

## Introduction

Mercy is a function of the brute facts, though it is the opposite of brutal. Here is one possible example. In *Soldiers of Salamis*, Javier Cercas's novel of the Spanish Civil War, the fascist writer Rafael Sánchez Mazas has escaped from a mass execution and is hiding in a ditch. The Republican soldiers are searching for him, and one of them is standing on the edge of the ditch with his rifle. Someone shouts:

“Is anyone there?”

The soldier is looking at him; Sánchez Mazas is looking at the soldier, but his weak eyes don't understand what they see ... the soldier's look doesn't express compassion or hatred, but a kind of secret or unfathomable joy, something verging on cruelty ... [he] calls out loudly without taking his eyes off him:

“There's nobody over here!”

Then he turns and walks away.<sup>1</sup>

In that moment, the soldier has the absolute power of life and death over Sánchez Mazas. But he does not shoot him on the spot or call over his comrades to recapture him. He just walks away. His reasons are inscrutable.

Is this an act of mercy? If Sánchez Mazas had whispered ‘Have mercy on me, my friend’, this would have been the response he was looking for. And if the soldier had heard, his actions would have been enough to indicate that he had understood and heeded the request. Given that this was a military operation, we can be confident that the soldier was disregarding orders by acting as he did. But it would surely have been no less merciful if the soldier had been operating outside any normative framework—if he had been a bandit, or a deserter roaming the countryside with a gun.

In fact, the soldier’s action would seem to count as an act of mercy irrespective of his motivation for doing what he did. Even if he lied because he disliked the person asking ‘Is anyone there?’ or because he was secretly a fascist sympathiser, it would not make any difference. It would be appropriate to say: he acted mercifully because he was a fascist sympathiser, or he acted mercifully because he wanted to mislead his superiors. Just as, had the outcome been different, it would be appropriate to say: he showed no mercy because he was an anarchist sympathiser, or he showed no mercy because he wanted to please his superiors.

What about the soldier's intentions? If he had fired and missed, that would not count (unless he did so deliberately), and if he returned to base and just forgot to report seeing Sánchez Mazas, that would hardly qualify as an act of mercy either. The intention to do less harm must be present, even if its motive is irrelevant. So, if the soldier were thinking, 'I won't shoot him now, because I would rather he die more painfully of cold and starvation', that would count against the idea that this was an act of mercy because the intention is to do *more* harm. But it would make no difference if the soldier thought, 'I won't shoot because I don't care what happens to him either way', rather than 'I won't shoot because he too is a human being and I pity him', because the act itself involves less harm, and indifference to the long-term outcome is not at odds with that.

Yet having acted with merciful intent does not necessarily mean that an act will be merciful. An act of mercy is an action that is both intended to be and turns out to be less harmful than it might have been. So there is no way of knowing whether an act is merciful except by its consequences, which are measured by the harm to individuals. If the soldier had tried to miss but ended up fatally shooting Sánchez Mazas anyway, that would not be an act of mercy. The most that could be said is that the soldier had intended to act mercifully but had not done so. Mercy is defined not by its intended effects but the actual ones.

Three things seem to be involved when we are talking about mercy: the context, which determines the range of possible actions; the intention of the action; and its outcome. This suggests a definition broad enough to encompass a range of culturally and historically specific examples. You act mercifully towards someone if you intentionally and successfully do them less harm than you might, in the sense that doing something else, which you might equally well have done in that situation, would have done greater harm.<sup>2</sup> It is difficult to see how an action that did not fulfil these basic criteria would count as an act of mercy. However, there are many circumstances in which this definition appears too inclusive, given that it is possible to do very great harm that is less than the maximum physically possible.

Some more restrictive definition of ‘might equally well have done’ is required, but it is important to consider carefully why that is. After all, what, if anything, is the matter with a torturer who says, ‘I *was* merciful, I tortured him a bit less severely than I might have done’? One response might be to claim that an action that is in itself wrong cannot be an act of mercy. However, this does not seem to capture what is at issue here. If there are less harmful alternatives, torturing ‘a bit less severely’ does not seem to count as merciful at all. But with less harmful alternatives excluded, the torturer’s unpalatable claim becomes more plausible, even though what he is doing may still be wrong in

some absolute sense. To transform mercy into a subset of the set of morally permissible actions is to mistake its frame of reference. A merciful action is one that is less harmful than its alternatives where these alternatives are defined not by their rightness but by their harmfulness, and harm is often wrong.

What makes other courses of action into relevant alternatives, other than their physical possibility? In social contexts, our actions are rarely constrained only by physical limits on our power; they are governed by norms, shared habits, and expectations that, even if not enforced by third parties, guide our mutual interaction. In our thinking, these norms usually take precedence over alternatives that are merely hypothetical. It does not make any difference what the normative framework is; if you do someone more harm than you would normally do in the circumstances, then it is difficult to claim that you have acted mercifully, even if the harm done is far less than it would have been possible for you to have done. So, if the norm is below the maximum level of harm (as is almost always the case), then an act that inflicts harm between the maximum and normal levels cannot be considered merciful, notwithstanding the proximity to the norm and the great distance from the maximum. For example, a judicial sentence that is below the maximum for the offence but above that normally imposed cannot count as merciful, even if it is not in itself all that harsh.

One corollary of this is that the same action—say, execution by beheading—might be considered merciful in one context (as an alternative to hanging, drawing, and quartering) and unmerciful in another (where it represented the maximum available penalty). And if mercy is fully context-dependent, there will be many such anomalies. For example, in some times and places both victors and vanquished would have considered permanent enslavement a merciful alternative to the wholesale massacre of defeated enemies; today, denying them anything less than their full rights under the Geneva Convention will count as unmerciful. Does this imply that we can never tell whether or not an act is merciful from the nature of the act itself? Is the torturer who says, ‘I was merciful, I tortured him a bit less severely than I usually do’ telling the truth? Or is there some threshold of harm above which no act can be merciful, whatever the circumstances?

Given our usual understanding of what constitutes harm as opposed to pain (namely, that it encompasses long-term capabilities, not merely immediate sensations), there is, at the very least, an elective affinity between mercy and not killing. There may be more and less merciful ways to bring about someone’s death, but there has to be a strong presumption that killing is likely to be more harmful to someone than an alternative course of action that does not result in their death. And though it seems possible that there might be a threshold at which life with prolonged pain counts

as a fate worse than death, it is still far from clear how we could say with certainty that killing someone without their consent involved doing them less harm than could otherwise have been done, just as it would be difficult to say with certainty that a cruel person was successfully inflicting more harm by torturing someone and letting them live than they would have done by killing them instead. (If mercy is defined by its consequences rather than its motivation, the phrase ‘mercy killing’ is therefore one that should be used with some caution.)

The fact that mercy inclines against killing, and inclines further than any given norm, is crucial to the argument of this essay. Its central claim is that the world we inhabit (i.e., the social world) is made out of acts of mercy like the one described in *Soldiers of Salamis*. From one perspective, that is obviously true, because otherwise we would all be dead or living with constant violence. What is questionable about the claim is not whether there is any evidence compatible with it, but rather the possible underinterpretation of that evidence. Given that most interactions involve doing or receiving less harm than is possible, to what extent does mercy provide an adequate explanation?

What is it that we are accounting for? At its most basic level it is that it is usually possible to walk down the street unharmed. There are people coming towards you, but none of them tries to attack you. They could, but they don't. And that's not because they think you

are carrying a concealed weapon, or even because they can reasonably expect to be arrested and convicted if they do (conviction rates for stranger-to-stranger assault are alarmingly low); it is just because the idea has not occurred to them, or they have decided not to act on it. But the possibility is still there, and, according to some sociologists, we use little rituals just to signal that there's no danger this time. It was not always thus. According to Jared Diamond, in 1931 it would have been 'unthinkable' for anyone to travel from Goroka to Wapenamanda, 107 miles away in New Guinea, without being killed within the first ten miles by an unknown stranger.<sup>3</sup> In some times and places there is more of a gap between the harm that people are capable of doing to each other and the harm they routinely do. We need to know what accounts for this difference, because political theorists tell us that this is what politics is for.

As Hobbes was perhaps the first to state explicitly, peace (i.e., not killing, or being killed) is what politics, as opposed to war, is all about. So it is easy to see that mercy, which by definition will incline against killing even when other principles do not, might have a role in the transition. This essay argues that mercy is a necessary and sufficient condition of politics as opposed to war. This is a novel argument insofar as it claims more for mercy than has ever been claimed before. But it does so largely by default. In particular, it is because less is attributed to the fictive person of the state, and

less is claimed for the artificial virtue of justice, that more is assigned to the merciful discretion of individuals. Mercy is a way of describing the brute facts that we are left with when other explanations fall away. The resulting account of the political is radically reductive in that it emphasises the local, the material, and the contingent, and leaves little scope for ideal theory. But it is also one with a wider range of application, eroding division between the social and political, and with its boundaries of nationality, species, and time.

At first glance, this argument may seem inherently implausible. But contemporary political realism gives premodern accounts of mercy renewed relevance. For almost two millennia in Europe, the idea that mercy might constitute a significant portion of what we are looking for from politics was taken for granted. In the *Politica* of 1589, for example, Justus Lipsius identified Justice as the ‘Sun’ and Clemency as the ‘Moon of Government’:

This goddess is lenient and soft; she mitigates and moderates; she sets free the guilty, raises up the fallen, and comes to the rescue of those who ruin themselves. And I cannot describe her otherwise than as a virtue which on the basis of judgement leans away from punishment and revenge, towards mildness. Of all virtues this is the one most proper to man, as it is the most humane.<sup>4</sup>

To demonstrate the point, Lipsius offered numerous examples of clemency in *Monita et exempla politica* (1605), drawn not just from sacred and classical history, but also including more recent figures famed for their magnanimity, such as Louis XII of France and Alfonso I of Naples. Lipsius had himself benefited from the clemency of the Hapsburg rulers of the Netherlands, but he assumes that mercy is an attribute of successful and benevolent rule whatever the historical context.<sup>5</sup>

The conception of mercy on which Lipsius and other political theorists relied originated with Seneca. In his essay *De clementia*, written for the young emperor Nero, Seneca defines mercy (*clementia*) as ‘restraining the mind from vengeance when it has the power to take it, or the leniency of a superior towards an inferior in fixing punishment’.<sup>6</sup> The latter may take the form of lenity in carrying out the punishment, remission of part of the punishment, or even of making the punishment less harsh from the outset. The opposite of mercy is not strictness (*severitas*) but cruelty (*crudelitas*), ‘the inclination of the mind toward the side of harshness’, and it is this that mercy rejects, rather than strictness itself. Mercy is a unilateral tempering of the power to act cruelly, and, if exercised consistently by the ruler, holds out the prospect of ‘a state unstained by blood’.<sup>7</sup>

At the same time that he identifies cruelty as the antonym of mercy, Seneca distinguishes mercy from two

concepts that might appear synonymous with it: the ‘counterfeit virtues’ of pity (*misericordia*) and pardon (*venia*). Pity is ‘the sorrow of the mind brought about by the sight of the distress of others’ and is to be avoided on the Stoic principle that ‘no sorrow befalls the wise man’. Similarly, pardoning is a judgement that may overlap with mercy in terms of its results but involves ‘the remission of a deserved punishment’, whereas mercy ‘declares that those who are let off did not deserve any different treatment’.<sup>8</sup> However, these distinctions are rarely maintained by other writers, and words like *clementia*, *lenitas*, *misericordia*, and *humanitas* are all used to describe acts of mercy without any clear differentiation being made. Seneca tries to steer away from the latter two, but even he is inconsistent in his usage.<sup>9</sup>

Where Seneca had tried to separate clemency from pity and from pardon, Christianity conjoined them. In the New Testament, God’s mercy is manifest through compassionately pardoning those who stand justly condemned. And whereas Latin at least allowed a distinction to be made between mercy and pity, the Greek word *eleos* encompasses both. Humankind, though deserving of punishment under the law, is offered salvation through Christ: ‘In our natural condition we . . . lay under the dreadful judgement of God. But God, rich in mercy, for the great love he bore us, brought us to life’.<sup>10</sup> The church fathers did not necessarily see any discontinuity between the form of mercy

offered by the Christian God and a Roman ruler. The saving mercy of God in the incarnation was, Augustine claimed, a form of *popularis clementia*, the mercy toward the people that Julius Caesar was also said to have practised.<sup>11</sup>

This analogy between the mercy of divine and human sovereigns worked both ways. Just as Seneca had encouraged Nero to follow the example of the clemency of the gods to men, in a Christian context, princely mercy could be interpreted as *imitatio Dei*. Mercy is a function of power, so when it is exercised the king aligns himself with God, whose absolute power is also tempered with mercy. This is the idea captured in Portia's famous speech in *The Merchant of Venice*:

But mercy is above this sceptred sway;  
It is enthroned in the hearts of kings,  
It is an attribute to God himself;  
And earthly power doth then show likest God's  
When mercy seasons justice.<sup>12</sup>

This was not a poetic exaggeration. In late medieval and early modern Europe the royal prerogative of clemency was exercised repeatedly in a variety of contexts to demonstrate that the monarch was merciful and thus merited their power. Its most dramatic manifestation was the general pardon. A general pardon

was open to any individual who wanted to purchase it, and though certain crimes were usually excluded, in the sixteenth century those offered at the start of the reign of English monarchs could be exceptionally generous, sometimes including even treason, rebellion, and murder.<sup>13</sup> Such conspicuous gestures confirmed the widely held belief that clemency was at the prince's sole discretion, and the throne itself was 'underpropped with mercy'.<sup>14</sup> The text of Charles II's coronation pardon of 1661 makes the connection explicit. It is said to be offered because the king is 'well pleased with opportunities to abound in acts of Grace and Clemency to His people, from whom He doth also expect Returns of Loyalty and due obedience on their parts'.<sup>15</sup>

The royal prerogative was gradually eroded by Parliament, and with the coronation of George I, the coronation pardon lapsed. Yet at the same time, pardoning in the royal name became entrenched in the everyday practice of the law. It is in this context that the widespread practice of judicial clemency in the eighteenth century should be viewed. Half of those convicted of capital crimes in eighteenth-century England were never executed, and this more diffused clemency performed the same function for the ruling class as a whole that it had previously done for the monarch himself. As Douglas Hay has argued, it was the discretionary application of the criminal law that 'more than any other social institution, made it possible to

govern . . . without a police force and without a large army'. It maintained both order and deference because 'discretion allowed a prosecutor to terrorize the petty thief and then command his gratitude'.<sup>16</sup>

Montesquieu may have maintained that letters of pardon were 'a great spring of moderate governments', but to many thinkers of the Enlightenment mercy appeared superfluous or even harmful.<sup>17</sup> Hume condemned the medieval practice of 'extorting from the king pardons for the most enormous crimes' as a 'great mischief', and considered moves to restrict the royal pardon to be 'excellent'. According to him, 'all civilized nations' sought 'to remove everything arbitrary and partial' from the discretion of judges, particularly with regard to property, for 'public utility requires that property should be regulated by general inflexible rules'.<sup>18</sup>

The Italian legal theorist Cesare Beccaria agreed. Although he argued for the end of torture and capital punishment, he nevertheless insisted that clemency is needed only when the law is excessively severe, and that 'as punishments become milder, clemency and pardons become less necessary'. Clemency, which had once seemed indispensable to the exercise of sovereignty, should become 'redundant in a perfect administration where punishments are mild and the methods of judgement are regular and expeditious'. Mercy is for lawmakers to determine, not the executors of justice. The laws themselves should be 'inexorable'.<sup>19</sup>

By the end of the eighteenth century, Beccaria's followers were denouncing mercy in even stronger terms. The Neapolitan jurist Gaetano Filangieri called it 'an injustice committed against society ... a manifest vice'.<sup>20</sup> Jeremy Bentham (who picked up the phrase 'greatest happiness of the greatest number' from Beccaria) claimed that 'the power of pardoning ... has cruelty for its cause ... [and] cruelty for its effect'. According to him, 'The government of the passions precedes that of reason'; mercy belongs to an earlier, more primitive age in which, because 'the effect of an offence is only to enrage the sovereign, there is merit in his abstaining from punishing it'.<sup>21</sup>

In retrospect, it is easy to place this rejection of mercy within the context of the wider shift in ethics identified by Albert Hirschman in *The Passions and the Interests*.<sup>22</sup> For a long time, destructive human passions were thought best governed by countervailing ones. Thus, as Spinoza noted, 'to cruelty is opposed mercy (*clementia*) ... a power of the mind, by which a man governs anger and vengeance'.<sup>23</sup> However, in the course of the eighteenth century there was a change. Hume too believed that 'nothing can oppose or retard the impulse of passion but a contrary impulse', but he thought that there was a significant exception: 'There is no passion ... capable of controlling the interested affection, but the very affection itself, by an alteration of its direction'. By 'interested affection' Hume meant the 'avidity ... of acquiring goods and possessions',

and it was the equation of interest with economic self-interest that, according to Hirschman, fed the belief that 'Interest Governs the World'.<sup>24</sup>

As Hirschman demonstrates, in the eighteenth century people came to believe that the pursuit of economic self-interest might also be in the public interest, and promote moderation and prosperity in a way that the warlike passions did not. Thus, Hume maintained that it was the conventions arising from the pursuit of economic self-interest that gave rise to the principles of justice, and that its resulting utility provided the justification.<sup>25</sup> This move deprived mercy of an independent rationale: it was no longer required as the specific countervailing passion to cruelty, and it was not itself, as Spinoza acknowledged, one of those powers of the mind 'that relate only to the agent's advantage'.<sup>26</sup>

If mercy had a justification at all, it was that it contributed to public utility. But Beccaria was sure that it did not. Confident that 'commerce has been stimulated by philosophic truths' and that 'we have discovered the true relations between sovereign and subjects and between nation and nation', Beccaria sought to extend economic rationality to the law.<sup>27</sup> People were motivated not by the passions but by rational calculation of self-interest, so the possibility of clemency needed to be removed in order for marginal deterrence to function effectively. In this way, the wise lawmaker 'raises his building on the foundation of self-love' to

ensure that 'the interest of all ought to be the product of the interests of each'.<sup>28</sup>

As this suggests, the exclusion of mercy from law and politics was closely linked to the rationalization of political life as a system for maximizing self-interest. Hirschman suggests that the shift from the passions to the interests was an argument for capitalism before its rise. By furnishing new ways of avoiding anger and cruelty, nascent capitalism simultaneously dispensed with the countervailing passion of mercy. Mercy had once been considered a remedy for the cruelties of war, but wars driven by the passions were replaced by what Beccaria called the 'silent war' waged among nations by trade, so now no remedy is needed, for this is 'the most humane sort of war and more worthy of reasonable men'.<sup>29</sup>

If the arguments for capitalism are the same as those against mercy, the consequences are far-reaching. Capitalism offers an account of the way the world is made based on the convergence of our interests rather than the mercy of the powerful. This congruence of self-interest is often called justice, but it is a justice that no longer needs to be tempered by mercy, because its principles are in everyone's interest to begin with. Mercy is therefore excluded as a possible remedy for the workings of capitalism itself. In this essay, I ask whether it is possible to dispense with mercy quite so easily; I then examine the potential consequences of its reintroduction.