

Mercy and Criminal Justice: A Response to Lindsay Farmer

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Summary

In *Justice, Mercy and Punishment* Professor Antony Duff considered the question of mercy and criminal justice, and critically applied it to the release of Abdelbaset Ali al-Megrahi on compassionate grounds in August this year. Lindsay Farmer's analysis of the place of mercy in criminal justice, published here as *Mercy and Criminal Justice: a reply to Antony Duff* led to the opposite conclusion. In this short response, Antony Duff argues that the exercise of mercy in these circumstances is in conflict with justice and that this distinguishes the sort of decision made in Megrahi from the exercise of discretion in sentencing, or where the rigour of the criminal law must be tempered to be just.

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Antony Duff is a Professor of Philosophy at Stirling University. He has written extensively on the philosophy of criminal law and the philosophy of punishment. Notably his work on communicative theory *Punishment, Communication and Community* (2000, OUP) addressed the problem of justifying punishment.

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Article

Lindsay Farmer offers a rich account (richer than the account that I sketched) of the roles that mercy can play in a decent system of criminal justice, but I'm not sure how far we differ on issues of substance.

My concern was with mercy as something that can temper justice, i.e. that can conflict with the strict demands of justice and sometimes qualify or override them; my argument was that mercy, *as thus understood*, can play an important but limited role in a system of criminal justice (a role that is indeed perhaps best discharged, as Farmer suggests, outside rather than inside the criminal court). There are two other features of a decent system of law that might also be said to involve mercy, but in a rather broader sense of that term; I suspect that at least some of the aspects of mercy for which Farmer thinks I fail to find room are matters of mercy only in this broader sense, which does not involve any necessary tension with the demands of justice.

First, there are cases in which what mercy must temper is not justice itself, but the very rough form of justice that the normal rules and operations of the criminal justice system can do. Attention to the individual features and circumstances of a particular defendant show (to a suitably sensitive eye) that he does not deserve the sentence prescribed by the law; an act of 'mercy' is then needed to save him from this undeserved fate. Since we can be confident that any human system of justice will be at best a system of rough justice, we

need to make room for a discretionary power to vary, to temper, the overly harsh requirements of the law. This is not, however, a matter of mercy tempering justice. It is rather a matter of using discretion to do what comes closer to justice in the individual case—what some call equity. (The extent to which this kind of discretion is needed and important depends on the extent to which our existing system of criminal justice fails to do justice to those who come before its courts, and the extent to which the justice of its processes and punishments is undermined by the various forms of social injustice that lie behind so much offending.)

Second, when it comes to sentencing, it could be argued that the demands of justice are not precise: we cannot hope, and should not try, to specify exactly what quantum or type of penal burden justice requires for a particular offence. If we ask what this offender deserves, a plausible answer will not specify a precise punishment, but a range of possible sentences that vary in both type and severity. Justice sets limits on the kinds of punishment that could be appropriate for the offence in question, and very rough upper (and perhaps sometimes lower) limits on the severity of the punishment: within those limits, the whole range of other factors that Farmer rightly emphasises will come into play. But, again, this is not a matter of mercy tempering justice. As Farmer says, the details of the sentences are ‘not determined according to criteria of desert’: but this is simply because the criteria of desert, the demands of justice, are silent here—in which case we do not need to appeal to mercy to temper those demands.

Another example will illustrate the different ways in which we might talk of mercy. It is clear that the English Director of Public Prosecutions (who must approve any prosecution for assisted suicide) will not prosecute people who, moved by love and compassion, help a close friend or relative travel to the Dignitas centre in Switzerland to commit (assisted) suicide. It is also clear that such people are guilty of the offence, as defined in English law, of assisting a suicide. Is this an exercise of mercy by the DPP? In one sense it is: out of compassion for the assister, the DPP decides not to apply the letter of the law; although justice, as defined by the criminal law, requires their prosecution and conviction as wrongdoers, he mercifully refrains from prosecuting them. In another sense, however, he is acting not mercifully but justly: for even those who think that it is wrong to assist another’s suicide, and who would oppose any such reform of the law, can agree that in these cases the person assisting the suicide does not deserve to be condemned for it, and that to follow the letter of the law would therefore be to violate rather than to fulfil the demands of justice.

There are, then, at least these three different kinds of case in which, three different kinds of ground on which, an official (a prosecutor, a judge, a minister ...) might see good reason not to apply the full rigour of the criminal law to someone who has undoubtedly committed a criminal offence. First, the law itself might be too crude to satisfy the demands of justice to the individual offender: the law’s rigours must be tempered, in order to do adequate justice. Second, the demands of justice, as specified in the law, might leave room for decisions based on grounds other than justice: the demands of justice could be satisfied by any of a range of sentences, and a sentencer might properly attend to (among other things) the effect of this or that sentence on the offender in deciding what punishment to impose. Third, the punishment that the law prescribes might be in accordance with the demands of justice: the offender does deserve a sentence as severe as this. But given his particular situation, for instance the fact that he is in the final stages of a terminal illness, it might seem cruel to enforce what justice demands; the demands of justice might give way to, be tempered by, a sense of compassion.

The third of these cases is the one with which we began, since that is Abdelbaset Ali al-Megrahi's case as described by the Justice Secretary; it is in this kind of case that mercy is a value not merely distinct from but conflicting with justice. We might also talk of mercy in the other two kinds of case, and I am not suggesting that we are wrong to do so; indeed, we can say that in all three cases the same kind of attention to and concern for the offender should be at the heart of the officials' deliberations. But it is important to distinguish the cases, and to recognise the different roles that the demands of justice play in each of them.



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