MARTHA C. NUSSBAUM  Equity and Mercy

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

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

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 so 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 praoν 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 *eikό*, “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 *epiekτθς*; 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” (tέν haplόs dikέnThe) with both equity and grace (charis). All translations from the Greek are my own.


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 *eoικα*, “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.9 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.10

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

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 in 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 (tisin) 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 dikē 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 dikē as the fact that the night did not deliberately aggress against the day; the fact that Oedipus acted in ignorance is as irrelevant to dikē 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 toupieikes oute tēn charin), but only cares for strict and simple justice (tēn haplōs dikēn).”

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 circumstance.

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