy and justice in this regard should not necessarily be perceived as a flaw. Indeed, there is nothing wrong with prosecution and punishment that express a two-fold message: one in accordance with the letter of the law, and one beyond the letter of the law; a message of retribution with mitigating considerations; a message of responsibility along with the recognition of others' hardships and the acknowledgment that man is not in complete control of his circumstances; and a message of determining liability alongside a willingness to relinquish and restrain. Not only is such duality not unacceptable, but sometimes it is even essential.

#### *H. The Consequential Argument*

The consequential argument focuses on the alleged implication of integrating mercy into the legal system as a whole. The consequential argument applies not only to fear of the possible damage to the power and message of punishment in a particular case or sequence of events, but also fear of the systemic nullification of law.<sup>122</sup> The argument is that a legal system that accommodates the consideration of mercy as a legitimate consideration will ultimately breed chaos and disorder.<sup>123</sup>

Addressing this argument demands that this Article clarifies the function mercy fulfills in a system of law based on order, security and considerations of retribution. This Article must examine the moral and cultural context of integrating mercy into such a system, and whether, in the framework of the relationship between mercy and justice, leniently towards the offender beyond the strict letter of the law does indeed pose a challenge to the rule of law, leading (conceptually) to disorder and chaos.

This Article argues that the relationship can be described differently. The synergy of mercy and law together, where the integration of the former is necessary and desirable, may in fact contribute to the strengthening of those same societal goals that the legal process is designed to promote. This question, as noted above, has an abstract and even a spiritual dimension. Mercy, the readiness to forbear and not be entrapped by negative emotions, transmits power. Overcoming anger, vengeance and other negative emotions is an expression of

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<sup>122</sup> Andrew Brien, *Mercy Within Legal Justice*, 24 SOC. THEORY & PRAC. 83, 85 (1998).

<sup>123</sup> *Id.*

power. The hero “conquers his temptation.”<sup>124</sup> This contributes to strengthening social values, such as mutual support and hope for a better future. It is our belief that the argument that the integration of mercy and judgment would bring about the systematic nullification of law, giving way to chaos, stems from the fear of excessive use of mercy in the judicial process.

Finally, this Article finds little support for the alternative assumption that an approach applying only simple retribution always impacts positively upon society. One may argue that the opposite is sometimes true. On the other hand, a verdict which broadcasts a message of compassion, consideration, conciliation and willingness to relent, where applicable, may be essential for the existence of normal community life, and certainly no less so than a verdict adhering to the petty attitude of “let the law drill through the mountain.” This is the foundation of a sustainable society.

### *I. The Argument of Compassion for the Victims*

One of the arguments in popular literature against the integration of mercy in the judicial process, especially in contemporary times, focuses on the object of compassion and sympathy. Instead of empathy for the offender, their children or their family, many argue that empathy is required specifically for the victims, who have been caused suffering, to society, and to potential future victims in need of protection by the legal system. This claim is very popular and can be found in legal rulings,<sup>125</sup> though it does not appear often in academic literature.

One can interpret this in utilitarian terms of crime deterrence and sparing the suffering of future victims suffering. It can also be couched in terms of retribution, giving fitting expression to the suffering of the victims. Supporters of this argument tend to associate compassion towards the offender with further injury to the victims.

It is beyond the scope of this Article to enter the discussion of whether and to what extent criminal punishment must be influenced by the victim’s position. In principle, the current trend that can be seen in some countries’ legal systems,<sup>126</sup> granting increased weight to the position of the victims (both directly, by providing tools for the description and illustration of the distress and suffering caused to them before the court, and indirectly, by providing more

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<sup>124</sup> Mishna, Pirkei Avot, 4:1.

<sup>125</sup> See, e.g., CrimA 3173/09 Pragin v. State of Israel, Nevo Legal Database (2009) (Isr.); Kennedy v. Louisiana, 554 U.S. 407, 444 (2008).

<sup>126</sup> See *supra* Introduction and supporting footnotes.

significant weight to these considerations in sentencing) is a laudable one. Indeed, this trend only reinforces the vitality of mercy as a mitigating concern.

It is doubtful whether an argument for the importance of identification with the suffering of the victims is indeed opposed to an argument for mercy in adjudication and sentencing, at least in the sense advocated in this Article.<sup>127</sup> Presumably, in most relevant cases, the suffering of the victims and the protection of potential victims are already presupposed at the stage of sentencing. Criminal law, from start to finish, necessarily presents the defendant as an object for denunciation. It presents a narrative of harm, danger and threat. When the court arrives at the stage of sentencing, it is equipped with the guidelines of the law, applying punitive retribution corresponding to the wrong of the defendant's actions, and with the express intent of redressing the suffering caused. In our current judicial reality, the court is also equipped with details about the degree of suffering of the victim, and a public tailwind encourages harsh punishment. The nature of criminal law emphasizes the perspective of the victims and society, to the extent that the degree of punishment is sometimes decided based only on this consideration.

The incorporation of the two senses of mercy in criminal proceedings does not stand in conflict to any feeling of empathy towards the victims, nor sensitivity to their distress and suffering. Rather, as a strong emphasis is placed on the suffering of the victims in sentencing by default, Lesser Mercy instead serves as an important counterweight.<sup>128</sup> It guarantees that judicial deliberation will not let considerations of judicial identification with the victim or considerations relating to the danger posed to society blind the judge to other relevant perspectives. The implementation of mercy in criminal proceedings allows for a more nuanced approach to justice by requiring the inclusion of additional normative presuppositions.

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<sup>127</sup> Actually, in some certain cases, it seems like those two principles might guide us to the same end result. *See, e.g.*, CrimA 5855/15 Lugassi v. State of Israel, Nevo Legal Database (June 5, 2016) (Isr.). The circumstances of the case were exceptional. The Appellant was convicted for the offense manslaughter and the victim was his own brother. *Id.* The brothers' mother seeks to reduce her son's punishment and treat him with the degree of mercy, which will alleviate even a little of the family's terrible pain. *Id.* Although the public interest requiring adequate punishment of the appellant, for his grievous acts and their consequences, the degree of mercy in the circumstances of the case cannot be ignored. The court addressed the pain of the victim's mother seeking to reduce her son's punishment and treat him with mercy so as to alleviate the family's pain. Accordingly, and while the court exercised the degree of mercy, the appellant's sentence was reduced.

<sup>128</sup> In that manner, it should be noted, that more than once, the Israeli courts have discussed this issue, mercy's application in criminal law. *See, e.g.*, CrimA 6672/03 Kaminsky v. State of Israel, Nevo Legal Database (Dec. 25, 2003) (Isr.). There, Justice Tirkel has ruled that there the appellants' actions and crimes has illustrated that they had no mercy, and therefore, the court should not apply mercy on the merciless. *Id.*

As for Greater Mercy as a residual prerogative, it must not be mistakenly construed to advocate a general policy or default, but rather, the possibility of judging beyond the letter of the law in light of unique circumstances.

If, after taking into account the totality of the circumstances, and after attempting to view the offense and sentence from the perspective of the defendant, the court nonetheless remains convinced that there is good reason for severity, due to the condition of the victim or by identification of a danger to society. This Article does not presume to deny such an option. Indeed, this is likely the reality of most cases. This Article merely posits the right of the reverse possibility to consideration: The possibility to conclude that, under unique circumstances—perhaps in light of the offender’s particular suffering or remorse—it is appropriate to make an exception, and to devise a sentence with mercy in mind.

### *J. The Argument of Human Pride and Dignity*

The final argument is that, notwithstanding the distinction that was drawn above between mercy and pity, mercy towards the offender contains an element of condescendence. Punishing a person retributively is the one way to express respect for their rationality and autonomy. Conversely, exhibiting mercy towards the offender is an expression to the power of the judicial system, and, conversely, contempt for the defendant.

This argument can be attacked in several ways. First, it is unlikely that many defendants would stand before the court at sentencing and urge the law to punish them retributively, with no degree of mercy, as if this somehow preserves their dignity. Second, severe punishment, such as imprisonment for many years, in itself represents a significant blow to the dignity of the convict. Third, there is also the possibility of error at the point of conviction to consider. Fourth, every institution with strength and power in its hands must know how to curb that power. Finally, this argument is inherently paternalistic, to presume to dictate to subjects that a course of action that expressly contravenes their interests is somehow necessary to protect their dignity.

But beyond all of these arguments, the true problem lies in the identification of the argument for judicial leniency with arrogance and contempt. Mercy, although it transmits power and the ability to forbear, may express a positive message which validates the autonomy of the individual by recognizing their ability to mature, and to acknowledge and defer to this ability. When identifying a person’s failure in light of stress or difficult circumstances, adopting the perspective that they present through their pleadings and accepting their special

request for leniency on the basis of trust in their rational ability to reform their ways can only be made possible through acknowledgment and respect for their autonomy.

*K. Summation of Critical Analyses*

In light of the foregoing, our thesis is not primarily a rational response to direct complaints against the recognition of the place of mercy in sentencing. Rather, it is first and foremost an argument in favor of the adoption of a different approach towards the nature of the work of the judiciary and the qualities judges should express in their work. While some see the sentencing parameters as rigidly fixed in a framework of clear duties, this Article asserts herein that such an approach is as unrealistic and incomplete as it is uncompromising. Criminal sentencing cannot be confined to the discourse of retribution, from which any deviation is injustice. Moral judgment is not in thrall to generalized categories, emotions, such as recognition for the suffering of others and the discovery of empathy, are not foreign to it. Qualities of sensitivity, balance and moderation may complete justice when it veers towards unsettling results. Recognizing that justice, retribution, and responsibility are not absolute terms, as well as the limits of the judicial mandate to judge others, leaves an important place for balancing and mitigating the stringent sentencing considerations that often dominate sentencing.

#### CONCLUSION

Criminal justice is the ultimate tool provided by society to protect itself against delinquency. It is unique and costly. It allows for the state to visit significant harm to its subjects' liberty and rights. The impact of its edicts may be difficult, painful, destructive, and irreversible. Criminal justice is an arena wherein society, through its institutions, are mobilized against the individual. Often, the defendant emerges from criminal proceedings bruised and humiliated, regardless of their formal outcome.

At the stage of the delivery of the verdict and of sentencing, the first and foremost consideration before the court is to protect society. This is closely pursued by considerations of retribution, redressing victims' grievances, deterring other criminals, and giving expression to the public's normative sentiments. These considerations necessarily pull in the direction of harsh punishment.

This Article has analyzed and advocated the importance of mercy in sentencing. Furthermore, this Article has defined the purpose of mercy as a factor that can serve to moderate more central considerations, and their implicit tendencies toward stringency. Mercy is founded on the basis of observation and attention to the plight of the accused. The stage of the delivery of the verdict and sentencing combined form the defendant's day of reckoning. Their fate hanging in the balance. An argument for compassion is actually a case for the importance of attending to all relevant considerations, without foregoing the perspective of the defendant and others affected collaterally. An argument for mercy is based on its conceptualization as a factor complementing justice and moderating the injury of the sentence when applicable.

Ultimately, the issue of the status of mercy in judgment and punishment confronts us with a fundamental question: What are the values and virtues of society, and the judges acting in its name? As argued herein, the answer to this question must account for the essential degree of willingness to express sensitivity, human compassion, and recognition of the necessity and morality of grace.