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# Forgiveness and Public Trust

Linda Ross Meyer

# FORGIVENESS AND PUBLIC TRUST

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> Gentlemen of the jury, if we convict and punish him, he will say to himself: . . . I am even, I owe them nothing now, and owe no one anything forever and ever. . . . But do you want to punish him fearfully, terribly, with the most awful punishment that could be imagined, and at the same time to save him and regenerate his soul? If so, overwhelm him with your mercy! He will be horror-stricken; he will be crushed by remorse and the vast obligation laid upon him henceforth. And he will not say then, "I am even," but will say, "I am guilty in the sight of all men and am more unworthy than all."[1]

Is forgiveness a personal, emotional experience unfitted for the public realm? Many have argued that only victims can forgive, and that justice, respect for victims and equal protection of the laws are sacrificed when forgiveness overflows its smallish province.[2] I respectfully disagree and venture to support the idea that forgiveness is neither just personal, "merely" emotional, nor only private, but that forgiveness grounds the basic trust that makes community possible.

In order to understand why someone other than a direct victim may forgive a wrong, it is important to look closely at our concept of wrong itself, and to see that a wrong is public, not just private or personal. Part I addresses this issue. Once wrong is understood as the breach of a community bond, I undertake some explanation of community, which is the subject of Part II. In Part III, I argue that forgiveness should not only be understood as an emotional experience, but also as including cognitive and speech-act dimensions; hence, forgiveness is not just a subjective emotional experience by a particular victim. I explain why community members not only

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1. FYODOR DOSTOEVSKY, THE BROTHERS KARAMAZOV 710 (1976).

2. *See, e.g.*, JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 1-34; 162-86 (1988); Robert C. Solomon, *Justice v. Vengeance*, *in* THE PASSIONS OF LAW (Susan A. Bandes ed., 1999); LEWIS B. SMEDES, THE ART OF FORGIVING 39 (1996).

can, but ought to, forgive. I then sketch briefly the relationship of this community forgiveness to punishment and (human) justice.

## I. WHAT'S WRONG WITH WRONG

Relegating mercy or forgiveness to the private realm results in part from assuming that crime wrongs only its direct victims (those who suffer tangible pain or loss from the crime[3]), and that therefore only those direct victims have standing to seek redress or to forgive. If the wrong of wrong, however, was limited to its tangible effects on the victim — to its harm, that is — several rather strange consequences would follow. First, there would be no wrong to victims who suffered no harm (no mental or physical pain). Even the sense of insult, invasion and betrayal that accompanies otherwise harmless or attempted crime, and hence differentiates crime from misfortunes, would go unfelt by an infant, for example, or a mentally ill person. Taking candy from a baby would not only be easy, it would be morally neutral. Second, wrong would be greater in proportion to the harm done. Momentary negligence that caused serious and permanent physical injury would be a greater wrong than malicious but impotent racial animus.

Of course, we do believe that infants can be wronged, and we grade crimes by the offender's mens rea, not the tort measure of damages done. So what is wrong with wrong, if not the physical and mental harm to the victim?

Another common but unworkable suggestion of what's wrong with wrong is that it free-rides on the sacrifices of others.[4] So understood, wrong does wrongs more than the direct victim because it creates unfairness in the distribution of liberty. But this suggestion would mean that the only community members who are wronged are those who restrain their criminal impulses merely in order to get the benefit of others' like restraint. Those who simply have no criminal impulses in the first place would have no standing to complain. In other words, only potential criminals would be wronged by wrong.

The problem with the traditional theories of wrong is that they rest on social contract premises, presuming that right is defined by a social contract that answers the following question: why would equal individuals associate and cooperate with each other? The answer is always in terms of getting goods available only through

3. For an account of wrong that would ground such a view, see Heidi M. Hurd, *What in the World is Wrong?*, 5 J. CONTEMP. LEGAL ISSUES 157 (1994).

4. *See* Herbert Morris, *Persons and Punishment*, 52 MONIST 475 (1968).

social cooperation (such as property or safety). Hence, wrong is defined as maldistribution or individual loss. The problem lies with the question, however — it assumes that we are individuals who must be somehow bonded to each other.

If one assumes the other optional default position, i.e., that we are already bonded,[5] the question about wrong is asked differently. The wrong of wrong is not harm to the victim as an individual, but the breaking of trust with one's community and the injury to the victim as a community member. The bonds between members of a community are not tangible as physical injury or property loss, but they are nonetheless real. As Hannah Arendt states:

> The physical, worldly in-between along with its interests is overlaid and, as it were, overgrown with an altogether different in-between which consists of deeds and words and owes its origin exclusively to men's acting and speaking directly to one another. This second, subjective in-between is not tangible, since there are no tangible objects into which it could solidify; the process of acting and speaking can leave behind no such results and end products. But for all its intangibility, this in-between is no less real than the world of things we visibly have in common. We call this reality the "web" of human relationships, indicating by the metaphor its somewhat intangible quality.[6]

Accordingly, Nietzsche[7] (as well as Durkheim[8] and Hegel[9]) saw crime as the moment of the individual's emergence as an individ-

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5. Other societies may understand this more deeply. For example, Archbishop Desmond Tutu has explained the African concept of *Ubuntu* as the following:

> It speaks about the essence of being human: that my humanity is caught up in your humanity because we say a person is a person through other persons. I am a person because I belong. The same is true for you. The solitary human being is a contradiction in terms. That is why God could say to Adam, "It is not good for man to be alone." No one can be fully human unless he or she relates to others in a fair, peaceful, and harmonious way. In our African understanding, we set great store by communal peace and harmony. Anything that subverts this harmony is injurious, not just to the community, but to all of us, and therefore forgiveness is an absolute necessity for continued human existence.

Archbishop Desmond Tutu, *Foreword* to EXPLORING FORGIVENESS xiii (Robert D. Enright & Joanna North eds., 1998).

6. HANNAH ARENDT, THE HUMAN CONDITION 182-83 (1958) (emphasis omitted).

7. *See* FRIEDRICH NIETZSCHE, TWILIGHT OF THE IDOLS 98-99 (R.J. Hollingdale trans., 1896).

8. *See* DURKHEIM AND THE LAW 73-75 (Steven Lukes & Andrew Scull eds., 1983); EMILE DURKHEIM, ON MORALITY AND SOCIETY 114-33 (Robert N. Bellah ed., 1973).

9. *See* G.W.F. HEGEL, PHILOSOPHY OF RIGHT ¶ 99 (T.M. Knox trans., 1st ed. 1952). For full treatment of Hegel's understanding of punishment/sanction, see Phi-

ual, as an entity separable and separate from the community, an "outlaw," someone standing outside the law defining the community.[10]

Seeing the wrong of crime as a breach of public trust solves the following puzzles:

1) Why do we care so much about mens rea?

We care because the guilty mind has set itself against, strayed farther from, the norms of the community.

2) Why do we require public prosecutions?

We require them because the guilty person has betrayed us all and broken the communal bonds.

3) Why do we understand wrong "objectively," as something apart from the subjective experiences of crime victims (and hence something that exists even when the victim is unaware of it)?

We understand wrong "objectively" because the wrong is in part the breaking of the social bond, and the objective (that is, public) disrespect shown to the victim (whether or not the particular victim feels loss or pain, and whether or not the victim understands the wrong as disrespectful).

Indeed, even the individual victim's experience of being wronged is formed in part by public norms — what counts as insulting or even assaultive behavior, what counts as theft, what counts as rape, what counts as carelessness, what counts as the act of a "guilty mind" rather than a mere misfortune are all public norms (imperfectly embodied in criminal and tort law). It is because the victim is a member of a community that she sees herself as a victim of a malicious or reckless act, rather than as a victim of circumstance or bad fortune. Her trust and security are shattered precisely because another community member has violated the expectations and trust that are so basic to social interaction they become unspoken expectations in any encounter with another.

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lippe Nonet, *Sanction*, 25 CUMB. L. REV. 489 (1995); *see also* TRISHA OLSON, PUNISHMENT AS COMING HOME (1989) (unpublished paper on file with author, construing Hegelian view of punishment as atonement).

10. *See* NIETZSCHE, *supra* note 7, at 98-99. Nietzsche celebrates the assertion of free will that is implicit in the criminal act. The deep irony of crime is that it is in rebellion against law/God that we actualize our individuality and experience a sense of free will. We will to be gods unto ourselves — overcoming the conditioned nature of our own finitude. The freedom we achieve, however, is only nihilistic negative freedom — the destruction of the conditions of our being, doing, or thinking anything at all. "The sole and desolate being of the wrong lies in the outcast existence of the broken will, seeking itself in the night of its own self-estrangement, and crying the word of despair in the work of wrong." Nonet, *supra* note 9, at 514-15.

## II. WHAT COMMUNITY BONDS?

We like to think that in our diverse world, we no longer have community, and hence no basis for talking in terms of community norms. Which community: the suburban, inner-city, African-American, Catholic, gay, skin-head, survivalist or intellectual? We have so many different cross-threads in our culture that we can each define ourselves in myriad ways. I'm white, Midwestern, vegetarian, environmentalist, intellectual, Anglo, WASP, academic, leftist, Lutheran, feminist, pro-family, straight, democratic, upper-middle class, middle-aged, professional, small-town, Irish, married-with-children, pro-gay, etc. There is no one community, and perhaps even these labels describe only interest groups, not true communities.

And yet, deep beneath the all-too obvious differences between us, we share a great deal that goes unnoticed because it is assumed. We speak similar languages that share deep roots and common ancestors. Our common linguistic heritage means that we share many basic concepts, concepts that include understandings of meaningful human action and basic norms of respect. Anthropology would not be possible without these deepest of all commonalities — the ability (even need) to make sense of another's action as intentional and meaningful, to recognize, as Kant would say,[11] that we all are creatures of reason.

The way we make sense of each others' actions lies deep in our language and understanding of the world, given to us by a common past. The post-modern discovery that we are "socially constructed" beings is now commonplace, usually asserted to underscore cultural differences and distinctions, but it also entails that we have a deep connection to each other — we already share language, ways of thinking, ways of feeling, and ways of going on that we were born into and that shape our human world. We may vary in our expressions of respect, in the details of our expectations and our norms, but we still share some bedrock.

From a "communitarian" standpoint, I have described a fairly "thin" or "watered-down" community, a community that still contains deep normative divisions. But this "deep community" is still a very important, if not a very salient one, for it grounds our basic intuitions about right and wrong, what counts as a human goal, what counts as rational, and what counts as intelligible.

11. *See generally* IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS 56-58 (T.K. Abbott trans., 1987).

When we meet a stranger, we assume that stranger will make sense. We must assume this in order to get the process of interpretation off the ground.[12] Part of "making sense" is having goals that we can recognize as human goods, and part of making sense is fitting into cultural "scripts" that we recognize.[13] We assume, at least until we have evidence otherwise, that the stranger is not malicious, is not crazy, and that we can communicate with him or her. This is basic public trust. It is the necessary beginning for any human interaction — buying a cup of coffee at McDonald's, walking across a street on a green light or taking a seat on a bus. More personal relationships also build special trust, but the basic public trust is necessary for simply leaving the house in the morning.

Do we really trust each other? What about the wary meeting of black and white on a city street?[14] The assumptions of bad faith in a "high crime" area?[15] The discriminatory mistrust shown a black woman by a Benetton store?[16] How can I speak of public trust, or single communities, in such a world?

I can speak of public trust in our world because we still think of these scenarios as "problems" we would like to solve. We notice them and dwell on them precisely because they "stick out" and are salient. The background they stick out from is still trust, the taken-for-granted trust that most of us operate with most of the time, the trust we don't even notice. Next time you drive on the highway, notice how much you trust the other drivers — to stay in their lane, to go the right direction, to avoid radical changes of speed, not to bump you off the road intentionally, etc.

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12. *See* DONALD DAVIDSON, ESSAYS ON ACTIONS AND EVENTS 221-23 (1980).

13. *See generally* J.M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY 1-19 (1998).

14. *See* Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539, 553 (1991) (describing a black-white encounter and calling into question the application of traditional tort law concepts).

15. *See* Illinois v. Wardlow, 120 S. Ct. 673, 676-77 (2000) (upholding a *Terry*-stop based on "reasonable suspicion" when the police saw the defendant run away from them in a "high crime" area). The Court said that running away in such a setting could be enough for police to reasonably suspect a person of a crime. *See id.* The dissent, by Justice Stevens, countered that those who live in high crime areas may have innocent reasons to fear and flee the police, given the level of police harassment and brutality, and the likelihood of being caught in the cross-fire of a violent situation. *See id.* at 678 (Stevens, J., dissenting). The majority's assumption that the guilty are more likely to flee the police than the innocent assumes a certain level of public trust; the dissent questions that assumption. *See id.* at 679-80.

16. *See* PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 44-47 (1991) (telling the story of her exclusion from a Benetton store).

The more deeply a crime breaches basic public trust, the more "strange," "inhuman" and "senseless" it seems. The criminal appears to stand out from the "rest of us" as incomprehensible, inassimilable. We ask, why would anyone do this? The criminal is an individual, an outlaw, a predator,[17] a monster,[18] a barbarian,[19] outside the bounds of human comprehension and community. The breach of public trust creates a chilling shiver of fear and insecurity because it strikes at the very bonds that make it possible for us to live together.

## III. REINTERPRETATION OF FORGIVENESS/MERCY

If a non-victim community member can forgive, forgiveness must be more than the subjective emotional experience of overcoming anger or resentment. I acknowledge that when a victim has the courage and generosity to forgive a wrongdoer, the victim is changing the way she feels about the wrongdoer. To change one's emotions, however, one has to change one's mind. Emotions are cognitive at least in part,[20] otherwise they would not be amenable to conscious change, and forgiveness would be only an event, not a virtue.[21] Hence, forgiveness cannot be "just" a change in how one feels.

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17. *See, e.g.*, N.J. STAT. ANN. 2C, §§ 7-8 (West 1999) (describing New Jersey's enactment of "sexual predator" statutes); Linda Ross Meyer, *Is Practical Reason Mindless?*, 86 GEO. L.J. 647, 669-70 (1998) (discussing the U.S. Supreme Court's decision to uphold Kansas's sexual predator law).

18. *See, e.g.*, Nancy Gibbs, *The Monsters Next Door: A Special Report on the Colorado School Massacre*, TIME, May 3, 1999, at 20; LEWIS B. SMEDES, FORGIVE AND FORGET: HEALING THE HURTS WE DON'T DESERVE 106 (1984) (referring to forgiving "monsters"); Jonathan Simon, *Power Without Parents*, 16 CARDOZO L. REV. 1363, 1421 (1995) (presenting an account of a gangster whose "nom de guerre" is "Monster" Kody).

19. "Barbarian" was the word the Greeks used to refer to those whom they could not understand; whose language sounded like "barbarbar." *See* WEBSTER'S THIRD INT'L DICTIONARY 174 (1986). Someone who does not make sense is a barbarian. *See id.*

20. For a sampling of this burgeoning literature, see SUSAN BANDES, THE PASSIONS OF LAW (1999); NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 69-86 (forthcoming May 2000); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996); MARTHA C. NUSSBAUM, THE THERAPY OF DESIRE: THEORY AND PRACTICE IN HELLENISTIC ETHICS 507-10 (1994).

21. *See* Joanna North, *The "Ideal" of Forgiveness: A Philosopher's Exploration*, *in* EXPLORING FORGIVENESS, *supra* note 5, at 20 (arguing that for forgiveness to have moral value, it must be an active process, and not a "mere cessation of hostile feelings").

As philosophers, theologians and psychologists have recognized, forgiveness begins[22] from a new vision of the wrongdoer that tries to empathize with him and see him as more than his crime.[23] Understanding the wrongdoer and his action is a way of bringing him back inside the human sense-making community so that he no longer looks like an "inhuman predator" and stands out-law. Making sense of the wrongdoer's action means looking at him as more than his one act and filling out the picture of the past, as well as acknowledging the possibilities inherent in his future, and seeing him therefore once again inside the sphere of humanity.[24] This expanded frame of reference opens the possibility for the next aspect of forgiveness — its forward-looking and action-oriented part — a

22. Before forgiveness can come into play, however, we must know much of the truth of what happened and be able to characterize it as a wrong. This "moment of truth" may be a confession followed by apology, see Symposium, *The Role of Forgiveness in the Law*, 27 FORDHAM URB. L.J. 1347, 1414-19 (2000) [hereinafter *Forgiveness* Symposium] (remarks of Jonathan R. Cohen), or the result of a state investigation or truth commission. The importance of saying the truth is rightly emphasized as the beginning of the process of any forgiveness or reconciliation. *See id.* at 1436-40 (remarks of Juan Méndez) (regarding the recognition of a human right to truth); Margaret Walker, *Forgiving: Not One Path, No Single Destination* (forthcoming conference paper to be published with Obert C. and Grace A. Tanner Humanities Lectures, Apr. 13-14, 2000, Univ. of Utah) (emphasizing that a facet of forgiveness is putting the wrong in the past — which requires factualizing it). Truth, of course, may never be complete or undisputed or settled, but some resolution of it is perhaps the beginning of the process. *See Forgiveness* Symposium, *supra*, at 1375-78 (remarks of Frederick W. Gay) (describing the first part of a victim-offender mediation as often involving a clarification of what happened and why).

23. *See* G.W.F. Hegel, *Who Thinks Abstractly?*, *in* TEXTS AND COMMENTARY 116-17 (Walter Kaufmann trans., 1977).

> A murderer is led to the place of execution. For the common populace he is nothing but a murderer. Ladies perhaps remark that he is a strong, handsome, interesting man. The populace finds this remark terrible: What? A murderer handsome? How can one think so wickedly and call a murderer handsome; no doubt, you yourselves are something not much better! . . . This is abstract thinking: to see nothing in the murderer except the abstract fact that he is a murderer, and to annul all other human essence in him with this simple quality.

*Id.*

24. *See* LEWIS SMEDES, FORGIVE AND FORGET 45-49 (1984); North, *supra* note 21, at 26-27; MURPHY & HAMPTON, *supra* note 2, at 84-87; Everett L. Worthington, Jr., *The Pyramid Model of Forgiveness: Some Interdisciplinary Speculations about Unforgiveness and the Promotion of Forgiveness*, *in* DIMENSIONS OF FORGIVENESS: PSYCHOLOGICAL RESEARCH & THEOLOGICAL PERSPECTIVES 107, 118-23 (Everett L. Worthington, Jr. ed., 1997). This expansion in view also works on the victim as well, making the victim aware that her life, too, is not defined and confined by the crime. She is not just a "victim." Hence, forgiveness is said to set the victim free from the crime as well. *See* Smedes, Worthington, *supra*.

commitment to "deal" with the wrongdoer that paves the way for potential reconciliation.

That the victim is committed to deal with the offender does not instantly put the offender back at status quo ante. The battered woman need not welcome her abuser back into the home. It merely places the victim at the table, ready to begin the perhaps painful process of working on a *rapprochement*, and further progress depends on the remorse and return of the offender.

This "commitment to deal" is a necessary part of forgiveness,[25] so that forgiveness is not just an emotional change in the victim. If you say you forgive me, but will not talk to me or interact with me in any way, then I do not believe you have forgiven me. Forgiving may not require forgetting, but our usual use of the term means more than "I'm not actively angry anymore." I can also imagine someone saying, "I am still angry, but I forgive you anyway." (I have said so myself, to my children.) Here, "I forgive you" looks like a speech act[26] — a commitment to deal.[27] Emotion may lag behind, but the commitment is the key.

If reconciliation is central to forgiveness, however, how can we forgive the dead, as we say we do? If they are dead, we can no longer have a future relationship with them, can we?[28] On the contrary, the "forgiving of the dead" may also be more than an emotional experience. The public rehabilitation of the deceased's memory, or a "clearing of her name," may mean something much more like forgiveness as reconciliation than forgiveness as emotional transition. We honor the dead with medals, remember them with statues, poems, music and art. We read and argue with the dead all the time (especially we philosophers). All of these actions are quite public and much more akin to active reconciliation than subjective emotional experience. The communal remembering that keeps great spirits in our midst, even after their bodies are gone, is

25. *See, e.g.*, Martin E. Marty, *The Ethos of Christian Forgiveness*, *in* DIMENSIONS OF FORGIVENESS, *supra* note 23, at 9; Elliot N. Dorff, *The Elements of Forgiveness: A Jewish Approach*, *in* DIMENSIONS OF FORGIVENESS, *supra* note 23, at 29. Both authors argue that return or reconciliation is at least one facet of forgiveness.

26. *See* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 12 (1962) (arguing that one's statement can also be described as an act).

27. Others have argued, with Murphy, that forgiveness is not performative. *See, e.g.*, R.S. Downie, *Forgiveness*, 15 PHIL. Q. 128, 132 (1965); H.J.N. Horsbrugh, *Forgiveness*, 4 CANADIAN J. PHIL. 269, 270 (1974). *But see* William R. Neblett, *Forgiveness and Ideals*, 83 MIND 269 (1974) (defending the idea that "I forgive" may sometimes be performative).

28. Jeffrie Murphy makes this objection in his conference remarks. *See Forgiveness* Symposium, *supra* note 22, at 1353-66 (Keynote address of Jeffrie G. Murphy).

part of what it is to be part of community and therefore linked to the past.

We are not, however, any more "at risk" from the dead. They can do no further wrong to us. Or can they? Are we safe from Hitler because he is dead? Or is he, and what he stands for, not still a risk? Does he not still gain admirers and adherents? Though sometimes the forgiveness of the dead is a bit cheap (it is often all too easy to "forgive" when we are safe), the dead do haunt us still. What becomes impossible, however, is for the dead to change, grow, or learn. Hence, they cannot meet forgiveness half-way to complete the reconciliation. We may gain new information about who they were, but we are stuck with the past as best we can know it.

In sum, the victim's forgiveness means, in part, seeing the offender as a sense-making member of the human community and committing to deal with him again. These actions require that the victim herself be a member of the community, for they employ public norms of what counts as sense-making and what counts as "being a member" again. Hence, it is not the victim as subjective sufferer who forgives, but the victim as member of the public community, the victim as an "Everyman."

If forgiveness is in part sense-making and committing to deal, then forgiveness is not just a change in "subjective" feelings, and therefore not restricted in principle to victims. In fact, the victim might forgive, while the community may not.[29] Community members who are indignant, shocked and baffled by a criminal's actions and who have lost their trust in him can also undergo the discipline of sense-making and committing to deal. I argue, indeed, that this is part of the ritual of public punishment (below). The breach of public trust is not just a wrong to the direct victim, but a wrong to all whose security and trust are broken by crime.

Just because non-victims *can* forgive, it does not follow that they have standing to forgive, or *ought to* forgive even when the victim refuses. Isn't it presumptuous and doesn't it demean and trivialize the victim's pain to forgive on the victim's behalf? How could I

29. *See, e.g.*, Rachel Gottlieb, *Victims: Megan's Law Backfires: In Some Family Abuse Cases, Publicity Compounds the Hurt*, HARTFORD COURANT, March 3, 1999, at 1 (reporting that Megan's law injures a victim's family when the father-abuser, after years of intensive counseling, reconciles with the family and resides at the same address, but neighbors will not attend the victim's birthday parties and send hate-mail to the family).

presume, for example, to forgive Hitler or Stalin or the murderer of someone else's child?[30]

Though this is a powerful objection, I believe it makes two mistakes. First, it takes a see-saw view of punishment that understands punishment as a reaffirmation of the victim's value, which the crime has devalued (victim goes up when offender goes down). I explore this further in Part IV. Second, it ignores the fact that the future-looking nature of forgiveness is risky not only for the victim, but also for other potential victims. The community representative is a potential victim and must be willing personally to take the risk of recommitment to dealing with the offender. From this angle, the victim can never forgive only for himself, but must forgive for the future and for the future potential victims.[31]

One problem arises when violence or wrong is done within a subcommunity. Can representatives of a non-minority group forgive a wrong targeted at a minority group only? I would venture that the community doing the forgiving must be the community "at risk" and in relationship with the offender. There is no coming over to the other, and hence, no forgiveness, when one need not "deal" with the offender because one is a stranger and is not at risk.[32]

## IV. FORGIVENESS AND PUNISHMENT

Many scholars have pointed out that retributive justice is the only morally defensible current theory of punishment; utilitarian theories always have the difficulty that there is no utilitarian reason not to punish the innocent if it will achieve whatever good end is prescribed by the theory (e.g., deterrence, education, victim support, etc.).[33] Yet, even in retributivism's most persuasive guise, it

30. *See, e.g.*, LEWIS B. SMEDES, THE ART OF FORGIVING 39 (1996) ("No one — not a president, not a peasant — has a right to forgive anyone for wounds he himself did not suffer. Charity for the mothers of Nazi sons is fine. But no one but their victims can forgive Nazi sons.").

31. *See* Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1277-82 (1994) (arguing that victim-offender mediation omits consideration of deterrence and other purposes of the state). That even private forgiveness can have public consequences is exemplified in Jane Austen's *Pride and Prejudice* when Jane and Elizabeth forbear from "exposing" the character of Wickham. *See* JANE AUSTEN, PRIDE AND PREJUDICE 226-27, 277-78 (Oxford Illus. ed. 1813). Their private act of forgiveness for his deceptions, of course, results in his being able to seduce their sister Lydia. *See id.*

32. Punishment between strangers makes no sense either. *See* HERBERT MORRIS, ON GUILT AND INNOCENCE 96 (1976).

33. For excellent arguments against utilitarian theories of punishment, see Michael Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER AND THE

fails in its own aim — to end the cycle of vengeance. Instead, punishment must involve an element of forgiveness and even of mercy (mitigation of just deserts). Hence, I disagree that forgiveness is an optional "add-on" to punishment[34] and also that mercy and forgiveness differ as act versus emotion.

### A. Retribution as a See-Saw

One of the most tempting formulations of retributivism takes seriously the dignitary harm done by crime and understands that wrong is not just tangible harm, but also disrespect. The victim is treated in a demeaning fashion by the criminal act, and even if the victim's intrinsic worth is untouched, the victim's self-esteem may be injured.[35] Punishment, then, serves to show society's respect for the victim by taking away the offender's wrongfully gained status, honor or mastery and countering the message, implicit in the criminal act, that the victim does not count.[36] I call this the see-saw view of retribution, because it places the victim and offender on a moral see-saw — as the offender goes up, the victim goes down and vice versa. This sort of retribution is ultimately unsatisfying, however, because it falsely ties the victim's value to the offender's punishment. Moreover, we cannot "balance" victim and offender without degrading the offender and perpetuating the wrong.

If we believed the victim's value to be tied to the offender's punishment, then it would be hard to justify the use of excuses in the criminal law. For example, in a case of mistaken defense of others (or "imperfect" self-defense), the victim is still assaulted intentionally and thereby demeaned — arguably demeaned even more in that the offender unreasonably thought the victim was an aggressor. To excuse the aggression (or even to mitigate the punishment) because of the aggressor's unreasonable mistake would seem to leave the victim at the low end of the see-saw, unredeemed and undervalued. However, to punish the offender for a negligent act to the same extent as for an intentional wrong also seems unjust.

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EMOTIONS (Ferdinand Schoeman ed., 1987); Herbert Morris, *A Paternalistic Theory of Punishment*, 18 AM. PHIL. Q. 263 (1981).

34. *See* MURPHY & HAMPTON, supra note 2, at 182-83. Mercy is both required and not deserved, a grace we are obligated to extend to offenders. *See id.* This takes some of the "gift" nature away from forgiveness — though no less than the "duty" of charity generally. *See id.* In parallel, one is obligated to be charitable, but no one has a right to receive a gift. *See id.*

35. *See* David Sachs, *How to Distinguish Self-Respect from Self-Esteem*, 10 PHIL. & PUB. AFF. 346-60 (1981).

36. *See* MURPHY & HAMPTON, supra note 2, at 122-47.

Instead, we must acknowledge that the victim's true worth or dignity is never touched by criminal actions. The more society acknowledges this, refuses to see the victim "as victim only" or as sullied somehow by the crime, the better. Of course, society does not always understand this, but tends to treat victims as pariahs, at fault somehow, out of a reflexive urge to explain crime as something that will happen to others, not oneself.[37] To the extent that the conviction of an offender serves as a public acknowledgment that the offender, not the victim, was wrong, the conviction or guilty plea serves to fix blame and exonerate the victim (as a matter of communal psychology). But the extent of the punishment, while a rough gauge of how seriously we take an offense, should not be calibrated to the worth or redemption of the victim. We have no business "valuing" the victim in the first place — the victim is beyond value, beyond price. Indeed, we often complain that capital punishment, for example, is too likely to reflect a jury's "valuation" of the victim rather than the crime.[38]

More telling, however, it seems that one can never achieve balance between the victim and offender unless the offender gets what he dished out. Raping the rapist, beating up the bully or torturing the torturer, however, only perpetuates the wrong, dehumanizing the offender and the punisher as well.[39] If we accept some "moral equivalent" but humane punishment instead, then the offender is simply not balanced with the victim — reparation is no reparation[40] — because part of the harm the victim suffers is the dignitary harm of being treated offensively and demeaned.[41] We cannot restore balance without demeaning the offender, and demeaning the offender perpetuates the wrong.

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37. *See* Neal R. Feigenson, *The Rhetoric of Torts: How Advocates Help Jurors Think About Causation, Reasonableness, and Responsibility*, 47 HASTINGS L.J. 61, 136-37 (1995).

38. *See* THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 114 (Stephen R. Donziger ed., 1996) (citing statistics that killers of whites are eleven times more likely to get the death penalty than killers of blacks).

39. *See* James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055 (1998). For a contemporary example, see Periscope, *Pakistan*, NEWSWEEK, Mar. 27, 2000, at 5 (reporting the outcry over a murderer who was sentenced to be strangled, cut into 100 pieces and put into acid).

40. *See* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 91-92 (1999); MIROSLAV VOLF, EXCLUSION & EMBRACE: A THEOLOGICAL EXPLORATION OF IDENTITY, OTHERNESS, AND RECONCILIATION 122-23 (1996) (agreeing that punishment never repairs or repays the victim).

41. *See* Paul Campos, *The Paradox of Punishment*, 1992 WIS. L. REV. 1931 (1992).

When we promise victims closure, redemption from pain and complete satisfaction through an offender's punishment, we lie to them. We do not give offenders their just deserts, and if we did, we would be wrong to do so. We must do more to help crime victims than we do, and we should not lead them to expect all their solace from punishment.

### B. Retribution As Just Deserts

Another attractive vision of retribution is the idea that punishment is nothing more than taking the offender seriously as a legislator with free will in the Kantian kingdom of ends and universalizing the maxim of his wrongful act so that it falls on his own head.[42] If I act with reason, then I will my action to be applied in all similar cases. Therefore, if my action is criminal, then I will that I be treated the same way in similar circumstances. Thus, if we respect the offender as a reasonable actor, we should give him his punishment, the punishment he has in a way decreed for himself. To treat him any differently — to mitigate or excuse his act — is to deny him his free will and personhood, to see him as subject to the forces of cause and effect rather than able to act.[43]

Or, to put it at perhaps a deeper level: The criminal has actualized his (negative) freedom by rejecting the moral standards of the community, setting himself up as his own god. In doing so, however, he has negated the possibility of his own positive freedom as a reasonable agent, for in rejecting cultural norms, he rejects the norms that articulate and define reason itself. By rejecting that which makes him what he is, he sets himself at war with himself. He has put himself outside, made an exception of himself (as a

42. *See* KANT, *supra* note 11, at 49.

43. *See* Morris, *supra* note 33; HEGEL, *supra* note 9, ¶ 100.

> [The penalty] which falls on the criminal is not merely implicitly just — as just, it is *eo ipso* his implicit will, an embodiment of his freedom, his right; on the contrary, it is also a right *established* within the criminal himself, i.e., in his objectively embodied will, in his action. The reason for this is that his action is the action of a rational being and this implies that it is something universal and that by doing it the criminal has laid down a law which he has explicitly recognized in his action and under which in consequence he should be brought as under his right . . . punishment is regarded as containing the criminal's right and hence by being punished he is honoured as a rational being. He does not receive this due of honour unless the concept and measure of his punishment are derived from his own act. Still less does he receive it if he is treated either as a harmful animal who has to be made harmless, or with a view to deterring and reforming him.

HEGEL, *supra* note 9, ¶ 100.

Kantian would put it[44]), by adopting a course of action for others that he would not will for himself. Punishment, by bringing home to him the universalized consequences of his own action, restores him to the human community and makes of him a creature of reason once more. His "will" is broken to the yoke of reason and he is rescued from the oblivion of his rebellion from his own humanity. In his return, the law of reason itself becomes actualized in the world — has power, is at work[45] — and the renewed being together with others becomes a chosen, active expression of positive freedom rather than a mere status quo ante.[46] The bond of community itself is felt, seen, and active in the world, instead of merely inferred from the fact of living alongside one another. The prodigal son's return is cause for celebration; the reunion of father and son is more salient and vivid than the preexisting union because it has been explicitly chosen and longed for, rather than taken for granted.

Again, however, the problem of moral equivalence haunts us. The wrongness of the wrong that the offender committed is in part in its disrespect for and humiliation of others. Yet, to give him "his just deserts," or the full recoil of his own dehumanizing action, would be to disrespect and humiliate him — contrary to the very rule of respect to which we want to bring him home. Hence, he cannot get his just deserts *and* return to the community.

The problem is that the universalization of the offender's maxim (rule of action) is not possible unless the premise of inequality on which that maxim relies is rejected. In assuming that the maxim applies to all "like cases," we must treat the criminal herself as "like us," thereby granting her the respect due a rational being. So, we have already "brought her back to us" in the very act of trying to universalize her action. We cannot then demean her without violating the condition precedent to universalizing her maxim — her own humanity. The very attempt to "give her her just deserts" requires giving her less than her just deserts.

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44. *See* KANT, *supra* note 11, at 52.

45. *See* HEGEL, *supra* note 9, ¶ 97.

46. *See id.* ¶ 220 ("Objectively, this is the reconciliation of the law with itself; by the annulment of the crime, the law is restored and its authority is thereby actualized. Subjectively, it is the reconciliation of the criminal with himself, i.e. with the law known by him as his own and as valid for him and his protection; when this law is executed upon him, he finds in this process the satisfaction of justice and nothing save his own act.").

### C. Punishment As Atonement

In the end, it is not the equivalence of punishment to the crime that is important, but the return to community. Hence, punishment is exactly NOT the criminal's due, but a mitigated one — a merciful one. In this view, mercy must be part of every punishment, because punishment is never equal to the crime without being criminal.[47] The criminal does not get her due, but receives grace — and is, as Dostoevsky would say, forever in our debt and therefore forever tied and obligated to us in relationship.[48]

Punishment thought this way looks more like a form of forgiveness — a bringing home of the offender and being again willing to deal with her. Because punishment is bounded by the humanity of the community, it is never equivalent to the crime, but always merciful. Forgiveness, mercy, and punishment become interwoven and inextricable. As Hegel, among others, has articulated, punishment might look more like the religious practice of atonement than the quid pro quo of retribution.[49] Stephen Garvey, following the religious model, suggests that atonement has two steps, expiation and reconciliation.[50] The first involves repentance, apology, reparation and penance by the offender; the second, forgiveness by the victim.[51] As Garvey explains:

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47. Jean Hampton disagrees that the confinement of punishment to the "humane" should be considered mercy. *See* MURPHY & HAMPTON, *supra* note 2, at 160 (arguing that offender's moral worth "must always be respected in the construction of a genuinely retributive, rather than vengeful, response[; s]o a judge isn't being merciful if he refrains from torturing a torturer").

48. *See* DOSTOEVSKY, *supra* note 1.

49. *See* Nonet, *supra* note 9, at 521 (quoting Hegel) (emphasis omitted):

> As the fulfillment of this return, die Erinnerung is the at-one-ment of the self with itself, in German die Versohnung, the return of the son to his filial belonging with the father, that is mortal man's unity with the godhead. In this return, the self rises again in its Auferstehung, its resurrection to its proper identity with itself in the spirituality of selfhood. Hence it is that the transformation of revenge into punishment accomplishes "the atonement of the law with itself," as well as that "of the offender with himself," by which "the law is restored," and "first known by the offender as his own," so that he "finds in it the peace of justice."

HEGEL, *supra* note 9, ¶ 220. For an intriguing vision of punishment as atonement using the Christian paradigm, see Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801 (1999).

50. *See* Garvey, *supra* note 49, at 1804-05. The parallel in Hegelian terms is die Vernichtung, die Aufopferung, die Erinnerung and die Versöhnung. *See* Nonet, *supra* note 9, at 521-22. Both authors rightly emphasize the importance of remembering the wrong, even while forgiving the wrongdoer. Forgiveness here is not condonation or amnesia.

51. *See* Garvey, *supra* note 49, at 1805.

> the atonement model provides punishment with an end — the atonement of the wrongdoer and his victim and the restoration of the relationship that existed between them before the wrong — but treats punishment as an intrinsically appropriate way in which to pursue and achieve that end. The ends and means of punishment are thus fused.[52]

If punishment is atonement, and the atonement is with the community, not just the direct victim,[53] then it requires a commitment by the community to reintegrate the offender and be willing to deal with her. In this sense, Arendt is right to say that if we cannot forgive, we cannot punish and if we cannot punish, then we cannot forgive.[54] In traditional communities, it is exile or shunning, not death, that is the "last ditch" expedient for dealing with crime. By contrast, in traditional societies even a death penalty is a moral judgment that recognizes the offender as responsible and human, though perhaps able to atone only in death.[55]

In our day, prisons and mental hospitals are where we "keep" our moral monsters in exile. We talk retributivism and "just deserts," but the truth is that we don't really believe that offenders are "equal" again once they have paid their "debt to society." Instead, we do not care much about what happens to offenders as long as they stay away from us. We "incapacitate" them as though they were mere animals, blaming their keepers, not them, when they escape and reoffend.[56] Reintegration has not been the focus

52. *Id.* at 1806.

53. Garvey is not so clear about this, but does recognize that victim-offender mediation is not by itself sufficient. *Id.* at 1829-30. He sees a place for public penance, though mostly as a way of expressing the victim's worth (a characterization I would resist as too close to the see-saw view of retribution) and working out the offender's self-hatred. *See id.* at 1819. I would just add that the reason penance and not just restitution to the victim is required is because the wrong is a wrong to all. The penance serves as a public, tangible, demonstration of remorse that prepares the defendant to receive the community's forgiveness. If the offender is not penitent, the reconciliation never is realized. However, the community may nonetheless have the obligation to set the stage and give the offender the opportunity to make his self-imposed exile into a penance. Punishment, then, is the opportunity for penitence, as in the original understanding of the penitentiary.

54. *See* ARENDT, *supra* note 6, at 241.

55. *See* Garvey, *supra* note 49, at 1838; *see also* MURPHY & HAMPTON, *supra* note 2, at 158 (community would hold reconciliation feast with offender who was to be hanged); Plato, *Crito*, *in* EUTHYPHRO APOLOGY CRITO PHAEDO PHAEDRUS 147 (Harold North Fowler trans., 1914) Socrates chooses death over exile, because he cannot leave his community without leaving himself behind. *See* Plato, *supra.*

56. *See* Meyer, *supra* note 17, at 668-69; FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME ch. 1 (1995) (noting that incapacitation has, by default, taken a dominant role in justifying punishment).

of most of our current schemes of punishment. On the contrary, we segregate offenders even after they have done their time through Megan's laws, loss of voting rights, sex offender civil commitment statutes[57] and job disqualifications. We have lost the sense of the jury and grand jury as a voice of the community, setting the terms of reintegration. The restorative justice movement, however flawed, that emphasizes reintegration of offenders and offers models for bringing victims and offenders together,[58] offers a note of hope that a new paradigm for punishment will emerge from the demise of retributivism and recapture some older intuitions about criminal justice.[59]

### D. Ground in Human Finitude

The centrality of forgiveness has its root in the basic condition of human life: we intend, plan and think like gods, but we are finite both in power and duration and we live only one moment at a time. Hence, for example, though we act and intend as though we can control our destinies, we cannot be master of all the consequences of our actions.

Hannah Arendt has written that the human condition requires something like forgiveness in its very basis, because we cannot, as

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57. *See* Sherry F. Colb, *Insane Fear: The Discriminatory Category of "Mentally Ill and Dangerous,"* 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 341 (1999).

58. *See, e.g.*, MARK S. UMBREIT, VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION (1994); HOWARD ZEHR, CHANGING LENSES (1990). Insofar as the movement leaves out community and puts the burden of reconciliation on the victim exclusively (and it is a heavy burden, see Brown, *supra* note 31), I would suggest amendment. However, some models include community participation. For example, Vermont has a community-based reparative probation board. *See* Michael Tonry, *U.S. Sentencing Systems Fragmenting*, 10 OVERCROWDED TIMES 1, 10 (1999). We should also not forget that the state itself serves as a community voice, at least with respect to those deeply-agreed-upon norms at the heart of the criminal law. The state, however, has abdicated its obligation to reintegrate and forgive.

59. *See* DAVID GARLAND, PUNISHMENT AND CULTURE 207 (1990).

> Puritan penal rituals — in theory at least — were not intended to isolate offenders and show them to be alien. Instead the arrangements of the ceremony . . . were intended to demonstrate an intimate link between the offender and the community of believers. Onlookers were made to feel that they too could be tempted into sin . . . In other words the sinner-offender was not conceived as "Other" but rather as a kind of Protestant Everyman, a living example of the potential for evil which lies in every heart and against which every soul must be vigilant. In keeping with this conception, the denouement of each public ceremony was aimed not at the vanquishing of the enemy, but instead at the reinclusion of the atoned and repentant sinner.

*Id.*

finite, be responsible for all the consequences of our actions into infinity.[60] She writes:

> Without being forgiven, released from the consequences of what we have done, our capacity to act would, as it were, be confined to one single deed from which we could never recover; we would remain the victims of its consequences forever, not unlike the sorcerer's apprentice who lacked the magic formula to break the spell.[61]

Reason would require responsibility, but finitude makes it impossible. Hence, for example, the legal doctrine of proximate cause in both criminal and tort law seems a sort of arbitrary, though necessary, limitation on human responsibility.

Arendt says that the cure for the infinity into which we project ourselves is forgiveness — a commitment to cut off the consequences of past actions in order to make possible a new start,[62] which is action itself. We cannot act unless we are forgiven. Yet one cannot forgive oneself — someone else has to do it. Hence, contrary to Kant,[63] the presence of others is necessary for the very actualization of human reason — community, not individuality, is the ground of human action. As Archbishop Tutu put it, "a person is a person through other persons."[64]

Heidegger puts the thought the other way around: we are responsible only because we take over being a basis for ourselves[65] — accept responsibility for what we are (and what we did not make or do). What we are is already set out for us by the world and the others in it; we are finite and do not make ourselves. Our place is made before we fill it. Yet, this "self," to be responsible for its actions, must first take responsibility for being as it is, though no action of the self made the self. Hence, responsibility cannot be only for what we do, and at the same time, cannot be for everything we do. The basic premise of criminal law must be tempered by the recognition of finitude at both ends: we are responsible for more and for less than we do. More needs to be done to work

60. *See* ARENDT, *supra* note 6, at 240-41.

61. *Id.* at 237.

62. *See* ARENDT, supra note 6, at 237. Martha Minow has explored how forgiveness makes possible a "new start" after a regime of terror. *See* Minow, *supra* note 40, at 91-92.

63. *See* KANT, *supra* note 11, at 53-54, 57-63 (deriving duties to others from an analysis of the concept of will).

64. *See* Tutu, *supra* note 5.

65. *See* MARTIN HEIDEGGER, BEING AND TIME 330 (John Macquarrie & Edward Robinson trans., 1962).

through the underpinnings of human responsibility,[66] but the direction in which we need to go is clear.

If responsibility is itself not a creature of individual will, then punishment need not be the "just deserts" or universalized maxim of that will. The individual cannot be so neatly marked off from the rest of us, either as an actor or as an offender, and hence, the basic condition of being-with-others should focus and undergird the theory of punishment. This opens the door for an understanding of mercy that does not undermine punishment, but completes it.

## V. FORGIVENESS AND PITY

The quotation I began with[67] shows another, less attractive, side of forgiveness — what Nietzsche calls "pity."[68] "I forgive you" can be condescending, widening the gap between self and offender rather than closing it.[69] The defendant in Dostoevsky's quotation will be "crushed" by mercy and "horror-stricken" and "more unworthy than all."[70]

Nietzsche recognized that pity demeans and shames, "an agreeable impulse of the instinct for appropriation at the sight of what is weaker."[71] It also makes the suffering of another superficial:

> But whenever people notice that we suffer, they interpret our suffering superficially. It is the very essence of the emotion of pity that it strips away from the suffering of others whatever is distinctively personal. Our 'benefactors' are, more than our enemies, people who make our worth and will smaller.[72]

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66. For attempts at this daunting philosophical task, see Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959 (1992); *see also* LARRY MAY, SHARING RESPONSIBILITY (1992). Also, see the emergence of "character theories" of responsibility. *See* Sherry F. Colb, *The Character of Freedom*, 52 STAN. L. REV. 235 (1999); Sherry F. Colb, *The Three Faces of Evil*, 86 GEO. L.J. 677 (1998); Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511 (1992). *See generally* Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719 (1992).

67. *See* DOSTOEVSKY, *supra* note 1.

68. *See infra* notes 70-74.

69. *See* MURPHY & HAMPTON, *supra* note 2, at 31.

70. DOSTOEVSKY, *supra* note 1. *See also Romans* 12:19-20 (stating that generosity to an enemy will "heap coals of fire on his head").

71. FRIEDRICH NIETZSCHE, THE GAY SCIENCE 176 (Walter Kaufmann trans., 1974).

72. *Id.* at 269.

And, the power and "richness" to forgive may also accompany a view of offenders as mere "parasite[s]," "incapable of discharging their debt."[73]

And yet, (for Nietzsche there is always an "and yet") Nietzsche himself calls for the "self-overcoming of justice: . . . grace"[74] and justice as "love with seeing eyes."[75] He seems to envision an understanding of grace or love that does not demean others like pity does, but becomes a better justice. He cannot, however, get there: the superman is above all a self-willed willer who cannot love another without destroying the otherness of the other in an imperialistic embrace. The superman can either reject the other, or will the other to be self, resulting in pity-like appropriation, not love. But the superman cannot give over the power to will to another, even in part, i.e., cannot accept another's authority.[76]

What even Nietzsche, smasher of cultural idols, is unable to do is to give up individualism,[77] our precious enlightenment inheritance. Yet, to cross over to the other is to give up some part of one's self. The offender must accept more than his due, accept a gift, a reunion he does not deserve, that will not make him "even." He must also give up his willful selfishness that was the root of his crime, and accept the "yoke" of reason — reason he did not will for himself but must take also as a given. The victim must give up her "rights" to justice and compensation, her injured pride and resentment, her boundaries and security (doubly precious now after being invaded), take a less personal perspective on the offender that replaces repugnance with understanding, and risk "dealing" with the offender.[78] For this, our individualism does not prepare us well. We are not at all sure that we want the "vast obligation" of forgiveness instead of the "I am even" of justice. We are not at all sure

73. FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 72 (Walter Kaufmann trans., 1967).

74. *Id.*

75. Friedrick Wilhem Nietzsche, *Thus Spake Zarathustra*, *in* THE PHILOSOPHY OF NIETZSCHE 71 (T. Common trans., Modern Library ed. 1937).

76. *See* Philippe Nonet, *What is Positive Law?*, 100 YALE L.J. 667 (1990) (conveying a similar understanding of Nietzsche).

77. Or, perhaps, what we are unable to do, given our philosophical position in history.

78. I will no doubt be chided as anti-feminist for my views here. We are supposed to be raising our consciousnesses and allowing ourselves the self-esteem to feel resentment, anger, and seek retribution. *See* ROBIN WEST, CARING FOR JUSTICE 109-27 (1997). Although men may have much to teach women about self-respect, if I may be so "essentialist," women may have much to teach men about forgiveness. *See id.* at 22-93. We need not degrade ourselves or consent to abuse, but we must take risks.

that we want our individual boundaries permeated. Again, Nietzsche puts it so well:

> There was a time in our lives when we were so close that nothing seemed to obstruct our friendship and brotherhood, and only a small footbridge separated us. Just as you were about to step on it, I asked you: "Do you want to cross the footbridge to me?" — Immediately, you did not want to any more; and when I asked you again, you remained silent. Since then mountains and torrential rivers and whatever separates and alienates have been cast between us, and even if we wanted to get together, we couldn't. But when you now think of that little footbridge, words fail you and you sob and marvel.[79]

To change our understanding of punishment is to change our understanding of community to something we are, and not something we will. Its reverberations require even a new understanding of justice itself.

## VI. REDEFINITION OF JUSTICE

Scholars often separate forgiveness from mercy, defining the former as an emotional change in the victim that may come before or after punishment, and the latter as an act of remission or mitigation of punishment.[80] Scholars have also argued that justice is the staff of political life and mercy should only nibble at the edges lest it overwhelm justice and destroy community.[81]

I have argued, however, that forgiveness and mercy are deeply related and that they are more central to the creation of community than is justice. As a factual matter, justice is not the norm, but the exception. Few crimes are reported, few offenders are arrested, few arrests are prosecuted, and very, very few offenders go to trial to seek "justice" rather than a negotiated settlement. At each stage, some of the offenders are forgiven (by victims, police and/or prosecutors).[82] In civil cases, the same is true: settlement,

79. GAY SCIENCE, *supra* note 71, at 90; *see also* FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL 224 (Walter Kaufman trans., 1966).

80. *See supra* note 27.

81. *See* R.J. O'Shaughnessy, *Forgiveness*, 42 PHIL. 336 (1967); Joseph Beatty, FORGIVENESS, 7 AMER. PHIL. Q. 246 (1970); MURPHY & HAMPTON, supra note 2, at 161, 162-86; P. Twambley, *Mercy and Forgiveness*, 36 ANALYSIS 84 (1976); H.R.T. Roberts, *Mercy*, 46 PHIL. 352 (1971); KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 188-92 (1989).

82. An emphasis on justice may overlook that forgiveness is often not extended as readily to minority offenders. *See* THE REAL WAR ON CRIME, *supra* note 38, at 109-13. Though the response to this is usually to call for eliminating "discretion," I believe this is neither realistic nor helpful. Even the rule of law requires rulers who honor it

not justice, is the norm. Although not all failures to prosecute are instances of forgiveness, often the contrition of an offender and restitution to the victim will contribute to a decision to give a case lower priority or to "let bygones be bygones." Moreover, in everyday life, we give many second chances and even more benefits of the doubt to friends, family members, and associates for the sake of continuing and preserving the relationships.[83] As the quotation from Dostoevsky underscores, equality may also mean anomie, distance and lack of relationship;[84] obligation, on the other hand, is relationship — literally a ligature binding us together.

At a deeper level, however, we have still to answer Anselm's paradoxes.[85] Mercy seems either irrational or redundant, because if it followed reason, it would be justice.[86] And, mercy seems un-

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and must be trusted not to fiddle around with the rules. Excessive or convenient formalism is also unjust. Instead, we must work harder to fill out the vision of offenders who are not "like us" in order to avoid characterizing them as "outlaws" and "others." *See id.*

83. Children may be an exception, for their punishments are necessary to moral education. *See* Morris, *supra* note 33. But neither do they "get what they would deserve" were they adults — I don't punish my children's' lies as I would adult perjury — and reconciliation is essential.

84. *See* ROBERT H. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985) (arguing that individualism undermines moral commitment and community service); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982) (same).

85. *See* ANSELM OF CANTERBURY, PROSLOGION chs. IX-XI, *in* A SCHOLASTIC MISCELLANY: ANSELM TO OCKHAM 78, 81 (Eugene R. Fairweather ed., 1946); MURPHY & HAMPTON, *supra* note 2, at 168-69 (discussing Anselm's paradoxes).

> But how canst thou spare the wicked if thou art wholly just and supremely just? For how does the wholly and supremely just do something that is not just? But what justice is there in giving eternal life to one who deserves eternal death? O good God, good to the good and to the evil, on what ground dost thou save the evil, if this is not just, and thou doest nothing that is not just? Can it be that thy goodness is incomprehensible, lying hidden in the inaccessible light where thou dwellest? Surely in the deepest and most secret place of thy goodness there lies hidden the source from which the river of thy mercy flows. For though thou art wholly and supremely just, yet thou art kind even to the evil, just because thou art completely and supremely good. For thou wouldest be less good, if thou wert not kind to any evildoer. . . . At the same time, though we may be able to grasp why thou canst will to save the wicked, we can find no reason to explain why, among men who are equally evil, thou does save some, and not others, through thy supreme goodness, and dost condemn the latter, and not the former, through thy supreme justice.

ANSELM OF CANTERBURY, *supra*, chs. IX-XI.

86. *See, e.g.*, MURPHY & HAMPTON, *supra* note 2, at 181; H. Scott Hestevold, *Disjunctive Desert*, 20 AMER. PHIL. Q. 357 (1983); James P. Sterba, *Can A Person Deserve Mercy?*, 10 J. SOC. PHIL. 11 (1979).

fair, because it treats like cases differently.[87] How can mercy not undermine justice?

I would answer Anselm's paradox this way: it seems a paradox only when applied to God, not when applied to human beings who exist in time.

First, justice is not equality simpliciter, of course,[88] but the treatment of like cases alike. But when are cases alike? We finite creatures see only a few cases at a time, and we are ourselves constantly in motion, changing and growing daily. Each case poses new facts, and as we see the facts in new lights against other facts, justice glimmers differently. We cannot capture it in a code for all time, we can only capture it for a moment, perhaps, in a particular case. As the common law recognizes, justice keeps moving, just around the bend, and the cases of yesterday are distinguished in light of new facts.[89] For finite creatures, justice can never be codified and eternalized, but is a pilgrim's progress.

Second, as our view of the world is finite and in time, so also is our language. True justice is equity not equality,[90] but equity cannot be said in the clumsy generalities that we must use to say it. As human reason and language itself requires generalization and fuzzy family-resemblance sorts of categories, human reason can never fully contain justice. We instead must live by the rough justice of the rule of law, which is of course better than lawlessness, but itself depends on a cultural commitment to justice. Without the guidance of ever-elusive justice, the rule of law would be a senseless and mindless formalism. Without judicial good faith and cultural

87. For example, Justice Blackmun expressed this frustration with current death penalty jurisprudence, which tries to cabin juror's discretion in order to promote equality at the same time that it allows full exploration of all mitigating evidence, in an eloquent dissent from denial of certiorari in *Callins v. Collins*, 510 U.S. 1141, 114 S. Ct. 1127 (1994). Justice Thomas has also famously argued that the "power to be lenient is [also] the power to discriminate," and argued that capital sentencing jurors should not be allowed to give unfettered effect to mitigating evidence. *See* Graham v. Collins, 506 U.S. 461, 492 (1993) (Thomas, J., concurring).

88. *See* Kurt Vonnegut, Jr., *Harrison Bergeron*, *in* WELCOME TO THE MONKEY HOUSE 7-13 (1968) (imagining a world of absolute equality, where those born beautiful must disfigure themselves, those born graceful must hobble themselves, etc.)

89. *See* Linda Ross Meyer, *"Nothing We Say Matters": Teague and New Rules*, 61 UNIV. CHI. L. REV. 423, 465-76 (1994) (discussing the temporality of the common law).

90. *See* ARISTOTLE, 5 NICOMACHEAN ETHICS x. 3-8 (1951).

commitment,[91] the rule of law would be a Kafkaesque farce and pretense.

Third, there is no way to guarantee that equity is not perfidy: the power to give justice is the power to discriminate, to paraphrase Justice Thomas. We never know whether parity or disparity in sentencing is unfairness or better justice, except when we judge roughly by aggregation. We never know all the facts, we never prove all the facts, we never exhaust the possible comparisons and contrasts with other cases, we never perfectly define the rule.

Fourth, people do not exist in an eternal moment, either, but are constantly changing their minds, projecting new actions into the world, learning and growing. We cannot reduce them to one moment only, to one crime[92] or one good deed.[93] Justice for yesterday's action, therefore, may be unjust by the time it is determined and imposed — justice always races ahead and lags behind us.

So, if justice is equity, it cannot be the usual, the modal form of interaction with a few merciful exceptions. Justice itself is at best the exception. (But that does not mean we do not seek it and live with the uncertainty).[94]

## CONCLUSION

We grant ourselves and each other forgiveness and mercy in recognition of the uncertainty of justice and in recognition of our own finitude and need for new beginnings. We must be humble in judging.[95] We cannot rely on justice to arbitrate our relationships; we have to take risks. It is mercy and forgiveness, that lets us get on with living and recognizes that we cannot be litigating *Jarndyce v. Jarndyce*[96] forever. To live is to forgive and to risk and to be uncertain and to outstrip language and reason itself. To use Jean Hamp-

91. Here, I am thinking of something along the lines of Llewellyn's "steadying factors." *See* KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 19-61 (1960).

92. *See* HOWARD ZEHR, DOING LIFE: REFLECTIONS OF MEN AND WOMEN SERVING LIFE SENTENCES (1996) (attempting to humanize "lifers" for us through a series of portraits).

93. *See* Bergman v. Lefkowitz, 569 F.2d 705 (2d Cir. 1977) (rejecting plea for leniency based on prior good deeds).

94. We do live with the uncertainty. *See* Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. REV. 1467, 1525-28 (1996); BALKIN, *supra* note 13, 142-70.

95. *See* Brett Scharffs, *Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127 (1998); Linda Ross Meyer, *Between Reason and Power: Experiencing Legal Truth*, 67 U. CINN. L. REV. 727, 753 (1999).

96. *See* CHARLES DICKENS, BLEAK HOUSE (George Ford & Sylvere Monod eds., 1977).

ton's term, we can only "morally hate" the dead, but, if we are to continue to see another as human, we must forgive the living.[97]

97. *See* MURPHY & HAMPTON, *supra* note 2, at 146-47.