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## MERCIFUL DAMAGES: SOME REMARKS ON FORGIVENESS, MERCY AND TORT LAW

Neal R. Feigenson\*

I want to explore the place, if any, of forgiveness and mercy in tort law, using empirical psychological research where relevant to shed some light on the topic. I first describe a number of misgivings about encouraging forgiveness or mercy as part of the substantive or procedural law of torts. I then suggest a concept, *merciful damages*, that may allow some of the benefits of forgiveness and mercy while avoiding or at least mitigating some of the concerns.

I have benefited greatly from what Jeffrie Murphy and Jean Hampton have to say about forgiveness and mercy in their book,<sup>1</sup> especially Professor Murphy's first and last chapters, and I take some of his ideas as my points of departure. Murphy carefully distinguishes forgiveness, which involves a change in feelings toward the transgressor (specifically, to overcome resentment for the right reasons), from mercy, which involves an act toward the transgressor (specifically, to relieve the transgressor of some or all of what would otherwise be his or her just deserts).<sup>2</sup> Moreover, only a victim of wrongdoing is in a position to forgive the wrongdoer, while only a decision maker with authority to impose on the wrongdoer certain legal but harsh consequences is in a position to be merciful.<sup>3</sup>

Two consequences follow. First, forgiveness is neither necessary nor sufficient for mercy. Second, "[t]he area of resentment and forgiveness is individual and personal in a way that legal guilt and

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\* Professor of Law, Quinnipiac College School of Law. I am grateful to Elizabeth Malang and the other members of the *Fordham Urban Law Journal* for organizing the Symposium and inviting me to participate; to my colleagues Greg Loken and Linda Meyer for their helpful comments on an earlier draft of this Essay; and to Daniel Shuman for sharing with me a prepublication draft of his essay, *The Role of Apology in Tort Law*, in 83 *JUDICATURE* 180 (2000). See *infra* notes 51-53 and accompanying text (describing Shuman's proposal that fact finders be allowed to take a tortfeasor's apology into account in reducing noneconomic damages and comparison of that proposal with merciful damages).

1. See JEFFRIE C. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* (1988).

2. See *id.* at 20-21, 33-34.

3. See *id.*

responsibility are not.”<sup>4</sup> This is not very promising for an application of forgiveness to tort law as a system of substantive and procedural rules. Whether a tort victim, moved by compassion, decides to forgive the tortfeasor after fully litigating his or her case would seem not to concern the law (or society at large) directly. Should a victim be moved to settle with a tortfeasor and thus waive the right to seek the full compensation to which he or she might be legally entitled to — that is, to be merciful — would also seem to be without much significance for tort law. In the aggregate, however, such decisions may affect both the number and sorts of cases that remain in the formal adjudicatory system.<sup>5</sup>

Murphy suggests that mercy, as the “legal analogue” of forgiveness,<sup>6</sup> may be morally justified within a just legal system. If mercy on the part of a state decision maker is not simply an unjustified departure from what the law requires, there must be good reasons for the decision maker to be merciful. If such reasons exist, however, it seems that the decision maker has a *duty* to decide mercifully. Mercy becomes a matter of what the person being judged deserves, and hence mercy is subsumed within justice and is not an autonomous virtue.<sup>7</sup> Murphy’s way out of this conundrum is to refer to a private law model in which the victim of the offense has the right, but not the duty, to forgo imposing on the offender the penalty that justice makes available.<sup>8</sup> And if we think of those private victims as delegating to the appropriate state decision maker their right to forgo justice, there is no conflict between the state’s obligation to mete out just deserts to criminal offenders and its occasional exercise of mercy.<sup>9</sup>

This line of reasoning may help (at least in theory) to explain the role of mercy in criminal law, but it does not appear to be as useful when applied to civil litigation. By choosing to sue instead of settle, the victim of a tort implicitly (or explicitly) refuses to waive his

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4. *Id.* at 33.

5. The role of forgiveness in negotiation, mediation and the like is an interesting topic but it is beyond the scope of this essay. See, e.g., Jonathan Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 FORDHAM URB. L.J. 1447 (2000) (discussing research on the potential benefits of apology in avoiding litigation); see also Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165 (1997).

6. See MURPHY & HAMPTON, *supra* note 1, at 34.

7. The argument is more complicated than this; for instance, mercy can be supported on consequentialist grounds, but in that case, justice is overridden by utility as a ground for decision. See *id.* at 172-73.

8. See *id.* at 175-76.

9. See *id.* at 177-80.

or her right to obtain full compensation from the tortfeasor. It seems odd, then, to posit that the state has been delegated any waiver such that the state's exercise of mercy in civil adjudication may be consistent with justice.

### Compassion, Mercy and Legal Judgment<sup>10</sup>

Let us assume, nevertheless, that state decision makers (judges and/or juries) in tort cases may, consistently with justice, decide mercifully. Let us also assume that, although forgiveness is neither necessary nor sufficient for mercy, the (private) feeling that drives forgiveness — compassion or sympathy<sup>11</sup> (and love) — may motivate the (public) act, and therefore, that the feeling may have some significance for law.<sup>12</sup>

Is compassionate or sympathetic decision making a good thing? Theoretical arguments that it is are (mostly) familiar. It has been said that “the ultimate function of sympathy is to provide[ ] a vital sense of commonality or connection among individuals, disrupt[ing] . . . the trend toward what will eventually be isolation and death.”<sup>13</sup> Philosophers, similarly, have long characterized sympathy as one of the “moral sentiments,” crucial to the maintenance of peaceful co-existence in society.<sup>14</sup> Compassion contributes to moral judgment because it promotes a concern for the welfare of others that is fundamental to many moral systems. It can be argued that sympathetic decision making may lead to more democratic and just results insofar as it helps correct for the law's relative lack of attention to those traditionally disadvantaged in society, thus tending to “level the playing field” of justice.<sup>15</sup> Finally, the process of compassionate decision making is democratically inclusive because it incorporates into formal legal decision making,

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10. The arguments and discussions of supporting research in this section are adapted from a previously published article. See Neal Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1 (1997).

11. A basic definition of *compassion* or *sympathy* (I treat the two terms as synonymous) is a heightened awareness of the suffering of another and the urge to alleviate that suffering. Compassion, like most if not all emotions, thus combines cognitive, affective and action-oriented features: the awareness of the other's suffering is both thought and felt and is accompanied by the desire to do something about it. Sympathy or compassion involves the ability to imagine oneself in the sufferer's predicament and, in some sense, to feel the other's suffering.

12. See MURPHY & HAMPTON, *supra* note 1, at 34, 176.

13. Feigenson, *supra* note 10, at 27 (quoting LAUREN WUPE, *THE PSYCHOLOGY OF SYMPATHY* 68, 177 (1991)).

14. See *id.*

15. *Id.*

with its traditionally male model of objective rationality, empathic modes of moral reasoning associated with women.

What does empirical psychology, and in particular the psychology of the emotions, have to say about the relationship between compassion or sympathy and legal decision making? Three benefits have been identified. Compassion in legal judgment may be desirable because it enables decision makers to better understand the situations they judge; "by taking the perspectives of all parties involved, judges better appreciate the human meanings of those situations."<sup>16</sup> Moreover, compassion is a natural part of human life whose absence or repression would impair decision making. Research on the effects of mood on judgment suggests that compassion may enhance legal decision making by leading to more careful and deliberate information processing.

The research also tells us, however, that compassion is likely to lead to decisions that are unduly subjective and biased, contrary to many norms of good decision making.<sup>17</sup> Because compassion involves taking the perspective of the other person, the target of the compassion, compassionate decisions are likely to be highly subjective (in a sense that cannot be ascribed to other emotional judgments). In one study, for instance, participants who were instructed to take the perspective of a target person attributed to the target a greater number of characteristics they believed to be true of *themselves* than did participants not instructed to take the perspective of the target.<sup>18</sup> Moreover, the researchers found no significant difference between the responses of participants instructed to imagine what they would think and feel if they were in the target person's situation and those instructed to imagine what the target person was thinking and feeling. This further indicated that decision makers instructed to empathize have a hard time distinguishing self from other.<sup>19</sup> The consequence is that decision makers may confusedly decide the case before them on the basis of information about themselves instead of the parties.<sup>20</sup> In a legal system in which similar cases may be presented to any of several decision makers (different juries, different judges in same district), this subjectivity promises to decrease consistency (or interdecision-

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16. *Id.*

17. *See id.*

18. *See id.* at 33-34.

19. *See id.* at 33.

20. This sense of subjectivity in judgment is, in part, what the rule against "Golden Rule" arguments is designed to avoid. *See id.* at 14-15.

maker reliability, to use the technical term), undermining the basic justice goal of treating like cases alike.

Compassion is also likely to bias legal decision making. For one thing, sympathetic or compassionate decision making is prone to diverge from the widely accepted ideal of impartial justice.<sup>21</sup> Research confirms this conflict between sympathy and impartial justice.<sup>22</sup> Participants in two experiments were faced with either the task of allocating relatively desirable or undesirable work assignments to employees or with the task of allocating scarce resources among deserving candidates.<sup>23</sup> In the first experiment, (procedural) justice dictated allocating the jobs by a random procedure; in the second, (distributive) justice dictated allocation according to need.<sup>24</sup>

In each experiment, participants who were instructed to imagine how the employee or potential recipient felt about the situation were more likely to allocate the better job or the scarce resource to the target person than justice principles required — and the participants themselves acknowledged that their choices were less fair.<sup>25</sup>

Additional unfair bias results both from the ways compassion is aroused (*i.e.*, the psychological “inputs” that influence the intensity of sympathy) and from how compassion affects social judgments (the psychological “outputs” resulting from the influence of sympathy).<sup>26</sup> Consider compassion’s inputs. A basic function of all emotions is to redirect the attention of the person experiencing the emotion. This function seems perfectly consistent with one major benefit of sympathy in legal judgment: it calls our attention to features of the case that are worth noticing and valuing. The redirection of attention and emphasis by emotion works well when the intensity of the feeling matches the urgency of the situation. Research shows, for instance, that levels of sympathy for an accident victim (and, hence, the urge to relieve the victim’s suffering) do correspond, to some extent, to the severity of the victim’s suffering.<sup>27</sup> But the intensity of a judge’s or juror’s emotional response to a case may not match its legal urgency. The ways in which sympathy is generated suggest that compassionate decision making is likely to be unfairly biased because the factors that cause sympathy

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21. See Feigenson, *supra* note 10, at 49.

22. *See id.*

23. *See id.*

24. *See id.* at 49.

25. *See id.* at 49-50.

26. *See id.* at 50.

27. *See id.*

do not correspond or are even irrelevant to the factors on which just decisions should be based. Any of three factors affecting the intensity of sympathy may be involved.

First, sympathy is subject to a salience bias. “Empathy and sympathy depend most on the sights and sounds of the person in pain.”<sup>28</sup> An empathy-based morality, as psychologist Martin Hoffman has argued, is therefore too prone to be biased by the salience and source of the stimulus.<sup>29</sup> “A cry of pain may arouse more empathic distress than a facial grimace; a friend’s or relative’s cry more than a stranger’s . . . .”<sup>30</sup> In general, the more salient the stimulus, the stronger the affective reaction. Yet the salience of a party’s suffering at trial may be affected as much by the lawyers’ talents in eliciting and evoking that suffering as by its true extent, in which case the intensity of emotional response would not reliably signal the appropriateness of that response.

Research also shows that compassion is more readily aroused the greater the *similarity* between observer and sufferer. The more similar to the sufferer the observer believes herself to be, the more readily and fully she can imagine what the sufferer’s world looks and feels like. Relatedly, the intensity of sympathy may be influenced by how much the perceiver *likes* the sufferer. But no acceptable legal or moral theory makes the similarity of the decision maker to the litigant or the likeability of the litigant relevant to the substantive justice of the outcome.

Compassion, like other emotional reactions, also tends to be more intense the more *unexpected* the event giving rise to the emotion. Research shows that observers tend to feel greater sympathy for the victim of an accident (or a crime) that occurs under exceptional circumstances. But the unexpectedness or perceived abnormality of an instance of suffering is not at all an accurate heuristic for whether a legal decision maker should mercifully seek to alleviate that suffering. Legal scholar Richard Delgado has eloquently explained how sympathy is liable, for exactly this reason, to ignore the most pervasive suffering: the more entrenched the poor become in their poverty, the more others become accustomed to the presence of the extremely poor, and the less sympathetic they are likely to be.<sup>31</sup>

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28. Feigenson, *supra* note 10, at 50.

29. *See id.*

30. *Id.*

31. *See id.* at 55.

Finally, consider compassion's outputs. Research on affect and social judgment also indicates that compassion may lead decision makers to perceive and weigh the evidence in a biased fashion.<sup>32</sup> This research shows generally that emotional feelings influence which facts decision makers will attend to, how much time they will spend poring over them, and how they will interpret and categorize them.<sup>33</sup> Decision makers' feelings in response to what they first learn about the case will affect their further perception and evaluation of the case, because they learn the evidence over a period of time and cannot withhold their judgments until all the evidence is in. And in the case of compassion or sympathy, the perspective-taking slants the observer's judgment in favor of the target of the emotion.<sup>34</sup>

These biases in compassionate legal judgment would not alone make compassion in tort law suspect, if the biases were those we would accept on moral grounds. Unfortunately, they are not. Favoritism based on the relative salience of the target person's suffering, the similarity of target to observer, the likeability of the target and the unexpectedness of the suffering bear no necessary connection to any coherent conception of fair decision making. The biases that compassion introduces to factual perception and interpretation only compound the problem. So to the extent that compassion motivates forgiveness and hence mercy, merciful tort decisions run a considerable risk of being biased and unfair.

Professor Murphy observes that mercy poses what he calls equal protection problems.<sup>35</sup> If there is a good reason to be merciful to A, then it must be (partly) because of some characteristic that A possesses. All things being equal, if B shares that characteristic, doesn't B, then, deserve equivalent mercy? But "deserve mercy" is an oxymoron. And if the giving of mercy remains optional, so that there is no paradox in not requiring mercy for B while continuing to recognize the characteristic as a good reason for mercy, the unequal treatment of A and B persists. If this is a bothersome feature

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32. *See id.* at 57-59.

33. *See id.*

34. I noted earlier that this perspective-taking makes judgment more subjective because it leads the observer to ascribe more of his or her own features to the target of observation. Relevant here is that this subjectivizing takes a particular direction: participants tend to attribute to the target person *positive* traits they attribute to themselves rather than neutral or negative ones. Thus, compassionate decision makers (unsurprisingly) tend to view the evidence favorably to the object of their compassion.

35. *See* HAMPTON & MURPHY, *supra* note 1, at 180-81.



with regard to the good reasons for being merciful, then it should trouble us all the more when unequal treatment results from less defensible features of compassion and mercy.

### Merciful Damages

Despite these misgivings, perhaps compassionate mercy could have a place in tort law, one that recognizes at least some of the virtues of forgiveness without being vitiated by (all of) the foregoing concerns. Consider that tort law (albeit to the chagrin of some) accommodates retributive emotions when it allows punitive damages to be assessed against defendants whose conduct is determined to be especially egregious or outrageous. Perhaps the law should also make room for forgiveness and mercy by allowing what I will call *merciful damages*. Merciful damages would *reduce* the extent of a culpable tort defendant's liability when the decision maker (properly) decides to be merciful toward the defendant. They would be determined in a separate damages phase of a bifurcated civil proceeding, after the liability decision. In the remainder of this essay I will briefly outline the when, how and why of merciful damages.

*When.* To determine when merciful damages would be warranted, let us turn to Professor Murphy's analysis of (private) forgiveness. Murphy argues that a victim ought to forgive wrongdoing in any number of situations in which it is possible to distinguish the immoral act from the immoral agent and thus to square forgiveness with self-respect and respect for the law.<sup>36</sup> Where the wrongdoer has separated himself from his act, we can "join the wrongdoer in condemning the very act from which he now stands emotionally separated"<sup>37</sup> without continuing to resent the person who committed the act. Forgiveness is morally appropriate where the wrongdoer (1) has repented or had a change of heart; (2) meant well or had good motives; (3) has suffered enough (for morally cognizable reasons); or (4) has undergone humiliation (for instance, through an apology ritual); and it is also appropriate (5) for old times' sake, out of recognition of the wrongdoer's personhood before the offense.<sup>38</sup>

Will any of these situations justify merciful decision making in the legal sphere? Some may. Repentance, sufficient suffering or

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36. *See id.* at 24-25.

37. *Id.* at 25.

38. *See id.* at 24. I do not address Murphy's argument that forgiveness may also sometimes be morally required. *See id.* at 29-32.

sincere apology by the tort defendant would seem to warrant a merciful response by a public decision maker just as they would support forgiveness by the private victim. Meaning well or having good motives could properly evoke mercy toward the would-be Good Samaritan whose carelessness leaves the victim worse off.<sup>39</sup> But there are difficulties. As a practical matter, many defendants who repent or apologize between tort and trial would presumably manifest that change of heart by settling the lawsuit, so there would not be much occasion for judge or jury to exercise mercy on those grounds.<sup>40</sup> Nor would forgiving for old times' sake find much purchase in many tort suits because of the lack of any prior (and potentially continuing) relationship between plaintiff and defendant.

Another ground for being merciful, however, may be peculiarly applicable to certain tort cases, and allows the tort decision maker to implement the same principle that Murphy's criteria share: warranting forgiveness by separating the sinner from the sin.<sup>41</sup> It should also tend to avoid the undesirable bias introduced by the personal emotional feelings that often drive forgiveness.<sup>42</sup> When jurors determine responsibility for harm, they tend to think (among other things) that bad outcomes must be due to bad people, and that the worse the outcome, the worse the cause.<sup>43</sup> The first is an extension of what psychologists call the correspondence bias or the fundamental attribution error: people act the way they do primarily because of the kinds of people they are rather than the kinds of situations in which they find themselves.<sup>44</sup> The second is an instance of what is known as thinking by representativeness: the sample resembles the universe from which it is drawn, the cause resembles the consequence it engenders.<sup>45</sup> The net effect of

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39. Experimental research shows that mock jurors take the actor's good motives into account in making punishment decisions in euthanasia cases when they interpret jury instructions as allowing them to do so. See Irwin A. Horowitz, *The Effect of Jury Nullification Instruction on Verdicts and Jury Functioning in Criminal Trials*, 9 *LAW & HUM. BEHAV.* 25 (1985).

40. That some apologizing defendants will not settle is presumed by Shuman's proposal that factfinders be permitted to reduce a tort plaintiff's noneconomic damages in recognition of the defendant's apology. See Daniel Shuman, *The Role of Apology in Tort Law*, 83 *JUDICATURE* 180 (2000).

41. See MURPHY & HAMPTON, *supra* note 1.

42. This ground is not necessary for an award of merciful damages; I am not sure whether it should alone be sufficient for them.

43. See NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* (2000).

44. See *id.*

45. See *id.*

these habits of thought is to conflate actor with outcome, sinner with sin.<sup>46</sup>

Sometimes this kind of thinking is especially inapt.<sup>47</sup> Sometimes the harm a defendant has caused the plaintiff is far out of proportion to the riskiness of his or her conduct, to the blameworthiness of the conduct *ex ante*. Indeed, many accidents are caused by mere inadvertence or impulse rather than intentional or even reckless disregard of the safety of others. The consequences of inattention, however, can be enormous: death or severe injury. In such cases it seems especially incorrect (albeit particularly tempting<sup>48</sup>) to identify bad outcomes with bad character. It is not so much that the tortfeasor has distanced himself or herself from his or her violation of the norm of reasonable care (for instance, by confession and apology) as that the circumstances show no great disrespect for the norm in the first place. Now as long as the defendant's conduct was sufficiently risky to reach the threshold of being considered negligent, the law entitles — commands — the decision maker to hold the defendant liable for the full extent of the injuries thus caused. When full liability is dictated by rule yet grossly disproportionate to just deserts, mercy would allow the decision maker to temper justice and decline to assess the (marginally blameworthy) actor with all of the (overwhelmingly negative) consequences of the act.

Thus, in awarding merciful damages, the decision maker in effect says to this sort of defendant: We recognize that you did wrong (acted negligently) and caused harm to the plaintiff. The magnitude of the harm, however, is so much greater than that the conduct probably risked that to say “the harm belongs to you” would impose unjustified suffering on you — no less unjustified (insofar as actual harm exceeds probable harm) than it would be to permit the plaintiff to bear that harm. Compassion is the appropriate re-

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46. For a detailed discussion of these and other habits of common sense legal decision-making, see FEIGENSON, *supra* note 43.

47. See Shuman, *supra* note 40.

48. When jurors are confronted with the task of assigning liability that seems disproportionate to blameworthiness, they may be prone to restore proportionality, a hallmark of common sense justice, by resorting to blaming habits that convert mere inadvertence into (greater) culpability. Thus the cause will seem to resemble the effect, and the punishment will seem to match the offense. Melodramatic thinking, in which bad outcomes like accidents are traced to the bad conduct of bad guys, is the jury's way of doing this. (And mercy tempers the consequences of juries' tendency to use melodramatic thinking to magnify the egregiousness of a tort defendant's conduct.)

sponse to the perception of unjustified suffering, and compassion motivates mercy.<sup>49</sup>

Think of merciful damages on this ground as a way to fine-tune Holmes's insight that liability attaches to the moral quality of (risky) action and not to action *per se*.<sup>50</sup> One who inadvertently causes serious harm or injures through conduct that falls slightly short of the community's expectations has indeed behaved in a blameworthy fashion — but not in a *very* blameworthy fashion. Harm in excess of culpability is just bad luck, not truly indicative of the blameworthiness of the actor as a person. Damages, however, must be paid by people, not their acts; in a third-party liability regime there is no practical way to disentangle the two even if morality suggests they should be distinguished. Merciful damages would allow decision makers to recognize the difference between the nature of the act and the nature of the actor when the difference is plain.

The idea of merciful damages is not entirely unanticipated in the law. In his recent article, Daniel Shuman points out that many states permit the fact finder to consider the defendant's public apology in mitigation of damages for defamation.<sup>51</sup> Shuman himself recommends extending this concept to allow the fact finder to reduce the plaintiff's intangible or noneconomic losses by recognizing the defendant's apology in any kind of case.<sup>52</sup> Merciful damages goes still further by permitting a reduction in the defendant's liability whenever mercy is warranted.<sup>53</sup>

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49. This kind of case should be distinguished from those in which tort law *entirely relieves* the defendant of responsibility on the ground that the (extensive) damages were *unforeseeable*. Forgiveness and mercy do not negate responsibility but rather (some of) what would otherwise be its consequences. Cf. Joanna North, *The "Ideal" of Forgiveness: A Philosopher's Exploration*, in *EXPLORING FORGIVENESS* 15, 17-18 (Robert D. Enright & Joanna North, eds., 1998). Consider, for instance, *Petition of Kinsman Transit Company*, 338 F.2d 708 (2d Cir. 1964). To simplify the facts, a shipowner negligently secured one of its boats to a dock, so that it was knocked loose by floating ice and crashed into a drawbridge that the city had negligently failed to raise. Ship and bridge dammed the flow of ice, causing widespread flooding. The court held both shipowner and city liable, rejecting their argument that their carelessness could not be considered the proximate cause of such vast damages and reasoning that the harm they caused was exactly the sort that should have been anticipated given their negligence, only greater. Had the defendant's carelessness been less pronounced (and perhaps also had the defendants met one or more of Murphy's five criteria), this could have been a proper case for liability followed by mercy.

50. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 76-77 (1881/1963).

51. See Shuman, *supra* note 40.

52. See *id.*

53. Shuman's recommendation resembles the merciful damages proposed in this paper in that it would apply to any kind of tort case, and would be decided by the fact

*How.* A few comments on the administration of merciful damages are in order. Relegating the merciful decision to a later, "damages phase" of trial, as I suggested earlier, promises some advantages. First, exercising mercy with regard to damages instead of liability would be more consistent with Murphy's conception of forgiveness as distinct from excuse, justification, or any other mitigation of responsibility. Forgiveness (and resentment) pertain to wrongdoing that is neither excused nor justified; one who forgives recognizes the wrongdoer's responsibility but then treats the wrongdoer less harshly than he or she has a right to do.<sup>54</sup> In the proposed scheme, the defendant's responsibility would first be decided in a liability phase of trial. Only the legally responsible defendant is subject to damages, and only such a defendant, whose responsibility has been recognized, could benefit, in a second phase of trial, from a merciful reduction in damages.<sup>55</sup>

Second, while the objections to the use of compassion in legal decision making discussed earlier would still apply to the decision whether to award mercifuls, at least some would apply with less force. Because forgiveness and mercy address the tortfeasor and not the tort, the sinner and not the sin,<sup>56</sup> more legally irrelevant information about the defendant would come before the decision maker, and the subjectivity and bias inherent in compassionate judging would continue to be a risk. If damages are determined after liability, however, compassion would not skew the basic liability judgment. Compassion would be no more likely to exonerate the defendant than it is now. The risk of unequal treatment of similarly situated defendants would remain, but would at least be confined to the damage award. In short, just as information not relevant to a capital defendant's guilt or innocence may be admitted into evidence in the penalty phase so that the decision makers may reach a morally superior sentence, so a damages phase in

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finder on a case-by-case basis. Merciful damages differ from Shuman's proposal, however, in a couple of important respects. First, as noted in the text, merciful damages may be warranted for reasons other than the defendant's apology. Second, an award of mercifuls would not reduce the plaintiff's recovery. See *supra* notes 49-52 and accompanying text.

54. See MURPHY & HAMPTON, *supra* note 1, at 20.

55. Merciful damages are thus distinguished from the sense in which the general tort rule of negligence can itself be described as "forgiving" (by comparison with strict liability), because the application of the more lenient negligence rule (where it makes a difference) results in a decision of no liability in the first place — which is not what Murphy and others mean by forgiveness. See *supra* note 49 (contrasting merciful damages with proximate cause limitations on legal responsibility).

56. See MURPHY & HAMPTON, *supra* note 1, at 24-25.

which mercifuls are possible would admit otherwise extraneous party information in order that the court decide on a morally superior award.<sup>57</sup>

An obvious objection to this proposal, even conceding that the defendant who (carelessly) causes harm far out of proportion to his blameworthiness may be a proper target of compassion, is the tort law precept that “where one of two innocent persons must suffer a loss, it should be borne by the one who occasioned it.”<sup>58</sup> Merciful damages would hardly be morally appropriate if they resulted in undercompensating a blameless and deserving victim — especially given experimental<sup>59</sup> and jury verdict<sup>60</sup> research showing that tort jurors may already be prone to anti-plaintiff bias in awarding compensatory damages. To address this concern, the state could establish a fund from punitive damages paid to the state instead of directly to the plaintiff (as some states already mandate<sup>61</sup>) and use that fund to make up shortfalls from full compensation created by mercifuls. These shortfalls are almost certain to be smaller on average than the funds generated by the average punitive award, because punitives can range up to many times compensatory damages, whereas mercifuls cannot exceed compensatory damages. Moreover, assuming that mercifuls are confined to unusual cases, such as those in which harm appears greatly to exceed culpability, they should be awarded only exceptionally — perhaps something

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57. This would not entirely avoid evidentiary problems. Federal Rule of Evidence 408, for instance, makes evidence of a defendant’s apology inadmissible if made during compromise negotiations, and some states make a defendant’s “benevolent gestures” inadmissible. *See, e.g.*, MASS. GEN. LAWS ch. 233, § 23D (1999). As Shuman points out, there is at least a tension between the therapeutic value of apology for the victim, which is generally highest when the apology is prompt, and the evidentiary rules that protect only those apologies made during settlement talks. *See* Shuman, *supra* note 40.

58. *Seals v. Snow*, 254 P. 348, 349 (Kan. 1927).

59. Neal Feigenson et al., *Effect of Blameworthiness and Outcome Severity on Attributions of Responsibility and Damage Awards in Comparative Negligence Cases*, 21 LAW & HUM. BEHAV. 597 (1997); Doug Zickafoose & Brian Bornstein, *Double Discounting: The Effects of Comparative Negligence on Mock Juror Decision Making*, 23 LAW & HUM. BEHAV. 577 (1999).

60. *See* James Hammitt et al., *Tort Standards and Jury Decisions*, 14 J. LEG. STUD. 751, 752 (1985).

61. *See, e.g.*, IOWA CODE ANN. § 668A.1(2)(b) (West 1999). *See generally* Sonia Larsen, Annotation, *Validity, Construction, and Application of Statutes Requiring that Percentage of Punitive Damage Awards be Paid Directly to State or Court-Administered Fund*, 16 A.L.R. FED. 129 (1993).

in the range of the 5% or so of cases in which punitives are now awarded,<sup>62</sup> so that the fund should not readily be exhausted.<sup>63</sup>

*Why.* Let me conclude by suggesting why merciful damages, if the idea can survive the criticisms raised earlier, might be a good thing. There is, first of all, a pleasing moral symmetry in permitting tort decision makers to judge mercifully. Just as punitive damages empower decision makers to give vent to anger and outrage at malicious conduct that results in relatively minor damage, so merciful damages would empower them to relieve defendants who have merely been careless of some of the overwhelming consequences of their behavior — behavior in which any of us could easily imagine ourselves engaging.

Forgiveness and mercy may also be therapeutic for the tortfeasor. Without mercy inspired by forgiveness, the likelihood is greater that an individual defendant will return again and again, even obsessively, to the memory of the transgression, which will continue to define his current existence as the linchpin of his self-narrative.<sup>64</sup> Forgiveness and mercy exercise a kind of social influence on the tortfeasor, through which society tells him or her, “You

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62. See generally Michael Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 WIS. L. REV. 15.

63. Jury research suggests another reason why being merciful to tortfeasors in the way my proposal permits may be unjust to their victims. Experiments varying trial format show that plaintiffs win less often in bifurcated trials than they do in unitary trials (although when they win, they receive larger awards). See Irwin Horowitz & Kenneth Bordens, *An Experimental Investigation of Procedural Issues in Complex Tort Trials*, 14 LAW & HUM. BEHAV. 269 (1990). This may very well be because the sympathy for victims evoked by proof of damages sometimes inclines jurors in unitary trials to decide for the victims on the question of liability. Yet it would hardly seem fair to make room for leniency toward injurers at the expense of depriving some (otherwise deserving) victims of any recovery at all.

It could be argued, on the other hand, that juries, recognizing the availability of mercifuls, could inflate their compensatory damages awards, confident that the increment would be assessed to the fund, not to the defendant. Appropriate jury instructions permitting mercifuls only in exceptional cases could address this concern.

Another, procedural objection to the proposal is that every case would have to be bifurcated, because it most likely could not be determined in advance which cases would be strong enough candidates for a possible award of mercifuls. Currently only unusually complex cases tend not to be tried in unitary proceedings. This would somewhat simplify trials in which defendants are ultimately found not liable (by eliminating proof of damages), but would lengthen proceedings in the slight majority of cases in which defendants are found liable. Note that Shuman also recommends bifurcated proceedings. See Shuman, *supra* note 40.

64. See JEFFERSON A. SINGER & PETER SALOVEY, *THE REMEMBERED SELF* 42 (1993); cf. E.D. Scobie & G.E.W. Scobie, *Damaging Events: The Perceived Need for Forgiveness*, 28 J. THEORY SOC. BEHAV. 373, 395 (1998).

are not that act of negligence. It's okay to tell a new story about yourself."<sup>65</sup>

The value of merciful damages for the tort *victim* is another matter. Forgiveness, which as we have seen may inspire mercy, has often been proclaimed as therapeutic for the victim because it reduces the anxiety and stress associated with continuing anger and resentment.<sup>66</sup> (It may be observed that these positive health effects of forgiveness are based largely on anecdotal experience and clinical observation, and some researchers have pointed to a lack of quantitative empirical support for such claims.<sup>67</sup>) Perhaps more importantly from the victim's perspective, mercy may be valuable because, as Professor Murphy writes of forgiveness, it reflects moral humility, the victim's recognition that he or she, too, could offend and desire forgiveness, and would want to live in a world in which that forgiveness would be forthcoming.<sup>68</sup> Murphy also lauds the victim who, acting out of (appropriate) compassion, mercifully waives his or her right to enforce a legal obligation, because the "disposition to mercy" helps to reign in the "narrow and self-involved tendenc[y]" always to stand on our rights.<sup>69</sup>

But how can these benefits accrue to the tort victim when it is the *legal decision maker* who may award merciful? Indeed, what can be good about an act of mercy by the community toward a tortfeasor to whom the victim himself or herself, by proceeding to trial, has chosen not to be merciful? It is this: the public exercise of forgiveness and mercy is more impressive and more meaningful than the merely private. Only through lawful, public acts can the

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65. Cf. HANNAH ARENDT, *THE HUMAN CONDITION* 237 (1958).

Without being forgiven, released from the consequences of what we have done, our capacity to act would, as it were, be confined to one single deed from which we would never recover; we would remain the victims of its consequences forever, not unlike the sorcerer's apprentice who lacked the magic formula to break the spell.

*Id.* Later Arendt expands the point:

[F]orgiveness may be the necessary corrective for the inevitable damages resulting from action . . . . [T]respassing [as opposed to 'crime and willed evil'] is an everyday occurrence which is in the very nature of action's constant establishment of new relationships within a web of relations, and it needs forgiving, dismissing, in order to make it possible for life to go on by constantly releasing men from what they have done unknowingly.

*Id.* at 239-40.

66. See, e.g., Richard Fitzgibbons, *Anger and the Healing Power of Forgiveness: A Psychiatrist's View*, in *EXPLORING FORGIVENESS* 63 (Robert D. Enright & Joanna North, eds., 1998).

67. Scobie & Scobie, *supra* note 64, at 376.

68. See MURPHY & HAMPTON, *supra* note 1, at 32.

69. *Id.* at 176.



community affirm that *as a community* it displays the virtues of moral humility and not always standing on its rights. And because it acts through a public, lawful process, the community can be more confident that its mercy is morally appropriate, because it is not due to the victim's insufficient self-respect or insufficient respect for the rule or norm the defendant has violated. If we may presume that the tort victim who forgoes mercy by not settling (even after receiving the defendant's apology and, let us say, reasonable settlement offer) cedes to the community (represented by judge and jury) the right to determine satisfactory compensation, then the community may properly grant mercy even where the victim has not, thereby expressing its contrary view that mercy is warranted. It may even be that the victim will be led by the community's merciful example to become more forgiving (and thus to obtain the benefits that supposedly accrue therefrom).<sup>70</sup>

Finally, merciful decision making may be valuable because it addresses not just the tortfeasor, the victim, and the relationship between them, but also the relationship of both tortfeasor and victim to the community.<sup>71</sup> Forgiveness and mercy help to reintegrate the defendant into the community, reducing the debilitating social consequences of disconnectedness.<sup>72</sup> A priest and former police chief writes that the best way for a police department to respond to a big public mistake (e.g., the beating of Rodney King) may be to apologize and seek forgiveness,<sup>73</sup> and that forgiveness promises to benefit both the police and the public by alleviating their mutual sense of alienation and antagonism. It is not inconceivable that an analogous reduction in the alienation pervasive in consumerist society would ensue if corporate defendants were given an incentive to elicit forgiveness and mercy instead of treating victims of their

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70. Another divergence between the community's exercise of mercy and the tort victim's is that a jury might more readily be merciful with someone else's money. Making up merciful reductions in the victim's damages out of state funds, as proposed earlier, only partly responds to this objection, because even though the plaintiff will not be undercompensated as long as the compensation fund is solvent, jurors may still be too merciful too often for the solvency of the fund.

71. See Walter J. Dickey, *Forgiveness and Crime: The Possibilities of Restorative Justice*, in *EXPLORING FORGIVENESS* 106, 107 (Robert D. Enright & Joanna North, eds., 1998).

72. For a thorough discussion of restorative justice based on apology and reparations by the criminal offender, emphasizing the value of reintegration into the community, see Gordon Bazemore, *Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration*, 41 *AM. BEHAV. SCI.* 768 (1998).

73. See David Couper, *Forgiveness in the Community: Views from an Episcopal Priest and Former Chief of Police*, in *EXPLORING FORGIVENESS* 121, 126-27 (Robert D. Enright & Joanna North, eds., 1998).

products as quantifiable variables in calculations of expected accident costs.<sup>74</sup> Note also that giving defendants an incentive to apologize could also increase the number of settlements and reduce the number and cost of antagonistic, divisive lawsuits.<sup>75</sup> And the incentive seems real: what little empirical research there is indicates that confessing one's blameworthy actions does indeed reduce observers' anger toward the actor and increases their inclination to forgive.<sup>76</sup> So tort defendants would have reason to believe that contrition may pay off in the form of the enhanced prospect of mercifuls, as well as a better relationship with the community.

### CONCLUSION

Six centuries ago, the lawyer for a man whose servant properly set a fire but then carelessly tended it, so that it spread to the plaintiff's house and burned it, argued that his client "will be undone and impoverished all his days if this action is maintained against him; for then twenty other such suits will be brought against him for the same matter."<sup>77</sup> The judge responded: "What is that to us?"

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74. It may be relevant to note that, judging by the size of punitive damage awards, jurors seem to get angriest at corporate defendants who they believe to have subordinated consumer safety to cost-benefit calculations. See, e.g., *Anderson v. General Motors*, No. BC 116-926 (Cal. Super. Ct., July 9, 1999), in which a jury awarded burn victims of exploding gas tanks \$107 million in compensatory damages and over \$4.8 billion in punitive damages. (The trial judge later remitted the award to approximately \$1 billion, and the defendants are appealing the decision. See 43 JURY VERDICT WEEKLY 39 (Ca.).

75. See Cohen, *supra* note 5.

76. Bernard Weiner et al., *Public Confession and Forgiveness*, 59 J. PERSONALITY & SOC. PSYCHOL. 281 (1991). In another experiment, a little boy who transgressed (by helping a confederate trip a little girl) was perceived to be less aggressive and less deserving of punishment when he expressed remorse after the incident than when he expressed pleasure in what he had done. See Gary S. Schwartz et al., *The Effects of Post-Transgression Remorse on Perceived Aggression, Attributions of Intent, and Level of Punishment*, 17 BRIT. J. SOC. & CLINICAL PSYCHOL. 293 (1978). In addition, two studies show that children blame and punish transgressors less when the actor apologizes. See Bruce W. Darby & Barry R. Schlenker, *Children's Reactions to Apologies*, 43 J. PERSONALITY & SOC. PSYCHOL. 742 (1982); Bruce W. Darby & Barry R. Schlenker, *Children's Reactions to Transgressions: Effects of the Actor's Apology, Reputation and Remorse*, 28 BRIT. J. SOC. PSYCHOL. 353 (1989). Research on victims' responses also indicates that the offenders' apologies improve victims' impressions of the offenders and reduce victims' tendency to be aggressive toward the offenders. See Ken-ichi Ohbuchi et al., *Apology as Aggression Control: Its Role in Mediating Appraisal of and Response to Harm*, 56 J. PERSONALITY & SOC. PSYCHOL. 219 (1989). However, as Shuman emphasizes, these effects have not been shown for serious harms, so the incentives in at least some instances warranting merciful damages (those in which harm greatly exceeds culpability) are in question. See Shuman, *supra* note 40.

77. *Beaulieu v. Finglam*, Y.B. 2 Hen. IV, f. 18, pl. 6 (1401).

It is better that he should be utterly undone than that the law be changed for him"<sup>78</sup> Who today is not taken aback (at the very least) by this response? If it would be an improvement in the morality of our tort law to allow for exceptional acts of mercy, then perhaps merciful damages would be a good way to do it.

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78. *Id.*