

## JUSTICE OR MERCY?

*Vera Bergelson\**

### TABLE OF CONTENTS

I. INTRODUCTION .....	959
II. DESERVED PUNISHMENT AND THE PROBLEM OF MERCY.....	961
<i>A. Definitions and Boundaries</i> .....	961
<i>B. The Relative Values of Justice and Mercy</i> .....	969
<i>C. Room for Mercy</i> .....	970
III. DIRTY HANDS AND OTHER ALTERNATIVES.....	972
IV. CONCLUSION.....	976

### I. INTRODUCTION

The central theme of Leo Zaibert’s thoughtful, witty and provocative book is the uneasy relationship between justice and mercy, punishment and forgiveness. Both justice and mercy have value in a civil society; however, from the philosophical perspective, those values are doomed to clash. Their clash is systemic and unavoidable because justice and mercy are fundamentally incompatible—either the defendant receives the punishment that he deserves or he is shown mercy and is forgiven some or all of the deserved punishment.<sup>1</sup>

Zaibert argues that punishment theorists have missed the central importance of the tension between those two values.<sup>2</sup> He maintains that the debate about the justifiability of punishment that, for decades, has focused on the differences between retributivism and various consequentialist theories should instead zoom on the conflict between justice and mercy.<sup>3</sup> Zaibert writes: “If the debate over punishment’s

---

\*Distinguished Professor of Law, Robert E. Knowlton Scholar, Rutgers School of Law. I am grateful to my research assistant Julie Minicozzi for her excellent research and advice in connection with this paper.

1. LEO ZAIBERT, *RETHINKING PUNISHMENT* 26 (2018).

2. *Id.* at 242.

3. *Id.* at 26. (“To discuss punishment without paying attention to the moral conflict it generates (and its attendant remainders) is not only an impoverished exercise but truly an exercise in futility: a way of unwittingly ensuring that the central debate over punishment’s justification will remain mired in an unproductive stalemate.”).

justification is to be advanced, we need to pay much closer attention to the central conflict opposing the value of deserved suffering and the value of its merciful remission.”<sup>4</sup> In this paper, I would like to do just that and consider the relative values of justice and mercy in criminal law and the legitimacy of mercy in criminal justice system.

Before I start, let me underscore three of Zaibert’s points that are important to this paper, namely:

1. Punishment is intrinsically dilemmatic because it involves the “inescapable wrongdoing” of causing suffering to the punishee and thus “necessarily generates remainders.”<sup>5</sup> Those remainders do not disappear simply because a particular course of actions is justified.<sup>6</sup>

2. Deserved punishment sometimes has value,<sup>7</sup> and the same is true of forgiveness.<sup>8</sup>

But it is incorrect to think that, even in paradigmatic cases, the value of inflicting the deserved punishment is greater than the value of its merciful remission.<sup>9</sup>

3. “No punisher, no matter how just, is ever fully morally innocent.”<sup>10</sup> Punishing simply cannot be done without “dirtying one’s hands.”<sup>11</sup> A punisher with integrity ought to experience something like agent regret (or tragic remorse);<sup>12</sup> in the majority of cases, he must feel conflicted.<sup>13</sup>

---

4. *Id.*

5. *Id.*

6. *Id.* at 23.

7. *Id.* at 183 (i.e. it has value “in the sense that it can add value to the organic wholes in which it appears . . .”).

8. *Id.*

9. *Id.* at 235 (criticizing contemporary punishment theorists for “tend[ing] to operate as if all cases, or at least the paradigmatic cases, of punishment were such that the difference between the value of inflicting punishment is much greater than the value of its merciful remission”).

10. *Id.* at 231.

11. *Id.*

12. *Id.* at 230 (citing Stephen De Wijze, *Tragic Remorse—The Anguish of Dirty Hands*, 7 *ETHICAL THEORY & MORAL PRAC.* 453–71 (2005)).

13. *Id.* at 109; *see also id.* at 231 (“A punisher is in the business of making people suffer, and this business, even when the suffering is deserved (or medically useful), simply cannot be done without—in admittedly different degrees—dirtying one’s hands.”).

2019]

*JUSTICE OR MERCY?*

961

I agree with Zaibert that punishment (like everything else, if I may add) is dilemmatic and generates remainders;<sup>14</sup> nevertheless, I will argue that the value of deserved punishment is fundamentally superior to the value of its merciful remission and that deserved punishment does not have to dirty the punisher's hands.

Specifically, I would try to establish that:

- what we routinely call "mercy" in criminal law is usually not mercy but some other societal or personal value;

- in those rare instances in which "mercy" indeed qualifies for its name, a well-designed and well-functioning criminal justice system (i.e. a criminal justice system with just, nuanced, proportionate and fairly enforced laws)<sup>15</sup> usually does not need it;

- to the extent mercy may have a legitimate place in criminal law, it does not hold the same moral or political weight as the deserved punishment; and

- in a well-designed and well-functioning criminal justice system, imposing the deserved punishment does not have to dirty the punisher's hands and does not require the punisher with integrity to experience either agent regret or tragic remorse.

## II. DESERVED PUNISHMENT AND THE PROBLEM OF MERCY

### A. *Definitions and Boundaries*

What punishment is *deserved* has been debated for centuries by philosophers, politicians, and general public alike.<sup>16</sup> Without attempting to contribute to this debate, I would like to highlight a few key points. It is usually agreed to that, at a minimum, *to deserve* punishment, the offender must have committed an offence, usually culpably, and without

---

14. *Id.* at 26.

15. Further in the text, a criminal justice system with just, nuanced, proportionate and fairly enforced laws will be referred to as "a well-designed and well-functioning criminal justice system."

16. See J. L. A. Garcia, *Deserved Punishment*, 8 L. & PHIL. 263, 264, 270, 275 (1989) (comparing theses of commenters H. S. Hestevold and George Sher to author's original thesis); Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719, 720 (1992) ("The question of why and when punishment is deserved goes to the heart of the modern debate over criminal justice.").

a valid justification or excuse.<sup>17</sup> If an innocent person is convicted and executed, this is clearly not the “deserved punishment” (indeed, this is not *punishment* at all).<sup>18</sup> The same is true if a person has committed a prohibited act while being irresponsible (for example, insane).<sup>19</sup> Punishment is not *deserved* if it is disproportionately harsh or disproportionately light.<sup>20</sup> It seems noncontroversial to say that a pickpocket does not deserve the death penalty. It seems equally noncontroversial to suggest that 60 days in prison for a convicted child rapist is an undeservedly light sentence.<sup>21</sup>

In addition to being proportionate to the wrongdoing, the deserved punishment has to take into account the offender’s unique circumstances and characteristics that (i) make the offender different from the paradigmatic rational actor to whom the law addresses its commands and (ii) affect the offender’s ability to adhere to the commands of the law.<sup>22</sup> Take the well-known case of Judy Norman who, after almost twenty-five years of marital abuse, killed her abusive husband while he was asleep.<sup>23</sup> Did she *deserve* her conviction of manslaughter and the sentence of six years in prison?<sup>24</sup> Did Billy Budd, the protagonist of the famous Melville novel, who in outrage struck and unintentionally killed his slanderer *deserve* his death sentence?<sup>25</sup> Many would argue that they did not, even though *other* killers may have deserved such sentences for the killings committed in *other* circumstances. In short, deserved punishment requires not only a *systemically* proper response to a criminal violation; it also requires treating each defendant and each situation *individually*.

---

17. See SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 259 (10th ed. 2017) (discussing “mens rea” requirement for criminal liability).

18. See Vera Bergelson, *Does Fault Matter?* 12 CRIM. L. & PHIL. 375, 379–80 (2018) (“[P]unishment is a *deserved* suffering or deprivation.”).

19. See KADISH ET AL., *supra* note 17, at 258–59 (“[M]ens rea defenses . . . [are] defenses that aim to establish the absence of moral blameworthiness.”).

20. See *id.* at 202.

21. See Wilson Ring, *Judge, Under Fire, Increases Sentence for Sex Offender from 60 Days to at Least 3 Years*, RUTLAND HERALD (Jan. 26, 2006), [https://www.rutlandherald.com/news/judge-under-fire-increases-sentence-for-sex-offender-from-days/article\\_3a3d6943-e131-5bd0-955f-9a02f4801998.html](https://www.rutlandherald.com/news/judge-under-fire-increases-sentence-for-sex-offender-from-days/article_3a3d6943-e131-5bd0-955f-9a02f4801998.html).

22. See *e.g.*, State v. Norman, 378 S.E.2d 8, 12 (N.C. 1989); KADISH ET AL., *supra* note 17, at 898.

23. *Norman*, 378 S.E.2d at 9–10.

24. *Id.* at 9.

25. See HERMAN MELVILLE, BILLY BUDD, SAILOR AND OTHER STORIES (Frederick Busch ed., Penguin Books 1986) (1924).

What constitutes *mercy* is not a simple matter either. In the context of punishment theory, mercy (or forgiveness, or leniency)<sup>26</sup> involves deliberately foregoing or reducing the deserved punishment.<sup>27</sup> Punishment may be reduced or foregone at different stages of the criminal process. Consider the situations below as possible candidates for mercy:

1. *Executive amnesty* – for example, President Gerald R. Ford precluded prosecution of Vietnam War draft evaders.<sup>28</sup> Ford's program allowed draft dodgers and military deserters to gain amnesty by turning themselves in, reaffirming their allegiance to the United States, and serving two years working in a public service job.<sup>29</sup>

2. *Prosecutorial discretion not to prosecute or prosecute for a lesser crime* – for example, a plea deal offered to an offender who has played a minor role in a crime in exchange for his cooperation in prosecution of the major players.<sup>30</sup>

3. *The grand jury's decision not to indict* – such cases are rare;<sup>31</sup> one of the most typical examples is non-indictment of an on-duty police officer for killing a suspect.<sup>32</sup>

4. *The power of nullification* – even when the State has established beyond the reasonable doubt that the crime has been committed and the defendant has committed it, the jury may

---

26. Following Zaibert, I use these terms interchangeably. See ZAIBERT, *supra* note 1, at 3 (“[W]hile the idea of mercy is admittedly more general than the idea of forgiveness, I will treat both as synonyms here.”).

27. *Id.* at 4 (“[M]ercy in this context means the deliberate sparing of a suffering that is deserved as a result of wrongdoing . . .”).

28. *Conditional Amnesty for Vietnam Draft Dodgers and Military Deserters*, N.Y. TIMES (Sept. 16, 2011, 4:23 AM), <https://learning.blogs.nytimes.com/2011/09/16/sept-16-1974-conditional-amnesty-for-vietnam-draft-dodgers-and-military-deserters/>.

29. *Id.*

30. See KADISH ET AL., *supra* note 17, at 1213–14.

31. See Josh Vorhees, *Darren Wilson is Not an Outlier*, SLATE (Dec. 2, 2014, 5:19 PM), <https://slate.com/news-and-politics/2014/12/darren-wilson-no-true-bill-why-cops-are-almost-never-indicted-for-shooting-someone-in-the-line-of-duty.html> (“When a prosecutor stands before a grand jury and asks for an indictment, the jurors almost always do what they’re told.”).

32. “According to . . . research, 41 U.S. officers were charged with either murder or manslaughter in connection with an on-duty shooting between 2005 and 2011. *Id.* For comparison, the FBI reported a total of 2,718 “justified homicides” by law enforcement officers during that seven-year time period.” *Id.*

exercise its power of nullification and refuse to convict.<sup>33</sup> One notorious example is the 1980s case of Bernard Goetz, dubbed “subway vigilante.”<sup>34</sup> Goetz shot four Black teenagers who, arguably, tried to rob him.<sup>35</sup> The trial took place at the high point of crime in New York, and both Black and White communities felt so terrorized by criminals and unprotected by the police, that, despite the overwhelming evidence against Goetz, the racially mixed jury acquitted Goetz of all charges related to the shooting.<sup>36</sup>

5. *The sentencing judge’s decision to reduce or eliminate the punishment* – for example, the sad story of the Williamses, the young, poorly educated, loving Native American parents of a sick child.<sup>37</sup> They were so afraid that welfare authorities would take their child away from them that they did not seek medical help soon enough to save the child’s life.<sup>38</sup> The Williamses were convicted of manslaughter but their prison sentences were suspended.<sup>39</sup> A less sympathetic example of leniency is the already mentioned sixty-days’ sentence imposed by Judge Edward Cashman on a convicted child rapist.<sup>40</sup>

6. *Executive clemency* – recall, for example, the case of Judy Norman.<sup>41</sup> Soon after the North Carolina Supreme Court reinstated Mrs. Norman’s conviction, North Carolina Governor James G. Martin commuted her sentence and ordered her

---

33. Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253 (1996).

34. *State v. Goetz*, 73 N.Y.2d 751 (N.Y. 1988). Goetz was convicted only on the charge of carrying an unlicensed concealed weapon. Joseph Berger, *Goetz Case: Commentary on Nature of Urban Life*, N.Y. TIMES (June 18, 1987), <https://www.nytimes.com/1987/06/18/nyregion/analysis-goetz-case-commentary-on-nature-of-urban-life.html>.

35. See also *People v. Goetz*, 497 N.E.2d 41, 43 (N.Y. 1986).

36. Jason Manning, *The Subway Vigilante*, THE EIGHTIES CLUB, <http://eightiesclub.tripod.com/id311.htm> (last visited November 1, 2019).

37. *State v. Williams*, 484 P.2d 1167 (Wash. Ct. App. 1971).

38. *Id.* at 1174 (stating the father’s testimony that the parents were afraid that “they would think we were neglecting him and take him away from us and not give him back”).

39. PAUL H. ROBINSON, WOULD YOU CONVICT?: SEVENTEEN CASES THAT CHALLENGED THE LAW 142 (1999).

40. Ring, *supra* note 21.

41. *State v. Norman*, 378 S.E.2d 8 (N.C. 1989).

release.<sup>42</sup> Mrs. Norman has served only two months of her six-year prison sentence.<sup>43</sup>

In all these examples, the individuals who had violated a criminal statute without an adequate justification or excuse were spared the punishment provided by the law by the decision makers entrusted with enforcing the law. But were their decisions acts of mercy? I do not think so. As Zaibert correctly points out, true mercy must be granted for *moral* reasons.<sup>44</sup> To forgive “because one realizes that this would bring about negative consequences is not to forgive.”<sup>45</sup> I fully agree with that: instrumental reasons of efficiency, crime prevention or social cohesiveness may support the decision to forego the deserved punishment; however, such decision is not mercy.<sup>46</sup>

Zaibert, however, goes a step further: for him, forgiveness must involve not just any moral reasons but only such that are *objectively* good and correct.<sup>47</sup> Forgiving someone out of subjectively felt compassion is not true forgiveness; accordingly, to forego punishment because “the wrongdoer has already suffered enough or because one realizes that, when she acted wrongly, the wrongdoer was undergoing a personal tragedy (say, the death of a loved one) . . . is not to forgive.”<sup>48</sup> With that I disagree. Moral reasons for forgiveness may be different, even misguided and mistaken. As long as they are not instrumental (i.e. directed at achieving a particular result in the future) but instead are grounded in the present moral reality as this reality is subjectively perceived by the forgiver, those moral reasons should satisfy the requirements for forgiveness. It may later turn out that the exhibited mercy was misguided (as in granting a sick prisoner a compassionate release so that he could spend his last days with his family when in fact his medical

---

42. Elizabeth Leland, *Abused Wife's Sentence Commuted Woman Killed Husband in 1985*, NEWSBANK: ACCESS WORLD NEWS (July 8, 1989), <https://infoweb-newsbank.com.proxy.libraries.rutgers.edu/apps/news/document-view?p=AWNB&docref=news/0EB6C4C5769CE850>.

43. *Id.*

44. ZAIBERT, *supra* note 1, at 177.

45. *Id.*

46. I also agree with Zaibert that true mercy must be unconditional. Repentance, apologies, or reconciliation may facilitate forgiveness, but they may not be a necessary condition of true forgiveness. *See id.* at 201–07.

47. *Id.* at 178 (maintaining that “genuine cases of forgiveness[] [are those] in which although it would be just – and *valuable* – to punish someone who deserves punishment (and who has no excuses, mitigations, or justifications), we nonetheless conclude that it is all-things-considered better – i.e., *more valuable* – if we remit this punishment”). I wish Zaibert had provided an example of such a moral reason but, regrettably, there are none.

48. *Id.* at 177.

condition was not immediately life threatening)<sup>49</sup> but, conceptually, misguided mercy is still mercy.

I would like to highlight one other related feature of mercy: in addition to being driven by a non-instrumental reason, mercy must be motivated by the desire to benefit *the punishee*. If the primary reason for not giving the wrongdoer his just desert is the desire to spare suffering or deprivation to someone else—the punisher; the victim; the wrongdoer’s family; the victim’s or the wrongdoer’s community or the public at large—this is not mercy but just another kind of an instrumental reason. Keeping in mind these two essential features of mercy, let’s revisit the examples above.

1. *Executive amnesty* – President Ford’s grant of amnesty to draft evaders was motivated, in his own words, by his desire “to bind up the Nation’s wounds.”<sup>50</sup> In his historic speech, President Ford declared, “My sincere hope is that this is a constructive step toward a calmer and cooler appreciation of our individual rights and responsibilities and our common purpose as a nation whose future is always more important than its past.”<sup>51</sup> That is, the presidential amnesty was granted not out of compassion for the draft evaders but out of the need to improve social stability.<sup>52</sup>

2. *Prosecutorial discretion not to prosecute or prosecute on lesser charges* – Two reasons most commonly offered for the prosecutorial decision not to prosecute are: the limited available enforcement resources and the “need to individualize justice.”<sup>53</sup> Neither reason involves mercy. The former, which often leads to a plea offer in exchange for the offender’s cooperation, is not an act of prosecutorial mercy to the offender but a strategic decision to build a stronger case. The need to individualize justice is, by

---

49. See, e.g., Jomana Karadsheh, *Lockerbie Bomber Dies More Than Two Years After Release*, CNN (May 21, 2012, 5:32 AM), <https://www.cnn.com/2012/05/20/world/africa/obit-lockerbie-bomber/index.html>.

50. *On This Day: President Ford Grants Conditional Amnesty to Vietnam Draft Dodgers*, FINDINGDULCINEA (Sept. 16, 2011, 06:00 AM), <http://www.findingdulcinea.com/news/on-this-day/Sept/President-Ford-Grants-Conditional-Amnesty-to-Vietnam-Draft-Dodgers.html>.

51. *Id.*

52. Similarly, his argument for granting pardon to his predecessor, President Nixon, was based not on sympathy for the former President, but primarily on the needs of national security and economy. See *The Nixon Pardon in Constitutional Retrospect*, NAT’L CONST. CTR. (Sept. 8, 2018), <https://constitutioncenter.org/blog/the-nixon-pardon-in-retrospect-40-years-later>.

53. See Wayne R. LaFave, *The Prosecutor’s Discretion in the United States*, 18 AM. J. COMP. L. 532, 533–34 (1970).



its very terms, not a matter of mercy either—it is a matter of justice.

3. *The grand jury's decision not to indict* – A grand jury's refusal to indict a police officer for shooting a suspect is not an act of mercy to the particular officer but, according to a researcher of police shootings, an expression of public confidence in the institution of police and reluctance to punish officers “whose crimes rose out of an on-duty incident that occurred as part of their jobs.”<sup>54</sup>

4. *The power of nullification* – Similarly, a trial jury's refusal to convict someone like Bernard Goetz is not an act of mercy to him but rather an expression of public fear and outrage over the high crime and ineffective policing.

5. *The sentencing judge's decision to reduce or eliminate the punishment* – The judge may reduce or eliminate punishment because the law, as written or as applied to the particular defendant, is too harsh and the defendant does not deserve that punishment. This appears to be the reason behind the suspended sentence for the Williamses.<sup>55</sup> Their suspended sentence was not an act of mercy on the sentencing judge's part but an attempt to individualize justice and give these defendants what they *deserved*.<sup>56</sup> Alternatively, the judge may reduce or eliminate the *deserved* punishment for any number of instrumental reasons. For example, Judge Edward Cashman who sentenced a convicted child rapist to merely sixty days in prison explained that he no longer believed in retribution; instead, he believed that criminal justice should pursue rehabilitative goals and the convicted offender would have better chances of being rehabilitated out of prison.<sup>57</sup> That decision was not an act of mercy for the particular offender; it was a generic expression of Judge Cashman's judicial philosophy.<sup>58</sup>

---

54. Vorhees, *supra* note 31 (quoting Professor Philip Stinson). According to a recent Gallop poll, “[T]he police were the third-highest-rated institution in terms of public confidence,” whereas the criminal justice system “finished a distant 10<sup>th</sup>.” *Id.*

55. ROBINSON, *supra* note 39, at 142.

56. *Id.*

57. Ring, *supra* note 21.

58. *Id.*

6. *Executive clemency* – Finally, the executive clemency may be exercised out of mercy but it may also be exercised for any kind of reason that has nothing to do with mercy (loyalty; nepotism; public relations; political advantage).<sup>59</sup>

This analysis shows that, in most instances, what we routinely call “mercy” is not mercy at all—real mercy is an extremely rare occurrence. More importantly, this analysis raises a question: *is there even a legitimate place for mercy in a well-designed and well-functioning criminal justice system?* Indeed, in most cases, in which we might want a punisher to give a punishee mercy, mercy is *not needed*.

Take the Williamses’ case. It is possible that the judge’s decision to suspend the defendants’ sentences was influenced by compassion. After all, the Williamses had just lost their son for whom they “possessed a great deal of love and affection.”<sup>60</sup> However, to the extent the Williamses’ sentences were merciful, that mercy was superfluous. The Williamses should have received leniency based on justice alone. As the appellate court explained, the parents were not required to call a doctor every time their child was sick.<sup>61</sup> The governing standard was “at what time would an ordinarily prudent person, solicitous for the welfare of his child and anxious to promote its recovery, deem it necessary to call in the services of a physician.”<sup>62</sup> That standard was clearly intended to reach inattentive or careless parents. But the broad language of the manslaughter statute, which at that time required only “simple or ordinary negligence,”<sup>63</sup> also captured those who failed ordinary caution *for any reason*, “regardless of [their] ignorance, good intentions and good faith.”<sup>64</sup>

As written, the law was vastly over-inclusive, and only if read literally, could apply to people like the Williamses who were neither inattentive nor careless. The Williamses *were* “solicitous for the welfare of his child and anxious to promote its recovery.”<sup>65</sup> Their failure to provide adequate care for their son was a combination of their inexperience and the very realistic fear of having their son taken away from them.<sup>66</sup> They

---

59. See, e.g., David Smith, *The Six Most Controversial Acts of Clemency by U.S. Presidents*, THE GUARDIAN (Apr. 13, 2018, 14:50 EDT), <https://www.theguardian.com/us-news/2017/aug/25/donald-trump-joe-arpaiio-most-controversial-pardons-ever>.

60. State v. Williams, 484 P.2d 1167, 1170 (Wash. Ct. App. 1971).

61. *Id.* at 1173.

62. *Id.* (quoting *People v. Pierson*, 68 N.E. 243, 244 (N.Y. 1903)).

63. *Id.* at 1171 (“Under these statutes the crime is deemed committed even though the death of the victim is the proximate result of only simple or ordinary negligence.”).

64. *Id.*

65. *Id.* at 1173 (quoting *Pierson*, 68 N.E. at 244).

66. KADISH ET AL., *supra* note 17, at 502 (explaining that the Williamses’ fear that the Welfare Department would take their son was not unfounded; “at one point, up to 25 to

did not *deserve* the harsh punishment of imprisonment and the sentence they received was *just*, not *merciful*. Individualized treatment of defendants in their special circumstances is inherently built into the concept of justice; thus, *where special circumstances warrant leniency, the defendants do not need mercy*.

In contrast to the Williamses' case, cases in which a prosecutor or a judge or a President shows leniency and precludes the *deserved* punishment, are inherently problematic. The decisions not to prosecute or not to punish are practically always made ad hoc, with no or very little transparency or accountability.<sup>67</sup> As such, they are inevitably selective, go against the principle of equal treatment and generate formidable remainders of their own. To sum up, in a well-designed and well-functioning criminal justice system, mercy is either not needed or deeply problematic.

### *B. The Relative Values of Justice and Mercy*

In the case of a conflict between the values of justice and mercy, the latter should yield to the former. There are several fundamental reasons for that:

- Justice is a *right*. In any legitimate criminal justice system, an individual has the *right* to be treated justly based on what he or she deserves. One may *demand* justice. In contrast, mercy is merely a *privilege*. A privilege may never be *demand*ed; it may be only asked for or hoped for. Even on the interpersonal level (as Zaibert has successfully argued),<sup>68</sup> a person may not *demand* forgiveness. It would be strange indeed if a person who had wronged me could come to me with a claim: "You *must* forgive me; I have the *right* to be forgiven." Well, it may be *good* and *right* to forgive a wrongdoer in certain circumstances (for example, when the harm is neither serious nor intentional or when the wrongdoer has repented, communicated his repentance and attempted to remedy the harm). But do I owe the person who has wronged me a *duty* to forgive him? Do I have to show him mercy? Of course not. Neither personal forgiveness nor

---

35 percent of all Native American children were being removed from their families and placed elsewhere").

67. LaFave, *supra* note 53, at 533.

68. ZAIBERT, *supra* note 1, at 197 (arguing that forgiveness could be neither owed nor demanded; "forgiveness, by its very nature, is always the gracious, supererogatory prerogative of the forgiver").

institutional mercy is a right; unlike justice, it is merely a privilege. And a *privilege* normally ought to yield to a *right*.<sup>69</sup>

- Justice and mercy stand on unequal *moral grounds*. A morally good (or even morally neutral) act does not require justification. A judge who sentences an offender to what he deserves does not need to justify the sentence to anyone. A judge who foregoes punishing an offender to what he deserves needs to explain to the community and the victims the reasons for such lenience. The child rape case, in which Judge Cashman gave the offender a trivial sentence, caused a public outrage, compelled the judge to explain his decision, and eventually resulted in the sentence being revised and significantly increased.<sup>70</sup>

- Justice is a *public* value. Not only an individual but society as a whole suffers if its members are not treated justly. Forgiveness (including mercy), on the other hand, is a *private* value, akin to generosity. And criminal law (unlike, say, torts) operates primarily as the public law, hence the primacy of justice over mercy in the criminal justice system.

- Justice is *universal*—anyone who pursues justice on behalf of others does a good thing. In contrast, mercy as a form of forgiveness is primarily *individual*; it may be granted only by the victim. I would be right to be seriously upset if a stranger attempted to forgive, on my behalf, someone who had harmed me. Similarly, the victims of a massive financial fraud would be right to be seriously upset with the judge who decided to exercise mercy on the person who had stripped them off of their life savings. Unlike justice, institutional mercy is always problematic because it is always granted by someone who has not been personally harmed.

### C. Room for Mercy

Despite all the reasons above, I believe that, in the less-than-ideal world, there is room for mercy: mercy may play a legitimate role in two sets of circumstances. One appropriate exercise of mercy occurs when the

---

69. See Vera Bergelson, *Rights, Wrongs, and Comparative Justifications*, 28 CARDOZO L. REV. 2481, 2496, 2501–02 (2007) (discussing conflicts between rights and privileges in the context of justificatory defenses). See generally Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

70. See Ring, *supra* note 21.

criminal punishment rules are *just per se but unjust in their application to a particular situation*.<sup>71</sup> An example may be *R. v. Dudley and Stephens*, the famous British case of shipwreck and cannibalism.<sup>72</sup> After twenty-one days in the open sea with no food and no reasonable chance of rescue, the captain made the decision to kill the weakest of the four people in the boat and feed on his flesh in the hope of saving the rest.<sup>73</sup> Factually, he turned out to be right—the remaining three survived.<sup>74</sup> The captain and his first mate were convicted of murder and sentenced to death, but the judges did not even bother to put on the traditional black hoods while announcing the death sentence—behind closed doors, a pardon by the home secretary had been negotiated long in advance and the death sentence was reduced to six months in prison.<sup>75</sup>

I suggest that this was an appropriate exercise of mercy. The law was just: killing an innocent should never be justified or excused and the judges made the right decision to convict Dudley and Stephens even though the judges felt enormous compassion for the defendants and realized that they may not have the moral high ground to punish these defendants. In the legal opinion, they said:

We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, *nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime*.<sup>76</sup>

With this understanding, the court had to rely on an extra-judicial authority. The opinion continued:

There is no safe path for judges to tread but to ascertain the law to the best of their ability and to declare it according to their judgment; and *if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to exercise that prerogative*

---

71. This scenario is different from *State v. Williams*, 484 P.2d 1167, 1170 (Wash. Ct. App. 1971), in which the law itself was problematic.

72. *R v. Dudley & Stephens* [1884] 14 Q.B.D. 273.

73. *Id.*

74. *Id.*

75. LEO KATZ, *BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW* 25 (1987) (describing the trial of Thomas Dudley and Edwin Stephens).

76. *R v. Dudley & Stephens* [1884] 14 Q.B.D. 273 (emphasis added).

of mercy which the Constitution has intrusted to the hands fittest to dispense it.<sup>77</sup>

*R. v. Dudley and Stephens* is an example of mercy needed to correct the law that would be ill-suited to a particular situation.

Another appropriate exercise of mercy involves an atypical offender.<sup>78</sup> Perhaps someone very old or very sick. Someone for whom traditional punishment would be disproportionately harsh, such as pregnant women, transgender people, or members of Indigenous populations.<sup>79</sup> Recognizing the fact that those offenders would suffer *disproportionately*, a prosecutor or a judge might show mercy and offer them a more lenient plea deal or give them a lesser (or different) punishment than what other offenders would have received for the same crime. In those two situations, mercy has its own place in criminal justice system. It *corrects or supplies* the lacunas of justice and does not conflict with it.

### III. DIRTY HANDS AND OTHER ALTERNATIVES

Zaibert maintains that a punisher with integrity must always feel bad.<sup>80</sup> Zaibert analogizes a punisher to a “lorry driver who, through no fault of his, [has run] over a child.”<sup>81</sup> Even though the driver is not at fault, he should feel agent remorse.<sup>82</sup> Similarly, Captain Vere in Melville’s novel must feel agent remorse, or perhaps more accurately

---

77. *Id.* (emphasis and added).

78. See generally Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009) (arguing that a successful justification of punishment must take account of offenders’ subjective experiences when assessing punishment severity).

79. See, e.g., Lorena Allam, Calla Wahlquist & Nick Evershed, *The 147 Dead: Terrible Toll of Indigenous Deaths in Custody Spurs Calls for Reform*, THE GUARDIAN (Aug. 27, 2018), <https://www.theguardian.com/australia-news/2018/aug/28/the-147-dead-indigenous-leaders-demand-action-over-unacceptable-deaths-in-custody>.

80. ZAIBERT, *supra* note 1, at 109.

81. ZAIBERT, *supra* note 1, at 96 (quoting BERNARD WILLIAMS, MORAL LUCK: PHILOSOPHICAL PAPERS 1973–1980 28 (1981)). “[E]ven at deeply accidental or non-voluntary levels of agency, sentiments of agent-regret are different from regret in general, such as might be felt by a spectator, and are acknowledged in our practice as being different. The lorry driver who, through no fault of his, runs over a child, will feel differently from any spectator, even a spectator next to him in the cab, except perhaps to the extent that the spectator takes on the thought that he himself might have prevented it, an agent’s thought. Doubtless, and rightly, people will try, in comforting him, to move the driver from this state of feeling, move him indeed from where he is to something more like the place of a spectator, but it is important that this is seen as something that should need to be done, and indeed some doubt would be felt about a driver who too blandly or readily moved to that position.” BERNARD WILLIAMS, MORAL LUCK: PHILOSOPHICAL PAPERS, 1973–1980, at 28 (1981).

82. WILLIAMS, *supra* note 81, at 28.

tragic remorse,<sup>83</sup> after the conviction and execution of Billy Budd.<sup>84</sup> According to Zaibert, even though Captain Vere had followed the law and was justified in punishing Billy Budd, he was doomed to suffer moral pains until his very death.<sup>85</sup>

I am not persuaded by these analogies and I believe that Captain Vere's remorse is very fact specific. In my mind, a decent trial court judge should not feel remorse every time he issues a sentence.

Two things in *Billy Budd* make Captain Vere feel remorse. One, of all available courses of action under the law, Captain Vere chose the harshest—a rushed trial on board the ship instead of a regular criminal trial on the shore.<sup>86</sup> Moreover, the trial itself was procedurally flawed and completely dominated by Captain Vere who used his authority to influence the decision-making officers' verdict.<sup>87</sup> In short, Captain Vere was not just any unbiased punisher; he was deeply, personally invested in the outcome of the case and bore direct responsibility for Billy Budd's conviction and sentence.

The second feature that makes Captain Vere feel "tragic remorse" is that the law under which Billy was punished was unduly harsh and unfair.<sup>88</sup> A momentary loss of control, even when it results in the death of an adversary, does not deserve hanging. Billy's loss of control was understandable and his outburst was partially justified (morally if not legally): Billy's anger was responsive and it was directed at the liar who had falsely accused him of a serious crime—mutiny conspiracy.<sup>89</sup> Billy was also partially excused: his anger and confusion were exacerbated by a bout of stutter that interfered with his ability to defend himself verbally against John Claggart's accusations.<sup>90</sup> This partial justification/partial excuse does not eliminate Billy's wrongdoing but it significantly

---

83. Zaibert uses the term introduced by Stephen de Wijze. See generally Stephen De Wijze, *Tragic Remorse – The Anguish of Dirty Hands*, 7 ETHICAL THEORY AND MORAL PRAC. 453 (2005) (describing how tragic remorse attaches to *choosing* agents).

84. ZAIBERT, *supra* note 1, at 219.

85. *Id.* at 230 (quoting Stephen De Wijze, *Tragic Remors—The Anguish of Dirty Hands*, 7 ETHICAL THEORY & MORAL PRAC. 453–65 (2005)) ("Vere's *innocence* has been blemished more, and at any rate differently, than that of the lorry driver—if for no other reason because Vere got his hands dirty in a way that the lorry driver did not. As de Wijze has put it, tragic remorse involves the realization 'that our moral innocence can be destroyed despite our strenuous efforts to prevent this.' Vere, but not the lorry driver, strenuously tried to protect his moral innocence.").

86. MELVILLE, *supra* note 25, at 352.

87. See *id.* at 356–65.

88. *Id.* at 358. Similarly, the law in *State v. Williams* was unduly harsh and unfair; however, in that case, the judge has minimized the injustice by giving the defendants an appropriate sentence. *State v. Williams*, 484 P.2d 1167 (Wash. App. 1971).

89. MELVILLE, *supra* note 25, at 349–50.

90. *Id.* at 349.

diminishes it, which makes the death sentence completely disproportionate. Should everything in the novel remain the same but Billy were merely sentenced to a short term of imprisonment, I doubt that Captain Vere would feel “tragic remorse” and murmur on his deathbed “Billy Budd, Billy Budd.”<sup>91</sup>

What I am trying to say is that the conflict in *Billy Budd* is not an inherent unresolvable conflict of justice and mercy. The conflict (its *justice v. mercy* aspect; the conflict in Billy Budd is certainly not reducible just to that) stems from the very fact-specific combination of the bad law (disproportionate punishment) and bad judging (due process violations). Similarly, the remorse that Zaibert attributes to *any* punisher is not an inherent attribute of punishment as such but usually has its case-specific explanations.<sup>92</sup> The punisher may have good reasons for remorse—for example, if the law he followed is just bad (sodomy laws); or the punishment is too harsh (three strikes laws) or barbaric (flogging); or if it is unfair with respect to the particular offender in particular circumstances (perhaps the offender has dramatically changed since the time of the crime—became better; older; sicker); or if the crime was an aberration; or if it was not entirely voluntary or rational. In other words, in those specific and limited circumstances in which the punisher *has no choice but to* impose punishment that is *not deserved*, the punisher may (and should) experience remorse.

*Commonwealth v. Fischer* is a good example of such a case: two freshmen college students had engaged in consensual sex; later that day, they met again but, this time, the boy misunderstood the girl’s signals and forced himself on her.<sup>93</sup> Considering the boy’s young age, inexperience, and a very similar sexual encounter with the same girl only a couple of hours earlier, his mistake was, arguably, reasonable. However, the defense of mistake was not available to the defendant because, in Pennsylvania, forcible sexual crime is strict liability.<sup>94</sup> The defendant was convicted and sentenced to two to five years in prison.<sup>95</sup> The appellate judge, Judge Phyllis Beck, who affirmed the conviction later commented that she found the case very difficult and personally

---

91. *Id.* at 382; ZAIBERT, *supra* note 1, at 219.

92. ZAIBERT, *supra* note 1, at 230.

93. 721 A.2d 1111, 1112 (Pa. Super. Ct. 1998).

94. *Id.* at 1114–15 (denying the defense of a reasonable mistake-of-fact on the issue of consent to a forcible sexual crime).

95. KADISH ET AL., *supra* note 17, at 420 (“Though reportedly a model prisoner, teaching English and math to fellow prisoners, he was denied parole (consistent with normal Pennsylvania practice with regard to sex offenders) and served the full five-year term.”).



distressing.<sup>96</sup> Note that Judge Beck did not feel the same way about all her cases but only about the one that *was* unjust under the circumstances.<sup>97</sup> She was powerless, under the governing law, to prevent the injustice from happening, hence her tragic remorse.

I suggest that, to test our intuitions on whether the punisher's remorse is an inherent part of punishment, we should not get distracted by the most egregious, painful, or deadly forms of punishment. Instead, we should mentally replace them with lesser forms of punishment, such as fines or community service. If the punisher's remorse is indeed an integral part of punishment, these forms of punishment would trigger it too. So, should a judge with integrity feel bad about issuing a fine to a driver who, without any right to do so, has repeatedly parked his car in a handicapped spot? Furthermore, leaving alone the judge's subjective feelings, should he, from an objective perspective, "lose his moral innocence" by issuing that fine? I doubt that. As I suggested earlier, agent regret (or tragic remorse) and the "loss of moral innocence" are not the necessary byproducts of *any* punishment. I thus disagree with Zaibert that "[i]n most cases, we simply cannot punish with clean hands."<sup>98</sup>

I was intrigued by the one exception Zaibert would allow: a punisher with integrity does not have to lose his moral innocence in the "cases involving inveterate wrongdoers such as Ohlendorf<sup>99</sup> or Hitler."<sup>100</sup> In those cases, the difference between the value of punishment and the value of forgiveness is so enormous, that we may punish without dirtying our hands.<sup>101</sup> What I find intriguing is this: why should the dirt that, arguably, sticks to the punisher be a function of the badness of the punishee? I thought, according to Zaibert, it is the very infliction of suffering on others that generates the "dirt," even when the inflicted suffering is fully deserved and justified. In that sense, the punisher is akin to an executioner who is, arguably, tainted by his very job. But if he is, in fact, tainted, he should be tainted by executing the bad, the very bad, and the worst. In the same way, if Zaibert insists that the very act of punishing taints the punisher, Zaibert should probably bite the bullet

---

96. *Id.* (citing interview with Jonathan L. Swichar, Esq., Appellate Counsel, Fischer (Nov. 25, 2001)).

97. *See id.*

98. ZAIBERT, *supra* note 1, at 242.

99. *Id.* at 55 (citation omitted) ("Otto Ohlendorf, an SS member on trial for having been directly responsible for the murder of a reported ninety thousand (innocent) Jews," reportedly, felt "no remorse . . . except nominally.").

100. *See id.* at 242 (implying that Ohlendorf and Hitler may be punished with clean hands).

101. *Id.*

and hold that those who punish Ohlendorf or Hitler also necessarily lose moral innocence.

I suppose that, by making a special rule for the punishers of Hitler and the like, Zaibert simply followed his moral intuition<sup>102</sup> (which I applaud), and when his moral intuition came into conflict with his “dirty hands” theory, he did what many of us do in similar circumstances—created an exception. This exception, however, is not very persuasive in light of Zaibert’s uncertainty about the desirability of giving Ohlendorf or Hitler the punishment they deserve. Zaibert writes:

[E]ven though we are assuming that the organic whole in which Ohlendorf suffers as much as he deserves is more valuable than the one in which he does not suffer *at all*, it is not clear that this organic whole is necessarily more valuable than one in which he does not enjoy impunity but nonetheless suffers less than he deserves.<sup>103</sup>

If even in Ohlendorf’s and Hitler’s cases the deserved punishment is merely *justified* but not *just* and *right*, it is not clear why their punisher should not lose moral innocence. This unsuccessful attempt to create a narrow exception for the cases, in which most people would have strong moral intuitions, only reveals the weakness and artificiality of Zaibert’s general claim that punishment may never be done with clean hands.

#### IV. CONCLUSION

In this paper, I have gratefully taken on some of the philosophical challenges presented by Zaibert in his fascinating new book and considered two main issues: one, what should be the relationship of justice and mercy in a well-designed and well-functioning criminal justice system; and two, how should imposing punishment affect the moral status of a punisher with integrity.

I have argued that, in a well-designed and well-functioning criminal justice system, there is very limited room for mercy, and both for moral and political reasons, mercy should practically always yield to justice. I have also suggested that imposing punishment does not inherently make one’s hands dirty, and thus a punisher with integrity does not have to lose moral innocence and does not have to experience agent regret or punisher remorse.

---

102. *Id.* at 57 (“Needless to say, I would not feel remorse in making Ohlendorf suffer . . .”).

103. *Id.* at 55.