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Alex Tuckness and John M. Parrish  
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## *Introduction*

Mercy is among the most widely admired of virtues. We unhesitatingly praise the individual who foregoes a right or forfeits an advantage out of compassion for others, who forgives even when they have truly been wronged, who shares with those less fortunate, who returns to the world better than they have received from it, and who judges others according to their common humanity rather than by their desert. Blessed, we continue to say in all sincerity, are the merciful.

It should therefore come as something of a shock to us to realize how rarely we find this ostensible virtue successfully invoked as a reason for any *public* action, and how implausible it has come to seem as a policy-justifying rationale in contemporary public life. Consider, for example, calls to reform sentencing in the American criminal justice system. There are persistent claims that contemporary criminal sentencing practices do not effectively achieve even their purported aims of protection and deterrence, much less the more rehabilitative purposes such sentences often profess to seek.<sup>1</sup> Yet “three strikes” laws, mandatory minimum sentences, and similar practices continue to endure, largely because it is difficult to marshal credible arguments in favor of judicial or prosecutorial discretion without appearing to violate justice in the name of mercy.<sup>2</sup>

Similar challenges emerge in the exercise of executive clemency. Despite the fact that there are few legal restraints on their power to do so, presidents and governors typically issue pardons and commutations shortly before they leave office so that the decisions’ inevitable unpopularity will not siphon off needed political capital. Whereas Roman emperors relished the opportunity to display their discretionary power by granting or

<sup>1</sup> John Tierney, “Mandatory Sentences Face Growing Skepticism,” *The New York Times*, December 11, 2012.

<sup>2</sup> Judges faced with laws they think inflexible and harsh will often work to avoid imposing the punishment and to avoid calling what they are doing mercy. See Robert A. Ferguson, “The Place of Mercy in Legal Discourse,” in Austin Sarat, ed., *Merciful Judgments and Contemporary Society: Legal Problems, Legal Possibilities* (Cambridge: Cambridge University Press, 2012), 74–75.

withholding mercy, a modern American governor will try to minimize the perceived amount of individual discretion involved in these decisions. Perhaps the most stunning contemporary use of the power to pardon and commute sentences was the decision of Governor Ryan of Illinois to pardon or commute the sentences of all 171 inmates on the state's death row shortly before he left office. To put this into perspective, that one act was more than four times the number of pardons and commutations in death penalty cases by all American governors combined over the previous twenty years.<sup>3</sup> However, in perhaps the most comprehensively "merciful" act by an American executive in history, many of the features commonly thought to define mercy were strangely absent. Ryan commuted all of the sentences rather than distinguishing between individual cases and showing what is on some accounts a central feature of mercy: leniency in response to particular facts. Likewise, Ryan described himself as compelled, rather than merely entitled, by the repeated failures of the justice system to deliver reliable verdicts and to treat like cases alike to commute the sentences; his compulsion came from claims of equal justice, not those of mercy. Other cases reflect this same pattern. One of the most frequently discussed potential candidates for the 2012 Republican presidential nomination, former Arkansas Governor Mike Huckabee, encountered significant criticism after a convict to whom he offered clemency was charged with killing four police officers after his release. Similarly, Mississippi Governor Haley Barbour ignited a firestorm of controversy in 2012 for pardoning or commuting the punishments of 215 convicted persons as his term as governor expired. He later justified his clemency citing the Christian obligation to promote forgiveness.<sup>4</sup>

We see a similar phenomenon in the public debates over capital punishment. Opponents of the death penalty frame their case almost exclusively with reference to justice: some will claim that innocent people are sometimes unjustly put to death, or that capital punishment is applied in an unjustly discriminatory manner based on race or economic class, or that to take a human life intentionally (other than in self-defense) unjustly violates the equal right of all human beings to life. Alternatively, death penalty opponents may claim that capital punishment fails to promote the public good (by failing to deter or failing to save money). Conspicuously

<sup>3</sup> Statistics are taken from the years 1983–2002 based on Appendix C in Austin Sarat, *Mercy on Trial: What It Means to Stop an Execution* (Princeton, NJ: Princeton University Press, 2005). For other discussions of the decline in executive clemency, see M. C. Love, "The Twilight of the Pardon Power," *Journal of Criminal Law & Criminology* 100.3 (2010).

<sup>4</sup> See Mark Z. Barabak and Nicholas Riccardi, "Mike Huckabee Defends Freeing Convict Wanted in Washington Police Shootings," *Los Angeles Times*, December 1, 2009; Haley Barbour, "Why I Released 26 Prisoners," *Washington Post*, January 18, 2012.

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absent from these debates is the claim that while murderers may deserve death, their lives should nevertheless be spared as a show of mercy. While still generally applauded as a personal virtue, mercy is not a quality those holding public office want to be characterized as possessing.

Debates about criminal justice may be the most conspicuous examples of our contemporary discomfort with mercy, but the discrediting of mercy as a justification for public policy is far more pervasive. The divisive debates over comprehensive immigration reform in the United States, and specifically over how to deal with immigrants who long ago entered the country illegally but would now like to establish legal residency, offer a highly relevant illustration of this point. In such debates, the term “amnesty” has acquired violently negative connotations for a large segment of the population. The once-formidable 2012 presidential contender Rick Perry first began to falter in Republican debates when he said that critics of a Texas law giving children of illegal immigrants the opportunity to receive in-state tuition rates were heartless – a charge that might have been expected to convict, rather than enrage, in a context in which mercy held legitimacy as a proper public virtue.<sup>5</sup> Similarly, the idea of “debt forgiveness” for homeowners, even those caught in ruinous mortgages by the worst abuses of the subprime era, had a hard time finding a vocabulary in which to express itself – notwithstanding the significant advantages for priming the faltering economy that many economists expected would result from such a policy. Perhaps the single most galvanizing event in the formation of the Tea Party movement was an on-air denunciation by CNBC correspondent Rick Santelli of such debt forgiveness initiatives as rewarding the “losers” at the expense of the winners. In a discourse in which mercy was regarded as a public virtue, the argument that economic “losers” should be supported would seem more plausible.<sup>6</sup>

There has also been a striking change in the rhetoric used to justify public support for the poor and the sick. Theda Skocpol has shown how the rising American welfare state was initially justified by concern for the vulnerable: wounded soldiers, widows, and mothers. While justice-based welfare state policies had taken hold in Europe earlier, in the United States, policies based on concern for the vulnerable persisted until much

<sup>5</sup> Perry was in fact forced to back away from his comment. See Kim Geiger, “Rick Perry Backs Off ‘Heartless’ Comment,” *Los Angeles Times*, September 28, 2011. Ironically, the same Rick Perry drew cheers at the Republican primary debate on September 7, 2011, when he defended the record 234 executions he presided over as Texas’s governor.

<sup>6</sup> For a partial transcript of his comments, see Lauren Sher, “CNBC’s Santelli Rants about Housing Bailout, 2009,” *ABC News*, Available: <http://abcnews.go.com/blogs/headlines/2009/02/cnbcs-santelli/>, March 5, 2013.

later (before eventually adopting the welfare state rationale).<sup>7</sup> While there are undoubtedly complex political, institutional, and social factors that help explain this divergence, we note the larger trend that help for the poor understood as an expression of mercy gradually came to be replaced by help for the poor understood as an entitlement of justice. Similarly, contemporary proposals to expand protections for the sick or the poor, if they appeal to something other than justice, prefer to talk of compassion rather than mercy. The latter seems to carry with it unwanted baggage.

One might be tempted to think that this skepticism about mercy is a specifically American phenomenon. The dramatic lessening of incarceration rates in Europe and the growth of international humanitarian initiatives both stand as potential counterexamples to our claim about the decline of mercy. In fact, however, when we look abroad to countries sharing similar religious and political traditions, we see that even merciful policies are generally justified by arguments assigning mercy at best a supporting role. This can be seen, for example, in the divergence of penal policies between the United States and Europe. James Q. Whitman describes in fascinating detail how, since the 1970s, European countries have pursued a policy of mildness in criminal sentencing.<sup>8</sup> In France and Germany, for example, incarceration rates and average prison terms for comparable crimes are far lower than those in the United States, and extensive reforms have been aimed at maintaining the dignity of prisoners. Perhaps most interestingly, in these countries pardons and amnesties remain relatively common.<sup>9</sup> Yet even here, mercy understood as freely showing undeserved favor to a vulnerable person is strikingly absent as a justification for these policies. As Whitman notes, modern penological theories do not typically treat paroles or pardons as “merciful” policies, but rather “as devices of rehabilitation, to be used by professionals trained in the techniques of social work and psychology.”<sup>10</sup> Even the policies that carry more of the connotations of traditional displays of regal mercy – pardons occasioned by a change of power or by a holiday, for example – have become predictably bureaucratized. Indeed, Whitman’s main thesis is that the move toward greater mildness in European penal policies stems from a desire to affirm the dignity of all

<sup>7</sup> Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge, MA: Belknap Press of Harvard University Press, 1992).

<sup>8</sup> James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (Oxford: Oxford University Press, 2003).

<sup>9</sup> *Ibid.*, 93. In France in 2001, parking violations were rampant, as people assumed that the inauguration of a new government would be accompanied by an amnesty.

<sup>10</sup> *Ibid.*, 35–36.

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people by eliminating forms of punishment that are degrading. It is thus a belief in the entitlement of all to equal dignity, not a desire to have the government exhibit the quality of mercy, that moves these states in the direction of mildness. Something similar is surely true of the European welfare state. In the same way that these states have sought to eliminate spectacles that degrade and humiliate prisoners in order to uphold their dignity, they have also challenged on grounds of justice those conceptions of “mercy” that might create a need for the poor to degrade themselves by begging for charity from the rich.

The growth of support for international humanitarian intervention might also appear to be an instance of mercy driving contemporary public policy, given that it typically invokes pity for those suffering as its justification. Yet whereas mercy tends to create or extend asymmetries of power or standing (which typically exist between the giver and receiver of mercy), humanitarianism has traditionally relied on noticeably more egalitarian arguments, drawing our attention to universal features of human nature as the ground for assistance.<sup>11</sup> It is therefore no coincidence that the most significant growth in humanitarian activity over the last decades has come from ostensibly apolitical humanitarian organizations in the non-governmental sphere, where skepticism about the public exercise of mercy obviously carries less resonance.<sup>12</sup> Moreover, in cases where humanitarian sentiments do translate into public policy in the international sphere, they are quickly subjected to the same types of objections we have been considering. For example, Miriam Ticktin describes how a 1998 French law made provision for undocumented persons to remain in the country (but not to work) if they had a serious medical condition for which adequate treatment was unavailable in their home country. While applauded by some as humane and compassionate, Ticktin criticizes the law as arbitrary in application and often cruel in its outcome (e.g., the rule has prompted some to seek to infect themselves with HIV deliberately to avoid deportation). Thus even when policies are justified as “humane” rather than “merciful,” the familiar concerns surface about arbitrary discretion and about supposed acts of kindness in fact being cruel.<sup>13</sup>

<sup>11</sup> Ilana Feldman and Miriam Ticktin, “Government and Humanity,” *In the Name of Humanity: The Governance of Threat and Care*, eds. Ilana Feldman and Miriam Ticktin (Durham: Duke University Press, 2010).

<sup>12</sup> Michael Barnett and Thomas G. Weiss, “Humanitarianism: A Brief History of the Present,” *Humanitarianism in Question: Politics, Power, and Ethics*, eds. Michael Barnett and Thomas G. Weiss (Ithaca: Cornell University Press, 2008).

<sup>13</sup> M. Ticktin, “Where Ethics and Politics Meet: The Violence of Humanitarianism in France,” *American Ethnologist* 33.1 (2006).

How and why did this skepticism about mercy arise? This is the puzzle we explore in this book. One common hypothesis might be that mercy as a rationale for public action declined as a result of recent changes in public attitudes. We see this in the concern over crime and lawlessness that has been a leading theme in American politics since at least the 1960s; in the meritocratic account of economic justice and individualistic desert that has been a dominant theme of conservatism since the Reagan Revolution; and in the increasingly violent turn in American popular culture. In these and similar recent developments we might look for the seeds of mercy's demise. If this were so, however, we would expect to find mercy as a live issue in contemporary partisan politics – attacked successfully by one political coalition and defended timidly and ineffectually by the other. Instead, we find that even those political actors who defend what we might call the merciful outcome in the scenarios discussed earlier – those who favor sentencing reform, oppose capital punishment, support immigration amnesty, or sympathize with homeowner debt forgiveness – nevertheless rarely if ever invoke mercy in defense of their position. Sentencing policies are criticized as counterproductive, the death penalty as racist, deportation as unfeasible, and debt enforcement as repressive of consumer demand. Not one of these policies, however, is argued against on the grounds that it is insufficiently supportive of the virtue of mercy.

Instead, we argue there are two principal problems that have led, over centuries rather than decades, to the contemporary marginalization of mercy in politics. The first is a conceptual confusion over what mercy is, which stems from its interaction with changing theological and political assumptions over time. Many acts that in centuries past would have been described as merciful would not be described so today because of increasingly restrictive definitions of the term. This might not be a serious problem if there were a consensus on the proper content of the restrictive definition: we could, after all, just use other words, such as “compassion,” to do the work that mercy used to do. But no such consensus exists. Instead, we find widely conflicting views of mercy, many of which retain their plausibility (even while contradicting one another) because of their resonance with concepts at the foundation of contemporary liberalism. In addition, there also needs to be a certain degree of fit between the moral assumptions that underlie the metaphors we use to explain mercy and the moral assumptions taken as starting points for contemporary philosophical and political discourse. A metaphor that lacks this kind of fit will begin to seem inapt and unpersuasive. In the case of mercy, as we will see in the chapters that follow, both the plurality of its plausible metaphors and the

tenuous fit of each of these metaphors with the background assumptions of modern politics and philosophy have coalesced to create confusion and uncertainty about the very meaning of mercy.

### The Meaning of Mercy and the Problem of Injustice

If we turn to the philosophical literature on mercy of the last fifty years or so, two things stand out. The first is that mercy has increasingly come to be regarded as paradoxical in nature, its status as a virtue becoming more suspect. The second and related development is that remarkably little consensus has emerged regarding what mercy is and how it should be defined. This, we argue, has a historical explanation stemming from the fact that there is not one singular conceptual tradition defining mercy, but rather a range of overlapping and often competing strains of thought.

Perhaps the best point of entry is to ask the deceptively simple question Seneca poses at a crucial moment in his famous treatise *On Mercy*: What is the opposite of mercy? The most influential answer to this question in contemporary philosophical discourse has been *justice*. Alwynne Smart, whose article sparked much of the contemporary philosophical discussion regarding mercy, holds that mercy, as it is commonly understood, inherently involves a departure from the requirements of justice, and that consequently acts of leniency seeking to correct an inequitable state of affairs to make it more just are not “really” mercy. Thus lenient judgments based on justice, even if accompanied by compassion for the victim, are for some philosophers not properly called mercy, because by definition (they hold), mercy goes beyond what is just. The essence of mercy is instead “deciding not to inflict what is agreed to be the just penalty, all things considered.”<sup>14</sup> Most legal scholars follow Smart’s assumption and take as their starting point the claim that mercy is “the suspension or reduction of a punishment that is deserved.”<sup>15</sup>

This way of posing the question – assuming that mercy deviates from justice and that the question is to explain how it could ever be good to deviate from justice – is not universally accepted. Some reject notions of

<sup>14</sup> A. Smart, “Mercy,” *Philosophy* 43.166 (1968): 349. For a more recent version where *mercy* is defined as a charitable departure from what retributive justice dictates, see John Tasioulas, “Mercy,” *Proceedings of the Aristotelian Society* 103.1 (2003).

<sup>15</sup> Ferguson, “The Place of Mercy in Legal Discourse,” in Sarat 19. In the same volume James Leonard, Paul Robinson, and Stephen Macedo follow this suggestion. See also D. Markel, “Against Mercy,” *Minnesota Law Review* 88.6 (2004): 1436.



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mercy that take questions of desert as their starting point.<sup>16</sup> If a pirate was going to kill someone for money but then decided to spare the person's life out of pity, some would count this as an act of mercy, even though it would be unjust for the pirate to kill the person.<sup>17</sup> Here there is no assumption that mercy is inherently in conflict or tension with justice: the baseline against which mercy is measured is no longer justice but simply whatever a person would otherwise have been likely to do. Mercy in these accounts is not the opposite of justice; rather, mercy should be understood as the opposite of retributive anger or of cruelty.

Other philosophers have developed a range of strategies for "saving" mercy as praiseworthy while retaining the assumption that mercy is inherently in tension with justice. One strategy is to understand mercy using a creditor-debtor metaphor. "Suppose X was due to pay you a sum of money on a particular date, but told you that he would be greatly inconvenienced to have to do so. If you could easily enforce your claim, but decide out of compassion to give him more time, you could be said to be acting mercifully."<sup>18</sup> Mercy on this account is forgoing something that is owed to you but that you are not required by justice to exact. This strategy takes for granted that mercy must go beyond justice, yet prevents mercy from being unjust by limiting it to cases where one has no moral obligation to impose the penalty or hardship. It also assumes that the category of just actions necessarily includes both those actions that are simply just and those that are supererogatory. Of key importance to the plausibility of this strategy is a secondary debate over whether or not acts of mercy are ever morally obligatory. Is mercy to be understood, as in Portia's famous soliloquy from *The Merchant of Venice*, as a gift that, while properly free and natural, is in its essence non-compulsory? Some hold that mercy is necessarily voluntary and non-obligatory in this way,<sup>19</sup> whereas others would claim that under

<sup>16</sup> Martha Nussbaum argues that classical accounts of mercy are tied to both equity and our common sense of frailty in "Equity and Mercy," *Philosophy and Public Affairs* 22 (1993). Legal scholars also sometimes reject the conceptual link between mercy and desert. See Alice Ristorph, "Actions of Mercy," in Sarat 209.

<sup>17</sup> The example is taken from G. Rainbolt, "Mercy: In Defense of Caprice," *Nous* 31.2 (1997): 233.

<sup>18</sup> H. R. T. Roberts, "Mercy," *Philosophy* 46.178 (1971): 353. Jeffrie Murphy, in his influential neo-Kantian account, opts for the same solution. Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge: Cambridge University Press, 1998), 180. Legal scholars sometimes adopt this solution as well. See, for example, D. T. Kobil, "Should Mercy Have a Place in Clemency Decisions?" *Forgiveness, Mercy, and Clemency*, eds. Austin Sarat and Nasser Hussain (Stanford: Stanford University Press, 2007).

<sup>19</sup> Jim Staihar and Stephen Macedo, "Defending a Role for Mercy in a Criminal Justice System," in Sarat 141; C. Card, "Mercy," *Philosophical Review* 81.2 (1972); H. S. Hestevold, "Justice to Mercy," *Philosophy and Phenomenological Research* 46.2 (1985); Murphy and Hampton, *Forgiveness and Mercy*.



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some circumstances mercy may indeed be morally obligatory rather than a praiseworthy counsel of perfection.<sup>20</sup>

Others balk at this strategy because they believe the term “mercy” as used in ordinary language covers a much broader range of cases than this conceptualization suggests. Is genuine mercy, these philosophers ask, really limited to cases like forgiving loans and largely inapplicable to criminal cases? One approach argues that mercy covers a wide range of cases of leniency arising from charity more generally and is not analogous to cases of private debts. Instead, this approach holds, we need to adopt a more pluralist account of the considerations relevant to punishment so that even if retributivist justice counts against mercy, other considerations might count in its favor.<sup>21</sup>

An alternative approach seeks to avoid the justice/mercy paradox by defining justice in terms flexible enough to encompass at least the possibility of mercy within its parameters. If, for example, justice sanctions a prison sentence of between two and four years for a given offense, mercy might involve sentencing the person to two years rather than four. The action is not unjust because it falls within the range justice permits, but it is merciful in withholding a stronger punishment that could have been justly inflicted.<sup>22</sup> Others criticize this account by stating that our use of the term “mercy” surely includes a broader range of cases in which we go distinctly beyond what justice by itself would suggest. If mercy must include cases that really are in some sense contrary to what justice dictates, then the aforementioned solution fails to capture an appropriate range of cases. In fact, if one has imposed a strictly just sentence, one has not been merciful.<sup>23</sup>

There are other dimensions along which the definition of mercy is in dispute. One is whether to call something merciful is necessarily to praise it. Many challenges to mercy’s coherence start from the widely held belief

<sup>20</sup> James Sterba, “Can Persons Deserve Mercy?,” *Journal of Social Philosophy* 10 (1979), Tasioulas, “Mercy.”

<sup>21</sup> For example, retributive theories normally focus on the wrongness of the act, not an overall assessment of a person’s character. A communicative theory of punishment would include the latter consideration such that evidence of repentance might justify a lesser punishment. See Tasioulas, “Mercy,” 116. Dolinko offers a similar account in arguing that a judge is merciful when an appeal to a wider set of considerations of justice than most judges do leads to a more lenient penalty. David Dolinko, “Some Naïve Thoughts About Justice and Mercy,” *Ohio State Journal of Criminal Law* 4 (2007). Adler holds that a merciful person possesses the qualities of mind and character enabling one to correctly determine the amount of disinterested empathy appropriate in criminal sentencing. On this account, someone lacking the virtue of mercy will be unable to appreciate how much a particular person will suffer if a particular punishment is imposed and thus will have difficulty recognizing what would be cruel. J. Adler, “Murphy and Mercy,” *Analysis* 50.4 (1990).

<sup>22</sup> Hestevold, “Justice to Mercy.”

<sup>23</sup> J. L. A. García, “Two Concepts of Desert,” *Law and Philosophy* 5.2 (1986).

that mercy must be a virtue.<sup>24</sup> Others insist that this is a mistake, that a definition of mercy must rely on descriptive criteria and should not prejudge the question whether mercy is praiseworthy.<sup>25</sup> Another point of contention has to do with whether an act must be motivated by pity or compassion to count as mercy. Some see the motivation as a necessary condition for mercy, whereas others do not.<sup>26</sup>

Disagreement among philosophers and lawyers on moral questions is not particularly unusual, but it is noteworthy that people trying to capture the sense of “mercy” in everyday speech or in legal discourse differ so widely and persistently. One of our chief arguments in the following pages is that these differences have a historical basis. What we call in contemporary English “mercy” in fact corresponds to a variety of different ideas that have been ascendant at different points in history. In ancient Greece and Rome, for example, mercy sometimes meant simply showing pity or treating with leniency those one had conquered, and was often disparaged as a failure to show requisite manliness. At other times, mercy in the ancient world might have involved setting aside the letter of the law based on particularistic facts of the case at hand in order to render a more equitable decision. Neither of these ways of thinking about mercy, however, appeals to “going beyond justice” as part of their definition. With the introduction of Christianity, by contrast, the idea of mercy grew to imply treatment more favorable than justice required, although even here the tradition was not univocal. Disagreements among the early church Fathers mirrored ongoing debates between Eastern (Orthodox) and Western (Roman Catholic and Protestant) understandings of mercy. Among the latter – but not the former – the idea arose that God’s justice required full satisfaction for sins. This doctrine had important implications (as we will see) for the development of Western philosophical and political understandings of justice and mercy.

A taxonomy of these different accounts of mercy would likely require at least five dimensions:

<sup>24</sup> See, for example, Ross Harrison, “The Equality of Mercy,” *Jurisprudence: Cambridge Essays*, eds. Hyman Gross and Ross Harrison (Oxford: Clarendon Press, 1992), 107.

<sup>25</sup> Steven Sverdlik, “Justice and Mercy,” *Journal of Social Philosophy* 16.3 (1985): 42.

<sup>26</sup> Rainbolt defines mercy without reference to its motivation, whereas Susan H. Williams and Kathleen Dean Moore include motivation by pity or compassion as a necessary component of its definition. See Susan H. Williams, “A Feminist View of Mercy, Judgment, and ‘Exception’ in the Context of Transitional Justice,” in Sarat 274–276; Kathleen Dean Moore, *Pardons: Justice, Mercy, and the Public Interest* (New York: Oxford University Press, 1989), 188; Rainbolt, “Mercy,” 233.