Mercy in Context

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Introduction

Mercy sometimes comes in for hard treatment among criminal theorists. Jeffrie Murphy condemns it as "a vice—a product of morally dangerous sentimentality."[1] Dan Markel has argued that granting "mercy to an offender would undermine a basic norm of reciprocity and fair dealing" for both victim and offender.[2] Ross Harrison, Kathleen Dean Moore, and H.R.T. Roberts contend that criminal institutions cannot exercise mercy on pain of contradicting the internal logic and morality of criminal justice.[3] This is not to say that mercy is friendless. Among other formidable allies, mercy boasts Martha Nussbaum,[4] Claudia Card,[5] Antony Duff,[6] Paul Robinson,[7] Carol Steiker,[8] and Alice Ristroph.[9] For these advocates, mercy provides a critical corrective for criminal justice systems that are often rule-bound, blind to human suffering, arrogant, or even cruel.[10]

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1. Jeffrie G. Murphy, *Mercy and Legal Justice*, 4 SOC. PHIL. & POL'Y 1, 4 (1986).

2. Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1456 (2004).

3. Ross Harrison, *The Equality of Mercy*, *in* JURISPRUDENCE: CAMBRIDGE ESSAYS 107, 121 (Hyman Gross & Ross Harrison eds., 1992); KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 190–92 (1989); H.R.T. Roberts, Discussion, *Mercy*, 46 PHIL. 352, 353 (1971).

4. MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS 397–98 (2001); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 368–72 (1996); Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFFS. 83, 125 (1993) [hereinafter Nussbaum, *Equity*].

5. Claudia Card, *On Mercy*, 81 PHIL. REV. 182, 200, 206 (1972).

6. R.A. Duff, *The Intrusion of Mercy*, 4 OHIO ST. J. CRIM. L. 361, 387 (2007).

7. Paul H. Robinson, *Mercy, Crime Control, and Moral Credibility*, *in* MERCIFUL JUDGMENTS AND CONTEMPORARY SOCIETY: LEGAL PROBLEMS, LEGAL POSSIBILITIES 99, 117 (Austin Sarat ed., 2012).

8. Carol S. Steiker, *Tempering or Tampering? Mercy and the Administration of Criminal Justice*, *in* FORGIVENESS, MERCY, AND CLEMENCY 16, 19 (Austin Sarat & Nasser Hussain eds., 2007).

9. Alice Ristroph, *Actions of Mercy*, *in* MERCIFUL JUDGMENTS AND CONTEMPORARY SOCIETY: LEGAL PROBLEMS, LEGAL POSSIBILITIES, *supra* note 7, at 205, 207–08, 233.

10. Nussbaum, *Equity*, *supra* note 4; Card, *supra* note 5; Duff, *supra* note 6; Paul H. Robinson, *Mercy, Crime Control, and Moral Credibility*, *in* MERCIFUL JUDGMENTS AND CONTEMPORARY SOCIETY: LEGAL PROBLEMS, LEGAL POSSIBILITIES, *supra* note 7, at 117; Steiker, *supra* note 8; Alice Ristroph, *Actions of Mercy*, *in* MERCIFUL JUDGMENTS AND CONTEMPORARY SOCIETY: LEGAL PROBLEMS, LEGAL POSSIBILITIES, *supra* note 7.

Interestingly, many of the critiques of and arguments for mercy share a premise: that mercy stands outside of criminal justice.[11] Mercy appeals to reasons, sentiments, or factors regarded as irrelevant by the criminal law when it assesses liability and just punishment. For mercy critics, this externality means that exercising mercy compromises core normative commitments of criminal justice like desert, proportionality, and equality while considering factors that have not been deemed relevant by the political process.[12] For them, mercy is, by definition, unjust because "justice" lies within the four corners of the criminal law. For mercy advocates, this externality highlights the limited normative vocabulary of criminal justice and the moral adolescence exhibited by its unbending commitments to generalized rules and principles.[13] For them, refusing to entertain claims for mercy by or on behalf of those subject to prosecution and punishment is unjust because it excludes morally salient facts and arguments that have, for whatever reason, been ignored or marginalized by the criminal law.

To make this dynamic more concrete, consider an example from the literature.[14] Imagine a defendant has been convicted of premeditated murder. Based on the facts of her case, and taking into consideration statutory sentencing requirements, administrative sentencing guidelines, and relevant precedents, the law requires a sentence of fifty years' imprisonment. In an effort to persuade the judge to impose a lesser sentence, defense counsel points out that the defendant previously served in the military where she earned a medal for bravery in action. Her military service does not bear on her act or culpability and is not included among the factors recognized by prevailing sentencing rules, but counsel nevertheless argues that the judge should enter judgment on a lesser offense or impose a lesser sentence than would otherwise be required by law based on their client's military service. Mercy skeptics like Dan Markel argue that granting either of these requests would be unjust because it would deny the electorate the legitimate results of democratic processes, give this defendant less punishment than she deserves, treat other offenders unequally, imply a partial license to kill, and diminish

11. David Gray, *Justice and Mercy in the Face of Excessive Suffering: Some Preliminary Thoughts*, *in* NUSSBAUM AND LAW 277, 279–80 (Robin West ed., 2015); Markel, *supra* note 2, at 1436; Steiker, *supra* note 8, at 31; Duff, *supra* note 6, at 363–64; Card, *supra* note 5, at 189.

12. *See* Markel, *supra* note 2, at 1456 (stating that "mercy stands at odds with the nature of the modern liberal democratic regime under rule of law").

13. *See infra* notes 20–50 and accompanying text (drawing distinctions between criminal law's precise, constrained nature and mercy's flexibility and more refined moral sensitivity).

14. *See* Markel, *supra* note 2, at 1454 (describing a hypothetical defendant with characteristics potentially relevant to arguments for mercy, such as disability, veteran status, pregnancy, or advanced age).

the moral standing of the victim.[15] By contrast, mercy advocates like Martha Nussbaum would argue for taking counsel's requests seriously because they reveal narrative details of the defendant's life that appeal to moral sentiments the criminal law has ignored, such as benevolence.[16] For them, the fact that the criminal law does not recognize these features of a defendant's life as material marks a failure of the system rather than grounds for objecting to mitigation of judgment or moderation of sentence.

We can see in this example the basic structure of most disagreements between mercy advocates and mercy skeptics. They usually agree on the basic facts. After considering all the relevant statutes, rules, precedents, and practice, they agree about what the "law" requires. They also agree that norms and considerations external to the law may call for modifying judgment or punishment. They nevertheless disagree on whether these external reasons justify reducing, modifying, or forgoing arrest, prosecution, and punishment altogether.[17] Moreover, the disagreement appears to be intractable. It reflects a fundamental disagreement about whether criminal justice as a moral enterprise should or should not be subject to modification according to moral or ethical claims that are not sanctioned by the rules.

Rather than adding to this debate, this Essay aims to situate conversations about mercy in a socio-normative context. Relying on an account of social transformation advanced by Emile Durkheim in his masterwork *The Division of Labor in Society*,[18] I will argue that mercy is an artifact of a particular moment in society. Our debates about criminal justice, mercy, and social justice more generally happen at a moment in history rather than at its end. Recognizing this fact should occasion some humility. Like us, our theories and policies around criminal justice and mercy are ephemeral products of our times. In turn, that humility invites us to ask hard questions about the contingency of our moral assumptions, what the emergent challenges of modernity mean for solidarity and social justice, and what role disciplinary regimes can and should play in service of what comes next.

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15. *See* Markel, *supra* note 2, at 1454–56 (contending that acts of mercy undermine fundamental principles of criminal justice, such as "moral accountability," victims' interests in "personal security," "equal liberty under law," and resistance to the "usurpation of political power").

16. *See* Nussbaum, *Equity*, *supra* note 4, at 105–10 (developing a concept of mercy prompted by literary perception and observing that ideal "literary" judicial reasoning should recognize defendants' complex personal histories). I am thankful to John Deigh for his framing and patient discussion on this point.

17. *Compare* Alvana K. Eisenberg, *The Case for Mercy in Policing and Corrections*, 102 TEXAS L. REV. 1409, 1412 (2024) (explaining the role mercy should play in policing), *with* MOORE, *supra* note 3, at 192 (characterizing a judge's exercise of mercy as illegitimate or inappropriate).

18. *See generally* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (Steven Lukes ed., W.D. Halls trans., Free Press 2014) (1893) (introducing a conception of social solidarity as society becomes more complex and interdependent, and offering a theory of the intertwined nature of social solidarity and individual personality).

I. Some Basic Features of Criminal Justice and Mercy

Conversations about mercy often get caught up in semantic debates about what is and is not "mercy" and related contests about what kinds of motives and reasons should and should not provide grounds for granting mercy.[19] We do not need to resolve those questions here. For present purposes, we are more interested in describing where the lines between criminal justice and mercy are drawn as a conventional matter. Here, the literature reflects broad agreement.

The criminal law is public law.[20] It is promulgated and enforced by the state and justified primarily by the collective interests of society in retribution or deterrence.[21] By contrast, mercy is primarily motivated by concern for specific offenders.[22] The criminal law is interested in questions of culpable blame and the imposition of punishment.[23] On the other hand, mercy is "mild," "gentle," and organized around granting leniency despite an offender's culpability.[24]

The criminal law comprises rules of general, prospective application that define prohibited conduct in relatively precise terms.[25] Similarly, the criminal law engages offenders in a limited, almost abstract way, eschewing interest in the narratives of their lives and the complexities of their agency to

19. *See, e.g.*, Eisenberg, *supra* note 17, at 2–3 (discussing a possible definition of mercy).

20. *See* GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 36 (1998) ("Because crime is an assault upon the public, it makes sense to think of punishment itself as an expression of public authority."); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 5 (1968) (noting that criminal punishment "must be imposed and administered by an authority constituted by a legal system against which the offence is committed"); Markel, *supra* note 2, at 1449 (describing a theory of criminal action as a harm against the state).

21. FLETCHER, *supra* note 20, at 35–36.

22. *See* Duff, *supra* note 6, at 364 (explaining that "what is called 'mercy' can sometimes be seen as a matter of individual justice or equity); *see also* Marah Stith McLeod, *Showing Mercy Through a Presumption of Retribution*, 102 TEXAS L. REV. 1473, 1475 (asserting that mercy is sensible only in relation to an individual's retributive desert).

23. *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 408–09 (2000) (indicating that the Supreme Court defines criminal processes by their relationship to punishment). As I have argued elsewhere, the phenomenon of strict liability crimes is not to the contrary. *See* David Gray, *"You Know You've Gotta Help Me Out . . ."*, 126 PENN ST. L. REV. 337, 378–81 (2022) (contending that strict liability crimes impose culpability by the riskiness of the conduct).

24. Nussbaum, *Equity*, *supra* note 4, at 86–87; Markel, *supra* note 2, at 1436; Duff, *supra* note 6, at 364.

25. *See* U.S. CONST., art. I, §§ 9–10 (barring bills of attainder and ex post facto laws); *see also* LON L. FULLER, THE MORALITY OF LAW 39 (1964) (describing ways a legal code can fail to create functional criminal laws, including "a failure to publicize . . . rules," "the abuse of retroactive legislation," and "a failure to make rules understandable"); DURKHEIM, *supra* note 18, at 62, 227 (remarking that the criminal law possesses the "striking characteristic" of being "written upon the consciousness of everyone" and must take a "definite form" to function); Nussbaum, *Equity*, *supra* note 4, at 93 (illustrating a view of criminal law that is general in form but particular in a given case).

focus narrowly on discrete moments, acts, and mental states.[26] When the criminal law is interested in the particularities of an offender or his act, it is only to the extent those details can be comprehended by generally applicable rules recognized by statute or precedent.[27] Conversely, mercy often is justified as a means of tempering the apparent harshness that results from applying general rules in particular circumstances.[28] As Martha Nussbaum explains, mercy embraces a literary mindset akin to the empathetic judgment we exercise as readers of novels or engaged members of the audience at the theater.[29] Mercy judges people, actions, and events in narrative context.[30] It requires full consideration of the sympathetic circumstances of a defendant's life, including past and present hardship.[31]

The criminal law is concerned with proportionality, both in its absolute sense—giving every offender the punishment appropriate for his crime—and in its comparative sense—treating like cases alike.[32] Because mercy focuses on the personal circumstances, narratives, and histories of individuals, it has no particular commitment to proportionality.[33] For mercy, no two cases are

26. Duff, *supra* note 6, at 370–72, 376; *see also* Nussbaum, *Equity*, *supra* note 4, at 89 (describing the ancient theory that "encroachment and pain" require a proportional response of "compensating pain"); Steiker, *supra* note 8, at 30 (lamenting the truncating effect of retributivist rationales for punishment); OLIVER WENDELL HOLMES, THE COMMON LAW 48–51 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881) (discussing these principles in the context of common law crimes).

27. *See* Mark Osler, *Rule Complexity, Story Complexity, Mercy & Hope*, 102 TEXAS L. REV. 1495, 1496–97 (2024) (arguing that criminal law generally favors rule complexity over story complexity); Murphy, *supra* note 1, at 7–8 (contending that it is a "basic demand of justice," not mercy, to tailor the treatment of the individual to their "individual differences" within the confines of the general criminal law). Martha Nussbaum has compared this brand of legal judgment to what the ancient Greeks called "*dikê*." Nussbaum, *Equity*, *supra* note 4, at 88–90. Consider, as an example, the United States Sentencing Guidelines' treatment of offender characteristics. U.S. SENT'G GUIDELINES MANUAL § 5H (U.S. SENT'G COMM'N 2023).

28. *See* Duff, *supra* note 6, at 364, 370 (acknowledging that mercy is sometimes conceived of as a form of "individual justice or equity" when a certain type of punishment is "cruel or inhuman"); *see also* Nussbaum, *Equity*, *supra* note 4, at 93, 96 (suggesting that mercy regards the written law as "a set of guidelines with gaps to be filled in or corrected").

29. Nussbaum, *Equity*, *supra* note 4, at 105–09.

30. *Id.* at 103.

31. *See* Josh Bowers, *Mercy* in Extremis*, In-Group Bias, and Stranger Blindness*, 102 TEXAS L. REV. 1561, 1588 (2024) (arguing that mercy entails a "*self-other merging*" to emphasize commonalities); Duff, *supra* note 6, at 377 (postulating that sometimes "the demands of compassion for the offender's tragically disadvantageous upbringing" ought to "temper" those of the justice system). This empathetic dimension, "judging with," as Nussbaum describes it, marks an important point of distinction with the consideration of mitigating factors in the criminal context, where difficult upbringing, say, may be a factor, but only to the extent it can be considered from an objective, external perspective. Nussbaum, *Equity*, *supra* note 4, at 94–96.

32. Markel, *supra* note 2, at 1454; Duff, *supra* note 6, at 365. *But see* David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619, 1670–72 (2010) (arguing that comparative proportionality is a heuristic for absolute proportionality and should not carry independent moral weight).

33. Duff, *supra* note 6, at 365; Nussbaum, *Equity*, *supra* note 4, at 97.

alike. Moreover, the fact that mercy is an exercise of leniency moots any claim of entitlement underwritten by absolute or comparative proportionality.[34]

The criminal justice system is populated by individuals who are state agents and therefore occupy roles defined and constrained by institutional rules.[35] Specifically, the criminal law privileges objective, detached judgment and the rigorous enforcement of rules as rules.[36] It is skeptical of untethered discretion.[37] From the criminal law's perspective, judges should be "*mere machine*[*s*]*,*"[38] calling "balls and strikes,"[39] and jurors should dispassionately apply the facts to the law.[40] As a consequence, criminal law can sometimes seem harsh and unfeeling.[41] By contrast, mercy is flexible and situational.[42] It requires judges and juries to do more than just apply rules in a cool, objective manner.[43] It challenges them to set aside the bounded morality of institutional roles to engage their fuller ethical and moral

34. *See* Gray, *supra* note 11, at 291, 294 (characterizing mercy as existing outside of proportionality and thus independent of it); *see also* Markel, *supra* note 2, at 1437 (pointing out that mercy is an act of grace which "someone has neither a natural nor a legal right to claim").

35. Duff, *supra* note 6, at 370, 372, 378.

36. *See, e.g.*, California v. Brown, 479 U.S. 538, 542–43 (1987) (upholding an instruction advising jurors that they must not be "swayed by 'mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling'"); Bowers, *supra* note 31, at 39–40 (furnishing several examples of "rigid, binary, rulebound approach[es]" to enforcing rules); Nussbaum, *Equity*, *supra* note 4, at 98–99 (exemplifying an "unyielding" approach to enforcing the law through stoic philosophy).

37. *See* Markel, *supra* note 2, at 1476 (emphasizing the importance of mechanisms for checking discretion); THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules . . . .").

38. Steiker, *supra* note 8, at 24 (quoting Letter from Thomas Jefferson to Edmund Pendleton (Aug. 26, 1776), *in* THE PAPERS OF THOMAS JEFFERSON 503, 505 (Julian P. Boyd ed.,1950)).

39. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of J. John G. Roberts, Jr.).

40. *See, e.g.*, NINTH CIR. JURY INSTRUCTIONS COMM., MANUAL OF MODEL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 109 (2023) ("It is also your duty to apply the law as I give it to you to the facts as you find them, whether you agree with the law or not. You must decide the case solely on the evidence and the law.").

41. *See* Kempis Songster, Terrell Carter & Rachel López, *Regarding the Other Death Penalty*, 124 COLUM. L. REV. (forthcoming 2024) (manuscript at 1–4) (on file with authors) (describing the often-ignored harshness of life sentences); McLeod, *supra* note 22, at 1473 (highlighting the particularly harsh nature of criminal justice in the United States). *See generally* Rachel E. Barkow, *When Mercy Discriminates*, 102 TEXAS L. REV. 1365 (2024) (describing how criminal law can be both discriminatory and unduly harsh).

42. *See* JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 159 (1988) ("The merciful punisher knows full well that he has a 'right' to inflict what he has an obligation to inflict, but he also believes himself to have other obligations, in particular, to the wrongdoer as a human being."); *see also* Nussbaum, *Equity*, *supra* note 4, at 86 (contrasting retributive justice, which is rigid and harsh, with merciful punishment, which is flexible and situational).

43. Nussbaum, *Equity*, *supra* note 4, at 93–95.

capacities.[44] Highlighting this feature, Martha Nussbaum has compared mercy to the Greek concept of *epieikeia*: "[T]he ability to judge in such a way as to respond with sensitivity to all the particulars of a person and situation, and the 'inclination of the mind' toward leniency in punishing."[45]

This is all pretty quick and abstract. To make things a bit more concrete, consider this variation of a hypothetical described by Antony Duff.[46] Fred and George are lifelong friends and partners in a business. Fred discovers that George has been embezzling funds. Fred storms over to George's house to confront him. When he arrives, Fred finds George in tears. It seems his husband of two decades has just died in a tragic accident. Duff posits that it would be "grotesque" in this circumstance for Fred to brush aside the news in order to vent his spleen over the embezzled funds.[47] Instead, most emotionally mature and morally sane people would immediately forget about the money and grieve with their friend. Duff goes further still, suggesting that, rather than waiting for another time to confront George, there is a strong case that Fred should just let the whole thing go.[48] By contrast, if George is charged with criminal embezzlement, then his sudden loss would be irrelevant. Nothing about his husband's death suggests incapacity to stand trial, a legal excuse, or grounds for lesser sentence. Though a prosecutor or judge might feel sympathy for George's personal loss, it simply has no legal salience. So, the only way for George to pursue mitigation or leniency before a criminal court based on his husband's tragic death is to beg for mercy.

Much ink has been spilled by mercy advocates trying to argue for mercy in the criminal justice system or to develop a consolidated theory of mercy and criminal justice.[49] Many of these attempts argue that criminal law prescribes a kind of bounded justice that, by virtue of its boundedness, inevitably makes mistakes.[50] On this view, mercy provides a safety valve or corrective, allowing police officers, prosecutors, judges, and juries to set aside the demands of the criminal law and do justice in a broader sense—to

44. Card, *supra* note 5, at 189; *see* Eisenberg, *supra* note 17, at 2–3 (theorizing that mercy should take the form of "a general disposition or practice" in the criminal justice system, as opposed to "a thing sporadically doled out . . . in particular cases"); Duff, *supra* note 6, at 373 (contending that there are cases in which it is inappropriate for institutional actors to "think and act purely from within the perspective of the criminal law—purely within the confines of [their] role"); Nussbaum, *Equity*, *supra* note 4, at 103, 110–11, 115 (expounding on Seneca's "merciful attitude" conception of mercy).

45. Nussbaum, *Equity*, *supra* note 4, at 85–86.

46. Duff, *supra* note 6, at 366.

47. *Id.*

48. *Id.*

49. *See, e.g.*, McLeod, *supra* note 22, at 1477 (proposing "a path toward the systematic consideration of mercy in American sentencing"); Adam M. Gershowitz, *Mercy for the Masses: A Default Rule for Automatically Triggered Commutations*, 102 TEXAS L. REV. 1431, 1432–35 (2024) (proposing a sentencing system that incorporates mercy and punishment through default rules).

50. Nussbaum, *Equity*, *supra* note 4, at 93.

be more like Fred.[51] That makes intuitive sense, but it begs the question whence this separation arose and why. The next section posits an answer based on the work of sociologist Emile Durkheim.

II. Criminal Law and the Division of Labor

In *The Division of Labor in Society*, Emile Durkheim describes two main ways societies create and sustain solidarity.[52] Mechanical solidarity characterizes traditional, pre-industrial societies where individuals share a robust set of moral and ethical values, ontological beliefs, and lifeways that innervate all aspects of life.[53] Individuals tend to participate in the same relatively narrow range of economic activities—farming, hunting, gathering, domestic industry, etc.—and everyone knows how to perform most of the labor that needs doing. There is little, if any, labor specialization.[54] Collective consciousness is predominate; membership in the group is the primary source of identity; and notions of individuality are largely absent.[55] Disciplinary power is diffused and exercised through dense networks of frequent social contacts by and on behalf of the community as a whole.[56] In these "segmentary" societies, social cohesion is a function of similarity, familiarity, close contact, and shared experience.[57]

Organic solidarity emerges in large, modern, industrial societies where it is impossible to maintain mechanical solidarity.[58] In these societies, growth in population and geographic range occasions diversity in values, belief systems, and lifestyles. Growth also leads to economic diversity, specialization, and the division of labor.[59] Individual consciousness is predominate, backed by robust commitment to autonomy and individual freedom.[60] Durkheim contends that, as a society grows and becomes more

51. Steiker, *supra* note 8, at 31; *see* Markel, *supra* note 2, at 1432 (contending that sites for discretion are necessary to "offset the potential inequities that might otherwise arise" in criminal justice); Osler, *supra* note 27, at 28 (providing empirical data that show "a remarkable drop in the number of death sentences in the United States in the past twenty-five years," attributable in part to "the development of effective 'mitigation techniques'"). *But see* McLeod, *supra*, note 22, at 5–6 (describing how mercy seems to compromise retributive commitments to proportionality in punishment).

52. DURKHEIM, *supra* note 18, at 138.

53. *Id.* at 138, 141.

54. This includes gender roles, which Durkheim sees as phenomena of modernity. *Id.* at 47.

55. *Id.* at 101.

56. *Id.* at 61.

57. *Id.* at 177. Although most of us are products of modern societies rather than isolated tribal groups, there are communities where mechanical solidarity predominates. Consider, as examples, the lives of Hasidic or Orthodox Jews in places like Brooklyn, New York, and Pikesville, Maryland; the Amish in Lancaster, Pennsylvania; or Seventh Day Adventists in Loma Linda, California.

58. *See id.* at 143 (explaining that organic solidarity "relies on principles so utterly different from [mechanical solidarity] that it can develop only to the extent that the latter has vanished").

59. *Id.* at 205–06.

60. *Id.* at 234–35.

diverse, the conditions necessary for maintaining mechanical solidarity are radically diminished, occasioning potential dissolution.[61] In these societies, social cohesion is instead achieved by economic interdependence and individuals' recognizing their critical roles in society and the economy—akin to how the organs in a human body perform their specialized functions in support of the whole.[62]

According to Durkheim, societies transition from mechanical to organic solidarity as they shift from being relatively small, homogeneous, tightly knit communities to being larger, more diverse, more diffuse, and more anonymous ones.[63] In mechanical societies, social ties are created and reinforced through actual familiarity. Members are known to one another. Most daily interactions are with intimates or individuals who are immediately recognizable through defined lines of kinship or similarly scrutable associations.[64] In organic societies, members routinely engage with strangers, often for mere moments, in passing or in the context of specific, limited, transactions. At the same time, labor becomes more and more specialized, making individuals fully dependent on society for survival.[65]

For Durkheim, this process of labor specialization and cohesion through economic interdependence is necessary for social progress.[66] Take as an example two tools central to human life. During the Paleolithic and Acheulean periods, the height of human technology was the hand axe. Axe-making was a bespoke, artisanal affair. A single person knew everything there was to know about the design and production of their hand axes. Most folks could probably make one. By contrast, nobody knows how to make a smartphone. These devices could not be what they are if their technology, design, and production was limited by the mind of a particular person or even a few dozen people. Everyone involved in the production of a smartphone is by necessity an expert but is also utterly dependent upon the contributions of others. For Durkheim, this mutual dependence—and mutual incomprehensibility—forms threads of social connection that intertwine and

61. *Id.* at 134; *see also* THE FEDERALIST NO. 10, *supra* note 37, at 77–78 (James Madison) (describing the threats to social stability posed by factions in a diverse society).

62. DURKHEIM, *supra* note 18, at 143, 316.

63. *Id.* at 234; *see also* Bowers, *supra* note 31, at 1578 (noting that much of our lives are "spent 'on the road' in proximity to strangers").

64. DURKHEIM, *supra* note 18, at 139; *see also* MAX GLUCKMAN, POLITICS, LAW AND RITUAL IN TRIBAL SOCIETY 10–18, 107–08 (1967) (summarizing ethnographers' documentation of kinship relations in tribal societies).

65. DURKHEIM, *supra* note 18, at 102.

66. *Id.* at 208.

reinforce one another within and across social projects and enterprises to produce social cohesion without any need for a shared core of beliefs.[67]

Societies that enjoy mechanical solidarity do not really have or need criminal law as we think about it, much less criminal justice institutions.[68] Daily life is densely innervated by social relationships, cultural practices, customs, and shared religious beliefs that mark membership and imbue even mundane tasks with meaning. Members have significant positive and negative duties to each other and society. Because collective consciousness predominates, conformity is at a premium. As a consequence, repressive rules are pervasive, touching on almost every aspect of life and sanctioning conduct that we might regard as well within the sphere of individual freedom because even seemingly minor transgressions threaten the ethical identity of the community as a whole.[69] Because social ties are close, immediate, and intimate, behavior in mechanical societies is closely surveilled and discipline is diffuse and pervasive. These societies practice repressive punishment locally and directly rather than through freestanding, professionalized institutions operating under formalized criminal codes.[70] Major transgressions of social rules are relatively rare but occasion strong moral condemnation because they threaten society and social order.[71]

As societies grow, they become more diverse and their members more estranged.[72] Zones of shared experience, activity, and belief shrink.[73] Social ties become more attenuated, remote, and even abstract.[74] Individual

67. *See* DURKHEIM, *supra* note 18, at 102 (concluding that organic solidarity is "possible only in so far as the individual personality is absorbed into the collective personality" and that the more "specialized" individuals are, "the more personal" the social cohesion); *see also* THE FEDERALIST NO. 10, *supra* note 37, at 82–84 (James Madison) (describing how social cohesion emerges in a diverse society through segmented factions).

68. DURKHEIM, *supra* note 18, at 52, 80 (noting the prominent role of custom in mechanical societies and pointing out how social norms therein were enforced through "the gathering of the whole people which fulfilled the functions of a court of law").

69. *Id.* at 58, 72, 108–10.

70. *Id.* at 80.

71. *See id.* at 77 ("When we demand the repression of crime it is because we are seeking not a personal vengeance, but rather vengeance for something sacred which we vaguely feel is more or less outside and above us.").

72. *See id.* at 234 ("[I]t is evident that [personal relations] are rarer and briefer when each separate individual is in contact with a larger number of other people.").

73. *Id.* at 233–36 (describing how societies shift from conditions where "everyone's attention is constantly fixed upon what everyone else is doing, [and] the slightest deviation is remarked upon and immediately repressed" to conditions where "we do not know one another so well" because "neighbors and members of the same family are in contact less often and less regularly, separated as they are at every moment by a host of matters and other people who come between them" with the result that "both social control and the common consciousness grow weaker").

74. *Cf. id.* at 226 ("[C]onsciousness alters in nature as societies grow more immense. Because they are spread over a much vaster area, the common consciousness is itself forced to rise above all local diversities, to dominate more the space available, and consequently to become more abstract.").

consciousness becomes predominate as society privileges autonomy and independence.[75] Amidst these shifts, criminal law and criminal justice institutions emerge as means of preserving some degree of mechanical solidarity.

Criminal codes "comprise acts universally condemned by the members of each society" that offend "the strong, well-defined states of the collective consciousness."[76] Crimes, as crimes, threaten the social order.[77] Because "the acts that [criminal law] punishes always appear as attacks upon something which is transcendent,"[78] criminal punishment is always, at least in part, an act of moral vengeance that serves to defend society, vindicate its defining beliefs, and expiate its moral outrage.[79] But it "is not a gratuitous act of cruelty."[80] Rather, "[i]ts real function is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigor."[81] "When we demand the repression of crime," Durkheim writes, "it is because we are seeking not a personal vengeance, but rather vengeance for something sacred which we vaguely feel is more or less outside and above us."[82] Proportionality in punishment emerges as an artifact of the degree of the threat to society.[83] As a consequence, punishments may be quite spectacular because the spectacle itself provides a critical moment to express and command social solidarity.[84]

Because the criminal law is so closely tied to the collective consciousness, penal rules cannot persist for long if they are subject to dispute or wander too far from universal commitments closely tied to

75. *See id.* at 233 (observing that "as society spreads out and becomes denser," "the authority of custom . . . diminish[es]" and is "less in a position to hinder the free flourishing of individual variations").

76. *Id.* at 59, 64.

77. *See id.* at 77 (describing crime as offending "the sentiments that . . . are the most universally collective ones of all, since they represent . . . the common consciousness"). This is evident in retributivist theories. *See, e.g.*, Markel, *supra* note 2, at 1449 ("[T]he offense is . . . against the people and their agent, the state, whose charter mandates the protection not only of the persons constituting the political order, but also of the decision-making authority of the regime itself.").

78. DURKHEIM, *supra* note 18, at 77.

79. *Id.* at 68–71; *see also* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 471, 473–74 (1997) (arguing that the criminal law marks a shared zone of agreement that transcends differences and must do so in order to maintain its legitimacy).

80. DURKHEIM, *supra* note 18, at 83.

81. *Id.*

82. *Id.* at 77.

83. *Id.* at 68–69, 78.

84. *See id.* at 67–68 (detailing how punishment may often take the form of a "passionate reaction" because the communal feeling "dies down only when it is spent"). Michel Foucault famously makes this case in the vivid opening pages of *Discipline and Punish*. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON, 3–5 (Alan Sheridan trans., Vintage Books 1979) (1975).

collective identity.[85] We should therefore expect that the scope of criminal prohibitions will contract as societies become larger and more diverse.[86] As an example, Durkheim cites the abandonment of criminal codes punishing sexual relations and impiety.[87] We might add recent movements to legalize intoxicating substances in many states.

This is by no means a straight line, of course. In the midst of social transformations, the criminal law may and usually does experience periods of expansion. This may be in response to eruptive change when the criminal law may be deployed as a part of a retrograde effort to combat natural trends toward diversity and individuality. It is no surprise that rallying cries for "law and order" and a return to "traditional values" share the same stage. Similarly, the criminal law may be deployed as a means of repressing segments of society that have achieved new freedoms or otherwise threaten the old regime.[88] Here one might cite the role of the war on drugs as a response to the civil rights and anti-war movements.[89] But, on the whole, repressive criminal law shrinks over time in step with the division of labor.[90] The normative density and reach of the criminal law, already limited in

85. *See* Robinson & Darley, *supra* note 79, at 482 ("When a society contains groups with a strong and deeply felt moral disagreement . . . the situation is destructive of the law's moral credibility and thus its power to gain compliance.").

86. Durkheim does not regard regulatory crimes as an exception to this rule. To the contrary, he regards the expansion of the administrative state as a signal of emergent organic solidarity precisely because it responds to the needs of the division of labor and usually withholds the kind of moral condemnation and regressive punishment that characterizes repressive criminal law. *See* DURKHEIM, *supra* note 18, at 161 (describing the effects of the enlargement and increased complexity of regulatory mechanisms of discipline in societies where the prominence of repressive law has diminished).

87. *Id.* at 123–26; *see also* Lawrence v. Texas, 539 U.S. 558, 569–70 (2003) (finding unconstitutional laws prohibiting sodomy, in part because of the states' abandonment of sodomy laws).

88. *See* DURKHEIM, *supra* note 18, at 64 (suggesting that "an act is criminal when it offends the strong, well-defined states of the collective consciousness").

89. For a nuanced account of how the criminal law, including drug laws, evolved as a means of repressing Black liberation movements, see generally ORISANMI BURTON, TIP OF THE SPEAR: BLACK RADICALISM, PRISON REPRESSION, AND THE LONG ATTICA REVOLT (2023) (furnishing an account of the "calculated denial of the material, social, cultural, and political nutrients necessary for reproducing defiant Black life and consciousness across generations" in response to Black liberation movements).

90. *See* DURKHEIM, *supra* note 18, at 129–30 (observing that punishments recede in harshness when "there are more persons in society" and thus "the common consciousness comprises ever fewer strong and well-defined sentiments"). As I have argued elsewhere, a parsimonious criminal code is a necessary feature of retributivism. David Gray & Jonathan Huber, Response, *Retributivism for Progressives: A Response to Professor Flanders*, 70 MD. L. REV. 141, 156 (2010); *see also*, DURKHEIM, *supra* note 18, at 82 (describing how criminal codes tend toward parsimony).

scope, diminishes further as a society continues to grow and the zone of shared norms and collective consciousness contract.[91]

As societies continue to grow and become more diverse, diffuse, and estranged, the idea that there is a substantial set of core beliefs that describes a shared social consciousness—which was once a reality, then a useful article of faith—becomes pure fiction.[92] Without the benefit of that shared core, society faces dissolution because the foundations of collective identity have crumbled away.[93] On Durkheim's account, organic solidarity emerges to provide social cohesion.[94] In contrast with mechanical solidarity, organic solidarity is a function not of shared belief, but the web of intersecting and overlapping social and economic relationships that form as artifacts of the division of labor.[95] As members become more specialized in knowledge, skill, and economic contributions, they inevitably also grow more dependent on others to provide goods, services, and social contributions they no longer can.[96]

On Durkheim's account, criminal law in a society defined by organic solidarity loses its repressive character and expiatory force.[97] Punishment no longer needs to pay tribute to a defining set of normative commitments because society is no longer defined in this way. Crime is instead identified by the threat it poses to social relationships and individuals as such.[98] Rather than being repressive, Durkheim posits that criminal justice in an organic society is restorative.[99] It seeks to understand, reconstruct, and reintegrate rather than judge, condemn, and marginalize. As a consequence, it shifts its emphasis from the community to the individuals involved, adopting many of the characteristics of private law.

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91. DURKHEIM, *supra* note 18, at 123–28; *see also* Duff, *supra* note 6, at 371, 378 (explaining that the scope of criminal law in modern liberal states is necessarily limited in order to accommodate diversity and individual liberty). Drug laws and regulatory offenses are not to the contrary. Drug laws are limited because they are presented as defending core social identity, both facially and through racial dog whistling. Regulatory offenses are not limited because they are not similarly presented. They are, instead, reflective of the kinds of criminal laws one would expect to find in support of organic solidarity. They do not have moral valence. Offenders are seldom subject to strong condemnation. Sanctions often focus on restoration rather than retribution.

92. DURKHEIM, *supra* note 18, at 130, 134.

93. *Id.* at 134; *see also* THE FEDERALIST NO. 10, *supra* note 37, at 77 (James Madison) (describing how factions threaten social stability).

94. DURKHEIM, *supra* note 18, at 138.

95. *Id.* at 158, 264–65; *see also* THE FEDERALIST NO. 10, *supra* note 37, at 82–84 (James Madison) (describing how overlapping group identities provide social stability in diverse societies).

96. DURKHEIM, *supra* note 18, at 158 (explaining that an individual who "devote[s] himself to one special function . . . discover[s] that inevitably he is in solidarity with other people").

97. *Id.* at 177.

98. *See id.* at 130 ("[T]he sole collective sentiments that have gained in intensity are those that relate . . . to the individual.").

99. *Id.* at 88, 99, 105.

III. Social Transformation, Criminal Justice, and Mercy

Emile Durkheim's description of how criminal law emerges in societies transitioning from mechanical to organic solidarity helpfully illuminates debates about criminal justice and mercy. Societies shift from mechanical to organic solidarity as they grow in size and diversity.[100] Criminal law is one site where this transition is manifest. In rough terms, criminal law as an institutional regime emerges as the threads of mechanical solidarity become attenuated. At this developmental stage, criminal law has a distinctly retributive or repressive character in that it aims to maintain mechanical solidarity by reiterating, reifying, and retrenching the shared beliefs that define society ethically and constitute its collective consciousness. This makes the criminal law a tragic enterprise. It emerges as a social phenomenon to combat the anomie that accompanies social change; but it inevitably fails due to the same irresistible pressures that produce social change in the first place: growth, diversity, and anonymity. Just as the division of labor is an inevitable consequence of social evolution, so, too, is the perpetual inadequacy of the criminal law as a means of maintaining mechanical solidarity through repressive social control.

In addition to challenges posed by waning collective identity, the criminal law's efforts to maintain mechanical solidarity by repressive means are limited by its modes of operation. Mechanical solidarity is maintained by dense, frequent contact that creates familiarity and provides constant opportunities for mutual discipline. The criminal law does not and cannot operate this way. As a phenomenon of large, diverse, anonymous societies, the criminal law can only engage citizens infrequently, on an ad hoc basis or in response to notorious breaches.[101] It must also resort to general rules and

100. *See id.* at 206 (describing "the growth in social volume" as "a facilitating condition" for the shift).

101. Although outside the scope of this Essay, this lacuna between criminal law's mechanical aspirations and its practical reality helps us better understand contemporary debates about surveillance and policing. New and emerging technologies offer the opportunity to exercise the same kind of pervasive disciplinary control familiar in small, densely interconnected societies but otherwise impossible in large, diffuse ones. That is all well and good in a mechanical society where there is a dense set of shared norms and collective consciousness predominates. But that is not the world we live in. At this point in history, we live in a large, diverse society where personal freedom, autonomy, and individual consciousness are predominant. For us, the prospect of pervasive surveillance poses an existential threat because it compromises the anonymity and privacy upon which liberty depends. There is a similar dynamic at play in debates about policing. In their groundbreaking work on "broken windows," George L. Kelling and James Q. Wilson contend that the primary goal of policing is to enforce the "informal but widely understood rules" that define order in a particular society. George L. Kelling & James Q. Wilson, *Broken Windows*, ATLANTIC, Mar. 1982, at 29, 30, https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/ [https://perma.cc/54BE-TYKR]. That might be perfectly appropriate in a community that boasts the conditions necessary to mechanical solidarity, where it reinforces shared norms and collective identity, but can only be oppressive in diverse communities where it threatens

specialized institutions constrained by procedural norms that privilege objectivity and proportionality. Those institutions are populated by institutional actors who have defined role identities and frequently operate within epistemic constraints such as those imposed by rules of evidence. Together, these features of criminal justice institutions make impossible, and even reject, the contextual, intimate, informal, and narrative judgment that are defining features of mechanical societies.

Mercy reflects an effort to perfect the criminal law. Viewed from a sociohistorical perspective, criminal justice and mercy are pieces of a fractured whole. The criminal law attempts somewhat desperately to preserve mechanical solidarity by defending an ever-diminishing set of shared values and core norms, imagining all the while that some degree of collective consciousness remains. Predictably, this effort fails because it must. As societies grow and diversify, individual consciousness inevitably becomes predominate. Mechanical solidarity simply cannot survive the tectonic shift to modernity. Separately, and somewhat comically, the criminal law cannot preserve mechanical solidarity because it makes a virtue of alienation. It is organized around specialized, hierarchical institutions that stand apart and above society. It relies on abstract rules and principles, limits its agents to their institutional roles, and denies the moral and social complexity of its subjects. In short, the criminal law operates in stark contrast with the diffuse, pervasive, engaged, contextual, and familiar judgment that is essential to mechanical societies.

Mercy is an appealing salve because it seeks to recapture and recreate the kind of intimate judgment indigenous to the close, familiar relations that define mechanical societies. But that effort too seems tragic and naive when faced with the realities of modern society. That is because the basic conditions of diminished collective identity and anonymity remain.[102] Just as the audience to a play may experience catharsis, so, too, may the participants in a criminal trial. That catharsis may be more intense if participants are invited to employ *epieikeia*, but the feeling quickly dissipates because the

liberty and autonomy not just through the exercise of power but by the attempt to impose contested norms.

102. This explains the somewhat paradoxical fact that both the retributive impulse at the center of the criminal law and demands for mercy may share their roots in religion. While *religion* exercised in mechanical societies describes a shared, defining worldview, *religions* in emerging organic societies highlight the fact of increasing diversity. As individuals and societies struggle with waning mechanical solidarity, it is no surprise to find them reaching for religion as a means of establishing community, organizing their beliefs, and guiding their actions. For adherents to religious traditions that counsel mercy, this religious grounding itself marks both a corrective and a rejection of the secular, rule-bound state apparatus of judgment and punishment. Just as importantly, however, mercy need not be tied to religion. It can just as easily be grounded in basic human empathy, humility, or a literary sensibility. So, the fact that calls for mercy often come in religious packaging is neither surprising nor necessary. I am grateful to Lee Kovarsky for pressing this question.

entire engagement is limited and transactional. The players come together for a moment to accomplish a particular task and then return to their separate lives. They do not and cannot experience the kind of social cohesion and solidarity that arises from living in the dense, close, familiar community of a mechanical society.

This is not necessarily cause for despair, however. It instead reminds us that, like criminal justice, mercy is an artifact of a particular moment in society. Both criminal law and mercy emerge as societies grow and become more diverse and anonymous; both reflect an effort amidst social change to recapture solidarity in its mechanical form; and both are doomed to fail as the practical conditions necessary to achieve and sustain mechanical solidarity disappear. Taking seriously these tragic features of criminal justice and mercy reminds us that we live amidst social change, in the middle of history, not at its end. Rather than engaging in debates about criminal justice and mercy as abstract questions of theory, we should instead see them as contingencies of our transitional moment and as invitations to think about what comes next.

For Durkheim, what comes next is a world where criminal law and other forms of repressive social control give way to restitutive forms of law. Restitutive law for Durkheim corresponds roughly to what we call private law.[103] Where repressive law sees transgressions in mechanical terms as threats to collective consciousness, restitutive law sees transgressions as violating the conditions of social cooperation necessary to the success of the division of labor.[104] Where repressive law punishes in order to defend, maintain, and sustain collective identity and therefore society itself, restitutive law aims at "*restoring the previous state of affairs*, [and] reestablishing relationships that have been disturbed from their normal form."[105] Where repressive law focuses on the right of society to self-defense, restitutive law focuses on the individual rights essential to the division of labor, including those protecting labor and property.[106]

Durkheim recognizes that all societies exist on a continuum. No existing society is entirely mechanical or entirely organic. Neither does he seem to think that any society will ever be entirely one thing or the other. Rather, his descriptive claim seems to be that, as the primary source of solidarity in a society shifts from mechanical to organic, we can expect to see repressive

103. DURKHEIM, *supra* note 18, at 55. Of course, "private" is still a public phenomenon in that it defends the conditions of social cooperation even if it no longer depends on the existence of shared social identity. *See* Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1075, 1085 (1984) (arguing that the private settlement of disputes fails to achieve real reconciliation for litigants and compromises law's public function).

104. DURKHEIM, *supra* note 18, at 82–84, 94, 99–102.

105. *Id.* at 55.

106. *Id.* at 68, 92–100.

forms of law, including criminal law, give way to restitutive forms of law. By their nature, these branches of law tend to rely on principles rather than rules and to focus on the particularities of specific circumstances rather than abstract generalities. In short, these are fields of law that invite the kind of textured reasoning characteristic of *epieikeia*. In this context, the tension between law and mercy simply does not arise.[107]

The shift from repressive to restitutive law that tracks the shift from mechanical to organic solidarity is likely to be reflected in the division of labor between criminal law and fields of private law such as domestic law, tort, and contract. But it is also likely to produce a shift in the criminal law itself, away from punishment toward what we nowadays call restorative justice.[108] Along the way, we are likely to see more opportunities for individuals to intervene in criminal law processes. One example is the use of victim impact statements.[109] Further along, we may expect to see a more prominent role for victims in decisions about whether to prosecute and what charges to bring, decisions that normally fall within the exclusive purview of prosecutors as representatives of "the people."[110]

In addition to shifts from repressive to restitutive law, Durkheim argues that the shift from mechanical to organic solidarity will occasion a change in the way individuals construct identity and meaning in their lives. As collective identity recedes, social bonds become more attenuated, and labor becomes more specialized, there is a risk that individuals will experience anomie, isolation, and alienation. On Durkheim's account, we can avoid these dangers by focusing on the unique contributions we make to society from our particular positions in organizations and the economy.[111] The sense of meaning we experience from these contributions and achievements is at risk, Durkheim points out, if there are dramatic inequalities in the distribution of goods and resources.[112] So, in addition to promoting a shift from punishment to restorative justice, the shift toward organic solidarity promises

107. *See* Steiker, *supra* note 8, at 28 (describing how the conflict between justice and mercy is eliminated when considering a legal rule's effect on social welfare); s*ee also* Stephen Bero, *Mercy in Tort: An Introduction*, 102 TEXAS L. REV. 1599, 1607–12 (2024) (describing how specificity and mercy play a role in tort actions and policy).

108. *See* Steiker, *supra* note 8, at 29–32 (explaining the theory of restorative justice, including the centrality of mercy to the theory).

109. *See* Paul G. Cassell, *On the Importance of Listening to Crime Victims . . . Merciful and Otherwise*, 102 TEXAS L. REV. 1381, 1399 (2024) (arguing for victim impact statements at sentencing, in part because victims are better able to take into account the specific nuances of a crime, while state actors rely on general rules and heuristics). *But see* Markel, *supra* note 2, at 1478 (arguing against an increased role for victims in sentencing).

110. *See, e.g.*, LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE IN THE LEGAL SYSTEM 5 (2012) (highlighting, for instance, the tension that may arise between "society's goals in addressing domestic violence" and "the goals of a woman subjected to abuse").

111. DURKHEIM, *supra* note 18, at 314, 317.

112. *Id.* at 293–94, 318.

to provoke serious engagements with questions of distributive justice, which often are ignored by the criminal law and its focus on individual responsibility.[113] Mercy, or at least *epieikeia*, is likely to play a prominent role in these conversations by focusing attention on the social determinants of crime, which, in turn, allows us to see more clearly the links between social stability and economic justice.[114]

Nothing in the foregoing suggests that the future of any society is preordained. Moreover, even if we think that Durkheim has described what progress looks like for society and its institutions, progress is never linear. We can expect lots of volatility along the trend line.[115] But it is nevertheless helpful to have some sense of where we might be heading, if only to better understand the phenomena we observe along the way. In this Essay, I have tried to do just that for debates about criminal justice and mercy. Notably, this effort pursues an agenda quite different from that implicit in conventional debates about mercy and criminal justice.

As noted at the beginning of this Essay, most debates about mercy and justice assume that the primary normative questions circulate around when and in what circumstances state officials can or ought to modify judgment or mitigate punishment based on countervailing normative demands.[116] The normative tenor of those debates suggests that they exist out of time. That perspective indulges a version of recency bias, ignoring the simple fact that we occupy a singular position between past and future. This Essay has suggested that this position "betwixt and between" past and future is not just temporal, but liminal. The normative questions raised by conflicts between criminal justice and mercy challenge us to ask hard questions not only about what to do now, but about where we are headed as a society and how what we do now might facilitate that transition. The normative vocabulary of mercy does more than inform us about what we should do now. It points us toward where we are going. It also suggests that, as Aristotle taught us long ago, normative questions are not ontological, they are teleological.

Mercy plays an important role in our particular sociohistorical moment. It serves as a check on criminal law's propensity to be harsh and unyielding.

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113. For a thoughtful discussion of how we might situate concepts of free will and personal responsibility in restorative justice regimes, see generally Maggie T. Grace, *Criminal Alternative Dispute Resolution: Restoring Justice, Respecting Responsibility, and Renewing Public Norms*, 34 VT. L. REV. 563 (2010).

114. DURKHEIM, *supra* note 18, at 295–97, 317–18; *see also* Lisa Herzog, *Durkheim on Social Justice: The Argument from "Organic Solidarity"*, 112 AM. POL. SCI. REV. 112, 113 (2018) (explaining how Durkheim's account of organic solidarity marries "commutative justice" and "distributive justice").

115. *See* DURKHEIM, *supra* note 18, at 317–18 (commenting that "very profound changes have occurred in the structure of our societies," such that "the new life that all of a sudden has arisen has not been able to organize itself thoroughly").

116. I am in debt to John Deigh for pressing this question.

It reminds us to look at defendants and victims more holistically in their full narrative contexts. It challenges us to accept the burdens of our own agency rather than hiding behind the constraints of institutional roles. It helps us identify opportunities to pursue social justice more broadly. But perhaps most importantly, it guards against complacency by forcing us in individual cases and policy discussions to confront the fact that our criminal justice institutions are the products of us and our times, and that our decisions and actions now have both history and future.