Journal of Law and Religion 35, no. 1 (2020): 18–32 © Center for the Study of Law and Religion at Emory University
doi:10.1017/jlr.2020.8

ESSAY

JUSTICE, MERCY, AND EQUALITY IN DISCRETIONARY CRIMINAL JUSTICE DECISION MAKING

ALBERT W. ALSCHULER

Julius Kreeger Professor Emeritus, The University of Chicago Law School

This essay was presented in draft at a symposium convened at the Inner Temple, London, in October 2018 and will be published in Mark Hill, Norman Doe, Richard Helmholz, and John Witte, Jr., eds., Christianity and Criminal Law (Abingdon: Routledge, 2020).

ABSTRACT

This essay examines whether, in exercising their discretion, criminal justice officials should do justice, grant mercy, and treat alleged or convicted offenders equally. Although it endorses doing justice, the essay maintains that officials should almost never reduce a just punishment simply to be merciful. Public officials are fiduciaries, and they ordinarily have no authority to make unmerited gifts. Sometimes, however, deciding not to inflict a just penalty can reflect the willingness of an entire society to forgive. That may be the case, for example, when truth and reconciliation commissions approve amnesties. The essay focuses on the teachings of Jesus Christ and questions some of them. It asks, for example, whether a modern chief executive would merit praise or condemnation if this executive followed Jesus's example in the case of the woman taken in adultery. The essay also suggests that—unlike other officials—chief executives exercising their pardon power need not act affirmatively to treat like cases alike. A conclusion notes that it would have been out of character for Jesus Christ to refuse a plea for mercy. Nevertheless, few Christians have endorsed an implication of his willingness to forgive—the abolition of criminal punishment.

KEYWORDS: criminal justice, mercy, equality, pardons

INTRODUCTION

Discretion not to punish runs from the start of the criminal justice system through the end. A police officer who observes a crime may make an arrest or let the offender go. A prosecutor may decline to file charges even when guilt is clear. A prosecutor also may allow a defendant to plead guilty to a less serious crime than the one he apparently committed, and this official may agree to recommend a lenient sentence.

Whether a grand jury has the same authority as a prosecutor to free the guilty is not settled. A few states tell grand jurors they have this power; a larger number tell them they do not; and still more do not instruct them on the question.[1] Some early state constitutions, statutes, and decisions

1 See United States v. Navarro-Vargas, 408 F.3d 1184, 1197–98 (9th Cir. 2005).

https://doi.org/10.1017/jlr.2020.8 Published online by Cambridge University Press

expressly authorized trial juries to acquit defendants whose factual guilt was clear, but that power of juries, which was never recognized in England, vanished in America more than a century ago.[2] Judges now insist that authorizing trial juries to nullify would be inconsistent with the rule of law.[3] (Oddly, judges do not say the same thing about prosecutors' decisions to free the guilty, which occur often.) Although jurors are told not to nullify, jurors who do acquit clearly guilty defendants are not sanctioned, and their verdicts are not set aside.[4]

Like a jury, a judge deciding guilt or innocence has no authority to acquit a guilty defendant. Following conviction, however, a judge may be empowered to sentence the offender to prison for a long term or a short term or to place him on probation. A parole board may be authorized to release the offender long before he has completed the sentence set by the judge. Other correctional authorities may have discretion to determine the conditions of the offender's confinement. Finally, many state governors, like the US president, have an almost entirely unfettered authority to commute an offender's sentence or to pardon him altogether.

In exercising their discretion, criminal justice officials should do justice, but whether they should also be merciful is a more challenging issue. In some translations, the Bible tells them to do both: "[W]hat doth the Lord require of thee," the prophet asks, "but to do justly, and to love mercy, and to walk humbly with thy God?"[5]

Can officials do both? Philosophers since Aristotle have doubted they can.[6] Jeffrie Murphy explains the dilemma:

> [I]f we simply use the term "mercy" to refer to certain of the demands of justice (e.g., the demand for individuation), then mercy ceases to be an autonomous virtue and instead becomes a part of . . . justice. It thus becomes obligatory, and all the talk about gifts, acts of grace, supererogation, and compassion becomes quite beside the point. If, on the other hand, mercy is totally different from justice and actually requires (or permits) that justice sometimes be set aside, it then counsels injustice. In short, mercy is either a vice (injustice) or redundant (a part of justice).[7]

The word *mercy* is indeed slippery. Does it consist, as Alwynne Smart maintains, of "deciding not to inflict what is agreed to be the just penalty, all things considered"?[8] Smart's definition may seem under-inclusive because the baseline from which mercy reduces suffering need not always be "justice." When a kidnap victim begs a kidnapper to show mercy, he is not seeking the remission of just punishment. Is the relevant baseline, then, any painful or undesired condition that might exist in the absence of the merciful action? Can mercy include seeking less punitive ways of *doing* justice? Can the word sometimes refer, not to an act or omission at all, but simply to a character trait—a merciful disposition?

---

2 Albert W. Alschuler and Andrew G. Deiss, "A Brief History of the Criminal Jury in the United States," *University of Chicago Law Review* 61, no. 3 (1994): 867–928, at 902–11.

3 For example, United States v. Kleinman, 859 F.3d 825, 835–38 (9th Cir. 2017); United States v. Thomas, 116 F.3d 606, 614–16 (2d Cir. 1997).

4 For example, *Kleinman*, 859 F.3d 825, 835–38 (9th Cir. 2017); see Bushell's Case, Vaughn 135, 124 E.R. 1006 (1670).

5 Micah 6:8 (King James). Other translations speak of loving "goodness" or "kindness" rather than loving "mercy."

6 See Aristotle, *Nicomachean Ethics*, book V, 1137b[1] (London: Aeterna Press, 2015) ("[I]t seems strange if the equitable, being something different from the just, is yet praiseworthy; for either the just or the equitable is not good, if they are different; or, if both are good, they are the same.").

7 Jeffrie G. Murphy, "Mercy and Legal Justice," in *Forgiveness and Mercy*, Jeffrie G. Murphy and Jean Hampton (Cambridge University Press, Cambridge 1988), 162–86, at 169.

8 Alwynne Smart, "Mercy," *Philosophy* 43, no. 166 (1968): 345–59, at 349.

https://doi.org/10.1017/jlr.2020.8 Published online by Cambridge University Press

Smart's definition also may seem over-inclusive, for it speaks of foregoing just punishment without specifying an accompanying mental state or motive, and some mental element surely is necessary. A prosecutor who decides not to seek just punishment only because a trial would consume three days of his time does not appear to be merciful. *Compassion* for the person whose punishment is remitted seems essential, though this motivation need not be exclusive.

Echoing Ludwig Wittgenstein's analysis of the word *game*, Alex Tuckness and John Parrish declare that mercy is "a 'family resemblance' concept: one where the concept can retain usefulness even though one cannot give a definitive account of its necessary and sufficient conditions."[9] Unlike pornography, however, one does not always know mercy when one sees it, and use of the undefined term can muddy rather than clarify.

In this essay, I focus on when and whether mercy can be distinguished from justice, accepting the conventional view that mercy must be supererogatory. It must be something given, not owed. This understanding does not extend to every use of the word in other contexts. The kidnapper who spares his victim merely does his duty, and Immanuel Kant maintained that developing a merciful spirit is obligatory.[10] When one seeks to call some acts *justice* and others *mercy*, however, the line between obligation and supererogation seems crucial.

Focusing on this characteristic reveals that the question ultimately is one of ethics, not linguistics. In exercising their discretion, when, if ever, should criminal justice officials remit or forego punishment they consider just partly or entirely out of compassion for the person whose punishment is foregone? When, if ever, should they forego punishment simply to be merciful? In some situations, mitigating punishment is a moral duty; in others, it is improper. If these situations exhaust the field, justice is what matters, and mercy is an impossible virtue.

In examining the duties of criminal justice officials, I focus particularly on the power of chief executives to grant commutations and pardons. This power is likely to seem the least problematic place for official acts of mercy. I consider not only whether and when chief executives should be merciful but also the extent to which they should treat applicants for clemency equally. My inquiry begins with a case in which Jesus Christ pardoned a criminal.

THE EXAMPLE OF JESUS CHRIST

The woman's guilt was clear. "Teacher, this woman was caught in the very act of committing adultery."[11] The prescribed punishment was clear as well. "Now in the law Moses commanded us to stone such women."[12] But when Jesus challenged anyone without sin to throw the first stone, the accusers left the scene.[13] Then Jesus said to the woman, "Go your way, and from now on do not sin again."[14]

An inspiring story, you say? Suppose a US president were to free someone guilty of a capital offense with no punishment at all, simply warning her not to do it again. Suppose that, when challenged to defend his action, the president declared that no one is entitled to punish unless he is

9 Allen Tuckness and John M. Parrish, *The Decline of Mercy in Public Life* (Cambridge: Cambridge University Press, 2014), 250.

10 See Immanuel Kant, *The Doctrine of Virtue: Part II of "The Metaphysics of Morals,"* trans. Mary J. Gregor (New York: Harper & Row Torchbooks, 1964), 459–61 (marginal page references to the Academy edition).

11 John 8:4. This and all subsequent biblical quotations are from the New Revised Standard Version.

12 John 8.5.

13 John 8:7–9.

14 John 8:11.

https://doi.org/10.1017/jlr.2020.8 Published online by Cambridge University Press

without sin himself. Suppose the president granted clemency without mentioning any redeeming virtue of the offender or any extenuating circumstance of the crime. Suppose he said nothing to distinguish the pardoned offender's case from that of any other offender.

One might wonder whether this president opposed criminal punishment altogether. If only people without sin are entitled to punish, no one is. And if the president did not mean to bring the punishment of criminals to an end, did he free this one at random? Did he see clemency as sport or as an expression of tender sentiments on a lovely day? Is there an alternative?

However you look at it, the president's pardon was outrageous. He should be impeached.

Was Jesus's view of clemency as radical as the case of the woman taken in adultery makes it seem? John Calvin said that "although Christ remits one's sins, He does not subvert the social order or abolish legal sentences and punishments." Calvin condemned as "Popish theology" the idea that "Christ has brought in the law of grace, by which adulterers may be freed from punishment."[15]

Someone seeking support for Calvin's tough, "non-Popish" view can suppose that the Bible provides an incomplete account of the woman's case. He can, if he likes, accept the imaginative reconstruction offered by J. Duncan M. Derrett.[16]

Derrett notes that Jewish law allowed conviction only on the testimony of two witnesses[17] and that people committing a capital offense would have made every effort to conceal it. In all probability, Derrett says, witnesses did not simply stumble upon the woman in the act of adultery. Instead, the woman's husband had learned of her disloyalty. Because the husband could not testify against his wife, he arranged to have two or more witnesses observe a later tryst. These witnesses might have warned the woman and prevented her crime, but they conspired with the husband to cause her death. When Jesus said, "Let anyone among you who is without sin be the first to throw a stone at her," he was not broadly condemning the hypocrisy of punishing others while leaving one's own sins unacknowledged. Rather, he was inviting any accuser who was not complicit in the woman's crime to begin an execution. Confronted with this challenge, the accusers slunk away one by one.

One can also, if one likes, attribute to Jesus a modern recognition of the injustice of the ancient law of adultery. This law required death for a married woman who had sex with someone other than her husband, and it demanded death for her lover as well. But it did not punish either participant in sexual intercourse between a married man and a woman other than his wife.[18]

John's gospel does not reveal the fate of the man caught in the act with the woman. Perhaps he was a fast runner, or perhaps he already had been executed. Perhaps he was recruited by the husband to entrap the woman and then was allowed to go free. Perhaps he paid a bribe to escape prosecution (something a married woman, unable to own property independently, could not have done). Or perhaps the man was simply the beneficiary of discriminatory prosecution. (An aside: Many scholars do not believe that the story of the woman taken in adultery was part of John's gospel. In 383, however, Saint Jerome included this story in the Latin version of the gospels he prepared on the basis of earlier Greek texts. The church declared Jerome's version authoritative at the Council of Trent more than 1,100 years later.[19])

15 John Calvin, *The Gospel According to St. John 1–10*, trans. T. H. L. Parker, ed. David W. Torrance and Thomas F. Torrance (Edinburgh: Oliver and Boyd, 1959), 209.

16 J. Duncan M. Derrett, *Law in the New Testament* (Eugene: Wipf & Stock, 2005), 156–88.

17 Deuteronomy 19:15.

18 Deuteronomy 22:22; Leviticus 20:10–12.

19 "Jesus and the Woman Taken in Adultery," Wikipedia, accessed May 22, 2019, https://en.wikipedia.org/wiki/Jesus_and_the_woman_taken_in_adultery; see generally Jennifer Knust and Tommy Wasserman, *To Cast the First Stone: The Transmission of a Gospel Story* (Princeton: Princeton University Press 2019).

https://doi.org/10.1017/jlr.2020.8 Published online by Cambridge University Press

Could one reasonably applaud Jesus while booing the modern president by distinguishing between divine and earthly justice? In about 386, Ambrose, the bishop of Milan, replied to a judge who asked whether, as a Christian, he could properly sentence offenders to death. Ambrose said that the church did not forbid capital punishment, because this punishment might repress crime and because "clemency should proceed from [the judges'] own free-will and forbearance, rather than from any legal necessity."[20]

After reciting the story of the woman taken in adultery, however, Ambrose said of Jesus:

> Being the Redemption, He refuses to condemn her, being the Life He restores her, being the Fountain He washes her. . . . Jesus . . . stoops down . . . that He may raise the fallen . . . . Here is an example for you to follow, for it may be that there is hope of amendment for this guilty person . . . . See how many roads there are to redemption![21]

Pardons appear to be as old as punishment. As best I can tell, every legal system has provided for them. At a minimum, Jesus's teachings suggest a liberal use of this power.

EQUALITY

Someone who sought to identify the most troublesome presidential pardon in American history might consider Bill Clinton's pardon of Marc Rich. Clinton pardoned Rich, a billionaire fugitive from justice, on his last day in office, only hours before the inauguration of George W. Bush. Rich had fled the United States as he was about to be charged with tax evasion and conspiring to purchase more than six million barrels of oil from Iran while that country was holding fifty-two US hostages.

Although Clinton's chief of staff and his White House counsel opposed clemency for Rich, Rich's ex-wife, Denise Rich, supported it. She had contributed more than $1 million to the Democratic Party and its candidates; $450,000 to Clinton's library fund; $100,000 to a fund supporting Hillary Clinton's Senate campaign; $10,000 to the president's legal defense fund; and $7,375 worth of furniture to the Clintons. She also had presented a gold-plated saxophone to the president at a charity ball. Denise Rich not only wrote letters to the president but also pressed a White House social secretary for an invitation to a White House dinner. Seated at Clinton's table with such notables as Barbra Streisand and Maya Angelou, she sought a private moment with the president to emphasize that pardoning her former husband would mean a great deal to her.[22]

On the day Clinton pardoned Rich, he also granted clemency to his half-brother (Roger Clinton), two former members of his cabinet (John Deutch and Henry Cisneros), one cabinet member's son (Richard Riley, Jr.), a former cabinet member's chief-of-staff (Ron Blackley), a former member of Congress (Mel Reynolds), a former governor who had been a college friend (J. Fife Symington III), a lawyer who had managed Clinton's Georgetown campaign for student body president (Paul Prosperi), one of the president's partners in the Whitewater real estate venture (Susan

20 Ambrose, Letter 25 (to Studius), in *The Letters of S. Ambrose, Bishop of Milan, Translated with Notes and Indices* (Oxford: James Parker, 1881), 182–84. The Tertullian Project has placed the text of this 1881 edition of Ambrose's letters online, and the letter to Studius appears at http://www.tertullian.org/fathers/ambrose_letters_03_letters21_30.htm#letter25.

21 Ambrose, Letter 25, 184; see also Letter 26 (to Irenaeus), 184–90.

22 Albert W. Alschuler, "Bill Clinton's Parting Pardon Party," *Journal of Criminal Law and Criminology* 100, no. 3 (2010): 1131–68, at 1137–42.

https://doi.org/10.1017/jlr.2020.8 Published online by Cambridge University Press

McDougal), and two applicants who, apparently without Clinton's knowledge, had paid a brother of Hillary Clinton more than $200,000 apiece to support their applications.[23]

Clinton's last-day pardons lent support to the argument of some notable opponents of pardons (at least in democratic societies)—Immanuel Kant, Jeremy Bentham, Cesare Beccaria, and Baron de Montesquieu. These critics maintained that pardons inevitably render justice unequal.[24] President George W. Bush, who himself incurred criticism for remitting the sentence of his vice president's chief of staff, wrote in his memoirs, "I came to see the massive injustice in the system. If you had connections to the president, you could insert your case into the last-minute frenzy."[25] Reformers have proposed that a body of rules should replace "case-by-case pardons" to promote the equal treatment of similarly situated applicants.[26]

Jesus's championship of people at the bottom of the social pyramid—Samaritans, prostitutes, women, children, the poor, the hungry, the thirsty, the meek, the naked, the homeless, the lepers, the tax collectors, and the prisoners—makes clear that he would have disapproved of partisanship toward the rich and powerful in granting clemency.[27] Yet Jesus's miracles and his pardon of only one adulteress also raise issues of equality. Why did he restore the sight of some and not others? Jesus made little or no effort to treat like cases alike.

Perhaps equal treatment does not matter in working miracles—supernatural events to which no one is entitled. And although equal treatment does matter in granting clemency, it may matter less in this phase of the criminal process than in most others. In granting clemency, might governors and presidents be seen as mini-miracle workers?

Consider this thought experiment: President P has known Member of Congress C for many years, and when C was indicted for mail fraud, convicted, and sentenced, P followed his case closely. P believes that C was treated unjustly. If the merits of C's application were all that mattered, P would pardon him.

Nevertheless, P hesitates. He thinks: "There may be other applicants who were treated as unfairly as C. Indeed, there probably are many of them. But because I do not know their cases as well as I know C's, I cannot be sure. To find out, I would need to investigate their cases in depth, and it isn't my job to do over what the criminal justice process already has done. Unlike C, the other applicants haven't overcome my presumption that the criminal justice system got it right."

---

23 Alschuler, "Bill Clinton's Parting Pardon Party," 1142–60.

24 See Immanuel Kant, *Metaphysical Elements of Justice*, trans. John Ladd, 2nd ed. (Indianapolis: Hackett, 1999), 144 (describing clemency as "the most slippery of all the rights of the sovereign" and a means by which the sovereign can "wreak injustice to a high degree"); Jeremy Bentham, *The Rationale of Punishment* (London: Robert Heward, 1830), 429 ("The essence of this power is, to act by caprice."); Cesare Beccaria, *On Crimes and Punishments* (Edinburgh: James Donaldson, 1788), 167–68 ("Happy the nation in which [clemency and pardon] will be considered as dangerous!"); Charles de Secondat baron de Montesquieu, *Complete Works*, vol. 1, *The Spirit of Laws* (London: T. Evans and W. Davis, 1777), 121 ("Clemency is the characteristic of monarchs. In republics, whose principle is virtue, it is not so necessary.").

25 George W. Bush, *Decision Points* (New York: Crown, 2010), 104.

26 Daniel J. Freed and Steven L Chanenson, "Pardon Power and Sentencing Policy," *Federal Sentencing Reporter* 13, no. 3/4 (2001): 119–24, at 124.

27 Luke 4:17–18 ("He unrolled the scroll and found the place where it was written: 'The Spirit of the Lord is upon me, because he has anointed me to bring good news to the poor. He has sent me to proclaim release to the captives.'"); James 2:1–4 ("My brothers and sisters, do you with your acts of favoritism really believe in our glorious Lord Jesus Christ? For if a person with gold rings and in fine clothes comes into your assembly, and if a poor person in dirty clothes also comes in, and if you notice of the one wearing the fine clothes and say, 'Have a seat here, please,' while to the one who is poor you say, 'Stand there,' or, 'Sit at my feet,' have you not made distinctions among yourselves, and become one with evil thoughts?").

https://doi.org/10.1017/jlr.2020.8 Published online by Cambridge University Press

P also thinks: "My friend C is a wealthy, white college graduate, and many of the others who are likely to have meritorious cases are none of those things. To favor applicants whom I know or whose friends have my ear is systematically to favor the already advantaged."

Should P's concern about equal treatment lead him to reject C's application for a pardon? Or should he conclude that neither his inability to provide equal justice nor his predicable tilt in favor of wealthy white men should keep him from redressing the injustice he sees in C's case?

In granting clemency, presidents have an obligation not to treat like cases differently, but I think they have no obligation to treat like cases alike. To put the point less cryptically, presidents have an ethical duty not to discriminate but no duty to act affirmatively or to expend resources to ensure equal treatment. A policy of granting clemency to whites and not people of other races obviously would be outrageous, and so would a policy of granting clemency to political supporters simply because they are supporters. Nevertheless, affirmative measures to ensure equal treatment probably should be regarded as supererogatory—admirable when they can be undertaken without unduly sacrificing other goals but not imperative.

In this respect, chief executives may differ from judges and other criminal justice officials. Although presidents do not promise to render justice in every case, judges do.

A PLACE FOR MERCY IN CRIMINAL PROCEDURE

Asking whether chief executives render justice or grant mercy when they pardon poses a false dichotomy. They sometimes grant clemency without doing either one, and they sometimes do both at the same time.

President Kennedy's commutation of the sentence of Soviet spy Rudolf Able to facilitate his exchange for U-2 pilot Francis Gary Powers was clemency that did neither.[28] This commutation implied neither that the president considered the commuted sentence unjust nor that he felt merciful toward the spy. Other situations, however, show presidents both rendering justice and granting mercy. Even when pardons correct substantive injustice, granting them can be merciful.

When a president approves clemency because a prisoner's innocence has been shown or because the prisoner's punishment is excessive, the president does justice. Yet if presidents need not treat like cases alike—if they have no obligation even to listen—affording any procedure at all is merciful. If presidents are entitled to treat the judgments of the "regular" criminal justice system as conclusive, granting relief from any of these judgments is supererogatory. Presidents commonly do render justice when they pardon, but because they have no obligation to render justice, they also grant mercy.

This view of clemency as a hybrid of justice and mercy (just in substance and merciful in procedure) becomes plausible only when clemency is seen as a dispensable safety valve at the far end of a just legal system. Chief Justice Marshall took this view when he wrote for the Supreme Court in 1833, "A pardon is an act of grace."[29]

Justice Holmes, however, apparently took a different view when he wrote for the Court in 1927, "A pardon in our days is not a private act of grace . . . . It is part of the Constitutional scheme."[30] When clemency is seen as simply one more tier of review and presidents are thought responsible for

28 See Tom Wicker, "Powers Is Freed by Soviet in an Exchange for Abel; U-2 Pilot on Way to U.S.," *New York Times*, February 18, 1962, A1, https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/big/0210.html#article; see also Steven Spielberg, dir., *Bridge of Spies* (Touchstone Pictures, 2015).

29 United States v. Wilson, 32 U.S. 150, 160 (1833).

30 Biddle v. Perovich, 274 U.S. 480, 486 (1927).

https://doi.org/10.1017/jlr.2020.8 Published online by Cambridge University Press

doing justice, the distinction between clemency and other phases of the criminal justice system collapses.

For example, a new technology might enable authorities to identify a substantial number of wrongly convicted prisoners with a high degree of certainty, and a legal system that provided no mechanism for releasing these prisoners would be unjust. Without affording any judicial or administrative remedy, however, courts and legislatures might look to executive clemency to do the job. These authorities might say with the US Supreme Court, "Clemency . . . is the historic remedy for preventing miscarriages of justice when judicial process has been exhausted."[31] In this situation, reviewing convictions produced by the "regular" criminal justice system would not seem supererogatory.

SHOULD PUBLIC OFFICIALS BE MERCIFUL IN SUBSTANCE AS WELL AS PROCEDURE?

In arguing that doing justice can be merciful when an official has no obligation even to consider an applicant's case, I have used the word *mercy* in a different way from the definition propounded by Alwynne Smart (a decision "not to inflict what is agreed to be the just penalty, all things considered"). But I now turns to Smart's kind of mercy. Should officials be merciful in substance as well as procedure? When, if ever, should they remit punishment agreed to be just out of compassion for the person whose punishment is foregone?

One cannot sensibly answer this question without considering how broad the concept of justice should be. The more sophisticated one's understanding of justice becomes, the less room it allows for mercy. With a primitive concept of justice—an eye for an eye—mercy has much work to do. Acknowledging that justice depends as much upon circumstances and personal characteristics as upon physical action and harm, however, shrinks mercy's role. And recognizing that developments after an offense (such as unprompted repentance) can bear on what punishment an offender deserves diminishes the role of mercy still further.

Should the concept of justice grow to the point that the space for mercy simply vanishes? A president may approve a pardon because a prisoner deserves it (say, because new evidence establishes his innocence), or he may approve a pardon for instrumental reasons (say, to facilitate an exchange of prisoners). If the applicant does not deserve a pardon and the pardon serves no instrumental purpose, however, it seems improper. Mercy alone looks like a bad reason for clemency. Perhaps the recognition of mercy as a virtue always reflects an impoverished concept of justice—one that does not truly render to each his due.[32]

For private individuals, a line between duty and supererogation seems useful (difficult though the line is to draw). Buying a stereo system with funds the purchaser could have donated to Doctors Without Borders is not wrongful even if making the donation would have been more virtuous. An aspiring musician has no duty to pattern his life on that of Mother Teresa rather than Elvis even if emulating Mother Teresa would be nobler. One's moral obligation stops short of making the most virtuous choice.

A public official, however, stands in a different place. He is a fiduciary, charged with advancing the public's interest rather than his own. Unlike a private individual drawing on his own bank

31 Herrera v. Collins, 506 U.S. 390, 412 (1993).

32 See Marcus Tullius Cicero, *De Natura Deorum/On the Nature of the Gods*, trans. Francis Brooks (London: Methuen, 1896), Book XV, https://oll.libertyfund.org/titles/cicero-on-the-nature-of-the-gods (describing justice as "the virtue which assigns to each his due").

https://doi.org/10.1017/jlr.2020.8 Published online by Cambridge University Press

account, an official cannot properly draw on the public treasury to make a gift to Doctors Without Borders, and just as an official may not give public cash to people not entitled to it, he may not make personal gifts of noncash benefits.[33]

When an official must decide whether to remit criminal punishment, supererogation seems impossible. In exercising his discretion, the official must advance the public interest as best he can. Serving any other goal is a violation of his duty, and doing better than his best is impossible. No space is left for supererogation. In the absence of an instrumental public purpose or a clear indication that the public favors making unmerited gifts, an official should not grant undeserved clemency. I note, however, that an undeserved remission of punishment sometimes can reflect the willingness of society as a whole to forgive.

To test whether, as I have just argued, officials should hardly ever view mercy alone as a sufficient reason for remitting punishment, this section considers three cases. They are among the strongest I can think of for calling legitimate official action merciful.

First, consider compassionate release of the dying. Someone who has been imprisoned fifteen years for a robbery has only weeks to live, and his wife and children ask the governor to allow him to die at home. Describing the governor's release of the prisoner as an act of mercy seems natural and conventional, but this characterization implies that the governor has made a gift, that he would not have violated any moral duty by leaving the prisoner confined, and that he had no obligation to base his decision on what the prisoner, his family, and the public deserved. Might it be better for the governor to view his task as one of doing justice—including justice to the prisoner who, despite his crime, remained entitled to humane treatment as his life approached its end?

Or consider a hypothetical case posed by Saul Touster.[34] The Civil War has ended, and a recently emancipated slave has stolen a horse and wagon in order to search for members of his family who were sold to a plantation owner in another state. The former slave might be a plausible candidate for a defense of necessity, but recognizing this defense would declare his action justified and would encourage others to engage in similar conduct. Recognizing a formal defense would license the former slave to continue to steal wagons until he achieved his goal. The use of a low-visibility discretionary mechanism—refusal to prosecute, jury nullification, or executive clemency—would be less problematic. A virtuous prosecutor might decline to prosecute and then take up a collection to buy the former slave a horse and wagon.

The prosecutor's private donation of a wagon could be seen as supererogatory. Should his refusal to prosecute be regarded as supererogatory as well? If the only measure of justice were what the law provides, the prosecutor's action would fit Alwynne Smart's definition; he would have chosen not to inflict the penalty deemed just. In this case, however, the law book badly missed the mark (or rather it would have if it had not authorized the prosecutor to make exceptions). The prosecutor did justice by declining to prosecute, and perhaps he would have violated his moral duty by doing anything else.

Finally, consider a case in which private mercy influenced public punishment. On October 26, 2018, the remains of Matthew Shepard were interred in the National Cathedral, a shrine where visitors also can view the tombs of Woodrow Wilson, Helen Keller, and other notable Americans. It had been twenty years since Aaron McKinney and Russell Henderson lured Shepard from a

33 A variation on a familiar Bible story illustrates how the moral and legal positions of principals and agents differ. Suppose that when the prodigal son returned, his father was absent. If the father's property manager had taken it upon himself to kill the fatted calf and host a feast, he would have been liable to the father in damages.

34 Saul Touster, *The Treatment of Jewish Survivors of the Holocaust, 1945–1948: Dilemmas of Law, Care, and Bureaucracy* (Waltham: Brandeis University, 2000), 12–13.

https://doi.org/10.1017/jlr.2020.8 Published online by Cambridge University Press

Laramie bar, beat his skull with a .357 Magnum, burned him, and strung him on a fence to die. McKinney and Henderson killed Shepard because he was gay. His internment was delayed for two decades because his parents feared desecration of his grave by people like those who demonstrated at his funeral with signs reading "Matt in Hell" and "God Hates Fags."

One of Shepard's killers, Henderson, avoided capital punishment by agreeing to testify against the other, McKinney. Shepard's parents, Dennis and Judy Shepard, then persuaded a reluctant prosecutor not to seek the death penalty for McKinney. Here are excerpts from Dennis Shepard's courtroom remarks on the subject of mercy:

> My son was taught to look at all sides of an issue before making a decision or taking a stand. . . . When he did take a stand, it was based on his best judgment. Such a stand cost him his life when he quietly let it be known that he was gay. He didn't advertise it, but he didn't back away from the issue either. For that I'll always be proud of him. He showed me that he was a lot more courageous than most people, including myself. . . . Matt's beating, hospitalization, and funeral focused worldwide attention on hate. Good is coming out of evil. . . . [Mr. McKinney, y]ou made this world realize that a person's lifestyle is not a reason for discrimination, intolerance, persecution, and violence. . . . [M]y son has become a symbol, a symbol against hate and people like you. . . . I would like nothing better than to see you die, Mr. McKinney. However, this is the time to begin the healing process. To show mercy to someone who refused to show any mercy. To use this as the first step in my own closure about losing Matt. . . . I'm going to grant you life . . . because of Matthew. . . . I give you life in memory of one who no longer lives. May you live a long life, and may you thank Matthew every day for it.[35]

Dennis and Judy Shepard supported the death penalty. They saw their choice to spare McKinney as merciful—a gift to an undeserving beneficiary. One could accept this characterization without viewing the prosecutor's acquiescence in their choice the same way.

Whether survivors should have a voice in determining a murder's punishment is a challenging issue.[36] Delegating part of this choice to these private parties affords authority over offenders' lives to people whose interests would disqualify them from serving as jurors, and it ensures the unequal administration of justice. Whether an offender lives or dies may turn, not on a judgment by a community's authorized representatives, but on whether the offender victimized someone whose family is charitable or vindictive or someone who had no family at all. The separation of criminal law from tort law in England roughly a thousand years ago was a civilizing step, and turning back from that step may diminish the sense that crime wrongs all of us.

Many champions of the death penalty, however, see this form of punishment as a means of providing closure to victims' families—in Franklin Zimring's words, as state-sponsored psychotherapy.[37] One implication of viewing "closure" as a justification for the death penalty is that a survivor should be able to say with Dennis Shepard that mercy, not death, is his path toward closure. If taking account of survivors' wishes is appropriate and if these parties may approve an undeserved remission of punishment, there is a place for substantive mercy in the administration of

35 Dennis Shepard, Statement to the Court, November 4, 1999, Matthew Shepard Foundation, https://www.matthewshepard.org/statement-court-1999/.

36 Compare Booth v. Maryland, 482 U.S. 496 (1987) (holding that the Cruel and Unusual Punishment Clause prohibits a jury from considering a "victim impact statement" during the sentencing phase of a capital murder trial because this evidence has no bearing on a killer's personal responsibility and moral guilt), with Payne v. Tennessee, 501 U.S. 808 (1991) (overruling *Booth* and noting that sentencing authorities have long considered "the specific harm caused by the crime in question").

37 Franklin E. Zimring, *The Contradictions of American Capital Punishment* (Oxford: Oxford University Press, 2003), 116.

https://doi.org/10.1017/jlr.2020.8 Published online by Cambridge University Press

criminal justice. Even on this questionable hypothesis, however, the prerogative of mercy ordinarily belongs to victims or their representatives, not public officials.

DID SHAKESPEARE AND JESUS GET IT RIGHT?

The finest speech ever given in the English language on the subject of mercy took a different view from the one I have advanced. Although I have maintained that public officials have less justification for being merciful (in the Alwynne Smart sense) than private individuals, Shakespeare declared mercy one of a ruler's noblest virtues:

> The quality of mercy is not strain'd,
> It droppeth as the gentle rain of heaven
> Upon the place beneath. It is twice blest:
> It blesseth him that gives and him that takes.
> 'Tis mightiest in the mightiest, it becomes
> The throned monarch better than his crown.
> His sceptre shows the force of temporal power,
> The attribute to awe and majesty,
> Wherein doth sit the dread and fear of kings;
> But mercy is above this sceptered sway,
> It is enthroned in the hearts of kings,
> It is an attribute to God himself;
> And earthly power doth then show likest God's
> When mercy seasons justice. Therefore, Jew,
> Though justice be thy plea, consider this,
> That in the course of justice, none of us
> Should see salvation. We do pray for mercy,
> And that same prayer doth teach us all to render
> The deeds of mercy. I have spoke thus much
> To mitigate the justice of thy plea,
> Which, if thou follow, this strict court of Venice
> Must needs give sentence 'gainst the merchant there.[38]

Did Shakespeare err? Although the character who declaims these great lines purports to plead for mercy rather than justice, does she in fact plead for justice? In urging a nobleman to temper justice, does she mistakenly take the law as the measure of justice? Does she in fact favor tempering only an unjust law? Does she truly beg for an official gift to an undeserving wrongdoer, or does she decry a cruel and brutal law, one that allowed a creditor to enforce a vicious penalty clause?

Opposing Alwynne Smart-style mercy implies no support for harsh punishment. To the contrary, it often makes mandatory the generosity and lenient treatment that pleas for mercy treat as optional. I have advocated narrowing the concept of mercy only as far as the concept of justice expands. An appropriate concept of justice sees humane treatment as a public official's obligation and an offender's right.

And yet, however expansive the concept of justice becomes, occasions for undeserved mercy will remain. "Be merciful," Jesus Christ said, "just as your Father is merciful."[39] "Forgive, and you will

38 William Shakespeare, *The Merchant of Venice*, in *The Riverside Shakespeare*, ed. G. Blakemore Evans (Boston: Houghton Mifflin, 1974), 4.1, ll. 184–205, at pp. 276–77.

39 Luke 6:36.

https://doi.org/10.1017/jlr.2020.8 Published online by Cambridge University Press

be forgiven."[40] And at the end: "Father, forgive them; for they do not know what they are doing."[41]

Although Jesus accompanied his final plea for mercy with an appeal to justice ("they do not know what they are doing"), he repeatedly championed Alwynne Smart-style mercy—the remission of punishment as a gift to the undeserving. Consider, for example, this familiar passage of the Sermon on the Mount—one that links forgiving wrongdoers and foregoing punishment with giving to the poor:

> You have heard that it was said, "An eye for an eye and a tooth for a tooth." But I say to you, Do not resist an evildoer. But if anyone strikes you on the right cheek, turn the other also; and if anyone wants to sue you and take your coat, give your cloak as well; and if anyone forces you to go one mile, go also the second mile. Give to everyone who begs from you, and do not refuse anyone who wants to borrow from you.[42]

The sacred texts of Jesus's own religion endorsed the principle he repudiated—an eye for an eye.[43] In place of this principle, he urged, not a broader concept of justice, but radical forgiveness. Inviting a burglar who steals your cash to take your jewels as well is supererogatory, if indeed it is virtuous at all. (Your offer might shame some burglars and lead to their reform, but many others would be likely to say, "Thanks, Sucker." Allowing them to take your jewels with your blessing probably would not be good for them, for you, or for society.[44])

Jesus commended a father who, rejecting his prodigal son's proposal for justice ("Father, I have sinned against heaven and before you; I am no longer worthy to be called your son; treat me like one of your hired hands."), pardoned the son, and celebrated his return.[45] And although Jesus directed his prescription for mercy and forgiveness primarily to private individuals ("forgive us our debts, as we also have forgiven our debtors"[46]), the case discussed at the beginning of this essay suggests that he also favored Alwynne Smart-style mercy in the administration of the criminal law. It bears repetition that, in freeing the woman taken in adultery, Jesus mentioned neither any mitigating circumstance of her crime nor any redeeming virtue of her character.

A central tenet of Christianity is that Jesus's crucifixion and death were themselves an act of Smart-style mercy. "[W]hile we still were sinners, Christ died for us."[47] "Here is the Lamb of God who takes away the sin of the world."[48] "For this is my blood of the covenant, which is poured out for many for the forgiveness of sins."[49] "[W]e have been sanctified through the offering of the body of Jesus Christ once for all."[50]

Some Christians have seen in Jesus' atonement only his sacrifice of his life for undeserving others. In their view, Jesus saved sinners simply by offering a moral example. Others, however, have recognized a dark side of the story—a God who demanded blood for the remission of sins and

40 Luke 6:37.
41 Luke 23:34.
42 Matthew 5:38–42.
43 Exodus 21:23–25; Leviticus 24:19–20; Deuteronomy 19:21.
44 Jeffrie G. Murphy, *Punishment and the Moral Emotions: Essays in Law, Morality and Religion* (Oxford: Oxford University Press, 2012), 154 ("If one forgives the unrepentant wrongdoer, then one risks sacrificing one's own self-respect through complicity in or tacit endorsement of the insulting and degrading message contained in the wrongdoing.").
45 Luke 15:11–32.
46 Matthew 6:12.
47 Romans 5:8.
48 John 1:29.
49 Matthew 26:28.
50 Hebrews 10:10.

https://doi.org/10.1017/jlr.2020.8 Published online by Cambridge University Press

accepted the blood of the innocent (at least for a time). This vision cannot be reconciled with most modern understandings of either justice or mercy.

The forgiveness offered by some of Jesus' followers continues to astonish—for example, that voiced by survivors and family members within hours of a white supremacist's murder of nine congregants at the Emanuel African Methodist Episcopal Church in Charleston. A jury, however, may have taken an appropriate stand for justice when it rejected the wishes of many of these survivors and family members and sentenced the killer to death.[51]

To this point, I have contended that public officials should be less willing than private individuals to approve Alwynne Smart-style mercy. Sometimes, however, deciding not to inflict the just penalty can reflect the willingness of an entire society to forgive. Consider the amnesties that public authorities have approved following wars, rebellions, and the fall of oppressive governments.

The United States Constitution established a government of checks and balances, but the framers seemed to overlook this principle in article II, section 2, clause 1. This provision gave the president an unchecked power to pardon[52]—a power even broader than the king's.[53] When Alexander Hamilton explained the framers' choice in *Federalist* 74, he argued that leaving "the prerogative of pardoning . . . as little as possible fettered or embarrassed" would serve two purposes. First, the pardon power would promote justice: "The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel." Second, remitting even deserved punishment would serve instrumental public goals: "[I]n seasons of insurrection or rebellion, there are often critical moments, when a welltimed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth."[54]

Hamilton focused on restoring public peace, but amnesties typically reflect compassion for amnesty recipients as well. After George Washington granted amnesty to participants in the Whiskey Rebellion and remitted the death sentences of two of its leaders, he told Congress that it was "consistent with the public good . . . to mingle in the operations of Government every degree of moderation and tenderness which the national justice, dignity, and safety permit."[55] Similar sentiments influenced John Adams's pardon of participants in Fries' Rebellion, James Buchanan's pardon of Brigham Young and other participants in the Utah War of 1857–58, Abraham Lincoln and Andrew Johnson's amnesties and pardons for Confederate rebels, Theodore Roosevelt's pardon of participants in the Philippine insurrection, Warren Harding's pardon of Eugene V. Debs and others convicted of subverting military recruitment

51 Jelani Cobb, "Inside the Trial of Dylann Roof: The Complicated Moral Calculations that Followed a Horrific Crime," *New Yorker*, February 6, 2017, https://www.newyorker.com/magazine/2017/02/06/inside-the-trial-of-dylann-roof.

52 U.S. Constitution. art II, § 2, cl. 1 ("[The President] shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.").

53 See John Somers, *The Security of Englishmen's Lives* (London: Printed for Effingham Wilson, Royal Exchange, 1821), 38–39; James N. Jorgensen, "Federal Executive Clemency Power: The President's Prerogative to Escape Accountability," *University of Richmond Law Review* 27, no. 2 (1993): 345–70, at 349–52.

54 Publius [Alexander Hamilton], "The Command of the Military and Naval Forces, and the Pardoning Power of the Executive. From the New York Packet. Tuesday, March 25, 1788," *The Federalist Papers*, no. 74, The Avalon Project, accessed March 9, 2020, http://avalon.law.yale.edu/18th_century/fed74.asp.

55 George Washington, "Seventh Annual Address to Congress," December 8, 1795, in James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents, 1797–1897*, 10 vols. (Washington, DC: Government Printing Office, 1896–1899), 1:184.

https://doi.org/10.1017/jlr.2020.8 Published online by Cambridge University Press

during World War I, Calvin Coolidge's pardon of World War I deserters, Harry Truman's amnesty for many World War II draft violators and deserters, Gerald Ford's conditional pardon of 14,000 Vietnam-era draft violators and deserters, and Jimmy Carter's unconditional amnesty for nearly everyone else who refused to serve in Vietnam.[56]

Truth and reconciliation commissions have been described as a third way between general amnesties and Nuremberg-style war-crimes trials.[57] Notably, the South African commission granted 1,500 amnesties (from more than 7,000 applications) for crimes committed by government officers and political activists during the apartheid era. Applicants were eligible only if they disclosed their actions fully and established they acted for political reasons.[58] Although the commission is widely credited with promoting social reconstruction and facilitating South Africa's transition to constitutional democracy,[59] some South Africans bitterly protested the exemption of murderers and other violent offenders from the punishment they deserved.[60]

When truth and reconciliation commissions exempt offenders from punishment, they do so primarily for forward-looking public reasons, and compassion for offenders seems subordinate. Yet the goals they advance are those commonly associated with private forgiveness and mercy—healing, reconciliation, and moving on. A commission can accomplish these purposes only when most of a society is willing to forgive, and a society that has authorized a truth and reconciliation commission through democratic processes evidently is. Such a commission is likely to be the faithful agent of a public ready to put aside past wrongs and start over. Amnesty that public officials approve because it advances public purposes, however, is not supererogatory.

Mercy unmixed with instrumental and self-serving goals may be rare. Jesus repeatedly emphasized that mercy would be rewarded.[61] Jesus himself, however, exemplified pure mercy—selfless mercy, mercy unaccompanied by any instrumental objective, the remission of punishment simply as an undeserved gift. May a public body properly approve this kind of mercy? I have argued that, in the absence of clear authorization, it may not.

CONCLUSION

In opposing grants of mercy by public agencies unless they serve forward-looking public purposes, I may seem—or even be—heretical. The case of the woman taken in adultery makes it likely that

56 Charles Shanor and Marc Miller, "Pardon Us: Systematic Pardons," *Federal Sentencing Reporter* 13, no. 3/4 (2001): 139–46, at 139–40.

57 Daniel Philpot, "Judicial Punishment in Transitional Justice: A Christian Restorative Approach," in *Christianity and Criminal Law*, ed. Mark Hill et al. (London: Routledge, 2020).

58 *Encyclopedia Britannica Online*, s.v. "Truth and Reconciliation Commission, South Africa," by Desmond Tutu, accessed March 9, 2020, https://www.britannica.com/topic/Truth-and-Reconciliation-Commission-South-Africa; Therese Abrahamsen and Hugo van der Merwe, "Reconciliation Through Amnesty? Amnesty Applicants' Views of the South African Truth and Reconciliation Commission," *CSVR Reports* (2005), http://www.csvr.org.za/docs/trc/reconciliationthroughamnesty.pdf.

59 See Desmond Tutu and Mpho Tutu, *The Book of Forgiving: The Fourfold Path to Healing Ourselves and Our World* (New York: Harper Collins, 2014), 3 ("I have often said that in South Africa there would have been no future without forgiving.").

60 See Ashraf H. A. Rushdy, *After Injury: A Historical Anatomy of Forgiveness, Resentment, and Apology* (Oxford: Oxford University Press, 2018), 3–4.

61 See, for example, Matthew 6:14–15 ("For if you forgive others their trespasses, your heavenly Father will also forgive you; but if you do not forgive others, neither will your Father forgive your trespasses."); Rushdy, *After Injury*, 32 ("Jesus' point, then, is that interpersonal forgiveness must be unconditional, recurrent, and pervasive, while divine forgiveness is conditional—precisely, on the exhibition of interpersonal forgiveness.").

https://doi.org/10.1017/jlr.2020.8 Published online by Cambridge University Press

Jesus took a different view. Few Christians through the centuries, however, have approved non-instrumental gifts of unmerited leniency by public officials. Officials could make these gifts only by distributing them as miraculous lightning bolts (as Jesus did during his ministry) or by granting them to all offenders (as Jesus did in the atonement), bringing criminal punishment to an end. The clearest strategy for avoiding, denying, or concealing my heretical position is to say that criminal punishment is so clearly essential that Jesus could not have wanted to remit all of it, and many Christians have taken this tack. These Christians have offered little support for their position, however,[62] and perhaps Jesus was willing to approve mercy in every case. It would have been out of character for him to say no, and no one has pointed to a case in which he did. Jesus instructed followers to "judge not," "condemn not," and "forgive."[63] He may have opposed criminal punishment altogether.

ACKNOWLEDGEMENTS

I am grateful to Rachel Barkow, Paul Larkin, Jeffrie Murphy, and Mark Osler for valuable comments.

62 The nearest they have come seems to be Matthew 18:15–17 (approving the shunning of persistent, unrepentant sinners) and Matthew 12:30–32 (declaring blasphemy against the Holy Spirit unforgivable).

63 Luke 6:37.

https://doi.org/10.1017/jlr.2020.8 Published online by Cambridge University Press