UNCOMPROMISING MERCY

Kristen Bell

A thesis submitted to the faculty of the University of North Carolina at Chapel Hill in partial fulfillment of the requirements for the degree of Master of Arts in the Department of Philosophy.

Chapel Hill
2008

Approved by:

Gerald Postema

Thomas Hill

Susan Wolf

ABSTRACT

KRISTEN BELL: Uncompromising Mercy
(Under the direction of Gerald Postema)

Tension reigns between mercy and justice. Mercy seasons justice – it gives less than what justice mandates – and in that sense, it requires a departure from justice. But a departure from justice is unjust. On the other hand, if mercy is not distinct from justice, then it is redundant. Mercy would not be mercy, it would simply be justice. Mercy either undermines or collapses into justice, rendering it apparently impossible to be both just and merciful. If mercy is to have an appropriate place in a criminal justice system that prizes justice, we must articulate an uncompromising mercy; a mercy that compromises neither justice nor itself. In this thesis, I argue that mercy is uncompromising when it is given not for reasons of justice, but for other good reasons that do not conflict with justice. I argue that one such reason is that the punisher stands in a relation of liability toward the offender.

TABLE OF CONTENTS

Uncompromising Mercy[1]

"Until you put these things right, you're not entitled to boast of the justice meted out to thieves…You allow these people to be brought up in the worst possible way, and systematically corrupted from their earliest years. Finally, when they grow up and commit the crimes that they were obviously destined to commit, ever since they were children, you start punishing them. In other words, you create thieves, and then punish them for stealing!"

—Thomas More, *Utopia*

I. Introduction

David Woods robbed and murdered 77-year-old Juan Placencia by stabbing him 20 times in 1984. The state of Indiana executed Woods in 2007. Woods was severely physically and psychologically abused as a child. His father abandoned the family and his mother neglected and abused Woods. She would lock the refrigerator and only reward the children with food when they stole for her. She hosted a motorcycle gang in her home that sadistically tortured Woods and carried out sexual acts in front of him. The state removed Woods from his mother's custody when he was fourteen and rotated him through a series of inadequate foster homes. At age nineteen, Woods murdered Placencia and at age forty-two, Woods was executed.[2]

At the thought of the brutal murder of an elderly man, we want punishment to the fullest extent of the law. At the thought of Woods as a victim of horrific abuse and other social ills, we are inclined to show mercy. The inclination to show mercy stands in direct

[1] The title, "Uncompromising Mercy," was influenced by Pamela Heironymi's article, "Articulating an Uncompromising Forgiveness," *Philosophy and Phenomenological Research*, May, 2001.

[2] *Woods v. McBride*, 430 F.3d 813 (2005). Also see Amnesty International, "USA (Indiana): Death penalty / Legal concern: David Leon Woods," 13 April 2007. Retrieved from http://archive.amnesty.org/library/Index/ENGAMR510722007?open&of=ENG-2AM.

conflict with the thought that the offender did something dreadfully wrong. *Mercy* for that *murderer*? How could one simultaneously hold such conflicting thoughts in one's mind? The difficulty in responding to this conflict leads many of us to try to diminish the conflict in one way or another. Some reject the inclination to show mercy by reminding themselves that Woods knew right from wrong despite the abuse he suffered and that many children who suffer abuse do not grow up to commit murder. Others reject the inclination to punish to the fullest extent of the law. Into one's mind comes the philosophical toolkit to show that the offender was not really responsible for his action or the action was not really as wrong as we initially thought. Carefully reinterpreted, the crime is not so bad – after all, he didn't really *mean* to do *that* – and we can feel comfortable diminishing punishment. For many of us, however, neither tack is satisfying. We want a reason to show Woods mercy without diminishing his culpability, but such reasons do not come readily to mind.

I will present an analysis of mercy that aptly accommodates deeply conflicting intuitions about such cases. The analysis does not explain away the conflict we feel, but fully appreciates it and argues for what should follow from it. The argument suggests that we should show offenders like Woods mercy without compromising the thought that they deserve severe punishment. To be upfront, the primary goal of the paper is not to analyze this case in particular, but to analyze mercy and its relationship to criminal justice. On the basis of my analysis, I argue that mercy should have a constrained place in criminal justice. An advantage of my analysis is that it aptly accommodates our conflicting intuitions about crimes like the one described above.

In Part II, I clarify the terms mercy and justice and argue alongside John Tasioulas that most of the incompatibility between them is merely apparent. In Part III, I raise a

problem for Tasioulas' analysis of the relationship between mercy and justice. If mercy is to have an appropriate place in the law, we must show that it is not merely permissible to show mercy but that we have solid grounds from which to argue that we should show mercy. In Part IV, the main section of the paper, I articulate one justifiable ground for mercy, namely that the state ought to show mercy when it stands in a relation of liability toward the offender. This condition is particularly clear when the offender has suffered horrific child abuse. In Part V, I consider two objections to my view. In Part VI, I outline other cases in which mercy may be appropriate. It is not my aim, however, to articulate an exhaustive list of all of the instances in which mercy is appropriate. It is my aim to show that there is good reason to exercise mercy in the courtroom, albeit with considerable restraint.

II. Understanding Mercy and Justice

A clarification of the term mercy is necessary before continuing. For the purpose of this paper, "mercy" will mean giving an offender less punishment than she deserves through some form of special concern for the offender herself. By "giving an offender less than she deserves," I mean giving the offender less severe punishment than that mandated by a sophisticated retributive norm. Mercy as understood here thus presupposes a retributive framework.[3] To make sense of giving a person less severe punishment than she deserves, we assume that we can make sense of the person deserving some degree of severity in punishment. Various theories of retributive punishment give accounts of what it means to deserve a specific degree of punishment for crime. Despite their differences, these theories

[3] It is generally assumed that mercy understood in any reasonable sense, not just the sense that I have stipulated, must presuppose a retributive framework and is impossible in a strictly utilitarian framework. Andrew Brien challenges this assumption in "Mercy, Utilitarianism, and Retributivism," *Philosophia* 24 (1995): 493-521.

share the idea that there is some degree of punishment that offenders should receive which is proportionate to their culpability. The proportionate degree of punishment, the 'just deserts,' is generally determined as a function of the quality of an offender's will and the degree of harm or insult caused by the crime. [4]

To be clear, mercy as understood here is distinct from equity and clemency. Equity is giving an offender exactly what she deserves given all the particulars of the situation. An equitable judgment may give an offender less severe punishment than what is determined by general laws that either do not or cannot take particulars into account. An equitable judgment, however, does not give the offender less severe punishment than what is demanded by the retributive norm applied to the most specific, particularized understanding of the case at hand. Equity is thus not mercy because mercy is giving an offender less than she deserves, not exactly what she deserves.[5]

Pardon or clemency does involve giving an offender less than she deserves. Pardon is distinct from mercy, however, because it is granted on the basis of what is most beneficial for society as a whole.[6] Mercy is granted through some form of special concern for the offender, not on the basis of general utility. Ford made the political move of pardoning Nixon for the

---

[4] Note that one can recognize the retributive norm without advocating that the state should always punish on the basis of this norm. One who recognizes the retributive norm affirms that it makes sense to speak of 'just deserts,' of offenders deserving an amount of punishment proportionate to their crime. A retributivist argues that the state should dole out these 'just deserts' to criminal offenders.

[5] Aristotle champions equity as the correction of law according to principles of justice when the law is too general or abstract to aptly apply in particular situations (Book V, Chapter X, *Nicomachean Ethics*). Alwynne Smart points out that most cases of "mercy" are really misnamed cases of equity. She goes on to discuss cases of "genuine mercy" in which we have reason to give the offender less than the proportional punishment ("Mercy," *Philosophy* 43 (1968): 345-359). Her discussion of "genuine mercy," however, seems to slide back into equity (see criticism from Jeff Murphy in *Forgiveness and Mercy* and from Roberts, H.R.T, "Mercy," *Philosophy* 46 (1971): 352-353).

[6] By 'pardon,' I mean what most people think of as a justifiable pardon – not a pardon that results from some form of cronyism. This latter form of pardon probably would meet my definition of mercy.

good of the nation, but he did not necessarily show him mercy. A police officer might not give a speeding driver the ticket she deserves because he is too lazy to pull her over and/or fill in the paperwork, but this is not showing her mercy on my account. For similar reasons, mercy does not generally cover giving a reduced sentence as a result of a plea bargain or giving a sentence determined on purely deterrent grounds that is less than what the offender deserves on retributive grounds. What is missing here is some form of special concern toward the offender.[7]

I should also note that showing mercy does not necessarily entail reducing the time of a prison sentence. As stated above, mercy involves giving an offender less than she deserves and this means giving the offender less severe punishment than that mandated by a sophisticated retributive norm. By "less severe," I mean "less of a negative impact on the offender's long run utility." One way for punishment to be less severe is for it to last for a shorter period of time. Another way for punishment to be less severe, however, is for it to last just as long, but to involve less suffering. A third way for punishment to be less severe is for it to be effectively geared toward improving the offender's life in the long run (generally this will involve the infliction of less suffering). In this sense, a desire to reform prisons from places where offenders serve hard time to places where offenders are effectively rehabilitated can be interpreted as a desire to show mercy across the board.

My aim is not to argue that mercy always or most paradigmatically means giving an offender less than she deserves through some form of special concern toward the offender.

---

[7] There is a potential complication here. An individual could hold that the state should never dole out punishment according to the retributive norm and her position may be rooted in a special regard for offenders. If this individual advocates for less punishment than the retributive norm demands, then she is arguably advocating for mercy as I have stipulated it. She would be advocating, however, for universal mercy, or mercy across the board; not for mercy in particular cases. Although I think this is a plausible position, I will not explore it – I am interested in arguments for mercy that turn out to apply in some cases but not all.

Indeed we often use the term mercy outside of a retributive framework or to refer to what I have called equity or clemency. We may also feel uncomfortable seeing certain calls for penal reform as calls for mercy. My aim is not to fully capture the broad conceptual structure of mercy or to explain all the ways in which we use the term. Rather, I am assuming that we recognize the notion of giving an offender less than she deserves through some form of special concern. I am henceforth calling this notion mercy and I am investigating how it may or may not have an appropriate place in criminal justice. It seems acceptable to call this notion mercy even if it does not best capture the concept of mercy broadly-construed.[8]

I also need to clarify my use of the term justice. In this paper, justice will be used in three senses. To be legally just is to remain within the bounds of the spirit of the law. To be retributively just is to ensure that people receive their just deserts. To be broadly, fully, or socially just is to be in accord with what is required by a theory of political justice. The term criminal justice is short for the criminal justice system, it does not refer specifically to any of the above three kinds of justice. A good criminal justice system, however, will be concerned with all three kinds of justice (although in some cases I will argue that a good criminal justice system should not guarantee retributive justice).

Given this clarification of mercy and justice, I can begin my investigation into how mercy may or may not be appropriate in criminal justice. On first glance, mercy and justice (in all three senses) seem incompatible. Justice plays fair, mercy plays favorites. Justice carefully apportions what is deserved, mercy shrugs in indifference. The conflict between

---

[8] The rough acceptability of my stipulation is supported by Seneca's definition of mercy in *De Clementia*: "mercy can be described as an inclination of the mind towards mildness in exacting punishment…[it can also be described as] the moderation that removes something from the due and merited punishment…everybody understands the fact that mercy consists in stopping short of the penalty that might have been deservedly fixed." Seneca Dialogues and Essays, Trans. John Davie (New York: Oxford University Press, 2007), p. 214.

justice and mercy is straightforwardly articulated by Saint Anselm.[9] We begin with the thought that mercy is distinct from justice. Mercy seasons justice – it gives less than what justice mandates. In that sense, mercy requires a departure from justice. But a departure from justice is unjust. On the other hand, if mercy is not distinct from justice, then it is redundant. It would be a mistake to say that mercy tempers or seasons justice. Mercy would not be mercy, it would simply be justice. Mercy either undermines or collapses into justice, rendering it apparently impossible to be both just and merciful. If mercy is to have an appropriate place in a criminal justice system that prizes justice, we must articulate an uncompromising mercy; a mercy that compromises neither justice nor itself.

Numerous philosophers have attempted to dissipate the apparent conflict between justice and mercy.[10] The conflict is merely apparent when we pay close attention to what we mean by mercy and justice. Mercy is clearly a departure from retributive justice insofar as it gives the offender less than she deserves. In this sense, mercy tempers (one kind of) justice and is distinct from it. Mercy, however, need not be a departure from legal justice or social justice. In this sense, mercy does not undermine (the two other kinds of) justice. One might

---

[9] Anselm discusses the conflict between mercy and justice in *Proslogion*, Chapter Nine. Jeff Murphy aptly summarizes Anselm's discussion in *Forgiveness and Mercy* (New York: Cambridge University Press, 1988) p. 168-169.

[10] Claudia Card dissipates the conflict by arguing that offenders can deserve mercy, but she makes this move at the cost of making mercy only superficially different from equity (see "On Mercy," *The Philosophical Review* (April 1972): 182-207). Jeff Murphy and P. Twambley argue that the conflict cannot be resolved under a public law model, but demonstrates that it can be resolved under a private law model in which mercy is a matter of a victim waiving her right to punish (see Jeff Murphy and Jean Hampton, *Forgiveness and Mercy* (New York: Cambridge University Press, 1988) and P. Twambley, "Mercy and Forgiveness," *Analysis* 36 (1979): 84-90). In his *Genealogy of Morals*, Nietzsche explains the conflict by distinguishing two kinds of justice. Mercy does conflict with society's egalitarian view of justice, but mercy does not conflict with his ideal justice. Mercy on his view is the self-sublimation of justice (for discussion of this view, see David Cartwright, "Revenge, Punishment, and Mercy: The Self Overcoming of Justice," *International Studies in Philosophy* 17 (1985): 17-26). Each of these views has its appeals and drawbacks which will not be detailed here.

wonder how mercy can depart from retributive justice without departing from legal justice and social justice.

John Tasioulas gives a convincing response.[11] He argues that the law grants a large degree of discretion in determinations of punishment. Mercy is choosing the lenient option on the spectrum while staying within its bounds. Thus mercy is within legal justice. The judge, however, should not simply jump down to the lenient end whenever she pleases. Such behavior would be capricious and arbitrary – surely threatening the spirit of legal justice which treats like cases alike and potentially threatening social justice as well. Instead, judges ought to have good reasons for picking the lenient option. That is, they must have appropriate grounds for mercy which make mercy appropriate in legal and social justice. These grounds for mercy cannot revise downwards the amount of punishment that is deserved or otherwise mercy will no longer be distinct from retributive justice. Grounds for mercy do not change what the offender deserves, but rather challenge whether we ought to give the offender what he deserves. From a broader perspective of justice, retributive justice is only one of our many concerns—grounds for mercy highlight our other concerns and put retributive justice in the back seat, or at least not in the driver's seat. The offender still deserves the same amount of punishment, but it is no longer of central importance to give him what he deserves.

III. Searching for grounds for mercy

Tasioulas' analysis of mercy hangs on articulating appropriate grounds for mercy. If mercy is not grounded, it threatens legal and social justice and should arguably be kept out of

[11] "Mercy," Meeting of the Aristotelian Society, held in Senate House, University of London on Monday, 13 January, 2003.

a criminal justice system. The grounds for mercy which Tasioulas identifies, however, are unsatisfying. He lists four paradigmatic grounds for mercy. I will argue that the first two grounds are actually grounds for equity rather than mercy, the third ground is plausible but mysterious, and the fourth ground is not sufficiently justified. I consider these grounds in turn.

The first ground for mercy applies if the offender faced particularly difficult obstacles in doing the right thing. For example, if a woman is continually beaten by her husband, we think it is harder for her to resist the temptation to kill him than it is for the rest of us and so we should be lenient in punishing her. The grounds for leniency in this case, however, are grounds for equity not grounds for mercy. The fact that the offender faces particularly difficult obstacles revises down the level of punishment that she actually deserves. Her just deserts are determined by a function of the quality of her will and the degree of harm or insult she caused. The obstacles suggest that her will was not as malicious as we might otherwise think and so they suggest that she deserves less than we might otherwise think. The obstacles call us to carefully consider exactly what she deserves, but do not give us reason to give her less punishment than she deserves.

Tasioulas suggests that a second ground for mercy applies if the offender has already suffered a great deal due to his crime. Consider a father who forgets to check his smoke detectors and his house burns down with his wife and children inside. The loss of his family makes him suffer enough (indeed much more than enough), so we do not need to impose additional punishment for his negligence. Here again, however, Tasioulas has pointed to grounds for something more like equity than mercy. The retributive norm demands that the father suffer x units of punishment. He is already suffering more than x units of punishment

through the loss of his family. It would be unjust to give him more punishment because he does not deserve any more than x units. A judge would not be merciful in not giving the father x units of punishment, she would simply be just. There is no real leniency here – no reason to give the offender less than he deserves. The focus here is on ensuring that he gets exactly what he deserves – no more, no less.

Remorse is a third potential reason to be merciful. Intuitively, remorse seems to be a good reason to show mercy. It is difficult, however, to say exactly how this works. Why should we give a remorseful offender less than he deserves? It cannot be because he is already suffering lest we fall into the same problem sketched above. It also cannot be because the remorse transforms the offender into a 'new person.' If the offender is really a 'new person,' it does not make sense to show mercy to him (or punish him) for something that someone else did. Remorse may well be a justifiable ground for mercy and it is worth exploring how it might work. I flag this project for another day because I want to focus on the next potential ground for mercy.

Tasioulas proposes that an offender's personal history can serve as ground for mercy. He suggests that "grinding poverty, severe emotional deprivation, physical abuse and other such evils" in an offender's life intuitively call for leniency. These factors, however, do not suggest that less punishment is in fact deserved; the factors do not necessarily diminish the offender's culpability or his status as a moral agent responsible for his actions. The presence of such evils in the offender's life recommend giving him less than he actually deserves. These factors play the right structural role to be paradigmatic grounds for mercy. The pressing question, however, is how and why such evils in the offender's life serve as reasons

for leniency without revising down the level of punishment deserved. Several options present themselves. I will briefly list a few options and focus on the last one.

One might think that such evils make it the case that the offender is not responsible for her character. She could not help becoming the kind of person she is due to the presence of such evils in her life. Her crime sprung directly from her character and since she is not responsible for her character she is not responsible for her crime. This option fails for two reasons, the second of which is more fundamental. First, this option invites us to revise down the level of punishment that is deserved rather than calling for less punishment than deserved. If the offender is not responsible for her character or her crime, then she is not culpable and she does not deserve punishment. We have not introduced ground for giving her less than she deserves, we have grounds for judging that she deserves little or no punishment. The option points to grounds for equity, not mercy. Second, the argument that the offender is not responsible for her character should work in principle for any offender, not just for offenders who have suffered physical abuse or grinding poverty. Desert cannot be based on responsibility for character 'all the way down' lest it become altogether inapplicable. This consideration suggests that this option does not even give solid grounds for equity. Clearly, we must look for another option if we think the presence of evil in the offender's life is a grounds for mercy.

In some cases, the evil that an offender experiences is due to the fact that she is a member of a group that is systematically oppressed in an unjust society. If so, the state's authority to punish the offender may be undermined. This consideration suggests that it would not be just to punish the offender. We should give the offender less than he deserves, in fact nothing at all, but not out of an attitude of leniency toward him. We have solid

grounds for something like a pardon for reasons of state, except here it is for reasons of the lack of a just state. We do not have grounds for mercy.

Perhaps the most natural way to explain how the presence of evil in an offender's life serves as grounds for mercy is to appeal to human sympathy. Indeed the Latin word for mercy, misericordia, comes from one's heart being miserable at the distress of another. Tasioulas suggests that "a humanitarian sentiment of 'There but for the grace of God go I' may demand that these obstacles to good character be taken into account by tempering the strict requirements of retributive justice."[12] The thought echoes Martha Nussbaum's understanding of mercy.[13] According to Nussbaum, who is highly influenced by Seneca's *De Clementia*, the merciful judge looks at each case in its full complexity as part of a human narrative in a world of obstacles. The merciful judge sees all the obstacles that the offender faces. She imagines what it is like to be the particular offender, taking what Nussbaum describes as a "sympathetic participatory attitude." Nussbaum bets that when one honestly does these two things—pays attention to all obstacles and imagines being the offender—one will cease to have a strict retributive attitude toward the offender.[14] One will assign a punishment not on the basis of giving the offender what is exactly proportionate to her offense, but on the basis of improving the life of the offender.[15]

---

[12] Ibid, 116.

[13] Martha C. Nussbaum, "Equity and Mercy," *Philosophy and Public Affairs* 22 (1993): 83-125.

[14] A number of cases in practice do not support Nussbaum's claim. Often hearing the full details of a case leads juries to pass down harsher verdicts because they are emotionally swayed by particular details of the crime and the impact it has on the victims. See Mary Sigler, "The Story of Justice: Retribution, Mercy, and the Role of Emotions in the Capital Sentencing Process," *Law and Philosophy* 19 (2000): 339-367. Also see Alicke, M.D., Davis, T.L., and Pezzo, M.V., "A posteriori adjustment of a priori decision criteria," *Social Cognition* 12 (1994): 281-308 and Alicke, M.D., "Culpable control and the psychology of blame," *Psychological Bulletin* 126 (2000): 556-574.

Nussbaum's account is extremely attractive, but it leaves open important normative questions. She has described what she thinks judges will be inclined to do when they look at offenders with the sympathetic participatory attitude she has advocated, but she has not explained why judges should look at cases with that attitude or why they should follow through with less than proportionate punishments. If I were to wear rose colored glasses, I would be inclined to go outside and play when it is cloudy and rainy. But why should I wear those glasses? And even if I should wear them, why should I play outside when it is raining? I might catch cold.

There are two issues here. First, why should judges adopt the sympathetic participatory attitude when looking at a case? Second, even if judges should look with sympathetic eyes, it does not immediately follow that they should pass down sentences determined under that sympathetic perspective. Maybe there are reasons to look in a sympathetic light and then pass down a harsh sentence, knowing that it is harsh. Why should the judge pass down a sympathetic sentence rather than a duly proportionate one? Nussbaum lays out Seneca's mercy tradition and contrasts it to the retribution tradition. She bets that we'll side with Seneca, but she doesn't present a case for why we should side with Seneca.

Like most writers in the philosophical literature on mercy, Nussbaum (as well as Tasioulas, Seneca, and others[16]) take it as "axiomatic" that mercy is a virtue; that one should be merciful when the opportunity arises. They work to show that mercy does not undermine justice and thus mercy is permissible. But they stop short of saying why we should be

---

[15] Aquinas's understanding of mercy is quite similar. For Aquinas, mercy is compassion for the offender which prompts us to do what we can to help him (*Summa Theologica*, Question 30). Jean Hampton follows a similar line in *Forgiveness and Mercy*.

[16] Daniel Statman is an exception to this trend. He pushes on the question, "Why is mercy morally good?" in "Doing Without Mercy," *The Southern Journal of Philosophy* 32 (1994): 331-354. George Rainbolt attempts to respond in "Mercy: In defense of caprice," *Noûs* 31 (1997): 226-241. He defends the *disposition* to show mercy, but does not attempt to defend the *act* of mercy in a courtroom.

merciful. They suggest that we should be sympathetic and thus merciful but this just pushes the question back. Why should we be sympathetic? It is exactly here where critics of mercy dig in their heels. Although admittedly permissible, why is it good to give less than a just retributive punishment simply because you feel bad for the offender? At best it looks soft and sanctimonious, at worst it looks like a serious abuse of power that would be repugnant to an egalitarian. As Nietzsche so scathingly points out, sympathy may ultimately be about looking down on the offender from a position of superiority. In her grandeur, the sympathetic person graces the offender with her pity, seeing her as inferior rather than taking her seriously as an equal. The offender is disregarded as a pest which is not even worthy of the sole of one's shoe. Nietzsche thinks we ought to unabashedly applaud such behavior, but an egalitarian should be appalled by it. If this is mercy, it violates our commitment to meeting one another as equals.

Moreover, one might be skeptical about the appropriateness of sympathy-driven mercy in the law because it invites vicious arbitrariness in practice. Whether and how much sympathy a judge or jury-member feels and consequently how much mercy she shows, may depend on her mood, the order in which she hears the case, or the extent to which she identifies with the offender based on morally irrelevant factors like gender, race, and demeanor.[17] These concerns are obviously not unique to the domain of sympathy and mercy, they permeate the legal system. They are diminishable but not inescapable wherever human judgment must be applied. The problem here, however, is that we know that sympathy-

[17] A great deal of empirical work has been done to determine the myriad of factors that influence sentencing decisions. I cannot canvas this literature here, but I point the reader to an article that lists good references on the topic. Bryan Myers, Steven Jay Lynn, Jack Arbuthnot, "Victim Impact Testimony and Juror Judgments: The Effects of Harm Information and Witness Demeanor," *Journal of Applied Social Psychology* 32 (2002), 2393–2412.

driven mercy is particularly susceptible to these concerns and we also know that we can function perfectly well without sympathy-driven mercy. If we have no argument that we should be sympathetic and merciful, and we know that doing so would invite additional arbitrariness into the law, we can do without it.

IV. Locating grounds for mercy

Up to this point, I have suggested that Tasioulas' account of mercy is promising insofar as it dissipates the initial conflict between mercy and justice, but problematic insofar as it struggles to fully articulate grounds for mercy. At first pass he shows that mercy is possible and permissible to practice alongside justice, but on a closer look mercy is not positively advisable. Tasioulas has articulated a mercy that does not compromise justice but is nevertheless a compromising mercy, one that we can easily do without. Under the gaze of a cynical egalitarian or a practically-minded jurist, it is even a mercy we ought to do without. In this section, I aim to articulate strong grounds for mercy. In so doing I hope to make room for an uncompromising mercy, a mercy that is not only permissible, but positively advisable. A mercy we ought not do without.

I pick up where Tasioulas' analysis seems to run dry. He suggests that the presence of certain evils in an offender's life is grounds for giving the offender less punishment than she deserves. It is unclear, however, how or why those evils serve as grounds for mercy unless we appeal to sympathy which leads us to a compromising mercy. I will argue that the presence of certain kinds of evil in an offender's life make it the case that the state stands in a relation of liability toward the offender. (To simplify the argument, I will initially consider only one sort of evil, horrific child abuse. In Part V, I will extend the argument to cover

other sorts of evil that an offender may have experienced.) Given this relation of liability toward the offender, it would be inappropriate for the state to give the offender exactly what he deserves. Instead, the state should (not just could!) show the offender mercy.

The argument will take several detours en route to its aim. Below is a rough roadmap of the argument to help the reader keep track of the argument's basic path.

Section A: The appropriateness of a response to wrongdoing depends on the relation between the respondent and the offender. Appropriateness can be evaluated narrowly and broadly.

Section B: If a respondent stands in a relation of liability toward the offender, it is narrowly inappropriate to give the offender exactly what he deserves. Instead, the narrowly appropriate response should be moderated by concern for the offender.

Section C: The state stands in a relation of liability toward victims of child abuse.

Section D: The state's narrowly appropriate response given a relation of liability is mercy.

Section E: The state's broadly appropriate response toward abused offenders is generally mercy.

Section A: Relations and appropriate responses to wrongdoing

The argument begins with a short detour into the realm of moral accountability. Christopher Kutz[18] argues that accountability consists in a warrant for certain types of interpersonal responses. A response is warranted when it is appropriate according to

[18] *Complicity: Ethics and Law for a Collective Age* (New York: Cambridge University Press, 2000).

governing social or moral norms. A person is accountable for a harm when others are warranted in responding to her in ways that are determined by governing norms. The content of the concept of accountability comes from our practice of holding one another accountable and the norms which govern that practice. Kutz's strategy roughly follows Peter Strawson's move to focus on the practice of how we hold each other responsible rather than on metaphysical features about our actions or our will. Strawson leaves open the question of which reactive attitudes count as appropriate – how much we should resent, when is it appropriate to forgive, etc. Kutz suggests that this question is filled in by an appeal to social and moral norms.

We can call one of those norms the retributive norm. According to the retributivist norm, the appropriate response to a wrongdoer is to give him what he deserves, his 'just deserts.' The degree and kind of blame is determined by some function of the quality of the agent's will and the degree of harm or insult caused.[19] Kutz aptly points out that the retributive norm is not the sole determinant of the appropriateness of our responses. In practice we generally think responses to wrongdoers should vary based on the relationship between the wrongdoer and the respondent. If Bob does something wrong, the appropriate response from a stranger is different from an appropriate response from Bob's family members which is also different from an appropriate response from Bob's colleagues, or Bob's victim, or the state in which Bob lives.

At least three theoretical constructs can explain why the appropriateness of the response depends on the relationship between Bob and the respondent. Option One: What Bob *deserves* from each respondent varies because the relationship between Bob and the

[19] I am not attributing this view to any retributivist in particular. I am simply articulating a norm in conceptual space and calling it retributivist because it shares some key features with retributive theories of punishment.

respondent is different. On this view, just deserts are relational and cannot be determined exclusively by an appeal to the quality of the agent's will and the degree of harm caused. Just deserts are instead determined by society's norms about what an appropriate response is and it turns out that different norms apply to different relations. Kutz vaguely endorses this option, but I do not follow him in this regard. We do have some notion of desert as a function of the quality of the offender's will and the degree of harm caused. We could reject this notion, but then we would jeopardize the basic retributive framework in which mercy resides (at least for the purpose of this paper).

Option Two: What Bob deserves from each respondent varies because he has done different wrongs to the different parties. He punched his victim, he violated bystanders' sense of security, he disappointed his parents. He deserves different responses from these different people because each person is responding to a different action (or an action differently described). On this option, just deserts are not fundamentally relational, but they depend on fine-grained differences in actions. I do not think this option holds because a bystander can appropriately hold Bob accountable for punching the victim, not just for violating her own sense of security.

Option Three: Bob deserves the same thing from each respondent, but the appropriate response is different. In some relationships, it is more or less appropriate to apply the retributive norm and give the offender what he deserves. The just deserts do not change with different relationships, but the appropriateness of giving those just deserts changes with different relationships. Some should comfort Bob, some should educate Bob, some should give Bob what he deserves – what one should do is a matter of the relation which one stands in with respect to Bob. The retributive norm is not the only norm which

governs the appropriateness of our responses to wrongdoers. The retributive norm is salient in the context of some relationships, but is not salient in the context of other relationships. In some contexts it is not appropriate to only be concerned with giving what is deserved.

The relationship between the offender and the respondent determines how salient the retributive norm is in determining the appropriateness of the response. Some relationships highlight the salience of norms other than the retributive norm. To determine what an appropriate response is, we need to look not just at features of the offender and her offense, but at different kinds of relationships, the corresponding norms they make salient, and the corresponding responses that are appropriate with respect to them. Note that this highly contextual account does not imply that responses depend entirely upon the preferences of individual respondent. There are standards governing appropriate response and those standards depend upon the structure of relationships between respondents and agents.

Up to this point, we have seen appropriate response to an offender vary from person A to person B because the relationship between person A and the offender may be different from the relationship between person B and the offender. An example illustrates, however, that the appropriateness of a single individual's response to an offender can vary because one individual can stand in various relations toward the offender.

Consider the cuckolded Karenin responding to his wife's adultery throughout the course of Tolstoy's *Anna Karenina*. Responding to Anna as an important public official serving as an example of stability in a wobbling society, discretion is appropriate. Responding to Anna as a fellow socialite concerned with saving face in social circles, a duel and a divorce are called for (here the retributive norm seems most salient). Responding as a self-righteous Christian toiling for moral perfection, forgiveness is essential. Responding to

Anna as loving husband is what's missing here. The problem with Karenin's response to Anna's adultery (to the extent that we do find fault with his response) is not that any of his responses are inappropriate given the position they are coming from. We cannot find fault with his response qua public official, qua socialite, or qua Christian. The problem is that he is not responding from the position we hoped he would. None of his anger, disappointment, or forgiveness springs from his relation to Anna as a betrayed husband. Instead it comes from his relation toward her as inconvenienced official, cuckolded socialite, and saint under siege. We may or may not blame him for this failure to respond as a husband, but we are nevertheless disappointed with his response.

I mention the example not to defend a view about the Karenins or about the appropriateness of responses to adultery, but to illustrate a point about the structure of our judgments of appropriate response. The case illustrates that we have two ways of evaluating the appropriateness of a response to wrongdoing. We evaluate appropriateness narrowly-construed and broadly-construed. When we evaluate appropriateness narrowly construed, we judge whether the response is appropriate given the relation between the offender and the respondent. In this sense, we can say Karenin's initial response of discretion is appropriate qua his relation to Anna as public official to citizen. When we evaluate appropriateness broadly construed, we judge whether the relation from which the response is coming is the appropriate relation, all things considered. In this sense, we say Karenin's initial response of discretion is not appropriate because he ought to be responding from his relation to Anna as loving husband rather than public official. Narrow appropriateness is about whether a response aligns with the norms that are salient given a specified relation. Broad appropriateness is about specifying the relation from which the responder ought to be

responding from. As the example of Karenin illustrates, a response can be narrowly appropriate but broadly inappropriate. The response can be narrowly appropriate insofar as it is the proper response given a particular relation, but broadly inappropriate insofar as it is not the appropriate relation from which to respond.

Some of the most difficult dilemmas we face in our lives revolve around the difficulty of determining what is broadly appropriate. "From which relation should I respond?" can be an extraordinarily difficult question. For example, consider Melville's depiction of Captain Vere in *Billy Budd*. Captain Vere must judge Billy who is falsely accused by the evil Claggart of conspiring to mutiny. Kutz aptly describes Captain Vere's dilemma:

> "As a representative of naval authority, Vere regards Billy's assault on Claggart as a capital offense…liable to immediate punishment. As a fellow sailor (and fellow Christian), Vere regards Billy's act as provoked and at least excusable, if not justified as well…No wonder Vere seems feverish in his deliberations as he paces his cabin, caught amid so many positions."[20]

The term 'relation' has been very vague throughout this discussion. I have been using the term loosely. I referred to various relationships that we recognize between Karenin and Anna: public official and citizen, fellow socialites, fellow Christians, husband and wife. Between Vere and Billy we recognize the relationship of captain to crew member and of fellow sailor. We can define a relation as a connection between people that comes with a set of norms as to how parties ought to treat and react to each other in various situations. Broad appropriateness is a question of which relation and corresponding set of norms one should respond from. Narrow appropriateness is a further question of what the norms require. For

---

[20] Kutz, 33-35.

Captain Vere the first question is torturously difficult and the second is rather simple. For a husband who is more ideal than Karenin, the first question may be quite easy (he should respond as husband, not as official or socialite), but the second question may be very challenging. Foreshadowing the remainder of the paper: we are grappling with the first question when we are considering whether or not to show mercy, we are grappling with the second question when we are considering what shape that mercy should take (years off a sentence, better rehabilitation, total lift of punishment, etc) or if we chose not to be merciful, what shape full punishment should take.

Section B: The relation of liability

I hope to have shown that the appropriateness of a response to wrongdoing depends on the relation between the respondent and the offender. In this section, I call attention to a specific kind of relation that can hold between the respondent and offender: a relation of liability. The section begins with a thought experiment which illustrates that we intuitively recognize the relation of liability and the corresponding response of leniency. After considering the thought experiment, I turn to further demonstration and specification of the relation of liability. I then argue that a relation of liability toward an offender calls for a lenient response.

<u>The Intuitive Case:</u>

Ivan, Theodore, Gregory, and Alex all share a house. They divide the chores amongst themselves – Ivan takes care of the windows, Theodore takes care of the floors, Gregory takes care of the kitchen, and Alex takes care of the bathrooms. They expect one another to

do their chores well enough so that everyone's basic needs are met. They are good friends and are all rather laconic so they trust one another's judgment and do not discuss details about the chores. Ivan notices that there are a couple small holes in the screens on the windows. He knows that the group does not have sufficient funds to buy replacement screens and he also knows that it is a very hot summer and they will be too warm if they close the windows. So he leaves the windows open despite the holes in the screens. One afternoon a black widow spider crawls in through a hole in the screen and bites Theodore. The bite is not lethal, but Theodore is laid up in bed for a few days in extraordinary pain.

No one thinks Ivan is at fault. He did not fix the screens, but he did nothing wrong in either his action or inaction; he used good judgment, took a smart risk, and it unfortunately backfired. It is not the case that he should have done anything differently than he did. Despite the fact that Ivan is not at fault, the incident has altered the normative relation between Ivan and Theodore. Although Ivan, Gregory and Alex all ought to be responsive to Theodore's suffering (expressing concern, perhaps offering to get some ice to reduce the pain), we think the "ought" here is stronger for Ivan than the others. If they all utterly ignore Theodore's suffering, we think we should shake our finger at Ivan before Gregory or Alex. A lot of us think Ivan should say something along the lines of "I'm sorry" to Theodore.[21] No one thinks Gregory or Alex should do likewise. If Theodore were to die from the bite, we think Ivan should feel pangs of what Bernard Williams called agent-regret in a way which Gregory and Alex should not. If Theodore calls in sick to work the next day complaining of pain from the bite, Gregory and Alex might tell him to "just suck it up," but that kind of criticism seems less appropriate from Ivan's mouth.

---

[21] Note that saying something along the lines of "I'm sorry" is not equivalent to apologizing. An apology is generally appropriate only when a relation of fault is in play.

Limits are in play here. Ivan should not stand by and let Theodore use the bite as an excuse for everything. Ivan is under no obligation to stay by Theodore's bedside for days. Although it might be nice for Ivan to say "I'm sorry," he certainly does not have to do so. Even if the bite were lethal, one would likely tell Ivan not to feel *so* bad. After all, it was an accident and there was nothing he could do, he wasn't at fault. But even though he is not at fault, not responsible, not blameworthy, that is not the end of the story. If Ivan does nothing, says nothing, feels nothing we would think something is amiss. He should at least do or say *something*. The others should do or say something as well, but for Ivan the "should" is a bit stronger and the appropriate actions or words are relatively more involved. The others should have concern for Theodore, but Ivan should have special concern. Exactly what is involved in this special concern is not clear, but we know it is special in comparison to the others' response. The point is that the norms governing Ivan's response to Theodore are different than those governing Alex and Gregory's response. It makes little difference whether we say the change is due to a change in the relation or a change in the applicable norms. Given our definition of relation, they can mean the same thing. For simplicity, I shall say different relation. After the bite, Ivan stands in a relation of liability toward Theodore and the others do not.[22]

Let us investigate what the relation of liability involves if we change the situation a bit. Suppose that when Theodore is in bed recovering from the sting he becomes very grouchy and starts hurling vicious insults at Gregory on a regular basis. Just as Ivan is not at

---

[22] The intuitive point here is that our responsibilities to one another are not solely determined by considering what is and what is not our "fault." Susan Wolf highlights a similar point in her discussion of moral luck. She writes, "to draw sharp lines between what one is responsible for and what is up to the rest of the world, to try in this way to extricate oneself and others from the messiness and the irrational contingencies of the world, would be to remove oneself from the only ground on which it is possible for beings like ourselves to meet." "The Moral of Moral Luck" in *Setting the Moral Compass*, ed. Cheshire Calhoun (Oxford: Oxford University Press, 2004), p. 123.

fault for Theodore's sting, Ivan is not at fault for the fact that Gregory is being insulted. Intuitively, however, it seems that Ivan should have a more moderate or lenient attitude toward Theodore than Alex and Gregory. Although the insults may lead Gregory and Alex to be justifiably indignant and perhaps break ties of friendship with Theodore, it would seem unfair, or at least significantly harsher, for Ivan to leave Theodore in the dust. To do so would be to fail to recognize his own liability and the role he played in the situation. It may be appropriate for the others to give Theodore exactly what he deserves, but it would be inappropriate for Ivan to do likewise. Ivan's response should be moderated by the relation of liability he bears toward Theodore. Ivan still owes Theodore special concern. Ivan could appropriately criticize Theodore for his poor behavior, but the criticism should be guided by the aim of improving Theodore, not by a resolve that he get his just deserts.

We can see the relation of liability and the corresponding response of leniency at work in our daily lives, not just when housemates fail to fix screens. Suppose you give someone advice that everyone would agree is good advice, but it severely backfires for the advisee and she does something wrong (or at least something unfortunate or misguided). For example, you advise a friend to date someone and the relationship turns very sour from both ends. Or you advise a daughter to attend a particular university and she flunks out because the school turns out to be an awful fit. Or perhaps you buy a colleague a drink not knowing she is a recovering alcoholic and she falls off the wagon. Most of us recognize that the range of appropriate ways for you to respond to the advisee's misguided actions is different from the range of appropriate ways others could respond. Your normative relation is marked by your liability. It would be inappropriate for you to insist on giving the advisee exactly what she deserves (to the extent that she deserves anything in these cases). To do so would be

unduly harsh; instead you should moderate your response with genuine concern for the advisee.

A Closer Look:

I hope to have demonstrated the intuitive force behind recognizing a relation of liability and its corresponding response of leniency. With this intuitive force established, let us take a closer look at the relation of liability. Under what conditions does the relation of liability arise?

The relation of liability has its roots in a recognition of the pervasiveness of obstacles and accidents in human life, of the undeniable fact that things all-too-often go wrong in this world. Given this starting point, it is unsurprising that a Stoic was the first and perhaps the most insistent defender of mercy. After we admit that life is characterized by accidents and obstacles, we must consider how to cope with such difficulties. When unfortunate events happen, we should not expect individual victims to bear the heavy burden of such events entirely on their own. Instead we recognize that we ought to take care of one another. Certain norms, one might call them norms of responsibility for one another, guide how we ought to do so. If someone has caused the unfortunate event through some wrongdoing, she is primarily responsible for cleaning up the mess that she leaves in her wake (she ought to "make amends"). Often, however, there is no offender or the offender lacks the resources to make amends. In these cases, it is not entirely clear what is to be done. Should the community-at-large, including those utterly disconnected from the situation, take on the responsibility for cleaning up the mess? Should a group of people who bear some relevant relation to the victim shoulder the responsibility? Should the victim just tough it out on her own in some cases?

Tort theory sheds some light on these questions.[23] Tort law establishes conditions under which victims of various sorts of accidents can shift some of their costs onto other parties. Generally, a victim can claim some compensation from a defendant if she has suffered some harm that was proximately caused by a wrong committed by the defendant. The tort claim can take two forms: fault liability and strict liability. The difference between fault and strict liability is thought to be rooted in a difference between underlying *duties of care*. We recognize various duties of care toward one another. Breach of theses duties gives rise to liability, but whether it is strict or fault liability depends on the content of the duty. To illustrate the difference, compare the following two activities: dynamite blasting and driving. We recognize a duty not to harm anyone by dynamite blasting. We do not recognize a duty not to harm anyone by driving. We do, however, recognize a duty not to harm anyone by *faultily* driving. The blaster breaches her duty if she harms anyone no matter how much care she takes. The driver breaches her duty only if she negligently, recklessly, or intentionally harms someone through her driving. The blaster will be subject to strict liability for any blasting accident and the driver will be subject to fault liability for any accident she causes through her own fault.

The general point illuminated by tort theory is that when things fall apart, duties of care govern who is responsible for picking up which pieces. Often the contents of duties of care are such that one can be responsible for 'picking up the pieces' regardless of whether one is technically at fault or not. For example, Ivan has a duty of care to prevent his housemate's from being inconvenienced by anything concerning the house's windows. Ivan

---

[23] This paragraph draws heavily on Jules Coleman's entry in The Stanford Encyclopedia of Philosophy. "Theories of Tort Law," *The Stanford Encyclopedia of Philosophy (Spring 2007 Edition)*, Edward N. Zalta (ed.). Retrieved from http://plato.stanford.edu/archives/spr2007/entries/tort-theories/.

can stand in breach of this duty through no fault of his own. He innocently failed to prevent Theodore from being inconvenienced by problems with the windows. Given that Ivan stands in breach of his duty of care to Theodore, he bears a relation of liability toward Theodore. As we recognized, Ivan ought to show special concern toward Theodore with respect to affairs that are causally tied to the spider bite. Ivan should offer to help alleviate Theodore's pain and perhaps say "I'm sorry," but he need not bail Theodore out of a debt that he incurred before the spider bit. Ivan is also not obligated to show special concern toward Theodore in regard to unconnected misfortunes which may befall him years later.

Duties of care should not be confused with full-stop duties in the Kantian sense. To have a duty of care does not entail that it is always possible for one to meet that duty (indeed it is impossible for Ivan to absolutely ensure that no one is ever inconvenienced by the windows), nor does it entail that one is morally obligated to fulfill that duty at any and all expense. If one fails to fulfill a duty of care, one is not necessarily morally blameworthy (one is only blameworthy if one's failure is a result of maliciousness, recklessness, or negligence). If one fails to fulfill a duty of care, however, one does stand in a relation of liability toward the failed party. One ought to show special concern toward the failed party with respect to the proximate effects of the breach of duty. Although one is not necessarily blameworthy for failing to fulfill duties of care, one is blameworthy for second-order failure – for failing to show appropriate concern to the failed party. We do not fault Ivan for the spider bite, but we do fault Ivan if he does nothing for Theodore in response to the bite.

To summarize: If x has a duty of care to protect y from some unfortunate event E, then x should try to prevent E from befalling y. If E nevertheless befalls y (through the fault of x or through no fault of x), then x stands in a relation of liability toward y. X is

accordingly obligated to show special concern toward y in regard to affairs that are causally tied to E. The form and extent of the concern depend on the context of the situation. The phrase "causally tied" is admittedly rather vague. To say one event is causally tied to another is not to say that the latter event is necessarily *the cause* of the former. What I am calling a causal tie is much weaker. To say one event is causally tied to another is simply to say that the latter is causally significant to the former. What counts as significant will be highly context sensitive.

I have drawn attention to the structural role that duties of care play in giving rise to relations of liability. To see when relations of liability actually hold, we need to discern the contents of the relevant duties of care we owe to one another. Who has which duties of care? The answer depends on the context of the situation, in the next section we return to the context in which we were initially working, the context of the state and an abused offender.

Before moving on, however, we should take a closer look at what the narrowly appropriate response is to an offender given a relation of liability. As observed in the case of Ivan and the advisees, the relation of liability seems to command a moderate or lenient response when the failed party commits an offense that is causally tied to the respondent's breach of duty of care. Why does the relation of liability command a more moderate or lenient response? As we have established, the relation of liability commands special concern toward the failed party in regard to affairs causally tied to the breach of duty. If the failed party does something wrong (and the wrong is casually tied to the breach of duty), the special concern should not simply vanish. The shape that the concern takes, however, is certainly affected by the context of the situation. The liable respondent may admonish the offender – the offender did do something wrong and the respondent should not deny this, condone this,

or ‘look past’ it, especially when the wrong is very grave. The response must nevertheless be guided by the special concern which the respondent owes to the offender in virtue of the relation of liability in which she stands. The respondent should accordingly treat the offender not with the aim of making her suffer in proportion to her offense, but with an eye of concern toward her. This treatment may well include harsh criticism, but if the criticism is appropriate, it must be forward-looking and given for the sake of the offender. The narrowly appropriate response given a relation of liability need not be “soft,” but it should be marked by special concern for the offender. Generally this means that the response will be less severe than it would be if a relation of liability were not in place.

Section C: The state’s relation of liability toward victims of child abuse

In this section I argue that the state has a duty of care to protect children from abuse. The state thus stands in a relation of liability toward all victims of child abuse. In the next section I will argue that given this relation, the state ought to respond leniently to offenders who have been abused.

The state certainly does not have a duty of care to prevent everyone’s interests from ever being disturbed. The state does have a duty of care, however, to prevent everyone’s basic rights from being violated. Part of what it is to have a right is to demand that the state try to protect it from being violated and to show some ‘special concern’ in the event that it is violated. It seems safe to assume that children have a right not to be abused. The state accordingly has a duty of care to protect children from abuse and stands in a relation of liability toward victims of child abuse. I see no reason to suppose that duties of care and

corresponding relations of liability would hold only between individual parties and not between the state and individuals.

Note that the number of ways in which the state can incur a relation of liability toward a citizen depends on the number of duties of care which the state can be said to bear toward its citizens. The state's duties of care in turn depend on what rights citizens have and this depends on a larger theory of justice which I cannot hope to defend within the scope of this paper. It appears uncontroversial from the perspective of a wide range of theories of justice that a child has a right to not be abused. People also seem to have a right to safety in their own homes, to very basic necessities, and to an opportunity to earn a living wage, but exploring this area in detail is a project for another day.

It is worth mentioning that in many cases, the state does not merely stand in a relation of liability toward victims of child abuse. The state also stands in a relation of fault toward many victims of child abuse. The state is at fault when it actively contributes to the abuse or when it could have and should have prevented the abuse. The state is at fault if one of its representatives, such as a foster parent or an employee at a juvenile detention center, abuses the child. The state can also be at fault for negligence in preventing the abuse. For example, the state is at fault if a state-employed social worker notices that a child is being abused, has the resources to help the child, and fails to help the child. The state is also at fault if a child attends public school with obvious signs of abuse and her teachers either fail to notice or fail to act. In these cases and many others, the state could have and should have done something to protect the child's right to not be physically abused.

Although the state may be in a relation of fault toward many victims of child abuse, the state does not bear this relation toward all victims of child abuse. The state is not at fault

if the child abuse is very well hidden and no relevant party would have had good reason to suspect abuse. In these cases and others, it is not the case that the state should have done anything differently all things considered. The state may have been able to stop the abuse if it kept close tabs on every family's private life, but the state justifiably refrains from doing so due to respect for privacy. In these sorts of cases, the state is not at fault – that is to say, there is nothing the state should have done differently, the state is not blameworthy.[24] Even if the state does not stand in a relation of fault toward victims of child abuse, the state nevertheless stands in a relation of liability toward these victims. I have chosen to focus on what follows from a relation of liability rather than what follows from a relation of fault because the former is the broader category – all relations of fault are relations of liability, but not all relations of liability are relations of fault.

Section D: The state's narrowly appropriate response toward abused offenders

I hope to have shown that the state stands in a relation of liability toward all victims of child abuse. What is the narrowly appropriate response to an abused offender given this relation of liability? Applying our work in Section B, the answer may seem obvious. The state ought to be lenient toward offenders whose crimes are causally tied to the abuse they suffered as children. In this section, I will clarify what is meant by 'causally tied' in this context. I will also clarify what a 'lenient response' is in this context, arguing that it amounts to showing mercy.

---

[24] Optimists may argue that it is possible for the state to prevent abuse. If that is the case, then there is something the state could have done and should have done to prevent abuse. Accordingly, the state would stand in a relation of fault to all victims of abuse. I do not think optimists are correct on this point. If they were, however, the case I will make for mercy for abused offenders would be even clearer. Imagine Ivan had known black widows would enter the house and that he could have fixed the screens. It is even clearer in this case that Ivan should be lenient toward Theodore. Likewise, if the state is at fault for child abuse, it is even clearer that the state ought to be lenient toward abused offenders.

One might argue that in many cases an abused offender's crime is not causally tied to the abuse he suffered as a child. The effects of child abuse diminish over time and arguably do not significantly contribute to criminal behavior in adults. If there is no causal tie between the crime and the state's breach of duty of care, then the state does not owe the offender any special concern or leniency of the sort discussed here. A close investigation of what counts as a causal connection is required to fully consider this argument. I leave this investigation to future work. For now, however, I would like to make a prima facie case that child abuse is causally significant to violent crime committed by adult offenders who were abused as children. Although it is notoriously difficult to show that child abuse is a cause of crime, it is clear that child abuse is significantly linked to crime. People who suffer child abuse and neglect are four times more likely to be arrested as juveniles and twice as likely to be arrested as adults than those who have had benign childhoods.[25] Although the influence of the abuse on crime does seem to diminish as most victims age, the influence certainly does not fade to the point of vanishing. The abuse may become more distant in time without becoming any less influential in the life of the victim. More work clearly needs to be done here. For now I hope to have shown that crime committed by abused offenders may not be caused by, but is causally connected to the abuse they suffered as children.

I have argued that the state stands in a relation of liability toward victims of child abuse. This relation calls for a lenient response when the victim of abuse commits an offense that is causally tied to the abuse she suffered. But what does a lenient response amount to in

---

[25] English, Widom, and Brandford. "Childhood Victimization and Delinquency, Adult Criminality, and Violent Criminal Behavior: A Replication and Extension," Final Report presented to the National Institute, Grant No. 97-IJ-CX-0017. Retrieved from www.ncjrs.gov/pdffiles1/nij/grants/184894.pdf. For an excellent review of research studies in this area, see Janet Currie and Edal Tekin, "Does Child Abuse Cause Crime?," Working Paper in Andrew Young School of Policy Studies Research Paper Series (2006). Retrieved from http://aysps.gsu.edu/CurrieTekin_ChildAbuse.pdf.

this context? One might think leniency here amounts to showing the offender mercy, i.e. giving the offender less than she deserves through an attitude of special concern. Alternatively, however, one might think the position of liability calls for prosecuting and punishing the offender's previous abusers and need not entail showing the offender mercy. Or perhaps the position of liability calls for the state to give the offender or his children some kind of monetary reparations but nonetheless punish the offender to the fullest extent of the law.

A look back at Section B reveals that the relation of liability commands special concern. When people commit wrongs that are tied to our breach of duties of care for them, our response toward them must be guided by a concern for their well-being. To figure out the most (narrowly) appropriate response, a judge must consider what would be best for the offender given the range of options (the range is constrained by the fact that the offender has broken the law – I will discuss this point further below). The best option may be to choose a shorter and/or more comfortable sentence on the range of options. This option qualifies as merciful insofar as the shorter sentence is a less severe punishment than that recommended by the retributive norm. The best option, however, may not involve choosing a short sentence. Given the lives that many offenders return to on the streets of America, often the best way to show concern for their well-being is not to cut prison time, but to ensure that the prison time improves the offender's life in the long run. Due to the current state of affairs, this option would involve insisting on serious penal reform. According to the understanding of mercy laid out at the beginning of the paper, this option would also count as showing the offender mercy. This point is consistent with Seneca's thought that being merciful is a matter of acting on a heightened concern for the well-being of the offender.

One might wonder whether an appropriate response might be to simply prosecute and punish the offender's abusers but nevertheless give the offender his just deserts. This response would not be appropriate because it is not guided by special concern for the offender – punishing his abusers does not contribute to the offender's own well-being. One might also wonder if it would be appropriate to give monetary reparations to the offender or to those he loves (if he cannot use the money in prison), and then give him his just deserts. This option is appropriate only if the reparations are given out of a genuine concern for the offender's well-being. One must judge that the reparations are an effective way to improve the offender's well-being, in this case the response is appropriate and it also qualifies as what I have called mercy. It is unlikely, however, that this response will work in practice. Monetary reparations rarely improve the lives of those within the walls of a prison and moreover they express that the offender's abuse can be compensated for in a dollar amount. The state may have good reason to avoid making that sort of expression.

Section E: The state's broadly appropriate response toward abused offenders

The above discussion establishes that mercy is the *narrowly* appropriate response given a relation of liability toward abused offenders. It would be too quick, however, to conclude that the state should therefore show mercy to such offenders. The relation of liability is not the only relation which the state stands in with respect to the offender. The state stands in various relations toward the offender: the stands as upholder of the law, as exactor of just deserts, and as protector of the population at large (this list is not necessarily exhaustive). Insofar as conflict exists between the narrowly appropriate responses

recommended by these relations, the state must face the question of broad-appropriateness: from which relation should the state respond?

First, let us consider the fact that the state stands in the relation of upholder of the law toward the offender. Fortunately, the appropriate response from this relation does not conflict with the narrowly appropriate response from the relation of liability. Insofar as the law outlines a range of punishments for the offender and the judge (or jury) has discretion within this range, then from the position of upholder of the law, the state's appropriate response is underdetermined – it is anything within the range determined by the law. From the position of liability, the state's appropriate response is to choose the option which is best for the offender. This will generally be a lenient option in this range. The state's position of upholder of the law constrains the options from which it can respond in its position of liability, but there need be no incompatibility here.

A strict retributivist[26] will press that the state bears another important relation to the offender which does conflict with the relation of liability. The state is the only entity with the authority to give the offender his just deserts. For short, call this the relation of exactor of just deserts. The narrowly appropriate response given this relation is for the state to give the offender exactly what he deserves (of course within the limits of the state's position as upholder of the law). The narrowly appropriate response here clearly conflicts with the narrowly appropriate response from the position of liability. From one perspective it is appropriate to punish the offender less severely than he deserves, from another it is

[26] Recall that by strict retributivist, I mean someone who thinks the state ought to dole out punishment in accord with the retributive norm. One can endorse what I have referred to as the retributive norm without being a retributivist. Such a person would hold that there is a certain amount of punishment which the offender deserves on some function of the quality of his will and the gravity of his crime, but the state should not be in the business of giving the offender what he deserves. The concept of mercy as I defined it presupposes the retributive norm but not the strict retributivist position.

appropriate to give the offender exactly what he deserves; both responses are within the bounds of the law. We have captured and clarified the conflict that opened this essay, now we must make progress on it. Like Captain Vere, we face a difficult question. What is the broadly appropriate response for the state? From which relation should it respond to the offender?

I will argue that the state should not respond from a position of exactor of just deserts toward abused offenders (and some others). The argument begins by supposing that the state ought to respond from the position of exactor of just deserts toward abused offenders. This supposition leads to an inevitable tension between kinds of justice – the tension renders it impossible for the implementation of the law to be fully just. Assuming that this is a conclusion to be avoided, I reject the supposition that the state ought to respond from the position of exactor of just deserts toward abused offenders. The argument will be framed with reference to Kant's discussion of similar issues in the *Metaphysics of Morals*. My aim in referencing Kant is not to defend an interpretation of his opinion on the issue,[27] but rather to use his work as a springboard for our own investigation. He is a helpful foil because he appears to endorse the supposition that the state ought to respond from the position of exactor of deserts toward abused offenders.[28]

Kant recognizes that an appropriate response to an offender varies with the relation in which one stands to the offender. [29] He discusses this point in his discussion of the

---

[27] For an interpretation of Kant's view of mercy, see Sarah Holtman, "When Mercy Seasons Justice: Reflections on the Character of the Kantian Judge."

[28] Kant's determination of 'just deserts,' is different from what we have been working with. It does not depend on the quality of the agent's will. This point is not relevant, however, to the rest of the argument.

[29] Kant's acceptance of the idea that appropriateness changes with relation is further evidenced in his discussion of the right to pardon. He argues that although it is unacceptable for a sovereign to pardon an offender in his

appropriate response toward a mother who murders an illegitimate child and a soldier who murders someone in a duel. The appropriate response from society is heavily influenced by norms of honor which are not ensconced in law. If the response to crime is coming from society or "the people," leniency is appropriate. If the response to crime is coming from the state as exactor of just deserts, the death penalty is appropriate. Kant highlights the discrepancy between the two narrowly-appropriate responses: "the public justice arising from the state becomes *injustice* from the perspective of the justice arising from the people."[30] Kant is not entirely clear on how the state should respond given this discrepancy. He remarks that in such cases "penal justice finds itself very much in a quandary…it remains doubtful whether legislation is authorized to impose the death penalty."[31]

On an admittedly controversial Rousseauvian interpretation of Kant, the appropriate response is for the state to respond as representative of the will of the people rather than exactor of just deserts. For if the state does not represent the will of the people, the state lacks the authority to use coercive power. The judge has two options. Respond from the position of state as upholder of the law, determine accordingly that death is appropriate, and then not actually punish the offender because she lacks the authority to do so. Or respond from the position of the people, determine that leniency is appropriate, and punish the offender leniently. All things considered, the latter option is preferable. The idea here is that the broadly appropriate response is for the state to respond in the name of the people who may be more or less behind leniency or just deserts in any given case. This argument pushes

---

relation to the offender as sovereign, it is acceptable for a sovereign to pardon an offender in his relation to the offender as a fellow person. *The Metaphysics of Morals,* 6:337.

[30] *The Metaphysics of Morals*, ed. Mary Gregor (New York: Cambridge University Press, 1996), 6:337.

[31] Ibid., 6:336

back the question of broad appropriateness onto the people. The argument justifies leniency for abused offenders if the people are behind it, but it also seems to justify extraordinarily harsh punishment for abused offenders if the people are behind it. This Rousseauvian argument is unsatisfying. The law becomes a hostage to public opinion, inviting in a myriad of problems that I am not prepared to solve on behalf of Rousseauvians.

It is worth considering an alternative response to Kant's quandary of what is broadly appropriate. On a strict retributivist reading of the text,[32] Kant asserts that the state should execute the offender because it must act from the position of exactor of just deserts. Kant admits that this course of action is unjust from the perspective of the people whose response is influenced by social norms of honor. In this sense, Kant echoes Thomas More's comment that "until you put these things right, you are not entitled to boast of the justice meted out to thieves." In Kant's view one should mete out punishment even if one cannot call it fully just, because the state simply ought to respond from its position as exactor of just deserts. The injustice here is not that there is an actual public outcry against the state's action, but rather that there is a discrepancy between the state's action and what social norms call for when properly applied to the situation. The state's implementation of the law in theses cases does not respect the norms active in the society which it governs. In this sense, the state's authority to govern that society is not fully justified; the state must act in such cases but it must do so without full license. Its actions are admittedly unjust. Kant seems to be willing to accept such injustice because he believes it is temporary and can be eradicated by social

---

[32] "The knot can be undone in the following way: the categorical imperative of penal justice remains (unlawful killing of another must be punished by death), but the legislation itself (and consequently also the civil constitution), as long as it remains barbarous and undeveloped, is responsible for the discrepancy between the incentives of honor in the people (subjectively) and the measures that are objectively suitable for its purpose. So the public justice arising from the state becomes *injustice* from the perspective of the justice arising from the people" (*MM* 6:337).

reform. Social reform can change the norms of honor such that they no longer motivate people to engage in duels or kill babies. After reform, justice from the perspective of the state would align with justice from the perspective of the people and no form of social injustice would plague implementation of the law.

Notice that Kant's assertion that the state ought to act as exactor of just deserts leads him to accept *temporary and removable injustice* in the implementation of the law. One might be willing to bite this bullet alongside Kant, but I will argue that in some cases the bullet is much larger and unpalatable. If one thinks the state ought to act as exactor of just deserts in the case of abused offenders (and others), then one must accept *perpetual and inevitable injustice* in the implementation of the law.

Just as people in Kant's society respected certain social norms of honor, people in today's society (and arguably in Kant's as well) respect certain norms of liability. If an officer was insulted in Kant's society, social norms of honor required him to fight a duel. From a social perspective, it would accordingly be inappropriate to punish the officer. If we breach a duty of care, social norms of liability require us to show special concern toward the failed party and be lenient toward her if she does wrong. From a social perspective, it would accordingly be inappropriate to demand that an abused offender suffer in exact proportion to his culpability. Instead, some measure of leniency is appropriate (note that the social perspective is not what the people are actually saying, but what the social norms deem appropriate). From the perspective of the state as exactor of just deserts, however, the appropriate response is giving the offender his just deserts. If the state acts as exactor of just deserts, its implementation of the law is unjust given the social perspective: "the public justice arising from the state becomes *injustice* from the perspective of the justice arising

from the people."[33] Kant suggests that this injustice is not a large problem as long as it is temporary and removable by reform. In the case of abused offenders, however, sufficient reform is impossible. I do not simply mean "impossible" in the sense that reform is inevitably slow and unlikely to happen. I mean that it is impossible given basic facts about the world to remove the relevant injustice without introducing new injustice.

The possibility of child abuse remains as long as society retains families and some degree of privacy (which a broad theory of justice requires). We cannot guarantee that no victim of child abuse will become a criminal offender as long as citizens are allowed a reasonable degree of freedom (which again justice requires). No matter how just a state is, it is possible, indeed likely given what we know about human nature, for it to have criminals who are victims of child abuse. Social norms of liability maintain that leniency is the appropriate response to abused offenders. Moreover, we do not think social reformers ought to eliminate the norms of liability governing this response. Recall that the norms of liability help us together cope with a world marked by accidents and obstacles. Since we should not eliminate the norm and we cannot reform away the incidence of abused criminal offenders, we are stuck with the fact that justice from the prospective of the state as exactor of just deserts will perpetually be at odds with justice from the perspective of society that takes seriously the vicissitudes of life.

This conflict is problematic. The implementation of the law in these cases can never be fully just. The state could give the offender exactly what she deserves, but doing so is an injustice given the social perspective. Or the state could give the offender less than she deserves, but doing so would be an injustice from the state's perspective. Justice is bound to

---

[33] Ibid.

speak with conflicting voices. The conflict runs deep; it cannot be relieved by reforming society. Assuming that we want justice to speak with one voice, we need to keep the conflict from initially arising. There are two ways to avoid the conflict. First, one could argue that we were mistaken in supposing that justice from the social perspective calls for leniency. Perhaps the broadly appropriate response from the social perspective is not to respond from a relation of liability, but rather from some other relation that calls for giving the offender exactly what she deserves. In this case, it would be just from the perspective of both the state and society for the offender to be punished with her just deserts. Second, one could argue that we were mistaken in supposing that justice from the state's perspective entails giving the offender exactly what she deserves. Perhaps the broadly appropriate response from the state is not to respond to abused offenders from the position of exactor of just deserts, but rather from a position of liability that calls for leniency. In this case, it would be just from the perspective of both the state and society for the offender to receive less than her just deserts.

Two reasons stand in favor of making the second move rather than the first. The first reason is that the first move is problematic. Saying that we should not respond from a relation of liability when we stand in one is failing to take seriously the duties of care that we owe to one another. Failing in this way commits us to leaving victims of some of life's worst misfortunes to bear the effects of those misfortunes on their own. Instead of helping them out of a recognition that we too could be subject to the same misfortunes ('there but for the grace of God go I'), we say 'too bad, that is your problem, not mine.' To not respond from a relation of liability when we stand in one is to give up on our commitment to care for one another in a world characterized by misfortune.

The second reason for choosing the second move rather then the first move is that we have already accepted something akin to the second move in a variety of other contexts. In many cases it is clear that it is not broadly appropriate for the state to respond from the position of exactor of just deserts. When there is a very strong state interest not to respond from the position of exactor of just deserts, it is appropriate for the state not to respond from the position of exactor of just deserts. Evidence lies in the fact that we think it is appropriate for prosecutors to give plea bargains to offenders who testify against mob bosses or drug lords and for Ford to have pardoned Nixon. Such cases illustrate that we are not giving much up if we admit that justice from the state's perspective does not demand responding from the relation of exactor of just deserts.[34] We already admit this point in a great deal of cases.

These two reasons seem to sufficiently support making what I referred to as the second move. That is, we should accept that that justice from the state's perspective does not require the state to give the offender exactly what she deserves. The broadly appropriate response from the state is not to respond to abused offenders from the position of exactor of just deserts, but rather from a position of liability that calls for leniency. In this way, the implementation of the law with respect to these cases can be just both from the perspective of the state and society.

The upshot of the argument here is rather surprising. Making room for mercy in criminal justice is the best way for the implementation of the law to be just in every sense. We initially suspected that mercy in criminal law compromises justice. Now we see that denying mercy room in the criminal law would compromise justice. Note that the argument has not undermined the retributive norm or suggested that it is internally flawed. We have

[34] Kant scholars have argued on various grounds that Kant's mature jurisprudence is in fact not committed to the claim that the state must always serve as exactor of just deserts.

instead provided reasons to think that the retributive norm is not the relevant norm determining the broadly appropriate response of the state toward abused offenders. Given our non-ideal world, the retributive norm should sometimes take the back seat and give mercy the reigns.

My conclusion is somewhat tentative. I should note two qualifications. First, justice must make room for mercy only insofar as the society is committed to the norm of liability. I have given some reason to think that society should be so committed, but if it is not then the above argument for mercy does not hold. Second, I have not considered all the various relations which the state arguably stands in with respect to the offender. It is possible that one such relation conflicts and arguably trumps the relation of liability. I cannot think of such a relation and I doubt that one exists. Nevertheless I should temper my conclusion. Provided that the state should not respond from some other conflicting relation that I have failed to consider, the state ought to respond to abused offenders from the position of liability which calls for mercy (within the bounds of the position of upholder of the law).

V. Objections and responses

I have argued that if the state responds as exactor of just deserts it does so at the cost of inviting inevitable social injustice. One might argue that the state should nevertheless respond as exactor of just deserts on the following grounds. Sometimes social norms call for punishment beyond the retributive norm. In these cases, we want to say that the state should respond as exactor of just deserts – not giving the offender more (or less) than he deserves – and we accept the inevitable injustice which this break with social norms invites. Justice from the perspective of the state will be unjust from the perspective of society, but we are

willing to accept injustice in these cases, even if it is inevitable. Given that we are willing to accept inevitable injustice here, why should inevitable injustice be grounds to change our position in other cases?

In response, one could deny the existence of a social norm on which it is appropriate to give an offender more than he deserves. Generally when people think it is appropriate to be very harsh toward an offender it is because they think she deserves this harsh treatment because her will was particularly malicious or her act was particularly heinous. A person in a mob may assent to the thought that the offender should get more than she deserves, but on reflection few think this is appropriate. History, however, stands in the face of this first response. Some people have thought, indeed some continue to think, that it is appropriate for racial minorities to get more punishment than they deserve. We need an alternative response.

Even if there is a social norm on which it is appropriate to give the offender more than he deserves, we can affirm that it is possible to reform society such that people will no longer think it is appropriate to give any offender more than he deserves (perhaps less, but never more). In the case of abused offenders, however, the reform option is not available and we are forced to conclude that the state should not respond as exactor of just deserts lest we surrender to perpetual injustice. It seems suspicious and ad hoc to argue that it impossible to solve the problem raised by child abuse, but nevertheless possible to solve the problem raised by racial bias. To solve the problem of child abuse we would have to either a) sacrifice a measure of justice to eliminate the possibility of abused offenders or b) dismiss the importance of norms of liability in how we treat these offenders. Neither option is broadly justifiable (as long as one affirms a commitment to the norms of liability). To solve the problem raised by racial bias we would have to either a) eliminate the possibility of minority

offenders or b) dismiss the importance of skin color in how we treat these offenders. The second option is not only justifiable, but arguably morally required.

The second objection I will consider is that I have failed to take my own medicine. I criticized sympathy as grounds for mercy because the appeal to sympathy did not sufficiently explain why one should show mercy. One might worry that the same problem holds equally well on my account of grounds for mercy. My account seems to dodge the million dollar question of "why be merciful?" just as much as the sympathy account. The sympathy account bottoms out with an appeal to the value of being sympathetic. My argument turns on an appeal to the norm of liability which calls for special concern toward those whom we have failed in our duties of care. I have pointed to this norm at work in our moral lives, but not justified it 'all the way down.'

I accept that my grounds for mercy do not justify mercy 'all the way down.' Normative justification must stop somewhere. I do claim, however, that my grounds provide a more satisfying justification than the grounds of sympathy. On my account, mercy is grounded in a shared norm rather than an emotion. Grounding mercy in a shared norm allows us to substantively discuss standards of correctness for mercy. *We* can make a case that a judge who shows mercy to an attractive person who has never suffered abuse and no mercy to a smelly person with a horrific childhood is *wrong* to do so. On the other hand, if mercy is grounded in an emotion, then it admits of a great deal of individual variation and does not admit of standards of correctness. All one can say to the above judge is "*I* would have felt *differently*." Grounding mercy in a shared norm rather than an emotion may make mercy no more or less justified from an abstract philosophic point of view, but it does make

mercy more justified from the point of view of the law -- a realm in which (ideally) arguments are made from shared standards of correctness.

VI. Extended Application

In this section, I consider how my account of mercy applies to a variety of potential cases. I have shown that mercy should be shown to abused offenders, but is it appropriate for other offenders? In most cases, the answer to this question depends on the reader's broad theory of justice. I will consider the following cases: the otherwise abused offender, the impoverished offender, the offender without access to health care, and the foreign offender.[35]

My position entails that whenever the state stands in a relation of liability toward the offender, there is a prima facie case for mercy which can be rejected by a strict retributivist. If we cannot hope to justly reform the conditions under which the relevant duty of care was breached, mercy should be shown even if one is a strict retributivist. I will begin by exploring the various candidates for prima facie mercy.

Whether the state stands in a relation of liability toward the offender depends on whether the offender's basic rights have been violated in a way that is causally relevant to the crime. In almost every theory of justice, an offender's basic rights are violated whenever she

---

[35] Readers may wonder how my account of mercy applies not just to cases in criminal law, but in the theological context in which mercy is often discussed. God's mercy has often been understood as a 'power show' that lets off mere mortals on a whim or out of pity for their inferiority. This idea is unappealing to many on the basis of humanist or justice concerns (Saint Anselm was particularly concerned about justice). On my account, one can potentially understand God's mercy as God choosing to respond to humans from the relation of friend or perhaps from the relation of a failed protector. Mercy as the response from God as friend is particularly relevant in the Christian tradition in which Christ—believed to be God who stands with humans as human—seems to make special room for mercy. Mercy as the response from God as failed protector is particularly relevant for those grappling with the problem of evil (the mercy shown by the God figure to the Grand Inquisitor in Dostoyevsky's *Brothers Karamazov* springs to mind). On my account of mercy, one can see God's mercy as grounded in a closeness, respect, or love for humanity rather than pity which looks down upon humanity. I leave it entirely to the reader, however, to decide whether this application of my account counts as a virtue, a vice, or an irrelevant feature of the account.

is severely physically abused regardless of whether the abuse happens at the hands of a parent, a spouse, or a perfect stranger.[36] If the abuse is causally relevant to the crime (which it is in most cases), then it presents a prima facie case for mercy. Note that I have provided no grounds for mercy for domestically abused wives who get speeding tickets or for abused children who fail to pay taxes. A causal link is missing here between the state's breach of duty of care and the performance of the offense. In some theories of justice, people have a right to basic necessities and/or the opportunity to earn a living wage. If an offender does not have access to such things (this may be true in economically depressed areas) and this privation is causally relevant to his crime, then he is a prima facie candidate for mercy. In a few theories of justice, people have a right to access health care. If an offender does not have access to health care and this privation is causally relevant to his crime, then he is a prima facie candidate for mercy.[37] In these last two types of cases, however, it may be difficult for the privation to be causally relevant to the crime in a way which does not revise down the amount of punishment judged to be deserved as a function of the offender's will and the harm caused. If grinding poverty really leads an offender to steal food, we do not judge that his will is malicious or that he caused a harm on balance. He may not deserve any punishment to begin with so mercy would not have a toehold. There may be some cases which fit the necessary conditions here, but I suspect there are few.

---

[36] Some theories of justice maintain that severe emotional as well as physical abuse constitutes a violation of basic rights. Some theories of justice may say the offender's rights have not been violated if she brought the abuse on herself. One could arguably claim that in some cases a spouse chooses to stay in an abusive relationship and thus her rights are not violated. The state has not failed this person and my grounds for mercy would no be applicable here. Note that an analogous argument does not hold for young children because young children have no real alternative to staying with abusive parents.

[37] These cases are undoubtedly rare, but one is arguably presented in the movie John Q. A father who cannot pay for an operation for his dying son takes an emergency room hostage until a doctor performs the necessary operation. Many viewers think that John should be punished, but given less punishment than he deserves as a function of the quality of his will and the harm he caused.

Suppose the relevant rights of the above candidates for mercy were violated in a foreign state, but the candidates commit their offense in America. Some other country stands in a relation of liability toward them, but arguably America does not. If America does not stand in a relation of liability toward them, then the grounds for mercy discussed in this paper do not apply (other grounds may nevertheless apply). If one adopts a very cosmopolitan theory of international justice, however, one could argue that America does stand in a relation of liability toward these offenders. The violation of rights in foreign countries is no less America's business than the violation of rights in America. America stands in a relation of liability toward any citizen of the world whose rights have been violated. A great deal more would follow from accepting this position, but a full exploration here is beyond my scope.

If we cannot hope to justly reform the conditions under which the offender was failed in all the above scenarios, then we have more than prima facie grounds for mercy. In these cases, we can argue that mercy should be shown on pain of social injustice. Even the strict retributivist should show mercy in such cases. Determining whether we can hope to justly reform the conditions under which the state breaches its duty of care is a complex task which I admittedly gave short shrift to in my discussion above. My hunch, minus a great deal of relevant sociological, economic, historical, and political evidence, is that a maximally just state will not be able to eradicate abuse, but it will be able to able to provide all with basic necessities, an opportunity to earn a living wage, and access to health care. Thus physical abuse is the only grounds for mercy which a strict retributivist must accept.

VII. Conclusion:

Mercy is not popular in America's criminal justice system. Many decry mercy as not fit for democracy, as an archaic practice designed for monarchs to demonstrate their power above the law.[38] In the news media, mercy has been referred to as "an abuse of power,"[39] and a "cavalier laceration of the unhealable wounds of those who mourn the victims of the killers."[40] I added my voice to this criticism in Part II. If mercy is something we do simply out of sympathy, it invites a disregard for treating people as equals and for avoiding arbitrariness in practical implementation of the law. Mercy compromises some our important commitments and so unless we have strong positive reason to hang on to it, we should compromise mercy, consign it to tales of emperors, monarchs, and knights.

Although the argument has taken many twists and turns along the way, I hope to have shown that we should not compromise mercy. We may find ourselves legitimately tempted to compromise mercy in the law if we understand it to be grounded in sympathy which obeys no rhyme or reason. We may also be tempted to compromise mercy if we over-simplify responses to wrongdoing, if we think an appropriate response can be boiled down to an appeal to a single norm. I have argued, however, that the appropriateness of our responses to wrongdoing is not so simple, but tied to the complex structure of the relations we bear to one another. I have also argued that mercy can be understood not as grounded in sympathy, but in a relation of liability. Understood in this sense, mercy is uncompromising: it does not compromise justice, it in fact demands its place in the law on pain of injustice, and it comes equipped with standards of correctness. According to those standards, the state ought to

---

[38] Dan Markel, "Against Mercy," *Minnesota Law Review* 88 (2004).

[39] Brian C. Crecente, "Owens Blasts Death Rove Move on TV," *Rocky Mountain News*, Jan 14 2003 at 3A.

[40] George F. Will, "Unhealable Wounds," *Washington Post*, Jan 19 2007 at B7.

show mercy to offenders who have been physically abused. They do not deserve less severe punishment, but we cannot boast of justice unless we show them mercy.

WORKS CITED

Alicke, M.D., Davis, T.L., and Pezzo, M.V., "A posteriori adjustment of a priori decision criteria," *Social Cognition* 12 (1994): 281-308

Alicke, M.D. "Culpable control and the psychology of blame," *Psychological Bulletin* 126 (2000): 556-574.

Amnesty International, "USA (Indiana): Death penalty / Legal concern: David Leon Woods," 13 April 2007. Retrieved from http://archive.amnesty.org/library/Index/ENGAMR510722007?open&of=ENG-2AM.

Brien, Andrew. "Mercy, Utilitarianism, and Retributivism," *Philosophia* 24 (1995): 493-521.

Card, Claudia. "On Mercy," *The Philosophical Review* (April 1972): 182-207.

Cartwright, David. "Revenge, Punishment, and Mercy: The Self Overcoming of Justice," *International Studies in Philosophy* 17 (1985): 17-26.

Coleman, Jules. "Theories of Tort Law," *The Stanford Encyclopedia of Philosophy* (Spring 2007 Edition), Edward N. Zalta (ed.). Retrieved from http://plato.stanford.edu/archives/spr2007/entries/tort-theories/.

Crecente, Brian C. "Owens Blasts Death Rove Move on TV," *Rocky Mountain News*, Jan 14 2003 at 3A.

Currie, Janet and Edal Tekin, "Does Child Abuse Cause Crime?," Working Paper in Andrew Young School of Policy Studies Research Paper Series (2006). Retrieved from http://aysps.gsu.edu/CurrieTekin_ChildAbuse.pdf.

English, Widom, and Brandford. "Childhood Victimization and Delinquency, Adult Criminality, and Violent Criminal Behavior: A Replication and Extension," Final Report presented to the National Institute, Grant No. 97-IJ-CX-0017. Retrieved from www.ncjrs.gov/pdffiles1/nij/grants/184894.pdf.

Hieronymi, Pamela. "Articulating an Uncompromising Forgiveness," *Philosophy and Phenomenological Research* May, 2001: 548-574.

Kant, Immanuel. *The Metaphysics of Morals*, ed. Mary Gregor (New York: Cambridge University Press, 1996), 6:337.

Kutz, Christopher. *Complicity: Ethics and Law for a Collective Age* (New York: Cambridge University Press, 2000).

Markel, Dan. "Against Mercy," *Minnesota Law Review* 88 (2004).

Murphy, Jeff and Jean Hampton, *Forgiveness and Mercy* (New York: Cambridge University Press, 1988).

Myers, Bryan, Steven Jay Lynn, Jack Arbuthnot, "Victim Impact Testimony and Juror Judgments: The Effects of Harm Information and Witness Demeanor," *Journal of Applied Social Psychology* 32 (2002), 2393–2412.

Nussbaum, Martha C. "Equity and Mercy," *Philosophy and Public Affairs* 22 (1993): 83-125.

Rainbolt, George. "Mercy: In defense of caprice," *Noûs* 31 (1997): 226-241.

Roberts, H.R.T, "Mercy," *Philosophy* 46 (1971): 352-353.

Sigler, Mary. "The Story of Justice: Retribution, Mercy, and the Role of Emotions in the Capital Sentencing Process," *Law and Philosophy* 19 (2000): 339-367.

Smart, Alwynne. "Mercy," *Philosophy* 43 (1968): 345-359.

Seneca. *Seneca Dialogues and Essays*, trans. John Davie (New York: Oxford University Press, 2007), p. 214.

Statman, Daniel. "Doing Without Mercy," *The Southern Journal of Philosophy* 32 (1994): 331-354.

Tasioulas, John. "Mercy," Meeting of the Aristotelian Society, held in Senate House, University of London on Monday, 13 January, 2003.

Twambley, P. "Mercy and Forgiveness," *Analysis* 36 (1979): 84-90.

Will, George F. "Unhealable Wounds," *Washington Post*, Jan 19 2007 at B7.

Wolf, Susan. "The Moral of Moral Luck" in *Setting the Moral Compass*, ed. Cheshire Calhoun (Oxford: Oxford University Press, 2004), p. 123.

Woods v. McBride, 430 F.3d 813 (2005).