

When Mercy Seasons Justice

Many people play a role in the criminal justice system – police officers, defendants, victims and their families, lawyers, judges, and jurors. Law and order advocates, legislators who enact strict sentencing guidelines, tough cops, and hanging judges emphasize adherence to the law and the righteousness of punishing those who violate it, but mercy also has its place.

Prosecutorial discretion permits all law enforcement officers, from the traffic cop who gives a warning instead of a ticket, to the prosecutor who drops charges or offers a generous plea deal, to give wrongdoers, or alleged wrongdoers, a second chance or the benefit of the doubt. In doing so, they demonstrate forgiveness, the merciful component of justice. Regulations, quotas, and political realities limit this discretion, but some degree of mercy is an option at every stage of law enforcement.

Judges have tremendous latitude over their courts and can dismiss unsubstantiated charges at their first presentation, but, as Justice Cardozo observed, “The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to “the primordial necessity of order in the social life.” Wide enough in all conscience is the field of discretion that remains.”

Strict sentencing laws limit a judge’s discretion and the severity of their impact argues for expanded opportunities for mercy. In 1996, just a few years after the federal sentencing guidelines went into effect, federal judge Thomas Wiseman, Jr., wrote quite presciently:

“Pre-guidelines, I put about half of the people . . . on supervised probation. The rate of recidivism was less than eight percent; the cost of supervision was about one-tenth that of incarceration; persons on supervision had jobs and could pay restitution, support their families and stay off welfare. Perhaps, after we have built several thousand more prison beds and warehoused several thousand more nonviolent offenders for lengthy sentences, the expense will be so great that we will be forced to rethink the problem and the current “solution.” Perhaps we will once again put some faith in the rehabilitative model, and pull back a little from the “just deserts” model. Perhaps we will once again legitimate disproportional justice. This is the one area of my job where that which the law requires of me sometimes differs from what I believe, religiously and philosophically, to be the right thing to do.”

Thomas A. Wiseman, Jr., What Doth the Lord Require of Thee?, 27 Tex. Tech L. Rev. 1403, 1406-1407 (1996).

The U.S. Supreme Court “has demonstrated that mercy has its proper place in capital sentencing, but the nature of that “proper place” varies depending on the jurisdiction. Some state laws specifically grant juries the discretion to “recommend mercy” (W. Va. Code 62-3-15; Ga. Code § 17-10-2); and in New York “a jury is not commanded to return a verdict of guilty even in the face of apparently conclusive proof of the defendant's guilt. [I]t may and often does exercise a positive sense of moderating mercy.” People v Van Patten, 48 A.D.3d 30, 36 (3d Dept. 2007). In other states, such as Alabama, “a juror may not arbitrarily consider mercy when deciding whether a defendant should be sentenced to death The jury may not recommend mercy without reason.”

Ultimately, however, only the victims of injustice can bestow the mercy that brings justice and under Shari’ah law, the family of murder victims decide the punishment. “Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal.” But if anyone remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to judge by (the light of) what Allah hath revealed, they are (No better than) wrong-doers.” Qu’ran.

