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THE DIFFICULTIES OF DEMOCRATIC MERCY

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The Difficulties of Democratic Mercy

Aziz Z. Huq*

Dean Martha Minow's wide-ranging and learned Jorde lecture "Forgiveness, Law, and Justice" is characteristic in its unstinting ambition.¹ The lecture does not only sweep in complex normative and empirical questions concerning the relationship of legal institutions and rules to a capaciously defined concept of "forgiveness." It furthermore aspires beyond the sublunary scholarly task of delimiting and describing. Unconfined to the desiccated philological minutia of a Casaubon,² Dean Minow instead approaches her topic with dauntless optimism and eyes fixed firmly on empyrean-minded aspiration. To follow her argument is to be apprised of the possibility of a stronger loving world, and to have one's own parochial and reflexive skepticism—the coin of the realm in the law school workshop—put to shame.

Yet to speak in aspirational terms should not mean dispensing with the question of how a given vision of justice can be attained, or diagnosing with precision the barriers to its realization.³ So while I share Dean Minow's large ambitions for law as a catalyst for interpersonal and social reform, my commentary here will focus narrowly on the impediments to that ambition. My aspirations here are modest along several margins. To begin with, my aim is narrow in both conceptual and geographical terms. Although Dean Minow anchors her topic with a parsimonious definition of forgiveness as "a conscious, deliberate decision to forego rightful grounds for grievance against those who have committed a wrong or harm,"⁴ her discussion overflows that definition to touch on several related, but nonetheless distinct, normatively infused concepts. In the course of her exegesis, moreover, she ranges through a set of geographically disparate examples that include transitional justice mechanisms in South Africa, Liberia and Sierra Leone; the exercise of prosecutorial

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¹ Martha Minow, *Forgiveness, Justice, and the Law*, -- CALIF. L. REV. -- (2015).

² Not all philologists are as narrow-minded or intellectually impoverished as Dorothea Brooke's unfortunate elect. See, e.g., JAMES C. TURNER, *PHILOLOGY: THE FORGOTTEN ORIGINS OF THE MODERN HUMANITIES* (2014).

³ Even the prophetic voices most admired today had specific and nuanced diagnoses of the social pathologies they confronted, not merely diaphanous hopes of a better world. See, e.g., Tommie Shelby, *Justice & Racial Conciliation: Two Visions*, *DAEDALUS*, Winter 2011, at 95, 96-99 (describing Martin Luther King Jr.'s precise and unsparing understanding of the "racial realities of his day").

⁴ Minow, *supra* note 1, at --.

discretion in the International Criminal Court; the treatment of former child soldiers; and the discharge of sovereign debt obligations under the so-called “odious debt” doctrine.⁵

Eschewing that conceptual and geographic breadth, I will focus on only one of the concepts that Dean Minow seriatim conjures. I will also invoke solely the vulgar demotic of American law. More specifically, this commentary homes concentrates upon our domestic experience with what Dean Minow’s colleague Carol Steiker terms “legal institutions of mercy”⁶ to examine the conditions under which democratic mercy is feasible. These institutions have either wholesale or retail power to mitigate civil or criminal liability. The simple claim that I want to advance is that our own rich experience under the U.S. Constitution suggests that it is extraordinarily difficult to institutionalize such official forbearance—especially on democratic soil—and especially when our political economy, in its superfluously punitive modalities, generates the need for forgiveness. Rather than seeking for redemptive reforms through democratic process, I suggest that the institutional installation of merciful discretion often requires a dispensation from, and limits to, the otherwise democratic order.

My response proceeds in three steps. I begin by offering some analytic clarification by disentangling three distinct concepts at work across Dean Minow’s examples—forgiveness, mercy, and excuse—and by showing how the law can play different functions depending on which of these normative concepts is at stake. I next explain why a domestic focus, as opposed to the international lens that Dean Minow employs, may reap dividends for her project. The third—and most substantial—element of the commentary examines the operation of mercy in the domestic domain with an eye to understanding why its dispensation is so impoverished. I conclude by pointing to the nettlesome trade-offs, most importantly between democracy and mercy, that Dean Minow’s proposals invite—tradeoffs that, in my view, admit of no easy solution.

I.

Distinct, yet easily confused, concepts are at play across the examples that Dean Minow assembles.⁷ All concern on the one hand, some sort of response to a wrong, and on the other hand, some sort of renunciation or setting aside of otherwise lawful or appropriate consequence. Despite this commonality, they can be organized into three classes. First, Dean Minow’s examples pick out a concept of *forgiveness* that arises in bilateral relations between individuals. Forgiveness, as illustrated in Dean Minow’s discussion of

⁵ *Id.* at --.

⁶ Carol S. Steiker, *Tempering or Tampering? Mercy and the Administration of Criminal Justice*, in FORGIVENESS, MERCY, AND CLEMENCY 21 (Austin Sarat & Nassar Hussain eds., 2007). Professor Steiker’s focus in this chapter is different from mine: She is focused on reconciling the use of mercy with different theories of punishment; I am concerned with its political economy.

⁷ Many previous commentators have noted the frequency with which these concepts are treated as fungible. See Jeffrie Murphy, *Mercy and Legal Justice*, in JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 162 (1988) (noting that mercy is often confused with other virtues like excuse, justification, and forgiveness).

divorce mediation and transitional justice,⁸ is comprised of a change in one person's disposition or attitude toward another.⁹ It involves a psychological change, and "needs no observable action."¹⁰ Second, on my reading Dean Minow invokes a distinctly institutional concept of *mercy*. The latter is an official exercise of discretion to mitigate a legal consequence that is otherwise a person's lawful fate.¹¹ Unlike forgiveness, mercy cannot be a change in dispositions only. It also needs issue in a consequence, typically some sort of forbearance from the implementation of an otherwise permissible civil or criminal penalty.¹² In addition, mercy is often characterized by a measure of particularity, and hence ex ante unpredictability, in its operation. As my colleague and fellow commentator Martha Nussbaum has pointed out, one philosophical tradition of mercy, closely associated with the philosopher Seneca, "entails regarding each particular case as a complex narrative of human effort," and then devoting close, empathic attention to the internal experience of those particulars.¹³ The particularity of mercy—its standard-like rather than rule-like character to use the legal argot¹⁴—distinguishes it from our third category: the more rule-like forms of discretion, such as the familiar criminal-law doctrines of *excuse or justification*.¹⁵ Where mitigating discretion operates in a wholesale fashion according to crisp rules prescribed ex ante, such as in the treatment of child soldiers under international criminal law described by Dean Minow,¹⁶ then neither forgiveness nor mercy are at stake, but instead excuse or another rule-like form of mitigation.

Each of these concepts—forgiveness, mercy, and excuse—is distinct and freestanding. Each can also be tethered to distinct and different functions for law and legal institutions. Hence, on Dean Minow's accounting, although the state itself cannot forgive—at least in the sense of adopting a new psychological dispensation toward a wrongdoing—it can thus create institutional arrangements that engender opportunities for individuals to forgiveness.¹⁷ For example, it can provide a forum for the mending of personal relationships in divorce and tort disputes.¹⁸ Alternatively, the law can intercede strategically to alter the relationship of whole social groups such as the

⁸ Minow, *supra* note 1, at --.

⁹ On the necessarily interpersonal character of forgiveness, see HANNAH ARENDT, *THE HUMAN CONDITION* 248 (1958) (characterizing forgiveness as "dependent upon others").

¹⁰ Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1440 (2004).

¹¹ Murphy, *supra* note 7, at 3; see also Markel, *supra* note 10, at 1436 ("Mercy [is] the remission of deserved punishment, in part or in whole, to criminal offenders on the basis of characteristics that evoke compassion or sympathy but that are morally unrelated to the offender's offense").

¹² H.R.T. Roberts, *Mercy*, 46 PHIL. 352, 353 (1971).

¹³ Martha C. Nussbaum, *Equity and Mercy*, in *SEX & SOCIAL JUSTICE* 154, 166-67 (1999).

¹⁴ Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 562 (1992).

¹⁵ Cf. Markel, *supra* note 10, at 1440-41 (distinguishing mercy from the use of "articulable standards of desert in relation to culpability and the severity of the offense").

¹⁶ Minow, *supra* note 1, at --.

¹⁷ Cf. *id.* at -- (noting the importance of spatial arrangements in transitional justice institutions that allow for proximity between victims and perpetrators, and thus enable forgiveness inducing encounters to occur).

¹⁸ *Id.* at --.

different races in post-Apartheid South Africa.¹⁹ The state's role here is epistemic: a transitional justice institution that generates disclosures—or, more likely, articulates expressly what hitherto has been a “public secret”²⁰—thereby dissolving an impediment to frank and full intergroup recognition, and then enabling forgiveness and social progress. Or finally, the state can itself renounce a civil or criminal penalty against a liable or culpable person, either by announcing a general mitigating rule or by vesting an official with exculpatory discretion.²¹ Simply put, society moves on as a practical matter without regard to lingering beliefs and dispositions. In the latter category fall a substantial number of Dean Minow's examples, including the operation of some transitional justice regimes, the exercise of prosecutorial discretion under the Rome Statute, and the operation of the odious debt doctrine in relation to sovereign debt.²² In short, just as we can disentangle a number of operative concepts in Dean Minow's account, so too we can conjure a wide array of permutations respecting's law's function.

I am skeptical I can say anything meaningful about so diverse an array of psychological and institutional concepts, let alone about the distinct and different roles that law and legal institutions might play in service of the different concepts. Consequently, I will focus on the one category that strikes me as most interesting, in part because it is likely the one that is most difficult to get off the ground: these are the instances in which the law vests relatively unconstrained discretion in an individual, usually an official, to dispense with an otherwise applicable civil or criminal penalty—in other words the operation of “legal institutions of mercy.”²³ In my account, this term captures those legal institutions that are delegated or reserved some measure of discretionary authority to mitigate public law penalties.²⁴ That discretion can be exercised either wholesale (as a rule-like excuse) or retail (as standard-like mercy). Such entities have special salience in the criminal justice context, but also play a role when the state commits a serious, constitutional wrong.

The reason to focus on a class of predominantly criminal examples is straightforward: it is the hardest case for mitigation, but also arguably where qualities of forgiveness and mercy are most needful.²⁵ Criminal liability often

¹⁹ *Id.* at --.

²⁰ For the concept of a “public secret,” or what is generally known but, for one reason or another, cannot easily be articulated, see MICHAEL TAUSSIG, *DEFACEMENT: PUBLIC SECRECY AND THE LABOR OF THE NEGATIVE* 5-6 (1999).

²¹ There is also a mixed case in which the state arranges for conditional amnesties from prosecutions, where the mitigation of penalties depends on positive disclosures by the defendant or alternatively (in, say, the case of child soldiers) participation in a program of demobilization and reintegration.

²² Minow, *supra* note 1, at --.

²³ Steiker, *supra* note 6, at 21.

²⁴ I will focus largely on criminal law and constitutional rules. I do not address private law matters of tort, family law, or contract.

²⁵ I elide here the question of ‘needful on what ground?’ Dean Minow's lecture does not state whether she is a welfarist, some other sort of consequentialist, or whether she rejects consequentialism altogether. I suspect the latter. Given the tenor of her lecture, she may find persuasive some of Bernard Williams's acute critiques of utilitarianism as a system that

involves both the most serious class of wrongs, ranked by some theorists as more disruptive of social relations than comparative economic or natural disasters,²⁶ and the gravest species of punishment. Assuming that forgiveness is a normatively appropriate response to a criminal wrong,²⁷ what sort of circumstances can democratic institutions coexist with legal institutions of mercy? And can our democracy dispense with penalties under those circumstances when a mitigating grace is most warranted?

II.

To explore these questions, I believe we are better off focusing on our domestic circumstances rather than the international examples that Dean Minow considers. To establish the bona fides of this analytic shift, I examine here two of her examples—the design and operation of transitional justice institutions and the effects of debt forgiveness—to show that we gain more traction from attention to municipal experience, as opposed to international experience.

Several of Dean Minow's examples of forgiveness or mercy in operation, such as the Truth and Reconciliation Commission (TRC) of South Africa and the exercise of prosecutorial discretion under the Rome Statute, concern instances of "transitional justice," which has been defined as "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes."²⁸ Transitional justice institutions include both truth commissions akin to the TRC,²⁹ and also criminal prosecutions of former regime officials.³⁰ Almost all instances of transitional justice, however, emerge from different

eccentrically treats "utilities and preference schedules as all there is" and indulges in the "illusion that preferences are already given, that the role of [law] is just to *follow* them." Bernard Williams, *A critique of utilitarianism*, in J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 144, 147 (1973) (emphasis in original). I have thus framed my commentary to avoid the attribution of a utilitarian perspective to Dean Minow.

²⁶ EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 32-33 (W.D. Halls trans., MacMillan & Co. 1984) (1893) ("In the penal law of most civilized peoples murder is universally regarded as the greatest of crimes. Yet an economic crisis, a crash on the stock market, even a bankruptcy, can disorganize the body social much more seriously than the isolated case of homicide."); *id.* at 38-39 (arguing that "an act is criminal when it offends the strong, well-defined states of the collective consciousness," not merely because it has widespread disruptive effects).

²⁷ For an argument that mercy cannot be reconciled with retributivism, see Alwynne Smart, *Mercy*, 43 *PHIL.* 345 (1968).

²⁸ Ruti G. Teitel, *Transitional Justice Genealogy*, 16 *HARV. HUM. RTS. J.* 69, 69 (2003) (footnote omitted); see also MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998).

²⁹ See KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* 269 (2011) (counting 29 truth commissions); PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY* 291-97 (2001) (listing twenty truth commissions established since 1982).

³⁰ SIKKINK, *supra* note 29, at 268 (listing 48 countries with "transitional human rights prosecutions").

national contexts in different historical, geopolitical, and socioeconomic moments.

As a threshold matter, it is important to resist the temptation to see transitional justice as a *sui generis* problem. Transitional justice is not analytically distinct from “ordinary” justice, which must also “routinely cope with policy shifts caused by economic and technological shocks and by changes in the value judgments of citizens and legal elites.”³¹ At the same time, there may be reason to believe that examination of the delimited class of cases labeled “transitional” will yield only limited generalizable lessons, and that an analysis of the law’s relationship to forgiveness gets off the ground more easily, and with more sure-footed results, by starting in a more mundane municipal context.

The first problem is that the number of truth commissions (twenty-eight)³² and international criminal courts (at best no more than ten)³³ is relatively small. Each example of transitional justice is characterized by sharply distinct socio-economic, geopolitical, and historical-institutional variance. Efforts to understand why forgiveness or mercy works in one context but seemingly not in others is therefore handicapped by the need to untangle the distinct effect of legal institutions from a host of other background dynamics. As Dean Minow candidly concedes, therefore, efforts to generalize from historical experiences of transitional justice confront considerable identification hurdles.³⁴

Even the case studies upon which Dean Minow focuses upon yield few unambiguous lessons. Consider here her analysis of the South African TRC.³⁵ To reach a judgment about the social value of the TRC—its capacity to knit together the frayed bonds of social fabric across racial lines—it is worth going beyond the assessment Dean Minow offers of its direct consequences. It is also necessary to examine its opportunity costs. The TRC required the allocation of considerable human, institutional, and fiscal capital in the early days of the post-Apartheid transition. Even if we are focused narrowly on the prospects for restoring a social fabric frayed or eviscerated by racial discrimination, as Dean Minow appears to be, there is an important question about how alternatively the human and material resources used for the TRC could have been deployed to build social capital and cohesion. The question has force because the South African state today routinely fails to supply the basic public good of security

³¹ Eric A. Posner & Adrian Vermeule, *Transitional Justice As Ordinary Justice*, 117 HARV. L. REV. 761, 764 (2004).

³² SIKKINK, *supra* note 29, at 269.

³³ Enumerations seem rare in the literature, although narrative histories count few institutions. *See, e.g.,* Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777, 787-90 (2006) (providing a brief history of international criminal tribunals’ development).

³⁴ It is perhaps telling that Kathryn Sikkink’s account of the diffusion of transitional justice-related norms globally identifies domestic prosecutions as playing an important catalytic role in generating a widespread norm against immunity for grave human rights abuses. SIKKINK, *supra* note 29, at 109-10.

³⁵ *See* Minow, *supra* note 1, at --.

from violent crime.³⁶ Vigilantism is rife, while mob violence is routinely directed at real and perceived sources of disorder, especially immigrants from Mozambique and other neighboring states.³⁷ While the wealthy purchase private security, a large impoverished (and mostly black and colored) majority is left to their own devices, thus creating a “hegemony of the very same social groups that held sway under apartheid” at the expense of “the very same groups cast out by the logic of white supremacy.”³⁸

A recent empirical study of police and state legitimacy in South Africa that I conducted with colleagues from Oxford University, the London School of Economics, and the Human Sciences Research Council in Durban demonstrates that state failure in this regard has led directly to a substantial drop in the legitimacy of the police and the state.³⁹ Drawing on a nationally representative sample of 3,183 citizens, that study found stark racial and economic divisions in judgments of the legitimacy of the state.⁴⁰ In effect, “whites are considerably more likely to feel they have a duty to obey the police than black South Africans,” in part because the latter are more likely to perceive the police as being ineffectual in dealing with violent crime.⁴¹ The racially disparate delivery of security from crime as a public good, in short, has direct effects on perceptions of the legitimacy of the state.⁴² Rather than uniting citizens, the state thus effectively drives an emotional and affective wedge between whites and blacks.

It could be inferred from this that post-Apartheid criminal justice institutions have not only failed their basic mission, but that they have failed in a way that reproduces the stark racial divides that characterized Apartheid society.⁴³ To the extent that the goal of transitional justice institutions such as the TRC were aimed at reconstituting social relations without subordinating racial hierarchies, it is therefore fair to ask whether the ensuing allocation of resources was wise. It may well be that South Africa’s limited pool of legal

³⁶ In 2011, about 50 murders, 100 rapes, almost 400 armed burglaries, and more than 500 violent assaults were reported every day in South Africa. *Kill and be killed*, ECONOMIST, Aug. 27, 2011, available at <http://www.economist.com/node/21526932>.

³⁷ For acute studies of recent ethnic riots in South Africa, see Aidan Mosselson, ‘*There is no difference between citizens and non-citizens anymore*’: *Violent xenophobia, citizenship and the politics of belonging in post-apartheid South Africa*, 36 J. S. AFR. STUD. 641 (2010); Jonny Steinberg, *Security and Disappointment: Policing, Freedom and Xenophobia in South Africa*, 52 BRIT. J. CRIMINOLOGY 1 (2011).

³⁸ T.R. Samara, *Order and security in the city: producing race and policing neoliberal spaces in South Africa*, 33 ETHNIC & RACIAL STUD. 637, 651 (2010).

³⁹ Ben Bradford, Aziz Z. Huq, Jon P. Jackson & Ben Roberts, *What Price Fairness when Security is at Stake? Police Legitimacy in South Africa*, 7 REG. & GOVERNANCE 246 (2014).

⁴⁰ *Id.* at 256-57.

⁴¹ *Id.* at 257-68.

⁴² *Id.* at 257 (figure 2, reporting relationship of police effectiveness and legitimacy).

⁴³ The state’s response instead may have done more harm than good to racial equality. See, e.g., Steinberg, *supra* note 37, at 9 (noting police reliance in black townships upon “high density, high mobility, paramilitary policing” to vindicate social order). Evidence of how corrosive state failure to provide security against crime is to legitimacy is available beyond the South African context. See, e.g., Justice Tankebe, *Self-Help, Policing, and Procedural Justice: Ghanaian Vigilantism and the Rule of Law*, 43 L. & SOC’Y. REV. 245 (2009).

expertise and institutional capital may well have been better assigned to building fair and noncorrupt police and judicial institutions for millions of black South Africans, rather than to enabling a mere 429 people⁴⁴ to confront their past. To think that transitional justice is the path to social reintegration and racial harmony is to ignore the quotidian experiences of millions of ordinary South Africans.

The point here can be generalized: transitional justice institutions are often established in the wake of particularly severe governance shocks, and coincide with a need for substantial reconstruction, or construction *ex nihilo*, of legal institutions. Scarcity of financial resources, not to mention of legal and human capital, may be far more acute in transitional justice contexts than in the operation of ordinary criminal justice systems. As a result, the effect of transitional justice investments upon the values that Dean Minow emphasizes is not a simple matter, but rather is contingent on complex questions concerning the alternative uses of resources in developing effectual justice institutions. Judgments about forgiveness-related legal investments raise especially nettlesome questions in delicate moments of political transition. To offer predictions about how the law can be employed to promote forgiveness or produce mercy, therefore, a focus on ordinary domestic institutions of criminal justice may be warranted. Although opportunity costs exist in these circumstances, more possibilities obtain for observing how different institutional choices achieve or retard normatively desirable goals are greater. Lessons in institutional design may also be more generalizable because of greater regularities in the basic aims and operation of domestic criminal justice systems, as opposed to the high variance circumstances of transitional justice.

Similar concerns can be offered about Dean Minow's sovereign debt example. Here, the problem of adequate numerosity to reach judgments with external validity is especially acute. Beyond the 1932 Tinoco arbitration between Costa Rica and Great Britain,⁴⁵ crisp exemplars of odious debt forgiveness are hard to discern.⁴⁶ Moreover, as Dean Minow candidly recognizes, even if such a doctrine obtained, its consequences are uncertain.⁴⁷ It seems perilous to deploy what little international experience exists as the ground to build the general proposition that the legal mitigation of debt can yield valuable social change. To do so when less fragile ground is available seems unnecessary.

⁴⁴ Minow, *supra* note 1, at --.

⁴⁵ Lee C. Buchheit, G. Mitu Gulati & Robert B. Thompson, *The Dilemma of Odious Debts*, 56 DUKE L.J. 1201, 1216 (2007).

⁴⁶ *Id.* at 1221 (noting that the "concept of odious debts languished in something of a doctrinal backwater for many years," and describing arguments based on the concept after the second Iraq war); cf. Andrew Yianni & David Tinkler, *Is There A Recognized Legal Doctrine of Odious Debts?*, 32 N.C. J. INT'L L. & COM. REG. 749, 771 (2007) (concluding that "odious debt is not accepted as a rule of international law"). Gulati has elsewhere identified "multiple instances of the United States engaging in and ratifying repudiations of debts contracted by previous regimes." Sarah Ludington, Mitu Gulati, & Alfred L. Brophy, *Applied Legal History: Demystifying the Doctrine of Odious Debts*, 11 THEORETICAL INQUIRIES L. 247, 249 (2010).

⁴⁷ Albert H. Choi & Eric A. Posner, *A Critique of the Odious Debt Doctrine*, 70 LAW & CONTEMP. PROBS. 1 (2007) (arguing against recognition of the doctrine).

Further, it is unclear whether Dean Minow need resort to a controversial *rara avis* of international law to advance her argument. Price Fishback, Kenneth Snowden, and Jonathan Rose have recently demonstrated that the New Deal era Home Owners' Loan Corporation (HOLC) programs, purchasing loans from private lenders and refinancing them on easier terms, had substantial benefits to home owners at a time of large dislocation and economic distress.⁴⁸ More recently—and inspired by HOLC's experience—Arif Mian and Amir Sufi have argued that a greater willingness to write-down underwater mortgage debt after 2008 would have both reduced the extent of the recession and blunted its welfare effects.⁴⁹ Although defended by both sets of authors in narrow welfarist terms, debt reduction in both historical eras likely advanced the wider set of values Dean Minow considers salient.

Moreover, American historical experience with debt reduction not only supports the arc of Dean Minow's general argument, it also yields a useful cautionary lesson about how debt forgiveness can be implemented to exacerbate other social harms. Although HOLC refinancings were accomplished in relatively even-handed ways, HOLC's scheme for rating neighborhoods based on their racial composition was taken up by the Federal Housing Authority and deployed to make first-time home purchases cheaper for whites than for blacks.⁵⁰ More recently, the federal government's failure to press for mortgage write-downs in the wake of the 2008 recession must be understood against the back-drop of a highly racialized targeting of subprime lending, and a consequent pattern of foreclosures and economic distress in which African-Americans and Hispanics fared far worse than whites.⁵¹ The domestic experience of debt and debt relief, in short, is far richer and far more morally charged than its international counterpart,⁵² and thus provides much richer loam for nourishing, and setting bounds to, Dean Minow's argument.

⁴⁸ PRICE FISHBACK, KENNETH SNOWDEN, & JONATHAN ROSE, *WELL WORTH SAVING: HOW THE NEW DEAL SAFEGUARDED HOME OWNERSHIP* (2013).

⁴⁹ ATIF MIAN & AMIR SUFI, *HOUSE OF DEBT* 140-41 (2013) (summarizing expected effects of greater debt reduction during the recent recession).

⁵⁰ KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 196-8, 202-08* (1985) (describing the A through D rating system used by HOLC, and its use by the Federal Housing Authority). The Federal Housing Authority (FHA) insured first-time mortgages. Without a FHA guarantee, first-time lenders were often unable to obtain credit. Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1308-11 (1995).

⁵¹ Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629, 634 (2014) (“[T]he housing boom and the immense profits it generated frequently came at the expense of poor minorities living in central cities and inner suburbs who were targeted by specialized mortgage brokers and affiliates of national banks and subjected to discriminatory lending practices.”); *see also* SIGNE-MARY MCKERNAN ET AL., *IMPACT OF THE GREAT RECESSION AND BEYOND: DISPARITIES IN WEALTH BUILDING BY GENERATION AND RACE* 16-17 (2014), available at <http://www.urban.org/UploadedPDF/413102-Impact-of-the-Great-Recession-and-Beyond.pdf> (reporting large disparities in wealth loss between black and white families).

⁵² The anthropologist David Graeber has persuasively argued that the social institution of debt reflects “a set of institutions of what humans are and what they owe one another, that have now been so deeply ingrained that we cannot see them.” DAVID GRAEBER, *DEBT: THE FIRST 5,000 YEARS* 123-24 (2011).

III

In the balance of this commentary, I turn to the domestic criminal justice context and ask whether analytic purchase can be obtained there concerning the law's capacity for cultivating forgiveness and enacting mercy. That experience is especially rich because the Constitution encompasses no less than four institutional seats of merciful discretion. First, there is the discretionary equitable authority possessed by federal courts under Articles I and III.⁵³ Second, the Supreme Court has repeatedly recognized an almost unbounded equitable discretion on the part of prosecutors to ascertain what criminal charges to bring or not bring.⁵⁴ Third, the executive has seemingly untrammelled authority to pardon criminal offenses.⁵⁵ And finally, the grand jury requirement of the Fifth Amendment and the petit jury rule of the Sixth Amendment to the Constitution⁵⁶ both create instruments with what at first blush seems discretionary authority to exercise mercy and to remit criminal punishment.

The Constitution, then, contains an embarrassment of merciful riches. Yet close examination of these four discrete institutional sites of discretionary authority at work today reveals not one that is, in fact, capable of suttlng mercy or catalyzing forgiveness in a meaningful fashion. Nor is it clear any one could. Each of these institutions' powers has been narrowly construed, or hedged around with disabling institutional counterweights. Each consequently falls short of the redemptive ambitions glimpsed by Dean Minow. The reason for this, I will argue, roots back to the democratic pedigree of legal authority in the United States, and the tendency of political economies that provide occasions for mercy to simultaneously stifle the instruments of mercy.

To pursue this argument, I will focus primarily on American experience with equitable judicial discretion and with prosecutorial discretion, the two sites of merciful discretion that have proved responsive to democratic pressures in interesting ways despite their notional separation from democratic politics. Yet it is worth pausing briefly before turning to these institutions, and noting the current state of presidential pardoning and juries as means of implementing merciful mitigation. In brief, the current state of presidential pardons and jury is penurious and threadbare in the extreme. The presidential pardon has dwindled to a shadow of its former self.⁵⁷ The grand jury, while

⁵³ U.S. CONST. art. I, § 9, cl. 2, art. III, § 2 (respectively the Suspension Clause and the grant of power to hear all cases "in Law and Equity").

⁵⁴ For recognition of the broad scope of prosecutorial discretion, *see, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 465-70 (1996); *United States v. Wayte*, 470 U.S. 598, 607 (1985); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

⁵⁵ U.S. CONST. art. II § 2 cl. 1; *see also Ex parte Grossman*, 267 U.S. 87, 108-11 (1925) (emphasizing the scope of the pardon power); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) (same).

⁵⁶ U.S. CONST. amend. V, amend. VI.

⁵⁷ To date, President Obama has granted 52 pardons in comparison to Richard Nixon's 863, Harry Truman's 1913, and William McKinley's 191. U.S. Dep't of Justice, *Clemency Statistics* (last

formally a check on prosecutors, is largely ineffectual,⁵⁸ except as a means of muffling and deflecting responsibility for controversial charging decisions.⁵⁹ The petit jury is a vestigial remnant of our adversarial system of criminal justice,⁶⁰ now long superseded by a plea bargaining process wholly within the prosecutor's control.⁶¹ Even in those instances in which a jury trial occurs, the scope of discretion enjoyed by ordinary citizens against the state is limited.⁶² Whereas their Founding era analogs would have enjoyed a plenary "right and power to consider legal as well as factual issues,"⁶³ today a juror who claimed authority to resist the court's direction on matters of law would be met at best with reprimands and at worst criminal sanctions.⁶⁴

If pardons and jurors play no meaningful mitigation function today, their respective desuetudes are nevertheless illustrative of two slightly different ways in which legal institutions of mercy are extinguished. Whereas the pardon has been abandoned under political pressure and without institutional change, the role of the jury has been hedged in by institutional changes, such as the rise of plea-bargaining, and legal reform, such as the rejection of jury discretion over matters of law and the criminalization of jury nullification demands. The decline of these legal institutions of mercy evinces on the one hand a tension with democracy, and on the other hand a tendency for professionalized institutions that are systemic repeat-players—here, prosecutors and judges—to crowd out institutions drawn by sortation from a larger democratic pool. Mercy is vulnerable to both democratic and technocratic pressure.

In contrast to the null results an analysis of juries and pardons yields, the trajectory of the equitable judicial discretion and prosecutorial discretion is rather more complex. In sketching brief accounts of how both fail to further Dean Minow's ambitions, I necessarily simplify, offering snapshots rather than comprehensive accounts of complex institutional phenomena.

visited Jan. 19, 2015), available at <http://www.justice.gov/pardon/statistics.htm>. Even these statistics understate the expected role of the pardon power, which was used with much greater frequency in the early Republic to make "exceptions in favor of unfortunate guilt." George Lardner Jr., & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790-1850*, 16 FED. SENT'G. REP. 212, 212-18 (2007).

⁵⁸ For a devastating critique of the current operation of grand juries, see Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 323 (1995) ("In almost all cases, a criminal defendant would be just as well off without the grand jury as he is with it.").

⁵⁹ Cf. Benjamin Weiser, *Mixed Motives Seen in Prosecutor's Decision to Release Ferguson Grand Jury Materials*, N.Y. TIMES, Nov. 25, 2014, at A16.

⁶⁰ JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 26 (2010), available at www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinesspdfversion.pdf (noting that 97 percent of federal cases are resolved by plea bargain).

⁶¹ Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471-76 (2004) (describing prosecutors' incentives to obtain pleas).

⁶² Indeed, we have all but lost the sense of the jury as a site of political participation akin to the ballot box, as richly explored in Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995).

⁶³ AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 238 (2005).

⁶⁴ Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 492-94 (1998) (collecting examples).

We can usefully begin with what upon first impression might seem the more promising locus of merciful discretion—the equitable discretion of the federal courts. Two textual elements of the Constitution warrant the conclusion that federal courts possess a measure of discretionary equitable authority: Article III’s reference to “equity”⁶⁵ jurisdiction originating in the English Court of Chancery,⁶⁶ and Article I’s Suspension Clause,⁶⁷ which referenced by implication the traditionally equitable remedy of habeas corpus.⁶⁸ Although the systems of law and equity have been merged for almost 80 years now,⁶⁹ it remains the case that courts must often exercise a “flexible and comprehensive”⁷⁰ discretion in determining the scope of public law remedies, including but not limited to habeas corpus. To understand the possibility of the federal courts as “legal institutions of mercy,” therefore, we can usefully examine the manner in which judges have exercised their discretion to calibrate not just the equitable remedy of habeas, but more generally the suite of public law remedies used to maintain the state within constitutional bounds.⁷¹

Beginning with habeas, an analysis of judicial discretion in the design of public law remedies reveals that courts have not exercised their equitable authority in ways to advance Dean Minow’s normative goals. The equitable writ of habeas corpus, in its pure form, is meant to be a remedy against executive detention.⁷² Yet here in its historic heartland, the habeas writ’s

⁶⁵ U.S. CONST. art III, § 2.

⁶⁶ On the origins of the Chancery Court, see J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 96-98 (4th ed. 2002). See also *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 327 (1999) (identifying “the English Court of Chancery” as the source “from which the First Congress borrowed in conferring equitable powers on the federal courts”).

⁶⁷ U.S. CONST. art I § 9 cl. 2.

⁶⁸ See *Gomez v. U.S. Dist. Court for N. Dist. of California*, 503 U.S. 653, 654 (1992) (noting that a “habeas petition” is “an equitable remedy”); *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996). As a historical matter, the habeas remedy “was equitable in everything but name.” PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 87 (2010).

⁶⁹ See Fed. R. Civ. P. 1; Rules Enabling Act, 28 U.S.C. § 2071 (2004) (originally enacted as Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064).

⁷⁰ *Seymour v. Freer*, 75 U.S. (8 Wall.) 202, 218 (1869); *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

⁷¹ I bracket here the separate question of how federal judges give substantive content to the Constitution. At least formally, judges do not claim to be making discretionary decisions when they give substantive content to elements of the Constitution. If judged on the surface of their opinions, judges behave as if their decisions as to constitutional interpretation were wholly constrained. This means that judges’ interpretation of constitutional text is not an example of *discretionary* judicial behavior. Of course, judges’ claims as shackled when interpreting the Constitution should not be taken at face value. The Constitution does not prescribe rules for its own interpretation, and the heated debate over that question reveals ample space for judicial discretion. See Richard H. Fallon, Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation* (November 2014), available at http://www.law.uchicago.edu/files/files/fallon_10.30.14.pdf. Since judges do not concede that they have discretion as to interpretive method—and indeed go to some length to deny it—it is not a useful object of analysis here.

⁷² *I.N.S. v. St. Cyr*, 533 U.S. 289, 301 (2001) (“At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.” (citing *Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, J., concurring))).

operation has been at best anemic and at worst counterproductive. Perhaps the highest profile site of detention without ex ante process in recent years has been the Guantánamo Naval Bay, which stood largely unregulated by the courts until the Supreme Court's decision in *Boumediene v. Bush*.⁷³

That intervention, however, cannot be ranked a success. The Court's intervention in *Boumediene* came after a majority of detainees had been released.⁷⁴ Moreover, the decision precipitated a sharp and immediate decline in the rate of releases—one that continues to this day.⁷⁵ It is likely that this deceleration in release rates is due not so much to *Boumediene*, but to the mounting congressional opposition to detainee releases that emerged only once President Obama entered office.⁷⁶ From 2009 onward, Congress attached riders to annual defense authorization measures categorically barring the transfer of detainees to the United States, and also barring transfers to other countries without an onerous Secretary of Defense certification.⁷⁷ Without any formal suspension of the habeas remedy, congressional foes of the president have flexed democratic muscles and dramatically limited the efficacy of the writ.

Worse, the timing of judicial intervention has changed the law of national security detention in a way deleterious to libertarian goals. My own ongoing analysis of the government's own documentation for detainees reveals that by the time the Court had intervened, a substantial number of the detainees with the strongest claims to freedom had already been released.⁷⁸ This means that the pool of remaining detainees who could proceed with post-*Boumediene* habeas proceedings systematically possessed more indicia of terrorist risk than the overall Guantánamo detainee population. As a result, the substantive and evidentiary law of detention that has developed through post-*Boumediene* district and circuits courts in the District of Columbia suffers from a selection effect: it is based on judicial review of a sample of cases that are systematically riskier than the randomly drawn detainee from the population. It is not implausible to think that the underlying jurisprudence will be at least *sub rosa* animated by the judges' gestalt impression of the detainees who parade before them on habeas.⁷⁹ That is, for the de minimus libertarian effect that

⁷³ 128 S. Ct. 2229 (2008).

⁷⁴ Cf. Aziz Z. Huq, *What Good is Habeas?*, 26 CONST. COMMENT. 385, 402 (2010) [hereinafter Huq, *What Good*] (reporting trends in release over time).

⁷⁵ *Id.* at 403 (reporting releases by year). In ongoing empirical work, I have examined the rate of change in the release rate from Guantánamo. That rate dips precipitously after *Boumediene*, and never recovers.

⁷⁶ *Id.* at 418–20 (discussing political incentives of the Obama Administration).

⁷⁷ The Secretary of Defense would have to certify that actions have or would be taken to “substantially mitigate the risk of such individual engaging or reengaging in any terrorist or other hostile activity that threatens the United States or United States persons or interests,” and that the transfer affirmatively “is in the national security interest of the United States.” National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§1034, 1035(b), 127 Stat. 672, 851 (2013).

⁷⁸ Aziz Z. Huq & Charles Zhang, *Identifying the Predicates of Military Detention at Guantánamo* (December 2014) (on file with author).

⁷⁹ Perhaps suggestive of this unease is an aside in a concurring opinion to a denial of habeas relief by Judge Lawrence Silberman of the D.C. Circuit: “[C]andor obliges me to admit that one cannot help but be conscious of the infinitely greater downside risk to our country, and its people, of an

Boumediene has had in the short time,⁸⁰ it's long term effect may be to lower the price of liberty deprivations.

The inefficacy of habeas is not limited to the national security context. In the less noticed immigration context, habeas once served an extensive role in promoting legality at the border.⁸¹ Today, it has been all but abolished by statute,⁸² and leaving non-citizens potentially subject to “expedited” forms of removal that preclude judicial review of most constitutional issues.⁸³ Nor has postconviction variant of the Great Writ better survived the rigors of democratic attention. Rather, as I have explored at length elsewhere,⁸⁴ the scope and effective power of postconviction habeas review has been winnowed by both legislated changes, in particular the 1996 Antiterrorism and Effective Death Penalty Act,⁸⁵ and the minatory attitude of a Court that sees scant value in ensuring state courts’ compliance with constitutional rules.⁸⁶ As a consequence of these legislated and judicially wrought changes, a vanishingly small proportion of habeas petitioners even obtain merits review of their claims, let alone relief,⁸⁷ even as application of reticulated gatekeeping rules sucks up judicial energy, thereby deepening the bench’s disaffection with postconviction review.⁸⁸

order releasing a detainee who is likely to return to terrorism I doubt any of my colleagues will vote to grant a petition if he or she believes that it is somewhat likely that the petitioner is an al Qaeda adherent or an active supporter.” *Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring).

⁸⁰ Huq, *What Good, supra* note 74, at 410-11 (discussing the small number of detainees released as a consequence of habeas’s operation).

⁸¹ Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 987-1020 (1998) (providing a comprehensive historical account).

⁸² Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1975-89 (2000) (describing changes legislated in 1996). The so-called REAL ID Act of 2004 further narrowed the availability of habeas. *See* Emergency Supplemental Appropriations Act for Defense, The Global War on Terror, and Tsunami Relief, 2005 (REAL ID Act), Pub. L. No. 109-13, Div. B, §§ 101-501, 119 Stat. 231 (2005); *see also* Gerald L. Neuman, *On the Adequacy of Direct Review After the Real Id Act of 2005*, 51 N.Y.L. SCH. L. REV. 133 (2007) (explaining jurisdictional scheme and identifying constitutional concerns).

⁸³ *See* 8 U.S.C. § 1252(e)(2) (providing for judicial review of “expedited removals” limited to the questions of whether a petitioner is an alien, whether a removal order exists, and whether the petitioner can demonstrate refugee status).

⁸⁴ Aziz Z. Huq, *Habeas and the Roberts Court*, 81 U. CHI. L. REV. 519, 531-53 (2014) [hereinafter Huq, *Habeas and the Roberts Court*] (describing and offering a rational reconstruction of the current scheme for postconviction habeas relief).

⁸⁵ Pub. L. No. 104-132, 110 Stat. 1214 (1996).

⁸⁶ Such problems are endemic. Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 16-23 (2010).

⁸⁷ NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, at 45 (2007), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf> (finding that 58 percent of noncapital habeas petitions are dismissed on procedural grounds).

⁸⁸ Democracy, in my view, is not the sole motive force pressing for the narrowing of habeas relief. The Justices are also aware of the “acute systemic pressures” imposed by postconviction cases on federal caseloads. Huq, *Habeas and the Roberts Court, supra* note 84, at 590. Institutional self-interest in the teeth of rising incarceration rates, therefore, also conduces to the doctrinal narrowing of habeas.

Even if the equitable powers of the federal courts are notable largely by their absence from habeas jurisprudence, this does not mean that such discretion is not exercised. To the contrary, to step back and consider not just habeas but the full range of public law remedies for constitutional violations is to understand that the Supreme Court does routinely exercise large equitable discretion of a merciful character in the design of public law remedies. The object of mercy, however, is not the victim of constitutional harms. To the extent federal courts today exercise a merciful form of equitable discretion in public law, it is not to enable social cohesion or to redeem historical injustice. It is instead to exculpate the errors of the state. Dispensation from the consequences of wrongful action is to be found in the widening gyre of absolute and qualified immunity.⁸⁹ It is in the deepening shadow of the “good faith” exception to the exclusionary rule,⁹⁰ most recently exemplified by the Court’s willingness in *Heien v. North Carolina*,⁹¹ to permit a Fourth Amendment violation to go without remedy because a police officer’s failure even to know what the law he was enforcing required was “reasonable” if “not ... perfect.”⁹² *Heien*’s contrast with the Justices’ unforgiving, even contemptuous, attitude to citizens’ mistakes of law almost perfectly illustrates the distribution and quality of the Justices’ empathic investments.⁹³ Equity in judges’ hands, in sum, exculpates noncompliance with the Constitution and so facilitates state coercion. It provides no platform for forgiveness or exemplar of mercy.

The second site of constitutional mercy meriting consideration here is the equitable discretion of the prosecutor not to pursue charges in a criminal case, an authority that has received a constitutional imprimatur without substantial limits.⁹⁴ That discretion is not merely a function of constitutional

⁸⁹ See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (discussing and authorizing qualified immunity); *Imbler v. Pachtman*, 424 U.S. 409, 422 (1976).

⁹⁰ See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 598 (2006); *Davis v. United States*, 131 S. Ct. 2419, 2427 (2011).

⁹¹ 135 S. Ct. 530, 536 (2014).

⁹² *Id.* at 536.

⁹³ Mistakes of law occur in the Fifth Amendment self-incrimination context and are not given exculpating significance there. See, e.g., *Connecticut v. Barrett*, 479 U.S. 523, 531-32 (1987) (Petitioner did not invoke Fifth Amendment right to counsel when he agreed to speak to police, but not to give a written statement without a lawyer present.); *Moran v. Burbine*, 475 U.S. 412, 424-26 (1986) (finding affirmative police misrepresentations about availability of defendant’s lawyer did not undermine waiver of Fifth Amendment rights). The Court has also taken a pitiless view of habeas petitioners’ filing errors, even when those errors are made in reliance upon a judge’s directions. See *Bowles v. Russell*, 551 U.S. 205, 209 (2007). It is, to be sure, possible to imagine justifications for treating officials’ and citizens’ errors asymmetrically. Yet the repeated character of officials’ encounters with the law, the distribution of educational and other epistemic resources, and the simple possibility of training—with the concomitant risk of moral hazard from judicial exculpation of official error—all these list against the sort of unilateral mercy that the Court has evinced.

⁹⁴ *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (“In the ordinary case, ‘so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.’” (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364

rules, but also flowed from the shift to determinate sentencing regimes such as the federal sentencing guidelines⁹⁵ coupled to a persistent failure to control “fact-bargaining” between prosecutors and defense attorneys out of reach of judicial oversight.⁹⁶ So far as criminal penalties go, therefore, it is more appropriate to look at prosecutorial behavior than judicial conduct to take the full measure of how discretionary authority is wielded.

Prosecutorial discretion under the current criminal justice dispensation has elicited divergent assessments. In net, however, it cannot be said to further Dean Minow’s goals related to mercy or forgiveness. On the one hand, the sheer breadth of state and federal criminal law, coupled to the inevitable resource constraints upon a criminal adjudicative system, lead to systematic “leniency.”⁹⁷ In some instances, prosecutorial charging discretion operates as an offsetting counterbalance to legislative punitiveness. Empirical studies of the introduction of mandatory minimum sentences in Massachusetts, New York, Oregon, and New Jersey found that prosecutors “changed their practices to avoid imposition of mandatory penalties, that the harsher punishments were imposed in the remaining cases, and that overall there were no effects on conviction rates.”⁹⁸

On the other hand, the rise of prosecutorial discretion since the 1970s coincided with an unprecedented four-fold leap in the incarceration rate.⁹⁹ Worse, the most sophisticated recent study of discretion in the criminal justice contexts not only finds substantial racial disparities after controlling for offense conduct, but also concludes that “half” of those disparities “can be explained by the prosecutor’s initial charging decision—specifically, the decision to bring a charge carrying a ‘mandatory minimum.’”¹⁰⁰ No less than courts, chief executives wielding the pardon pen, grand juries, and petit juries, prosecutors are not a promising site for mitigating discretion—at least in the absence of resource constraints that leave then no choice but to forego indictments.

To be clear, my claim is not that American legal institutions are incapable of mercy. In January 2003, for example, Governor George Ryan

(1978)); *accord* *Wayte v. United States*, 470 U.S. 598, 608 (1985) (noting that courts are “properly hesitant to examine the decision whether to prosecute”).

⁹⁵ Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 *YALE L.J.* 1420, 1494 (2008) (“The most significant consequence of the Sentencing Reform Act was the transfer of power over punishment from judges to line prosecutors and the Department that employs them.”).

⁹⁶ Fact bargaining has been documented since the inception of the guidelines regime. *See, e.g.*, Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 *S. CAL. L. REV.* 501, 522 (1992).

⁹⁷ SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES* 1006 (8th ed. 2007) (“Criminal statutes now commonly permit (or purport to require) draconian punishments that no one expects to be imposed in the typical case,” with the result that “[l]eniency’ has therefore become not merely common but a systemic imperative.”).

⁹⁸ Michael Tonry, *Sentencing in America 1975-2025*, 42 *CRIME & JUST.* 141, 166 (2013).

⁹⁹ BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 39 (2006) (reporting data from late 1960s to the mid 2000s).

¹⁰⁰ Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 *YALE L.J.* 2, 7 (2013).

pardoned four capital prisoners and commuted the sentences of the remaining 167 individuals on death row.¹⁰¹ But the Ryan commutation yields a clue to why institutional mercy is so rare: Ryan was at the end of his term, and feared no democratic reprisal.¹⁰² To the contrary, the “undemocratic” character of his action was a central theme in the loud criticism his action elicited.¹⁰³ In the American political system, democratic sentiment—directly or indirectly, and to greater or lesser extents—animates the unforgiving cast of prosecutorial discretion, the demise of pardons and jury nullification, and the calcification of judicial equity that I have described. It is only via the direct election of state prosecutors, the electoral reward that flows to legislators for promising ever-more punitive policies, and the president’s selection of Supreme Court Justices who will be tough on crime that institutional form could have been given to the “relentlessly punitive spirit [that] has been ascendant in the United States for more than a generation.”¹⁰⁴ Further, it is a paradox of American popular government that democratic pressure at the aggregate level has likely *contracted* local opportunities for democracy via juries. Public punitiveness, that is, translates as an expansion in criminal liability and harsh, mandatory sentences. This in turn compels a shift to pervasive plea-bargaining, and crowds out petit juries, while rendering grand juries mere processing mills for indictments. So it is that the Constitution’s *success* as a democratic regime causes our legal institutions of mercy to flicker and falter notwithstanding their constitutional foundations.

Yet if legal institutions of mercy have been increasingly extinguished across the American body politic today, it is not for want of compelling need. Rather, America’s incarceration rate is almost four times that observed in the next most punitive Western democracy.¹⁰⁵ Its social cost falls disproportionately on African-American families, widening extant gulfs in economic equality.¹⁰⁶ Its gains, especially at the upper margin of punitiveness, are uncertain.¹⁰⁷ The punitive urge thereby satisfied is, perhaps unsurprisingly, more closely correlated to racial intolerance than fear of crime or a

¹⁰¹ AUSTIN SARAT, *MERCY ON TRIAL: WHAT IT MEANS TO STOP AN EXECUTION* 1-2 (2006).

¹⁰² *Id.* at 24-28.

¹⁰³ *Id.* at 28.

¹⁰⁴ TODD R. CLEAR & NATASHA A. FROST, *THE PUNISHMENT IMPERATIVE: THE RISE AND FALL OF MASS INCARCERATION IN AMERICA* 1, 58-63 (2014) (discussing reasons for increased public punitiveness).

¹⁰⁵ WESTERN, *supra* note 99, at 14.

¹⁰⁶ Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 *ANNALS AM. ACAD. POL. & SOC. SCI.* 221, 222 (2009).

¹⁰⁷ On the one hand, the most recent research on the marginal deterrence effects of mass incarceration reveals surprisingly little evidence of welfarist justification. Daniel S. Nagin et al., *Imprisonment and Reoffending*, 38 *CRIME & JUST.* 115, 181-87 (2009). Further, cross-national analyses suggest that “crime rates have moved in parallel in the English-speaking countries and western Europe since the 1960s,” suggesting that “many of the things governments have done to reduce crime rates in recent decades have been epiphenomenal.” Michael Tonry, *Why Crime Rates are Falling Throughout the Western World*, 43 *CRIME & JUST.* 1, 2-3 (2014).

Durkheimian concern with maintaining social cohesion.¹⁰⁸ This punitive political economy, moreover, has only strengthened those interest groups that oppose mercy, sapping the electoral power of geographic communities that would oppose it.¹⁰⁹ Reasonable disagreement obtains as to whether ongoing debates about criminal justice will prove an inflection point in the development of American attitudes to punishment.¹¹⁰ Whatever the path of American criminal justice, it seems tolerably clear that the positive feedback loops of the contemporary carceral state's political economy mean that correcting its errors or extinguishing its perverse or excessive consequences only becomes more difficult with time.¹¹¹ Just as American institutions are most in need of legal institutions of mercy, therefore, their democratic pedigree means they are least likely to keep hold of the ones bequeathed to them by the Constitution.¹¹²

¹⁰⁸ James D. Unnever & Francis T. Cullen, *The Social Sources of Americans' Punitiveness: A Test of Three Competing Models*, 48 CRIMINOLOGY 1, 99, 102-07, 117 (2010) (testing three predicates of punitiveness and finding racial animus to have the most predictive power).

¹⁰⁹ On the one hand, prison unions and the prison industry have become increasingly powerful lobbies; on the other hand, legislative appointment rules that assign prison populations to districts with prisons, rather than districts of original residence, deflate urban communities' influence at the expense of rural communities' power. Marie Gottschalk, *Hiding in Plain Sight: American Politics and the Carceral State*, 11 ANN. REV. POL. SCI. 235243-45 (2008). In a more recent book, Gottschalk emphasizes these factors, but also underscores the political problem that "a safe healthy, and humane penal system is generally not considered a credible and desirable policy goal on its own," in part because of a dominant ideological system she labels "neoliberalism." MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 15, 17 (2014) [hereinafter GOTTSCHALK, *CAUGHT*].

¹¹⁰ Compare GOTTSCHALK, *CAUGHT*, *supra* note 109, at 8 (stating that optimism is "unwarranted"), with CLEAR & FROST, *supra* note 104, at 159-60 (arguing that "the tide has turned").

¹¹¹ The basic logic here was anticipated by MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* 36-67 (1982).

¹¹² The account I offer here stands in tension with one eloquent account of mercy's demise, offered by Professor Rachel Barkow. See Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332 (2008). In that essay, Barkow rejects political economy explanations, and instead argues that "the rise of the administrative state has made unchecked discretion an anomaly in the law." *Id.* at 1334. Although I do not question the notion that claims about unchecked discretion play some role in the public discourse concerning mercy, see, e.g., SARAT, *supra* note 101, at 27, her sole focus on that role is not wholly persuasive for a range of reasons. First, Barkow does not account for the frequency and density of discretion that obtains without much contestation within the administrative state. See Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1107-31 (2009). It is therefore not clear that prosecutorial discretion in the prosecution context is as distinctive as she claims. Second, while Barkow tries to distinguish the case of prosecutorial discretion on the ground prosecutors are more "accountable," see Barkow, *supra*, at 1353, this does not explain federal prosecutors, who are not elected and whose connection to the electorate via Main Justice and the Attorney General may be more or less loosely articulated. Finally, attention to the moment in our national political discourse at which discretion goes from being uncontroversial to divisive—consider here the Ryan commutation or, more recently, President Obama's experience with immigration enforcement—suggests that it is less the *fact* of discretion, and more the *manner* in which that discretion is used that engenders public hostility. Hence, in the immigration case, discretion has long characterized immigration enforcement: It became controversial only when pivotal political actors found it advantageous to make an issue of it. It is not clear any analogous story of issue mobilization can be told about prosecutorial discretion in the criminal justice context. Barkow's

IV

What then might an advocate of legal institutions of mercy—as I take Dean Minow to be—draw by way of inference from this account of our law’s indigenous capacity for mercy and other forms of mitigating discretion? I can conjure two inferences from our own democracy’s entanglements with mercy.

To begin with, theorists from St Anselm¹¹³ to Jeffrie Murphy¹¹⁴ have observed a tension between the demands of justice and the exercise of mercy. The above analysis suggests a further tension between the demands of democratic rule and merciful discretion. As the late Dan Markel eloquently argued, mercy “stands at odds with the nature of the modern liberal democratic regime under rule of law.”¹¹⁵ The essence of democratic government is representation of the people. To represent in a democratic register, whether as delegate or trustee,¹¹⁶ is not to act upon unbounded caprice. It is to be constrained by some view of what the people want or need. Markel dissolved this problem by pointing to the democratic character of our merciful institutions.¹¹⁷ The problem, however, is more difficult than he made it out to be, not least because it begs what is colloquially known as the dead-hand problem.¹¹⁸ To the extent democracy remains our desideratum, a historically entrenched constitutionalism can be justified as a limit on current majorities so long as it serves some other value.¹¹⁹ It is not enough to say that a legal institution of mercy has a constitutional pedigree, therefore, without explaining why it is justified as an exception from contemporaneous democratic rule.

Second, more modestly but perhaps more importantly, recent American experience points to a deep functional incompatibility between democracy and the discretionary provision of merciful dispensation from legal punishments. There is, I have argued, a negative correlation between the tendency of democratic political economies to generate a need for merciful discretion and the capacity of legal institutions of mercy to operate. This

account, in short, focuses on a value (legality) that matters to scholars, and assumes without warrant that it matters equally to members of the general public.

¹¹³ ST. ANSELM, *PROSLOGION*, 125, 127, 129 (M.J. Charlesworth trans., Oxford Univ. Press 1965).

¹¹⁴ Murphy, *supra* note 7, at 168-69.

¹¹⁵ Markel, *supra* note 10, at 1456.

¹¹⁶ For the canonical contemporary formulation of this distinction, see HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 119-21 (1967).

¹¹⁷ Markel, *supra* note 10, at 1456-57.

¹¹⁸ Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 609 (2008) (“Th[e] dead hand complaint can be broken into three claims: that it is feasible for the living to depart from arrangements indicated by the Constitution; that our generation participated in little of the process responsible for the text; and that the Constitution is otherwise imperfect for our time.”).

¹¹⁹ A constitution’s dead hand can serve contemporary democracy too, for example by supplying an off-the-rack set of institutional frames for elective choice, which then do not have to be recreated from scratch with each new iteration of democratic choice. Aziz Z. Huq, *The Function of Article V*, 162 U. PA. L. REV. 1165, 1187 (2014). Legal institutions of mercy cannot be vindicated in these prodemocratic terms.

countercyclical quality renders *democratic* institutions of mercy, to say the least, imperfect resources. This is not to say that legal institutions of mercy are infeasible. To the contrary, European experience suggests that “autonomous . . . bureaucracies that are relatively immune to the vagaries of public opinion” may well be capable of mercy.¹²⁰ Perhaps institutional redoubts from democratic pressure can be constructed on American soil. The historical experience here, I think, does not bode well.¹²¹ But Dean Minow’s ambitious and powerful words in favor of forgiveness and mercy at a minimum ought to provide sufficient impetus to try, and more than enough reason to think the attempt worth making.

¹²⁰ JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 13-14 (2003).

¹²¹ *Cf.* Huq, *Habeas and the Roberts Court*, *supra* note 84, at 590 (arguing that courts have limited constitutional relief out of institutional self-interest, rather than for any principled reason).

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