

# The Morality of Mercy

Heidi M. Hurd\*

*In this article I explore whether retributivists are wrong to dismiss the notion that mercy can have any moral merits. My goal is to canvass what is surely a non-exhaustive list of instances in which mercy seems to have intuitive moral appeal—even for declared retributivists—and to ask of each such instance two questions: (1) Is it an instance of true mercy (a properly-motivated suspension of just deserts), as opposed to an instance in which real justice (the imposition of just deserts) is sought to be achieved, or in which other considerations are really doing the moral work? (2) If it is an instance of true mercy, can it really be defended on moral grounds? As I will demonstrate, the arena in which mercy is moral is incredibly circumscribed. As such, retributivists are right to insist that, as a general matter, mercy is an unjustified gesture and a dubious moral virtue. But in the arena in which it flourishes morally, it is not just a virtue; it is the essence of the category. For it finds its place in loving relationships and friendships, and within those relationships, it is not just valuable, but constitutive. If we are to love and be loved, I hazard that we must be merciful and we must depend upon mercy. And if this is the case, it may be that we must each cultivate a merciful disposition that may well have an inevitable tendency to lead us astray in other arenas in which mercy is misplaced.*

*The article is divided into three main parts. Part II is devoted to a preliminary discussion of the nature of mercy, and particularly, the nature of the mental state(s) that must (or may) accompany an act of clemency in order for it to be of a merciful sort. As I conclude in this part, it may be impossible to specify the mens rea of mercy without understanding the circumstances in which mercy is both true to its name and justified. As such, it may be that settling the nature of mercy must await the lessons of Parts III and IV—the parts that concern the circumstances in which it is morally defensible for legal officials and private persons to deliver less than someone's just deserts.*

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\* Dean and David C. Baum Professor of Law and Professor of Philosophy, University of Illinois College of Law. This paper benefited enormously from numerous lively office-hour discussions with my 2006 Section C criminal law class at Illinois. Special thanks for colorful examples and careful research is owed to Jessica Bartlett, Scott Berliant, Daniel Bridges, Tristan Bullington, Amanda Ghagar, Anthony Grossi, Anna Krasinski, David Mangian, Shawn Moon, Aaron Moshiaiwili, John Mounce, Rebecca Rabin, and Eric Rainey. Thanks also to my colleagues David Hyman and Michael Moore, who helped me think through some of the arguments contained in the piece.

*justifications for official acts of clemency reveal such acts to be something other than acts of mercy—for example, efforts to redress procedural or factual errors so as, in fact, to impose just deserts; efforts to obtain gains in social utility; efforts to restore a victim's sense of power and control by honoring her wishes as to the punishment accorded her aggressor. Indeed, as I shall argue, there is no moral basis for mercy, properly described, by officials within a justice system that is devoted to achieving retributive justice.*

*Part IV concerns private acts of mercy on the part of those who have been wronged towards those who have done them wrong. It begins with the assumption that victims have rights correlative with the secondary duties acquired by wrongdoers upon causing injury: (1) rights of compensation for the wrongs done to them, and (2) rights to exact retribution when the wrong is not a legal one or when the law might otherwise permit private retribution, or to assist in the prosecution of a wrong when private retribution has been preempted by a formal criminal justice system. It further presupposes that inherent in the nature of being a rights holder is the power to waive one's rights, such that victims are within their rights to waive the debts owed them by others or to refuse to exact retribution for the wrongs that have been done them. The question in this section, then, is how to determine when it is morally laudatory to stand on one's rights—to enforce the secondary obligations of wrongdoers—and when is it morally laudatory to waive such rights—that is, to give mercy. As I argue, intimate relationships demand that one occasionally sacrifice one's rights, and as such, they require that one cultivate a disposition for mercy. Inasmuch as it may be impossible to be the kind of person who (rightly) forgives wrongs at home without simultaneously being the kind of person who (wrongly) forgives wrongs on the job, it may be that the demands of personal virtue preclude one from being the kind of person who can live up to the demands of retributivism.*

## I. INTRODUCTION

It is commonplace amongst retributivists to believe that mercy cannot be morally justified, and that it is a confusion on the part of religion, literature, opera, and the movie industry to portray acts of mercy as laudable instances of institutional justice, moral goodness, or personal virtue. Indeed, many retributivists measure others' commitment to retributivism by whether they have mastered what is thought to be a sophomoric lesson about retributivism—the need to reject mercy as an institutional ideal, and perhaps as a personal one, as well. After all, by its nature, an act of mercy towards one who has done wrong consists of suspending a deserved penalty. In the context of the criminal law, it consists of suspending a wrongdoer's just punishment—of waiving retribution. Inasmuch as retributivism holds that punishment is justified if and only if an individual deserves it, it makes a wrongdoer's deserts both a necessary and a sufficient condition of punishment. It thus follows by simple deduction that one cannot adhere to

retributivism and defend the occasional, partial, or complete suspension of an individual's just punishment without contradiction.<sup>1</sup>

Inasmuch as I have always considered myself a retributivist, I must confess that I have always shared the retributivist's conviction that it is confused to try to defend mercy in any of its institutional forms—as a gubernatorial pardon, an instance of jury nullification, an act of judicial leniency, or a prosecutorial wink and a nod—and I have even been skeptical of the defensibility of decisions by individuals (and potential plaintiffs) to waive secondary obligations of repair and to refuse to press demands for corrective justice. What could possibly be good about suspending justice? What could possibly be virtuous about doing what is, *ex hypothesi*, unjust—that is, undeserved? How could moral strength lie in indulging, tolerating, or forgiving another's weakness, laziness, or viciousness?

Yet those who take mercy to be tautologically at odds with retributivism surely have to find common portraits of what most would describe as mercy to be intuitively compelling. Take simple examples from religion, literature, and Hollywood. It is hard to deny the moral attraction of Jesus Christ's central admonition to turn the other cheek to those who wrong us. And his willingness on the cross to invoke his own lesson and call upon God to forgive those responsible for his crucifixion seems the very essence of strength and virtue. Shakespeare powerfully connected mercy to the divine in his two famous comedies, *The Merchant of Venice* and *Measure for Measure*, writing:

The quality of mercy is not strain'd,  
It droppeth as the gentle rain from heaven  
Upon the place beneath. It is twice blest:  
It blesseth him that gives, and him that takes . . .<sup>2</sup>

No ceremony that to great ones longs,  
Not the king's crown, nor the deputed sword,  
The marshal's truncheon, nor the judge's robe,  
Become them with one half so good a grace  
As mercy does.<sup>3</sup>

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<sup>1</sup> For the retributivist indictment of mercy that inspired the modern philosophical literature on the topic, see Alwynne Smart, *Mercy*, 43 PHIL. 345 (1968). For the most influential articulation of the thesis that mercy is either a vice or a means of achieving what is deserved (and hence, not mercy at all), see Jeffrie G. Murphy, *Mercy and Legal Justice*, in JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 162 (1988). See also Ross Harrison, *The Equality of Mercy*, in JURISPRUDENCE: CAMBRIDGE ESSAYS 108 (Hyman Gross & Ross Harrison eds., 1991)(arguing that rationality requires rule-governed reasoning that ensures the like treatment of like cases in ways that cannot countenance the non-rule-governed exercise of mercy).

<sup>2</sup> WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, act 4, sc. 1.

<sup>3</sup> WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE*, act 2, sc. 2.

We all raise our children on a diet of fairytales and Disney movies that regularly extol the justice of retribution (the seven dwarfs driving the wicked queen off the cliff), while simultaneously triumphing mercy over the imposition of just deserts (Simba's willingness to pull his evil uncle, Scar, back up the cliff in their final altercation in *The Lion King*; Cinderella's invitation to her abusive stepmother and step-sisters to live in the castle to which she moves with a prince beloved for rescuing her from their abuse; and Luke Skywalker's reconciliatory gestures to his father, Darth Vader).<sup>4</sup> And we intuitively celebrate acts of mercy within the PG- and R-rated movie fare that is the sustenance of adults—the scene, for example, in the recently-popular film, *Three Kings*, in which Sfc. Troy Barlow (played by Mark Wahlberg) spares the life of the malicious torturer who was clearly intending to torture him to death had Major Archie Gates (played by George Clooney) not come to the rescue.

It is the object of this article to explore whether retributivists are too hasty in dismissing the notion that mercy can have any moral merits. My goal is to canvass what is surely a non-exhaustive list of instances in which mercy seems to have intuitive moral appeal—even for declared retributivists—and to ask of each such instance two questions: (1) Is it an instance of true mercy (a properly-motivated suspension of just deserts), as opposed to an instance in which real justice (the imposition of just deserts) is sought to be achieved, or in which other considerations are really doing the moral work? (2) And if it is an instance of true mercy, can it really be defended on moral grounds? As I will demonstrate, the arena in which mercy is moral is incredibly circumscribed. As such, retributivists are right to insist that, as a general matter, mercy is an unjustified gesture and a dubious moral virtue. But in the arena in which it flourishes morally, it is not just a virtue; it is the essence of the category. For it finds its place in loving relationships and friendships, and within those relationships, it is not just valuable, but constitutive. If we are to love and be loved, I hazard that we must be merciful, and we must depend upon mercy. And if this is the case, it may be that we must each cultivate a merciful disposition that may well have an inevitable tendency to lead us astray in other arenas in which mercy is misplaced.

This article is divided into three main parts. Part II is devoted to a preliminary discussion of the nature of mercy, and particularly, the nature of the mental state(s) that must (or may) accompany an act of clemency in order for it to be of a merciful sort. As I shall conclude in this part, it may be impossible to specify the *mens rea* of mercy without understanding the circumstances in which mercy is both true to its name and justified. As such, it may be that settling the nature of mercy must await the lessons of Parts III and IV—the parts that concern the circumstances in which it is morally defensible for legal officials and private persons to deliver less than someone's just deserts.

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<sup>4</sup> THE LION KING (Walt Disney Pictures 2004); CINDERELLA (Walt Disney Pictures 1957); STAR WARS EPISODE VI: RETURN OF THE JEDI (20th Century Fox 1983); THREE KINGS (Warner Brothers 1999).

Part III, then, takes up the justifiability of clemency by officials—for example, prosecutors, judges, governors, and presidents—towards those suspected or convicted of criminal offenses. As I shall argue in this section, the most attractive moral justifications for official acts of clemency reveal such acts to be something other than acts of mercy—for example, efforts to redress procedural or factual errors, so as, in fact, to impose just deserts; efforts to obtain gains in social utility; efforts to restore a victim's sense of power and control by honoring her wishes as to the punishment accorded her aggressor. Indeed, as I shall argue, there is no moral basis for mercy, properly described, by officials within a justice system that is devoted to achieving retributive justice.

Part IV concerns private acts of mercy on the part of those who have been wronged towards those who have done them wrong. It begins with the assumption that victims have rights correlative with the secondary duties acquired by wrongdoers upon causing injury: (1) rights of compensation for the wrongs done to them, and (2) rights to exact retribution when the wrong is not a legal one or when the law might otherwise permit private retribution, or to assist in the prosecution of a wrong when private retribution has been preempted by a formal criminal justice system. It further presupposes that inherent in the nature of being a rights holder is the power to waive one's rights, such that victims are within their rights to waive the debts owed them by others or to refuse to exact retribution for the wrongs that have been done them. The question in this section, then, is how to determine when it is morally laudatory to stand on one's rights—to enforce the secondary obligations of wrongdoers—and when it is morally laudatory to waive such rights—that is, to give mercy.

## II. THE NATURE OF MERCY: AN UNSATISFYING PRELIMINARY DISCUSSION

Before we can embark upon these two projects—that of the morality of public and private mercy—it is surely essential to say a bit more about what is meant by the term “mercy” in this discussion. If one opens a standard dictionary, one will find an extensive menu of distinct and quite different idiomatic uses of the term, and I shall not here try to parse amongst all of them. What is important and interesting about all of them, however, is that they are all both motivationally-loaded and causally-complex concepts. To put it differently, mercy (in all of its forms) has both *actus reus* and *mens rea* conditions. To be merciful, one must perform an action that causally impacts upon another person in a manner that improves his circumstances. It is not enough to harbor a belief or sentiment or emotion or desire or disposition towards another, nor is it enough to try (but fail) to lessen the burdens of another. Those who would be merciful if they could (but can't) may possess a merciful disposition or be of virtuous character, but we would not say that they gave mercy to another unless they successfully (at least partially) alleviated a source of distress. Similarly, those who seek to be merciful but fail in

their efforts might be aptly described as having attempted to give mercy, but again, we would not say that they, in fact, gave mercy unless they succeeded at so doing.

What distinguishes the various uses of the term “mercy” in any standard dictionary entry is precisely the different *actus reus* conditions that each embodies. Consider, for example, the use of the term “mercy” that connotes simply a gratuitous gesture or gift under circumstances in which the gift is particularly welcome or needed, as when one “shows mercy” towards another by giving him life-saving medicine, food, water or shelter, or inversely, in the case of a “mercy killing,” by taking another’s life when it is the only means of rescuing him from unbearable suffering. This understanding of “mercy” is distinct from the conception with which I am concerned in this article. For the notion of mercy in which I am interested has as its *actus reus* the waiving of a debt or the suspension of a deserved punishment. Its act requirement constitutes clemency, as I shall call it throughout this article—by which I mean the waiver of a right that one would otherwise have to demand corrective justice or to exact retributive justice.

Not only must one satisfy an *actus reus* requirement in order to be thought merciful in any traditional sense; one must also perform that act for a certain reason or set of reasons. Not just any reason will do. One who disconnects the respirator of a suffering patient (someone who would eagerly consent to death if asked) because she wants to collect her inheritance, does not perform a mercy killing, even if what she does is or would be welcomed by the patient who is released from his suffering. A slave master who gives a slave a life-saving drink of water solely so that he will live to slave another day hardly shows him mercy. A wealthy man who is induced by financial advantage to give to the poor does not give charity; he pays a tax. As these examples show, when the term “mercy” is co-extensive with the giving of a valued gift or benefit, it implies that the giver acts with a certain mental state: empathy, sympathy, compassion, pity—mental states reflecting a genuine concern for the good of the person to whom such mercy is extended, rather than a concern for promoting personal welfare or maximizing the utility of third parties.

The same appears true of the use of the term “mercy” in the contexts in which I am interested—in cases in which the “gift” given is the waiver of a debt or a reduction of deserved punishment.<sup>5</sup> A governor who pardons an inmate because he has been bribed to do so does not show mercy, even though he acts deliberately to ensure that the inmate receives less than is his due. A battered wife who refuses to give testimony against her abusive husband because she fears that he will find and kill her does not show him mercy, even though she intentionally pursues his undeserved acquittal. A merchant who waives another’s debt in a *quid pro quo* exchange for a further benefit does not show mercy, even though his debtor is

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<sup>5</sup> For further discussion of the claim that mercy involves not just leniency in the treatment of a wrongdoer, but the sacrifice of a right on the part of the person who is merciful, see H.R.T. Roberts, *Mercy*, 46 PHIL. 352, 353 (1971).

gratefully released from an otherwise haunting debt.<sup>6</sup> A president who pardons a predecessor as a means of reuniting a divided nation does not extend mercy; he simply (and perhaps prudently) forgoes the pursuit of individual justice in the interests of securing what is in the best interests of society as a whole.<sup>7</sup>

If I am right about these claims, then mercy is not mere clemency; it is clemency accompanied by a particular motivational *mens rea*. If there is a duty to be merciful, then it is a Kantian “imperfect duty”: a duty that can only be fulfilled if one has simultaneously embraced a particular end or acted for a particular reason.<sup>8</sup> But what reason must one have in waiving a debt or refusing to prosecute a wrong in order for an act of clemency to be merciful? The answer is surprisingly elusive, and it is surely to be one of the loose ends left partially untied by this article. It seems that there are several mental states that are sufficient, and none that are necessary, to make the pardoning of another’s wrongdoing an act of mercy. For example, it is often thought that those who act out of pity, forgiveness, compassion, or a paternalistic desire to achieve the moral rehabilitation of another, may give mercy when they waive or refuse to enforce the secondary duties of wrongdoers, while those who pursue self-interested ends or seek to enhance the welfare of third parties or society as a whole do not appear to be merciful when they employ clemency as a means to their ends.

If one exerts pressure on those mental states often thought to be contenders for the *mens rea* of mercy, however, it is clear that some must be disqualified. For example, one who pities another seems to conceive of the other as being in sufficiently compromised circumstances, or having sufficiently compromised attributes or abilities, as to be worthy of a full or partial moral excuse. To pity is to feel charitable and forgiving toward one who is not thought of equal ability or circumstance. Yet, if one forgives a debt or waives punishment because a

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<sup>6</sup> For a tale of a criminal pardoned on the condition that he let a physician cut a hole in his eardrum to study its effects on hearing, see KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 199–200 (1989).

<sup>7</sup> See *infra* notes 22–24 and accompanying text. Consider, also, the following passage from Kathleen Dean Moore:

[P]ardons have been used to limit constitutional rights, to deliver an offender into the hands of another state for a more severe punishment, to facilitate deportation, and to override an offender’s decision that execution is preferable to life in prison. How can this be justified? Because, said the court [in *Biddle v. Perovich*], a pardon is justified solely by the executive’s decision that the public welfare will be better served by not punishing than by punishing.

MOORE, *supra* note 6, at 200 (citing *Biddle v. Perovich*, 27 U.S. 480, 486 (1927)).

<sup>8</sup> As Marcia Baron writes:

[I]f I have a perfect duty not to make false promises, I fulfill that duty even if I refrain only because I think it a prudent policy never to make false promises. But I do not fulfill my imperfect duty of promoting the happiness of others if I do good deeds for others only with the aim of impressing them or winning their favor.

Marcia Baron, *Kantian Ethics and Supererogation*, 84 J. PHIL. 237, 242 (1987).

wrongdoer is deemed pitiful, it would seem that one is not granting mercy, but merely adjusting the penalty to the genuine deserts of the offender. One is finding the wrongdoer to be an unworthy recipient of retribution because of some internal failing or external impoverishment that makes fully autonomous and responsible moral agency impossible. One is thus doing justice, not mercy, where what is just is a function of a (full or partial) excuse that one is attributing to the other in light of his inability to meet the expectations we have of most.

Even when one eliminates imposters like pity, there remains a list of mental states that appear perhaps sufficient, but certainly not necessary, for mercy. And the fact that none seem necessary leaves one wondering whether there is not another one, yet to be identified, that is essential to pedigreeing an act as merciful. Consider forgiveness. To forgive is to intentionally absolve oneself of resentment towards someone who has done one wrong, thus restoring the person to moral equality so as to permit the possible fresh start of the kind of a relationship that demands equality.<sup>9</sup> Certainly someone who forgives another may be inclined to grant mercy, for in shedding his resentment, he may find little reason to collect on the debt or prosecute the injustice that was the cause of his resentment. But surely it is possible both to forgive someone without being moved to grant mercy, and to grant mercy without forgiving the wrong for which no payment is required. Parents often both forgive their children their wrongs and believe it just to exact punishment from them, not just because of its educative effects, but also because it is just that they “pay for” what they have done. And victims are periodically moved to plead for mercy for those who have wronged them, while in no way relinquishing the resentment that they feel for the wrongs they have suffered, or psychologically cleansing their wrongdoers of responsibility for the harms they have wrought. So it would seem that one is merciful if one forgives not just one’s debtor, but his debt as well; but it further seems that one can forgive a debtor without forgiving his debt, and one can waive a debt without forgiving one’s debtor.

Consider, in the alternative, the suggestion that the psychological heart of mercy lies in a desire to afford the other an opportunity for moral rehabilitation. Such is the mental state of Monseigneur Bienvenu, in Victor Hugo’s classic *Les Miserables*, who not only extends mercy to Jean Valjean by fibbing to the brigadier of gendarmes that the silver with which Valjean has been caught was given to him, rather than stolen by him, but then goes on to present Valjean with silver candlesticks as a means both of bolstering his fib and of giving Valjean the manifest means by which to start a new, more virtuous life. “Jean Valjean, my brother, you no longer belong to evil, but to good. It is your soul I am buying for you. I withdraw it from dark thoughts and from the spirit of perdition, and I give it

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<sup>9</sup> For very extensive and illuminating discussions of the nature and justified conditions of forgiveness that make this hasty characterization an over-simplification, see Jeffrie G. Murphy, *Forgiveness and Resentment*, in FORGIVENESS AND MERCY, *supra* note 1, at 14; Jean Hampton, *Forgiveness, Resentment and Hatred*, in FORGIVENESS AND MERCY, *supra* note 1, at 35.



to God,"<sup>10</sup> says the Bishop. By waiving his rights to redress and insulating Valjean from arrest, the Bishop appears to extend what might classically be thought of as mercy, for he is motivated by a desire to rehabilitate Valjean in the eyes of God. In secular terms, the Bishop has afforded him the means by which to recover his virtue through a life devoted to goodness. In so doing, the Bishop has imposed a debt far greater than the cost of silver, for the only means that Valjean has to repay the debt is, in fact, to live a virtuous life. Such is the sentiment captured in the final scene of *Saving Private Ryan*, when Captain Miller, who lies dying after the U.S. Ranger squad that he has lead has successfully rescued Private Ryan from deep within German-occupied territory, whispers to Private Ryan that the Private must "earn" his death.<sup>11</sup> For the only means that Ryan has of repaying the debt incurred by the sacrifices that have been made for him is to live a life worthy of heroic deaths.

The desire for another's moral well-being may well be the mental state that best captures classic conceptions of mercy. But is it necessary that one seek to rehabilitate another's moral character or restore his standing with God in order for one's clemency to be thought an act of mercy? Surely it is possible for a victim to plead for mercy on behalf of his assailant without seeking his moral recovery? I worry that even this mental state fails to be necessary, even if it is sufficient for clemency to count as mercy.

While the mental states I have canvassed surely do not exhaust the list of possible *mens rea* that could convert acts of clemency into mercy, the brief discussion above suggests that mercy may have no single necessary *mens rea*—only individually sufficient *mens rea*. Forgiveness, moral paternalism, compassion, love, and generosity may all constitute motivations that convert leniency into mercy.<sup>12</sup> And rather than continue to turn over motivational stones in the (perhaps hopeless) search of a singular mental state that covers or accompanies all of these, it seems fruitful to turn from the *mens rea* of mercy to its possible justifications. After all, only if mercy can be justified does one have a good reason to spend more time on the question of exactly which mental states make acts worthy of the name. It is to this project, then, that we turn: first to examine the circumstances under which legal officials may be morally justified in extending mercy to offenders, and then to examine the instances in which private persons are to be lauded for waiving, rather than standing on, their rights of redress.

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<sup>10</sup> Victor Hugo, *Les Misérables* (Lee Fahnestock & Norman MacAfee trans., New American Library 1987).

<sup>11</sup> *SAVING PRIVATE RYAN* (Paramount Pictures 1998).

<sup>12</sup> George Fletcher takes compassion to be within the province of equals, and he therefore takes it to account for the legally-recognized excuses that exonerate persons from responsibility on the basis that they should not be asked to do more than would those who are considering the imposition of a penalty. He reserves mercy for instances in which one of superior power forgoes imposing a penalty that he has a right to impose on one who genuinely fell below the standard of behavior that others would have reasonably achieved. GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* §§ 10.3.4–10.3.5, at 810–17 (1978).

## III. ACTS OF MERCY BY LEGAL OFFICIALS

Let me begin with a bold and surely contentious claim. I take it to be clear, at the end of the day, that institutional acts of mercy—at the prosecutorial, judicial, or gubernatorial level—are morally (and therefore legally) indefensible, at least on grounds consistent with a retributive theory of punishment. All of these constitute instances in which third parties, rather than primary victims, waive the secondary obligations of wrongdoers to repair their wrongs and to suffer retribution for their wrongdoing. Notice that the examples of morally-intuitive acts of mercy that I gave in the introduction all reflected instances in which victims themselves forgave the debts of their aggressors or suspended the just deserts of those who harmed them in situations in which it seems they would have been within their rights to deliver retribution for those harms. I take it that these examples are appealing precisely because even retributivists can think that victims have rights to enforce or suspend secondary obligations of repair owed to them, and that they may have moral rights (and therefore, perhaps, legal rights) concerning whether to exact retribution themselves (when privately enforced retribution is morally appropriate) or to participate in the legal prosecution of those who have harmed them. But those who would seek to forgive our wrongdoers in our stead, to waive obligations of repair owed to us, or to suspend the burdens of retribution that are due those who injure us, seem to lack any moral standing to be merciful. What could possibly justify a judge in giving a lenient sentence to a rapist whose victim seeks (or would not refuse) both corrective justice and punishment commensurate with that required to achieve retributive justice? What could justify a governor in pardoning or commuting the sentence of someone who received the penalty he deserved, when we cannot say that his clemency reflects the clemency that may be the right of those who were wronged?

I am not suggesting, by raising these questions, that victims “own” (or should “own”) when and whether retribution ought to be legally exacted. Such a theory would collapse the goal of retribution into the goal of victim-vindication by suggesting that if victims do not need or want vindication through the imposition of retributive sanctions, there is no justification for exacting retribution from those who have done heinous deeds. Such a theory of punishment would founder in numerous objections: how to vindicate those who have been killed or so injured as to not be able to appreciate, waive, or demand vindication; how to manage cases in which victims who do not subjectively want vindication ought to want it on some objective understanding of when vindication is important; and how to manage cases, in the reverse, in which the only punishments that will vindicate victims far exceed those that would be just to defendants, so that the victims again ought not to want them on an objective understanding of what is vindicating.

What I *am* suggesting is that the only genuinely powerful arguments for mercy concern instances in which those wronged exercise the rights they acquire to enforce or suspend debts owed by their wrongdoers. Inasmuch as prosecutors,

judges, governors, and presidents are not owed debts by wrongdoers, they lack standing to waive the obligations owed by wrongdoers to their victims and the obligations owed by wrongdoers to suffer for the wrongs they did others. In short, (1) victims may be within their rights to waive obligations of corrective justice (and so to refuse to bring suit against wrongdoers within civil court); (2) victims may have (some) rights to exact personal retribution that they are entitled to waive, and (3) victims may have rights to refuse to assist the criminal justice system in prosecuting their wrongdoers. But officials do not have the same moral license to extract less than the just deserts of offenders because they are neither owed obligations of repair, nor do they have personal standing to suspend retribution when the wrongs done to others have generated duties on the part of wrongdoers to suffer proportionately.<sup>13</sup>

Some will surely protest that there are numerous instances in which we are sympathetic to acts of mercy by officials. And it is worth spending time on the most compelling of these to make clear that they are poor examples of true mercy. First, and most typically, there are instances in which officials use their discretion or powers of pardon and clemency to redress apparent systemic failures that are suspected to have resulted in the imposition of undeserved penalties on defendants. The most obvious of these are in cases in which the record that resulted in the defendant's conviction and sentencing appears flawed: there is good reason to believe that witnesses lied; evidence was lost or destroyed; the judge or jury was biased; or facts have since emerged (DNA evidence, post-conviction confessions by others, etc....) that indicate that however convincing the case was when presented, it cannot now be thought to support a finding of guilt beyond a reasonable doubt. While we can all applaud officials who take systemic opportunities to reverse or mitigate penalties when they believe the facts ill-proven or controverted by later evidence, our approval does not ultimately vindicate the claim that mercy on the part of legal officials can be moral. For in such instances, officials have not been merciful; they have been just. They have used the powers

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<sup>13</sup> Jeffrie Murphy has theorized that if punishment is regarded as an official's right, but not as his duty, then the official may show mercy:

*if* (and this is a very big 'if') it can be shown that such an official is acting, not merely on his own sentiments, but as a vehicle for expressing the sentiments of all these who have been victimized by the criminal and who, given these sentiments, wish to waive the right that each has that the criminal be punished.

Murphy, *supra* note 1, at 179–80. As I shall argue later, I do not take victims to “own” the question of whether their assailants should suffer retribution, though I do take them to “own” the question of whether they should be compensated for the harm done to them, or whether they should impose private retribution when that is morally available to them (e.g., through shunning their wrongdoer), and perhaps (though I do not defend this in this article) whether they will participate in assisting the criminal justice system to impose retribution on their wrongdoers. Thus even if all citizens who are subject to a justice system would vote to waive the justified punishment of a wrongdoer, I do not believe that this settles the moral question concerning the justifiability of an official act of mercy. See *infra* text accompanying notes 16 and 17.

of their positions to prevent defendants from receiving undeserved punishments; they have not suspended admittedly deserved punishments. Certainly we may want to carve out opportunities for officials ranging from prosecutors to presidents to second-guess and reverse the findings of juries and the sentences of judges so as to safeguard, as best as possible, against punishing the innocent or over-punishing the guilty. But we should not think that those who use such institutional safety-valves are committing acts of mercy, for their purpose is to ensure that justice is done, not that it is undone.

The same is true in cases in which officials within the justice system use their discretion or power to set aside or suspend laws they deem unjust, either in general or in their application in specific cases.<sup>14</sup> Sometimes we applaud official disobedience in the same way that we applaud civil disobedience—when it is predicated on a principled view that the law is so unjust as to lack binding power. And so we (quietly) approve of a prosecutor who refuses to prosecute a mercy killing, or a judge who refuses to sentence a conscientious objector, or a jury that nullifies the conviction of a father who dispassionately killed the man who raped his seven-year-old daughter. But in all such cases, we are not approving the exercise of mercy, but rather the achievement of justice. We do not take these to be instances in which persons who genuinely deserve punishment are rightly given grace; we rather think that these are persons who do not deserve to be punished to begin with.<sup>15</sup>

There are other instances of official clemency in which evidentiary doubt, concerns about lack of due process, and the justness of civil disobedience are not the source of our intuition that an abatement of punishment might be in order. Consider, for instance, the sympathy we have for one who we believe has already “suffered enough”—the mother who killed her child while in the grip of post-partum depression; the man whose drunken driving accidentally killed his best friend, who was riding as a passenger; the husband who ended the life of his beloved wife in order to relieve her suffering; the defendant whose trial has encountered an undue number of procedural set-backs, such that he has already served substantial time behind bars. These cases seemingly make mercy morally appropriate—and yet, not because we have doubts about the legal guilt of those involved.

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<sup>14</sup> Such was the basis of legitimacy ascribed to mercy by the Sicilian nobleman Filangieri when he wrote: “If a pardon is just the law is wrong, but if the law is not wrong a pardon is.” *Dei Delitti e delle Pene* (1761), quoted in Nigel Walker, *The Quiddity of Mercy*, 70 *PHIL.* 27, 27 (1995).

<sup>15</sup> And so when the Prince of Persia pleads for mercy from the cruel Princess Turandot in Giacomo Puccini’s final opera, *Turandot*, he mis-states his plea. She should suspend his execution at the hands of the saber-wielding Pu-Tin-Pao not as a matter of grace, but because the contract to which she is holding him (and to which she holds all her suitors)—one that required him to answer three riddles correctly in order to gain her hand in marriage, at the risk of execution if he failed—is an immoral one. Giacomo Puccini, *Turandot* act 1, in *Puccini Librettos* 383 (William Weaver trans., Anchor Books 1966) (1926).

Certainly I share the view that a person's just deserts can take many forms beyond those of legal sanctions—including, in some cases, inescapable guilt at having done something morally heinous, or inescapable loss of someone emotionally irreplaceable. While it may not be possible for the law to enumerate or tabulate kinds of suffering other than that associated with time lost to imprisonment, we can certainly appreciate that a person's "moral ledger" can be "balanced" by losses other than that of liberty. We can thus fully account for the intelligibility of thinking that someone who has culpably done wrong may, nevertheless, be punished too much if legally sanctioned, because such a person may have suffered losses of a different sort that are morally commensurate with the harm that he has caused.<sup>16</sup>

Yet when we believe that those who have "suffered enough" in the absence of legally-imposed punishment should receive mercy (i.e., relief from legally-imposed punishment), we misuse the concept of mercy. For in such cases, the point is that we believe that they do not deserve further punishment; it is not that we believe that deserved punishment should be suspended. Our claim is that while the legal system does not, and cannot, formally recognize "in-kind punishments" (the death of a child, the accidental killing of a friend, the loss of a spouse), such punishments count in satisfaction of the obligation of suffering acquired by the person through his or her wrongdoing. We celebrate an official's use of discretion to reduce punishment in such cases because we celebrate instances in which people genuinely receive their just deserts, and we know that absent the exercise of official discretion, people who are punished by losses caused by their own bad acts would be over-punished if such losses were not tabulated as part of the penalties imposed upon them by the justice system.<sup>17</sup> In short, to be merciful to those who would be over-punished in the absence of mercy is not to be merciful; it is to be just.

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<sup>16</sup> Claudia Card advances an argument for mercy that is a variation of this insight. In her view, mercy is *deserved*, and hence not a violation of justice, when it is employed to achieve the "cosmic deserts" of offenders whose misfortunes are disproportionate to those of others. As she says:

The basic point of mercy seems to lie in the recognition that, in the absence of "cosmic justice," some of those whom a socially just community would have the right to punish may be unusually more "sinned against than sinning," either by other persons or, metaphorically speaking, by fate. . . . Those who stand to benefit from exercising the right to punish may be more fortunate on the whole than are (some of) those who become liable to punishment. There seems to be no feasible institutional remedy for this state of affairs . . . . A partial remedy is found, however, in the exercise of mercy.

Claudia Card, *On Mercy*, 81 PHIL. REV 182, 185 (1972).

<sup>17</sup> Such was one of President Gerald Ford's rationales in his Statement in connection with his Proclamation of Pardon that relieved past-President Richard Nixon of all liability for offenses he may have committed during his presidency. As President Ford stated, "I feel that Richard Nixon and his loved ones have suffered enough, and will continue to suffer no matter what I do, no matter what we as a great and good nation can do together to make his goal of peace come true." *Statement by the President in Connection With His Proclamation Pardoning Nixon*, N.Y. TIMES, Sept. 9, 1974, at 24.

A third argument for official acts of mercy by prosecutors, judges, or elected executive officers is predicated on the claim that punishment ought to be applied in ways that restore a felt sense of power to victims made to feel powerless by their aggressors. In many cases, victims are best vindicated by imposing upon their wrongdoers penalties as severe as the harms inflicted on their victims—namely, penalties that on a retributive theory are deemed proportionate to a wrongdoer's just deserts. But in some cases, victims best recover a felt sense of power and control if they are allowed to plead for, and obtain, mercy on behalf of those who have injured them. After all, nothing could be more God-like than the ability to give grace, and hence, a legal system that affords victims the power to waive their offenders' just punishments grants victims a power that shames the brute force with which their aggressors victimized them.<sup>18</sup> On this argument, then, official acts of mercy towards those who have committed crimes are justified because private acts of mercy towards such offenders are justified.<sup>19</sup>

I shall return in the next section to the claim that private acts of mercy by victims towards those who have victimized them are justified. What I want to say here is this: while it may be true that victims have private rights to exact or waive retribution for moral wrongs in which the legal system takes no interest, and while it may be true that victims have private rights to participate or to refuse to participate in the public prosecution of those who have committed legal wrongs against them (not an obvious claim), it does not follow that officials within the criminal justice system are justified in taking a victim's preferences concerning the penalties accorded her assailant as the touchstone of the justness of a penalty. Now it *would* follow that victims would have rights to dictate the punishments awarded their assailants if the justice system were properly devoted to ensuring that victims were accorded corrective justice—if the best theory of its function were to ensure that victims were vindicated through penalties imposed upon those who wronged them. For then, if victims required little or no vindication, it would follow that officials ought to impose little or no punishment on their wrongdoers. But I take it, for lots of reasons, both referenced above<sup>20</sup> and discussed elsewhere,<sup>21</sup>

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<sup>18</sup> "If a person foolishly does me wrong, I will return to him the protection of my boundless love. The more evil that comes from him the more good will go from me. I will always give off only the fragrance of goodness." The Buddha, *The Sermon on Abuse*, available at [http://www.mountain.com.au/buddha/carus\\_57.htm](http://www.mountain.com.au/buddha/carus_57.htm) (last visited Feb. 11, 2007).

<sup>19</sup> Consider the story of five-year-old Kai Leigh Harriott, who confronted the man who fired a stray gunshot that paralyzed her, saying "What you done to me was wrong." But as she went on to tell the court, "I still forgive him." As the *Boston Globe* story retold it, "Kai and four members of her family told a Suffolk Superior Court judge that the shooting had changed their lives forever, but had also shown them the value of forgiveness. 'We're not victims here; we're victors,' said Kai's mother, Tonya David, addressing the court." Jonathan Saltzman, *I Still Forgive Him*, BOSTON GLOBE, Apr. 14, 2006, at A1.

<sup>20</sup> See *supra* text accompanying note 13.

<sup>21</sup> Heidi M. Hurd, *Expressing Doubts About Expressivism*, 2005 U. CHI. LEGAL F. 405, 406–08 (discussing corrective justice theories of punishment).

that the criminal law is poorly explained and justified by a corrective justice theory that conceives of punishment as a vehicle for restoring victims to their *ex ante* psychological circumstances.

Of course, one could be a retributivist who believes that offenders should be punished proportionately to the harms they have done to others, but who further believes that a victim who needs no vindication has clearly suffered no lasting harm for which punishment is owed. One who holds such a theory would similarly find my claim above to be false, for it would follow that if a victim's plea for clemency on the part of her assailant were *per se* evidence that her assailant did her no legally-relevant harm, then a judge would rightly waive retribution whenever a victim sought such clemency.

There are two things to say about this move, however. First, it presupposes a subjective theory of wrongdoing, rather than an objective theory. It is committed to the claim that a woman who has been brutally raped and maimed has suffered no wrong if she psychologically "turns the other cheek" and feels no sense of victimization. Since it seems to me that the woman has been wronged whether she thinks so or not, or feels so or not, I would not be inclined to marry a subjective theory of wrongdoing with a retributive theory of punishment so as to give victims ownership of the question of whether their assailants deserve punishment. Second, even if there is merit in the argument that victims ought to be able to declare definitively whether or not they have been victimized (so as to vitiate the wrongfulness of another's culpable actions by a psychological response that amounts to something like after-the-fact consent), this argument would not amount to an argument for mercy, but for justice. If victims ought to control the question of whether offenders have done them wrong, and therefore the question of whether offenders deserve punishment, then it would follow that when a victim seeks leniency, the offender *deserves* leniency. An official who responds accordingly does not extend mercy; he imposes a penalty consistent with the felt wrong done to the victim, and hence, the just deserts of the defendant.

Consider a fourth instance in which the suspension of a criminal sentence is thought by many to be appropriate: in cases in which those who have served long sentences are approaching death.<sup>22</sup> Many believe that it is unseemly to allow people to die in jail; that even those who have received life sentences without possibility of parole ought to be released in their final years, months, or days so that they do not spend their dying moments in prison. Are those who harbor such a belief proponents of official mercy? Are they defending a circumstance in which there are significant moral reasons to suspend what justice would require? I think not. Most typically, such advocates believe that life-long imprisonment is unjust, and that its injustice becomes manifest in the waning years of an inmate's life when the old man he has become bears little resemblance physically, temperamentally, or psychologically to the young man who once deliberately

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<sup>22</sup> See, e.g., Nigel Walker, *The Quiddity of Mercy*, 70 PHIL. 27, 33 (1995).

committed an inexcusable deed. Alternatively, however, such advocates are utilitarians who find no deterrent value (of a specific sort) in the further incarceration of someone who can reliably be predicted to be of no further danger to society, and who are convinced that whatever incremental benefits of general deterrence are obtained by requiring someone to spend his dying hours behind bars are outweighed by the benefits to him of allowing him to die a free man. Whether it be justice or utility that drives pleas to release aged inmates, those who make these arguments are not, in the end, advocates of mercy. They are either retributivists who are making desert-based arguments about the injustice of life-imprisonment as a penalty, or they are not retributivists at all, in which case they are not making arguments for departing from what is deserved (for they do not take desert to be a relevant moral variable in assessing punishments to begin with).<sup>23</sup>

There are many other arguments for official clemency that superficially disguise themselves as arguments for mercy but are, in the end, predicated on utilitarian claims about how best to maximize social welfare, or otherwise invoke theories of punishment at odds with retributivism. When President Gerald Ford pardoned past-President Richard Nixon of all potential offenses committed while in the presidency, he said: "I do believe with all my heart and mind and spirit that I, not as President, but as a humble servant of God, will receive justice without mercy if I fail to show mercy."<sup>24</sup> However, President Ford went on to say: "But it is not the ultimate fate of Richard Nixon that most concerns me—though surely it deeply troubles every decent and compassionate person—but the immediate future of this great country. . . . As President, my primary concern must always be the greatest good of all the people of the United States, whose servant I am."<sup>25</sup> And in his official *Proclamation of Pardon*, President Ford's sole explanation for pardoning past-President Richard Nixon was stated as follows:

It is believed that a trial of Richard Nixon, if it became necessary, could not fairly begin until a year or more has elapsed. In the meantime, the tranquility to which this nation has been restored by the events of recent weeks could be irreparably lost by the prospects of bring to trial a former President of the United States. The prospects of such a trial will cause prolonged and divisive debate over the propriety of exposing to further

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<sup>23</sup> The same should be said about the related argument that mercy is appropriate when claims against wrongdoers have been made "stale" by the passage of time. See Alwynne Smart, *Mercy*, 43 PHIL. 345, 354–58 (1968). Those who are convinced that wrongdoers who have been caught after years of being on the lamb should be punished less than would have been their due had they been apprehended at the time of their crime either believe that such persons no longer deserve punishment (because, as it is sometimes said, they are "not the same people" as those who committed the crimes), or they repair to a deterrence theory and argue that late-in-life punishment will accomplish no appreciable gains in specific or general deterrence.

<sup>24</sup> *Statement by the President in Connection with his Proclamation Pardoning Nixon*, *supra* note 17.

<sup>25</sup> *Id.*



punishment and degradation a man who has already paid the unprecedented penalty of relinquishing the highest elective office in the United States.<sup>26</sup>

If President Nixon did commit criminal offenses that would have merited punishment if proved, then he probably received less than his just deserts as a result of President Ford's pardon (notwithstanding arguments that he had "suffered enough"). But inasmuch as President Ford issued the pardon as a means of restoring and preserving social order and resurrecting the nation's trust in the office of the presidency, his pardon was not merciful but prudent. It was motivated by a desire to maximize social utility by reunifying the citizenry, rather than by a desire to alleviate Nixon's genuinely deserved punishment.<sup>27</sup>

A similar thing must be said of the justification of mercy advanced by Alwynne Smart in her field-defining article on the topic in 1968. Smart maintained that mercy is morally defensible when a refusal to bestow it would entail great suffering by innocent dependents. We are "justified in being merciful . . . only when we are obliged to be by the claims that other obligations have upon us."<sup>28</sup> In her view, legal officials have obligations not to impose suffering on innocent third parties, and when punishing a wrongdoer will have such secondary consequences, these obligations may trump the obligation to exact retribution.

I think that there are only two ways to interpret this claim. One is to conclude that Smart was not a thorough-going retributivist, but rather a mixed theorist about punishment who believed that desert is a necessary but not a sufficient condition for punishment. On such a mixed theory, one punishes a wrongdoer (up to the point at which it would be undeserved) only if one maximizes welfare by so doing. It would follow from this theory of punishment that one should be "merciful" to a wrongdoer when the harm inflicted on his family members by his imprisonment would exceed the social benefits of his incarceration.

The second way to interpret Smart's claim is to attribute to her the view that persons can have (*prima facie*) conflicting obligations. Either such obligations turn out to have interlocking exceptions, or they turn out to be of varying weights, such that conflicts are resolved by abiding by the most weighty of the obligations that bind. On this interpretation, judges have an obligation to exact retribution from wrongdoers unless they will cause harm to innocent third parties; or the

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<sup>26</sup> *Proclamation of Pardon*, N.Y. TIMES, Sept. 9, 1974, at 73.

<sup>27</sup> One might think that there are instances, however, in which the motives for mercy are overdetermined—in which they reflect both retributive and utilitarian concerns—such that we cannot easily categorize them. Consider, for example, President Lincoln's and President Johnson's pardons of Confederate soldiers, which were justified for mixed reasons: to promote national reunification (a utilitarian goal) and to reflect the judgment that Confederate soldiers were not really traitors (a goal consistent with retributive theory). See Kent Greenawalt, *Vietnam Amnesty—Problems of Justice and Line-Drawing*, 11 GA. L. REV. 1, 6 (1976).

<sup>28</sup> Smart, *supra* note 1, at 359.

obligation not to harm innocent third parties is more weighty than the obligation to achieve retributive justice. I have to say that I don't believe either of these claims. That is, I don't believe that judges, *qua* judges, (or other legal officials, *qua* legal officials) have obligations to safeguard the well-being of innocent third parties at the expense of retributive justice.<sup>29</sup> But if one does believe such claims, one parts ways with a retributive theory of punishment as surely as one does if one embraces a mixed theory of punishment. For retributivists take punishment to be justified if and only if a wrongdoer deserves it. On this view, desert is both a necessary and a sufficient condition for proportionate punishment. One who would postulate competing obligations that can, in various circumstances, win out against the obligation to impose retribution has embraced a theory of punishment that is analogous to that of the mixed theorist. Under such a theory, mercy is no more mercy than is leniency in the name of national harmony.<sup>30</sup>

It is possible to put the thesis that I have advanced in this section as follows: Whenever we find ourselves in agreement with an official's decision to lighten the penalty associated with a wrongdoer's misdeed, either (1) we are moved by a theory of punishment that parts ways with retributivism, so as to be indifferent to the match between the penalty in question and the just deserts of an offender, or (2) we are responding to a situation in which a "gap"—as it has been called<sup>31</sup>—between what the law rightly requires and what morality demands has made itself manifest. If the first explanation best captures our willingness to defend the official's decision, then it is a misnomer to describe ourselves (or the official) as defenders of mercy. Rather, we should simply describe ourselves as proponents of a theory that dictates punishments that are sometimes at odds with the just deserts of offenders—for example, a utilitarian deterrence theory or an expressivist theory or a victim-vindication theory.

If the second explanation better accounts for our intuitions concerning the official's clemency, then it is again a misnomer to describe ourselves (or the official) as defenders of mercy. For while we are anxious to spare another a punishment that seems both legally required and morally harsh, we are, in fact, actually responding to the fact that sometimes the best law that a legislature can write will require judgments of legal guilt in particular cases in which there is no moral guilt. Thus, for example, standard criminal codes are likely right to embody

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<sup>29</sup> As Kathleen Dean Moore pithily puts it after citing numerous examples of presidents who have invoked the harms done wives and children as justifications for pardoning their husbands and fathers, "Surely society should provide a safety net so that offenders' dependents do not go hungry. But pardoning the offender is an unjust way to accomplish what could be achieved by means consistent with just deserts." MOORE, *supra* note 6, at 207.

<sup>30</sup> For further discussion of the claim that retributivism is a "single principle theory," see IGOR PRIMORATZ, *JUSTIFYING LEGAL PUNISHMENT* 67–81 (1989). For a critique of this claim and the larger claim that by rejecting a "single principle theory" retributivism can accommodate mercy, see Andrew Brien, *Mercy, Utilitarianism, and Retributivism*, 24 *PHILOSOPHIA* 493 (1995).

<sup>31</sup> Larry Alexander, *The Gap*, 14 *HARV. J.L. & PUB. POL'Y* 695, 696 (1991).

a general rule that requires imminent peril before a private person can resort to the use of deadly force in self defense. Yet one can readily imagine a case in which pre-emptive self-defense would seem morally justified; in which the victim of a future attack knows that she will be unable to defend herself at the time of peril, making self-defense possible only if accompanied by the element of surprise. To take a second example, standard codes probably rightly embody a general rule against the intentional taking of another's life absent self-defense or necessity. But many believe that while the law is right to refuse to generalize a defense for "mercy killings," there are cases in which a person acts morally by risking his own liberty in order to honor the pleas of a loved one to release her from unbearable pain by ending her life. When we applaud an official's use of discretion to suspend legally-required penalties in "gappy cases," in which the demands of law depart from the demands of morality, we are not applauding mercy; we are applauding justice.<sup>32</sup> We are responding to the conviction that legal penalties should match moral deserts, so that when someone has committed a legally-prohibited deed for morally justified reasons, he ought to receive a penalty (if any) that matches his moral deserts.

#### IV. ACTS OF MERCY BY INDIVIDUALS

It is the nature of being a rights-holder that one is within one's rights able to waive one's rights. If victims acquire rights to compensation when others do them wrong, it follows that they can waive those rights—i.e., that they do no wrong to forgive debts of compensation owed to them by wrongdoers. Similarly, if victims acquire rights to exact private retribution from those who have committed moral wrongs against them, then presumably, they are morally entitled to waive these rights as well. And if victims have moral rights to participate in the prosecution of wrongs that have been defined by a legal system as crimes (a contentious claim that I shall not explore here), then it would seem to follow that they similarly have rights to refuse to aid officials in bringing a criminal to justice (e.g., by refusing to sign a complaint or give testimony). That private actors have these rights that entail that mercy can be a matter of right does not fully settle the question of the morality of mercy. For, as I have argued at great lengths elsewhere,<sup>33</sup> it is perfectly intelligible to praise and blame people for how they exercise their rights. There are many instances in which we laud others for going "beyond the call of duty"—for setting aside their rights in the name of others' good, as when a soldier throws himself on a grenade to save his buddies, or a bystander rushes into a

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<sup>32</sup> For a discussion of the essential role and nature of "modes of 'equitabilizing' or individualizing the administration of justice," see Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. REV. 925 (1960); Leslie Sebba, *Clemency in Perspective*, in *CRIMINOLOGY IN PERSPECTIVE* 221 (Simha F. Landau & Leslie Sebba eds., 1977).

<sup>33</sup> Heidi M. Hurd, *Duties Beyond the Call of Duty*, 6 ANN. REV. L. & ETHICS 1 (1998).

burning building to save the trapped dog of a total stranger. And there are many instances, as well, in which we condemn others for “standing on their rights”—for exercising their free speech rights to say hurtful things about others, for exercising their property rights to destroy artifacts of timeless value, for exercising parenting rights in ways that grossly curtail the prospects their children will have as adults.

So the question in this section is not whether victims have rights to extend well-motivated clemency to those who have wronged them by waiving the debts they are owed in compensation or the punishments they would have a right to impose. The question is whether it is ever morally laudable, or even morally neutral, to do so. Put more precisely, when (if ever) is mercy supererogatory, such that while one has no obligation to grant it, it is praiseworthy to do so? And when is mercy suberogatory, such that while one has a right to extend it, it is blameworthy to do so? Are there ever instances in which mercy is “quasi-supererogatory,” such that it is perversely praiseworthy to give it and blameworthy to withhold it? And when we find an act of mercy to be laudable, is it really an act of mercy—or is it laudable precisely because it is not, in fact, an act of mercy at all?

Now, right off the bat, it should be puzzling to suggest that it can be morally wrong to exercise moral rights. After all, in what sense of “wrong” can it ever be wrong to exercise a right? In what sense of “ought” can we say that someone “ought not” to do what he is entitled to do, or that someone ought to do what she is entitled not to do? Typically “oughts” are unpacked as deontic obligations, such that if we ought not to do something, we have no right to do it, and if we ought to do something, we have no right not to do it. Clearly to claim that persons either ought or ought not to exercise certain rights presupposes the existence of “non-obligatory oughts.” I have argued at great length elsewhere that the only means of making sense of such non-obligatory oughts is by repairing to an aretaic theory about the sorts of character traits that persons are aretaically obligated to cultivate or repress over their lifetimes. By superimposing an aretaic theory of the sorts of persons we ought to be over our lifetimes onto a deontic theory of the sorts of actions that we are and are not entitled to perform at razor points in time, we can morally praise and blame actions over which we have rightful discretion. Thus, we can say that someone is deontically entitled to give racist speeches and join racist organizations, but inasmuch as he ought to be the sort of person who appreciates that race is a morally irrelevant characteristic, he ought to exercise his rights of speech and association in other ways (and he is therefore aretaically blameworthy for persisting in the activities that are within his (deontic) rights). Similarly, we can say that someone is well within her deontic rights to refuse to be an organ donor, but inasmuch as she ought to be the kind of person who appreciates that the lives of others are of equal worth to her own, she ought to be willing to give life-saving bone marrow if so doing will not adversely affect her own life prospects (and she is therefore aretaically praiseworthy for going beyond the call of (deontic) duty in such a manner).

This altogether-too-hasty explication of the moral apparatus required to make sense of how we can pass moral judgment on the exercise of moral rights sets up the inquiry of this section. When do acts of mercy reveal virtuous character traits, such that someone likely would not have to or be able to cultivate such traits without being inclined to engage in such merciful conduct? And when do acts of mercy reveal vice rather than virtue, such that we condemn them because we appreciate that they belie weakness or self-aggrandizement, rather than compassion or selflessness? I cannot, of course, canvass all circumstances in which it might be thought virtuous for someone to exact less than is his due from one who has done him harm, but what I shall do in the next pages is examine the most salient or pervasive arguments for private mercy that are discussed in the literature so as to determine, once again, whether (1) they are arguments for true mercy, and (2) they capture circumstances in which we genuinely think it a good to lift a moral yoke under which another would otherwise rightly labor.

Let me start where all my moral presuppositions start: with my mother. My mother is famous for insisting that those who do us wrong “are more to be pitied than blamed.” In her view, we should be compassionate towards those who offend against us, because their moral failings are of a sort that reveal that they are not worthy objects of our ire. We should pity their inability to live up to the expectations of fully responsible, virtuous persons, and therefore, we should be lenient in our responses to their wrongs. This advice is typically accompanied by sympathetic tales about their pasts designed to show that they grew up lacking the education, support, or care necessary to become morally healthy adults capable of making morally responsible choices: they were abused, they were neglected, they were poorly parented, they fell in with the wrong crowd, they lacked adequate role models, they worked in dead-end jobs surrounded by people of limited ability and poor character, they became addicted to drugs or alcohol, they suffered from debilitating health problems, etc....

As I said in Part I, however, while pity motivates apparent mercy, it is just that: a mere appearance. For the claim that those who wrong us are too pitiful to merit blame is a claim that accords them a general excuse for living. This excuse makes them undeserving of responses on our part that presuppose that they have the capacity to go through life without doing wrong to others. It accords them morally what the criminal justice system cannot accord them legally—a generalized excuse that does not require a showing of anything so specific as external duress, insanity, diminished capacity, or provocation/passion. I am not going to take up the merits of my mother’s claim that people who do others wrong are simply too pitiful to blame (although there is much to say about the worry that pity is condescending and in many instances far more a vice than a virtue). What is clear is that if she is right—if some people do not acquire duties of corrective justice and retribution when they commit wrongs, any more than do dogs that bite—then leniency towards them is not a matter of mercy but of right. Those who do not deserve blame do not deserve punishment; and hence, those who forgive

them their debts cannot be praised for going beyond the call of duty or blamed for indulging a weakness of character. They can merely be credited with doing their duty under a retributive theory that condemns penalties that are disproportionate to moral deserts. In short, while this argument may be a plausible argument for leniency, it is not an argument for true mercy.

A second line of argument for the morality of private mercy proceeds from claims about the demands of rationality and the substantive value of equality—by the dual demands, in particular, that we judge like cases alike (the rationality claim), and that we treat like cases alike (the substantive equality claim). This line of argument can take three distinct but related forms: one that vindicates the value of reciprocity, one that vindicates the value of equal treatment, and one that vindicates the value of forgiveness of self. The argument from reciprocity draws on the notion that one favor deserves another. All of us will do moral wrongs to others at various points in our lives; all of us will be deserving of moral retribution; and all of us will likely bear obligations to compensate those we wrong in some fashion. If we are graced by the mercy of those we wrong—if our moral ledger is wiped clean by their willingness to waive their secondary rights to compensation and retribution—then surely we owe them such mercy in return should they ever wrong us in similar ways. To give back in kind gifts we have been given by others; to do favorably unto others as they have done favorably to us; to match kindness with kindness is dictated by the value of reciprocity—a value rooted in the mandates of rationality and equality that compels us to treat others as we have been treated by them.

The second argument concerning the demands of equal treatment generalizes from the favors we reciprocally owe those who have done us favors to favors we owe others in circumstances similar to our own. On this argument, if anyone has been merciful to us (or, relatedly, if we ever considered it appropriate for someone to be merciful to us), we have an obligation to be merciful to others who find themselves in like circumstances. Put in the pithy terms of the classic cliché, those who live in glass houses ought not to throw bricks; or in the more eloquent words of Jesus Christ, “He that is without sin among you, let him first cast a stone . . . .”<sup>34</sup> Inasmuch as we must recognize our own inability to live life free of wrongdoing, so we must accord others mercy when we would welcome it ourselves, or when we have been accorded it in like circumstances by others. Such is the lesson that we celebrate in *Les Misérables* when Jean Valjean promises the dying Fantine, whom he has unwittingly harmed, to adopt her young daughter Cosette, and in the end, when he saves Inspector Javert, who has spent a lifetime denying him mercy.<sup>35</sup> And such is the lesson that makes sense of Javert’s suicide, for he understands that the demands of equality seemingly require him to repay, in kind, the mercy that Valjean has bestowed on him in a manner that will make hypocritical his lifelong

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<sup>34</sup> *John* 8:7.

<sup>35</sup> Hugo, *supra* note 10.

devotion to a rigid retributivism. And finally, such is the secular lesson to be drawn from the non-secular Parable of the Unmerciful Servant:

Then Peter came to Jesus and asked, 'Lord, how many times shall I forgive my brother when he sins against me? Up to seven times?' Jesus answered, 'I tell you, not seven times, but seventy-seven times.' Therefore, the kingdom of heaven is like a king who wanted to settle accounts with his servants. As he began the settlement, a man who owed him ten thousand talents was brought to him. Since he was not able to pay, the master ordered that he and his wife and his children and all that he had be sold to repay the debt. The servant fell on his knees before him. 'Be patient with me,' he begged, 'and I will pay back everything.' The servant's master took pity on him, canceled the debt and let him go. But when that servant went out, he found one of his fellow servants who owed him a hundred denarii. He grabbed him and began to choke him. 'Pay back what you owe me!' he demanded. His fellow servant fell to his knees and begged him, 'Be patient with me, and I will pay you back.' But he refused. Instead, he went off and had the man thrown into prison until he could pay the debt. Then the master called the servant in. 'You wicked servant,' he said, 'I canceled all that debt of yours because you begged me to. Shouldn't you have had mercy on your fellow servant just as I had on you?' In anger his master turned him over to the jailers to be tortured, until he should pay back all he owed. 'This is how my heavenly Father will treat each of you unless you forgive your brother from your heart.'<sup>36</sup>

The third argument that draws on claims of rationality and substantive equality links these claims to the value of self-forgiveness. As Jean Hampton puts the point: "How can one who is unable to forgive the sins of others forgive his own sins? The evidence and principles he uses to assess the worthiness of others will, whether he likes it or not, be present when he assesses himself. The more easily he condemns others, the more easily will he be led to condemn himself."<sup>37</sup> While those who do grave wrongs to others ought never to find it possible to forgive themselves for those wrongs, there is surely much to be said for coming to terms with the fact that one will inevitably make mistakes that impact adversely on others and one will periodically succumb to defects of character so as to act in ways that are selfish, spiteful, jealous, vindictive, rude, and self-aggrandizing. If we think that it is possible to "be too hard on oneself," then we have to think that it

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<sup>36</sup> *Matthew* 18:21–35.

<sup>37</sup> Jean Hampton, *The Retributive Idea*, in *FORGIVENESS AND MERCY*, *supra* note 1, at 111, 156–57.

is incumbent upon us not to be too hard on others, for forgiveness of oneself entails forgiveness of the similar failings of others, and *vice versa*.<sup>38</sup>

These arguments all derive the morality of mercy from the demands of rationality and equality, but the question now presents itself: are these really arguments that make plausible the morality of mercy, or do these arguments make mercy morally plausible precisely because they convert mercy into something else that is of moral worth? The problem with arguments that work through the demands of reason and equality is that they can make anything moral to the extent that it exemplifies the like treatment of like cases. But that is simply because treating like cases alike is moral. All sorts of otherwise wicked actions are to some degree good if they genuinely copy the way people have been treated in similar instances in the past, just because it is a free-standing good to ensure that those who are similarly situated are treated similarly. But when we recognize that equal treatment is a good even when the treatment is bad, that does nothing to morally launder the treatment itself. It is small moral consolation to one who is tortured that his anguish is of the same kind and duration as was that of those who came before and those who will come after, for the goodness that comes from honoring the demands of equality is swamped by the wickedness of the treatment that is being equally applied.

And so it is with mercy. To say that we should be merciful to those who have exempted us from the demands of justice, or that we should be merciful to those whose circumstances are morally similar to the circumstances that prompted others to extend mercy to us, or that we should be merciful to others in ways that will allow us to go easy on ourselves when justice might demand greater preoccupation with our own failings, is to say that we should accord equal judgment and equal treatment to all those who are equally situated. This is no more an argument for mercy than it is an argument for any treatment whatsoever that accords with the demands of equality. The arguments for mercy outlined above appear to give mercy a moral leg up, but again, it is just that: a mere appearance. We embrace their conclusions in a way that we do not embrace analogous arguments for the morality of torture predicated on the value of equality ("he should be tortured because he was himself a torturer in the past; or because others like him have been tortured in the past") because we are predisposed to think of mercy as a good, and we therefore do not recognize that all the work to make mercy morally plausible in these arguments is work done by the value of equality alone. Let me sum up the point this way. Equality is a value. It lends greater value to things that are themselves morally valuable; and it lends a modicum of value to things that are themselves morally heinous. But in the end, it does not alter the moral character of

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<sup>38</sup> "What has been known for some time is that the vice of false pride stands formidably in the path of forgiveness. Generosity of spirit proves particularly difficult toward others if we have not ourselves first been liberated by its operation, validating the familiar truth that self-forgiveness quite regularly conditions forgiveness of others." Herbert Morris, *Murphy on Forgiveness*, 7 CRIM. JUST. ETHICS, Summer/Fall 1988, at 15, 16-17.



what it recommends more of! So, while mercy may demand more mercy, Javert may have been absolutely right: if mercy is itself an unjustified violation of the demands of justice, more of it cannot make it any less so.

A third argument for cultivating a merciful disposition draws on the intuition that there is virtue in being the sort of person who is capable of doing difficult things—performing demanding physical activities and bearing up under enormous emotional strains. Our common conception of a hero is one who can surmount his fears in order to accomplish physical feats that others would not attempt, or one who has the emotional resilience to endure loss, loneliness, isolation, or brutality that would defeat the ordinary person. We regularly laud those who bear up under crushing emotional pressure for having “strength of character,” and we admire those who do what is difficult simply because it appears admirable, in and of itself, to triumph over adversity.

The notion that the morality of mercy derives from its raw psychological difficulty is captured by claims of its God-like status. “To err is human, to forgive divine.”<sup>39</sup> Or as Shakespeare wrote of mercy:

It is enthroned in the heart of kings,  
It is an attribute of God himself;  
And earthly power doth then show likest God’s  
When mercy seasons justice.<sup>40</sup>

We are fascinated by those who have the emotional and psychological fortitude to resist the natural human temptation to seek an eye for an eye and a tooth for a tooth when they have been forced to suffer the loss of an eye or a tooth at the hands of another. And we tend to accord their seemingly unnatural fortitude an elevated moral status just because we admire the kind of inner strength that is required to conquer the passions that would make retribution so satisfying.

Of course, we need to be cautious about declaring mercy to be a showing of inner strength, for in many instances, it appears to be just the opposite. One who is quick to forgive others who wrong her and waives rights to redress too easily may well have an insufficient sense of self-worth, a warped understanding of her own rights and of the correlative duties that they create in others, an inadequately developed sense of justice.<sup>41</sup> We condemn battered women who make repeated

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<sup>39</sup> Alexander Pope, *An Essay on Criticism*, in THE OXFORD AUTHORS: ALEXANDER POPE 17 (Pat Rogers ed., Oxford Univ. Press 1993) (1711). Or as the Midrash tells: Moses spoke the words, “The Lord, the Lord, a God full of compassion and gracious, slow to anger, and plenteous in mercy and truth; keeping mercy for thousands, forgiving iniquity and transgression and sin.” *Exodus* 34: 6–7.

<sup>40</sup> WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1.

<sup>41</sup> Jeffrie Murphy has made a concern for self-respect a cornerstone of his skepticism about the virtue of forgiveness (and derivatively, private acts of mercy). For his latest book-length treatment of the perils of forgiveness and the conditions of its appropriate exercise, see JEFFRIE G. MURPHY, GETTING EVEN: FORGIVENESS AND ITS LIMITS (2003).

excuses for their abusing husbands for both failing to stand up for their own rights and for enabling their husbands to repeatedly violate their correlative obligations. We criticize parents who indulge their children's misbehavior, considering their refusal to enforce the conditions of justice to be evidence of weakness, rather than strength. And most of us have found ourselves counseling friends to stand up for themselves in relationships in which they seem to give far more than they take, more out of weakness than of strength. So the first thing to say about this argument for the morality of mercy is that mercy derives from inner strength in some circumstances, but not in all; and hence, we cannot say that mercy evidences a virtuous character by necessarily evidencing strength of character.

The second thing that we need to be cautious about is confusing the God-like with the demi-God-like. In many instances, the ability to give mercy is an intoxicating power, akin to that of a Roman emperor whose decision to give a thumb's up or a thumb's down dictates whether a fallen gladiator should be spared or slaughtered. Consider the exchange between Oskar Schindler (played by Liam Neeson) and Amon Goeth (played by Ralph Fiennes) in Steven Spielberg's classic movie *Schindler's List*. Schindler is cagily trying to persuade Goeth to stop shooting Jews as target practice from his villa balcony within the prison camp over which he presides.

*Oskar Schindler*: Power is when we have every justification to kill, and we don't.

*Amon Goeth*: You think that's power?

*Oskar Schindler*: That's what the Emperor said. A man steals something, he's brought in before the Emperor, he throws himself down on the ground. He begs for his life, he knows he's going to die. And the Emperor . . . pardons him. This worthless man, he lets him go.

*Amon Goeth*: I think you are drunk.

*Oskar Schindler*: That's power, Amon. That is power.<sup>42</sup>

As this haunting exchange well captures, mercy represents the power classically reserved only for kings. In private hands, it reflects the delicious opportunity to hold power over one who used his own power in harmful ways, and it thereby permits one psychologically to transition from the role of a victim to a role of a conqueror—to use one's new-found power to alleviate, rather than to inflict, suffering, thereby demonstrating that one is morally superior to one's assailant. While such a display of mercy may seem virtuous, I would say that it is merely a display, and not the real thing, and as such, we should be wary about presuming that those who give the equivalent of a thumb's up to those who have offended against them are necessarily displaying virtue, even if we are confident that they are not displaying the sort of weakness previously discussed. The same is

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<sup>42</sup> SCHINDLER'S LIST (Universal Pictures 1993).

true of displays of mercy by those who are seeking the virtue of martyrdom. Self-sacrifice is in some instances quite heroic, and clearly indicative of a virtuous character; but those who sacrifice themselves so that they will be thought of as self-sacrificing by others, or so that they may conceive of themselves as self-sacrificing, are not self-sacrificing at all: they are self-aggrandizing. In short, self-interested acts of mercy are not mercy (at least so I argued in Part I), and thus, to the extent that clemency is motivated by a need for self-restoration, self-aggrandizement, or self-promotion (however understandable its temptation), it does not deserve the name of mercy.

We are left then with those far-more-rare instances in which individuals genuinely grant mercy to others under circumstances in which their mercy manifests a remarkable ability to substitute genuine concern for their wrongdoers for legitimate concern for themselves consistently with a healthy sense of their own self-worth. Think of Jesus appealing to God from his tortuous place on the cross: "Father, forgive them for they do not know what they do."<sup>43</sup> While, of course, one could count this an example of pity that extends a generalized excuse for ignorance to those who have unwittingly done a grave wrong, we surely admire the extraordinary strength of character exemplified by Christ as he actively gives aid to his tormentors even as he is being tormented.

But which comes first: Christ's mercy or his strength? That is, when we admire the strength in mercy, are we admiring mercy, or are we admiring strength? Can we say that mercy is moral when and if it manifests psychological strength of character? Or do we simply want to say that strength of character is laudable, and when it shows itself in acts of mercy, those acts are made laudable to that extent (if to no other) extent)? Is strength of character like exercises of equality—it makes any deed better by virtue of exemplifying it, but it does nothing to morally alter the deed itself? I think this is the case. I think that we have vindicated the morality of mercy through raw boot-strapping if we declare it to be laudable when difficult, for what we really mean is that those who can do what is genuinely difficult are to be praised for their fortitude, and their deeds are thereby made better for evidencing that character. But bad acts that demonstrate strength remain bad, and so mercy extracts no moral advantage from the fact that it is sometimes remarkably difficult to administer.

This brings me to the final argument for the morality of mercy—an argument that I think has great potential to disprove the retributivist's conviction that mercy is always and inevitably an unjustified affront to the dictates of justice. Aristotle famously put this argument as follows: "When men are friends they have no need of justice."<sup>44</sup> And Jeffrie Murphy has nicely augmented this argument as follows:

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<sup>43</sup> *Luke 23:34.*

<sup>44</sup> ARISTOTLE, *THE ETHICS OF ARISTOTLE: THE NICOMACHEAN ETHICS* 259 (J.A.K. Thomson trans., Penguin Books 1976).

The people with whom we are most intimate are those who can harm us the most. . . . Deep as these hurts of intimacy may be, however, what would be the consequence of never forgiving any of them? Surely it would be this: the impossibility of ever having the kind of intimate relationships that are one of the crowning delights of human existence. The person who cannot forgive is the person who cannot have friends or lovers.<sup>45</sup>

As I have argued more generally elsewhere, without the category of so-called quasi-supererogatory actions, it appears difficult to explicate concepts of friendship and love.<sup>46</sup> What it *means* to love another or to be a friend to another is to stand in a relationship in which one ought to supererogate, and in which one is properly blamed for failures to do so.<sup>47</sup> Inasmuch as friendship and love necessitate supererogation, and inasmuch as we blame our friends for failing to be good friends and feel cheated by loved ones when they (merely) do no more for us than we are owed, we cannot make sense of our most vital relationships without appealing to the notion of quasi-supererogatory actions.

Among the many things that are quasi-supererogatory within intimate relationships, it would seem that mercy is among the most salient. One who does grave wrong to a loved one can hardly lay claim to forgiveness as a matter of right. Indeed, one who manages to forgive the wrong and to reject the moral compensation that would make a once-equal partner into a subservient debtor seems remarkably heroic, for everyone understands how it is the wrongs of those who are closest that wound most deeply and linger most resiliently in one's daily sense of oneself and others. But it would seem that one does not genuinely love another if one is not willing to sacrifice rights and waive duties. And within an intimate relationship, one can be properly blamed for failing to waive the moral debts generated by the transgressions of another. One who is acutely conscious of what he is owed and owes—who keeps a mental ledger on which he records the benefits he has extended and the in-kind payments he has received in satisfaction—is not one who loves. The very nature of love and friendship is that it fails to attend to the keeping of such a ledger. Certainly this is true in the case of parental love. However much our children hurt us, however grave their mistakes and regrettable their choices, our love for them seems properly indifferent to their failings—including their moral failings.<sup>48</sup> Nothing could define a loveless

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<sup>45</sup> Murphy, *supra* note 9, at 17.

<sup>46</sup> Hurd, *supra* note 33, at 1–36.

<sup>47</sup> For a nicely developed discussion of this position, see Neera Kapur Badhwar, *Friendship, Justice and Supererogation*, 22 AM. PHIL. Q. 123 (1985).

<sup>48</sup> Recall the tale of David, the greatest king of Israel, who weeps on the walls of his castle for his slain son, Absalom, who stole his throne and provoked a conflict that caused the deaths of thousands. “O my son Absalom, my son, my son Absalom! would God I had died for thee, O Absalom, my son, my son!” 2 *Samuel* 18:33.

childhood more vividly than the prospect of a child having to earn his parents' care and merit his parents' affection. But the same is true of other loving relationships, for deserved love is an oxymoron, and hence, relationships that presuppose that love is properly a reward for good behavior lack any glimmer of appreciation for the ways in which true love transcends concerns of rights and duties.

#### V. CONCLUSION

Let me close first by taking stock of the argument so far, and then by suggesting why I believe that we should always expect, and perhaps always hope, to see acts of mercy that extend far beyond the jurisdiction that I have argued is their legitimate and justified home. In Parts II and III of this article, I argued that retributivists are right to insist that mercy is of misplaced value when exercised by officials within a criminal justice system. As I demonstrated, when we consider an official (a prosecutor, judge, governor, or president) to have been morally justified in reducing a wrongdoer's punishment, one of two things is true: Either (1) we believe that the reduced penalty was justified by a goal that trumped retribution—e.g., the rehabilitation of the wrongdoer, the restoration of the victim, or the maximization of social welfare—so as to be indifferent to whether a wrongdoer's punishment matches his just deserts (i.e., so as to be indifferent to the problem of mercy raised in this article); or (2) we believe that rather than suspending the demands of retribution, the official in fact honored them by bringing the legally-imposed penalty in line with the wrongdoer's moral deserts (for example, by responding to post-conviction evidence of innocence or taking account of ways in which the wrongdoer has already been "punished enough" by other sources of suffering). As I argued, when an official exercises clemency out of a desire to advantage anyone other than the wrongdoer (e.g., to serve the greater good of the community), she cannot aptly be described as exercising mercy. And when she exercises clemency in ways that in fact suspend the just deserts of a wrongdoer (rather than in ways that adjust a legally-imposed penalty so as to cohere it with what is justified morally), she does not do so justifiably. For the only person who has moral standing to waive the obligations of repair and retribution that are owed by a wrongdoer is his victim.

But while a victim may choose to exercise or waive her rights to compensation and private retribution, nothing precludes us from praising or blaming such a choice. While we cannot find *deontic* fault with a victim's decision to waive a wrongdoer's obligation of repair (for deontic failures constitute actions that are wrongful, and one cannot say that an act is deontically wrong if one has a right to do it), we can surely find *aretaic* fault with that choice; for we can think that it manifests a weakness of character—a lack of self-respect, a disposition towards martyrdom, etc. And similarly, while we cannot declare that a victim is not *deontically* entitled to demand redress for every wrong that is done her, we can certainly condemn her for violating the *aretaic* obligation to be of

generous character when she preoccupies herself with ensuring that even the smallest debts are settled. Conversely, there are instances in which we would not blame someone for enforcing his rights to repair or private retribution, but in which we praise him for his choice not to do so.

In Part III of this article, I examined arguments for private mercy that are designed to map when it is praiseworthy of victims to waive their rights to repair and retribution. As I demonstrated, very few of these arguments make mercy, as such, laudatory. Rather, they piggy-back the morality of mercy on the morality of other concerns—e.g., reciprocity towards those who themselves have shown mercy, or the equal treatment of those who are situated similarly to those who have been treated mercifully.

But there is one very important arena in which mercy plays a crucial role—in which mercy is a constitutive virtue—and that is the arena of intimate relationships. One cannot be a friend without being merciful—that is, without forgiving (minor) debts and forgoing the punishment of (minor) transgressions. One cannot love another or function as a healthy partner within a loving relationship without being disposed to assume the best and forgive the worst in the other. One cannot raise children in a loving manner without turning a blind eye to some of their wrongs and waiving rights to redress when they do things that cause harm. And one cannot have a healthy relationship with one's parents if one does not allow their many sacrifices to offset whatever mistakes one discovers they have made as one joins them in adulthood.

And now we must confront a very serious possibility. It may be that one cannot cultivate the character necessary for being a worthy friend, devoted partner, loving parent, and compassionate child to an aging parent without having that character infect one's thoughts and deeds within non-intimate arenas—within police stations and courtrooms and state houses and the White House. It may be that a deeply loving husband and father who is generous of judgment in his relationships with his wife and children cannot simultaneously be a judge who is blind to, or unmoved by, temptations to be (unjustifiably) merciful to wrongdoers who stand before him. It may be that a prosecutor who is a valued friend to many because she sees the best in others and is psychologically willing to make excuses for their shortcomings is likely to allow that disposition to influence her views regarding when wrongdoers should be brought to justice. And in reverse, in may be that the qualities that make one a particularly effective police officer or judge incline one to be the sort of person with whom it is challenging to have a warm and loving relationship.<sup>49</sup> (Who would want to be married to the unforgiving Javier in *Les Misérables*? Who would trust that she could have a happy relationship with the Count of Cristo if she were to find herself within the pages of Alexander

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<sup>49</sup> As Nietzsche famously warned, "Anyone who fights with monsters should make sure that he does not in the process become a monster himself." FRIEDRICH W. NIETZSCHE, *BEYOND GOOD AND EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE* 168 (Marion Faber trans., Oxford Univ. Press 1998) (1886).

Dumas's famous tale?) In short, it may be that the qualities that would make one the kind of friend, father, mother, son, daughter, sister, or brother that we would each most like to be are in tension with the qualities that are required for success as a police officer, prosecutor, judge, governor, or president.<sup>50</sup>

Now to be clear, I use the word "tension" very deliberately. I am not suggesting that the character traits that define the ideal father and those that define the ideal judge are mutually exclusive. But character traits are psychological dispositions; they are habits of thought and action. They incline one towards beliefs, judgments, and decisions before reason has had its say. They function as default responses—as first instincts. They define our essential selves because they assert themselves in moments of crisis, trauma or excitement when our powers to think and act strategically have been suspended or impaired. They are responsible for the moral intuitions that we then use reason to articulate and rationalize, and in that sense, they are at the core of our moral perceptions, beliefs, and judgments. For all of these reasons, character traits tend to be "over-inclusive;" they tend to bleed into circumstances in which reason would rightly exclude them. Thus, deeply honest people tend to be honest to a fault; genuinely courageous people tend to be foolhardy about their own safety; generous people tend to be enablers of those who would fare better with a little "tough love." And in reverse, those who lie to protect their interests tend to lie even when it does not do so; those who indulge their appetites tend to over-indulge them; those who enjoy the limelight tend toward narcissism, and so forth.

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<sup>50</sup> Jacob Adler interestingly argues that far from being in tension with those traits of character that enable a judge to be just, a merciful disposition is essential to deciphering the fine differences between cases so as to ensure that genuinely like cases are treated alike, and genuinely different cases are treated differently. His argument goes like this:

[I]n order to assign a just punishment, a judge must be aware of how much suffering a given sentence will cause. She must be able to tell when a defendant has suffered enough, when a sentence would be excessively cruel, and so on. . . . Now how could a judge make such judgments? A firm grasp of psychological theory is necessary, but apparently not sufficient. One must be able to apply the theory to individual cases, which are almost infinite in variety. It seems that only a sense of empathy could let a judge know what sort of suffering a particular penalty will cause to this person. *But empathy for the suffering of another is compassion, and compassion when it motivates its subject to leniency, is mercy.* Thus only a merciful person could distinguish and act on this relevant factor of suffering.

Jacob Adler, *Murphy and Mercy*, 50 ANALYSIS 262, 266 (1990) (emphasis added). Notice, however, Adler's conflation of empathy and the definition of what it means to be merciful. One can surely agree that being of empathetic character will help a judge to appreciate the impact of a punishment on a given defendant so as to fine-tune the defendant's punishment to his true moral deserts (where what he deserves is, in part, a function of how the defendant will experience a given punishment). But one can reject that it is meaningful to equate acting in accordance with judgments derived, in part, through empathy with the exercise of mercy (which, I have argued, is not the achievement of justice but the deliberate suspension of justice). Adler's conflation makes a merciful character essential to justice, rather than in tension with justice, by definition, not by argument.

It is by virtue of their “spill-over effects” that character traits can create tensions for those who must cross between private and public roles. Put most bluntly, it would be very difficult to be a gushing sentimentalist at home and a unconflicted executioner in the local state prison. For while there is no philosophical contradiction between crying with one’s kids over the death of Ol’ Yeller one night and plunging the syringe into someone guilty of a heinous crime the next morning, it is hard for us to imagine that the dispositions that would incline one to be emotionally empathetic are not hard to harbor simultaneously with the dispositions that would make one an effective career executioner.<sup>51</sup> As Oregon Governor Oswald West said:

No matter how firm a stand he may appear to take, no matter what he may think and argue to the contrary, no man with a heart that pulses rich red blood, no man of real human sympathies can be thrown in direct contact with an unfortunate brother in his hour of distress without responding to those noble instincts which centuries of Christian teachings have implanted in his heart.<sup>52</sup>

If the character traits that people need to be happy and worthy within their intimate relationships are in tension with the character traits that they need to be effective participants in a criminal justice system devoted to exacting retribution from wrongdoers, then we will surely need to decide which is the more important set of character traits to cultivate. Is it more important to be generous in judgment about the errors of others, at the risk of being unjustifiably generous to wrongdoers? Or is it more important to be dispositionally hawkish about considerations of justice, at the risk of bringing standards to bear on loved ones that they cannot meet? Is it more important to cultivate a disposition to assume the

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<sup>51</sup> Johnny Cash captured these spill-over effects with his usual insight in his famous song, *Cocaine Blues* about “the dirty hack who shot [his] woman down”:

In about five minutes, in walked a man  
Holding the verdict in his right hand.  
The verdict read, “In the first degree.”  
I hollered, “Lawdy, lawdy have mercy on me.”

The judge, he smiled as he picked up his pen.  
Ninety-nine years in the Folsom Pen;  
Ninety-nine years underneath that ground.  
I can’t forget the day I shot that bad bitch down.

JOHNNY CASH, *Cocaine Blues*, on *AT FOLSOM PRISON* (Columbia/Legacy 1999) (1968). That the judge smiles in enjoyment at the prospect of imposing a life sentence is very telling, for it conveys the sense that we would like him no more than we would like the defendant. Who would want to be married to a man who could positively take pleasure in condemning a man to life when he is pleading for mercy? And yet, of course, one who would take such pleasure would likely be more effective at delivering up such justice than would one who found it a painful task.

<sup>52</sup> Oswald West, *OREGON JOURNAL*, Jan. 25, 1915, quoted in MOORE, *supra* note 6, at 205.



best of others, at the risk of under-weighting the recidivism of wrongdoers? Or is it more important to develop a toughness about the infractions of others, at the risk of using “tough love” on loved ones who do not need it to be so tough?

Perhaps I am merely a sentimentalist by nature, but I would hazard the view that the character traits that make one a worthy and happy friend, parent, spouse, brother, sister, and adult child, are the ones that ought to win out in the struggle to resolve the tensions that I have identified. There is, of course, nothing obvious about this. But I suspect (though I shall not defend it here) that the arguments that can be mustered for the opposite conclusions are consequentialist in nature (and perhaps patently utilitarian in content). That is, I suspect that in order to mount an argument in favor of having persons mold their characters to suit their professional roles (at the potential expense of their private roles), one would need to make claims about the social importance or utility of those roles. For example, it is socially advantageous to have a justice system, and hence we need police officers, prosecutors, judges, and executioners. We thus need persons who are dispositionally suited to these tasks, and the good of having persons fulfill these tasks effectively trumps the costs to them, their friends, and their family members that derive from cultivating dispositions that create tensions for them within their private lives.

Since I am not, by disposition, a consequentialist, I am inclined to be skeptical of the claim that the interests of individuals can be justifiably sacrificed in the name of the larger social good. It may be, then, that the price that we must pay for superimposing on individuals the professional roles required by a system of retributive punishment is that they will (rightly) allow their private dispositions to seep into their professional decisions. Put bluntly, we may need to recognize that mercy cannot be exorcized from retribution, for it derives from character traits that persons should cultivate in their private lives that trump in importance those that they should cultivate in their public lives. And so, while retributivists are right that mercy has no philosophical place in a system devoted to retributive justice, they are wrong to think that it has no psychological place. For if those who occupy roles within the system are the sorts of persons they ought to be within their private lives, then it is likely that they cannot, will not, and should not work to purge themselves of dispositions that will incline them, from time to time, to show mercy towards those who do not deserve it and should not receive it.

