Mercy in Tort: An Introduction

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What has mercy to do with tort law? Discussion of mercy in relation to crime and punishment is rich and voluminous,[1] while in-depth discussion of mercy in relation to tort law is virtually nonexistent.[2] Yet mercy has a significance for tort law that deserves more attention than it has received; by recognizing and reckoning with this significance, we can better appreciate some fundamental drawbacks of our tort system.[3]

Here is one example of such a drawback: Tort law systematically disadvantages the merciful. It similarly disadvantages other sympathetic characters like the forgiving, the soft-hearted, the conflict-averse, those who would rather let bygones be bygones, and so on, but let's focus on the merciful. To say that tort law disadvantages the merciful sounds, admittedly, at once both odd and oddly trivial. Odd because, as already noted, we are not accustomed to connecting mercy with tort law at all. Oddly trivial because, to the extent that tort plaintiffs can exercise mercy, it seems obvious and unavoidable that the merciful will be "disadvantaged." This sounds hardly different from saying that the rules of boxing disadvantage the merciful—isn't that kind of the point?

In a way it is, yet this also misses something. Of course, the fact that a merciful person is less likely to win a boxing match than an unmerciful one does not mean that the rules of boxing disadvantage the merciful *in any objectionable sense*—after all, the rules of boxing apply in just the same way to the merciful and merciless alike, giving them strictly equal opportunities to prevail. The same might be said of tort law: the merciful have the same

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1. A richness vividly illustrated by the other contributions to this Symposium Issue.

2. For a rare exception offering a sustained discussion, see generally Neal R. Feigenson, *Merciful Damages: Some Remarks on Forgiveness, Mercy and Tort Law*, 27 FORDHAM URB. L.J. 1633 (2000). Feigenson focuses on mercy exercised by judges or juries in awarding damages. *Id.* at 1640–41. Here I focus instead on mercy exercised by tort victims.

3. I hasten to add that this view cannot be fully developed and defended here; my more modest aim is to introduce the central thought and to establish it as worthy of further exploration. For a somewhat more developed treatment, see generally Stephen Bero, Mercy in Tort (Oct. 17, 2022) (unpublished manuscript) (on file with author).

rights in tort as the unmerciful, and thus (one might think) cannot be disadvantaged in any objectionable sense if they chose to forgo the exercise of those rights. But this thought is mistaken. Tort law is not a sport; the disadvantages that it imposes must be considered in relation to the role that it plays in our lives and the full range of values that are implicated. As I will argue, the particular ways in which tort law disadvantages the merciful are in fact objectionable.[4]

This is one dimension of what I will call the problem of mercy in tort. This problem deserves particular attention now, amidst a wave of work in tort theory that highlights the role that tort law plays in establishing relationships of mutual accountability and social equality.[5] Even if this view of the value of tort law is correct, we risk overlooking how tort law can also burden or distort our relationships; the problem of mercy in tort is one poignant illustration of this.

One reason this may be significant is that it brings into focus a factor that could tip the scales in favor of some form of social insurance as an alternative to tort law (at least for some cases). But more fundamentally, the problem of mercy in tort presents us with a reason to reconsider the way in which tort law yokes together compensation and accountability.

I. Mercy in Tort?

For present purposes, we can think of mercy, very simply, as compassionately declining to impose a burden. This is a rough approximation of a familiar commonsense notion of mercy, but on any plausible account of mercy, the situations that are our focus will count as cases of mercy.[6] These

4. To be clear, the claim is that tort law disadvantages the merciful, not that *being* merciful, or the morality of mercy, disadvantages the merciful. In the same way, a practice of assigning unpleasant administrative tasks by calling for volunteers might be said to disadvantage generous members of an organization, relative to a practice of assigning tasks by lottery or on a rotating basis. Thanks to David Enoch for urging clarification of this point.

5. *See generally*, *e.g.*, the works discussed and cited *infra* at notes 24–32 and accompanying text.

6. This sidesteps an active debate about the precise contours of mercy. *See, e.g.*, Claudia Card, *On Mercy*, 81 PHIL. REV. 182, 186–87 (1972) (analyzing mercy in terms of opting for more lenient treatment on the basis of an offender's "character and misfortunes," where this may or may not be "morally justified on the whole"); P. Twambley, *Mercy and Forgiveness*, 36 ANALYSIS 84, 86–87 (1976) (arguing that "one man shows mercy to another when he waives his right over that person and thus releases him from his obligation," and that mercy is always "*freely* given," never obligatory); George Rainbolt, *Mercy: In Defense of Caprice*, 31 NOÛS 226, 231–33 (1997) (analyzing mercy in terms of opting for more lenient treatment despite "fairly strong reasons" in favor of harsh treatment, where doing so is "imperfectly obligatory"); Ned Markosian, *Two Puzzles About Mercy*, 63 PHIL. Q. 269, 284 (2013) (analyzing mercy in terms of opting for the more lenient of two permissible options out of "compassion"); Adam Perry, *Mercy*, 46 PHIL. & PUB. AFFS. 60, 68–69, 77–79, 87–88 (2018) (analyzing mercy in terms of opting for more lenient treatment "with the intention of alleviating or preventing harm," though this need not be out of compassion and the lenient option need not be permissible); Kristen Bell, *Critical Mercy in Criminal Law*, 42 LAW &

are cases in which valid tort claims are not pursued (or are settled for less than they are worth[7]) due to compassion for the situation of the defendant. When we conceive of mercy in the familiar way just suggested, such cases make readily apparent the way in which mercy is well at home in tort law.

Consider a mundane example[8]: my neighbor negligently starts a fire that badly damages my garage. She refuses my request for compensation, so I prepare to file a tort claim. But then I learn that she has recently suffered a financial disaster and could not satisfy my claim without some significant personal sacrifice (assume she has no insurance, or has let the policy lapse, or coverage would be denied due to the nature of the accident). While I would be very glad to receive some compensation, I can get by well enough without, and ultimately, I do not wish to contribute to the larger calamity engulfing my neighbor. So, I let the matter drop.

This is an act of mercy, in the familiar sense mentioned above. Moreover, in a case like this, letting the matter drop would ordinarily be an entirely unobjectionable—indeed, likely admirable—thing to do. And this makes the example doubly mundane: not merely a humdrum set of facts but also one that raises no interesting problems for deliberation or assessment.

Hence, there is one important way in which mercy is *more* at home in tort law than in the criminal law, where the exercise of mercy is never so untroubled. One central difficulty in criminal law, of course, concerns the apparent tension between mercy and the demands of justice or desert (or alternatively, the need for deterrence, on utilitarian views).[9] But this dynamic is absent from tort law, in which the defendant's liability provides no positive reason to extract compensation, beyond reasons of self-interest that the plaintiff is at liberty to disregard. Here, unlike in the criminal law, mercy's

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PHIL. 351, 353–54, 359–60 (2023) (developing and analyzing contrasting conceptions of "beneficent mercy" and "critical mercy"). These are just a few examples from a large literature. For a useful "reasonably comprehensive list of contemporary publications about mercy," see *id.* at 353 n.3.

7. For simplicity, the focus throughout will be on merciful decisions not to sue, but the arguments apply equally to merciful settlements. For instance, one prominent category of cases in which merciful settlements may occur are those in which a plaintiff settles for the amount covered by liability insurance, declining to pursue the defendant's personal assets. For illuminating discussion of such cases, see generally Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275 (2001).

8. I have borrowed this example from Antony Duff precisely because its mundaneness is suggestive of the scope of this phenomenon. R.A. Duff, *Repairing Harms and Answering for Wrongs*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 212, 212 (John Oberdiek ed., 2014).

9. *See* Jeffrie Murphy, *Mercy and Legal Justice*, *in* FORGIVENESS AND MERCY 162, 168–69 (Jeffrie G. Murphy & Jean Hampton eds., 1988) (describing concerns about the "paradoxes" of mercy that date back at least to Saint Anselm); R.A. Duff, *Mercy*, *in* THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 467, 471 (John Deigh & David Dolinko eds., 2011) (explaining that a version of the paradox of mercy arises for deterrence-focused as well as retributivist views of punishment).

way is smooth.[10] Mercy in private law has thus served as a point of reference and as an exemplary, less-troubled sibling to mercy in the criminal law—but for that very reason, it has not been the main object of theoretical interest.[11]

That is one reason why in-depth discussion of mercy in tort is vanishingly rare. The other is that whether to exercise mercy in tort is generally seen as a matter purely of personal conscience, rather than as a question in which the law might take an interest. This view is so common and seemingly natural that it is rarely explicitly stated or defended, perhaps because the decision to exercise mercy is in the hands of private plaintiffs rather than legal officials, the decision is generally not subject to legal constraints, and the result of exercising mercy is often that legal proceedings simply never take place. As Arthur Ripstein puts it, in a rare explicit statement of the view, there is

> a moral question, invisible to the law, about whether the one whose life was interfered with should stand on his or her right . . . . Whether and when to stand on your rights is among the most important moral questions, but . . . it is not a legal question at all.[12]

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10. At least, this is the standard view. It is possible to take the view that tortfeasors *deserve* to pay compensation in a way that provides positive reasons for plaintiffs to extract it—reasons that plaintiffs are not free to set aside simply as they please. Heidi Hurd indicates that she has been drawn to this sort of view; but this, as Hurd is aware, is an unusual view, and even she ultimately declines to embrace it wholeheartedly. *See* Heidi M. Hurd, *The Morality of Mercy*, 4 OHIO ST. J. CRIM. L. 389, 391, 421 (2007) (expressing skepticism about "the defensibility of decisions by individuals (and potential plaintiffs) to waive secondary obligations of repair and to refuse to press demands for corrective justice," but ultimately conceding that in practice "we may need to recognize that mercy cannot be exorcized from retribution"). Alternatively, and more plausibly, some plaintiffs may have an important reason, perhaps even a duty, to pursue certain claims when they are in a position to address wrongs that also affect others (thanks here to Jennifer Laurin and Ekow Yankah). *See* Ekow N. Yankah, *Should Vulnerable Victims Show Mercy?*, 102 TEXAS L. REV. 1515, 1517 (2024) (discussing whether victims, especially those who are "racially or politically disenfranchised," have duties to forgo mercy and "insist on punishment for wrongdoing that demeans them as members of a group"). This important point raises some complex issues about the exercise of mercy in tort, but for purposes of this discussion I will assume that at least across a significant range of cases, including many "ordinary" cases of negligence, any other-regarding reasons to pursue tort claims still leave plaintiffs with broad latitude to decline to proceed for their own reasons.

11. *See* John Tasioulas, *Mercy*, 103 PROC. ARISTOTELIAN SOC'Y 101, 105–06 (2003) (observing that in the "private law model" of mercy there is no worry that mercy "relaxes the level of punishment required by justice," then turning to his main concern, which is "the vindication of mercy understood according to the traditional paradigm: the criminal law model of a judge . . . duty-bound to punish"); Duff, *supra* note 9, at 468 (noting that in private law contexts "mercy does not conflict with other moral demands, and thus does not raise the kinds of problem that concern" him—namely, the problem in criminal law of justifying the imposition of "a sentence lighter than that which is required by justice"). But for a rare exception that argues that civil law, rather than criminal law, offers the best model for understanding mercy, see Twambley, *supra* note 6, at 85–86.

12. Arthur Ripstein, *Morality and Law Through Thick and Thin: Comment on John Gardner's* From Personal Life to Private Law, 15 JERUSALEM REV. LEGAL STUD. 138, 148–49 (2017). Feigenson makes a similar observation about mercy as exercised by private plaintiffs. Feigenson,

That the question of whether to stand on one's rights as a tort victim—or rather, to be merciful—is "invisible to the law" and considered to be "not a legal question at all," makes it easy to understand why it is not much discussed by lawyers or legal academics.

So, mercy has, we may conclude, a place in tort—indeed, a place so comfortable and practically invisible that it is not seen to raise issues that could attract our interest. In Part III, I will argue that this is misguided, and that there is in fact a problem about mercy in tort that deserves more attention than it has received. But first, in order to appreciate the potential significance of this, it will be useful to review the contours of the debate concerning tort law and the leading alternative system of injury compensation. One reason why the problem of mercy in tort may be important is in bringing to light overlooked considerations that could tip the scales in favor of some form of social insurance as an alternative to tort law.

II. Tort Law Versus Social Insurance

New Zealand provides the classic (and, in its scope, largely unique) illustration of the social insurance alternative to tort law—more specifically, to personal injury law.[13] Since 1974, accident victims who sustain personal injuries in New Zealand can, regardless of fault, apply for compensation to a public agency—the Accident Compensation Corporation—which is funded through a combination of general tax revenues and levies on specific activities (e.g., on gasoline, for motor vehicle accidents).[14] Common-law damages claims are barred for personal injuries that are covered by the scheme.[15]

There are endless possible variations on this sort of social insurance scheme, but the key features for present purposes are just that the claims process is not adversarial, compensation is available regardless of fault, and compensation is paid from a social fund rather than by individual injurers. So, returning to the example of my damaged garage, under a suitably broad social insurance scheme, I could recover the costs of repair without imposing

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supra note 2, at 1634. This is part of why Feigenson chooses to focus on judges and juries, rather than plaintiffs, as agents of mercy in tort. *Id.* at 1635.

13. From here on, the focus will be on the law of accidents, including personal injury law. For further discussion of the scope of the problem of mercy for tort law, and for private law generally, see Bero, *supra* note 3, at 28–31.

14. *See* Accident Compensation Act 1972, ss 4, 6, 11, 31, 39 (N.Z.) (establishing the compensation scheme and the public agency to manage it); *Our History*, ACC, https://www.acc.co.nz/about-us/who-we-are/our-history [https://perma.cc/R85E-5X94] (noting that the Accident Compensation Corporation began operating in 1974); Accident Compensation Act 2001, s 213 (N.Z.) (designating a levy on fuel to provide funds to cover personal injuries from motor vehicle accidents).

15. Accident Compensation Act 1972, s 5 (N.Z.); Accident Compensation Act 2001, s 317 (N.Z.).

the financial burden on my neighbor, assigning fault to her, or haling her into court.[16] In fact, if the scheme followed the outlines of the New Zealand model, then a common-law damages claim would be barred, and there would be neither any need nor any opportunity for me to exercise mercy. We will explore the significance of this in the next section.

Several forceful arguments in favor of this sort of compensation scheme came to prominence in the 1960s in the lead-up to the introduction of New Zealand's system.[17] A no-fault social insurance system has the advantage, first, of eliminating the substantial expenses related to the determination of fault and the administration of the adversarial tort system.[18] Second, a no-fault system seems more responsive to need as well as fairer and more consistent in its treatment of both accident victims and those who cause accidents.[19]

The traditional rejoinders to these arguments come from two familiar quarters. The first, grounded in economic theory, appeals to the thought that by shifting the costs of accidents onto those whose conduct is responsible,

16. New Zealand's actual system covers only personal injuries. *See Injuries We Cover*, ACC, https://www.acc.co.nz/im-injured/what-we-cover/injuries-we-cover/ [https://perma.cc/M3Z7-TPQ2] (listing types of injuries covered). But in principle, a New Zealand–style system could be extended to cover the damage to my garage. There are various reasons for and against limiting such a system to personal injuries, but I set those aside in order to focus on the general issue of mercy in tort.

17. For a landmark report advocating this position, see ROYAL COMM'N OF INQUIRY, COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND 11–12 (1967), also titled the "Woodhouse Report," which investigated and reported on the need for changes in personal injury compensation laws. For an additional comprehensive overview of arguments against tort law and in favor of social insurance, see generally Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555 (1985). More recently, these arguments were given fresh currency by then-UK Supreme Court Justice Lord Sumption in a 2017 speech provocatively titled "Abolishing Personal Injuries Law - A Project." Lord Sumption, Just., Sup. Ct. of the U.K., Abolishing Personal Injuries - A Project, at 1–2 (Nov. 16, 2017), https://www.supremecourt.uk/docs/speech-171116.pdf [https://perma.cc/7ZC9-V5JQ].

18. These are often estimated to constitute a third or more of the money that passes through the system. *See* Lord Sumption, *supra* note 17, at 7 (arguing a no-fault system is more efficient since it avoids "costs of attributing blame"); PAUL HINTON & DAVID MCKNIGHT, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, TORT COSTS IN AMERICA: AN EMPIRICAL ANALYSIS OF COSTS AND COMPENSATION OF THE U.S. TORT SYSTEM 4 (2022), https://instituteforlegalreform.com/wp-content/uploads/2022/11/Tort-Costs-in-America-An-Empirical-Assessment-of-Costs-and-Compensation-of-the-U.S.-Tort-System.pdf [https://perma.cc/K53P-3TRT] (estimating that litigation costs and other expenses comprise 47% of the tort system).

19. *See* Lord Sumption, *supra* note 17, at 7 (arguing that no-fault systems better address personal injury by treating victims alike, regardless of fault); Jeremy Waldron, *Moments of Carelessness and Massive Loss*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 387, 389 n.1, 397 (David Owen ed., 1995) (arguing that the tort system, in contrast to a no-fault system, is unfair in its treatment of defendants).

tort law provides potential tortfeasors with an incentive to behave more safely.[20] A social insurance scheme, by contrast, removes this deterrent.[21]

The second traditional answer in support of tort law is grounded in corrective justice theory. The arguments in favor of social insurance, according to the corrective justice view, fundamentally mistake the point of tort law, whose essential aim is neither to alleviate hardship nor to achieve fairness between victims of similar harms or between those who commit similar wrongs. Instead, to borrow another of Arthur Ripstein's concise formulations, tort law "gives expression to a set of familiar and intuitively compelling ideas about responsibility and justice. . . . Damages serve to place a problem where it properly lies, that is, with the responsible party."[22] The point of tort law, in this view, is to put losses where they belong; considerations of hardship or fairness (with respect to anyone other than *this* plaintiff and defendant) are simply beside the point.

More recently, a new dimension has been introduced into this debate. Whether or not the traditional arguments are sufficient in themselves to answer the case in favor of social insurance, recent work in tort theory has further enriched our understanding of what might be lost if we simply replaced our current system with a New Zealand–style social insurance scheme.

At the forefront of this broad movement is civil recourse theory, developed by John Goldberg and Benjamin Zipursky in an influential series of separately and jointly authored works.[23] The basic civil recourse idea is that tort law should not be understood primarily in terms of economic efficiency or corrective justice, but rather in terms of equality and accountability. As Goldberg and Zipursky summarize:

> The notion that courts stand ready to provide remedies to the victim of wrongs is an idea of equal rights. This is why access to courts has long figured centrally in notions of the rule of law. In tort law, actors, even powerful private and state actors, must in principle confront the

20. *See* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972) (describing the expectation that tort liability will lead potential tortfeasors to adopt precautions to avoid the higher costs of tort judgments).

21. There is, however, some controversy about whether this economic argument is actually borne out by the evidence. For discussion, see generally Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377 (1994) and W. Jonathan Cardi, Randall D. Penfield & Albert H. Yoon, *Does Tort Law Deter Individuals? A Behavioral Science Study*, 9 J. EMPIRICAL LEGAL STUD. 567 (2012).

22. Arthur Ripstein, *Some Recent Obituaries of Tort Law*, 48 U. TORONTO L.J. 561, 573–74 (1998).

23. *See generally, e.g.*, JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS (2020) (discussing and developing their civil recourse theory).

> prospect that they will be held accountable for their mistreatment of others.[24]

According to this view, the characteristic function of tort law is to provide a legal avenue for individuals to hold one another to account for wrongful injuries, and the value of tort law lies in the fact that providing such an avenue is an important way of realizing or instantiating an ideal of social equality.

This idea that the private, bilateral structure of our tort system realizes, promotes, or protects certain relational values—that it puts the parties into a valuable relationship, or serves to facilitate, preserve, or repair existing valuable relationships—has spread widely and developed into a major theme (*the* major theme?) of recent tort theory. Thus, tort law is said, for instance, to "distinctively engender[] a valuable relationship, a form of a thin solidarity" and "respectful recognition" between the parties;[25] or to vindicate the victim's social standing by countering the demeaning message expressed by the tortfeasor's wrongdoing;[26] or to vindicate the insulted honor of the victim;[27] or to furnish tortfeasors with a legal avenue for satisfying their duty to take responsibility;[28] or to offer a mechanism by which tortfeasors can make appropriate amends[29] and repair the damage to their relationships with their victims.[30]

This line of thought offers a new defense of tort law against the social insurance alternative, which dispenses with the bilateral structure of tort and thereby depersonalizes the process and severs the adversarial link between the parties. For this reason, "such a system does not promote equal accountability or advance the relational idea of equality—the idea that we owe one another obligations or answers—in the way that the right to recourse does by literally allowing an individual to confront another and forcing the other to answer."[31] And social insurance could similarly be said to deprive

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24. *Id.* at 73; *see also* John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEXAS L. REV. 917, 974 (2010) (describing civil recourse as a commitment to providing accountability and respecting individuals' equality).

25. Avihay Dorfman, *What Is the Point of the Tort Remedy?*, 55 AM. J. JURIS. 105, 107 (2010) (emphasis omitted).

26. Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT L. 405, 414 (2017).

27. Nathan B. Oman, *The Honor of Private Law*, 80 FORDHAM L. REV. 31, 32, 64 (2011).

28. David Enoch, *Tort Liability and Taking Responsibility*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS, *supra* note 8, at 250, 252, 257.

29. Erik Encarnacion, *Corrective Justice as Making Amends*, 62 BUFF. L. REV. 451, 454 (2014).

30. *See* Linda Radzik, *Tort Processes and Relational Repair*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS, *supra* note 8, at 231, 232, 245 (discussing the role of relational repair in corrective justice and the role of tort law in helping achieve this type of relational repair).

31. Jason M. Solomon, *Civil Recourse as Social Equality*, 39 FLA. ST. U. L. REV. 243, 265–66 (2011).

injurers of a way to satisfy their duties to take responsibility and make amends; to remove a legal avenue for relational repair; and more generally, to get the law out of the business of realizing, protecting, or facilitating any kind of valuable relationship between the parties.

This defense of tort law is compelling. But to evaluate its strength properly, we would need a full accounting of the significance of tort law with respect to relational values. To the extent that tort law realizes or facilitates valuable relationships, that is a reason to prefer tort law to the less personal social insurance alternative. But to the extent that tort law puts the parties into a relationship that they might wish to avoid, or burdens or distorts their existing relationships, that may be a countervailing reason to prefer the social insurance alternative. This possibility has been largely ignored amid the current congratulatory mood in tort theory.

III. The Problem of Mercy in Tort

Earlier I quoted Ripstein, saying: "Whether and when to stand on your rights is among the most important moral questions."[32] And of course, if there is a genuine moral question about whether to stand on one's rights in tort, then there will be situations in which there are good reasons *not* to stand on one's rights—for instance, situations in which it is appropriate to be merciful. In such situations, as we have seen, a tort plaintiff is in quite a different position from a mercifully inclined sentencing judge. The plaintiff's position is, in an important way, the easier one: the sentencing judge must strike a difficult balance between mercy and the demands of justice, whereas the tort plaintiff is free to be merciful without constraint.[33]

But in a different way the sentencing judge's position is less conflicted. The judge is a neutral arbiter, with no personal stake in how the defendant is punished; the basic structure of tort law, by contrast, gives merciful plaintiffs a direct financial stake in the defendant's treatment. This way of arranging things is so familiar as to seem natural, even inevitable. But the social insurance alternative shows that it is not inevitable, and we should not let familiarity inure us to its potentially troubling features.

Here I will consider three of these, which I will call the problems of defendant hardship, systematic disadvantage, and inhumane relations. I do not mean to claim that these exhaust the problem of mercy in tort, but together they illustrate its scope and significance.

32. *See supra* note 12 and accompanying text.

33. Subject to the important qualification discussed *supra* note 10.

A. Defendant Hardship

The first problem, and the most straightforward, concerns the way in which tort law gives the plaintiff a remedy, even where the harm she has suffered would be much easier for her to bear than for the defendant to compensate. This may include, for instance, some cases in which the plaintiff is wealthier than the defendant, as well as cases in which the defendant is already overwhelmed by some other misfortune, like a terminal illness or the death of a loved one (the case of my damaged garage, as discussed further below, provides a less dramatic example). In such cases, the burden on the defendant of answering a claim and paying compensation may be greater than the burden on the plaintiff of simply living with her injuries.

Of course, the plaintiff is the wronged party and is entitled to compensation; nonetheless, in cases of this kind, and particularly as the defendant's hardship increases, we might reasonably prefer for the plaintiff to be merciful.[34] It is a much-disputed question whether there can be an obligation to be merciful, or whether mercy is by definition a matter of grace that cannot be demanded or required.[35] But we do not need to invoke an obligation to be merciful in order to make sense of the notion that there are situations in tort in which we would reasonably prefer for mercy to be exercised.

The plaintiffs to whom tort gives control over where losses fall are not, however, impartial arbiters, dispassionately pursuing the best overall outcome. Quite the contrary: they have a legitimate personal interest in compensation. For this reason, even where we would prefer for them to be merciful, it is hard to muster much in the way of surprise or disapproval when they are not. The tort system thus predictably fosters the pursuit of compensation even in the face of reasonable grounds for mercy, and in this way can be expected to produce an undesirable level of defendant hardship.

Consider the example of my damaged garage in this light. Suppose I can easily absorb the damage, but I am not one to leave money on the table when I am entitled to it, so I proceed regardless of the hardship to my neighbor. "Never mind," I reassure myself, "that's not my problem—I am the wronged party and I have a right to compensation; if she couldn't afford to take

34. I employ this locution in order to appeal to a preference that I suspect is widely held (at least over some significant range of cases), while avoiding controversy about the precise rationale for the preference.

35. Many suppose that mercy, as Jeffrie Murphy puts it, "transcends the realm of strict moral obligation and is best viewed as a free gift." Murphy, *supra* note 9, at 166; *see also*, *e.g.*, Card, *supra* note 6, at 184 (noting that mercy is "something we have no obligation to give"). But others dissent. *See, e.g.*, Tasioulas, *supra* note 11, at 126–27 (arguing that mercy is a duty and perhaps a right); Perry, *supra* note 6, at 70–71 (arguing that "you can have me at your mercy while being constrained in a normative sense"—because you are, for instance, morally required to exercise mercy).

responsibility, then she should have been more careful!" Here it is difficult to object to my pursuit of a valid claim. Nonetheless, an impartial observer might, given how heavily this falls on my neighbor and how much less it means to me, reasonably prefer that I had been merciful.

This outcome would raise no objection to tort law if my choice were unavoidable, but of course it is avoidable—under a social insurance system, it simply would not arise. And this clarifies that any complaint about the hardship to my neighbor should be addressed in the first instance not to me, the unmerciful plaintiff, but to the tort system that structures the possible outcomes in this way.

B. Systematic Disadvantage

Turn now from the defendant to the tort plaintiff, who must weigh her need for compensation against her merciful inclinations. Those who are more merciful will be less likely to pursue compensation,[36] and this cannot help but produce a pattern in which the merciful are systematically undercompensated, relative both to the unmerciful and to similarly injured merciful parties who benefit from the protection of a system of social insurance.

This is regrettable. We have already noted that there are cases in which we would reasonably prefer for plaintiffs to be merciful. In such cases, tort law systematically disadvantages those who do what, all things considered, we would like them to do. Moreover, even where the defendant's hardship is not so severe that we have a clear preference for mercy, exercising mercy is often admirable.[37] It exhibits a generous willingness to sacrifice for another's sake, a quality that is commendable in itself and contributes to harmonious social relations. It is regrettable that the tort system leaves those who exhibit this quality without support, while compensating the unmerciful.

We also should note the effect on mercifully-inclined plaintiffs who opt instead to pursue compensation. A plaintiff who exercises mercy forgoes material compensation that an unmerciful plaintiff, or a similarly merciful

36. Those who suspect that money will nearly swamp less material considerations like mercy in litigation decisions should consider the phenomenon of reluctance to pursue "blood money"—that is, damages exceeding liability insurance coverage that will be paid out of the defendant's personal assets. *See generally* Baker, *supra* note 7, at 281–301 (section exploring several aspects of this phenomenon). Also compare the evidence concerning the effectiveness of defendant apologies. *See, e.g.*, Jennifer K. Robbennolt, *Apologies and Reasonableness: Some Implications of Psychology for Torts*, 59 DEPAUL L. REV. 489, 493 (2010) (discussing how apologies influence litigation decisions, including that receiving apologies lowers the inclination to seek a lawyer's assistance).

37. Some might take the position that it is always admirable to exercise mercy, at least where doing so violates no other obligation; others might take the position that to exercise mercy in certain cases would not be admirable, for example, because it would be excessively indulgent or would display a lack of self-respect. But on any plausible view there will be a significant range of cases in which it is admirable for plaintiffs compassionately to shoulder the loss.

person protected by a system of social insurance, would obtain; but a plaintiff who stifles her merciful instincts in order to pursue compensation—perhaps she simply cannot afford the luxury—must painfully compromise her compassionate impulse, whereas a plaintiff lacking merciful inclinations faces no similar quandary.

The unfairness and perversity of these results are both objectionable in themselves and connected to sound reasons that the law has to avoid putting the merciful in these positions, if it reasonably can. In each of the cases described above, the merciful person has reason to prefer a system of social insurance that would dissolve her dilemma and allow her both to receive compensation and to spare the defendant. These reasons are, by hypothesis, *good* reasons that are rooted in appropriate grounds for mercy and that we would often admire, or even prefer them to act upon. They are thus reasons to which we should give due weight in decisions concerning institutional design.

We noted previously why this entire class of disadvantage might go unnoticed: it can seem, from within the perspective of our tort system, that the merciful cannot be disadvantaged in any objectionable sense because they have the exact same rights in tort as the unmerciful and cannot complain if they chose to forgo the exercise of those rights.

But we can now see that this view of the matter is doubly misguided. First, this complaint about the tort system is not one that only merciful plaintiffs themselves are in a position to raise. The reasons in question for preferring a social insurance scheme are good reasons that we should all consider in our policy preferences. Second, and more fundamentally, this view of the matter treats as given the structure that creates the dilemma in which merciful plaintiffs find themselves. But the social insurance alternative once again illustrates that this structure is not inevitable.

C. Inhumane Relations

Having considered in isolation the defendant (in subpart III(A)) and the plaintiff (in subpart III(B)), I turn now to the quality of the relationship between plaintiff and defendant. Independently of the law, the occurrence of wrongful injuries puts the parties into a new and fraught relationship: that of victim and wrongdoer. But tort law then puts the parties into the further, institutionally constituted relationship of (potential) plaintiff and defendant. As we saw in Part II, civil recourse theorists have emphasized that this latter relationship empowers victims to hold wrongdoers to account and vindicates their status as social equals;[38] others have suggested additional ways in which the plaintiff–defendant relationship is itself valuable, or provides a context for the creation or restoration of other valuable relationships.

38. *See supra* notes 23–30 and accompanying text.

But notwithstanding any empowering or relationship-enhancing features, the plaintiff–defendant relationship can also be a limiting and compromising one for both parties. It is a familiar observation that tort law both encourages blame and litigiousness on the part of plaintiffs (often described as part of a more general "compensation culture" that encourages accident victims to blame others and seek redress for every misfortune[39]) and discourages the acceptance of responsibility on the part of defendants.[40] But I wish to focus on a problem that is subtly, but importantly, distinct from these: even if the temptations to excessive litigiousness and defensiveness are avoided, the plaintiff–defendant relationship cannot help but be in certain respects inhumane.

To isolate this problem, imagine a plaintiff who has no desire either to indulge in excessive recrimination or to obtain a windfall; instead, she merely wants reasonable compensation for her wrongful injury. So, the plaintiff's response is measured and appropriate, not corrupted or distorted. Now apply these conditions to a situation—like the case of my damaged garage—in which there are reasonable grounds for mercy, and consider the significance that tort law has for the relationship between the parties. Of course, the pre-legal victim–wrongdoer relationship is frequently characterized by acrimony, intransigence, and hard feelings. But rather than intervening to ease these tensions, tort law effectively raises the stakes by turning the victim into a plaintiff with a new power over the wrongdoer–defendant and providing that the plaintiff must exercise that power to secure compensation.

To be clear, it seems preferable that the plaintiff should be able to obtain compensation from the defendant through a tort suit, rather than having no way to obtain compensation at all. But the relevant contrast is rather between the plaintiff–defendant relationship in tort and the relationship that obtains under a social insurance system, where the plaintiff can receive compensation without imposing any burden on the injurer.

If the accident involving my garage were covered by a social insurance scheme, then my claim for compensation would be addressed to the scheme itself, and nothing would be demanded of my neighbor at all. In these circumstances, what could we expect my attitude towards my neighbor's financial difficulties to be? I might be simply indifferent or too focused on my grudge about the garage to give them any consideration. But if I am more generously disposed, I might instead be moved by her situation. With compensation in hand, I might be inclined to put the matter of the garage behind us and even to offer support or advice, or just a sympathetic ear. If nothing else, I might at least feel regret and compassion for my neighbor's

39. *See* Kevin Williams, *State of Fear: Britain's 'Compensation Culture' Reviewed*, 25 LEGAL STUD. 499, 500 (2005) (describing compensation culture as encouraging an "unreasonable willingness to seek legal redress when things go wrong").

40. *See id.* at 506–08 (analyzing the impact on defendants of increased settlement costs).

difficulties. These are humane reactions; they are the kinds of reactions that we might hope for neighbors to have towards one another's setbacks and difficulties.

Now back to our actual tort system. What is to be my attitude towards my neighbor's financial difficulties here? Of course, I might decide to be merciful, drop my tort claim, and respond in the same humane way. But here there is also another calculation: if I (understandably) want the compensation that I am entitled to, then my neighbor's status as someone who is at fault and owes me compensation will be salient for me and will compete for attention with her status as an appropriate object of sympathy and concern.

It is perhaps not strictly impossible, but it is humanly very difficult to treat my neighbor's financial difficulties with compassion and generosity—to offer support or a sympathetic ear, to really appreciate and regret the severity of her misfortune—at the same time that I am seeking to prove her at fault and pursuing a claim for compensation that threatens to tip her from financial precarity into ruin. It is ordinarily too great a strain to divide our attitudes and reactions towards another person in this way, and for this reason, the pursuit of compensation in tort will predictably inhibit the development and expression of plaintiffs' humane impulses. The pursuit of my tort claim, in other words—even if done in a measured way, without vindictiveness or greed—represents at best an encumbrance, and at worst a barrier, to fully humane relations.

Conclusion: Compensation, Accountability, and Humane Values

The problem of mercy in tort, I have suggested, deserves more attention than it has received; for instance, it provides an overlooked reason to favor some form of social insurance as an alternative to tort law. Here I have sought only to introduce this idea, rather than to fully develop and defend it. Many important questions remain, including questions about the scope and severity of the problem, both in theory (e.g., Does it encompass only negligence law? Or also trespass, defamation, and perhaps even breach of contract, etc.?) and in practice (Is the problem's severity affected by the role of liability insurance, or by the prevalence of judgment-proof or corporate defendants?).[41] These questions deserve a much more detailed treatment than is possible here.

Allow me instead to conclude with two brief reflections. First, as indicated at the outset, the problem of mercy in tort does not stand in isolation; it is rather a useful and particularly vivid illustration of a broader dynamic, in which our tort system presents not only the merciful but also the forgiving, the soft-hearted, the conflict-averse, those who would rather let bygones be bygones, and a host of similar characters with an unappealing

41. For some further discussion of these and other questions, see Bero, *supra* note 3, at 22–31.

choice. Because the merciful are particularly sympathetic and (at least often) admirable, they make effective standard-bearers, but at the same time they represent only the thin end of the wedge; once we recognize the plight of the merciful in tort, it becomes easier to appreciate that there is a larger group whose plight may merit similar recognition.

Second, the plight of the merciful (and their brethren) arises because of the way in which our tort system yokes together compensation and accountability. Again, this seems so natural to us as to be virtually inevitable, but it's not inevitable. Advocates of social insurance alternatives to tort law have often pointed out that the aim of compensation can in several ways be advanced by disentangling compensation from tort law's accountability apparatus, and to their arguments we can now add that we could thereby unburden compensation from the problem of mercy in tort.[42] But at the same time, and perhaps more strikingly, disentangling the two could in an important way unburden tort law's accountability function, which can be distorted and compromised by being linked so closely to compensation.

The thought is that plaintiffs can only enjoy complete freedom about whether to hold tortfeasors accountable if this question is not inextricably tangled up with the distracting and often urgent matter of compensation. Civil recourse theorists have persuasively observed that it is important to be able to hold one another accountable for the sake of vindicating our status as social equals. At the same time, however, it is important to be able *not* to hold one another accountable in appropriate situations, and tort law's way of yoking accountability to compensation burdens the plaintiff's option to forgo accountability. Instead of serving as a realizer and guarantor of equality, accountability can become an unwanted gauntlet that plaintiffs must pass through in order to obtain the compensation they need and deserve. Even if our equal standing is vindicated when I have means to hold you to account, there are other relational values—humane values like mercy, forgiveness, tolerance, solidarity, and humanity—that are burdened when I *must* hold you to account or else bear the cost of your mistake.

42. In this way, the problem of mercy in tort can be seen as lending additional impetus to proposals that the best way to resolve the current system's divided focus between compensation and corrective justice is to pursue the two aims separately. *See, e.g.*, Jonathan Morgan, *Tort, Insurance and Incoherence*, 67 MOD. L. REV. 384, 399–400 (2004) (proposing that in the "ideal reconciliation of the tensions currently racking the law . . . [c]ompensation and corrective justice would be dealt with separately by quite separate systems, with different rules to reflect their entirely distinct requirements"); DON DEWEES, DAVID DUFF & MICHAEL TREBILCOCK, EXPLORING THE DOMAIN OF ACCIDENT LAW 437 (1996) (proposing that "by shifting many compensatory functions from the tort system to other compensatory regimes, the tort system in the reduced domains that we would leave to it would serve principally to vindicate traditional corrective justice values, unencumbered by other values that it cannot simultaneously or effectively advance").