

Should Racially Vulnerable Victims Show Mercy?

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On June 17, 2015, twenty-one-year-old Dylann Roof entered the Emanuel African Methodist Episcopal Church in Charleston, South Carolina, sat, and prayed with nine congregants for at least an hour before pulling out a handgun and killing Cynthia Hurd, Susan Jackson, Ethel Lance, DePayne Middleton-Doctor, State Senator Rev. Clementa Pinckney, Tywanza Sanders, Rev. Daniel Simmons, Sharonda Singleton, and Myra Thompson.¹ He left three survivors, explicitly so they could “tell the story” of his killings.² Roof did so for his own demented reasons; his racist rage was laid out publicly in an online manifesto, and he hoped his murders would begin a race war.³ Roof was ultimately convicted of a range of murder and hate crimes.⁴

The shocking nature of the racist killings, the background of American gun violence, and the venue of a historically Black church fated the killings to command national attention. But the nation’s attention became fixed on the Roof trial for another reason: in the face of this unspeakable horror, family members of many of the victims, in a spectacularly public fashion, stood before the court and spoke, in intimate and emotional terms, of the scarring impact of Roof’s killings. Then, extraordinarily, many of the same family members offered their forgiveness to Roof for his crimes.⁵

Though in some ways uniquely moving, the show of heartbroken families offering Roof a form of absolution also felt familiar. It fit into a familiar pattern of racist harm—sometimes extraordinary and fatal, sometimes more subtle—aimed at minorities, particularly African

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1. Yamiche Alcindor & Doug Stanglin, *Affidavits Spell Out Chilling Case Against Dylann Roof*, USA TODAY (June 19, 2015, 10:43 PM), <https://www.usatoday.com/story/news/nation/2015/06/19/dylann-roof-charleston-police-charged--murder-black-church/28975573/> [<https://perma.cc/7UYD-UJ9T>].

2. Alan Blinder & Kevin Sack, *Dylann Roof Found Guilty in Charleston Church Massacre*, N.Y. TIMES (Dec. 15, 2016), <https://www.nytimes.com/2016/12/15/us/dylann-roof-trial.html> [<https://perma.cc/KSX3-88GN>].

3. Rachel Kaadzi Ghansah, *A Most American Terrorist: The Making of Dylann Roof*, GQ (Aug. 21, 2017), <https://www.gq.com/story/dylann-roof-making-of-an-american-terrorist> [<https://perma.cc/WU67-R82Y>].

4. *Id.*

5. See, e.g., Nikita Stewart & Richard Pérez-Peña, *In Charleston, Raw Emotion at Hearing for Suspect in Church Shooting*, N.Y. TIMES (June 19, 2015), <https://www.nytimes.com/2015/06/20/us/charleston-shooting-dylann-storm-roof.html> [<https://perma.cc/MW94-AXF9>] (In one poignant example, the daughter of seventy-year-old victim Ethel Lance said: “You took something very precious away from me But I forgive you.”).

Americans, where victims subsequently offer very public forms of forgiveness.⁶ Perhaps this is not surprising; America's ability to ignore the insidious effects of racism is, perhaps naturally, matched by the depth of its racial anxiety. Thus, highly visible blows that enflame our racial scars are met with a longing for some rapidly soothing balm.⁷ And the natural players to reassure the collective angst are too often the African-American, or other minority, victims themselves.

This Essay should not be misunderstood as insulting the family members who offered Roof this extraordinary measure of grace. My concern is not that they are being conned to play act a role in our national racial drama. They expressed this forgiveness as guided by deep religious and moral commitments.⁸ Further, I am alive to the often-expressed sentiment that forgiveness may be for the sake of the one who grants it as much as the one who receives it.⁹ Nor is the story one-dimensional; some surviving relatives were clear they had no interest in abating their anger and condemnation of Roof.¹⁰ But the drama that played out in the families offering forgiveness, though in some ways intimate, cannot be relegated to the purely private sphere. The family victims of Roof were not merely offering personal forgiveness; they called upon the legal system to give their absolution legal weight.¹¹ Thus, their calls for forgiveness doubled as calls for legal mercy, implicitly or explicitly offered as carrying special weight to insist our institutions grant such mercy.

The place of mercy from deserved legal punishment has its own rich philosophical historical tradition.¹² The question insists one take a position on the appropriate relationship between mercy and punishment, the

6. I am particularly grateful for Myisha Cherry's recent exploration of forgiveness and its racial dimensions in MYISHA CHERRY, *FAILURES OF FORGIVENESS: WHAT WE GET WRONG AND HOW TO DO BETTER* (2023).

7. *See id.* at 91–94 (explaining how guilt leads whites to “us[e] the Black victim as a means to an end,” ultimately “leav[ing] the responsibility of responding to white violence” to Black victims).

8. *E.g.*, Stewart & Pérez-Peña, *supra* note 5; Alan Blinder, *U.S. Seeks Death for Charleston Shooting Suspect. Victims' Families Prefer Mercy.*, N.Y. TIMES (Nov. 26, 2016), <https://www.nytimes.com/2016/11/26/us/death-penalty-dylann-roof-charleston.html> [<https://perma.cc/HX6L-9LL7>].

9. *Cf.* Jeffrie G. Murphy, *Hatred: A Qualified Defense*, in FORGIVENESS AND MERCY 88, 103–05 (1998) (noting that even where “retributive hatred,” may be justified, forgiveness may free people from the burden of seeking retribution).

10. *See* Blinder & Sack, *supra* note 2 (noting that two survivors and many family members of the victims supported a proposed agreement for Roof to plead guilty for a life sentence).

11. *See* Blinder, *supra* note 8 (reporting on family victims' “humanness” in calling for a life sentence instead of the death penalty). For analysis on when personal forgiveness and legal mercy come apart, see MARTHA MINOW, *WHEN SHOULD LAW FORGIVE?* 8 (2019). For thoughts on the distinction and link between forgiveness and mercy, see Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY, *supra* note 9, at 111, 157–59.

12. For one rich consideration, with its religious influences, see Jean Hampton, *Forgiveness and Christianity*, in FORGIVENESS AND MERCY, *supra* note 9, at 10, 10–13.

appropriate influence of victims in addressing public wrongs, and the place of personal virtues in legal institutions embedded in a secular, liberal state.¹³ Among these myriad questions, this Essay takes up a more narrow range of concerns: the question may be understood as the tension between forgiveness or legal mercy and the duty of victims, particularly racially or politically disenfranchised victims, to insist on punishment for wrongdoing that demeans them as members of a group. The question, in brief, is whether vulnerable victims have special political, or perhaps even moral, duties to forgo any inclination to legal mercy.

Arguing against mercy feels, well, unforgiving. But the request for legal mercy from racially and politically vulnerable groups comes with two concerns. First, I worry, without having any clear way to prove it, that minority victims are more often asked to engage in public displays of forgiveness.¹⁴ In any case, forgiveness by minority victims is quickly amplified and consumed voraciously. We should worry that Black forgiveness for racist violence is so quickly and widely trumpeted. The forgiveness of Black victims is so desperately celebrated precisely because it offers the illusion of collective reprieve from racist injuries.¹⁵ Secondly, I worry that, while a particular disenfranchised victim may be in a position to withstand injury and offer forgiveness, insisting on mercy may be harming future potential minority victims by failing to demand we fully address the harmful behavior.

Concrete examples may help clarify our intuitions. The racist killings of Black churchgoers by Dylann Roof provide as painful an example as could be easily conjured. Equally, we can imagine a female victim of sexual assault where, perhaps due to her (otherwise) fortunate resources and social support, she feels the task of healing is a personal one and sees no personal rewards from her attacker being prosecuted or punished. She may, like the victims' families in Charleston,¹⁶ insist on mercy due to deeply held religious or ethical commitments. Though her motivation is based on mercy, further instrumental reasons also play a role in why she does not want to pursue the

13. An incomplete sampling of the philosophical literature on the role of mercy and forgiveness in law is Claudia Card, *On Mercy*, 81 PHIL. REV. 182 (1972); Pamela Hieronymi, *Articulating an Uncompromising Forgiveness*, 62 PHIL. & PHENOMENOLOGICAL RSCH. 529 (2001); Stephen P. Garvey, "As the Gentle Rain From Heaven": *Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989 (1996); GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 807–10 (1978); Jeffrie G. Murphy, *Mercy and Legal Justice*, in FORGIVENESS AND MERCY, *supra* note 9, at 162; R.A. Duff, *Justice, Mercy, and Forgiveness*, CRIM. JUST. ETHICS, Summer/Fall 1990, at 51; R.A. Duff, *The Intrusion of Mercy*, 4 OHIO ST. J. CRIM. L. 361 (2007) [hereinafter Duff, *The Intrusion of Mercy*]; and John Tasioulas, *Punishment and Repentance*, 81 PHIL. 279 (2006).

14. See CHERRY, *supra* note 6, at 84–85 ("[B]ecause Blacks disproportionately suffer hate crimes, they are most frequently put at risk of being solicited for quick requests.").

15. See *id.* at 88–93 (explaining how whites weaponize public forgiveness from Black victims to appease white discomfort with racial violence).

16. See *supra* note 8 and accompanying text.

prosecution. The personal psychological costs of prosecution may not appear worth it.¹⁷ One reason to think of this question as exploring the civic duties of victims is to highlight the expectation to pursue (the full extent of) punishment, even when victims have purely practical reasons to demur, against other ethical commitments to legal mercy.

Lastly, I have the perhaps naïve belief that there is value in making progress, even if short of perfect clarity, on the philosophical justifications underlying our punishment practices before trying to wrestle them into systematic coherence. The actual underlying effects of victim impact statements, particularly calls for mercy, are legally and empirically unclear.¹⁸

Various jurisdictions invite or allow such statements at the formal sentencing stage of punishment.¹⁹ Further, different crimes are governed by different victim statement regimes, with capital crimes inviting the most wide-ranging inquiry about the wrongdoer's character and the appropriateness of mercy.²⁰ This range of regimes for formal victim impact statements does not even account for the more or less formal processes in which prosecutors may take a victim's preferences into account before or during prosecution of a case.²¹ This unruly landscape hints that we remain collectively at a loss as to how to incorporate victims' calls for mercy within our institutions. Perhaps exploring the political duties of even one subset of victims might shed some light on a path ahead.

17. Along with Card, I take being motivated by mercy to mean being motivated by a certain kind of attitude and surely something outside of the purely instrumental. In her example, a victim who does not wish to participate in prosecuting a wrongdoer for fear of reprisal is not appropriately described as merciful. Nor, to my mind, is a sexual assault victim who wishes to avoid prosecution because the attendant material drawbacks are, to her mind, more trouble than they are worth. See Card, *supra* note 13, at 187 (contending that withholding a deserved penalty solely to safeguard others' rights or welfare does not constitute mercy).

18. Paul G. Cassell & Edna Erez, *How Victim Impact Statements Promote Justice: Evidence from the Content of Statements Delivered in Larry Nassar's Sentencing*, 107 MARQ. L. REV. (forthcoming 2024) (manuscript at 80) (on file with author); Paul G. Cassell, *On the Importance of Listening to Crime Victims . . . Merciful and Otherwise*, 102 TEXAS L. REV. 1381, 1382 (2024). For a broad view across jurisdictions, see Andrew Ashworth, *Victim Impact Statements and Sentencing*, 1993 CRIM. L. REV. 498, 502–06 and Maureen McLeod, *An Examination of the Victim's Role at Sentencing: Results of a Survey of Probation Administrators*, 71 JUDICATURE 162, 164–65 (1987).

19. Cassell & Erez, *supra* note 18 (manuscript at 3); Cassell, *supra* note 18, at 1384.

20. Garvey, *supra* note 13, at 1017–18. For an analysis of how mercy interacts with the death penalty and the need to preserve atonement, see Stephen P. Garvey, *Is It Wrong to Commute Death Row? Retribution, Atonement, and Mercy*, 82 N.C. L. REV. 1319, 1341 (2004).

21. See, e.g., Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1351–55 (2008) (explaining the wide discretion of prosecutors for charging decisions and how the discretion is neither accompanied with protocols nor requires reasoning).

I. Personal and Public Forgiveness

Extraordinary forgiveness is precisely that—extraordinary. Thus, it is little wonder that we collectively take notice when others forgive the seemingly unforgivable. Extraordinary abilities to forgive typically fill us with admiration for the forgiver. We marvel that they possess depths of virtue beyond the ordinary among us. Such remarkable virtue stands out to many as a goal to achieve or, if unattainable, an ideal of personal virtue for which one ought to strive.

When displays of personal forgiveness are moved into the public square, their claim on us collectively may extend beyond personal admiration. Where someone is forgiving another for not only a private wrongdoing but a public wrong—a crime—the stakes are decidedly changed. The reason is obvious: most justifiably criminalized acts are not only wrongs that cause serious harm to individuals but are also harms in which we collectively take a public interest.²² Echoing the link between tort law and criminal law, we recognize that the victim of any crime bears a uniquely important harm: it is their body that is broken and their life that is shattered. Yet because a crime undermines the conditions in which we can all carry on participating in our mutual civic project, we share an interest in repudiating the wrong done to all collectively as a public harm.²³ Thus, the personal harm visited upon the victim carries an important message that demands a collective response.

If not identical, there is a similar normative pull when crime victims extend forgiveness. Precisely because there is a public interest in their harm, there is an intuitive sense in which there may be a public interest in their releasing the wrongdoer from condemnation. Despite the analytical possibility of treating these features as entirely distinct,²⁴ there is a natural sense in which the victim's forgiveness tugs at the public position. The simplest intuition is that if the victim, who has suffered so much more—whose body was broken, loved one taken, or property stolen—can forgive the wrongdoer, who are we to hold our demands for punishment so dearly?

22. R.A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW 49–52 (2007); see R.A. Duff, *Responsibility, Citizenship, and Criminal Law*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 125, 127 (R.A. Duff & Stuart P. Green eds., 2011) (explaining *mala in se* crimes, where “moral wrongfulness is largely independent of the law” and a public response is required). I use the phrase “justifiably criminalized” to distinguish from the sweep of unjustifiable overcriminalization.

23. See Ekow N. Yankah, *Republican Responsibility in Criminal Law*, 9 CRIM. L. & PHIL. 457, 463–64 (2015) (“[A] well-formed society will recognize that the key role of criminal law is to protect and secure the civic freedom of each individual and reaffirm their civic equality.”).

24. See Duff, *The Intrusion of Mercy*, *supra* note 13, at 370, 378 (insisting that “[m]ercy is better seen as an intrusion into the criminal process, into the realm or perspective of punishment, of quite other considerations and values,” but also conceding that “[s]ometimes, however, the criminal law’s exclusive authority is temporarily undermined: sometimes the voice of compassion or sympathy for an offender’s suffering demands to be heard even in the courtroom”).

For what it is worth, the sense that there is public weight to the forgiveness of victims is often shared by victims themselves. Though a victim quietly and privately forgiving a wrongdoer, perhaps years later, is certainly of interest to those engaged in psychology and religion, the broader public is transfixed when victims stand before sentencing judges, express their forgiveness, and ask for their mercy to have weight in the legal proceedings.²⁵ Perhaps this should not be surprising; as mentioned, victim impact statements allow victims to demand that legal punishment take into account the unique damage and suffering a crime has wrought in their lives in crafting the appropriate punishment.²⁶ Why then would the inverse not be true—that a victim’s individual grants of mercy should influence the full measure of punishment for the wrongdoer as well? The point is that, despite the longstanding unease among liberal legal theorists about the role of personal emotions in State punishment, it is hard to escape the intuition that there is an important public interest not only in how victims were harmed but also in the ways in which they forgive.

II. Requesting Forgiveness and Mercy

If, as suggested, there is a public interest in victims extending forgiveness, then we should take a public interest in how forgiveness is distributed. When it comes to other grants of mercy, the point seems obvious. So, for example, the entrenched racial disparities in sentences across identical crimes is a source of persistent national shame and the object of important

25. See, e.g., Blinder, *supra* note 8 (noting the prevalence of public demonstrations of forgiveness in the Dylann Roof trial); Benjamin Mueller, *Victim Begg Court for Forgiveness for Wife Who Plotted His Murder*, L.A. TIMES (Aug. 1, 2013, 6:00 AM), <https://www.latimes.com/nation/nationnow/la-na-nn-julia-merfeld-michigan-hit-man-20130801-story.html> [<https://perma.cc/LUG4-3UUZ>] (highlighting that a husband, who was the intended victim of his wife’s murder plot, asked the sentencing judge for leniency, insisting his wife was “a godly woman” and a “wonderful wife”). It is worth clarifying that we are focused here on when the victim is asking the State to withhold or mitigate punishment for reasons of mercy. In cases where the State withholds punishment because a case is unlikely to be successful without the victim’s cooperation—where we sometimes colloquially say the victim refused to press charges—the State’s withholding of punishment is not based on mercy. This is true even if the victim’s decision to not move forward is, as a personal matter, based on their feelings of mercy.

26. E.g., Cassell & Erez, *supra* note 18 (manuscript at 6–7).

academic inquiry.²⁷ So too, are racial disparities in who is granted parole.²⁸ Not surprisingly, racial disparities have long marked our most institutionalized expression of mercy in the criminal law: grants of clemency.²⁹

Perhaps less noticed and harder to quantify is not only who is granted mercy but which groups of people are disproportionately *asked* to grant mercy.³⁰ Given that social demands for mercy do not require any official sanction, it is unclear how we could definitively measure the racial distribution of requests for mercy. But time after time—particularly with cases of racial violence aimed at minorities—there seems an almost reflexive request for victims to grant some form of absolution to the wrongdoers.³¹ Thus, my concern is that minority victims are more often asked to engage in public displays of forgiveness.

To be sure, forgiveness in the face of extraordinary violence will always seem remarkable and thus attract attention. The phenomenon is certainly not limited to disenfranchised victims. When Pope John Paul visited his would-be assassin in prison, the world followed with rapt attention.³² Public media certainly focuses on stories of forgiveness by relatives of crime victims of many races, in particular for crimes involving death.³³

27. For scholarship on the intersection of racial disparities and the criminal justice system, see generally PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017); Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 *GEO. L.J.* 1419 (2016); Bryan Stevenson, *A Presumption of Guilt: The Legacy of America's History of Racial Injustice*, in *POLICING THE BLACK MAN 3* (Angela J. Davis ed., 2017); Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns & Sheri Lynn Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 *PSYCH. SCI.* 383 (2006); JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* (2017).

28. *E.g.*, Kathryn M. Young & Jessica Pearlman, *Racial Disparities in Lifer Parole Outcomes: The Hidden Role of Professional Evaluations*, 47 *LAW & SOC. INQUIRY* 783 (2022).

29. *See* Rachael E. Barkow, *When Mercy Discriminates*, 102 *TEXAS L. REV.* 1365, 1369–70 (2024) (detailing studies of clemency grants, which indicate that white people receive clemency far more often than Black people, even though Black people make up a larger portion of the prison population).

30. *Cf.* CHERRY, *supra* note 6, at 84–85 (bringing attention to the “hurry-and-bury ritual,” in which the public quickly asks women and nonwhite victims, at a disproportionate rate, to forgive).

31. *Cf.* CNN, *‘The Bible Tells Us to Forgive’: Church Deacon Says Buffalo Shooting Victim Would Forgive Gunman*, *YOUTUBE* (May 19, 2022), <https://www.youtube.com/watch?v=NyJaYmKoJ3s> [<https://perma.cc/4X6E-UZ5V>] (reporting on a request for mercy after a racial mass shooting in Buffalo, New York).

32. Henry Kamm, *Pope Meets in Jail with His Attacker*, *N.Y. TIMES*, Dec. 28, 1983, at A1, <https://www.nytimes.com/1983/12/28/world/pope-meets-in-jail-with-his-attacker.html> [<https://perma.cc/75N9-LV47>].

33. *See, e.g.*, Mueller, *supra* note 25 (focusing on husband’s call for forgiveness when his wife intended to kill him); Andy Newman, *Judge Grants Couple’s Wish for Mercy*, *N.Y. TIMES*, July 24, 2001, at B3, <https://www.nytimes.com/2001/07/24/nyregion/judge-grants-couple-s-wish-for->

Yet one cannot help but notice a particularly common social script when it comes to victims of crime centered on sensitive racial, religious, and gendered fault lines. No sooner is the evidence gathered and the crime fully realized in the public mind, than does some journalist, as though acting as a representative of a shocked public, ask whether the victims can ever find it in their heart to forgive the perpetrator.³⁴ This Essay began by noting the voracious public consumption of expressions of forgiveness by the families of the victims of the Charleston shooting.³⁵ Another example can be seen in Payton Gendron—a White, self-proclaimed racist, fascist, and antisemite—who opened fire in May 2022 in a Buffalo supermarket within a predominately Black neighborhood, expressly to kill as many Black people as he could.³⁶ Mere days after the shooting occurred, national news outlets were inquiring of family and friends if they could forgive the gunman, or even more strikingly, whether they imagined that the now-deceased victims would have forgiven him.³⁷

The same pattern, even if less amplified, repeats itself in the case of other marginalized victims as well. On June 12, 2016, a gunman entered Pulse, an Orlando gay nightclub, and opened fire with a semi-automatic rifle and handgun, killing forty-nine people and wounding fifty-three others—at the time the deadliest mass shooting in U.S. history.³⁸ A mere week later, media accounts of parents forgiving the gunman were featured in national broadcasts.³⁹ Similar forgiveness stories have continued to arise long after

mercy.html [https://perma.cc/TK4Q-UP2H] (reporting on a husband's call for forgiveness of his wife's murderer); Nate Gartrell, *Emotional Oakland Court Hearing Sees Pleas for Mercy from Murder Victim's Family, Then a Life Sentence*, MERCURY NEWS (Nov. 21, 2023, 4:07 AM), <https://www.mercurynews.com/2023/11/20/emotional-oakland-court-hearing-sees-pleas-for-mercy-from-murder-victims-family-then-a-life-sentence/> [https://perma.cc/7NVD-BJC4] (illustrating a daughter's call for forgiveness of her father's murderer). For exploration of the pull of mercy in the context of death, see generally Stephen P. Garvey, *supra* note 20, and Austin Sarat, *Mercy, Clemency, and Capital Punishment: Two Accounts*, 3 OHIO ST. J. CRIM. L. 273 (2005).

34. See, e.g., CHERRY, *supra* note 6, at 83–85 (discussing forgiveness requests after the murders of Trayvon Martin, Samuel DuBose, and Eric Garner).

35. See *supra* note 5 and accompanying text.

36. Shimon Prokupecz, Christina Maxouris, Dakin Andone, Samantha Beech & Amir Vera, *What We Know About Buffalo Supermarket Shooting Suspect Payton Gendron*, CNN (June 2, 2022, 5:22 PM), <https://www.cnn.com/2022/05/15/us/payton-gendron-buffalo-shooting-suspect-what-we-know/index.html> [https://perma.cc/CJ8F-JAQA] (June 2, 2022, 5:22 PM).

37. E.g., CNN, *supra* note 31.

38. Matthew Grimson, David Wyllie & Elisha Fieldstadt, *Orlando Nightclub Shooting: Mass Casualties After Gunman Opens Fire in Gay Club*, NBC NEWS (June 13, 2016, 4:15 AM), <https://www.nbcnews.com/news/us-news/orlando-nightclub-shooting-emergency-services-respond-reports-gunman-n590446> [https://perma.cc/SK7U-KCMP].

39. E.g., Aarti Shahani, *A Father's Grief—And Forgiveness—In Orlando*, NPR (June 19, 2016, 7:00 PM), <https://www.npr.org/2016/06/19/482686317/a-fathers-grief-and-forgiveness-in-orlando> [https://perma.cc/6EEV-J6LD].

the shooting.⁴⁰ Similarly, on October 27, 2018, a gunman entered Tree of Life synagogue in Pittsburgh, Pennsylvania, killed eleven people, and wounded six others.⁴¹ It is among the largest mass-religious killing of Jewish people in United States history.⁴² Perhaps all too naturally given the shared religious settings, explicit analogies were made to the Charleston murders, and journalists pressed victims on the same themes of forgiving the unforgivable.⁴³ Interestingly, in the Pittsburgh tragedy, the Jewish victims were more willing to push back on the public pressure to express forgiveness than the Black victims in Charleston.⁴⁴ The victims in that shooting noted that granting forgiveness before the perpetrator atoned would be inappropriate.⁴⁵

Even if it is difficult to precisely catalogue the difference in demand between minority victims and others, the rhythm of this social script is well enough known. While the forgiveness of any victims of grave wrongdoing induces a certain wonder, the forgiveness of marginalized minorities is often requested (demanded?) even in the near aftermath of their suffering.⁴⁶ Moreover, this social script comes with a complement. Forgiveness from those marginalized by race, sexuality, or gender, when they are subject to hateful violence, is not only asked for but amplified and consumed voraciously by the public.⁴⁷

The public appetite for absolution from racist violence is rapacious and broad, feeding upon any incident of tinged racial threat, from the grave to the

40. See, e.g., ASSOCIATED PRESS, *How a Pulse Nightclub Survivor Learned to Forgive the Gunman*, WBAL (June 7, 2017), <https://www.wbal.com/how-a-pulse-nightclub-survivor-learned-to-forgive-the-gunman/> [<https://perma.cc/7UHQ-QADR>] (“Naulings sometimes imagines what he would say to Mateen’s son: ‘You know what? I forgive your father.’”).

41. Campbell Robertson, Christopher Mele & Sabrina Tavernise, *11 Killed in Synagogue Massacre; Suspect Charged with 29 Counts*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html> [<https://perma.cc/RMS2-C8JT>].

42. *Id.*

43. See, e.g., Kevin Sack, *Anguished by ‘Spiral of Hate,’ Charleston Pastor and Pittsburgh Rabbi Grieve as One*, N.Y. TIMES (Nov. 3, 2018), <https://www.nytimes.com/2018/11/03/us/pittsburgh-synagogue-charleston-emanuel.html> [<https://perma.cc/TYA5-YRS4>] (comparing demonstrations of “Christian grace” in the Charleston shooting to the potential forgiveness of Jewish mourners in the Pittsburgh shooting).

44. See *id.* (explaining how Judaism requires the offender to ask for forgiveness first); Anya Sostek, *‘That Perpetrator Hasn’t Sought Forgiveness in Any Way’: Jewish Faith Says Pittsburgh Synagogue Shooter Cannot Be Forgiven Until He Seeks It*, PITT. POST-GAZETTE (July 24, 2023, 3:04 PM), <https://www.post-gazette.com/news/faith-religion/2023/07/23/pittsburgh-synagogue-shooting-bowers-trial-death-penalty-jewish/stories/202307230006> [<https://perma.cc/M6KH-JHFA>] (same).

45. Sostek, *supra* note 44.

46. See, e.g., CHERRY, *supra* note 6, at 86–87 (discussing how quick requests of forgiveness to Black victims violate the “Too Soon Norm”).

47. See *id.* at 83–84 (highlighting the coverage of prominent racial crimes to emphasize the public’s investment in forgiveness).

slight. Recall an iconic early moment in America's contemporary wrestling with racist police violence: the police assault of Black motorist Rodney King by four White Los Angeles police officers, while other officers watched on, in March 1991, which was caught on video and carried by news media to the entire nation.⁴⁸ The video exposed the underlying fraught relationship between the Black community and police in Los Angeles (and elsewhere) and sparked days of protest and riots.⁴⁹ Yet the enduring public takeaway seemed to be less about addressing the underlying social wound—the need for structural reform of policing—and instead was more about King's televised plea, where he uttered the oft-repeated phrase, “[C]an we all get along?”⁵⁰ There is little doubt that had George Floyd survived, there would have been tremendous pressure on him to offer similar reassurance.

The hunger for racial absolution appears in wrongs much more intimate than citywide unrest and national news. I am honored to serve on the Board of Directors of the Innocence Project, which for decades has secured the release of the wrongfully convicted through the use of DNA and other evidence.⁵¹ The exonerees have often spent not just years but decades in prison, and the population is disproportionately Black.⁵² Many exonerees reflect on the devastating loss of so many years of their life with extraordinary magnanimity; it is perhaps a feature necessary to continue on to a flourishing life in the face of such injustice.⁵³ Yet one cannot help but notice that stories of exonerees absolving the actors in their convictions, even those actors who

48. Cydney Adams, *March 3, 1991: Rodney King Beating Caught on Video*, CBS EVENING NEWS (Mar. 3, 2016, 6:00 AM), <https://www.cbsnews.com/news/march-3rd-1991-rodney-king-lapd-beating-caught-on-video/> [<https://perma.cc/63T6-36KC>].

49. See Seth Mydans, *Videotaped Beating by Officers Puts Full Glare on Brutality Issue*, N.Y. TIMES, Mar. 18, 1991, at A1 <https://timesmachine.nytimes.com/timesmachine/1991/03/18/031291.html> [<https://perma.cc/25WZ-Y3RX>] (stating that the “beating has pushed the issue of police brutality to the forefront of the criminal justice debate”); Harvey Levin, *Trial by Fire*, 66 S. CAL. L. REV. 1619, 1620, 1632–36 (1993) (describing Los Angeles as “a war zone” after not-guilty verdicts were returned for the police officers); ELIZABETH HINTON, *AMERICA ON FIRE: THE UNTOLD HISTORY OF POLICE VIOLENCE AND BLACK REBELLION SINCE THE 1960S* 229–30 (2021) (describing the riots in Los Angeles after the verdicts for the police officers became public).

50. See Conor Friedersdorf, *Rodney King's Finest Hour*, ATLANTIC (Apr. 30, 2022), <https://www.theatlantic.com/ideas/archive/2022/04/rodney-king-riots-30-year-anniversary/629729/> [<https://perma.cc/3XE7-WEMJ>] (applauding Rodney King's press conference where he expressed his “hopes of stopping the death and destruction”).

51. *History of Impact*, INNOCENCE PROJECT, <https://history.innocenceproject.org/> [<https://perma.cc/96JJ-MKS2>].

52. *Race and Wrongful Conviction*, INNOCENCE PROJECT, <https://innocenceproject.org/race-and-wrongful-conviction/> [<https://perma.cc/53H7-KCPM>].

53. See, e.g., Mary Spiller, *Yusef Salaam, Central Park 5 Exoneree Turned NYC Council Candidate, Champions Forgiveness and Advocacy for New York*, BLACK ENTER. (Oct. 8, 2023), <https://www.blackenterprise.com/exonerated-five-yusef-salaam-forgiveness-politics/> [<https://perma.cc/JY3T-WWS3>] (describing the willingness of Yusef Salaam, who was wrongfully convicted of raping a white woman in the “Central Park 5” case, to forgive those involved).

played vicious roles, and forgiving the criminal justice system and perhaps even society more broadly, are eagerly consumed by audiences.⁵⁴

This pattern holds in even smaller scale moments of racial tension. When Christian Cooper, a birdwatcher, encountered Amy Cooper (no relation) walking her dog in an area of Central Park, New York, he insisted she leash her dog as required by regulation.⁵⁵ She responded by calling the police, feigning a scared and tearful voice, and reported that an “African-American” man was threatening her.⁵⁶ Because the incident occurred on the same day as the murder of George Floyd, the underlying racial threat of police violence was unmistakable, and the video went viral. Amy Cooper was reviled as an example of casual feminine, White “victimhood” that endangered Black men.⁵⁷ Though public condemnation of Amy Cooper was swift, so too was the public’s consumption of Christian Cooper’s forgiveness of her and his decision to not aid in her being investigated.⁵⁸

Having met and known exonerees, I do not for a moment doubt their sincerity, just as I do not doubt the religious sincerity of the families of the murdered in Charleston. But the public interest in racially explosive moments does not seem to be about understanding. Nor does it see victims in their totality. Instead, it is sated only by stories of forgiveness, by release from racial anxiety, and by permission to close the chapter and ignore the underlying wound. It is easy to note that the words of the families of the victims in the racist Buffalo killing, where anger and condemnation mixed in

54. See, e.g., Lara Bazelon, *Justice After Injustice*, SLATE (Sept. 30, 2015, 5:02 AM), <https://slate.com/news-and-politics/2015/09/restorative-justice-for-false-convictions-crime-victims-and-exonerated-convicts-work-together.html> [<https://perma.cc/R3L9-9T95>] (discussing “[w]hat happens after a wrongfully convicted person is exonerated—and the witness finds out she identified the wrong man”).

55. Sarah Maslin Nir, *White Woman Is Fired After Calling Police on Black Man in Central Park*, N.Y. TIMES (Feb. 16, 2021), <https://www.nytimes.com/2020/05/26/nyregion/amy-cooper-dog-central-park.html> [<https://perma.cc/T39G-FAW4>].

56. *Id.*

57. See Devon W. Carbado, *Strict Scrutiny & the Black Body*, 69 UCLA L. REV. 2, 5–11 (2022) (describing Amy Cooper’s racist conduct as “leveraging death,” in which she “was mobilizing her racial bargaining power in the shadow of state violence”).

58. See, e.g., Sarah Maslin Nir, *The Bird Watcher, That Incident and His Feelings on the Woman’s Fate*, N.Y. TIMES (Sept. 9, 2020), <https://www.nytimes.com/2020/05/27/nyregion/amy-cooper-christian-central-park-video.html> [<https://perma.cc/G8ZK-SCDN>] (noting that Christian Cooper was not excusing the racism but did not want her to be attacked); Christian Cooper, *Opinion, Why I Have Chosen Not to Aid the Investigation of Amy Cooper*, WASH. POST (July 14, 2020, 1:09 PM), https://www.washingtonpost.com/opinions/christian-cooper-why-i-am-declining-to-be-involved-in-amy-coopers-prosecution/2020/07/14/1ba3a920-c5d4-11ea-b037-f9711f89ee46_story.html [<https://perma.cc/6A78-WHC5>] (explaining his decision to “err on the side of compassion” and not help the prosecution of Amy Cooper).

equal measure with forgiveness and religious surrender,⁵⁹ received much less national attention. One worries that our admiration for the noble pushes aside the ability of others to express rightful anger, loss, or any emotions more complex than uplifting.

III. Racial Wounds as the Site of Forgiveness

That there is greater demand for Black hate-crime victims to offer public forgiveness, and in turn ask for institutional mercy, than for White victims, does not fully capture the dangers of this social script. Notice that in prominent, socially salient examples, the source of the wrongdoing is precisely that the harm is laced with racist hatred or contempt. The same social script does not apply to minority victims of “ordinary crimes.” While forgiveness of serious wrongdoing, even in an ordinary crime absent racial hatred, is always noteworthy, I am struck by the absence of visible social pressure to forgive. Though one can only observe the absence of the same social script, it seems victims of non-racialized violence are neither immediately requested to offer forgiveness nor have their merciful pronouncements broadly amplified. There seems to be no longing to have Black victims of an ordinary mugging or even murder forgive their assailant.⁶⁰

Rather, the public anxiety for forgiveness is centered around wrongs that are premised on sites of racial vulnerability. That is, we are most anxious to hear Black victims repudiate their calls for justice when they are harmed for being Black. We hunger for forgiveness by gay victims of homophobic violence. And, depending on the circumstance, we wish for women victimized by sexist or gendered wrongdoing to forgive.⁶¹ To be sure, we occasionally see evidence of similar concern with racially coded violence,

59. See Emily Belz, *Buffalo Survivors to Shooter: ‘You Will Not Escape the Fury of the Almighty,’* CHRISTIANITY TODAY (Feb. 15, 2023, 3:02 PM), <https://www.christianitytoday.com/news/2023/february/buffalo-shooting-sentencing-forgiveness-imprecatory-psalms.html> [<https://perma.cc/7HUL-4NZW>] (reporting on the statements of the family members of victims, including statements mixing God’s vengeance and mercy).

60. See Itay Ravid, *Inconspicuous Victims*, 25 LEWIS & CLARK L. REV. 529, 531–32, 544–45 (2021) (explaining the hierarchy of “victim-worthiness,” in which nonviolent, Black victims are placed at the bottom); see also Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 425 (1988) (using the case of Bernhard Goetz shooting Black minors on the subway as an example of how race can shift who is worthy of being considered as a victim).

61. Cf. Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1273–99 (1994) (explaining how “victim-offender mediation” seeks to discourage anger and look toward the future instead of the past harm). In the case of Black women, the combination serves to push them into an ever more subordinate position. CHERRY, *supra* note 6, at 93. For an introduction into intersectionality, see generally Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies*, 1 U. CHI. LEGAL F. 139 (1989).

even when not an exemplar of racist hatred.⁶² But it is hate crimes—wrongs premised on systemic vulnerability—that attract the most social pressure to forgive.

By contrast, crimes unrelated to racial and gender fault lines, and particularly when aimed at White people, do not seem to elicit immediate requests or inquiry as to whether the victims can forgive. I suspect we would have found it not just strange but deeply inappropriate if a reporter would have asked the families of the children killed in the Sandy Hook massacre if they could forgive the shooter, particularly immediately after the shooting.⁶³ Indeed, despite the fact that Scarlett Lewis, whose son Jesse was among the twenty children and six adults killed that day,⁶⁴ has spoken publicly about her faith-guided forgiveness, her story has been much less noticed than the collective advocacy of the parents to address gun control.⁶⁵ Similarly, I was struck by the social permission to express deep anger allowed to the parents of the victims of the Oxford, Michigan high school shooting, who collectively asked for the maximum sentence allowed by law.⁶⁶

In short, the social script focuses not simply on harm to Black and other vulnerable victims but on harm visited upon them *because* of their racial identity or other vulnerable characteristics. Granting forgiveness and asking for mercy may always be admired, regardless of its racial salience. But it is immediately, almost desperately, requested when we are faced with evidence that harm and violence is aimed at the vulnerable precisely because of their race, gender, sexuality, or so on. White parents are allowed to be angry and

62. See, e.g., Newman, *supra* note 33 (noting that the victim's parents expressed forgiveness despite the murder of a middle-class white woman).

63. It is worth noting that the shooter, Adam Lanza, died that day of suicide. But the death of the killer has not stopped the media from inquiring about hypothetical forgiveness in other killings. See, e.g., Shahani, *supra* note 39 (highlighting the father of a Pulse Massacre victim, which was the deadliest mass shooting in U.S. history at the time, expressing his forgiveness for the gunman).

64. *Sandy Hook Elementary School Shooting Victims*, ABC NEWS (Dec. 16, 2012, 12:02 PM), <https://abcnews.go.com/US/sandy-hook-elementary-school-shooting-victims/story?id=17984685> [<https://perma.cc/5RNG-LS65>].

65. Compare Michael Alison Chandler, *Five Years After Sandy Hook Shooting, How One Mother Learned to Forgive*, WASH. POST (Apr. 11, 2017, 5:30 AM), <https://www.washingtonpost.com/news/inspired-life/wp/2017/04/11/five-years-after-sandy-hook-shooting-how-one-mother-learned-to-forgive/> [<https://perma.cc/R8UJ-DJ7N>] (describing the forgiveness of another parent of a Sandy Hook victim), with Ed Pilkington, *Sandy Hook Parents Press Gunmakers to Stop Marketing Weapons of War to Kids*, GUARDIAN (Jan. 4, 2024, 7:00 AM), <https://www.theguardian.com/us-news/2024/jan/04/sandy-hook-parents-anti-gun-campaign-marketing-to-kids> [<https://perma.cc/4RE8-8Y7F>] (representing the voluminous coverage of the parents who have formed Sandy Hook Promise and their continued gun control advocacy).

66. See Anna Liz Nichols & Lily Guiney, *Families of Slain Students Speak at the Sentencing of Oxford High School Shooter*, MICH. ADVANCE (Dec. 8, 2023, 12:06 PM), <https://michiganadvance.com/2023/12/08/families-of-slain-students-speak-at-the-sentencing-of-oxford-high-school-shooter/> [<https://perma.cc/5TV3-54M4>] (detailing the pain and anger coming from the statements of those related to the victims).

are celebrated for their political action. Black families are celebrated for being forgiving.⁶⁷

IV. The (Social) Meaning of Black Forgiveness

The concern is that there is a social script that demands that certain victims offer forgiveness, in turn calling on the legal system for mercy, when they are wronged. In particular, Black and other minority victims of wrongdoing are pressed to offer forgiveness when they are harmed *because* of their vulnerable status. If our observation of this social script is correct, then the question of its cause naturally arises: Why does the public so hunger for Black forgiveness for racial violence? What is the social meaning of Black and other minority victims being asked, perhaps pressed, to forgive violence against them?⁶⁸

The answer is not terrifically surprising. The demand for forgiveness and mercy in the face of legal wrongdoing accords with social expectations of mercy in much more personal realms. For all the en vogue concerns about the militancy of Black, minority, female anger, or expansive, fanciful, and abusive claims of racial injury,⁶⁹ the social science tells a more complicated story. When the disenfranchised are harmed or insulted because of their social status, the ordinary response may not be recalcitrance. Rather, minorities and the vulnerable have too often internalized that racist or gendered slights are paired with intense social pressure to reassure the very people who injured you and their fellow travelers that nothing significant has happened.⁷⁰ In the case of the unintentional racist act or joke, Black people

67. Compare Steven Eisenstat, *Revenge, Justice and Law: Recognizing the Victim's Desire for Vengeance as a Justification for Punishment*, 50 WAYNE L. REV. 1115, 1157–58 (2004) (contending that anger from white victims may be used for positive social goals), with Barrett Holmes Pitner, *Viewpoint: How a Hug Sparked Debate on Race and Forgiveness*, BBC (Oct. 4, 2019), <https://www.bbc.com/news/world-us-canada-49926041> [<https://perma.cc/8N7L-JS6T>] (analyzing the beliefs of American culture surrounding Black anger, which dates back to slave rebellions being seen as “unwarranted acts of [B]lack aggression”).

68. For an argument that Black victims can reasonably infer that forgiveness requests, in effect, “seek relief from white discomfort, release from moral action, and superficial repair,” see CHERRY, *supra* note 6, at 91.

69. See, e.g., RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* 6–7, 18–19, 99–100 (Picador 2009) (2008) (arguing that the social and legal meaning of “racism” is without a “single clear and agreed-upon meaning,” leading to “racism-by-analogy claims” and “[p]laying the race card”). On the preemptive dismissal of claims of racism and sexism as inherently in bad faith, see David Schraub, *Deliberation and Dismissal*, 22 U. PA. J. CONST. L. 1319, 1357–62 (2020).

70. See Maria R. Lowe, Reginald A. Byron, Holly O’Hara & Dakota Cortez, *Neutralized Hegemonic Banter: The Persistence of Sexist and Racist Joking Among Undergraduate Students*, 91 SOCIO. INQUIRY 181, 183 (2021) (arguing that an acknowledgment of racist or sexist “banter” is met with claims that the behavior was a joke or that the victims are too sensitive, which victims then internalize as psychologically damaging microaggressions); see also R.A. Lenhardt,

are often called on to reassure the injuring party that “it’s all ok.” They are not the type to “take it too seriously.”⁷¹

Obviously, there is no perfect analogy in the case of racist violence. In the face of serious or intentional racist violence, the wrongdoer’s act cannot be dismissed lightly. No one can suggest that the family of the victims of the Charlestown killings were in any way intimating that they condoned the racist murder of their loved ones. Yet the same kind of reflexive social request to reassure others about the depth of the harm may, consciously or unconsciously, be made by those who see themselves as standing alongside the wrongdoer. Faced with an act of racial violence, White bystanders cannot help but be confronted with the knowledge that the violence evinces longstanding urges of racial domination in the name of Whiteness.⁷² Because the most piercing forms of racist violence echo through our history, it will confirm, for some, the racism about which they are concerned. For others, it makes impossible the denial of the racism they wish to ignore. In any case, for all who worry that such violence is inflicted in their name, that they are being made to associate themselves with it, it will cause an anxiety to both repudiate it and obtain assurance that the injury does not stain them.⁷³

Understanding the Mark: Race, Stigma, and Equality in Context, 79 N.Y.U. L. REV. 803, 839–44 (2004) (explaining the social and psychological effects caused by internalizing racial stigmatization); Brenda Major & Laurie T. O’Brien, *The Social Psychology of Stigma*, 56 ANN. REV. PSYCH. 393, 403–04 (2005) (identifying the complex ways people deal with stereotype threats, including consciously or unconsciously screening them out).

71. See Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1353, 1356 (2005) (“If I speak of the racism that has created these conditions, I will likely be heard to call my colleague racist. I would be misunderstood, and I do not want to offend.”); see also Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT’L BLACK L.J. 1, 5 (1988) (discussing the perception that arguments based on racial, experiential knowledge are emotional rather than rational). This phenomenon can be amplified in the workplace. See Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645, 1654 (2004) (claiming that corporations promote minorities that are “unlikely to be invested in facilitating the promotion of other nonwhites” because corporations reward “racial disidentification” and feel costs from “perceived racial group association”).

72. See Ekow N. Yankah, *Deputization and Privileged White Violence*, 77 STAN. L. REV. (forthcoming 2024) (manuscript at 9) (on file with author) (explaining “deputization” to be “innate to Whiteness in America,” in which White Americans use a longstanding legal power “to claim authority to enforce the law, as they see it, upon racial minorities”); Jacob D. Charles & Darrell A. H. Miller, *The New Outlawry*, 124 COLUM. L. REV. (forthcoming 2024) (manuscript at 4–5, 8) (on file with author) (providing contemporary examples of racial violence in which the killers believe themselves to be acting in the name of justice); Sean A. Hill II, *The Right to Violence* 8–11 (Ohio St. Legal Stud., Working Paper No. 811, 2023), <https://ssrn.com/abstract=4634278> [<https://perma.cc/93AT-ULU3>] (addressing the “right to violence” against non-white persons, which has existed since its exercise against indigenous populations and enslaved people).

73. See CHERRY, *supra* note 6, at 91 (contending that “whites typically do not develop the psychological stamina” to discuss or think about race); Schraub, *supra* note 69, at 1363–66

Racist violence done in the name of White supremacy induces an ugly guilt by association in the broader White public.⁷⁴ Across racial lines, racist violence makes it impossible to escape the past and present of our racial divide. Even if the spectacular violence of a mass shooter seems unfathomable, his hatred hints at more quotidian forms of racist behavior. In any case, such violence shatters the widely shared hope that we are making ever more racial progress towards a post-racial world. Little wonder that the public desperately seeks reassurance that the injury is not a symbol of an insurmountable racial curse. So even if not identical to the Black co-worker assuring that a racist joke is “no big deal,” victims and their families are uniquely placed, and uniquely pressured, to reassure our racial anxiety.⁷⁵

The pressure on crime victims to perform a role in offering public salve, potentially at a high personal, emotional cost, should already ground a shared ethical concern for our fellow citizens.⁷⁶ It is a particularly troubling concern if it adds to the various burdens that our history of racial oppression already places upon people of color.⁷⁷ But it is important to point out that the cost of this ritual of “Black forgiveness” is not only a personal burden borne by the victims. It has important political and legal ramifications that invite concern about the extent to which vulnerable victims should grant forgiveness and seek mercy.⁷⁸ Now, this Essay will briefly suggest three problems in our shared political project that are amplified when vulnerable victims forgive too easily.

(exploring how contemplations of racism raise anxiety); *see also* Ekow N. Yankah, *Whose Burden to Bear? Privilege, Lawbreaking and Race*, 16 CRIM. L. & PHIL. 13, 18–20 (2022) (discussing how systemic injustice recasts one’s successes as a form of “unjust enrichment”).

74. On the general idea that resentment is used as a defense against low self-esteem, see Murphy, *supra* note 9, at 93.

75. In a related conversation, Delmas explores how the strictures of civility can unjustly demand that resistance to racial oppression not create discomfort for the beneficiaries of oppression. *See generally* CANDICE DELMAS, *A DUTY TO RESIST: WHEN DISOBEDIENCE SHOULD BE UNCIVIL* (2018).

76. *See* CHERRY, *supra* note 6, at 94–97 (explaining that, instead of publicly asking for the forgiveness, we should ask victims and their relatives what they want to say and how we can help).

77. *See id.* at 94 (arguing that public requests for forgiveness may enforce views that Black victims are inferior); Yankah, *supra* note 73, at 17 (“But the most serious demands of political morality do not rest on the victims of injustice.”); Carol Hay, *The Obligation to Resist Oppression*, 42 J. SOC. PHIL. 21, 29 (2011) (casting the personal costs to victim’s in maintaining their sense of dignity in Kantian terms).

78. *See* MINOW, *supra* note 11, at 7–8 (claiming that forgiving the offender and advocating for punishment are not mutually exclusive, as one person’s forgiveness does not automatically compel others to forgive).

A. *Forgiveness Without Substantive Address*

The first, most obvious fault of offering forgiveness too quickly is that it may be to offer forgiveness before it is deserved. Though there is a sense in which forgiveness and mercy are typically understood as undeserved grace from deserved punishment or condemnation, there is a deep tradition that requires wrongdoers to atone for their wrong, at least in part, before one can forgive them and move on.⁷⁹ Atoning typically requires the offender to fully acknowledge the wrong they have done and show they are committed to making it right as best as they can. Forgiveness is sought because there is some aspect of the wrong that cannot be completely cured. A person who has perfectly replaced the item he broke, leaving no inconvenience, does not need your forgiveness. When asking for forgiveness, the wrongdoer acknowledges this remaining harm, be it large or small, but can point to the ways she has addressed the underlying wrong.

The analogy from personal to collective absolution is not perfect. There may be little a gunman can do, save words of apology, to address the aftermath of his killings. Insufficient time may have passed for the offender to have done anything that counts as attempting redress.⁸⁰ In the extreme case, the attacker may be dead and thus the question of forgiveness is not addressed to them. Yet facets of the personal example do have lessons for us in legal and political realms. When harm is aimed at victims due to their race, gender, or other vulnerable trait, the harm in part draws on the socially salient claim of that person's inferiority.⁸¹ Ordinary crime, devoid of hate, or premised on some idiosyncratic feature (imagine someone attacking redheads) lacks the historically shared message of group-based inferiority.⁸² It is precisely because such crimes attack fragile civic fault lines, embedded

79. See CHERRY, *supra* note 6, at 84–85 (explaining the idea of moral markers in the healing process, such as reparations or sincere apologies, which must be present for forgiveness requests to not be accurately described as “quick”). Note this demand on atonement was relied upon when leaders at the Pittsburgh synagogue were asked whether they would forgive the gunman who murdered their fellow congregants. Sostek, *supra* note 44.

80. The fact that insufficient time has passed for any real redress to occur, however, may be its own sign that the request for or granting of forgiveness is rushed or inappropriate. See Claudia Card, *supra* note 13, at 202 (exploring whether other conditions may justify mercy even where the offender has not atoned).

81. See Yankah, *supra* note 23, at 468–70 (“Hate crimes are of special concern because an offender establishes as part of the very point of a harmful act—a beating, threat or murder—the denial of another citizen’s equal standing as a member of our civic community.”); cf. Ekow N. Yankah, *Ahmaud Arbery, Reckless Racism and Hate Crimes: Recklessness as Hate Crime Enhancement*, 53 ARIZ. ST. L.J. 681, 701–05 (2021) (arguing that reckless racial violence should have the same penalty as intentional racial violence, because a “reckless hate crime” may either obscure intentional hate crimes or be independently culpable).

82. See, e.g., Yankah, *supra* note 23, at 472 (arguing that hate crime is justified by the polity’s recognition of its racist history having rendered “the civic equality of certain groups particularly vulnerable”).

in our history, that it creates anxiety in the wider public.⁸³ Such crimes point to underlying injustices broader than the individuals involved; they point to longstanding wrongful messages in which we all must take an interest.

Thus, forgiveness offered without corrective efforts by all of us who broadly have an interest in addressing the wrong done, as in the personal case, is to offer forgiveness too cheaply. It is to offer forgiveness without the appropriate demand that the underlying source of racial contempt, gender domination, violent homophobia, and so on, is appropriately addressed. Investing in public safety of vulnerable communities, combating ugly stereotypes and rhetoric that fuel hatred, or even broader, addressing social conditions of deprivation that send the social signal that some groups are contemptible, are critical forms of responding to hate-fueled violence.⁸⁴ When exactly a society has done enough, so that background conditions do not require the vulnerable to measure whether they can freely grant forgiveness, is a difficult thing to measure. But, as in our personal lives, forgiveness for politically shared wrongs offered too cheaply can mislead listeners into assuming that the problem has been sufficiently addressed—that they no longer need to be concerned or focus resources on curing the wound.⁸⁵

B. *Forgiveness and Suppliance*

A second distinct concern is that being disproportionately and repeatedly pressed to forgive wrongful injury aimed at oneself is to participate in a form of social supplication. This may seem counterintuitive at first glance. Being in the position to forgive is usually seen as a normative power one holds over another. To the extent it is the forgiver that may release the wrongdoer from forms of rightful condemnation (even if just from the forgiver) and perhaps punishment, the forgiver holds something above the head of the wrongdoer. They may, in at least this one moment, grant absolution as a lord over a server.⁸⁶

83. *Id.*

84. See, e.g., CHERRY, *supra* note 6, at 69–70 (explaining how the use of blunt truth in a public space may help victims heal by “regain[ing] a sense of personal and civic power”); TOMMIE SHELBY, DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM 114–15, 216–27 (2016) (arguing that “it falls to concerned private citizens and organizations” to ensure that active resistance to social conditions is met).

85. Obviously, in the case of grave racist violence, no reasonable person misses the wrongful aspect of the harm. Yet the desire to rush past the motivating prejudice may dim the clarity with which others recognize the salience of current racial, gendered, and homophobic hatred. Ashwini Vasanthakumar, *Epistemic Privilege and Victims’ Duties to Resist Their Oppression*, 35 J. APPLIED PHIL. 465, 470–71 (2018) (pointing out that victims have special insight into the way oppression may continue to harm that others do not see).

86. See CHERRY, *supra* note 6, at 69–70 (noting that although forgiveness is “neither cheap nor easy,” having the choice to publicly forgive the offender empowers victims).

But the ennobling status of forgiveness can be inverted when too quickly granted and too commonly expected. Recall Pope John Paul's forgiveness of Mehmet Ali Ağca, his would-be assassin.⁸⁷ Though the Pope's act of forgiveness was applauded, it could also be understood as fitting. If there is someone who we can expect to forgive a wrong against himself, it might well be the Pope. Put colloquially, the Pope is the kind of person we expect to be forgiving.

When such expectations are placed on those in a different domain, however, the expectation becomes decidedly less comfortable. In a different context, one might deeply worry about what it means to be seen as the kind of person from whom forgiveness is expected. In the personal case, a friend that too quickly forgives appalling behavior, say from a romantic partner, might raise concern that they insufficiently value themselves, repudiate the wrongful behavior, or demand to be treated by others with the required level of respect.⁸⁸

Likewise, there is the worry that too quickly forgiving in the public sphere and asking for mercy for wrongdoers undermines the reaffirming expressive value in punishment.⁸⁹ Punishment is, I have argued elsewhere,⁹⁰ best seen as justified by its role in protecting a scheme in which we can live as civic equals. Part of that function is consequentialist in nature; by depressing crimes that make it impossible for us to live together as equals,

87. Kamm, *supra* note 32; Andrea Torielli, *Gun Shots, Fear, Prayer and Forgiveness*, VATICAN NEWS (May 12, 2021, 2:36 PM), <https://www.vaticannews.va/en/pope/news/2021-05/gun-shots-fear-prayer-and-forgiveness.html> [<https://perma.cc/4AMQ-HKV6>].

88. Hay, *supra* note 77, at 22–24; Thomas E. Hill, Jr., *Servility and Self-Respect*, 57 *MONIST* 87, 95 (1973); Bernard R. Boxill, *The Responsibility of the Oppressed to Resist Their Own Oppression*, 41 *J. SOC. PHIL.* 1, 9–11 (2010). Resistance may also serve an important role not just in expressing one's self-respect but, in so doing, reinforcing one's well-being. See Daniel Silvermint, *Resistance and Well-Being*, 21 *J. POL. PHIL.* 405, 406 (2012). See generally Eric J. Miller, *The Moral Burdens of Police Wrongdoing*, 97 *RES PHILISOPHICA* 219 (2020) (exploring the related duties of the oppressed to resist state injustice).

89. See Hampton, *supra* note 11, at 123–33, 141–43 (explaining retributivists' concerns with forgiveness because of the potential for condoning the crime). Classic starting points for this view can be found in Jean Hampton, *Punishment, Feminism, and Political Identity: A Case Study in the Expressive Meaning of Law*, 11 *CAN. J.L. & JURIS.* 23 (1998); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 *UCLA L. REV.* 1659 (1992); and Joel Feinberg, *The Expressive Function of Punishment*, 49 *MONIST* 397, 400 (1965). For a related version of this retributivist view, see Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 *HARV. L. REV.* 1485, 1488 (2016). For inspection on how the use of criminal law can be dangerously exaggerated in the search for solidarity, see Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 *HASTINGS L.J.* 829, 903 (2000).

90. See Yankah, *supra* note 23, at 463–65, 472 (arguing that punishment is “embedded in the very social project of our living together as a civic community”); Ekow N. Yankah, *Punishing Them All: How Criminal Justice Should Account for Mass Incarceration*, 97 *RES PHILISOPHICA* 185, 197 (2020) (contending that if one's retributivism is overridden when it clashes with civic equality, then one should support “robust, full-blooded republican theory”).

punishment guards the viability of a working, shared civic life. But punishment also plays a role in communicating to the victim and the offender that we take the pain caused by wrongdoing seriously. It is an important way, among many available, that we rally to stand beside the victim. Whatever other future good may come of the punishment, it serves to forcefully repudiate the offender's claim that the victim is of lesser standing.⁹¹

I doubt that those throughout the wider public eagerly consuming Black forgiveness are intentionally dismissing the pain of minority families in the aftermath of fatal attacks. In our opening example, the religious convictions of particular Black victims and the knowledge of widespread religiosity in the Black community may make questions of forgiveness seem quite natural.⁹² Still, whether maliciously motivated or not, we should worry about the social meaning of being seen as a group who can be counted on to forgive wrongs against them. Further, where wrongs are aimed at certain victims because of their identity, the fusion of wrong and easy forgiveness in the social sphere represents its own danger. In particular, the claim can too easily fuse into a widely held, if subconscious, idea that the group should innately and naturally forgive wrongs inflicted upon them.⁹³ The public expectation becomes that some people can be gravely wronged and then counted on to forgive. The readiness with which they are expected to forgive grounds the suspicion that they do not take themselves seriously as "bearers of moral rights."⁹⁴ This view naturally lends itself to the understanding that certain types of people understand themselves as supplicant.

The idea that some types of people can and do forgive easily can be so internalized as to nearly escape notice. Faced with evidence of the stunning ways in which race shapes life outcomes in America or grounds the suspicion with which one is treated, Black and Brown people are often chided for

91. See George P. Fletcher, *Domination in Wrongdoing*, 76 B.U. L. REV. 347, 353–55 (1996) (discussing how the "deprivation of liberty and the stigmatization of the offense and the offender provide the means to counteract the criminal's dominance by reducing his capacity to exercise power and by symbolically lowering his status"); GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 37 (1998) ("The corrective side of punishment stresses the equalization of suffering as between victim . . . and offender.").

92. See CHERRY, *supra* note 6, at 89–90 ("We might take seeing Black victims profess their religion in public as a reliable sign that it is morally permissible to make forgiveness requests to them.").

93. MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 20 (1998) ("A general endorsement of the therapeutic benefits of forgiveness, though, confuses specific acts of deserved forgiveness with a policy of unconditional forgiveness." (internal quotations marks omitted)); see also Eisenstat, *supra* note 67, at 1157 (noting the victim's involuntary participation in the forgiveness process "usurps the victim's right to determine what is in his best interests, and in a sense, once again forces the victim to be subject to the will of another").

94. Murphy, *supra* note 13, at 164; Hay, *supra* note 77, at 22; Ashwini Vasanthakumar, *Recent Debates on Victim's Duties to Resist Their Oppression*, 15 PHIL. COMPASS 1, 2–3 (2020).

“thinking about race too much,” or “playing the race card.”⁹⁵ Women subject to certain forms of harassment and sexual assault are told to understand that “boys will be boys” and are asked if their experience was “real rape.”⁹⁶ And so on, and so on. Taken to an extreme, the persistent social pressure for vulnerable victims to forgive harm done to them because they are Black, female, or other may become a demand that they pay themselves less heed than others. It is a demand that they claim less respect from those who harm them because of who they are.

In short, the social meaning that certain kinds of people will naturally forgive may ground the impression that the underlying racism or sexism is not as serious as one might think. Of course, no one thinks having your family murdered can be anything but horrific, but if that family can forgive, maybe the underlying racism isn’t so stubborn . . . or so the thought goes. As noted, it leads to the social belief that some type of people naturally forgive the slings and arrows aimed at them as a group. In less dramatic crimes, forgiveness too quickly dispensed may lead to a shared understanding that the victim does not take harm to themselves as seriously as those in a dominant group might—and that others need not as well.⁹⁷

C. *Victim’s Duties to Future Vulnerable Victims*

Tying the prior two concerns together, the last worry is that when vulnerable victims forgive racist, gendered, or other harms, they may be inadvertently failing to uphold their duties to protect other potentially vulnerable persons. The recent surge in philosophy concerning “non-voluntaristic associative duties” has sought to convince us that even unhappy roles, such as crime victim, may be bound by obligation.⁹⁸ One role, pulling

95. See, e.g., FORD, *supra* note 69, at 12–17 (2008) (criticizing Justice Clarence Thomas for “implicitly evok[ing] the experience of blacks such as Emmett Till” to “advance his own ends” during the political fight over his nomination to the Supreme Court).

96. See, e.g., KATE MANNE, *DOWN GIRL: THE LOGIC OF MISOGYNY* 199, 211 (2018) (explaining how the mistaken belief that “real rapists will appear on our radars . . . as devils” impedes accountability and “exonerates by caricature”); SUSAN ESTRICH, *REAL RAPE* 4 (1987) (noting that “most rape cases are not . . . clear-cut” and thus are less often “considered real rapes”); VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 204 (1986) (describing survey data that suggests people wish to simultaneously punish rapists severely and blame victims); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 174 (Harv. Univ. Press 1991) (1989) (“Perhaps the wrong of rape has proved so difficult to define because the unquestionable starting point has been that rape is defined as distinct from intercourse, while for women it is difficult to distinguish the two under conditions of male dominance.” (footnote omitted)).

97. Murphy, *supra* note 13, at 164.

98. The ancient conception of non-voluntaristic associative duties can be found in Aristotle. See ARISTOTLE, *POLITICS* bk. I, at 2–5 (C.D.C. Reeve trans., Hackett Publ’g Co. 1998) (c. 384–322 B.C.) (describing the human being as a “political animal”); see also, RICHARD KRAUT, *ARISTOTLE: POLITICAL PHILOSOPHY* 243–48 (2002) (explaining Aristotle’s belief that humans’ “desire to live

towards forgiveness, may be the way victims and their families understand their unique power to heal the broader civic wounds of a crime by granting public forgiveness and pressing for mercy.⁹⁹ But it is also plausible that, in many cases, victims owe a duty to other potential future victims, particularly those who share the characteristics that render them vulnerable, to reinforce the social commitment to their protection by participating in and insisting on the punishment.

I put such claims in the language of duty to highlight that the demands may be experienced as unwelcome obligations or perhaps even as a conflict of duties.¹⁰⁰ For some victims, forgiveness expresses important religious commitments. For others, pursuing punishment may be emotionally laden or dangerous. Even without grave moral reasons, some victims may simply find it costly or inconvenient to pursue punishment.¹⁰¹ Against these interests, it can only be pointed out to the victim that if they refuse to participate in punishment and instead press for institutionalized mercy for the wrongdoer, they may leave future potential victims in a worse position to rebuff wrongful attacks.

To see this, return to our earlier example: imagine a vulnerable victim—perhaps the victim of a racial attack or domestic violence. This victim is fortunate enough to be well-resourced, both psychologically and materially. Medical care, friends, and family will see to her well-being. Dwelling on the costs of pursuing further punishment or weighing her religious commitment to forgiveness, she is inclined to not press charges or to request merciful disposition for the offender. But notice that doing so means the underlying

well” animates the growth of larger and larger communities linked by interdependent obligations). For modern discussions of non-voluntaristic associative duties, see generally RONALD DWORKIN, *LAW’S EMPIRE* 166–201 (1986); Samuel Scheffler, *Relationships and Responsibilities*, 26 *PHIL. & PUB. AFFS.* 189 (1997); Samuel Scheffler, Professor of Phil., Univ. of Cal., Berkeley, *Families, Nations and Strangers*, The Lindley Lecture at the University of Kansas (Oct. 17, 1994); and Massimo Renzo, *Associative Responsibilities and Political Obligation*, 62 *PHIL. Q.* 106 (2012). For a view of how associative obligations and race interact, see generally TOMMIE SHELBY, *WE WHO ARE DARK: THE PHILOSOPHICAL FOUNDATIONS OF BLACK SOLIDARITY* (Harv. Univ. Press 2007) (2005).

On the non-voluntaristic duties of victims in the case of gendered violence, see Michelle Madden Dempsey, *Public Wrongs and the ‘Criminal Law’s Business’: When Victims Won’t Share*, in *CRIME, PUNISHMENT, AND RESPONSIBILITY: THE JURISPRUDENCE OF ANTONY DUFF* 269 (Rowan Cruft et al. eds., 2011) (considering whether certain categories of crime should be prosecuted over the victim’s objection).

99. See Robin Zheng, *What Is My Role in Changing the System?: A New Model of Responsibility for Structural Injustice*, 21 *ETHICAL THEORY & MORAL PRAC.* 869, 879 (2018) (discussing the ways in which we might understand individuals to be partly responsible for injustice by virtue of their “social roles”).

100. Vasanthakumar, *supra* note 94, at 4–5 (exploring the worries about the moral demandingness of duties to resist on victims); Hay, *supra* note 77, at 28–40.

101. Vasanthakumar, *supra* note 94, at 4–5.

conditions that permit racialized attacks or gendered violence may be addressed less than they otherwise might.¹⁰² There may be less attention and fewer social resources dedicated to the underlying problem. There may be less policing or prosecution of that type of harm. Thus, there may well be future victims of such crimes that would otherwise have avoided wrongful injury because our current victim stayed the hand of the State. That is, it is plausible that vulnerable victims that shield offenders from punishment—the public repudiation of their wrong—fail their duties to sufficiently protect potential future victims from such attacks.

This failure to protect future victims is particularly morally problematic because such victims are attacked precisely on the grounds of an innate and shared vulnerability; in this example, they are attacked because they are also Black or women. If it is plausible that we have non-voluntaristic associative duties to those to whom we are bound, sometimes simply by social circumstance, then there is a particular wrong in failing to do one's part to protect those who are bounded to you, especially when they are being wrongfully harmed because of the trait that binds you together. Black people who fail to notice the ways in which their actions harm others because they are Black, or women insensitive to the ways in which ignoring sexist wrongs harms other women, commit a special wrong in addition to having failed to do their part in the more generally shared duty we all have to secure a polity of equals.

To be sure, I do not know that the duty to stand up against potential harms to future wrongdoers will always conclusively defeat reasons for the vulnerable to ask for mercy in criminal law.¹⁰³ The criminal justice system is a clunky tool at its best, and a victim may think there are other ways of supporting those who share a salient vulnerability. Indeed, in other work,¹⁰⁴ I have explored the ways in which pursuing further punishment can be counterproductive to the general well-being of vulnerable groups and may counsel for alternative forms of punishment that strengthen beleaguered communities.¹⁰⁵ Likewise, a victim may think that all things considered, in this particular case, more punishment will set back the interest of a vulnerable

102. Hay, *supra* note 77, at 22.

103. Vasanthakumar, *supra* note 94, at 4–5 (noting that duties of resistance may be met in a complex number of ways, some clear and some ambiguous and unsatisfying, depending on background conditions); Hay, *supra* note 77, at 34–38.

104. See Yankah, *supra* note 73, at 24 (using the intersection of the criminal justice system and immigration policy, which exposes vulnerable demographics to economic exploitation, as an example of how legal punishment can advantage the privileged).

105. Yankah, *supra* note 90, at 191.

community. Lastly, it may be that forgiveness in a particular case will have no forward-looking effects.

Still, vulnerable victims must carefully consider their roles as a victim attacked for embodying certain innate traits, even as they consider their own interests and desires to offer absolution. Vulnerable victims must consider whether offering absolution too readily leads the broader society to think underlying problems of prejudice and injustice need not be as urgently addressed. Worse, the repeated script of certain groups being attacked and then offering absolution can lead to a social understanding of those groups as the kind of people who naturally forgive. Much as a friend who forgives too much can come to be seen as lacking self-respect, so too vulnerable victims can be viewed as supplicants who ought to forgive. Lastly, racially vulnerable victims must consider whether their forgiveness insufficiently takes a stand against future injuries aimed at those to whom they are inextricably bound.

Conclusion

The appropriate role of mercy in the criminal law has a rich history. The debate has usually centered around whether an avowedly liberal legal system could incorporate mercy.¹⁰⁶ Mercy, after all, is defined as withholding punishment that is otherwise deserved.¹⁰⁷ Further, because mercy is not dispensed to all, it has long been indicted as arbitrarily picking out some to gain a windfall in the form of less punishment. In short, mercy has been seen as illiberal, unjust, and arbitrary.

But even cursory inspection reveals more problems still. It would be naïve to believe that grants of mercy were randomly distributed. Clear racial patterns have long been noticed in who gets punished and who gets grants of mercy.¹⁰⁸ Just because mercy is unprincipled may not mean that it is arbitrary.

My goal is to highlight yet one other concern, largely unexplored in our thinking of mercy: forgiveness is often used as a basis to press for mercy, as when victims and their families ask the legal system to take notice of their absolution. I admit to unease in railing against those who, in the face of great pain, call for mercy. I, like anyone, am struck by their magnanimity and their often religiously inflected grace. But I believe it would be a mistake to simply

106. See generally, e.g., Card, *supra* note 13 (arguing that mercy is a part of the legal system); Garvey, *supra* note 13 (arguing that mercy should be a part of the legal system); Duff, *The Intrusion of Mercy*, *supra* note 13 (discussing the existence of mercy in criminal law).

107. Card, *supra* note 13, at 183; Leo Zaibert, *Pardon et Rétribution*, LA JUSTICE PÉNALE AUX FRONTIÈRES DU PARDON (N. Nayfield ed.) (forthcoming 2024) (manuscript at 2) (on file with author).

108. See Barkow, *supra* note 21, at 1334–35 (arguing that the criminal justice system has a history of exercising “discretion in racially discriminatory ways”); Barkow, *supra* note 29, at 1369 (“The evidence of racial disparities in [clemency and sentencing] is clear.”).

accept calls for mercy from the systematically vulnerable without a second thought. Just as we have a collective interest in how grants of clemency track racial lines and other sites of disenfranchisement, we have a collective interest in inspecting who is pressed to offer forgiveness and whether disproportionately offered forgiveness imposes its own social cost.