We stomp on the rape magazines or we invade where they prostitute us, where we are herded and sold, we ruin their theatres where they have sex on us, we face them, we scream in their fucking faces, we are the women they have made scream when they choose. . . . We're all the same, cunt is cunt is cunt, we're facsimiles of the ones they done it to, or we are the ones they done it to, and I can't tell him from him from him . . . so at night, ghosts, we convene; to spread justice, which stands in for law, which has always been merciless, which is, by its nature, cruel.

Andrea Dworkin, *Mercy*

This second doctrine [of mercy]—counterdoctrine would be a better word—has completely exploded whatever coherence the notion of 'guided discretion' once had. . . . The requirement [of mitigation] destroys whatever rationality and predictability the . . . requirement [of aggravation] was designed to achieve.

Justice Scalia, in *Walton v. Arizona*

"O child . . . do not cure evil with evil. Many people have preferred the more equitable to the more just."

Herodotus, *History*

I begin with the plot of a novel whose title is *Mercy*.¹ By the author's deliberate design, it is not really a novel, and there is no mercy in it. These facts are connected. My plan is to pursue this connection. The

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author of this “novel” is the feminist writer and antipornography activist Andrea Dworkin. Its narrator is also named Andrea—a name that, as she tells us, means “courage” or “manhood.” At the age of nine, Andrea is molested by an anonymous man in a movie theater. At fourteen, she is cut with a knife by a sadistic teenage lover. At eighteen she sleeps with many men for money; she finds a tender black lover, but is brutally raped by his roommate. Jailed for antiwar activity, she is assaulted and tortured by prison doctors. She goes to Crete and has a passionate loving relationship with a Greek bartender, but when he discovers that she has been making love casually with many men he rapes her and gives her up. Returning to New York, she lives a marginal life of sex, drink, and drugs. Threatened by a gang one night, she tries to make peace with its leader. He holds her hostage at knifepoint in her own bed. Apparently rescued by a man who turns up at her door, she finds herself raped by her rescuer.

At twenty-two she marries a tender young revolutionary. As soon as they are husband and wife, he finds himself unable to make love without tying her up and hitting her. She leaves him for street life. Some years later, after many other abuses, she takes karate lessons and becomes adept at kicking drunken homeless men to death. We encounter at this point the passage that I have quoted as an epigraph to this article; it expresses Andrea’s angry refusal of mercy, her determination to exact retribution without concern for the identity of the particulars. (“I can’t tell him from him from him.”) Although one might wonder whether the point is that terrible experiences have corrupted Andrea’s perception, it appears that her refusal of mercy is endorsed by the novel as a whole.

This novel does not read like a traditional novel, because its form expresses the retributive idea that its message preaches. That is, it refuses to perceive any of the male offenders—or any other male—as a particular individual, and it refuses to invite the reader into the story of their lives. Like Andrea, it can’t tell him from him from him. The reader hears only the solitary voice of the narrator; others exist for her only as sources of her pain. Like the women in the male pornography that Dworkin decries, her males have no history, no psychology, no concrete reasons for action. They are just knives that cut, arms that beat, penises that maim by the very act of penetration. Dworkin’s refusal of the traditional novelist’s attention to the stories of particular lives seems closely connected with her heroine’s refusal to be merciful to any of those lives, with her doctrine
that justice is cruel and hard. But the nature of the connection between mercy and a vision of the particular is not yet evident; my hope is to make it evident—and, in the process, to make a case for the moral and legal importance of the novelist’s art.

In order to do this, however, I must begin with a historical inquiry into the origins, in the Western tradition, of the close connection between equitable judgment—judgment that attends to the particulars—and mercy, defined by Seneca as “the inclination of the mind toward leniency in exacting punishment.” I begin with a puzzle in ancient Greek thought about law and justice. Solving this puzzle requires understanding some features of the archaic idea of justice that turn out to be highly pertinent to Andrea Dworkin’s project. This sort of justice is soon criticized, with appeal to both equity and mercy. After following the arguments of Aristotle and Seneca on this question, I shall return to contemporary issues, using these ideas to make a case for the moral and legal importance of narrative art in several areas of contemporary legal and political relevance, defending the equity/mercy tradition as an alternative both to retributive views of punishment and to some modern deterrence-based views.

II

There is a puzzle in the evidence for ancient Greek thought about legal and moral reasoning. Two concepts that do not appear to be at all the same are treated as closely linked as to be aspects of the same concept, and introduced together by one and the same moral term. The moral term is epieikeia. The concepts are the two that I have already identified as my theme: the ability to judge in such a way as to respond with sensitivity to all the particulars of a person and situation, and the “inclina-

2. I note that we do not find this refusal in some of Dworkin’s best essays on sexuality, in particular the essays on Tennessee Williams and James Baldwin in Intercourse.

tion of the mind” toward leniency in punishing—equity and mercy. From the beginning, the idea of flexible particularized judgment is linked with leniency. Epieikeia, which originally designated the former, is therefore said to be accompanied by the latter; it is something mild and gentle, something contrasted to the rigid or harsh. The Herodotean father, in my epigraph, contrasts the notion of strict retributive justice with epieikeia, at a time when that word was already clearly associated with situational appropriateness. The orator Gorgias, praising the civic character of soldiers fallen in battle, says of them that “on many occasions they preferred the gentle equitable (to praoon epieikes) to the harshly stubborn just (tou authadous dikaiou), and appropriateness of reasoning to the precision of the law, thinking that this is the most divine and most common law, namely to say and not say, to do and to leave undone, the thing required by the situation at the time required by the situation.” He too, then, links the ability to do and say the right thing in the situation with a certain mildness or softness; opposed to both is the stubborn and inflexible harshness of law. By this time, the original and real etymology of the word epieikeia—from eikos, the “plausible” or “appropriate,”—is being supplemented by a popular derivation of the term from eikō, “yield,” “give way.” Thus even in writing the history of the term, Greek thinkers discover a connection between appropriate judgment and leniency.

4. Both equity and mercy can be spoken of as attributes of persons, as features of judgments rendered by a person, or as moral abstractions in their own right. Thus a person may be praised as epiēkês; his or her judgments or decisions display to epieikes, or show a respect for to epieikes.

5. Hdt. III.53; for discussion, see D’Agostino, Epieikeia, p. 7. See also Soph. fr. 770 (Pearson), which contrasts “simple justice” (tēn haplōs dikēn) with both equity and grace (charis). All translations from the Greek are my own.

6. Gorgias, Epitaphios, fragment Diels-Kranz 82B6. The passage has occasioned much comment and controversy: see D’Agostino, Epieikeia, p. 28ff. for some examples. It seems crucial to understand the passage as pertaining to the civic virtue of the fallen, not their military attributes.

7. See P. Chantraine, Dictionnaire etymologique de la langue grecque: Histoire des mots, vol. 2 (Paris: Klinksieck, 1970), p. 355. For other references, see D’Agostino, Epieikeia, pp. 1–2, n. 3. Eikos is the participle of eikai, “seems.” (The English word “seemly” is an instructive parallel.) In early poetry, the opposite of epieikes is aeikes, “outrageous,” “totally inappropriate,” “horrible.”

8. In addition to the passages discussed below, see Pseudo-Plato, Definitiones 412A, the first known definition of epieikeia, which defines it as “good order of the reasoning soul with respect to the fine and shameful,” as “the ability to hit on what is appropriate in contracts,” and also as “mitigation of that which is just and advantageous.”
The puzzle lies, as I have said, in the unexplained connection between appropriate situational judgment and mercy. One might well suppose that a judgment that gets all the situational particulars correct will set the level of fault sometimes high up, sometimes low down, as the situation demands. If the judgment is a penalty-setting judgment, it will sometimes set a heavy penalty and sometimes a light one, again as the situation demands. If the equitable judgment or penalty are being contrasted with a general principle designed beforehand to fit a large number of situations—as is usually the case—then we might expect that the equitable will sometimes be more lenient than the generality of the law, but sometimes harsher. For, as that not-very-merciful philosopher Plato puts it in the Laws, sometimes the offender turns out to be unusually good for an offender of that sort, but sometimes, too, unusually bad.  

Plato has a modern ally in Justice Scalia, who feels that it is absurd that aggravation and mitigation should be treated asymmetrically in the law. The very same requirements should hold for both; presumably, once we begin looking at the specific circumstances, we will be about as likely to find grounds for the one as for the other.  

But this is not what many Greek and Roman thinkers seem to think. They think that the decision to concern oneself with the particulars is connected with taking up a gentle and lenient cast of mind toward human wrongdoing. They endorse the asymmetry that Justice Scalia finds absurd and incoherent. We must now ask on what grounds, and with what rationality and coherence of their own, they do so.

III

We can make some progress by looking at what epieikeia opposes or corrects. We see in our passages a contrast between epieikeia as flexible situational judgment and the exceptionless and inflexible mandates of law or rule. We also find these laws or rules described as “harsh,” “harshly stubborn,” a “cure of evil with evil.” This goes to the heart of

9. Plato, Laws 867d, on regulations concerning the recall of an exiled homicide.

10. Justice Scalia, in Walton v. Arizona: “Our cases proudly announce that the Constitution effectively prohibits the States from excluding from the sentencing decision any aspect of a defendant’s character or record or any circumstance surrounding the crime: [for example] that the defendant had a poor and deprived childhood, or that he had a rich and spoiled childhood” (at 3062).
our puzzle, clearly, for what we need to know is how that sort of justice comes to be seen as harsh in its lack of fit to the particulars, rather than as simply imprecise.

Let us think, then, of the archaic conception of justice. And let us examine the first surviving philosophical text to use the notion of justice, for its metaphorical application of dikê to cosmic process it illustrates very vividly what dikê, in human legal and moral matters, was taken to involve. Writing about the cyclical changes of the basic elements into one another—as the hot, the cold, the wet, and the dry succeed one another in the varying combinations that make up the seasons of the year—the sixth-century B.C. philosopher Anaximander writes, “They pay penalty and retribution (dikên kai tisin) to one another in accordance with the assessment of time.”

Anaximander describes a process in which “encroachments” by one element are made up in exact proportion, over time, by compensatory “encroachments” of the corresponding opposite element. We are, it seems, to imagine as neutral a state of balance in which each element has, so to speak, its own—its due sphere, its due representation in the sphere of things. Next the balance is thrown off, in that one or more of the elements goes too far, trespasses on the preserve of the other—as, for example, winter is an invasion by the cold and the wet into the due preserve of the warm and the dry. (Thus the root notion of injustice, already in the sixth century, is the notion of pleonexia, grasping more than one’s due share, the very notion that Plato exploits in the Republic, trying to capture its opposite with the notion of “having and doing one’s own.”) Winter is an imbalance, and in order for justice or dikê to be restored, retribution (tisis) must take place; the elements that encroached must “pay justice and retribution” to the ones they squeezed out. What this seems to mean is that a corresponding encroachment in the other direc-

11. Anaximander DK fragment Bl, the first surviving verbatim fragment of ancient Greek philosophy. (We know it to be verbatim because Simplicius, who reports it, also comments with some embarrassment about its language, saying “as he said using rather poetic terms.”) For an excellent account of Anaximander’s idea and its connection with ideas of justice and equality in law and morals see Gregory Vlastos, “Equality and Justice in Early Greek Cosmologies,” in Studies in Presocratic Philosophy, ed. David Furley and Reginald Allen, vol. 1 (London: Routledge, 1970), 56–91.

tion must take place, in order that “the doer should suffer.” Summer is the due retribution for the imbalance of winter; mere springtime would not right the balance, because cold and wet would not be duly squeezed out in their turn.

In short, this cosmology works with an intuitive idea that derives from the legal and moral sphere. It is the idea that for encroachment and pain inflicted a compensating pain and encroachment must be performed. The primitive sense of the just—remarkably constant from several ancient cultures to modern intuitions such as those illustrated in our Andrea Dworkin passage—starts from the notion that a human life (or, here, the life of the cosmos) is a vulnerable thing, a thing that can be invaded, wounded, or violated by another’s act in many ways. For this penetration, the only remedy that seems appropriate is a counterinvasion, equally deliberate, equally grave. And to right the balance truly, the retribution must be exactly, strictly proportional to the original encroachment. It differs from the original act only in the sequence of time and in the fact that it is a response rather than an original act—a fact frequently obscured if there is a long sequence of acts and counteracts.

This retributive idea is committed to a certain neglect of the particulars. For Anaximander, it hardly matters whether the snow and rain that get evaporated are in any sense “the same” snow and rain that did the original aggressing. The very question is odd, and Anaximander seems altogether uninterested in the issues of individuation and identity that would enable us to go further with it. Nor are things terribly different in the human legal and moral applications of retributive dikē. Very often the original offender is no longer on the scene, or is inaccessible to the victim, and yet the balance still remains to be righted. What then happens is that a substitute target must be found, usually some member of the offender’s family. The crimes of Atreus are avenged against Agamemnon, Agamemnon’s offense burdens Orestes. The law that “the doer must suffer” becomes, in this conception of justice as balanced retribution, the law that for every bad action some surrogate for the doer must suffer; and, like Andrea Dworkin’s narrator, the ancient concept of dikē can’t “tell him from him from him.” A male has raped Andrea; then another male will get a karate kick. The substitution is usually justified

13. *Ton drasanta pathein*, Aeschylus, *Choephoroi*, l. 313. A similar idea is expressed in many other places; see, for example, Aes., *Agamemnon* 249, 1564.
through an intuitive notion that the real offender is “the line of X” or “the house of X,” or, in Dworkin, “the gender of X.” But this alleged justification entails neglect of the particularity of the so-called offender; it neglects, too, questions of motive and intention that one might think crucial in just sentencing.

A closely related sort of neglect can arise even if the original offender is around to receive the punishment. For suppose that the offender committed an act that is in some sense heinous, but did so with extenuating circumstances. (Oedipus committed both parricide and incest, but with an excusable ignorance of crucial information.) Dikē says that parricide and incest have occurred here, and the balance must be righted. The eyes that saw their mother’s naked body must be blinded. Now in this case the doer and the sufferer are the same individual, but notice that Oedipus’s particularity is still in a significant sense neglected. For he is being treated the same way, by dikē, as a true or voluntary parricide would be treated, and crucial facts about him, about his good character, innocent motives, and fine intentions, are neglected. But to neglect all this is to neglect him: substitution again, though of a more subtle sort, neglecting crucial elements of the person’s individual identity.14

If we start thinking this way, the asymmetry we asked about begins to arise naturally. For looked at in this way, dikē is always harsh and unyielding. Sometimes the harshness is merited, sometimes excessive. But it is rarely too soft, for it begins from the assumption that the doer should suffer, that any wrong should be “made up” by a penalty that befits a deliberate wrong. The particulars of the case, more closely inspected, lead toward extenuation or mitigation far more frequently than in the opposite direction. If dikē has got the right person, well and good; nothing more need be added. If, however, dikē has got hold of the wrong person, a more flexible and particularized judgment will let that person off. So too in the Oedipus case: for dikē assumes that Oedipus is a parricide; there is nothing more we can find out about him that will aggravate his offense. We can and do, on the other hand, find out that in a most relevant sense he is not a parricide, because the act that he intended and chose was not the act that we have judged him to have performed. Once again, the more flexible judgment of epieikeia steps in to

14. One might wonder whether parricide and incest have actually been committed, for one might argue that intention is relevant to the categorization of the act.
say, be gentle with this man, for we cannot assume without looking further that he really did the awful thing for which strict justice holds him responsible. Getting the right life and getting the life right are not two separate issues, but two aspects of a single process of appropriate scrutiny.

In effect, the asymmetry arises from the fact that the circumstances of human life throw up many and various obstacles to meeting the tough standards of justice; if we set a high standard of good action, the very course of life will often make it difficult for mere human beings to measure up. To put it another way, the asymmetry arises from a certain view about the common or likely causes of wrongdoing: the asymmetrist claims that a certain number of wrongful acts are fully deliberate wrongs and that a certain number are produced by obstacles such as failure of knowledge, mistaken identification, bad education, or the presence of a competing moral claim. There may be some cases of parricide and incest that are produced by an especially or unusually blameworthy degree of hatred or wickedness, going beyond the responsible deliberateness assumed by the law, but the claim is that this is likely to be a smaller class than the Oedipus-type class, given the character of human life and the nature of human motivation.

The world of strict dikê is a harsh and symmetrical world, in which order and design are preserved with exceptionless clarity. After summer comes fall, after fall comes winter, after day comes the night; the fact that Agamemnon was not the killer of Thyestes’ children is as irrelevant to dikê as the fact that the night did not deliberately aggress against the day; the fact that Oedipus acted in ignorance is as irrelevant to dikê as the fact that the winter came in ignorance of its crimes against the summer. It is a world in which gods are at home, and in which mortals often fare badly. As a fragment of Sophocles puts it, “The god before whom you come . . . knows neither equity nor grace (oute toutipeikes oute tên charin), but only cares for strict and simple justice (tên haplôs dikên).”15

The world of epieikeia or equity, by contrast, is a world of imperfect human efforts and of complex obstacles to doing well, a world in which humans sometimes deliberately do wrong, but sometimes also get tripped up by ignorance, passion, poverty, bad education, or circumstan-

tial constraints of various sort. It is a world in which bad things are sometimes simply bad, sometimes extremely bad, but sometimes—and more often, when one goes into them—somewhat less bad, given the obstacles the person faced on the way to acting properly. Epieikeia is a gentle art of particular perception, a temper of mind that refuses to demand retribution without understanding the whole story; it responds to Oedipus's demand to be seen for the person he is.

IV

So far we have been dealing only with a contrast between the equitable and the just. Justice itself is still understood as strict retribution, and therefore the equitable, insofar as it recognizes features of the particular case that the strict law does not cover, stands in opposition to the just. But justice or dikē is by the fifth century a venerated moral norm, associated in general with the idea of giving to each his or her due. We would expect, then, as the conflict between equity and strict retributive justice assumed prominence, an attempt to forge a new conception of justice, one that incorporates the insights of equity. This project was pursued to some extent by Plato, in his late works the Statesman and the Laws.\textsuperscript{16}

Even more significant for our purposes, it was pursued, albeit unsystematically, by the Attic orators in their arguments over particular cases in front of citizen juries.\textsuperscript{17} But it was Aristotle who made the major contribution.

Aristotle's discussion of the equitable in the Nicomachean Ethics occurs within his account of justice. It begins with an apparent dilemma. The epieikes, he says, is neither strictly the same as the just nor altogether different in kind (EN 1137a33–4). On the one hand, it looks as if it would be strange to separate epieikeia from justice, for we praise both

\textsuperscript{16} See Statesman 294A–95A, Laws 757E, 867D, 876A–E, 925D–26D. Like Aristotle, Plato recognizes the importance of epieikeia both in the judgment of whether a certain offense was committed and in the assessment of penalties. He suggests that laws are written deliberately in such a way as to leave gaps to be filled in by the judgment of judges or juries. He compares the prescriptions of law to the general instructions that an athletic trainer has to give when he cannot deal with each pupil one by one and also to a trainer or a medical doctor who has to go out of town and therefore leaves instructions that cannot anticipate all the circumstances that may arise. This being so, it is in the spirit of law that when one does look into the particular case, one will modify the prescription to suit the differing conditions.

\textsuperscript{17} See Lawless, Law, Argument and Equity, with comprehensive bibliography; for some particulars, see below.
people and their judgments for the quality of *epieikeia*, recognizing it as a normatively good thing. But in that case it will be odd if *epieikeia* turns out to be altogether opposed to the just. Then we would either have to say that justice is not a normatively good quality, or withdraw our normative claims for *epieikeia* (1137a34–b8).18 Aristotle’s solution to the dilemma is to define equity as a kind of justice, but a kind that is superior to and frequently opposed to another sort, namely strict legal justice (1137b8ff.). Equity may be regarded as a “correcting” and “completing” of legal justice.19

The reason for this opposition, he continues, is that the law must speak in general terms, and therefore must err in two ways, both leaving gaps that must be filled up by particular judgments, and sometimes even getting things wrong. Aristotle says that this is not the fault of the lawgiver, but is in the very nature of human ethical life; the “matter of the practical” can be grasped only crudely by rules given in advance, and adequately only by a flexible judgment suited to the complexities of the case. He uses the famous image of the good architect who does not measure a complicated structure (for example a fluted column) with a straightedge. If he did, he would get a woefully inadequate measurement. Instead he uses a flexible strip of metal that “bends to the shape of the stone and is not fixed” (1137b30–32). Exactly in this way, particular judgments, superior in flexibility to the general dictates of law, should bend round to suit the case.20

Aristotle ends the discussion with some remarks that seem ill-suited to their context, but by now we should be prepared to understand how they fit in:

> It is also clear from this [account of the equitable] what sort of person the equitable person is. For a person who chooses and does such things, and who is not zealous for strict judgment in the direction of

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18. Strictly speaking, there is another possibility: that they are both valuable norms that pervasively conflict in their requirements. Aristotle does recognize contingent conflicts of obligation, but not this more deep-seated value conflict.

19. *Epanorthôma* suggests both things: the image is of straightening up something that has fallen over or gone crooked a bit. Equity is putting law into the condition to which it aspires in the first place.

the worse, but is inclined to mitigation, even though he can invoke the law on his side—such a person is equitable, and this trait of character is equity, being a kind of justice and not a distinct trait of character. (1137b34–1138a3)

Here Aristotle alludes to and endorses the tradition that links perception of the particular with mitigation, and by now we can see on what grounds he does so. But Aristotle makes a new contribution, for he insists that this is the way a truly just person is. In keeping with his insistence throughout his ethical and political writings that justice, as a virtue of character, is a peculiarly human virtue, one that gods neither possess nor comprehend, and indeed would think “ridiculous” (EN 1178b11), he now gives the just a definition suited to an imperfect human life.21

In the Rhetoric discussion of epieikeia, having given a very similar account of the equitable as that which corrects or supplements—and thereby fulfills—the written law, Aristotle adds a somewhat more detailed account of equitable assessment, telling us that the equitable person is characterized by a sympathetic understanding of “human things.” He uses the word suggnômê, “judging with.” He links this ability with particular perception, and both of these with the ability to classify actions in accordance with the agent’s motives and intentions (1374b2–10).22

The logic of these connections seems to be as follows. To perceive the particular accurately, one must “judge with” the agent who has done the alleged wrong. One must, that is, see things from that person’s point of view, for only then will one begin to comprehend what obstacles that person faced as he or she acted. In this sense, it takes suggnômê to deliver a “correct discrimination” of the equitable. When one looks at the person’s case with suggnômê, certain distinctions that do not play a part in the archaic conception of dikê assume a remarkable salience. Equity, like the sympathetic spectatorship of the tragic audience, accepts Oedipus’s plea that the ignorant and nonvoluntary nature of his act be acknowledged; it acknowledges, too, the terrible dilemmas faced by characters such as Agamemnon, Antigone, and Creon, and the terrible moral defectiveness of all their options. Recognizing the burden of these “hu-

21. See EN VII.1 on ethical excellence in general; Pol. I.1 on the social excellences, and EN X.8, 1178a9–b18 on virtue and justice as purely human and not divine.
22. Cf. also EN 1143a19–20, connecting suggnômê and equity, and both with perception of the particular; cf. also EN 1110a24–25, 1111a1–2, on suggnômê in tragic situations.
man things,” the equitable judge is inclined not to be “zealous for strict judgment in the direction of the worse,” but to prefer merciful mitigation.

I have already illustrated Aristotle’s argument by alluding to tragedy and tragic spectatorship. And since I shall go on to develop my own account of the equitable with reference to literature, it seems well worth pointing out that Aristotle’s account of suggnômê and epieikeia in these passages has close links with his theory of tragedy. For in his theory the spectator forms bonds of both sympathy and identification with the tragic hero.23 This means that “judging with” is built into the drama itself, into the way in which the form solicits attention. If I see Oedipus as one whom I might be, I will be concerned to understand how and why his predicament came about; I will focus on all those features of motive and agency, those aspects of the unfortunate operations of chance, that I would judge important were I in a similar plight myself. I would ask how and why all this came about, and ask not from a vantage point of lofty superiority, but by seeing his tragedy as something “such as might happen” in my own life.24 Tragedy is thus a school of equity, and therefore of mercy. If I prove unable to occupy the equitable attitude, I will not even enjoy tragedy, for its proper pleasure requires emotions of pity and fear that only suggnômê makes possible.

Aristotle’s attitude to law and equity was not simply a theoretical fiction. There is evidence that it both shaped legal practice and, even more clearly, built upon an already developed and developing tradition of Athenian legal thought.25 We have, of course, almost no records of the actual outcomes of jury trials, and no record at all of the deliberations of jurors. The process did not encourage lengthy or communal deliberation, as

24. See Poetics, ch. 9, and the excellent discussion in Halliwell, “Pleasure.” Aristotle remarks that neither pity nor fear will be experienced by a person who believes that he or she is above the uncertainties of life and can suffer no serious reversal. See Rhet. 1382b30ff.; 1385b21–22, 31: he calls this state of mind a hubristikê diathesis, an “overweening disposition.”
25. Among the legal and rhetorical figures mentioned, Lysias predates Aristotle and is active in the late fifth century, while both Isaeus and Isocrates are contemporaries of Aristotle; their period of activity overlaps with the likely period of composition of Aristotle’s Rhetoric, which is prior to Aristotle’s first departure from Athens in 347. Isaeus’s earliest and latest works, for example, can be dated approximately to 389 and 344/3 B.C.
each juror cast a separate vote after hearing the various arguments, apparently without much mutual consultation.\textsuperscript{26} We do, however, have many examples of persuasive speeches delivered to such juries. Since the orator’s reputation rested on his ability to persuade a jury of average citizens chosen by lot, we can rely on these speeches for evidence of widespread popular beliefs about legal and ethical concepts. These speeches show the orators relying on a concept of law and even of justice that is very much like the one that Aristotle renders explicit and systematic. Thus litigants frequently call for a justice tailored to the circumstances of their own case, and frequently use the expression \textit{ta dikaia} (“those things that are just”) in that sense.\textsuperscript{27} They often proceed as if the written law is understood to be a set of guidelines with gaps to be filled in or corrected by arguments appealing to the notion of equity.\textsuperscript{28} In this process, frequent appeal is made to the jurors’ sense of fairness, as if, once the particular circumstances of the case are understood, they can be expected to see that justice consists in an equitable determination.

This is a deep insight, one that I support. For it seems wrong to make a simple contrast between justice and equity, suggesting that we have to choose between the one and the other.\textsuperscript{29} Nor, in a deep sense, do we have to choose between equity and the rule of law as understandings of what justice demands. The point of the rule of law is to bring us as close as possible to what equity would discern in a variety of cases, given the dangers of carelessness, bias, and arbitrariness endemic to any totally discretionary procedure. But no such rules can be precise or sensitive enough, and when they have manifestly erred, it is justice itself, not a departure from justice, to use equity’s flexible standard.

\textsuperscript{26} On all this, see Lawless, \textit{Law, Argument and Equity}, with copious references to sources ancient and modern.

\textsuperscript{27} See Michael Hillgruber, \textit{Die zehnte Rede des Lysias: Einleitung, Text und Kommentar mit einem Anhang über die Gesetzesinterpretation bei den attischen Rednern} (Berlin and New York: Walter de Gruyter, 1988), 116–17. Hillgruber cites passages in the orators where an appeal to \textit{ta dikaia} is used to persuade the jurors that obedience to the letter of the law is not required by their oath. These passages are: Andocides 1.31, Lysias 15.8, Demosthenes 21.4, 21.212, 23.194, 24.175, [Dem.] 58.61. Lawless, \textit{Law, Argument and Equity}, p. 78, discusses this material and adds Isaeus 1.40 to the list.

\textsuperscript{28} See K. Seeliger, “Zur Charakteristik des Isaios,” \textit{Jahrb. für Philologie} 113 (1876): 673–79, translated in Lawless, \textit{Law, Argument and Equity}: “The principle of equity is almost always maintained, while the letter of the law is not infrequently circumvented, however much the orator is accustomed to holding his opponents to it.”

\textsuperscript{29} For examples of such contrasts, see Richard Posner, \textit{Law and Literature} (Cambridge, Mass.: Harvard University Press, 1988), 108ff., on which see further below.
V

We are still not all the way to a doctrine of mercy. For what Aristotle recommends is precise attention to the circumstances of offense and offender, both in ascertaining whether or not there is any guilt and in assessing the penalty if there is. He is prepared to let people off the hook if it can be shown that their wrongdoing is unintentional, or to judge them more lightly if it is the result of something less than fully deliberate badness. But the point of this is to separate out the fully and truly guilty from those who superficially resemble them. In effect, we are given a more precise classification of offenses, a classification that takes intention and motive into account. But once a particular offense is correctly classified, the offender is punished exactly in proportion to the actual offense.

By contrast to the archaic conception of justice, this is indeed merciful, but it does not suffice, I think, for all that we mean by mercy, which seems to involve a gentleness going beyond due proportion, even to the deliberate offender. With his emphasis on sympathetic understanding, Aristotle is on his way to this idea. And he insists that the virtuous disposition in the area of retributive anger is best named “gentleness” (using the same word that Gorgias had used in connection with epieikeia). He stresses that “the gentle person is not given to retribution [timóretíkos], but is rather inclined to sympathetic understanding [suggnômonikos]” (EN 1126a2–3). But retribution will still play an important role, where the circumstances demand it. For “people who do not get retributively angry at those at whom they should look like fools... For they seem to have no perception and no feeling of pain... and to allow oneself and one’s loved ones to be kicked around, and overlook it, is slavish” (1126a4–8). The demand to avoid the slavish is certain to play a role in the public world of the law, as well as in the private world of the family. This demand makes Aristotelian suggnômé stop short of mercy. For the full development of that idea, we must wait for Roman Stoicism and for Seneca.31

Stoic moral theory accepts and builds on the Aristotelian insight that

30. I am translating orgizesthai this way because Aristotle defines orgê as a desire for retribution, on account of the pain of a believed slight.

rules and precepts are useful only as guidelines in both private and public thought. Any fully adequate moral or legal judgment must be built upon a full grasp of all the particular circumstances of the situation, including the motives and intentions of the agent. Like Aristotle, Stoics are fond of using an analogy between medicine and ethics to illustrate this point: general ethical or legal rules are about as useful as medical rules and precepts—which is to say, useful as outlines, but no substitute for a resourceful confrontation with all the circumstances of the case. Both the Greek and the later Roman Stoics stress that an act is fully correct and moral, what they call a *katorthôma*, only if it is done with the appropriate motives and the appropriate knowledge; a *kathêkon* or (in Latin) *officium* is an act of (merely) the right general type, without consideration of the agent’s thoughts and motivations. Rules can tell you what the *kathêkonta* are, but to get all the way to a full *katorthôma* you need to become a certain sort of person. The same goes in reverse for bad actions. This means that the Aristotelian idea of justice as equity is already built into the moral schema from the beginning, and it will automatically influence the classification of offenses in public reasoning and in the law.\(^{32}\)

The Greek Stoics stop there, and in their moral rigor they explicitly reject any application of *epieikeia* that goes beyond the careful classification of offenses. The soul of the good Stoic judge is a hard soul that protects itself from all impulses that might sway it from the strict path of virtue and duty. “All wise men,” they announce, “are harshly rigorous [*austéroi*].”\(^{33}\) They “never permit their soul to give way or to be caught by any pleasure or pain.”\(^{34}\) This hardness cordon them off from any yielding response to the defects of another person. The wise man, they announce, does not forgive those who err, and he never waives the punishment required in the law. An unyielding judge, the Stoic will do exactly what strict justice requires. In this connection, *epieikeia* is explic-

32. One possible difference: Aristotle’s ethical schema makes a big distinction between *adikêmata*, for which it is necessary to have a bad *character*, and lesser wrongdoings that will be classified as among the blameworthy *hamartêmata*. The latter class will include bad acts done from weakness of will with respect to some passion. Stoic moral theory is harsher toward the passions, treating them as types of false judgment that are always in an agent’s power to refuse. Thus the distinction between *akrasia* and wrongdoing from bad character is significantly weakened, if not altogether eroded.

33. Diogenes Laertius VII.117 = *Stoicorum Veterum Fragmenta* (SVF) III.637.

itly rejected: the Stoic will never waive the punishment that is mandated for that particular type of offense.\textsuperscript{35}

Many Greek Stoic texts show us this attitude of detachment and harshness to offenders, an attitude far removed from the Aristotelian norm of suggnômeë. One can see this emerge with particular clarity in the treatment of tragedy, which Stoics are permitted to watch, so long as they watch it from a vantage point of secure critical detachment (like Odysseus, they say, lashed to the mast so that he can hear, but not be swayed by, the sirens’ song).\textsuperscript{36} From this secure vantage point they view the disasters and vulnerabilities of ordinary mortals with amusement and even scorn, defining tragedy as what happens “when chance events befall fools.”\textsuperscript{37} To Oedipus, the wise man says, “Slave, where are your crowns, where your diadem?” To Medea, the wise man says, “Stop wanting your husband, and there is not one of the things you want that will fail to happen.”\textsuperscript{38} There is no inevitability in tragedy, for if one has the proper moral views there is no contingency in the world that can bring one low.\textsuperscript{39}

Here Seneca steps in, perceiving a serious tension in the Greek Stoic position. On the one hand, Stoicism is deeply committed to the Aristotelian position that good moral assessment, like good medical assessment, is searchingly particular, devoted to a deep and internal understanding of each concrete case. On the other hand, the Stoic norm of critical detachment withholds psychological understanding, treating deep and complex predicaments as easily avoidable mistakes, simply refusing to see the obstacles to good action from the erring agent’s own viewpoint.

Seneca opts for the medical side of this dilemma, offering a complex account of the origins of human wrongdoing that leads to a new view of the proper response to it. Seneca begins his argument in \textit{De ira} as an Aristotelian would, asking the judge to look at all the circumstances of the offense (1.19.5–8). At this point he still seems to be a symmetrist,

\textsuperscript{35} SVF III.640.
\textsuperscript{37} Epictetus, Diss. 2.26.31. Though a Roman Stoic, Epictetus is loyal to the original views of the Greek Stoics.
\textsuperscript{38} Epictetus 1.24.16–18, 2.17.19–22.
\textsuperscript{39} The proper view is that virtue by itself is sufficient for eudaimonia.
urging that sometimes a closer look makes the person look better, sometimes worse. But he then continues his reflections, in the second book, in a manner that makes our asymmetry open up. People who do bad things—even when they act from bad motives—are not, he insists, simply making a foolish and easily corrigible error. They are yielding to pressures—many of them social—that lie deep in the fabric of human life. Before a child is capable of the critical exercise of reason, he or she has internalized a socially taught scheme of values that is in many ways diseased, giving rise to similarly diseased passions: the excessive love of money and honor, angers connected with slights to one's honor, excessive attachment to sex (especially to romanticized conceptions of the sexual act and the sexual partner), anger and violence connected with sexual jealousy; the list goes on and on.40

These cultural forces are in error, and in that sense someone who is in their grip is indeed a "fool," as Epictetus holds. But there is not much point in giving a little sermon to Medea as to a docile child; such errors, taught from an early age, take over the soul and can be eradicated, if at all, only by a lifetime of zealous and obsessive self-examination. And, furthermore, Seneca suggests that anger and the desire to inflict pain—the worst, in his opinion, of the errors of the soul—are not in any simple way just the result of a corrigible error, even at the social level. He repeatedly commits himself to the view that they do not result from innate instinct. On the other hand, they "omit no time of life, exempt no race of human beings" (De ira III.22).

In a crucial passage, Seneca says that the wise person is not surprised at the omnipresence of aggression and injustice, "since he has examined thoroughly the circumstances of human life" (condicio humanae vitae, II.10). Circumstances, then, and not innate propensities, are at the origins of vice. And when the wise person looks at these circumstances clearly, he finds that they make it extremely difficult not to err. The world into which human beings are born is a rough place, one that confronts them with threats to their safety on every side. If they remain attached to their safety and to the resources that are necessary to protect it—as is natural and rational—that very attachment to the world will almost certainly, in time, lead to competitive or retaliatory aggression. For

40. Most of my argument in this passage is based on the De ira (On Anger), though there are many similar passages in other works.
when goods are in short supply and people are attached to them, they compete for them. Thus aggression and violence grow not so much inside us as from an interaction between our nature and external conditions that is prior to and more deeply rooted than any specific form of society.

Seneca now uses this view as the basis for his argument against retributive anger and in favor of mercy. Given the omnipresence of aggression and wrongdoing, he now argues, if we look at the lives of others with the attitudes typical of the retributive tradition of justice—even in its modified particularist form—if, that is, we are determined to fix a penalty precisely proportionate to the nature of the particular wrongdoing, then we will never cease to be retributive and to inflict punishment, for everything we see will upset us. But this retributive attitude, even when in some sense justified, is not without its consequences for the human spirit. A person who notes and reacts to every injustice, and who becomes preoccupied with assigning just punishments, becomes, in the end, oddly similar to the raging ungentle people against whom he reacts. Retributive anger hardens the spirit, turning it against the humanity it sees. And in turning against humanity, in evincing the rage and hardness of the angry, one then becomes perilously close to the callous wrongdoers who arouse rage in the first place. Thus in Seneca’s examples we find acts of horrifying vindictiveness and cruelty committed by people whose anger is initially justified, according to a precise assessment of the nature of the crime. Sulla’s acts of retribution were first directed against legitimate enemies; they ended in the murder of innocent children (II.34). Caligula was justified in his anger over the imprisonment of his mother, and yet this led him to cruelty and destruction. Cambyses had just cause of battle against the Ethiopians, but in his obsession with revenge he led his men on a fatal campaign that ended in cannibalism (III.20). Andrea Dworkin’s heroine would be right at home here, for she reacts in some sense appropriately to real wrongs, but becomes in the process an engine of revenge, indifferent to the face of humanity.41

Seneca’s famous counterproposal, announced at the very end of De

41. Insofar as she punishes people who are totally innocent of crime, she is not even a good Greek Stoic judge, for whom the particulars of the crime and offender must be correct. But the Greek Stoic would say that once some basic criteria of responsibility are met, a tough punishment is in order without a search for mitigating factors, and here her judicial procedure is like theirs.
*ira*, is that we should “cultivate humanity” (*colamus humanitatem*, III.43). He elsewhere describes this as the proposal to “give a pardon to the human species” (II.10). It is this attitude that he now calls by the name of mercy, translating Greek *epieikeia* with the Latin word *clementia*. Rejecting the austerity and rigor of the Greek Stoic, he makes a sympathetic participatory attitude central to the norm of good judging. Senecan *clementia* does not fail to pass judgment on wrongdoing; this is continually stressed. Seneca does not hold that the circumstances of human life remove moral and legal responsibility for bad acts. We may still convict defendants who fulfill some basic conditions of rationality in action. But, looking at the circumstances of human life, one comes to understand how such things have happened, and this “medical” understanding leads to mercy.

*Clementia*, mercy, is even defined in a manner that makes its difference from Greek Stoic harshness evident: it is an “inclination of the soul to mildness in exacting penalties,” and also, “that which turns its course away this side of that which could be justly determined” (*De clem*. II.3). The Greek Stoic soul, by contrast, never bends aside, never inclines away from harshness. The somewhat more gentle Aristotelian soul does bend, but inconstantly, conscious always that it is slavish to allow oneself and one’s loved ones to be kicked around. Given that Seneca defines mercy as the opposite of cruelty, and given that cruelty is held to be a frequent outgrowth of retributive anger, we can say, putting all this together, that mercy, *clementia*, is opposed at one and the same time both to strictness in exacting penalties and also to retributive anger, as if that strictness does indeed lie very close to anger in the heart. As Seneca says, “It is a fault to punish a fault in full” (*culpa est totam persequi culpam*, *De clem*. II.7, fr.).\(^42\)

One might, of course, adopt this attitude as a practical strategy to keep the self pure from anger without endorsing it as just or correct toward the offender. Seneca sometimes appears to oscillate between these two positions, since he can commend the practical strategy even to those who do not accept his position about correctness. But in the end his position is clearly that it is right and correct to assign punishments in ac-

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42. Unlike Aristotle, Seneca does not endorse pity or compassion as a correct response to the misfortunes of human life. In his view, to do so would be to give too little credit to the person’s own will and dignity and, frequently, too much importance to external events.
cordance with mercy, both because of what it means for oneself and because of what it says about and to the offender.

The merciful attitude, as Seneca develops it, entails regarding each particular case as a complex narrative of human effort in a world full of obstacles. The merciful judge will not fail to judge the guilt of the offender, but she will also see the many obstacles this offender faced as a member of a culture, a gender, a city or country, and, above all, as a member of the human species, facing the obstacles characteristic of human life in a world of scarcity and accident. The starting point is a general view of human life and its difficulties, but the search for mitigating factors must at every point be searchingly particular. The narrative-medical attitude asks the judge to imagine what it was like to have been that particular offender, facing those particular obstacles with the resources of that history. Seneca's bet is that after this imaginative exercise one will cease to have the strict retributive attitude to the punishment of the offender. One will be inclined, in fact, to gentleness and the waiving of the strict punishment mandated in the law. The punishments that one does assign will be chosen, on the whole, not for their retributive function, but for their power to improve the life of the defendant.43

This merciful attitude requires, and rests upon, a new attitude toward the self. The retributive attitude has a we/them mentality, in which judges set themselves above offenders, looking at their actions as if from a lofty height and preparing to find satisfaction in their pain. The good Senecan judge, by contrast, has both identification and sympathetic understanding. Accordingly, a central element in Seneca's prescription for the judge is that he should remind himself at every turn that he himself is capable of the failings he reproves in others. "If we want to be fair judges of all things, let us persuade ourselves of this first: that none of us is without fault. For it is from this point above all that retributive anger arises: 'I did nothing wrong,' and 'I did nothing.' No, rather, you don't admit to anything" (II.28).

This part of Seneca's argument reaches its conclusion in a remarkable passage in which Seneca confronts himself with the attitude of merciful judgment that he also recommends, describing his own daily practice of

43. Some ameliorative punishments, according to Seneca, can be extremely harsh. Indeed, in a peculiar move, he defends capital punishment itself as in the interest of the punished, given that a shorter bad life is better than a longer one; he compares it to merciful euthanasia.
self-examination in forensic language that links it to his public recommendations:

A person will cease from retributive anger and be more moderate if he knows that every day he has to come before himself as judge. What therefore is more wonderful than this habit of unfolding the entire day? How fine is the sleep that follows this acknowledgment of oneself, how serene, how deep and free, when the mind has been either praised or admonished, and as its own hidden investigator and assessor has gained knowledge of its own character? I avail myself of this power, and plead my cause daily before myself. When the light has been removed from sight, and my wife, long since aware of this habit of mine, has fallen silent, I examine my entire day and measure my deeds and words. I hide nothing from myself, I pass over nothing. For why should I fear anything from my own errors, when I can say, "See that you don’t do that again, this time I pardon you." (III.36)

Seeing the complexity and fallibility of his own acts, seeing those acts as the product of a complex web of highly particular connections among original impulses, the circumstances of life, and the complicated psychological reactions life elicits from the mind, he learns to view others, too, as people whose errors emerge from a complex narrative history. Seneca’s claim is that he will then moderate his retributive zeal toward the punishment of their injustices and intensify his commitment to mutual aid.

This part of Seneca’s work seems very private. But there is no doubt that the primary aim of this work, and of the later De clementia as well, is the amelioration of public life and public judgment. The De ira was written at the start of the reign of the emperor Claudius. It responds to a well-known speech by Claudius on the subject of anger and irascibility, and obviously contains advice for the new regime. Moreover, its explicit addressee and interlocutor is Novatus, Seneca’s own brother, an aspiring orator and public man. Thus its entire argumentative structure is built around the idea of showing a public judge that the retributive attitude is unsuitable for good judging. As for the De clementia, its explicit addressee is none other than the new emperor Nero Caesar himself, and

44. See J. Fillion-Lahille, Le De ira de Séneque (Paris: 1984), and the summary of the evidence in Nussbaum, Therapy, ch. 11.
its explicit task is to persuade this young man to use his immense power in merciful, rather than retributive, ways. The private material provides the basis for a new sort of public and judicial life.

VI

But instead of pursuing this history further, I want now to suggest some implications of these ideas for contemporary political and legal issues. First I shall develop a general thesis concerning the connection between the merciful attitude and the literary imagination; then I shall apply it to some particular questions. The Greco-Roman tradition already made a close connection between equity and narrative. The person who “reads” a complex case in the manner of the reader of a narrative or the spectator at a drama is put in contact—by the structure of the forms themselves as they solicit the reader’s or spectator’s attention—with two features of the equitable: its attentiveness to particularity and its capacity for sympathetic understanding. This means that the spectator or reader, if he or she reads well, is already prepared for equity and, in turn, for mercy.

I could illustrate these points about the relationship between form and content in many ways. Instead I want to choose just two examples, which show with particular clarity the connection between mercy and the art of the novelist, for the novel has been in recent times an especially vigorous popular literary form. The novel goes beyond tragic drama in its formal commitment to following complex life histories, looking at the minute details of motive and intention and their social formation—all that Seneca would have the good judge examine. This means that the novel, even more than tragic drama, is an artificial construction of mercy.

My first example is from Charles Dickens’s David Copperfield.45 James Steerforth, we know, is a bad person, one who deserves blame for some very serious bad actions. He humiliates the kind teacher, Mr. Mell; he uses his charm to get power over those younger and weaker than himself; he uses his wealth to escape discipline and criticism. And, above all, he destroys the life of Em’ly, by convincing her to run away with him with a false promise of marriage—betraying, in the process, both David’s

45. These issues are discussed in more detail in my essay “Steerforth’s Arm,” in Love’s Knowledge.
trusting friendship and the simple kindness of the Peggotty family. These bad actions are seen and judged by Agnes Wickfield in the straightforward way characteristic of the strict moral code that is her guide in life. A reader of religious books rather than of novels and stories, Agnes has no interest in the psychology of Steerforth’s acts, or in seeing them from his point of view. She simply judges him, and judges him harshly, calling him David’s “bad angel,” and urging David (even before the serious crime) to have no further association with him. (It is a subtle point in the novel that moralism here allies itself with and provides a screen for the operations of jealousy; Agnes resents the romantic hold that Steerforth has over David and uses her moral condemnation to get revenge.) David’s view is more complex.

The novel—represented as written by David some years after the event, during a tranquil marriage to Agnes—does present its reader with Agnes’s moral judgment of Steerforth and the reasons for that judgment. The reader is led, at times—even as David shows himself being led—into the strict moral point of view, and is inclined at such times to judge Steerforth harshly. But these times are moments within the novel; they do not define the overall attitude with which the novel leaves us. David tells and shows the reader that the novelist’s imagination is of a certain sort—very different, in fact, from the moral imagination of Agnes. And this imagination leads to a different way of judging.

The central characteristic of the narrative imagination, as David depicts it, is that it preserves as a legacy from childhood an ability to attend closely to the particulars and to respond to them in a close and accurate manner. Like our ancient tradition, David immediately goes on to link this “power of observation” with gentleness: adults who retain it retain also “a certain freshness, and gentleness, and capacity of being pleased, which are also an inheritance they have preserved from their childhood” (p. 61).46 The nature of the connection is apparent in the manner in which the younger David sees Steerforth, and in which the mature novelist David depicts him for the reader’s imagination.47 We do become aware of Steerforth’s crimes, but we see them as episodes in the life of an extremely complicated character who has enormous ability, awesome

47. These are not precisely the same, since the mature novelist has achieved an integration of the erotic and the moral that eludes the character earlier on.
powers of attraction, great kindness and beneficence to his friends, and an extremely unfortunate family history. We do judge Steerforth’s arrogance, duplicity, and self-destructiveness. But we know also, as readers of the novel, that he grew up with no father to guide him, and with the misguided and uncritical affection of a willful and doting mother who indulged his every whim. We know, too, that his position and wealth compounded this ill fortune, exempting him for too long from the necessity to discipline his character and to cooperate with others. We are led to see his crimes as deliberate in the immediate sense required by strict legal and even moral judgment, but we also know that behind these crimes is a tangled history that might have been otherwise, a history that was not fully chosen by Steerforth himself. We imagine that with a different childhood Steerforth might have made an altogether different use of his abilities—that he might have had, in short, a different character. Like Seneca’s reader, we are led to see character itself as something formed in society and in the family, something for which strict morality rightly holds individuals responsible, but something over which, in the end, individuals do not have full control.48

The result of all this is mercy. Just before Steerforth leaves to run off with Em’ly, in the last conversation he has with David, we have the following exchange:

“Daisy, if anything should ever separate us, you must think of me at my best, old boy. Come! Let us make that bargain. Think of me at my best, if circumstances should ever part us!”

“You have no best to me, Steerforth,” said I, “and no worst. You are always equally loved, and cherished in my heart.” (p. 497)

David keeps the bargain, loving Steerforth with the unconditional attention and concern of his narratorial heart. When, years later, the tempest washes Steerforth’s body ashore, and he recognizes it, David exclaims:

48. Compare the ideas on moral responsibility developed in Susan Wolf, Freedom Within Reason (New York: Oxford University Press, 1990). Wolf holds—like the ancient tradition described here—that there is an asymmetry between praise and blame, that it is legitimate to commend people for achievements that are in large part the outgrowth of early education and social factors, but not legitimate to blame them when such forces have made them into bad characters who are unable to respond to reason. In Wolf’s view, as in mine, this asymmetry will sometimes mean not holding individuals responsible for their bad acts. Unlike her, however, I make a distinction between culpability and punishment, holding that a defendant’s life story may give reasons for mitigating punishment even when requirements for culpability are met.
No need, O Steerforth, to have said, when we last spoke together, in that hour which I so little deemed to be our parting-hour—no need to have said, “Think of me at my best!” I had done that ever; and could I change now, looking on this sight! (p. 866)

Just as the character David suspends punitive judgment on Steerforth’s acts, so the imagination of the narrator—and of the reader—is led to turn aside, substituting for punishment an understanding of Steerforth’s life story. David makes it very clear that the activity of novel writing causes him to relive this moment of mercy, and that its “freshness and gentleness” can be expected to be its reader’s experience as well.49 In this sense the novel is about itself, and the characteristic moral stance of its own production and reception. That stance is the stance of equity, and of mercy.

My second example is contemporary. Last year the novelist Joyce Carol Oates visited my seminar at Brown to speak about the moral and political dimensions of her fiction. As we discussed her recent novel Because It Is Bitter and Because It Is My Heart, a student, silent until then, burst in with a heated denunciation of Oates’s character Leslie, a well-meaning but ineffectual liberal photographer. Isn’t his life a complete failure really? Isn’t he contemptible for his inability to do anything significant out of his antiracist intentions? Isn’t he to be blamed for not more successfully combating racism in his family and in his society? Oates was silent for a time, her eyes peering up from behind her round glasses. Then she answered slowly, in her high, clear, girlish voice, “That’s not the way I see it, really.” She then went on to narrate the story of Leslie’s life, the efforts he had made, the formidable social and psychological obstacles in the way of his achieving more, politically, than he had—speaking of him as of a friend whose life inhabited her own imagination and whom, on that account, she could not altogether dismiss or condemn. Here, I believe, was mercy and, lying very close to it, the root of the novelist’s art. The novel’s structure is a structure of suggnômê, of the penetration of the life of another into one’s own imagination and heart. It is a form of imaginative and emotional receptivity, in which the reader, following the author’s lead, comes to be inhabited by the tangled

49. See especially p. 855, shortly preceding the discovery of Steerforth’s death: “As plainly as I behold what happened, I will try to write it down. I do not recall it, but see it done; for it happens again before me.”
complexities and struggles of other concrete lives.\textsuperscript{50} Novels do not withhold all moral judgment, and they contain villains as well as heroes. But for any character with whom the form invites our participatory identification, the motives for mercy are engendered in the structure of literary perception itself.

VII

Now to contemporary implications. Up until now, I have been talking about a moral ideal, which has evident implications for publicly promulgated norms of human behavior and for public conduct in areas in which there is latitude for judicial discretion. I have suggested that in many ways this norm fulfills and completes a conception of justice that lies itself at the basis of the rule of law; it was to prevent incomplete, defective, and biased discretionary reasoning that the rule of law was introduced and defended. But at this point and for this reason caution is in order, for the moral ideal should not be too simply converted into a norm for a legal system. First of all, a legal system has to look out for the likelihood that the moral ideal will not always be perfectly realized, and it should protect against abuses that moral arbitrariness and bias can engender. This suggests a large role for codified requirements in areas in which one cannot guarantee that the equity ideal will be well implemented. The equity tradition supports this. Second, a system of law must look to social consequences as well as to the just judgment on particular offenders. Thus it may need to balance an interest in the deterrent role of punishments against the equity tradition’s interest in punishments that suit the agent. Both the balance between codification and discretion and the balance between equity and deterrence are enormously complex matters, with which my analysis here cannot fully grapple. What I do wish to offer here are some representative suggestions of what the equity tradition has to offer us as we think about these issues.

\textsuperscript{50} Of course the novelist’s stance is traditionally linked with compassion, as well as with mercy. Sometimes, that is, the response will be to sympathize with the plight of a character without blaming, whereas in other cases there may be both blame and a merciful punishment. The line is, and should be, difficult to draw, for the factors that make mercy appropriate also begin to cast doubt on full moral responsibility. (In other cases, of course, there is not even a prima facie offense, and therefore we will have pity without mercy.)
1. A Model of Judicial Reasoning

In other recent work,51 I have been developing the idea that legal, and especially judicial, reasoning can be modeled on the reasoning of the concerned reader of a novel.52 Following in some respects the lead of Adam Smith in The Theory of Moral Sentiments,53 I argue that the experience of the concerned reader is an artificial construction of ideal moral and judicial spectatorship, with respect both to particularity of attention and to the sort and range of emotions that will and will not be felt. Identifying with a wide range of characters from different social circumstances and concerning oneself in each case with the entire complex history of their efforts, the reader comes to have emotions both sympathetic and participatory toward the things that they do and suffer. These emotions will be based on a highly particularized perception of the character's situation. On the other hand, since the reader is not a character in the story, except in the Henry Jamesian sense of being a "participant by a fond attention,"54 she will lack emotions relating to her own concrete placement in the situation that she is asked to judge; her judgments will thus, I argue, be both emotionally sympathetic and, in the most appropriate sense, neutral.

My current inquiry into mercy takes Smith's model one step further, where judgment on the wrongdoing of others is concerned, going beyond his rather austere construction of emotional spectatorship. For it construes the participatory emotion of the literary imagination as emotion that will frequently lead to mercy, even where a judgment of culpability has been made. And this merciful attitude derives directly, we can now see, from the literary mind's keen interest in all the particulars, a fact not much stressed by Smith in his account of the literary (perhaps because he focuses on classical drama, in which the concrete circumstances of daily life are not always so clearly in view). My literary judge sees defendants as inhabitants of a complex web of circumstances, cir-


52. Or the spectator at a play. I discuss some reasons for focusing above all on the novel in "The Literary Imagination in Public Life."


54. The citation is from the preface to The Princess Casamassima; see James, The Art of the Novel (New York: Charles Scribner's Sons, 1909), p. 62.
cumstances which often, in their totality, justify mitigation of blame or punishment.55

This attitude of my ideal judge is unashamedly mentalistic. It does not hesitate to use centrally the notions of intention, choice, reflection, deliberation, and character that are part of a nonreductive intentionalist psychology. Like the novel, it treats the inner world of the defendant as a deep and complex place, and it instructs the judge to investigate that depth. This approach is opposed, in spirit if not always in outcome, to an approach to the offender articulated in some well-known writings of Justice Holmes, and further developed recently by Richard Posner.56 According to this approach, the offender should be treated as a thing with no insides to be scrutinized from the internal viewpoint, but simply as a machine whose likely behavior, as a result of a given judgment or punishment, we attempt, as judges, to predict.57 The sole proper concern of punishment becomes deterrence. As law becomes more sophisticated, and our predictive ability improves, states of mind play a smaller and smaller role in judgment.

55. John Roemer has made the following important point to me in conversation: insofar as my literary judge treats many of a person's abilities, talents, and achievements as products of circumstances beyond his or her control, this reinforces and deepens the novel's commitment to egalitarianism. (In "The Literary Imagination" I had argued that the novel is already egalitarian in asking us to identify successively with members of different social classes and to see their needs without being aware of where, in the social scheme we are to choose, we ourselves will be.) For we will then see the talents and dispositions in virtue of which people earn their greater or lesser social rewards as not fully theirs by desert, given the large role played by social advantages and other external circumstances in getting to these dispositions; we will be more inclined to treat them as social resources that are as subject to allocation as other resources. (Not, obviously, in the sense that we will take A's talents from A and give them to B, but we will regard A's talents as like a certain level of wealth, on account of which we may require A to give back more to society in other ways.) On all this, see Roemer, "Equality of Talent," *Economics and Philosophy* 1 (1985): 151–86; "Equality of Resources Implies Equality of Welfare," *Quarterly Journal of Economics* (November 1986): 751–83; "A Pragmatic Theory of Responsibility for the Egalitarian Planner," *Philosophy & Public Affairs*, pp. 146–66, this issue.


57. Posner approvingly comments on Holmes's view: "We would deal with criminals as we deal with unreasonably dangerous machines. . . . [I]instead of treating dangerous objects as people, he was proposing to treat dangerous people as objects" (*Essential Holmes*, p. 168).
Holmes's defense of this idea takes an interesting form, from our point of view. For it begins from an extremely perceptive description and criticism of the retributive idea of judgment and punishment.\textsuperscript{58} His own deterrence-based view is advanced as an alternative—he seems to think it the only plausible one—to retributivism, and much of the argument's force comes from the connection of the positive recommendation with the effective negative critique. The trouble begins when he conflates the retributive idea with the idea of looking to the wrongdoer's state of mind, implying that an interest in the "insides" invariably brings retributivism with it.\textsuperscript{59} As we have seen, matters are far more complicated, both historically and philosophically. It is, I think, in order to extricate judging from the retributive view—felt by Holmes, rightly, to be based on metaphysical and religious notions of balance and proportion, and to be an outgrowth of passions that we should not encourage in society—that he feels himself bound to oppose all mentalist and intention-based notions of punishment.\textsuperscript{60} In "The Common Law" he argues that far from considering "the condition of a man's heart or conscience" in making a judgment, we should focus on external standards that are altogether independent of motive and intention. Here he insists on the very sort of strict assessment without mitigation that the entire mercy tradition opposes:

[The external standards] do not merely require that every man should get as near as he can to the best conduct possible for him. They require him at his own peril to come up to a certain height. They take no account of incapacies, unless the weakness is so marked as to fall into well-known exceptions, such as infancy or madness. They assume that every man is as able as every other to behave as they command. If they fall on any one class harder than on another, it is on the weakest.\textsuperscript{61}

\textsuperscript{58} See especially "The Common Law," in \textit{Essential Holmes}, p. 247ff. Holmes does not mention the ancient Greek debate; he focuses on Hegel's account of retributivism.

\textsuperscript{59} See ibid., p. 247: "The desire for vengeance imports an opinion that its object is actually and personally to blame. It takes an internal standard, not an objective or external one, and condemns its victim by that."

\textsuperscript{60} Holmes notes that the retributive view of the criminal law has been held by such eminent figures as Bishop Butler and Jeremy Bentham. He then quotes, without comment, Sir James Stephen's view that "The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite" (p. 248). Presumably this means that it allows for the satisfaction of this passion in an institutionalized and civilized form, not that it causes the passion's decline.

\textsuperscript{61} Ibid., p. 253.
From our viewpoint this dichotomy between intentionalism and retributivism leaves out the real opponent of retributivism, both historical and philosophical, simply putting in its place a strict external assessment that looks suspiciously like the old Anaximandrian dikē in modern secular dress, despite its evident differences.

Posner follows Holmes's view in most essential respects, developing it in much more detail, referring to modern behaviorist theories of mind. Like Holmes, Posner is motivated above all by the desire to describe an alternative to retributivism, which he criticizes eloquently, with appeal to both history and literature.\(^6^2\) His argument is highly complex and cannot even be accurately summarized, much less appropriately criticized, in the space available here. What is most important for our purposes is that Posner makes explicit that his behaviorist view of the criminal law requires rejecting—for legal purposes—the Kantian idea that people are to be treated as ends rather than means. It requires, in fact, treating them as objects that through their behavior generate either good or bad social consequences. This, we can easily see, is profoundly opposed to the stance of the literary judge, who may differ from some Kantians in her focus on particular circumstances, but who certainly makes the Kantian insight about human beings central to her entire project. Posner also makes it clear that the case for his account of external standards stands or falls with the case for behaviorism (perhaps eliminative materialism as well?) as an adequate and reasonably complete theory of human behavior. Since I think it is fair to say that the best current work in the philosophy of the mind and in cognitive psychology—like the best work on mind in classical antiquity—finds serious flaws in the behaviorist and reductionist views, this explicitness in Posner makes the vulnerable point in the Holmes/Posner argument especially plain. On the other hand, unlike Holmes, Posner does not seem to claim that the behaviorist view is the only available alternative to retributivist views of punishment. He shows an awareness, in fact, of the mercy tradition—strikingly enough, not in the chapter dealing with the criminal law, but in his chapter dealing with "Literary and Feminist Perspectives."\(^6^3\) Posner demonstrates some sympathy with this tradition, arguing that what the law should really seek is an appropriate balance between strict legal jus-


\(^{63}\) Posner, Problems of Jurisprudence, 393–419; see also Law and Literature, 105–15.
tice and a flexible and merciful discretion. He is, however, pessimistic about the role that latitude for mercy is likely to play in actual cases, holding that a discretionary approach on the part of judges will frequently be harsher to defendants—especially minority defendants—than will an approach based on strict rules. This is a valuable insight, and I shall return to it shortly. But first I must conclude the story, where Holmes is concerned.

Holmes's "The Common Law" was written in 1881, "The Path of the Law" (where Holmes argues for a related view) in 1897. It is worthy of note that toward the end of his life, in a remarkable letter, Holmes appears to endorse the mercy tradition, as a result of his reading of Roman philosophy. Writing on March 28, 1924, to his friend Harold Laski, Holmes begins by speaking of the large impression made on him by Seneca's "cosmopolitan humanity." He suggests (correctly) that this notion came to Christianity from Roman philosophy, rather than vice versa. He confirms the impression by reading Plutarch in order to get the Greek perspective. After making an obligatory shocking remark—that "the literature of the past is a bore"—he vigorously praises Tacitus. Then, appended to the account of his Roman reading, comes the arresting insight: "Before I leave you for the day and drop the subject let me repeat if I have said it before that I think the biggest thing in antiquity is 'Father forgive them—they know not what they do.' There is the modern transcending of a moral judgment in the most dramatic of settings."

It is not terribly clear to what extent Holmes means to connect this remark about Jesus with his observations concerning the debt owed by Christianity to Roman thought. My argument has shown that he certainly could do so with justice. Nor is it clear how or whether he would

65. There is another reason for Posner's skepticism about mercy: he feels that it implies a kind of interfering scrutiny of the "insides" that sits uneasily with the libertarian hands-off attitude to government intervention he has long defended. I think this is wrong: wanting to know the relevant facts in no way entails additional curtailment of individual liberty of choice.
66. In "The Path of Law" Holmes advances his famous "bad man" theory of the law: in order to figure out the deterrent aspect of punishment correctly, the judge should think, in each case, of what a bad person, completely insensitive to legal or moral requirement except in calculating personal costs and benefits, would do in response to a particular set of legal practices. Thus he endorses the basic strictness in assessing penalties that gave rise to our asymmetry in the ancient tradition.
apply his insight to concrete issues in the law. What is clear is that by this time in his life Holmes recognized that the transcendence of strict moralism that he recommended throughout his career need not be captured through a reliance on external behavioral standards. It seems to him to be most appropriately captured in the “dramatic setting” in which Jesus takes up, toward his enemies, the attitude of Senecan mercy.\textsuperscript{68} I think that he is right.\textsuperscript{69}

In short, in order to depart from a retributivism that is brutal in its neglect of human complexity, we do not need to embrace a deterrence-only view that treats people as means to society’s ends, aggregating their good and ill without regard to what is appropriate for each. The deterrence view is all too close to the retributive view it opposes, in its resolute refusal to examine the particularities of motive, intention, and story, in its treatment of people as place-holders in a larger social or cosmic calculus.\textsuperscript{70} A merciful judge need not neglect issues of deterrence, but she is above all committed to an empathetic scrutiny of the “insides” of the individual life.

2. Mercy and the Criminal Law

I have already begun to speak about the criminal law, since the focus in mercy is on wrongdoing and the wrongdoer. The implications of the mercy tradition for issues in the criminal law are many and complex, and I can only begin here to suggest what some of them might be. I shall do this by focusing on a pair of examples: two recent Supreme Court cases involving the death penalty which raise issues of mitigation and aggravation in connection with discretionary sentencing. One is Walton v. Arizona;\textsuperscript{71} the other is California v. Brown.\textsuperscript{72} At stake are the roles to be

\textsuperscript{68} Senecan influence on Christianity begins with the work of writers such as Clement of Alexandria and Augustine. I mean to point to a resemblance, which is later developed in explicitly Stoic terms.

\textsuperscript{69} For the distinction between forgiveness and mercy, see my discussion of Seneca above; a good modern discussion is in Jean Hampton and Jeffrie Murphy, \textit{Forgiveness and Mercy} (Cambridge: Cambridge University Press, 1988). The attitude of Jesus toward sinners appears to be more one of mercy than of forgiveness: for sinners will certainly be condemned and punished, not let off the hook.

\textsuperscript{70} In many cases this view is harsher than the retributivist view, since a deterrence-based view will often punish attempts at crime that do not succeed, or punish harshly a relatively minor crime if there is reason to think him or her a dangerous repeat offender.

\textsuperscript{71} 110 S. Ct. 3047 (1990).

\textsuperscript{72} 479 U.S. 538 (1987). For discussion of both of these cases I am indebted to Ronald
played by discretion in deciding capital cases and the criteria to be used in analyzing the aggravating and mitigating features of the case. Walton was convicted by a jury of first-degree murder and sentenced to death, in accordance with an Arizona statute that requires the judge first to ascertain whether at least one aggravating circumstance is present—in this case two were found73—and then to consider all the alleged mitigating circumstances advanced by the defendant, imposing a death sentence if he finds “no mitigating circumstances sufficiently substantial to call for mercy.” The defendant is required to establish a mitigating circumstance by the preponderance of the evidence, and it was this that was the central issue in Walton's appeal. Since previous Supreme Court decisions had rejected a requirement of unanimity for mitigation, Walton contended that the preponderance of the evidence test was also unconstitutional.74 His claim was rejected by a plurality of the court. My concern is not so much with the result as with some interesting issues that emerge from the opinions.

First, it is plain that the Arizona system, which the decision in effect upholds, establishes a lexical ordering, in which a finding of aggravation—which must be based upon criteria explicitly enumerated in the law—is used to classify an offense as a potential death-penalty offense; mitigation is then considered afterwards, in a discretionary manner. In other words, the whole range of potentially mitigating circumstances will be brought forward only when it has already been established that an offense falls into a certain class of extremely serious offenses. Discretionary concern for the entirety of the defendant's history will enter the picture only in the mitigation phase. Justice Stevens comments on this feature in his dissenting opinion, arguing that once the scope of capital punishment is so reduced, the risk of arbitrariness in sentencing is sufficiently reduced as well to permit very broad discretion and individuated


73. The murder was committed in an “especially heinous, cruel or depraved manner,” and it was committed for pecuniary gain. Note that even here, in the nondiscretionary and codified portion of the judgment, intentional notions are prominently used.

decision making with the remaining class. This seems to be a correct and valuable observation. Indeed, the mercy tradition stresses that merciful judgment can be given only when there is time to learn the whole complex history of the life in question and also inclination to do so in a sympathetic manner, without biases of class or race. The tradition wholeheartedly endorses decision making by codified requirement where these requirements cannot be met. (Here Posner’s warnings about arbitrariness in equity seem perfectly appropriate, and they are reflected in the move away from unguided discretion represented by the federal sentencing guidelines.)\textsuperscript{75} We should not, however, say, as Stevens seems to, that the main function of such criteria is to reduce the number of cases that are eligible for the death penalty. What they do is, of course, more substantial: they eliminate from the death-eligible group many cases for which death would clearly not be an appropriate penalty, leaving the judge free to turn his or her attention to those that are more problematic, requiring a more fine-tuned deliberation.\textsuperscript{76}

A second significant feature, and a more problematic one, is the plurality’s unquestioning acceptance of the preponderance of the evidence test, which, as Allen has shown here and elsewhere, has grave defects when we are dealing with a case having multiple relevant features.\textsuperscript{77} Suppose a defendant advances three grounds for mitigation, each of which is established to a .25 probability, and therefore to be thrown out under Arizona’s rule. The probability that at least one of the factors is

\textsuperscript{75} I have not committed myself here on the ideal scope for discretion in other areas of the law. This is an issue I feel I need to study further before making concrete claims. I focus on the capital cases because they have been the focus of an especially interesting debate about mercy, in which the penalty-setting phase has a special weight. I do think that a similar approach could be tried in another group of cases to which a finding of aggravation is pertinent, namely hate crimes. Here I think one would want to describe the grounds for aggravation very explicitly and systematically, either by setting up a special class of crimes or in the guidelines for sentencing. Once one had determined that particular offense was of this particularly severe kind, one could then consider whether the defendant’s youth, family background, and so forth gave any grounds for mitigation.

\textsuperscript{76} See Allen, “Walton,” p. 741. I agree with this point against Stevens, but disagree with an earlier one. On p. 736, Allen argues that “the primary thrust of [Stevens’s] argument . . . is for categorical rather than discretionary sentencing.” This seems to me inaccurate: it is, instead, a statement about the conditions under which discretionary sentencing can be well done.

true, assuming they are independent, is, as Allen shows, .58.\textsuperscript{78} If each of three factors is proved to a probability of .4, the probability that at least one is true is .78. On the other hand, if the defendant proves just one of the mitigating factors with a probability of .51 and the others with probability 0, he is successful, even though the probability that the decision is correct is in fact lower here than in the previous cases.\textsuperscript{79} The law asks the judge to treat each feature one by one, in total isolation from any other. But human lives, as the literary judge would see, consist of complex webs of circumstances, which must be considered as wholes.

This same problem is present in Justice Scalia’s scathing attack on the whole notion of mitigation. For Scalia thinks it absurd that we should have codified criteria for aggravation, apply these, and then look with unguided discretion to see whether a mitigating factor is present. If the criteria for aggravation are enumerated in the law, so too should be the criteria for mitigation. Only this explicitness and this symmetry can prevent total irrationality. Scalia here ignores the possibility—which Stevens recognizes—that the functions of aggravation-criteria and of mitigation are not parallel: aggravation serves to place the offense in the class to which mitigation is relevant.\textsuperscript{80} Furthermore, in ridiculing the entire notion of discretionary mercy, Scalia adamantly refuses the forms of perception that we have associated with the literary attitude. That is, he treats mitigating factors as isolated units, unconnected either to one another or to the whole of a life. It is in this way that he can arrive at the conclusion that unbridled discretion will (absurdly) be permitted to treat traits that are polar opposites as, both of them, mitigating: for example, “that the defendant had a poor and deprived childhood, or that he had a rich and spoiled childhood.”\textsuperscript{81} Scalia’s assumption is that both of these

\textsuperscript{78} See Allen, “Walton,” pp. 734–35. This is the assumption that the current test in effect makes. If they are not independent, this probabilistic analysis does not follow, but there is also, then, no justification at all for treating them in isolation from one another. In either case, then, the conclusion for which I am arguing follows: the life must be considered as a whole.

\textsuperscript{79} One might also point out that different jurors might be convinced by different factors, so long as they are treated as isolated units. One could have a situation in which all jurors agree that there is at least one mitigating factor present but, if they disagree enough about which one it is, the defendant’s attempt fails. I owe this point to Cy Wasserstrom.

\textsuperscript{80} Here the similarity to the ancient tradition is striking, especially to Seneca’s insistence on separating the determination of guilt and its level from the assignment of (merciful) punishment.

\textsuperscript{81} 110 S. Ct. at 3062.
cannot be mitigating, and that it is a sign of the absurdity of the current state of things that they might both be so treated. But the alleged absurdity arises only because he has severed these traits from the web of circumstances in which they actually figure. In connection with other circumstances either a trait or its opposite might, in fact, be mitigating. This, in Allen's argument and in mine, is the reason why categories for mitigation should not be codified in advance: it will be impossible for such a code to anticipate adequately the countless ways in which factors interweave and bear upon one another in human reality. Telling the whole story, with all the particulars, is the only way to get at that.

In reality, of course, the mercy tradition has serious reservations about the whole idea of capital punishment. Although some of its major exponents, including Seneca, endorsed it, they did so on the basis of very peculiar arguments comparing it to euthanasia (n. 43 above). If we reject these arguments we are left, I think, with no support for capital punishment from within that tradition, and strong reasons to reject retributivist justifications. Indeed, the tradition strongly suggests that such punishments are always cruel and excessive. The question would then have to be whether the deterrence value of such punishments by itself justifies their perpetuation, despite their moral inappropriateness. Furthermore, the deterrence-based argument has never yet been made out in a fully compelling way.

82. See Allen, "Walton," p. 739; also p. 742: "Any particular fact is of very little consequence standing alone. The web of facts is what matters." In David Copperfield we see a very clear example of a rich and spoiled childhood as a mitigating factor: Steerforth has no opportunity to learn moral self-restraint, and is encouraged to use his talent and charm in a reckless manner.

83. I am not claiming that knowledge of the whole story should never give rise to aggravation of punishment. By focusing on capital cases I have left undisussed a number of lesser cases in which such thinking might figure. One is a very interesting case recently heard by the Seventh Circuit, in which Posner defends an upward departure from the sentencing guidelines in a case of blackmail, on the ground that the blackmailer's victim, a married homosexual, fit the category of "unusually vulnerable victim" that justifies such aggravation. Detailed consideration of the whole story, and of American homophobia, was required in order to establish that this victim was really more vulnerable than other types of people with sexual secrets to conceal (U.S. v. Sienky Lallemand, Seventh Circuit, March 29, 1993).

84. Another point against Scalia is the structure of the pardon power: a governor can pardon a criminal, but not increase a criminal's sentence or condemn someone who was acquitted. Indeed, asymmetry is built into the entirety of the criminal justice system, in the requirement to prove guilt beyond a reasonable doubt, in the safeguards surrounding the admissibility of confessions, and so forth.
California v. Brown raises a different issue: that of jury instruction, where emotion is concerned. The Court reviewed a state jury instruction stipulating that the jury in a capital case (in the sentencing phase) “must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.” From the point of view of our account of literary judging, this instruction is a peculiar and inappropriate mixture. For the juror as “judicious spectator” and merciful reader would indeed disregard conjecture, prejudice, public opinion, and public feeling. On the other hand, sentiment, passion, and sympathy would be a prominent part of the appropriate (and rational) deliberative process, where those sentiments are based in the juror’s “reading” of the defendant’s history, as presented in the evidence. It would of course be right to leave aside any sentiment having to do with one’s own involvement in the outcome, but we assume that nobody with a personal interest in the outcome would end up on the jury in any case. It would also be correct to leave aside any mere gut reaction to the defendant’s appearance, demeanor, or clothing, anything that could not be made a reasoned part of the “story” of the case. But the vast majority of the passional reactions of a juror hearing a case of this kind will be based on the story that is told; in this sense, the law gives extremely bad advice. The Court, however, approved the instruction, concluding that “[A] reasonable juror would . . . understand the instruction . . . as a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase.” On the one hand, this seems to me a perfectly reasonable way of articulating the boundaries of appropriate and inappropriate sympathy. On the other hand, the likelihood is so high that the sentiments of the juror would be of the appropriate, rather than the inappropriate, sort—for what else but the story told them do they have to consider?—that approving the regulation creates a misleading impres-

85. Note that for a juror the case at issue is likely to be a rare event, and thus there is reason to think that jury deliberations will be free from at least some of the problems of callousness and shortness of time that may limit the advisability of discretion in cases involving judges. On the other hand, the limits of juror sympathy with people who are unlike themselves remains a clear difficulty. This is why I sympathize, to the extent that I do, with parts of the warning in the California juror instruction.

86. Compare the advice given to the prospective juror in the state of Massachusetts, in the “Juror’s Creed” printed in the Trial Juror’s Handbook: “I am a JUROR. I am a seeker of truth . . . I must lay aside all bias and prejudice. I must be led by my intelligence and not by my emotions.”

sion that some large and rather dangerous class of passions are being excluded.88 The other opinions in the case confirm the general impression of confusion about and suspicion of the passions. Thus Justice O'Connor argues that "the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime rather than mere sympathy or emotion." She goes on to state that "the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence."89 This contrast between morality and sympathy is a nest of confusions, as my argument by now should have shown. Justice Brennan, too, holds that "mere sympathy" must be left to one side—though he does hold (dissenting) that the instruction prohibits the juror from considering exactly what he or she should consider.90 Justice Blackmun does somewhat better, defending the juror's ability to respond with mercy as "a particularly valuable aspect of the capital sentencing procedure." But he, too, contrasts rationality with mercy, even in the process of defending the latter: "While the sentencer's decision to accord life to a defendant at times might be a rational or moral one, it also may arise from the defendant's appeal to the sentencer's sympathy or mercy, human qualities that are undeniably emotional in nature."91 The confusion persists: in a more recent case, the Court now speaks even more suspiciously and pejoratively of the juror's emotions, contrasting them with the "actual evidence regarding the crime and the defendant"92—as if these were not the source of and basis for these emotions.93

88. Thus I agree in part with Allen, "Walton," p. 747, although I do think it reasonable to stipulate this restriction on sentiment and believe that it is possible to think of cases where sentiments would be of the inappropriate sort.
89. 479 U.S. at 545.
90. Ibid. at 548–50.
91. Ibid. at 561–63. Thus I do not agree with Allen that Blackmun "gets it right" ("Walton," p. 750). Allen, like Blackmun, is willing to give the normative term "rational" to the opposition, granting that merciful sentiment is not rational. But why not? Such merciful sentiments are based on judgments that are (if the deliberative process is well executed) both true and justified by the evidence.
93. One might think that my view entails admitting victim impact statements, for they are certainly part of the whole story, even though the victim is often no longer around to tell it. I am dubious. A criminal trial is about the defendant and what will become of him or her. The question before the court is what the defendant did, and the function of narrative is to illuminate the character and origins of that deed. What has to be decided is not what to do about the victim, but what to do about the defendant. Now of course the victim's
In short, the insights of the mercy tradition can take us a long way in understanding what is well and not well done in recent Supreme Court writings about sentencing. It can help us to defend the asymmetry between mitigation and aggravation that prevailed in Walton, as well as Walton’s moderate defense of discretion. But it leads to severe criticism of the categories of analysis deployed in the juror-instruction cases, which employ defective conceptions of the rational.

3. Feminist Political Thought

It is now time to return to Andrea Dworkin and to feminism. Dworkin’s novel has been in the background throughout this paper, providing us with a striking modern example of the strict retributivist position and showing us how the retributive imagination is opposed to the literary imagination. But Dworkin’s book is, after all, called a novel. One might well wonder how I can so easily say that the novel form is a construction of mercy.

The problem is only apparent. For Andrea Dworkin’s “novel” is not a novel but an antinovel. By deliberate design, it does not invite its reader to occupy the positions of its characters, seeing their motivations with sympathy and with concern for the entire web of circumstances out of which their actions grow. It does not invite its reader to be emotionally receptive, except to a limited degree in the case of its central figure. But this figure is such a solipsistic, self-absorbed persona that to identify with her is to enter a sealed world of a peculiar sort, a world in and from which the actions of others appear only as external movement, without discernible motive. As for the men who people the novel, the reader is enjoined to view them as the narrator views them: as machines that produce pain. We are forbidden to have an interest in their character, origins, motives, or points of view. We are forbidden all sympathy and even all curiosity. We are refused perception of the particular, for, as in the male pornography that Dworkin’s activism opposes, her male characters are not particulars, but generic objects. In effect, we are refused novelistic readership.

experience may be relevant to ascertaining the nature of the offense, and to that extent it is admissible anyway. But the additional information imported by victim impact statements seems primarily to lie in giving vent to the passion for revenge, and the emotions they seek to arouse are those associated with that passion.

94. In “Defining Pornography,” University of Pennsylvania Law Review forthcoming, James Lindgren shows that none of the standard definitions of pornography works terribly well in separating feminist fiction from pornography, if (as MacKinnon has urged) the
Indeed, the very form of Dworkin's work causes us, as readers, to inhabit the retributive frame of mind and to refuse mercy. The inclination to mercy is present in the text only as a fool's inclination toward collaboration and slavery. When the narrator, entering her new profession as a karate-killer of homeless men, enunciates "the political principle which went as follows: It is very important for women to kill men," a voice within the text suggests the explanations that might lead to mercy. As the return of the narrator quickly makes clear, this is meant to be a parody voice, a fool's voice, the voice of a collaborator with the enemy:

He didn't mean it; or he didn't do it, not really, or not fully, or not knowing, or not intending; he didn't understand; or he couldn't help it; or he won't again; certainly he will try not to; unless; well; he just can't help it; be patient; he needs help; sympathy; over time. Yes, her ass is grass but you can't expect miracles, it takes time, she wasn't perfect either you know; he needs time, education, help, support; yeah, she's dead meat; but you can't expect someone to change right away, overnight, besides she wasn't perfect, was she, he needs time, help, support, education; well, yeah, he was out of control; listen, she's lucky it wasn't worse, I'm not covering it up or saying what he did was right, but she's not perfect, believe me, and he had a terrible mother; yeah, I know, you had to scrape her off the ground; but you know, she wasn't perfect either, he's got a problem; he's human, he's got a problem.

The only alternative to the retributive attitude, Dworkin implies, is an attitude of foolish and hideous capitulation. The novelist's characteristic style of perception is in league with evil.

This is an unsuccessful and badly written book. It is far less successful, both as writing and as thought, than the best of Dworkin's essays. And yet it is in another way an important book, for it brings to the surface

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95. Dworkin, Mercy, p. 328.
96. Ibid., p. 329.
97. In my Boston Review piece on Dworkin, I discuss some of the essays in Intercourse, which express a view of sexuality far more subtle and particularized than the views expressed here, especially where women are not in the picture and Dworkin is discussing male homosexuality.
for scrutiny the strict retributive attitude that animates some portions of feminist moral and legal thought, and allows us to see this attitude as a reasonable response to terrible wrongs. Dworkin is correct in stressing the pervasiveness of male violence against women, and correct, too, in insisting that to deny and conceal these wrongs is to condemn women of the present and future to continued bodily and psychological suffering. She is correct in protesting loudly against these wrongs and in refusing to say that they are not wrongs. The only remedy, Dworkin suggests, is to refuse all sympathy and all particular perception, moving over to a conception of justice so resolute in its denial of particularity that it resembles Anaximandorean diké more than it resembles most modern retributive schemes. The narrator announces, “None of them’s innocent and who cares? I fucking don’t care.” And it is Dworkin’s position, repeatedly announced in the novel as in her essays, that all heterosexual males are rapists and all heterosexual intercourse is rape. In this sense, there really is no difference between him and him, and to refuse to see this is to collaborate with evil.

But Dworkin is wrong. Retributivism is not the only alternative to cowardly denial and capitulation. Seneca’s De ira is hardly a work that denies evil where it exists; indeed, it is a work almost as relentlessly obsessed with narrating tales of evil as is Dworkin’s work. Like Dworkin’s work, it insists on the pervasiveness of evil, the enormous difficulty of eradicating it, and the necessity of bringing it to judgment. Mercy is not acquittal. In what, then, does its great difference from Dworkin’s work consist? First of all, it does not exempt itself. It takes the Dworkin parody line “She wasn’t perfect either” very seriously, urging that all human beings are the products of social and natural conditions that are, in certain ways, subversive of justice and love, that need slow, patient resistance. This interest in self-scrutiny already gives it a certain gentleness, forces it out of the we/them mentality characteristic of retributivism. Second, it is really interested in the obstacles to goodness that Dworkin’s narrator mocks and dismisses: the social obstacles, deeply internalized, that cannot be changed in an instant; the other more circumstantial and particular obstacles that stand between individuals and justice to those

98. One might argue that Dworkin’s style of retributivism, even if not morally precise, has strategic value, in publicizing the pervasiveness of harms done to women. I doubt this. For if, with Dworkin, we refuse to make distinctions we commonly make between consensual heterosexual intercourse and coercion, we are likely to get fewer convictions for rape, not more.
they love. It judges these social forces and commits itself to changing them but, where judgment on the individual is concerned, it yields in mercy before the difficulty of life. This means that it can be in its form a powerful work of narrative art. If you really open your imagination and heart to admit the life story of someone else, it becomes far more difficult to finish that person off with a karate kick. In short, the text constructs a reader who, while judging justly, remains capable of love.

What I am really saying is that good feminist thought, in the law and in life generally, is like good judging: it does not ignore the evidence, it does not fail to say that injustice is injustice, evil evil—but it is capable of suggnômê, and therefore of clementia. And if it is shrewd it will draw on the resources of the novelist's art.

I shall end by returning to Seneca's De clementia. Toward the end of the address to Nero Caesar, Seneca asks him a pointed question: "What... would living be if lions and bears held the power, if serpents and all the most destructive animals were given power over us?" (I.26.3) These serpents, lions, and bears, as Seneca well knows, inhabit our souls in the forms of our jealous angers, our competitiveness, our retributive harshness. These animals are as they are because they are incapable of receiving another creature's life story into their imagination and responding to that history with gentleness. But those serpents, lions, and bears in the mind still play a part today, almost two thousand years after Seneca's treatise was written, in determining the shape of our legal institutions, as the merciful attitude to punishment still comes in for ridicule, as the notion of deliberation based on sentiment still gets repudiated and misunderstood, as a simple form of retributivism has an increasing influence on our legal and political life. As judges, as jurors, as feminists, we should, I argue with Seneca, oppose the ascendancy of these more obtuse animals and, while judging the wrong to be wrong, still cultivate the perceptions, and the gentleness, of mercy.

99. Contrast Dworkin, Mercy, p. 334, where, in an epilogue entitled "Not Andrea," a liberal feminist attacks Andrea Dworkin as "a prime example, of course, of the simple-minded demagogue who promotes the proposition that bad things are bad."


101. Cf. also De clementia I.17.1: "No animal has a more troublesome temperament, none needs to be handled with greater skill, than the human being; and to none should mercy more be shown."