


2007

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Recommended Citation

Bibas, Stephanos, "Forgiveness in Criminal Procedure" (2007). *Faculty Scholarship*. Paper 920.
http://scholarship.law.upenn.edu/faculty_scholarship/920

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Forgiveness in Criminal Procedure

Stephanos Bibas^{*}

Though forgiveness and mercy matter greatly in social life, they play fairly small roles in criminal procedure. Criminal procedure is dominated by the state, whose interests in deterring, incapacitating, and inflicting retribution leave little room for mercy. An alternative system, however, would focus more on the needs of human participants. Victim-offender mediation, sentencing discounts, and other mechanisms could encourage offenders to express remorse, victims to forgive, and communities to reintegrate and employ offenders. All of these actors could then better heal, reconcile, and get on with their lives. Forgiveness and mercy are not panaceas: not all offenders and victims would choose to take part, there are dangers of fakery and arbitrariness, and some forgiven offenders would reoffend. On the whole, however, this forgiving model offers a humane alternative to state-dominated criminal procedure.

I. INTRODUCTION

The process leading to forgiveness is an important social ritual. Family members, friends, and colleagues routinely express remorse, apologize, and seek forgiveness from those whom they have wronged. Forgiveness, while acknowledging the wrongfulness of the act, separates that act from the actor and paves the way for the offender to return to the moral fold. Having forgiven, victims can heal, move on with their lives, and go back to living and working with the offender more normally.

Modern American criminal justice, however, has little room for forgiveness. It has become an assembly line, a plea-bargaining factory that speeds up cases and reduces costs by sacrificing the offender's and victim's day in court.¹ The state exacts its justice impersonally, nominally for the community, primarily to incapacitate the dangerous offender and to deter him and others. This lawyer-driven state monopoly minimizes the roles of offenders, victims, and communities. There is little effort to understand, heal, or reform offenders. Police and lawyers take control of the process from the moment of the crime report, and they forbid or discourage offenders and victims to have any contact or discuss a case. The logic of adversarial combat leads each side to take an antagonistic posture, instead of engaging in dialogue and seeing the other's point of view. Victims and community members play little role, apart perhaps from allocuting or submitting letters at sentencing. There is thus little room

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¹ Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 95–97 (2004).

for the parties most involved to communicate, let alone to understand, apologize, and forgive.

There is a certain cold logic to excluding forgiveness, as forgiveness does not fit into most of the traditional justifications for punishment. Forgiveness by victims seems to have little or no bearing on an offender's dangerousness and need for incapacitation or specific deterrence. Forgiveness is unrelated to the wrongfulness of the crime itself and so seems irrelevant to grievance retribution; the offender must pay his debt to society and purge his blood-guilt, and that is that.² In addition, showing mercy would undercut equal treatment.³ Present forgiveness and mercy threaten to undermine general deterrence, sending the message that future crime may receive leniency too.

Nonetheless, I hope to sketch out what a more forgiving, less state-centered criminal justice system would look like. In this short space, I cannot exhaustively explore, let alone defend, the many choices that this system would involve. Instead, in this preliminary sketch, I merely outline an alternative to the status quo, suggest the benefits that might flow from it, and anticipate a few major objections. Though it entails significant tradeoffs, the prospect of forgiveness holds out hope of reforming offenders, empowering and healing victims, and reconciling community members.

Part II of this essay defines forgiveness and its relationship to mercy. In brief, forgiveness involves letting go of one's resentment toward a wrongdoer for the wrong one has suffered. It need not involve absolving the wrongdoer of blame nor forgetting the wrong. Forgiveness, which flows from an internal transformation, provides a basis for mercy, an external remission of punishment. Mercy is not a matter of right, earned by a wrongdoer, but rather a free gift, a matter of grace. While one can imagine forgiveness without mercy or mercy without forgiveness, ordinarily forgiveness is a basis and prerequisite for mercy.

Part III discusses what a forgiving criminal procedure would look like and how it would benefit offenders, victims, and community members. A forgiving system would emphasize less the state's abstract right to exact punishment and more the rights, or at least interests, of offenders, victims, and community members. Procedural rules, judges, and defense attorneys could encourage face-to-face interaction between offenders and victims. Defendants might be more likely to express remorse and apologize, thus learning their lessons and starting down the road to reform. In turn, many victims would willingly forgive, heal, and get on with their lives. Whether one conceives of punishment as belonging in part to the victim or entirely to the state, on balance victims' forgiveness may provide a basis for reducing punishment. Communities could do more to reintegrate offenders, for example by gradually restoring their voting rights and lifting other civil disabilities.

² See IMMANUEL KANT, *PHILOSOPHY OF LAW* 194–98 (photo. reprint 1994) (W. Hastie trans., pub. 1887) (arguing that even if society were to disband, society would first have to execute the last murderer to purge the “bloodguiltiness” of his crime).

³ See Dan Markel, *Against Mercy*, 88 *MINN. L. REV.* 1421, 1453–73 (2004).

Part IV considers difficulties with giving forgiveness a greater role. Of course, some cases are harder candidates for forgiveness: some defendants are unrepentant or insincere, some victims are angry or scared, and some crimes are especially brutal or frightening. Forgiveness cannot be forced or routinized, and that introduces dangers of inequality and discrimination, as victims and communities may be less willing to forgive poor minority men. Secular law cannot incorporate sectarian religious principles wholesale, but it can leave room for and draw on their moral insights in a non-sectarian way. In sum, though it is far from a panacea, forgiveness has much to contribute to criminal procedure.

II. DEFINING FORGIVENESS AND MERCY

A criminal or other offender inflicts both tangible and intangible harms upon a victim. The tangible harms, which may include physical injury and monetary loss, create a debt for which the offender ought to make restitution. The intangible harms include an insulting and degrading message that the victim is inferior and the wrongdoer can use him as he pleases. The insult and degradation are moral injuries, creating a moral debt that the wrongdoer owes to the victim. This disrespect of the victim's worth justifies the victim's resentment of the offender.⁴ The resentment protests the injustice of the wrong, the victim's self-worth, and the wrongdoer's abuse of his moral agency.⁵ One could apply the same analysis to the indirect harms suffered by the community.⁶ The offender flouts the community's laws and sows fear and resentment, communicating disrespect for the community and creating a moral debt to the community.

Forgiving involves overcoming one's resentment of an offender for having inflicted an injury.⁷ Because the victim harbors resentment for the wrong done to

⁴ Jeffrie Murphy, *Forgiveness and Resentment*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 25 (1988) [hereinafter *FORGIVENESS AND MERCY*].

⁵ Richard Bierschbach, *Remorse and the Value of Forgiveness* 7–10 (April 4, 1997) (unpublished manuscript, on file with author).

⁶ I realize that "community" and "community members" are nebulous concepts with unclear definitions, particularly in our far-flung, heterogeneous society. I also realize that distinct or overlapping communities may each have interests in a crime. For present purposes, I am willing to treat jurors as adequate representatives of the community, however broadly one defines it. I do, however, think it a fair criticism of my approach that some, particularly members of minorities, do not trust juries or court officials to speak for them. I also imagine that this approach works best in small, close-knit, homogeneous communities. It could, however, still work in larger, far-flung, more heterogeneous communities, particularly because many offenders and victims share ties and belong to common subcultures.

⁷ Murphy, *Forgiveness and Resentment*, in *FORGIVENESS AND MERCY*, *supra* note 4, at 24–26; Paul Lauritzen, *Forgiveness: Moral Prerogative or Religious Duty?*, 15 *J. RELIGIOUS ETHICS* 141, 144 (1987); P. Twambley, *Mercy and Forgiveness*, 36 *ANALYSIS* 84, 89 (1976); *THE COMPACT OXFORD ENGLISH DICTIONARY* 623 (2d ed. 1991) ("Forgive," definitions three, four, and five; definitions one, two, and seven are listed as obsolete); see also Joseph Butler, *Upon Forgiveness of Injuries* (sermon IX), in *II THE WORKS OF JOSEPH BUTLER, D.C.L., SOMETIME LORD BISHOP OF DURHAM* 150–67 (photo. reprint 1995)

himself, forgiveness of the direct injury must ordinarily come from the victim rather than a third party.⁸ Forgiveness involves an internal emotional change, but it also expresses itself in action. For forgiveness to be meaningful, the victim must also manifest it by cancelling or remitting the moral debt and repairing his breached relationship with the offender.⁹ Forgiveness requires surrendering one's personal resentment, that is, not taking the offense personally.¹⁰ The personal feeling of resentment, however, is distinct from a more impersonal blame and sober evaluation of the offender. One can maintain the latter while releasing the former. Thus, forgiveness does not collapse into condonation, but on the contrary "simultaneously[] transcends moral distinctions and affirms their validity."¹¹ Nor, contrary to the adage, does forgiving require forgetting. Releasing one's resentment is consistent with keeping an eye on, blaming, and punishing the offender.¹²

There are many related questions about when to forgive and whether forgiving a remorseful wrongdoer is permissible, laudable, or morally obligatory. One might also debate whether remorse or apology must precede forgiveness. By expressing remorse and apologizing, an offender acknowledges the harm he has done. Forgiving a remorseless offender could undercut the violated moral norm and the victim's self-respect.¹³ I will not digress into these thickets except to note that they are contentious issues. I will focus instead on the paradigmatic case: a wrongdoer's remorse and apology open the door to a victim's and community's voluntary forgiveness, which fosters reconciliation and individual and social healing.

Unlike forgiveness, which flows from an internal emotional transformation, mercy is an external gift to a wrongdoer. Though the offender deserves punishment, and the state or victim has a right to exact it, mercy remits or lessens the deserved

(defining forgiveness as the overcoming of one's excessive resentment at having been injured oneself).

⁸ See Murphy, *Forgiveness and Resentment*, in FORGIVENESS AND MERCY, *supra* note 4, at 21; NICHOLAS TAVUCHIS, *MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION* 49, 143–44 n.4 (1991) (also noting exceptional case in which Pope canonized a slain nun and publicly forgave her killer). Sections II.B. and C., *infra*, discuss who has the right to forgive and show mercy in criminal justice—victims, community members, or the state in the abstract—and whether the state can or should forgive.

⁹ Jean Hampton, *Forgiveness, Resentment and Hatred*, in FORGIVENESS AND MERCY, *supra* note 4, at 35, 36–38; see also Lauritzen, *supra* note 7, at 144 (calling this the "paradigmatic case of forgiveness").

¹⁰ Anne C. Minas, *God and Forgiveness*, 25 PHIL. Q. 138, 145 (1975).

¹¹ Lauritzen, *supra* note 7, at 146–47 (also quoting Anthony Cua's discussion of the Tao in Chinese thought: "In a way, our forgiving agent is upholding and withholding moral distinctions at the same time. The fact that an act has been judged to be wrong implies an upholding of a distinction between right and wrong; but the act of forgiveness is withholding any further consequences that normally attend the application of moral distinctions." (internal quotation marks omitted)); accord Minas, *supra* note 10, at 145 (discussing Bishop Butler's views); Twambley, *supra* note 7, at 89.

¹² Murphy, *Forgiveness and Resentment*, in FORGIVENESS AND MERCY, *supra* note 4, at 33.

¹³ For a fuller discussion of the pitfalls of cheap forgiveness, especially for the unrepentant, see JEFFRIE G. MURPHY, *GETTING EVEN: FORGIVENESS AND ITS LIMITS* 70–72 (2003)

punishment out of compassion and pity.¹⁴ The offender has no right to mercy, but the punisher grants it as an act of grace out of love or compassion.¹⁵ While the offender cannot earn mercy, his remorse, repentance, and efforts to make amends open the door and provide a powerful basis for it. One can forgive without showing or recommending mercy, and one can show mercy grudgingly without forgiving and releasing one's resentment. I will not dwell on these cases. Most commonly, remorse and apology induce forgiveness, and forgiveness may motivate mercy.

III. BENEFITS OF PROMOTING FORGIVENESS IN CRIMINAL PROCEDURE

As the introduction noted, forgiveness and mercy do not square easily with a state-centered system of criminal justice. It is not obvious that a juridical abstraction such as the state can forgive, in the sense of harboring and releasing resentment. It is not obvious why the state would show mercy and risk undercutting grievance retribution, specific and general deterrence, and incapacitation. Forgiveness and mercy are humane practices, rooted in personal love and compassion, that coexist uneasily at best with an impersonal, unemotional state.

Criminal justice need not, however, be so cold, abstract, and impersonal. A more personalized, concrete criminal justice system could give much greater weight to the interests and desires of offenders, victims, and community members. This Part sketches out what such a system would look like and what benefits it might bring, while the next Part notes possible objections and costs. Section A addresses the mechanisms that might induce remorse and forgiveness and the benefits offenders might reap. Section B does the same for victims. Section C then considers community members and how the community might promote reconciliation and reintegration of offenders.

¹⁴ Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY, *supra* note 4, at 111, 158–59. Some authors define mercy as a matter, not of humane compassion, but of just empathy. In that version, a judge's empathy and understanding of an offender's act and plight leads him to see relevant differences between offenders and grant mercy based on those differences. There is no tension between justice and this variety of mercy; mercy becomes a way to individualize justice. This essay, however, will use the other, compassion-based understanding of mercy, as that is more closely allied with the idea of forgiveness.

¹⁵ Murphy, *Mercy and Legal Justice*, in FORGIVENESS AND MERCY, *supra* note 4, at 162, 166. As Portia famously says in WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc.1. 98, 181–84 (New York: The Univ. Society 1901):

The quality of mercy is not [con]strain'd;
It droppeth as the gentle rain from heaven
Upon the place beneath: it is twice blest;
It blesseth him that gives, and him that takes[.]

A. Offenders: Repudiating the Wrong

Why should offenders even want expressions of forgiveness? Some of the benefits are concrete. Judges and juries are likely to impose lower sentences if the victim of the crime is ready to forgive. Conversely, angry victims seek heavier sentences, and judges and juries may heed them.¹⁶ Parole and clemency boards likewise receive victims' input and may take it into account. As Part II suggested, defendants have no right to mercy, but remorse, apologies, and restitution may make them more sympathetic candidates for it.

Other benefits extend beyond the criminal process. A forgiving victim may serve as a reference, attesting that the offender deserves a job and a chance to get back on his feet. Forgiveness may counteract negative publicity and infamy associated with a crime, making it easier for offenders to reintegrate into society. Friends and neighbors who shunned the offender may perhaps stop doing so, sensing that it is time to heal and move on. If society forgives offenders, it may restore to them valuable markers of citizenship, such as the right to vote and serve on a jury.

Another important cluster of benefits is psychic. Offenders value the good will of their fellow human beings. In addition, many offenders feel the bite of conscience for their misdeeds. Indeed, some are so guilt-stricken that they are in denial to others or even to themselves.¹⁷ Forgiveness may lighten the burden of guilt from their shoulders, making it easier for them to move on with their lives.¹⁸ Defendants who come out of denial to ask for and receive forgiveness are more likely to learn their lessons. As twelve-step programs such as Alcoholics Anonymous emphasize,

¹⁶ See, e.g., SUSAN W. HILLENBRAND & BARBARA E. SMITH, VICTIMS RIGHTS LEGISLATION: AN ASSESSMENT OF ITS IMPACT ON CRIMINAL JUSTICE PRACTITIONERS AND VICTIMS 71 tbl. 5–9 (A.B.A. Crim. Just. Sec. Victim Witness Project 1989) (reporting that 35 of 74 sentencing judges found victims' sentencing opinions "very useful" or "useful" in reaching their decisions); MURDER VICTIMS' FAMILIES FOR RECONCILIATION, NOT IN OUR NAME: MURDER VICTIMS' FAMILIES SPEAK OUT AGAINST THE DEATH PENALTY 6, 8, 11, 56, 65 (4th ed. 2003), available at <http://www.mvfr.org/PDF/NIONbook.pdf> (relating stories of murder victims' families who successfully opposed the death penalty for their loved ones' killers). But see Julian V. Roberts, *Victim Impact Statements and the Sentencing Process: Recent Developments and Research Findings*, 47 CRIM. L.Q. 365, 381–85 (2003) (reporting empirical evidence that in Australia and Canada, victim impact statements do not lead judges to impose stiffer sentences but occasionally lead to lighter ones).

¹⁷ See Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1393–95 (2003).

¹⁸ "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." HANNAH ARENDT, *THE HUMAN CONDITION* 237 (2d ed. 1998).

While expressions of forgiveness may alleviate guilt, they may be insufficient without punishment, so that the offender feels he has paid his debt. Thus, offenders may benefit from forgiveness coupled with some punishment. See Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1842–44 (1997) (explaining that restorative justice cannot restore offenders because it does not punish them and so does not provide for atonement).

admitting guilt is an essential step along the road to reform.¹⁹ Forgiveness and the desire to earn it, in other words, can catalyze healthy change. The state-centered model of punishment overlooks these human needs.

The criminal justice system could do much more to encourage defendants to pave the way for forgiveness by admitting guilt, expressing remorse, and apologizing. Elsewhere, Richard Bierschbach and I have suggested a number of measures that could promote remorse and apology. Police could decide whether to arrest and prosecutors could decide whether to decline or divert prosecution based in part on an offender's apologizing and making amends.²⁰ Courts could offer the option of victim-offender mediation free of charge, at convenient times and locations, at any stage from arrest through imprisonment.²¹ Studies have shown that victim-offender mediation greatly increases the chance that the offender will apologize (from 29% to 74%) and that the victim will forgive (from 22% to 43%).²² Prosecutors can use cooperating-witness discounts to encourage defendants to come clean, apologize, and make restitution.²³ Offenders could have more opportunities to communicate with victims who are willing to do so.²⁴

Defense lawyers could work with their clients and challenge their false denials by confronting them with contrary facts. While the ultimate choice is up to the client, defense counsel could advise clients to consider confessing, expressing remorse, and apologizing.²⁵ They can, for example, point out the material and psychic advantages of striking a plea bargain that includes an admission of guilt and an apology. They can ask whether anyone was injured, how victims fared, and how clients feel about their actions. By breaking the dam of denial, defense counsel may help to treat addictions and habits that would otherwise lead to future crime and punishment.²⁶ At sentencing, in particular, defense lawyers may cultivate their clients' remorse in an effort to win lower sentences.²⁷

¹⁹ See Bibas, *supra* note 17, at 1395–96.

²⁰ Bibas & Bierschbach, *supra* note 1, at 128–30.

²¹ *Id.* at 130–34.

²² Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 190–91 tbl.7 & fig.7 (meta-analysis of four studies of offenders and one study of victims).

²³ Bibas & Bierschbach, *supra* note 1, at 134–35.

²⁴ *Id.* at 139.

²⁵ Bibas, *supra* note 17, at 1404–05.

²⁶ See, e.g., David B. Wexler, *Some Reflections on Therapeutic Jurisprudence and the Practice of Criminal Law*, 38 CRIM. L. BULL. 205, 205–08 (2002) (relating the example of one defense lawyer who encourages habitual drunk drivers to take responsibility and get treatment for their alcoholism, which can reduce punishment and serve clients' long-term interests, and contrasting this approach with the prevailing tendency of other defense lawyers to deny guilt at all costs).

²⁷ Cf. Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1632–37 (1998) (reporting empirical evidence that capital defendant's perceived remorse significantly reduces the probability that capital jury will return death sentence).

Trials, plea hearings, and sentencings could be more dialogical, allowing victims to respond and offenders to reply.²⁸ At plea hearings, judges could probe defendants' stories, question their excuses, and decline to accept guilty pleas from defendants who deny or minimize guilt.²⁹ Legislatures could abolish *Alford* and *nolo contendere* pleas, which let defendants effectively plead guilty without admitting guilt, or judges and prosecutors could refuse to accept them.³⁰ Sentencing judges could adjust sentences based on how fully and sincerely a defendant admits guilt, expresses remorse, and apologizes.³¹

B. *Victims: Letting Go of Anger and Grief*

Offenders may extend an invitation to forgive, but victims must choose whether to take it. Having been victimized, many victims are understandably angry, scared, sorrowful, or even grief-stricken. We naturally assume that victims therefore want vengeance and call for blood, and indeed sometimes they do. While victims do want to see justice done, they are open to mercy as well. Empirical evidence suggests that victims are far less vengeful than one might think.³² While they want some punishment, they care less about maximizing punishment than about other rights to participate in criminal justice.³³ Many want to confront offenders face to face, tell their stories, and understand why their crimes happened. Ideally, many would like to receive apologies as well. Apologies help to restore their sense of self-esteem and control, and victims who receive apologies find it easier to heal and forgive.³⁴

Forgiveness benefits victims as well as offenders. Until victims forgive, they are likely to bottle up sorrow, shame, fear, incomprehension, anger, even hatred and rage.³⁵ All of these emotions are tied to, if not directed at, the offender and his crime.

²⁸ Bibas & Bierschbach, *supra* note 1, at 139.

²⁹ *Id.* at 140.

³⁰ Bibas, *supra* note 17, at 1407–08.

³¹ Bibas & Bierschbach, *supra* note 1, at 144.

³² See JOANNA MATTINSON & CATRIONA MIRRLEES-BLACK, ATTITUDES TO CRIME AND CRIMINAL JUSTICE: FINDINGS FROM THE 1998 BRITISH CRIME SURVEY 34–44 (Home Office Research Study 200, 2000) (“Overall, victims’ [recommended] sentences are rather more lenient than might be expected from the more general opinions expressed by respondents” about crime in general; even for vehicle thefts, muggings, and burglaries, only about a third of victims preferred prison sentences); Donald J. Hall, *Victims’ Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233, 243–45 (1991) (reporting that while one study found that about eighteen percent of victims thought their defendants’ sentences were too lenient, several other empirical studies found that victims expressed sympathy for defendants, did not demand the maximum sentence, “did not sound punitive or vindictive,” and cared most about being kept informed and treated with respect (internal quotation marks omitted)).

³³ See Bibas & Bierschbach, *supra* note 1, at 137.

³⁴ *Id.* at 138.

³⁵ See Jeffrie Murphy, *Hatred: A Qualified Defense*, in FORGIVENESS AND MERCY, *supra* note 4, at 105–06 (“[F]eelings of hatred can, in many cases, consume one’s entire self. Thus it might be seen as a blessing—perhaps even divine grace—to have the burden of hatred lifted from one’s mind. For this

Forgiveness means letting go, separating the offender from the offense, and recognizing that the crime is past and the time for healing is at hand. In other words, it involves catharsis, a cleansing of anger and hate.³⁶ With forgiveness may also come understanding, which may lessen fear of the offender.

The law could do more to encourage victims to forgive at least repentant offenders. As suggested in Section III.A., the key is to create plenty of opportunities for face-to-face dialogue. These could include free mediation services and other opportunities to communicate with offenders. Plea hearings and sentencings could include more opportunities for victims and defendants to face and respond to each other. Even after conviction and imprisonment, restorative-justice efforts can continue to bring offenders and victims together to talk, heal, and forgive.³⁷

All of these measures must be voluntary. Some victims are rationally or irrationally too afraid, angry, hurt, or sorrowful to meet with offenders. Others are not yet ready. Still others simply have no desire to forgive. How to react is the victim's prerogative. The law cannot coerce what must be a free, autonomous choice. The law can, however, gently coax, encourage, and provide opportunities to meet and forgive. It can share statistics and victim testimonials that reflect how much better many victims feel after forgiving. It can provide victim counselors to discuss the pros and cons of talking with offenders. Victims can then consider how face-to-face dialogue might help them to understand, heal, and make a fresh start.

How should a victim's forgiveness or refusal to forgive affect punishment? At first glance, as the introduction suggested, a victim's forgiveness is irrelevant to the state's interest in incapacitating, deterring, and exacting retribution. Today, the right to punish belongs to the state, not the victim. Thus, many courts exclude testimony by victims or their surviving relatives about the proper punishment.³⁸

This cool logic, however, conflicts with many people's moral intuitions. Crime has a human face, and that face deserves standing and a say in the matter. First of all,

reason forgiveness can bless the forgiver as much as or more than it blesses the one forgiven." (footnote omitted).

³⁶ Cf. LEON GOLDEN, ARISTOTLE ON TRAGIC AND COMIC *MIMESIS* 5–39 (1992) (explaining Aristotle's conception of *katharsis* in the *Politics* as a purgative cure for excessive fear and pity, but suggesting that in the *Poetics* Aristotle uses the same word to mean a process of intellectual clarification).

I do not mean to suggest that all victims require forgiveness and only forgiveness in order to heal. Some may release their anger and heal after exacting vengeance or retribution.

³⁷ See Bibas & Bierschbach, *supra* note 1, at 123–24 (surveying post-imprisonment restorative-justice programs in Wisconsin, Iowa, and Minnesota).

³⁸ See *Lynn v. Reinstein*, 68 P.3d 412, 414–17 (Ariz. 2002) (refusing to admit survivor's opinion that defendant deserved life imprisonment, not the death penalty); Wayne A. Logan, *Opining on Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C. L. REV. 517, 519, 528–33 (2000) (noting that courts are reluctant to admit capital-punishment opinions of surviving relatives, though lower courts disagree and in some cases have admitted those opinions); Brian L. Vander Pol, Note, *Relevance and Reconciliation: A Proposal Regarding the Admissibility of Mercy Opinions in Capital Sentencing*, 88 IOWA L. REV. 707, 722 nn.77–79 (2003) (noting that courts usually exclude survivors' recommendations of mercy from capital sentencing).

why should the right to punish belong exclusively to the state? For many centuries, and in many cultures, victims brought criminal cases in their own names. Having suffered the most, they have the most immediate and concrete interests in the outcomes of their cases. Thus, criminal law used to and could once again resemble private law, in which tort victims may prosecute, settle, or waive their shares of claims.³⁹ Of course, the state and society are interested as well, but it is odd to deny the victim even a share of the punishment.

The exclusion of any victim's right seems especially puzzling when the victim wishes to show mercy. The state may cap punishment to prevent the victim's bloodthirstiness from exceeding proper bounds. The state has much less reason, however, to impose symmetrical limits on leniency. So long as the punishment imposed is sufficient to deter, incapacitate, educate, and condemn the seriousness of the crime, the state's interests are satisfied. Any margin of punishment above that needed to fulfill those goals should be the victim's to forgive.⁴⁰

Even if the right to punish belongs exclusively to the state, the state should take the victim's interests into account by giving weight to the victim's forgiveness. First, forgiveness provides a basis for mercy. An expression of forgiveness may remit the victim's claim for punishment, and the state should heed the claim of the most interested party. Second, forgiveness helps victims to cleanse themselves of anger and vengeance, promoting emotional healing.⁴¹ Third, an important function of punishment is to vindicate victims. Offenders have exalted themselves at victims' expense and violated their autonomy. Punishment evens the scales, vindicating victims and their autonomy by humbling offenders.⁴² By doing so, it heals victims' psyches and status. By forgiving, victims show that they are already recovering from their wounds and so may need somewhat less vindication. In the process, forgiveness also reaffirms the violated norm, partly substituting for punishment's role in vindicating norms. Fourth, victims have a psychological need not only to express their feelings about their crimes, but also to feel that they are being heard. The power to forgive and dispense mercy places the victim above the offender, at least partly rectifying the power imbalance and empowering the disempowered victim.⁴³ In those

³⁹ See Jeffrie Murphy, *Mercy and Legal Justice*, in FORGIVENESS AND MERCY, *supra* note 4, at 175–76 (explaining that mercy is easier to justify within a “private law paradigm,” such as *The Merchant of Venice*, as a right-holder can always waive his claim to satisfaction of a debt).

⁴⁰ There are, of course, counterarguments based on the dangers of discrimination, inequality, and arbitrariness, which I address *infra* Part IV.

⁴¹ See ARENDT, *supra* note 18, at 240–41 (describing vengeance as a re-enactment of a wrong that leaves everyone bound to it, and forgiveness, the antithesis of vengeance, as “freeing from [the wrong’s] consequences both the one who forgives and the one who is forgiven”); David A. Starkweather, *The Retributive Theory of “Just Deserts” and Victim Participation in Plea Bargaining*, 67 IND. L.J. 853, 864–67 (1992) (discussing “psychic restitution” to victims and how forgiveness helps to heal crime victims emotionally).

⁴² See Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY, *supra* note 4, at 124–32.

⁴³ See Edna Erez, *Who’s Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice*, 1999 CRIM. L. REV. 545, 550–53 (“With proper safeguards,

senses, forgiveness can partly undo the crime. Thus, even if the state holds the exclusive right to punish, it should heed the victim's wishes at least in part. Heeding victims is a form of therapy, a way to vindicate and heal wounded, disempowered victims.

Furthermore, the discussion of incapacitation, deterrence, and various kinds of retribution has ignored a fourth justification for punishment: moral reform. While one cannot be certain, it is at least possible that apologetic, forgiven offenders are more likely to take their lessons to heart and less likely to recidivate. Empirical evidence of restorative-justice outcomes certainly suggests that participating offenders are more likely to apologize and be forgiven and less likely to recidivate.⁴⁴ It is hazardous to infer causation from this mere correlation. Perhaps the offenders who were readier to apologize and sympathetic enough to forgive were already less likely to recidivate. Nevertheless, apology and forgiveness may reduce recidivism by fostering offenders' resolution to change their lives and opening doors to lawful employment. If forgiveness furthers moral reform, there may be less need for traditional punishment.⁴⁵

To implement this sentence reduction, judges need some flexibility and gradations at sentencing. Federal sentencing law, for example, should replace the almost-automatic 35% sentence discount for guilty pleas with a sliding scale that reflects remorse, apology, and forgiveness.⁴⁶

Mercy does not obliterate the need to punish. Some restorative-justice enthusiasts are so enamored of dialogue that they want it to supplant punishment instead of supplementing it.⁴⁷ Failing to punish serious crimes, however, would belittle them and their victims' suffering, undercutting the criminal law's moral message. Offenders, victims, and society would interpret non-punishment as a green light to keep committing the wrong.⁴⁸ Some punishment is needed to morally condemn the crime, restore the balance of justice, and vindicate the victim. If there is

the overall experience of providing input can be positive and empowering"; noting that giving victims a voice and some process control may matter more to their satisfaction than the outcome, as input empowers victims, communicates their stories to offenders, shows that the system cares enough to listen, and helps victims to cleanse and heal).

⁴⁴ William R. Nugent et al., *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 UTAH L. REV. 137, 140, 162 (meta-analysis of fifteen studies found up to a twenty-six percent reduction in reoffending); Poulson, *supra* note 22, at 190–91 tbl.7 & fig.7 (meta-analyzing four studies of offenders' apologies and one study of victims' forgiveness).

⁴⁵ Of course, a positive, grievance retributivist would not agree, focusing instead on the crime committed and not on any consequences that might flow from punishment.

⁴⁶ See Bibas & Bierschbach, *supra* note 1, at 141–44.

⁴⁷ See John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 4, 7 (1999) (treating the restorative-justice model as alternative to the punishment system and retribution as a destructive vice); Susan M. Olson & Albert W. Dzur, *Reconstructing Professional Roles in Restorative Justice Programs*, 2003 UTAH L. REV. 57, 77 (treating restorative justice as inconsistent with punishment and retribution).

⁴⁸ Bibas & Bierschbach, *supra* note 1, at 122–23.

no punishment to express condemnation, the offender pays no part of his debt and the victim receives no vindication.⁴⁹ And, as suggested earlier, non-punishment would undercut society's legitimate interests in deterrence and incapacitation. Forgiveness and reconciliation are quite consistent with imposing punishment to vindicate victims, deter, incapacitate, and educate.⁵⁰ Thus, while forgiveness may reduce the amount of punishment, ordinarily it cannot abolish it.

C. Society: Reintegrating the Wrongdoer

When community members hear news stories about a crime, their initial instinct is to ascribe blame and call for punishment. Indeed, particularly when one envisions a remorseless wrongdoer, the desire for retribution and justice is natural. Justice is an abstract, *ex ante* perspective that emphasizes the punishment an offense has earned. When one looks at an individual offender *ex post*, as a juror for example, the focus may change.⁵¹ If the offender has admitted guilt, expressed remorse, and apologized, he may seem to be a more sympathetic character. People's intuitive retributive judgments are concrete and contextual. They depend not only on the wrongfulness of the act, but also their assessment of the actor's character and on the damage and repair to the web of people and relationships. The truly remorseful, apologetic wrongdoer seems to have a better character.⁵² By coming clean and apologizing, he has put himself on the road to reform and begun to repair frayed social fabric.

We see this mercy at work at sentencing. Prosecutors, sentencing judges, and parole boards are naturally disposed to go easier on remorseful, apologetic defendants.⁵³ Capital jurors care greatly about remorse and are much less likely to sentence a remorseful defendant to death.⁵⁴ Most likely, prosecutors, judges, jurors,

⁴⁹ Garvey, *supra* note 18, at 1844.

⁵⁰ Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY, *supra* note 4, at 158 & n.39.

⁵¹ Cf. Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 750–51 (2005) (explaining why voters' abstract, *ex ante* punishment judgments differ greatly from jurors' *ex post*, concrete, contextual judgments of blame and punishment); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 926–27 (2006) (same).

⁵² *But see* Bibas & Bierschbach, *supra* note 1, at 107–08 (noting that some wrongdoers are remorseless because they are morally obtuse or suffer from psychoses or other mental illnesses for which lack of remorse is a symptom, and questioning whether these offenders have worse characters than those who had remorseful natures but suppressed them in order to commit their crimes); *see also* Jeffrie G. Murphy, *Remorse, Apology, and Mercy*, 4 OHIO ST. J. CRIM. L. 423 (2007) (discussing but ultimately rejecting Cynthia Ozick's view that an SS soldier who suppressed his good character to commit Nazi atrocities deserved no forgiveness or mercy when he later repented).

⁵³ Bibas & Bierschbach, *supra* note 1, at 93–95.

⁵⁴ *See* Eisenberg et al., *supra* note 27, at 1632–33 (finding, in multivariate empirical study of capital jurors, that “the difference . . . between jurors' beliefs about the defendant's remorse in life cases and in death cases is highly significant” and that “if jurors believed that the defendant was sorry for what he had done, they tended to sentence him to life imprisonment, not death”); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1559–61 (1998) (repeating same finding).

and parole and clemency boards would be more inclined to show mercy if they saw victims forgive and recommend mercy. As Section III.B discussed, these sentence reductions would serve important interests of victims.

As Part II suggested, in ordinary circumstances only victims can grant forgiveness for the injuries they have suffered. Perhaps one can extend this concept to proxies, as parents might forgive their baby's kidnapper or a widow might forgive her husband's killer. Community members can grant forgiveness for the indirect injuries they have suffered, but not on behalf of victims unless a victim or his proxy authorizes them to act as agents. While forgiveness may not be an indispensable prerequisite for mercy, it is the ordinary and surest ground on which mercy can rest. Thus, the state should rarely if ever remit the victim's portion of the sentence unless the victim or his proxy or agent recommends it. This analysis, of course, rests on either the partially victim-controlled or at least victim-concerned system sketched out in the previous section. In a traditional state-centered system, the state would have the power to grant mercy, though it would have no reason to do so.

Though victims suffer direct injuries and deserve a share of punishment, Part II suggested that community members also deserve a share for the indirect injuries they have suffered. A victim's plea for mercy cannot dispense with this community share, and a victim's refusal to show mercy cannot lock the community's share into place. A humane, contextualized punishment system could take account of community members' human emotions and leave room for them to show some mercy.⁵⁵ Perhaps juries, special sentencing juries, judges, or other local elected officials could handle these decisions. While no representative will be perfect, the key is to have a human decisionmaker consider mercy *ex post*, in context. That decisionmaker must at the same time be judicious about dispensing it, lest mercy undermine justice, deterrence, and incapacitation. As C.S. Lewis wrote, "Mercy, detached from Justice, grows unmerciful. That is the important paradox. As there are plants which will flourish only in mountain soil, so it appears that Mercy will flower only when it grows in the crannies of the rock of Justice . . ." ⁵⁶

Society's forgiveness extends beyond its decisions to reduce or remit punishment. All but the very worst prison inmates will be released someday. Once a prisoner has paid his just debt to society and the victim, society should move ahead with healing and forgiveness. Thus, for example, restoring an offender's right to vote after an appropriate period of time is a symbolically meaningful restoration of

⁵⁵ When one considers the state as an abstract, impersonal corporate entity, it seems odd if not incoherent to speak of forgiveness. The state in the abstract arguably has no resentment at some abstract injury to the rule of law or the social compact. Nor would a soulless entity have reason to grant mercy. Equality before the law, and the need to deter, incapacitate, and inflict retribution lead one to Kant's conclusion that the state must inflict the full measure of deserved punishment. One can, however, view the state as comprising a congeries of persons and communities with personalized albeit diffuse interests.

On this model, state actors could forgive and show mercy as agents of the communities and persons they represent. See Murphy, *Mercy and Legal Justice*, in FORGIVENESS AND MERCY, *supra* note 4, at 177–80.

⁵⁶ C.S. LEWIS, GOD IN THE DOCK: ESSAYS ON THEOLOGY AND ETHICS 294 (Walter Hooper ed., reprinted 2001).

citizenship. So too is restoring an offender's right to serve on a jury, hold most kinds of employment, or eventually to hold office.⁵⁷ Even the right to live near a school, park, or day-care center is valuable, as exclusions of felons from these areas put most of many cities off-limits. The restoration process may be gradual, just as the dialogue that leads to apology and forgiveness may gradually build mutual trust and understanding.

This approach involves what John Braithwaite calls reintegrative shaming.⁵⁸ The point of punishment is not to ostracize criminals into a permanent underclass, embittered and tempted to revictimize a society that shuns them. The point is to exact appropriate retribution and prepare offenders to return to the fold.

Forgiving and reintegrating offenders, especially remorseful offenders, are valuable both symbolically and practically. They hold out incentives for prisoners to reform themselves and earn these rewards. They hold out hope for prisoners that after suffering abasement, they will be symbolically lifted up again and start afresh. They highlight a law-abiding, respectable alternative way of life to the cycle of recidivism and reincarceration that ensnares far too many ex-convicts. Most of all, they reflect the humaneness of a society that, having denounced and punished, can rejoice over the return of its prodigal sons.⁵⁹ As Winston Churchill, who was no softie, said, "The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. . . [This civilized attitude includes] unflinching faith that there is a treasure, if you can only find it, in the heart of every man"⁶⁰

As Part II argued, forgiving does not require forgetting. One can legitimately worry about the sincerity of an offender's remorse⁶¹ or a sincerely repentant

⁵⁷ See generally Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 153 (1999); Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 67 nn.4–5 (2003) (discussing felons' right to serve on juries and collecting citations of articles discussing felon disenfranchisement); Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N.D.L. REV. 187, 190–91 (1995) (noting that occupational licensing laws typically govern accountants, alcohol sellers, ambulance drivers, attorneys, barbers, billiard room employees, contractors, embalmers, nurses, pharmacists, physicians, real estate professionals, and septic tank cleaners, among others).

⁵⁸ See JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* 54–107 (1989).

⁵⁹ Cf. *Luke* 15:11–32 (parable of the prodigal son).

⁶⁰ Winston Churchill, Home Secretary, Speech Delivered to House of Commons (July 20, 1910), in WINSTON S. CHURCHILL, *HIS COMPLETE SPEECHES: 1897–1963, VOLUME II: 1908–1913*, at 1589, 1598 (Robert Rhodes James ed., 1974).

⁶¹ As Dryden's character Zulema put it in a soliloquy:

True; they have pardon'd me; but do they know
 What folly 'tis to trust a pardon'd Foe?
 A Blush remains in a forgiven Face;
 It wears the silent Tokens of Disgrace:
 Forgiveness to the Injur'd does belong;
 But they ne'r pardon who have done the wrong.

offender's ability to resist future temptations. It is one thing to restore a pedophile's right to work as a bartender or plumber; it is another to license him as an elementary-school teacher. A convicted drug dealer and user should not quickly return to work as a pharmacist with access to prescription narcotics. A defendant convicted of fraud or embezzlement probably should not re-enter financial or legal services right away. Restoring rights requires difficult judgment calls about how severe the offender's crimes were, how trustworthy he has become, and how sensitive the right in question is. On the other hand, we should not be so afraid that we refuse to take any chances and never forgive. Voting rights, jury rights, and rights to live in most areas and hold less sensitive jobs are probably suitable for rapid restoration. Rights to hold office and practice more sensitive professions might deserve slower restoration. Timetables could vary depending on the profession, the crime of conviction, and the defendant's remaining drug-free for a period of time.⁶²

As the previous paragraph suggested, this area requires a difficult weighing of interests and the chances we are willing to take. To some, it seems safest always to err on the side of tough and inflexible punishment. The benefits of maximum incapacitation are immediate, certain, and concrete, while the payoffs from forgiveness and mercy are longer-term, squishier, and more speculative. In striking a balance, we must decide what kinds of persons we wish to be. Are we ruled exclusively by fear, or will we also make some room for hope and humaneness? Many readers, I hope, will see the intuitive value of taking a chance on reconciling at least the most promising offenders.

Offender registries and stigmatizing publicity require similar judgment calls. Sex-offender registries, for example, have a protective and regulatory function when viewed by schools, day-care centers, and probably parents. On the other hand, registries are proliferating and becoming so publicized that one suspects many of them are simply designed to stigmatize and shame. Other forms of publicity, besides registries, have the same problem. Once a prostitute or her customer has served a sentence, there seems to be little protective or regulatory reason to keep publicizing that person's name. Continued publicity is simply punishment without end. Ideally, governments could limit registry access to those with some need to know and would remove stigmatizing publicity after a time. In practice, because search engines cache web pages long after they have been removed, posting a name on the internet once may amount to a life sentence. In light of this problem, governments should use more

My hopeful Fortune's lost! and what's above
 All I can name or think, my ruin'd Love!
 Feign'd Honesty shall work me into Trust;
 And seeming Penitence conceal my Lust.

JOHN DRYDEN, *The Conquest of Granada*, in XI THE WORKS OF JOHN DRYDEN 110 (John Loftis et al. eds., 1978) (pt. II, act 1, sc. 2, ll. 1–10).

⁶² Defendants who need medication to control mental illnesses could likewise be required to show that they had been taking their medications for a period of time.

discretion in deciding what to post in the first place. Registries are sufficiently popular, however, that I doubt that governments will curtail their use.

Perhaps governments could even put out positive information to reward law-abiding behavior and end ex-offenders' stigma. They could, for example, issue certificates praising ex-offenders for remaining crime- and drug-free over the preceding six months, year, two years, and so on. Positive reinforcement would complement the negative reinforcement of probation officers' keeping tabs on ex-offenders. Similar graduation ceremonies and certificates can be important parts of drug- and alcohol-treatment programs.

IV. POSSIBLE OBJECTIONS AND CONCERNS

Skeptics might criticize my proposals as too optimistic on several grounds. Sections III.B and C addressed the victim's right or role in punishment and the dangers of pressuring unwilling victims and defendants. Here, I address three other objections.

First, forgiveness may seem to be an *unworkable ideal*. Some offenders are stony and remorseless. Some feign or fake remorse and apologies. Some victims are rationally or irrationally scared, fearful, angry, or simply unwilling to forgive. Victims of multi-victim crimes may disagree amongst themselves and with community members about what forgiveness and mercy are appropriate. Reconciling these competing views will not be easy. Forgiveness is also poorly suited to so-called victimless crimes, as there is no obvious person to do the forgiving. America is large, individualistic, and heterogeneous. Its communal social fabric is relatively weak, and it often seems uninterested in reintegrating and reconciling offenders to the fold. And, in a tough-on-crime era, forgiveness and mercy seem too soft to be politically feasible.

All of these administrative objections carry some weight but are not fatal to forgiveness. Many offenders will doubtless dissemble about how contrite and apologetic they are. Victims and judges, however, can discriminate degrees of sincerity, just as they make difficult credibility determinations about mens rea and blameworthiness. Moreover, even insincere or semi-sincere remorse and apologies have some value, as they vindicate victims and the violated norm and may lead to true remorse.⁶³

While no one person may be the obvious one to forgive a so-called victimless crime, there will often still be affected persons. Residents of a drug-infested neighborhood, or homeowners whose houses adjoin a polluted lake, can stand in as victims of drug and environmental crimes, for example.⁶⁴ Moreover, judges, jurors, and other court personnel can participate in society's share of forgiveness even for the most victimless crimes of all. Of course, multiple victims' views may conflict, but judges can weigh and balance these views just as they weigh conflicting input about defendants' characters and prospects.

⁶³ Bibas & Bierschbach, *supra* note 1, at 142–43.

⁶⁴ *Id.* at 145–46.

Even though America as a whole is far-flung and heterogeneous, it comprises neighborhood, family, ethnic, religious, and business communities whose members care about healing. A great deal of crime is local, intra-group, intra-racial, or even intra-familial. Especially in these contexts, the parties are likely to have the incentives and social supports to apologize, forgive, heal, and reconcile. Forgiveness may not work as well as it would on a small island, but it can still work.

Finally, today's politics are surprisingly hospitable to forgiveness. Forgiveness is a fascinating concept because it can cut across the usual political cleavages. Ordinarily, we think that political conservatives favor stiffer criminal punishment and political liberals want lighter punishment. That is a roughly accurate snapshot of how politics correlates with attitudes toward justice. Conservatives often stress the need to reinforce laws and condemn violations by punishing, deterring, and incapacitating. Many citizens sympathize with this perspective, as repeat and violent offenders deserve serious punishment. As a result, politicians engage in an escalating bidding war over justice, and the ratchet effect pushes penalties up.

The lineup can change, however, when one reframes the issue not as just deserts, but as mercy and forgiveness. Forgiveness and mercy tap deeply into Judeo-Christian religious traditions, particularly the Christianity that animates much of the religious right. A darling of the religious right is Chuck Colson, former special counsel to President Nixon, who was convicted and imprisoned for his role in the Watergate cover-up. He experienced a religious conversion and, after being released, founded Prison Fellowship and began ministering to prisoners. Over the last three decades, Prison Fellowship has grown into the world's largest prison ministry, in partnership with thousands of churches. Taking literally Jesus' command to visit the imprisoned, Prison Fellowship proclaims: "while society may cast aside those people it deems useless and unworthy, God continues to pursue them with His steadfast love, offering forgiveness and restoration."⁶⁵ Prison Fellowship's InnerChange Freedom Initiative provides religiously based programming within certain prisons, in an effort to induce repentance, reconciliation, and moral reform.⁶⁶ Prison Fellowship's sister organization Justice Fellowship not only ministers to prisoners, but also advocates and supports programs that reintegrate released prisoners into the community. These programs help ex-prisoners to find jobs, housing, churches, medical care, mental-health care, and substance-abuse treatment. Justice Fellowship also advocates restoration of ex-prisoners' "citizenship rights," such as voting rights.⁶⁷

These programs, and the vast support they have received from churches across the country, suggest that a large swath of the religious right is sympathetic to forgiveness and reconciliation. It highlights a vocabulary of mercy that can compete

⁶⁵ About Prison Fellowship, <http://www.prisonfellowship.org/contentindex.asp?ID=8> (last visited Jan. 27, 2007) (also quoting *Matthew* 25:35–36, 40).

⁶⁶ Program Details: IFI Freedom Initiative, <http://www.ifiprison.org/generic.asp?ID=971> (last visited Jan. 27, 2007).

⁶⁷ Issues in Criminal Justice Reform: Prisoner Reentry, <http://www.justicefellowship.org/contentindex.asp?ID=5567> (last visited Feb. 19, 2007).

with and temper the rhetoric of justice. Even in a tough-on-crime era, there is room and sympathy for forgiveness in the right circumstances.⁶⁸ On this issue, the left and religious right can come together.

This political analysis might provoke a second concern, namely that forgiveness is often *religiously motivated*. Words such as repentance, with their Christian roots and overtones, make many uncomfortable. The references to the religious right above make forgiveness seem partisan and sectarian. In our secular, pluralistic society, incorporating forgiveness might seem to be religiously divisive.

Enacting a secular policy for reasons that happen to flow from voters' religious or philosophical commitments, however, is a far cry from establishing a state church or coercing religious dissenters.⁶⁹ Moreover, forgiveness of repentant wrongdoers is a worldwide practice that cuts across religions.⁷⁰ Nor is there anything necessarily religious about forgiveness.⁷¹ Some people forgive because their religion teaches them to, just as some people refrain from murdering or stealing for the same reason. Others, even atheists and agnostics, forgive because their philosophies or moral intuitions tell them it is the right thing to do. This explains why the left and the religious right can agree on forgiveness and mercy; they are concepts that cut across political and religious lines. A facially neutral law encouraging forgiveness is thus no more sectarian than a law forbidding murder or stealing.

⁶⁸ Cf. Kenworthy Bilz & John M. Darley, *What's Wrong with Harmless Theories of Punishment*, 79 CHI.-KENT L. REV. 1215, 1247–51 & n.126 (2004) (arguing that restorative justice is powerful precisely because it can serve various philosophies of punishment, and that narrowing it down to a rehabilitationist approach would undercut political support, as many people prize the retributivist elements of facing down offenders); Dan M. Kahan, *What's Really Wrong with Shaming Sanctions* 23–26 (July 1, 2006) (unpublished manuscript, on file with the Social Science Research Network), <http://ssrn.com/abstract=914503> (arguing that restorative justice is more acceptable to the public than classic shaming sanctions because it is “expressive[ly] overdetermin[ed],” allowing people of different ideologies to read different meanings into it).

⁶⁹ This essay can only scratch the surface of these deep issues. For fuller treatments of the Establishment Clause question, see, Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should be Excluded from Democratic Deliberation*, 1999 UTAH L. REV. 639; Michael J. Perry, *Religion in the Public Square: Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause*, 42 WM. & MARY L. REV. 663 (2001).

⁷⁰ See, e.g., FARID UD-DIN ATTAR, *THE CONFERENCE OF THE BIRDS* [MANTIQU UT-TAIR] 53 (Garcin de Tassy & S.C. Nott trans., 1954) (classic religious epic written by 12th-century Persian Sufi Muslim, relating what the Lord said to a thrice-lapsed wrongdoer: “Return then, to the Way. I open my door to you and wait. When you have truly changed your attitude your sins will be forgiven.”); Mahmoud Ayoub, *Repentance in the Islamic Tradition*, in *REPENTANCE: A COMPARATIVE PERSPECTIVE* 96, 107 (Amitai Etzioni & David E. Carney eds., 1997) (discussing when, in Islam, forgiveness and remission of punishment should follow repentance); Malcolm David Eckel, *A Buddhist Approach to Repentance*, in *id.* at 122, 135–36 (discussing the Dalai Lama's praise of the Pope's forgiving his assassin); Louis E. Newman, *The Quality of Mercy: On the Duty to Forgive in the Judaic Tradition*, 15 J. RELIGIOUS ETHICS 155, 155 (1987) (discussing forgiveness and mercy in Judaism).

⁷¹ ARENDT, *supra* note 18, at 238 (“The fact that [Jesus] made this discovery [about the importance of forgiveness] in a religious context and articulated it in religious language is no reason to take it any less seriously in a strictly secular sense.”).

A third concern is that discretionary forgiveness will introduce *inequality*. Some victims and sentencing judges may discriminate based on race, sex, class, or education. Some may be arbitrary. Some are quick to forgive while others refuse to do so. Some offenders and some victims are more eloquent and attractive than others, which may increase their ability to win forgiveness and mercy.

Again, all of these concerns are legitimate but far from fatal. Discrimination, arbitrariness, and variations in temperament, eloquence, and attractiveness are endemic problems in criminal justice. Remorse, apology, and forgiveness are at least neutral metrics and criteria to structure and guide discretion.⁷² Formalizing their role and bringing them out into the open can only help to promote reasoned deliberation, appellate review, and public scrutiny.

One might think that the solution to sentencing discretion is to have more rules and less discretion. To an extent, rules and guidelines can channel discretion effectively. Many state sentencing guidelines systems have reduced sentencing disparities and focused decisions on relevant factors. More could be done to bring structure to pardon and clemency decisions, which are often quite unstructured and potentially arbitrary.⁷³ As the experience of the much-criticized United States Sentencing Guidelines shows, however, rules can structure discretion only up to a point. In practice, judges, prosecutors, police, and others retain substantial leeway, and factors such as forgiveness can guide them intelligently. Even in theory, reasoned judgment is not reducible entirely to rules. It requires practical, contextual judgments that reflect myriad factors, and one of those factors should be forgiveness.⁷⁴

Treating like cases alike is a value, but not the only one. Equality also requires treating unlike cases unlike, and forgiveness is a factor that makes cases unlike and worthy of different sentences. Moreover, equality should not trump all other values. A Procrustean system of fixed penalties or mandatory minima would ensure this equality by sacrificing individualization. Justice demands a balance of many competing values, not a simple one-dimensional yardstick. The possibility of mercy is one important factor that should keep justice from being inexorable and rigid.

⁷² *Id.* at 130.

⁷³ The criteria that guide pardon and clemency decisions will likely differ from those at the heart of sentencing. For example, pardon and clemency typically give greater weight to an offender's post-conviction remorse, reform, and rehabilitation. Pardon and clemency decisions seem more individualized and less amenable to resolution solely by codified rules. Because elected executive officials grant pardons and clemency, however, there is much more danger of election-year variations and demagoguery and so a need for neutral guidance. See generally Margaret Colgate Love, *Fear of Forgiving: Rule and Discretion in the Theory and Practice of Pardoning*, 13 FED. SENT'G REP. 125 (2000–01) (noting that traditionally pardons were discretionary grants unfettered by rules, surveying growth and circumvention of federal pardon bureaucracy, and discussing competing proposals to make pardons more or less guided by rules).

⁷⁴ See Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 71–72 (2006); see also Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEO. L.J. 387, 433–42 (2002) (going even further and arguing that sentencing requires “fault considerations that are so context-dependent and fine-grained that they cannot be stated *ex ante* in rules” (footnote omitted)).

V. CONCLUSION

Remorse, apology, and forgiveness are time-honored ways to restore offenders and victims and let them move on with their lives. Crimes wound relationships, and forgiveness helps to heal these wounds. Centuries ago, contrition and forgiveness rituals were central to colonial criminal justice,⁷⁵ and there is good reason to bring back this emphasis today.

Much of this essay's discussion seems optimistic, indeed cockeyed, in our day of amoral, efficient, assembly-line justice. Forgiveness, however, feeds a deep human need, one that our mechanistic, impersonal, lawyerized criminal justice process has suppressed. Restoring forgiveness to its proper role will not be easy and will require time and money. These are prices worth paying, however, to heal and reconcile wounded offenders, victims, and communities so that they can go on with their lives.

⁷⁵ See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 25–26 (1993) (describing the colonial trial as “an occasion for repentance and reintegration: a ritual for reclaiming lost sheep and restoring them to the flock”; also noting colonial expectation that defendants awaiting execution would be penitent and confess and that, when defendants threw themselves on the court’s mercy, courts might be “patient and lenient”).