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Justice without mercy

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The ground that I wish to explore in this essay has been covered before,[1] but there is (I think) some value in examining it further. Despite the previous coverage, it remains true that the jurisprudential thought of the modern era has maintained a steady focus on the idea of justice, but has paid much less attention to an important concept, that of *mercy*. An examination of indexes of the major texts of "the new liberalism" reveals many entries for "justice", but one will seek in vain for references to "mercy".[2] The neglect of mercy is not inexplicable, for it is famously associated with a number of paradoxes. For example, the idea of mercy depends upon its being conceived as a virtue that is in some way distinct from, and irreducible to, justice. Mercy, it is believed, moderates the operation of justice because it lies apart from the realm of law and justice, belonging instead to the domain of love, or compassion. Mercy *transcends* justice; but such transcendence would seem to involve a departure from justice (and therefore injustice). Were mercy always coeval with the requirements of justice, it would lose its identity as a separate virtue. Thus, mercy is either reducible to justice or, in undermining justice, ceases to be comprehensible as a virtue.[3]

Given this apparently paradoxical character, it is scarcely surprising that the major theories of justice largely ignore the idea of mercy. For if justice represents the *highest* ideal at which the enlightened polity should aim, then the perfection of society would appear to demand the constant refinement and realisation of that ideal rather than its abandonment in specific situations. Any imperfections arising from the operation of justice are interpreted as shortcomings in our perception of the ideal, and not indications of the limits of any such ideal. This attitude, which might be called "the idealisation of politics", is unfortunate. The sublimation even of liberal forms of social order has tended to reinforce feelings of dogmatic certainty, and to erode the very pluralism that liberal institutions notionally seek

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1 See e.g. J Murphy and J Hampton, *Forgiveness and Mercy* (Cambridge: CUP 1988); R Harrison, "The equality of mercy" in H Gross and R Harrison (eds), *Jurisprudence: Cambridge Essays* (Oxford: Oxford University Press 1992), p. 107; N E Simmonds, "Judgment and mercy" (1993) 13 *OJLS* 52; J Tasioulas, "Mercy", CIII, *Proceedings of the Aristotelian Society* (2003), p. 101.

2 I derive the term "the new liberalism" from John Gray, *Enlightenment's Wake* (London: Routledge 1995), p. 29. Gray's argument addresses the hostility of the Rawlsian/Dworkinian tradition of liberal jurisprudence towards the value of tolerance, rather than of mercy, thus itself exhibiting the same general trend.

3 I summarise here Jeffrie Murphy's argument in "Mercy and legal justice", in Murphy and Hampton, *Forgiveness and Mercy*, n. 1 above.

to defend. It is in this sense an oddity that liberal thought should place a theory of justice at its centre. More importantly, a society that has forgotten mercy in its zeal for justice exhibits some of the least appealing characteristics of human nature. The most corrosive effects of the idealisation of politics have received deepest exploration not in philosophy, however, but in literature. Nor is this an accident, for the tendency towards idealisation and abstraction impedes exactly that humane understanding of which it is the function of literature to give expression. Morality is encountered, in literature as in life, as an active sensibility rather than a framework of general propositions; and it is only through a heightened awareness of this sensibility that we may come to appreciate (as Trollope did) the dangers inherent in the ambition: "Let justice be done though the heavens may fall."[4]

My argument will demonstrate the centrality of mercy to an understanding of political society and of the place of the juridical realm within it. In doing so I begin with an assumption: that "paradox" is a state which does not exist in reality. Paradox is rather the result of the application of a set of premises to an established body of ideas about reality. Because, generally speaking, the premises are not alighted upon wholly independently of the existing ideas but are in some way suggested by them, the correct response to a paradox is not to attempt to overcome the contradiction implied by those ideas whilst retaining as much of their integrity as possible, but rather to challenge the entire picture suggested by them, and find another way of looking at the world. That is the method adopted here. The initial discussion will focus not upon the character of mercy, but on the nature of our understanding of society. I argue that our understanding of the social world crucially depends upon the articulation of mercy as a value, and that unconsciousness of this dimension of value is one of the most damaging effects of the idealistic view of politics. Mercy, I argue, is first and foremost a *religious* idea, and that any political analogue of mercy must retain certain features of that intellectual inheritance if it is to make a genuine contribution to understanding. The argument concludes by suggesting that central features of the present "analytical" approach to jurisprudence must be given up if a clear understanding of either law or justice is to be achieved.

1 Law, justice and society

The predominant jurisprudential theories of the Western philosophical tradition are distinguished by their search for insight into the nature of law by reference to its place within a wider understanding of society. This intellectual strategy is in marked contrast to much of the jurisprudence of the present day, in which intellectual effort is directed towards the analysis of general features of law which are thought to obtain irrespective of the broader character of society. In his "Postscript" to *The Concept of Law*, for instance, Hart observes that his account of law is general "in the sense that it is not tied to any particular legal system or legal culture, but seeks to give an explanatory and clarifying account of law as a complex social and political institution".[5] When we encounter a writer such as Hobbes, on the other hand, we find an account of law that is derived from a particular understanding of the nature of human forms of association. Similarly, the Thomist natural lawyers sought an understanding of law by reference to a theological conception of the relationship between God and man, in which it is God's intentions regarding the condition and direction of human life toward a complex and collective goal, that informs our knowledge of legal concepts. These connections between jurisprudential understanding and theories of the "human condition" continued to be debated well into the nineteenth century; but the

4 This phrase appears a number of times in Trollope's works, but can be seen for instance in chs 61 and 62 of *The Last Chronicle of Barset* new edn (Harmondsworth: Penguin Classics 2002).

5 See H L A Hart, *The Concept of Law* 2nd edn (Oxford: Clarendon Press 1994), p. 240.

decline of this mode of thinking had in fact taken root much earlier. In Kant (for example), a new framework of thought is already fully manifest: his *Groundwork of the Metaphysics of Morals* is chiefly famous for its attempt to ground an understanding of human obligation in pure reason that is *severed* from all connections with metaphysical supposition and sociological observation:

> I do not . . . need any penetrating acuteness to see what I have to do in order that my volition be morally good. Inexperienced in the course of the world, incapable of being prepared for whatever might come to pass in it, I ask myself only: can you also will that your maxim become a universal law?[6]

The extent of Kant's detachment of the juridical realm from all concrete associations is made evident in his assertion that "Even the Holy One of the Gospel must first be compared with our ideal of moral perfection before He is cognized as such."[7] In the light of such treatment, Kant's proximity to modern modes of jurisprudential theorising is in fact much greater than his immersion within the older tradition of reflection on the nature of law. A common body of assumptions underpin both Kant's approach to legal questions and ours. These assumptions amount to the abandonment of the classical idea that morality is comprehended by reflection upon the actual conditions of historical forms of association, and instead perceive morality as a series of law-like rules finding an ultimate source in the will of the "rational agent". Laws are thus thought to embody a deep expression of autonomy. In this way, legal understandings are regarded as pertaining to the vertical relationship between the individual and the state, and to the complex matrix of horizontal relationships between individuals within the state.[8] By placing a conception of the "agent" at the centre, therefore, the Kantian inheritance forces upon us a certain structure in our theorising: one that is fundamentally removed from the older tradition of inquiry in which attention was focused on the law's ability to realise a human good that was believed to be attainable only in the presence of certain associative conditions. We, instead, see the law as an instrument for the projection of ideals that, in deriving from agency, represent insights finding an ultimate source outside history, in a transcendent dimension of reasons.[9]

I make these observations not in order to precipitate a debate about them, but so as to emphasise the fact that, despite its universalising ambitions, modern jurisprudence is wedded to a vision of human society that is neither the necessary nor the only understanding of society. In its most abstract terms, this understanding of human society might be seen to embody the following assumptions.[10] We confront the world, it may be supposed, as a set of conditions. These conditions, whilst of course being sufficient in all essential ways of supporting and sustaining life, are nevertheless imperfect when contemplated from the perspective of the ideal or preferred mode of life. Some of these conditions may be interpreted as "natural" or "given" states whereas others are brought about through human efforts. It is thus the function of human agency to seek to alter these existing worldly conditions in various ways. In undertaking such efforts, the overriding goal

6 I Kant, "Groundwork of the metaphysics of morals" in M J Gregor (ed.), *The Cambridge Edition of the Works of Immanuel Kant* (Cambridge: CUP 1996), p. 403.

7 Ibid., at p. 408. For some interesting discussion of the relationship between these propositions, see N Simmonds, *Law as a Moral Idea* (Oxford: OUP 2007), pp. 150–6.

8 For an excellent discussion of these assumptions, see S F C Milsom, "The nature of Blackstone's achievement" (1981) 1 *OJLS* 1.

9 I discuss these issues at length in my *From Positivism to Idealism* (Aldershot: Ashgate 2007), ch. 2.

10 Any attempt to state the general foundation of a body of theories will of course invite a chorus of objections that "this isn't what *my* theory is committed to". I nevertheless venture to hope that the reader will see in these assumptions a tolerably accurate, if inevitably somewhat blunt, depiction of the underpinnings of modern jurisprudential approaches.

must be the production of *improved* conditions rather than worsened ones, and some set of standards is therefore needed to guide the understanding of what represents improvement to the human lot: that is, some practical notion of what the "good" or preferred mode of existence consists in. All such systems of understanding (whatever be their vision of "the good" or the means of reaching it) deserve to be called "moralities". Since it is the function of morality to seek to *change* the world, it is then thought that moral insight (or whatever passes for it) cannot derive from an understanding of worldly conditions, but must come from elsewhere. Thus, it is often supposed that morality consists of general principles or ideals which together form an independent outlook upon the world of mundane and variable fact.

Because the institution of the ideal form of association requires the contemplation of the world, and of human action, from the perspective of general rules, a close and permanent relationship exists between justice (as a component of the ideal life) and law (as the form in which justice is both articulated and realised). Justice, as an idea, is thus simultaneously abstract and autonomous vis-à-vis the worldly conditions upon which it sits in judgment, and yet intelligible only within the context of collective social conditions. The attempt to implement justice in the world is always, then, the attempt to bring about the just *society*. This creates an interesting problem. For justice, being a creature of law and of society, must always be associated with the suppression of human freedom: the meaning of "society" and of a "form of association" involving precisely the avoidance of a state of total freedom, or anarchy. But where freedom is *itself* conceived to be a value, its suppression will come to be seen as an instance of injustice. Justice is therefore associated both with the creation of social conditions *and* their limitation. It is accordingly inevitable to the character of justice that the effort to realise within the dynamic forces of human society a tolerable justice, must end simply with the continual alternation between intolerable anarchy and intolerable tyranny.[11] (I refer here to the co-presence of anarchic and tyrannical elements *within* a form of association, rather than as names of specific kinds of association.)

It is perhaps not difficult to discern the influence of natural law thinking in this vision of the just society. The natural law tradition, in one sense, represented the belief that if human existence belongs to a rationally ordered cosmos in which it has an ultimate purpose and direction, nevertheless the full and final expression of that purpose lies outside the circles of the world. Divine law is the law that is natural and proper to the human condition; but it is always human effort and human interpretations which form the actual rules by which societies are governed.[12] So long as the *lex divina* was present within the world only in a reduced and attenuated form, human beings must confront a world that is chaotic and random as well as cosmically meaningful.[13] The secular moralities of the present day occupy a similarly ambiguous position in the modern world-view. In forming an autonomous standpoint for reflection, morality is presented as both the source of meaning of the human world *and* its judge. This is an interesting intellectual position which depicts in an especially direct way the failure of modern philosophy to resolve the tension of historical immanence and transcendence: morality embodies the absolute meaning of

11 I borrow this image (though not the sentiment expressed) from Reinhold Niebuhr. See R Niebuhr, "The Christian witness in the social and national order" in R McAfee Brown (ed.), *The Essential Reinhold Niebuhr: Selected essays and addresses* (New Haven: Yale UP 1986), p. 99.

12 See e.g. H Grotius, *De Iure Belli ac Pacis* (London: Kluwer Law International 1952), II.2.vi.91.

13 The theme of "the frailty of human reason" in interpreting the divine law was present in various forms throughout the canon of natural law writing in the seventeenth and early eighteenth centuries, and perhaps especially acute in Locke: see J Locke, *Essays on the Laws of Nature*, W Von Leyden (ed.), (Oxford: Clarendon Press 1954).

associative human relationships and not simply their present meaning, and in this it is transcendent; but it is also the *goal* of human society, and thus considered to be capable of historical implementation. It is the crucial failure of the jurisprudential and political thought of the present that it employs the idea of transcendence so as to absolutise rather than to criticise these partial achievements of history.[14]

This absolutising tendency is both symptomatic of, and offers encouragement to, an assumption concerning the historical significance of human efforts and the operative range wherein they can meet with success. "Law" and "justice" represent accomplishments that, in being rational, express the highest potentialities of the human spirit, bringing order where before was chaos, and meaning to life where there had been mere existence.[15] In this there is an important bridge between the tradition of natural law thinking and the secular political theories that came after. For whether or not such efforts are interpreted as having their source in the divine will, such divinity is imaginable only in virtue of its rationality. This, indeed, eventually paved the way for the removal of theological presuppositions from political thought: as Kant was to observe, "Even the Holy One of the Gospel must first be compared with our ideal of moral perfection before He is cognized as such"; and this ideal is one "which reason frames a priori and connects inseparably with the concept of a free will . . ."[16] The detachment of theology from politics resulted in a belief in rationality as the ultimate instrument of order and significance in the world. Thus, law and justice, as the supreme incarnation of rational principles, came to imply a view of human societies as the ultimate centres of order in the world. It then became possible to view the value-systems of these societies as the final arbiters of human good and evil. The upward potentialities of these efforts seemed limitless. Such sentiments, as Matthew Kramer has observed, lie at the heart of a liberal vision of politics:

> [T]he liberal philosophers had to introduce a new tone of public discourse to match their substantive outlook. Just as liberalism had overall been a salutary response to what had preceded it, so its characteristic tone would improve upon the tenor of discourse that had prevailed under the *ancien regime*. Christianity had been pessimistic, murderously intolerant, fanatical, and dogmatic; liberalism would hence be optimistic, generously open-minded, cool-headed, and responsive to rational persuasion. Truth would be tied no longer to sacred writings and divine revelations, but would be seen henceforward as the product of close analysis and wide-ranging debate.[17]

The most direct expression of this optimism, arguably, is to be encountered in Rawls's mighty book, *A Theory of Justice*.[18] It will be recalled that Rawls sought to demonstrate, by this work, that the idea of justice could be elucidated on the basis of uncontentious propositions that are accepted as a rational starting point for further reasoning. The book (and the method) were to have a profound re-orientating effect upon political philosophy that is partly explained by its advance over the intellectual environment into which it emerged. This environment was one that was dominated by utilitarianism, which depicted the modern society as a realm of conflicting preferences, the goal of politics being to maximize overall satisfaction of those preferences. The notion of justice was marginal to

14 See further, Niebuhr, "Optimism, pessimism and religious faith" in McAfee Brown, *Essential*, n. 11 above, at p. 6.

15 Perhaps the clearest expression of this view is to be found in Hobbes's characterisation of the transition from the state of nature to that of civil society: see T Hobbes, *Leviathan*, R Tuck (ed.) (Cambridge: CUP 1996), at ch. 13.

16 Kant, "Groundwork", n. 6 above, at p. 408.

17 M H Kramer, "The rule of (mis)recognition in the Hart of jurisprudence" (1988) 8 *OJLS* 401.

18 J Rawls, *A Theory of Justice* revised edn (Cambridge Mass: Belknap Press 1999).

such concerns, the focus of politics lying not upon the value or soundness of the preferences but rather upon their strength. Where justice was discussed, therefore, it came to be viewed as an issue of the practical and provisional balance to be achieved between randomly colliding syndicates advancing interests that must find some way to coexist. Rawls's theory challenged this picture by describing an "original position" wherein rational individuals seek to articulate, from behind a "veil of ignorance", a set of principles for the structuring and administration of their society. By grounding his argument in an "original position", Rawls produced a powerful vision of justice that was appropriate to conditions of pluralism in that an understanding of it *precedes* contentious understandings of "the good".

The intricate details of the Rawlsian theory are not relevant to the present discussion; for it is the general direction of the theory that has cast most influence over modern political thinking. It is (as Raymond Geuss has observed) remarkable that such a complex theory, consisting of more than 500 pages of dense and sustained argument, should culminate in a vision of the just and well-ordered society that is so striking in its resemblance to present constitutional arrangements of that most self-conscious example of liberal democracy, the United States. Moreover,

> [i]t strains credulity to the breaking point to believe that 'free and rational agents' (with no further qualifications), even if they were conducting a discussion from behind an artificial veil of ignorance . . . would light on precisely *these* arrangements.[19]

Despite the serious redistributive aims of *A Theory of Justice*, the points of convergence between the theoretical model and actual features of the liberal democratic society are sufficiently profound as to encourage the belief that such enlightened polities embody Rawlsian moral concerns. The "meaning" of this form of human association (and, by extension, all human association) is thus believed to be supplied by the precepts of the Rawlsian theory.

One obvious antidote to the belief that meaning is given to human affairs via the autonomous standpoint of theory has received little emphasis in modern jurisprudential argument: that the present condition of the liberal society owes much more to the social movements and culture of "permissiveness" which arose in the 1960s than to developments within the rarified world of academic philosophy.[20] Had more attention been paid to this aspect of social progress, the efforts of philosophy would have reflected to a greater extent the realisation that important dimensions of social meaning arise out of historical actions that are independent of philosophical concerns. The present point I wish to explore is, however, different. It concerns the consequences that result from those tendencies within modern philosophy which operate to deify certain features of the present social order.

I have described the attitude implicit within the Rawlsian theory of justice (and other, similarly conceived theories) as "the idealisation of politics". Social arrangements and institutions are taken as implying certain ideals, and the imperfection of present arrangements is treated as an indication that some refinement (and in some cases abandonment) of the established ideals is required, the better to reflect our most sophisticated and appealing conceptions of justice. Conceiving the goal of politics to be the identification and realisation of an ideal of justice, such secular philosophies ground the

19 R Geuss, "Liberalism and its discontents", in *Outside Ethics* (Princeton NJ: Princeton UP 2005), p. 22.

20 A *Theory of Justice* was first published in 1971 (though early versions of some of the book's arguments had appeared in article form in academic journals from the 1950s). It is perhaps worth emphasising that I focus on Rawls here as the most *direct* embodiment of the trends I wish to examine; the philosophical methodologies (reflective equilibrium etc.) integral to those trends have seen widespread use throughout political philosophy since the publication of Rawls's book.

belief that the social grouping (or form of association) is the ultimate source of meaning in human affairs. Rawls (for example) considers that rational agents in the "original position" will agree that issues of justice arise only in a context of scarce resources and conflicting preferences: if the allocation of resources to each individual carried no implications for the others, no-one would care who received what, and no question of justice would arise. Thus, the idea of justice makes sense only within the context of a shared form of association where men live in permanent proximity to one another. All values therefore make sense in terms of a mode of association, making the social grouping the ultimate source of meaning in human affairs, and the final centres of order in an otherwise random and chaotic world.

Where a general theory of justice is the ultimate source of value and meaning in this way, there is indeed no room for mercy in the administration of human affairs. The history of human effort can be seen as the progressive attempt to replace conditions of chaos with conditions of order and stability. The moralities which guide such efforts, inevitably, are moralities of *rules*, for which law supplies the archetype. Since mercy seeks specific *departures* from the rules, it will seem that mercy is on the side of the chaotic elements of human history against which the general part of human effort is set. The value of mercy, in standing in opposition to that of justice, remains unintelligible within the structures of meaning which ground the understanding of the human social condition.[21] It is not difficult to trace the logic of this outlook. The meaning of history (as a realm of human choice and action) is progress: the gradual removal of ignorance and immaturity, and the realisation of ultimate meaning. Because this ultimate meaning, and therefore the possibilities of order, are embodied in a *particular* form of association (the desired, or just society) then the first moral duty of humanity is to seek the universal implementation of this social form: that is, the elimination of "outlaw states" and the conversion of all regimes to that of the ideal.[22]

These dangerous and corrosive effects of the idealisation of politics are too familiar to the international politics of the day to require exploration here. Instead, I wish to explore an alternative conception of the world, which is absent from current political consciousness, but which (I believe) ought to inform its basis and pursuit. This alternative conception, I shall now argue, makes better sense of the relationship between justice and mercy.

2 Mercy and society

Philosophy, in an abstract sense, can be understood as the attempt to find meaning in the world. The wisest thinkers realise that this meaning is not to be discovered through the analysis of social forces, but requires a metaphysical perspective which relates the significance of those forces to an ultimate source of meaning that lies beyond them. In spite of the general hostility felt towards metaphysics within modern analytic philosophy, the mainstays of that tradition – the distinction of fact and value, the depiction of morality as an abstract and autonomous perspective on the world, emphasis on voluntarism etc. – enshrine just such a metaphysical position whereby ultimate meaning within human affairs (that which ought to be) is held to transcend the meaning of present conditions (that which is). The history of attempts to locate this ultimate source of meaning is instructive.

21 Nietzsche's view of the character of mercy is further demonstration of this: mercy, for Nietzsche, was the prerogative of the powerful sovereign to be employed as an emblem of power. Forbearance toward challenges to the sovereign authority demonstrated the security of that power, and its lack of diminishment in the face of challenges that lack the significance of a *necessary* response. See F Nietzsche, "The wanderer and his shadow", in *Human, All Too Human,* R J Hollingdale (trans.) (Cambridge: CUP 1996), s. 33. This line of thought is inherited from Seneca: see *Seneca: Moral and political essays*, J F Procopé and J M Cooper (eds), (Cambridge: CUP 1995), Essay 2: "On mercy", p. 134.

22 For the notion of "outlaw states" see J Rawls, *The Law of Peoples* (Cambridge Mass: Harvard UP 1999).

If there is meaning in the world, it might be supposed that it can derive only from one (or perhaps both) of two sources: either from human history (as a realm of freedom and action), or from nature (as a domain of forces that are in play independently of human action). The ultimate meaning of the human condition might then be thought to lie within the relationship between the two. A tradition of thought has existed from the earliest times which attributed to nature a moral significance. Natural events (the rich harvest, the poor harvest, the storm at sea) came to be interpreted as judgments upon the sinful condition of mankind, which could be influenced by prayer. This two-fold attitude toward the external world (of fearful obedience and thankful piety) generated two distinct but related interpretations of the relationship between humanity and the world, both of which are present in the biblical account of Genesis: on the one hand was the assumption that God had created the earth as a home for mankind, rich in resources and appropriate to the purposes of human flourishing; on the other, the earth was viewed as a hostile environment with no particular sympathy to human aims, to be conquered and tamed by human agency.

Both strands of thought can be traced throughout the history of legal thought, but are perhaps most clearly to be observed in the diverse canon of natural law philosophy in the seventeenth and eighteenth centuries. The seventeenth century proved to be an especially rich period for the development of juristic thought: the disintegration of religious unity in Europe, coupled with the gradual shift from old jurisdictional notions of "kingdoms" to something more closely resembling the modern "state", combined to produce a new understanding of human society, and thus of the place of the human being within the world. These new jurisdictional orders were no longer to be thought of as projections of the divine will, manifested in the claims of the ruling dynasties, but rather as independent zones of power and interest.[23] No grand plan could therefore be discovered in the relations between states whereby a final peace would emerge according to God's law; nor did continual warfare signal the painful birth-pangs of the new order of peace and harmony amongst nations, but simply the inevitable posture to be assumed as between such independent sources of absolute power. Being in competition with one another, these independent jurisdictions could no longer be thought to exist in order to realise or secure a common good, but had to be conceived simply as alternative domains of power operating to preserve their independence vis-à-vis each other. As jurists strove to understand the moral relations between these independent entities, it inevitably came to seem that relations between individuals within states must be treated in the same way: lacking an idea of the common good, the moral basis of the state could not concern the promotion of conditions conducive to the realisation of this preferred existence, but must instead consist in the protection and preservation of spheres of personal autonomy wherein the individual remains free of the will of others.[24]

These currents of thought, which served to place individuality at the heart of political understanding, were capable of development in various ways. Two such understandings were to be of particular importance for the future direction of jurisprudential thought concerning the relationship between law and society. The first was that of Grotius, for whom the purpose of law was the systematic protection of entitlements governing the moral relations between individuals who pursue independent and potentially conflicting goals. Such entitlements were thought to derive from a basic right of self-preservation inherent in the notion of a "human being", and expressed in the idea of the *suum* (or that

23 Such developments in thought did not, of course, occur overnight. Their discovery rather had the character of a gradual and deepening awareness of the implications of these new theoretical assumptions.

24 For a deeper account of this connection, see R Tuck, *The Rights of War and Peace: Political thought and the international order from Grotius to Kant* (Oxford: OUP 2001).

which properly belongs to a person).[25] This was essentially an eschatological notion, in that the existence of the *suum* was inferred on the basis of a theological view of the world as created by God so that man may survive and flourish; (only in such terms could there be a *right* to the means of survival, *suum ius*). Here was an image of the world as a domain of order and purpose in which the existence of man is subsumed within a wider cosmos that is ultimately related to and expressive of God's intentions. Viewed in such terms, the world is a domain of non-overlapping entitlements for which positive law is required simply for their clarification and enforcement. On the other hand was the view of Hobbes, for whom the basic premise of self-preservation implied not a harmonious realm of compossible entitlements, but rather a lawless world in which human interaction naturally takes the form of a war of each against all. In such a world, none but the most primitive set of assumptions could exist to guide human endeavour toward the attainment of peace; law could therefore only emerge as fabricated response to these basic conditions of the human predicament. In this way, Hobbes rejected the idea of a rationally ordered cosmos (like that of Aristotle) structured by compossible domains of *ius*, and instead represented the world beyond the boundaries of human society as a hostile environment from which escape, at almost any price, is necessary.[26]

Present within these variant pictures of the world were two distinct views of the character, not only of law, but of all human value-systems; and the tension between them has in large measure shaped all subsequent thought about the nature of morality and law. We are accustomed to addressing this tension from a number of related standpoints: from the perspective of pluralism vs absolutism; moral objectivity vs moral subjectivity; ethical relativism vs ethical realism; and so forth. But there is also a neglected, eschatological dimension to the tension which (as I shall argue) is of central importance for jurisprudential thinking on the relationship between justice and mercy. For it forces us to confront two distinct understandings of historical reality: one for which the world of human experience is interpreted pantheistically as domain in which all things that come to pass do so for a reason and have significance relative to an ultimate purpose; the other for which concrete reality is a corrupted realm of chaos and crude matter from which the spirit must detach itself. This latter perspective is informed by a variety of dualism which has itself taken numerous forms in the history of religious thought. It is present in the Hebrew division between the imperfection of the existing age and that of the perfect age to come; and it featured too, this time as a dualism of material and spiritual interests, in early Christian notions of the religious person's renunciation of material and earthly connections.[27]

Neither view of existence is an acceptable one, for both make the mistake of supposing that historical reality admits of purely rationalist explanation. Put another way, both perspectives on historical reality hold the ultimate meaning of existence to fall *within* the world. The unacceptability of either perspective is easily demonstrated: a pantheistic interpretation effectively sanctifies history, for every event and process is a contribution to the ultimate meaning of things. But though we do not know the meaning of the Holocaust (for example), we rob it of its tragedy if we believe its presence in history to be ultimately redeeming. A world in which every senseless act is related to a higher (if mysterious)

25 See Grotius, *De Iure*, n. 12 above, at I.1.iii.18.

26 See Hobbes, *Leviathan*, n. 15 above, chs 13–22. For detailed discussion see R Harrison, *Hobbes, Locke and Confusion's Masterpiece* (Cambridge: CUP 2002). Specific dimensions of Hobbes's treatment of *ius* and *lex* are analysed in my "Thomas Hobbes and the intellectual origins of legal positivism', (2002) XVI *Canadian J of Law and Jurisprudence* 243–70.

27 For an insightful discussion, see M Oakeshott, "Religion and the world" in T Fuller (ed.), *Religion, Politics and the Moral Life* (New Haven: Yale UP, 1993), p. 28.

purpose is one that must fail to comprehend the nature of human evil. Yet dualism represents no advance over this view, for a world in which events are wholly unrelated to transcendent values which make sense of them is intolerable. To assume that the Holocaust has no meaning beyond the brute facts of its occurrence, to accept that all human laws and endeavours are reflective of nothing but temporary meanings and base desires, is to condemn the world completely as a home for the spirit and to render all motivation finally otiose.[28]

I have raised these points because they reveal much about the assumptions that structure modern thinking on justice. For the modern juristic thinking shares with these perspectives the belief that rational historical explanations are possible, and this is to locate all structures of meaning within the realm of possible experience. Here, the transcendent context wherein the present meaning of human affairs is related to its absolute meaning is that of human history. Hence the final balance of judgment in all things falls within the scope of what is rationally intelligible (insofar as history itself is rationally intelligible). Thus, we are left with the implication that *either* the ideal form of the just society is (in principle) a realisable goal, *or* that there is nothing more to the idea of justice than can be discovered within the actual structures of meaning by which present society is ordered. My concern here is not with the differences between these positions, but with their essential commonalities. The crucial presupposition which unites both cases is that human communities represent the ultimate centres of order in the world. Thus, such structures represent the only means by which evil can be redressed; for in constituting the ultimate possibilities of order, human societies erect the final limits within which the forces of evil and disorder are contained. Historical progress is then equated with the eventual suppression of the randomising effects of human effort (and of nature), and the abolishment of unchecked evil. In this way, history is taken to represent the transition from barbarism and ignorance toward the highest forms of civility.[29]

Understood in this way, the only possible response to evil and disorder is the imposition of justice. The disorder is suppressed because a scheme of justice includes certain distributive goals in terms of which material goods, powers and liberties are apportioned so as to produce a rationally defensible outcome.[30] Similarly, the response to evil is achieved by way of judgment, and a fair and organised system of punishment. As justice is a *social* virtue, there can be no room for mercy in either context. For mercy in its purest sense represents the remittance of the consequences of evil by modification of the response to it: evil *demands* a response (if it is to he held in check), but the exercise of mercy is the decision not to exact the whole response upon the wrongdoer, but to reserve some of the suffering to oneself. Mercy is therefore always and exclusively the prerogative of the victim of evil; it is not a virtue that can be exercised on the part of anyone else. It is, therefore, incapable of being exercised by the organs of the state, or by any collective institution: the intelligibility of justice, as a social virtue, rests upon the demand ". . . that the state act on a single, coherent set of principles even when its citizens are divided about what the right principles of justice and fairness really are".[31] Any attempt by organs of the state to exercise mercy *on the part of* the victim is then a readjustment of this single set of principles, not the simultaneous application of two distinct systems of value.

28 I owe the basis of this argument to Neibuhr, "Christian witness", n. 11 above, at p. 15.

29 See e.g. F Fukuyama, *The End of History and the Last Man* (Harmondsworth: Penguin 1993).

30 See e.g. R Dworkin, *Law's Empire* (London: Fontana 1986), p. 165.

31 Ibid., at p. 166.

This aspect of mercy, and its relationship to society, has been explored by Ross Harrison.[32] Harrison's analysis is informed by a slightly different perspective, in that it concerns the close relationship that (he argues) exists between mercy and autonomy (the source of the merciful impulse being vital in falling within the choice of the person who bears the risks of his or her leniency). The state, in being responsible for its citizens, must rather make its decisions on the basis of their content, for which the appropriate criteria must be rationality and justice: mercy is not open to the state for it embodies precisely the denial of that keystone of formal justice, that like cases must be treated alike.[33] The details of this position are not of direct concern to the present argument; but what *is* of concern is one of the assumptions on which it rests. This is manifested most clearly in the *responses* to Harrison's claims. One such appears in an important essay by John Tasioulas, upon which I shall very briefly focus.[34] For Tasioulas, Harrison's understanding of the character of mercy belongs to a long-established sceptical tradition which challenges the *rationality* of mercy.[35] "The obvious problem with this contrast between individuals and organs of the state", he says, "is that mercy is inherently other-regarding, impinging heavily on the interests of those liable to punishment." In belonging to this matrix of interests, mercy would then seem to belong to the same area of ethical thought as justice. Thus, "Harrison's understanding of mercy as rationally ungoverned leniency leaves it mysterious what value it realizes, unless capricious deviations from justice are implausibly accorded value." Hence also, "he dresses mercy in the irrationalist garb favoured by its detractors, not its supporters".[36]

The assumption that I wish to tease out is that if mercy is a *rational* virtue, then it must be understood (as is justice) by reference to its ability to transform the structure of relationships that hold *within* a system of interests. If the role of mercy is to be explained in this context, then (by the usual meaning of "explanation") there must be a certain consistency in mercy's treatment of specific cases, and therefore a degree of abstraction in the criteria which govern its exercise. The burden of my remaining argument will not be to question this inference, but to undermine it at the root. I shall call into question the very idea that mercy belongs to this system of interests at all; and hence I will show that the comprehensibility of mercy transcends the narrow idea of "rationality" associated with this view.

3 The character of mercy

The preceding discussion suggested an alternative framework in which to contemplate the idea of human society. This, I argued, might be viewed as an attempt to locate the source of meaning in the world, and to expound that meaning. In terms of this framework, the modern outlook on politics can be loosely identified with the belief that human societies represent the possibility of meaning in a world that is otherwise chaotic and random. At the same time, this outlook manifests awareness of a possible (and indeed actual) gap between the *present* meaning of human social arrangements, and the *absolute* meaning of those arrangements. This absolute meaning (it is thought) cannot be found in the world, for it is yet to be fully realised by any worldly conditions; it must instead belong to a transcendent horizon of morality by reference to which existing conditions (or that which is) are

32 Harrison, "Equality", n. 1 above, at p. 117.

33 Ibid., at pp. 108–09. I have necessarily compressed Harrison's argument here.

34 Tasioulas, "Mercy", n. 1 above. Again, it is not my intention to explore this argument in detail, but simply to highlight an assumption. I hope therefore that the reader can excuse the very short treatment of a rich and complex argument.

35 Ibid., at p. 104.

36 Ibid., at pp. 104 and 106.

compared to a set of ideal conditions (or that which ought to be). But since this transcendent horizon is thought to be the product of human reflection (the original position, the act of interpretation, the "reasoned conviction" etc.), the absolute meaning of the human condition is thought nevertheless to be represented by a form of collective social organisation. Morality, in short, is assumed to concern, not the situation of human existence within a wider cosmos, but instead the much narrower realm in which human effort can manipulate and vary aspects of the social situation. It is, as I have argued, difficult to see how mercy can inform this process.

Suppose, instead, however, that human societies are not, in the above sense, the ultimate source of meaning in the world. Any attempt to uncover a perspective of absolute meaning betrays a religious impulse. The location of such meaning in ideal social arrangements, belief in the triumph of "secular society" over dogmatic superstition, and so on does not create a vision of human existence that is free from religious belief; it is simply the manifestation of a secular religion in which "law" has replaced "God" as the supreme mover against evil and disorder.[37] An understanding of mercy, then, is not one that must free itself of all religious association in order to make itself relevant to modern understanding, but must instead involve elucidation of the character of mercy as a religious idea. I therefore propose an eschatological vision of human society (and of the human condition) that is significantly divorced from that which informs modern jurisprudential reflection; and I shall argue that only within this alternative vision can mercy have its proper meaning. (I do not claim any originality for this vision, which is familiar within much Christian theology and, with certain important adaptations, that of other religious world-views.)

In order properly to understand the human condition, it is necessary to comprehend not only the relevance of law and judgment, but also the ultimate significance of evil. Evil requires judgment, for without some means of redressing the effects of evil, and of placing its occurrence within bounds, the human condition can possess no meaning at all. Life, whether in the primitive "state of nature" or the modern polity, is subject to various confusions and frustrations, but, unless there is some sense of an ultimate order by which evil is punished and good rewarded, there is nothing beyond the chaos of circumstances to lend it coherence. Hence, in *Leviathan*, Hobbes observes that the recognition of certain structural possibilities even within the "state of nature" can be exploited in order to effect escape to a better condition of life in which evil is checked and order imposed.[38] By giving these transitional postulates the character of "theorems" (that is, ratiocinations rather than externally imposed norms), Hobbes regards the worldly instantiation of peace and harmonious order as emphatically human achievements. Modern political thought has followed Hobbes in this, both secular philosophies *and* exponents of religiously inspired politics sharing the basic belief that justice in the world is realised through human action: either there is no God, and we stand alone as bringers of order to a chaotic world; or God exists and we are his instruments, effecting the suppression of evil in his name. In both cases too, justice (and by implication mercy) must be understood as *legal* virtues, for they seemingly represent a scale of values that cannot be understood apart from law.[39]

37 "Secular society", moreover, is not strictly speaking a *type* of society; it is rather an incomplete view of the whole of society. (It is in this sense on a par with "the tolerant society", "the wealthy society", etc. in which it is always possible to meet with intolerance, poverty and so on.)

38 See Hobbes, *Leviathan*, n. 15 above, ch. 14.

39 See e.g. Simmonds, "Judgment and mercy", n. 1 above, at p. 52: "mercy is not, as might first appear, a recognition of the extent to which non-juridical values such as that of love transcend the abstract and formal claims of law. Rather, mercy is itself inseparable from the framework of juridical thinking, exhibiting its distinctive and autonomous character only in the specific context of judgment."

Though I aim to dispute these connections, the position of "the moderns" in relation to justice unearths a valuable insight: that of the necessary relationship between justice and power. If justice is to exist as more than merely an abstract idea, but is actually to be done in the world, it must be exercised through law. Howsoever law might be said to place restraints and limitations upon power, its existence also depends upon and presupposes power. Justice in the world is thus not independent of power. Power in this sense is political power (in belonging to the realm of political concepts), and insofar as it requires enforcement it is also military or executive power. Power, therefore, though not an intrinsically evil idea, cannot be entirely divorced from evil ambitions and effects: for it is always and everywhere the projection of human ideals and interests which hold themselves out as sufficient or final centres of order in the world. Consequently, the imposition of justice by human agency does nothing to suppress or eliminate evil in the world (though it may effect the suppression of particular instances of evil), but actively perpetuates the struggle between opposing ideologies. This fact has received greater acknowledgment in the sphere of international politics than elsewhere (illustrated by contemporary concern over the Treaty of Versailles, for example), but its obvious implication has never successfully penetrated political consciousness: that the domain wherein human agency can achieve its goals is much more limited than has been supposed.

A proper understanding of justice and mercy thus requires a severing of the assumed connection between human agency and God's will (whereby agency is represented as an instrument for the ultimate triumph of good over evil). This is a bigger step than might be supposed in the context of "secular society", for it is easy to underestimate the extent to which the tradition of natural law thinking has shaped the modern juridical consciousness. Such thinking served to emphasise the Judeo-Christian religion as a *juridical* religion: the religious person lives his or her life under the guidance of moral *laws* finding an ultimate source in the divine will. Human evil is an affront to such laws, and thus to the authority of God; as such, all evil must ultimately be contained within a greater power which limits and judges it. This power, historically and theologically, is manifested not through direct intervention in the world, but is assumed to be effected by the earthly princes who serve as God's instruments. In this way, the foundation of political or prerogative power is presented as an extension of the divine authority. Such assumptions have not disappeared from the modern polity: the oath of allegiance and loyalty, at all levels of the political system, terminates in an act of recognition of monarchical authority deriving from the coronation. Nor is this a mere ceremonial relic, for the coronation is marked not by a political proclamation but by a religious rite that is central to its constitutional meaning. The detailed business of the day-to-day administration of the law does not, of course, pay attention to these ideas. But insofar as government and officers of the law continue to believe their exercise of power to be other than groundless and arbitrary, and so long as the organisation of their efforts is informed by considered values rather than random impulses, such underpinning assumptions have not receded utterly into the background but have simply undergone a transition. Religious impulse has not disappeared; it has merely elevated the "secular state" to the level of an object of faith and worship.

Suppose, in contrast, that we regard human societies not as the final, but only as premature and inadequate centres of order in the world. Here, we perceive the world in terms of a set of transcendent values that are not merely the possible projections of our present values. This is, inevitably, an eschatological standpoint: one that is not ultimately structured by social values at all, but instead exhibits belief that a scale of values exists that does not fully accord with the possibilities of human judgment. Leaving behind the immediate social meaning of justice and mercy (or more precisely their possible

meanings as social constructs), then, how might we think of those ideas within the realm of absolute meaning?

One possibility is presented by Christian theology. From this perspective, the world (in the form of nature, history etc) has no immediate overall moral significance, whilst yet possessing such meaning absolutely. The natural world and the world of human society are of course interpretable; but in occupying a space *within* history, we lack the perspective necessary to judge its final or overall significance. We are therefore in the position of knowing that the world has meaning, but not being able to comprehend fully what that meaning is.[40] Acceptance of this proposition is, in essence, the core of religious faith: to believe in the reality of a moral order in nature (i.e. the moral significance of natural and historical processes), and to reject the nihilistic possibility that life has no meaning at all beyond the fact of its subsistence. Faith of this kind requires the abandonment of belief in any straightforward, intelligible correlation of morality with natural and historical processes, for it entails the essential impartiality of divine justice in the following way. God's creation of the world, as something apart from himself, involves the realisation of freedom within it. But the creation of such freedom necessitates also the creation of ultimate limits in relation to the defiance this freedom implies. These limits must operate within the world (if the world is not to be dismissed as utterly spoilt and irredeemable), and not simply become present as judgment in the afterlife. However, in the absence of direct intervention, the justice by which evil is checked must fall indiscriminately as a judgment upon all: the good as much as the sinners, upon whom it rains and shines in equal measure. If any natural process is to be interpreted as belonging to this moral order (the death of an enemy from disease, the poor harvest, the shipwreck of a missionary voyage etc.) then it must be regarded as possessing no immediate or discoverable meaning, but rather an ultimate and incomprehensible meaning.

Yet the full meaning of the moral order is not exhausted by these ideas, for the very impersonality of justice (the wrath of God) seems incompatible with the idea of God as present within the Judeo-Christian tradition. The full meaning of the moral order is thus completed by God's *mercy*, manifested in the image of the crucified Christ. Mercy can therefore be explained in the following terms. Divine justice (the manifestation of God's power in the world) is an inescapable consequence of human freedom; but the nature of such justice is to be impersonal, so that the sun shines on both good and evil, and the rain falls on the good person and the bad alike. The justification for God's judgment is characterised by the fallen state of humankind: "the good man" is never absolutely good, the "worst of men" not irredeemably bad, and therefore (as with all justice) its imposition is deserved. As beings (according to the Christian story) we are imperfect, forever giving in to sin. Thus, if we are to be saved it cannot be justice which achieves this salvation, but rather mercy. And it is mercy that is manifested in the crucifixion of Christ: God the Father judges the world, but gives the world his only Son, and in submitting to rather than refusing agony, it is God the Son who "takes away the sins of the world".[41] The crucifixion then represents God's mercy (specifically that of Christ) in remitting the full consequences of justice by taking the final such consequences to himself. Where otherwise there would be inescapable damnation, there is the possibility of redemption.

I have set out these views about the nature of mercy because they seem to me to represent the only finally satisfactory understanding of the meaning of mercy. The paradoxes concerning the character of mercy are dissolved, because the framework in

40 See e.g. Neibuhr, "Christian witness", n. 11 above, at p. 14.

41 The words of the *Agnus Dei*, taken from John 1:29: "Agnus Dei, qui tollis peccata mundi, miserere nobis."

which mercy is finally comprehensible is not that of the attempted balancing of competing interests in society. Within that narrower framework, mercy seemed paradoxical for it did not make sense in terms of the conceptions of rationality that structure the framework.[42] Rather than accepting that framework as the ground for dismissing mercy as a coherent idea, I suggest that we instead retain mercy and dismiss the framework. Within the broader framework I have outlined, the tension between justice and mercy becomes finally explicable: mercy tempers justice, in mitigating its punitive consequences, but it does so by simultaneously standing as the culmination and fulfilment of justice.[43] I do not claim that in order to comprehend the value of mercy one must *accept* the Christian story (for of course many do not); I simply claim that an *understanding* of the story is a prerequisite for grasping the true meaning of mercy; for it is only in terms of this framework that (I believe) the idea of mercy is ultimately comprehensible. In the following section I shall sketch out some of the implications of this view of mercy for a jurisprudential understanding of law and society.

4 The role of mercy in jurisprudential understanding

I began this essay by mentioning the general absence of discussions of mercy in the arguments of modern jurisprudence. The reason for such lack of discussion can be put down to the general acceptance amongst jurisprudential scholars of a conceptual framework in which mercy has no obvious place. Modern jurisprudential arguments contain many fiercely competing understandings of the implications of this framework, but they do not often exhibit a willingness to make the framework itself an object of criticism. I have attempted in the foregoing discussion to bring into focus some of the main features of this framework: the focus on personal interests, the mechanism of justice, belief in rational solutions, the perfectability of society and so on. These ideas I have brought loosely together under the term "the idealisation of politics". Because the idealisation of politics involves the belief that the meaning of society itself is ultimately comprehended by a theory of justice, modern jurisprudential scholarship can be described without too much exaggeration as recommending the pursuit of justice "without mercy". I believe this to be an unfortunate and damaging direction of thought, and that its central claims, as well as its questions and focal concerns, ought to be given up.

Mercy, on the view I have been suggesting, is irreducibly a religious idea. Its operations are therefore not historical (though they are manifest in history), but cosmic. The appearance of paradox within the character of mercy is the result of a failure to grasp this fact. Mercy seems paradoxical because it is thought to concern the adjustment of relationships amongst interests that have already been determined by the value of justice (and thus to be in conflict with justice). However, when properly understood, mercy does not concern the further refinement of the balance between personal interests, for it does not address such interests at all. Its concern is rather with the possibility of redemption. The rationality of mercy therefore transcends the rationality of interests, in terms of which its relationship to justice remains incomprehensible. Mercy (in the broader terms I am suggesting) does not *annul* justice, for justice remains historically present as a necessary absolute limit to evil in the world; yet it completes the eschatological meaning of that justice in offering salvation in place of unavoidable damnation. Insofar as justice and mercy are

42 Thus Murphy, in "Mercy and legal justice", n. 3 above, at p. 174, dismisses mercy as a juridical virtue in categorical terms, stating that there "is simply no room for mercy as an autonomous virtue with which [a judge's] justice should be tempered. Let them keep their sentimentality to themselves, for use in their private lives with their family and pets."

43 I borrow the expression from Neibuhr, "Christian witness", n. 11 above, at p. 30.

present as moral or political ideas, their operations must be analogues of these cosmic movements. But for that reason, any such concepts will always be *imperfect* analogues: for to promote ideas of justice and mercy (or indeed any moral concepts) to the status of absolute principles, "correct" understandings, or as offering definitive guidance to human endeavour is to elevate a form of human association to the level of an eschatological end-point or ultimate meaning. Modern philosophy might then be characterised by its failure to appreciate that human society can be comprehended only by reference to a deeper set of values, and that the equation of these values with "the ideal society" serves not to illuminate, but to prevent the full emergence of this meaning.

Contemplation of the value of mercy is essential to an understanding of the nature of law and society. This is so, not because an awareness of mercy suggests any particular set of social arrangements as necessary or desirable, but because it promotes a greater sensitivity to the mutable and imperfect nature of all "progress", whether theoretical or practical. From this awareness comes a different conception of the role of law in society: for having given up the belief in the idea of "the ideal society", law is no longer associated (whether directly or instrumentally) with the production of that happy but far-off condition. Instead, law might be seen simply as a means whereby conditions are created or preserved in which human beings have space to "flourish".[44] The notion of human flourishing is itself a philosophical problem, but in general terms it might be said to involve the act of living a social life, and of exploring the meaning of one's existence within the various commonalities that make this existence possible. It should be apparent from the foregoing reflections that the character of this "flourishing" is not determined by the extent to which a specific set of external social conditions has been established; thus, the nature and substance of the commonalities embodied within the law are never fixed or static, but subject to continual change and restatement. Nor should they be presumed to point in any specific direction, or to represent a cumulative advance in the *same* direction at different times.[45]

The purpose of jurisprudence, it seems to me, is not therefore to ascribe a particular character to the law, but instead to explore the meaning and to clarify the implications of the commonalities to be found within the heart of law. In doing so, the jurisprudential scholar might hope suggestively to relate the substance of legal understandings to a deeper set of values that are not finally social but rather transcendent and eschatological. Perhaps the most important insight that could serve such an endeavour is the constant awareness that in seeking to relate the fluid and transitive to what is absolute and unmoving, the utmost care must be taken to avoid the presentation of the fluidity of real events and arrangements as something itself fixed in their truth or direction. Something of this concern possibly lies at the back of the following words of Gadamer's:

> Is not conscious distortion, camouflage, and concealment of the proper meaning in fact the rare extreme case of a frequent, even normal situation? – just as persecution (whether by civil authority or the church, the inquisition or any other agency) is only an extreme case compared to the intentional or unintentional pressure that society and public opinion exert on human thought.[46]

44 This term has evolved a series of quite specific meanings (see e.g. J Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press 1980), ch. 4); but I use it more loosely here.

45 For an exploration of some of these themes in the context of adjudicative practices, see A W B Simpson, "The common law and legal theory", in *Oxford Essays in Jurisprudence* 2nd series (Oxford: Clarendon Press 1973).

46 H-G Gadamer, "Hermeneutics and historicism", reprinted as an appendix in *Truth and Method* 2nd edn (London: Continuum Books 1989), pp. 507–45, at p. 535.

The moral to be drawn from this is the need to avoid the tendency to make absolute that which is in reality mutable and transitive. This applies as much to the moral ideas that we take as fundamental as to the pliable legal rules through which they receive varying expression. Morality is best understood as an active sensibility which addresses a continually disordered array of values and circumstances that are permanently in motion. The processes of detachment and abstraction that inevitably inform moral decision are naturally inclined to suggest a picture of morality as a juridical structure of rules, rights and principles. A representation of morality along these lines vastly impoverishes our ethical understanding;[47] but its most corrosive effects lie in the elimination of mercy from the evaluative judgments concerning human relationships. If we do pursue such an understanding, we may come to find that a certain destructive mercilessness also characterises our social institutions through which such values are projected, defying all attempts to perceive within them a full and satisfactory expression of even the most basic moral concerns.

47 See my discussion in *From Positivism to Idealism*, n. 9 above, ch. 2.