

## Migration, Mercy, Love, and Carrier Sanctions

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There are a great many ethical questions to be asked about migration policy. The first, and most important, is whether or not states have any right at all to exclude would-be immigrants.<sup>1</sup> Some theorists believe states have some right to exclude, although they tend to disagree about the justification and strength of that right; some theorists believe that purported right to be non-existent. If states do have some right to exclude, though, our next question is how to understand the limitations of that right; some people, presumably, have rights to move across borders, and how we answer the first question will help us understand who those people are.<sup>2</sup> What I am interested in discussing, in this paper, is a third sort of question, one generally not asked in these contexts: what happens, morally speaking, once we've decided that we are within our rights to exclude some unwanted group of migrants?

This question, of course, only makes sense once we've decided that we *have* the right to exclude, and so I'm going to take that right for granted in what follows.<sup>3</sup> I want to make the case that having a *right* to exclude does not yet exhaust the moral analysis of what we ought to *do* about exclusion. In particular, I want to defend the idea that states have a strong moral reason – indeed, a duty – to show themselves to be *merciful*; they are obligated, that is, to develop some policy measures that reflect a morally-motivated concern with the goods of others, even when those others have no independent right to be offered that which this policy provides them. I want, in other words, to make the case that merely being *just* is not, morally speaking, quite enough; a state – like a natural person – is obligated to do more than respect rights. It must, instead, both respect rights and develop some particular plan of action, by

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<sup>1</sup> Much recent work has focused on this question. Those who support the right to exclude include Michael Walzer, Christopher Heath Wellman, David Miller, and myself. Those who do not include Kieran Oberman, Philip Cole, Joseph Coleman, and Michael Huemer.

<sup>2</sup> Our answer to the first question, though, will not entirely determine the answer to the second; there might be some situations in which people who do not have an independent right to migrate cannot be rightly excluded, because the moral costs of doing so make any practice method of preventing their movement morally impermissible.

<sup>3</sup> My justification for this right can be found in Blake (2013) and Blake (2014).

which it shows itself to have a due concern with the goods of persons. This program of mercy will necessarily be messier than a discussion of justice. Mercy as an ethical norm does not give us the clear guidance that justice is purported to provide; we are obligated, I will argue, to develop some program of mercy, but mercy itself does not tell us which of such programs is best. Nonetheless, mercy as a norm is an important one – in private life, and in politics – and we impoverish the discourse surrounding migration by refusing to invoke it.

This paper will develop these ideas over three parts. In the first, I will define what I mean by mercy, and try to offer some defenses of that concept's political relevance. I will discuss, in this section, three powerful worries about the use of mercy in political life: the thought that mercy is incompatible with justice, especially for a political liberal; the related worry that mercy is too close to caprice; and the worry that mercy as a discourse assumes a power imbalance which itself ought to be the target of our normative discussion. The next section of the paper will try to show why a program of mercy is a moral requirement for a morally adequate political community. I will here defend two arguments in favor of this moral requirement. The first is the thought that the state depends crucially upon citizens maintaining an adequate stock of moral concern for the goods of others; the state is obligated to demonstrate, through its policy decisions, a due concern for those whose goods are vulnerable to the decisions of that state. The second begins with the conception of the state as an agent – as an entity to which actions can be legitimately ascribed; this fact, I argue, requires the state to maintain a moral personality, which is marked in part by how it justifies its actions towards those who have no democratic power to dispute those actions. The final section of the paper offers two possible contexts in which this norm of mercy might help us make sense of our moral reactions to different aspects of migration. The first example is that of romantic love, and the unification of those who seek permanent romantic partnerships. Some theorists have argued that we are obligated by justice to provide migration rights for the non-citizen spouses of citizens; I argue, instead, that we have no such obligation – but that we would likely show ourselves to be unmerciful, were we to refuse to offer such rights. The second example is that of carrier sanctions – which involve financial penalties towards carriers who allow those without legitimate documents to use their services. These sanctions are sometimes felt to be unjust; the most common form of criticism describes them as illegitimate forms of coercion against would-be migrants. This conclusion is, I argue, an error; it confuses coercion against a migrant, with coercion against those who would offer assistance to that migrant. The migrant might be entitled to that assistance, of course – in which case we are morally required not simply to avoid carrier sanctions, but to develop a program by which those entitled to assistance will receive it. But even when the migrant is not entitled to our assistance, I argue that we are right to feel a moral disquiet with the existence of carrier sanctions. The source of this disquiet, though, is not injustice, but a lack of mercy; we do not violate rights through such sanctions, but they represent a site in which the wealthy states of the world might have shown mercy – and have instead refused to do so.

## **I. Mercy: what it is, and why it makes us nervous**

Mercy, as I say above, is comprehensible as a morally-motivated refusal to do what one is, in justice, permitted to do. It is, in other words, a refusal to exercise one's rights, because of a moral concern towards some other person.<sup>4</sup> The philosophical discussion of mercy generally places that concept within a larger discussion of criminal punishment.<sup>5</sup> Mercy is, obviously, relevant to the criminal law; discussions of clemency and pardons require us to ask what the justification of mercy might be, and whether or not the practice of mercy is contrary to the purposes of criminal law. Mercy as a concept, though, goes beyond its uses in criminal law. The judge who lightens a sentence towards a genuinely repentant criminal is, on some accounts, engaging in an act of mercy; her imposition of a harsh sentence would not be unjust – certainly, the criminal might have no right to complain – but she exercises mercy because of a moral concern for the effects of that sentence on the criminal's life.<sup>6</sup> Similar cases, though, might be found in areas outside criminal law. A state might, on some theories of international justice, have a moral right to impose tariffs that would reduce the standard of living in a neighboring state; it is possible – although, sadly, unlikely – for the state to refuse that tariff, out of a moral concern for the citizens of that foreign state. Mercy requires only this: that we might choose to refrain from doing what we are permitted to do, not because of self-interest, but because of an interest in the good of another.

There are, of course, several things worth discussing in this analysis of mercy. The first is that if there is a duty of mercy, it is best understood in terms of imperfect duties. If we are told to develop a plan of mercy towards others, we are obligated to build some program through which we avoid going to the limits of our rights, and instead work to help the goods of some individual person; no individual person, though, has the right to *be* the focus of our merciful acts.<sup>7</sup> There are, in

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<sup>4</sup> It is also possible, I believe, for a state to show mercy towards another state; this is a complexity I will ignore in the present context.

<sup>5</sup> See, on this, Claudia Card, "On Mercy," 81(2) *Philosophical Review* (April 1972); Alwynne Smart, "Mercy," 43 *Philosophy* (1968); John Tasioulas, "Mercy," *Proceedings of the Aristotelian Society* 103 (2003); Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge: Cambridge University Press, 1988); Jim Staihar and Stephen Macedo, "Defending a Role for Mercy in a Criminal Justice System," in Austin Sarat, ed., *Merciful Judgments and Contemporary Society* (Cambridge: Cambridge University Press, 2012); and Martha C. Nussbaum, "Equity and Mercy," 22(2) *Philosophy and Public Affairs* (Spring 1993).

<sup>6</sup> Whether or not this is a legitimate case of mercy, of course, would depend upon the theory of mercy one might have. Smart, for instance, might justify the sentence based on the thought that the repentant criminal is a different human – given his repentance – than the one who performed the crime. Others – notably Card – would disagree entirely, and would justify the reduced sentence only if the longer sentence would itself be unjust in the particular case.

<sup>7</sup> Card disagrees about this; her account of mercy, though, makes it less an independent virtue than a way of making justice more fine-grained. My own view

other words, no correlative rights held by those for whom a merciful act or policy might be beneficial. The second thing to notice is that there is an appeal here to some moral motivation for mercy. My view is that something very much like a Kantian duty of beneficence can serve as the ground for the merciful policies of a state. Kant's doctrine of virtue argues that we are obligated, as part of our moral agency, to develop some plan of beneficence – by which we work for the goods of other individuals, and take their own plans of life as having importance for us in the development of our own plans of life. The duty of beneficence requires individual agents to give of their own time and treasure to offer assistance to others, as those others pursue lives for themselves. Those others, again, do not have rights to be the ones assisted; they cannot claim injustice when some other individual is offered that assistance instead of them. But the one who refuses to develop a plan of beneficence is failing at the task of being a good human; and, I will argue, the state that refuses to develop a similar plan is failing at the task of being a good state.

Before I go on to defend this conclusion, though, it is worth noting the ways in which mercy is often felt to be worrisome. There are at least three categories of worries that might be addressed at this point. The first is that mercy is, itself, unjust. The second is that mercy seems to open the door to capricious decision-making. The final is that mercy is, ethically speaking, perverse; it forces the powerless to plead for favors towards the powerful, instead of undermining the inequality of power itself. I will go over these objections in turn.

We can start with the notion of injustice. The thought that mercy is contrary to justice has a long history within the literature on mercy and criminal law. The worry is quite simple: if a reduced sentence is given to some, but not to others, then it seems as if there is a simple injustice that those punished more might rightly resist. If that inequality is shown to have adequate moral justification, based on the different circumstances between the criminals, then the inequality is not really a matter of mercy; it is, instead, the result of justice itself – in which case mercy disappears. If, in contrast, there is no morally adequate justification for different treatment, then mercy appears to be a simple case of refusing to treat people according to their desert – in which case, mercy announces itself as a moral failing. As Jeffrie Murphy describes this worry: mercy seems to be either redundant, or a vice.<sup>8</sup>

These are powerful worries for the criminal law; they are less so for political society. In the case of migration, recall, we are imagining a case in which the one migrating has no independent right to move across borders; the state has a right to exclude – but not, we think, a *duty* to exclude. Punishment, in contrast, seems more like a matter of duty; the state that refused to punish criminals would be failing in its moral duties, certainly towards the non-criminal citizens and possibly towards the criminals as well.<sup>9</sup> Thus a difference in treatment between equally deserving

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insists that mercy might be an independent virtue, one that would guide action even in a world of perfect justice.

<sup>8</sup> Murphy and Hampton, 172.

<sup>9</sup> See Herbert Morris, "Persons and Punishment," 52 *The Monist* (1968).

criminals seems to be an immediate matter of moral concern; the difference in treatment between potential migrants seems less so.

The relationship between political justice and mercy is thus distinct from the relationship between criminal justice and mercy. That relationship, though, is also subject to some moral difficulties. One such difficulty emerges from the thought that political decisions must be justified to individuals who disagree in their ethical frameworks; all democratic societies are subject to enormous diversity of cultural, moral, and religious views. In face of this diversity, though, is there any real possibility of agreeing about any particular plan through which the duty of mercy is fulfilled? If there is, instead, some particular plan chosen against the wishes of some dissenting group, can that group not complain that its chosen conception of mercy is being ignored? To put it in Rawlsian terms: can there be public reason, about merciful policies?

The response to this worry is, first, to acknowledge that it can be quite right; there can be some sorts of mercy that are, in fact, contrary to the demands of public reason. Take, for instance, Ted Cruz's call to increase migration from Syria – but only for Christians. This sort of policy rests on a principle that cannot be accepted from within political liberalism: namely, that Christians have a special relationship to the United States. President Obama's reply was instructive: "That's not who we are. We don't have religious tests for compassion."<sup>10</sup> The announcement that one is going to have mercy towards a particular group can be made in such a way as to announce that non-members of that group will never be full members of political society itself.

The second response, though, is to note that this is not inherently true of all such announcements. It does not seem contrary to the demands of justice that a democratic society adopt some particular program of mercy, and work towards it; the announcement might be made in a way that contravenes political justice, but it need not do so. Rawls's constraints of public reason, further, apply only to matters of basic justice and constitutional essentials – not to all forms of political decision-making. Take, for example, the case of public artwork. A society might argue – rightly, I think – that some public money should be devoted to a program of public artwork, so as to pursue the independently valuable goal of aesthetic beauty and public engagement with physical space. The society will likely disagree about what counts as art, and what sorts of art are best. They are, though, ethically permitted to work through those differences as best they can, through the ordinary processes of majoritarian politics, and there is nothing unjust in having the majority's view determine what the conception of art will be used in the purchase of art. There will not be convergence; but such convergence is not required. There are, of course, constraints that emerge from political justice; the society could not spend public money on artwork glorifying only one particular ethnicity, for instance. Within those constraints, though, justice seems to permit wide latitude for democratic deliberation about art; much the same, I think, can be said about mercy.

This, though, seems to lead to our second worry: the thought that any particular plan of mercy might involve relying on distinctions without any moral

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<sup>10</sup> The Guardian, November 16, 2015.

merit – and that this runs the risk of making the life chances of individual people rely on caprice, rather than moral desert. To some degree, this objection is well-taken; if we accept that not all people will receive the benefits of migration – just as not all artists will receive public commissions – then we have to figure out what cannot rightly ground the distinction between those who do and those who do not. We have already, above, seen one restriction on principles; the determination cannot be made in such a way as to announce an inequality among those people already present within society. A program of racist art, for instance, would be impermissible, as would Cruz’s proposal to offer assistance to only Christian Syrians. I have, elsewhere, defended a second sort of restriction, which involves the thought that some differences in treatment cannot be accepted by their targets without the acceptance of either an empirical or an ethical falsehood.<sup>11</sup> We are obligated to treat people as moral equals, and this obligation requires us to offer them some justification for how we treat them that they could in principle accept. I believe that this constrains how we might select those we admit, even when no-one in the selection pool has a right to be admitted. If I assert that the members of a given racial group are habitual thieves, and so not worthy of migration rights, then I am making either an empirical or a moral error – or, more likely, both at the same time.<sup>12</sup> But from the fact that some distinctions are invidious, we cannot infer that *all* such distinctions are invidious. Indeed, the charge of *caprice* is often best described as a version of our first worry – that of injustice. If, instead, we allowed migration status to be determined by something genuinely capricious – say, for example, a lottery – it is not clear, to me at any rate, that we are genuinely so worried. If, indeed, none of the would-be migrants at issue have any independent right to migrate, but we have made a decision to admit some subset of those migrants, then it seems difficult to condemn that lottery program as unjust. If this is true, though, then it seems as if the worries about caprice are to some degree overstated; we would rightly complain of randomness in, for instance, our tax bill, but could not similarly complain if some capricious method were used to provide a benefit to which we were not entitled.<sup>13</sup>

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<sup>11</sup> Michael Blake, “Immigration and Political Equality,” 45 *San Diego Law Review* (2008).

<sup>12</sup> An example of this is found in Alan Dershowitz’s discussion of A. Lawrence Lowell’s defense of Jewish quotas at Harvard, based on his conviction that Jews steal. When told that Christians steal, too, Lowell is purported to have said: “You’re changing the subject. We’re talking about Jews now.” Dershowitz, *Jerusalem Post*, December 19, 2013.

<sup>13</sup> An example of such real caprice might emerge from the benefits of Irish citizenship for migration into the United States; Senator Ted Kennedy always ensured that the Irish had more access to citizenship than, say, the French, because of his own Irish heritage. Between 1992 and 1994, for instance, 40% of the diversity lottery visas were reserved for Irish citizens. On my view, a great many people had and have a right to enter the United States; but if we restrict our attention to the French and the Irish, I think the French cannot rightly complain that

This image, though – one of a great many people pleading for assistance, which will be offered to some of that group, but not others – is itself rather disquieting. This leads us to our final concern: isn't this discussion of mercy itself rather missing the entire point of political philosophy as a normative enterprise – namely, that we ought to figure out what sorts of unjust power differentials exist, and then figure out how to undermine those? There is, indeed, something rather offensive in the reintroduction of mercy into this discussion; we would rather fight for justice, after all, than beg for mercy. So why should we not simply abandon talk of mercy, and begin the task of overcoming these inequalities in the first place?

The worry is, of course, a profound one, and I cannot hope to really address it adequately here. A few points, though, might be helpful. The first is that, in a world with borders and rights to exclude, even perfect justice would not prevent the circumstances in which mercy is appropriate. Imagine, that is, that we have arrived at a world in which all states – and, perhaps, all persons – have exactly that stock of goods and rights you think they deserve. Then acknowledge that people will still want to move across borders, and that those already there might not want them to do so. (Imagine, for example, that I want to become an oceanographer, and am born into a land-locked country; I face some disadvantages, as compared to one born next to a coastline, that could not be compensated for by any amount of money.) Now, it is entirely possible for us to say: so much the worse for borders, and for exclusion – we ought to have the right to settle wherever we want. But if we do not want to do that – if we think, for instance, that states would have some limited to right to exclude, even in a perfect world – then we have to acknowledge that the sorts of hierarchy we see here would be replicated even in a just world. At this point, we are right to figure out what mercy asks of us, since it seems that we are obligated to understand it even in the best of worlds.

This world, of course, is very far from the best of worlds. This means, though, that there are some advantages – philosophical, as well as rhetorical – from understanding the nature of mercy, rather than simply relying on justice as our single normative framework. Philosophically speaking, it has the advantage of offering a way of guiding our deliberation when justice itself is silent; it might well be the case, I believe, that there are times when we show ourselves to be a callous people through the choices we make, even if we cannot show any individual person whose rights are violated by these choices. More importantly, I believe, this way of examining the issues is also a call to those philosophers who – like me – believe both in the legitimacy of some forms of exclusion, and that the particular forms of exclusion we see defended in Western Europe and the United States today are ethically horrific. We can use the concept of justice to analyze some of this horror; few of us who defend exclusion defend the idea that we can exclude everyone, no matter how badly off they may be.<sup>14</sup> But we can understand our reactions here

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the existence of Ted Kennedy (rather than some Francophilic counterpart) is capricious in any morally relevant sense.

<sup>14</sup> Wellman, of course, comes rather close. Christopher Heath Wellman and Philip Cole, *Debating the Ethics of Immigration: Is There a Right to Exclude?* (Oxford: Oxford University Press, 2011).

better by expanding our normative terrain, so that we also understand the ways in which we are failing more accurately. This leads us, finally, to the rhetorical advantages of the concept of mercy. There are disadvantages to a focus on mercy, and on the virtues involved in doing more than merely respecting rights; there are, however, advantages, too. It is not an accident that President Obama's response to Ted Cruz took the form of a reflection on the collective identity of the United States. We are motivated by the rights of others, but we are also motivated by a concern for our own identity as a moral agent; we want, in our private lives, to do more than merely refrain from injustice. The language of mercy can help us make sense of this, both for natural persons, and for states. Jeffrie Murphy describes this well:

[T]he virtue of mercy is revealed when a person, out of compassion for the hard position of the person who owes him an obligation, waives the right that generates the obligation and frees the individual of the burden of that obligation. People who are always standing on their rights, indifferent to the impact this may have on others, are simply intolerable. Such persons cannot be faulted on grounds of justice, but they can certainly be faulted.<sup>15</sup>

As with persons, so with polities. Justice is the first virtue of social institutions, as Rawls notes, but that does not imply that justice is the only such virtue – and we have reason to examine these other virtues on their own ground, so as to understand them well and deploy them effectively.

## **2. Mercy and the state: why must the state be merciful?**

There are, of course, a number of questions that remain about the nature of mercy, and how it is to be understood. I hope, though, that the above at least begins the task of defending the thought that mercy cannot be immediately ruled out as a legitimate basis for policy. What I want to do now is discuss two possible ways of generating an obligation to engage in some forms of merciful policy. These arguments are intended to generate the conclusion that the state has an obligation to develop some form of merciful policy; they do not directly defend the necessity of immigration as a unique site for the exercise of mercy – although, as I will show, I think there are some ways in which migration is an especially appropriate arena for that exercise. The arguments are, instead, intended to show that the state has some obligation to respect the imperfect duty to care for the goods of persons generally, rather than just the goods of domestic citizens. This duty, though, gives rise to a legitimate demand for some program of merciful agency towards would-be migrants. I will call these arguments the argument from *democratic emotion* and *democratic agency*, and will deal with them in turn.

The first argument – that of democratic emotion – begins with a simple fact: democratic self-rule is a fragile thing. In particular, while we have very little information about how to build a flourishing society from the outside, we have some very good information about what sorts of things a flourishing society must have,

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<sup>15</sup> Murphy and Hampton, 176.

for that flourishing to continue.<sup>16</sup> One thing such a society must have, it seems, is a sense among the citizens that the game of electoral politics is worth playing, and worth playing even when the results of that politics do not go one's own way. In a flourishing democracy, stability is provided by some sort of commitment to doing justice within that state – rather than, as it were, simply taking one's toys and going home when one loses an election. John Rawls's account of stability shifted over the course of his career; what did not shift was his conviction that we cannot have a democratic society unless people have, as individuals, an existing and felt moral reason to continue to support that democratic society, and to support it even when that society does not give us the results we would choose.

What, then, is required for the existence of this sort of stability? Once again, it is easier to say what is corrosive of it than what would create it. One key argument comes from Susan Moller Okin, whose *Justice, Gender, and the Family* argues that the family is a key site of justice. There are many reasons for this; the norms of gender and divorce law, for instance, create relationships of differential power within the home, which in turn create differential ability to acquire power outside the home. More importantly, though, Okin was committed to the thought that doing justice was a *skill* – that it required moral education, and that the family was itself a school in which that skill was either reinforced or undermined. Okin's critique of patriarchal liberalism is far-reaching, but one aspect of that critique is important for our purposes: we cannot, says Okin, be good agents of justice in one sphere if we live in a society that consistently denies it in another. If the family is allowed to remain a sphere of injustice, then, this is wrong both in its concrete effects on women's lives, but also because of the effects it has on the moral personalities of girls and boys growing up in those unjust families<sup>17</sup>.

Okin's argument, though, can also tell us something about the development of moral personality even outside the family. Doing justice within society, Okin said, is a skill; it is a skill, though, that rests ultimately upon the continued willingness to see humans as worthy of moral concern. We are creatures that are liable to moral corruption – to reinterpreting moral matters until they give us reason to do what we already wanted to do.<sup>18</sup> We are prone to biases, implicit and otherwise, in how we understand the lived experiences of other humans. The exercise of empathy, though, is required for us to continue the process of electoral politics; we must remember the moral nature of our opponents, to continue doing politics with them – and the moral reality of those citizens we may never meet, in order for us to avoid self-interested ways of ignoring their complaints. What Okin's argument establishes, though, is the fact that lessons learned in one sphere have effects on skills within the political sphere. It is hard to be a political egalitarian, when the family is patriarchal. But so, too, I argue, it is hard to be continually motivated by

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<sup>16</sup> For evidence from development economics, see Paul Collier, William Easterly, and Dambisa Moyo.

<sup>17</sup> Susan Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989)

<sup>18</sup> See Stephen Gardiner, *A Perfect Moral Storm* (Oxford: Oxford University Press, 2013)

the goods of those with whom we share a society, when that society regards the goods of outsiders as unworthy of moral concern.

What I mean by this is that we need virtue as well as law in order for society to flourish. Virtue, however, must be modeled. Virtue requires, at the minimum, a constant recognition of the moral reality of other people, and a willingness to consider them as morally significant creatures, whose goods are worthy of being taken seriously. In the absence of this sort of empathetic identification, we are likely to fall into a variety of pathological states, none of which seem to lead to stable forms of self-government. At the macro level, there is the simple fact that one must be committed to the thought that those with whom one disagrees are rational humans, rather than devils, in order to continue the process of political deliberation with them. The political polarization of the ongoing election is not itself a problem; a democracy might survive polarized views, if those views are capable of respecting and negotiating with their opponents. What is more problematic, I think, is the ways in which the recent election frequently involves the demonization of one's opponents, up to and including threats of imprisonment – and the threatened refusal to concede to an election that does not go one's way. Political deliberation requires the continued sense that one's opponents are not demons made flesh, but reasoning creatures like us, with whom we have moral reasons to do politics.

What does all this have to do with migration? The answer, I think, is that how a state treats those who are outside that state provides some lessons for how we are obligated to treat people generally. A polity that refused to take the goods of other people seriously – that avoided violating rights, but did no more – would be an inadequate polity, simply in virtue of the fact that it failed to remind the populace of the society that human goods are worth taking seriously. We are sometimes skeptical of this sort of moral education view; does anyone, we might wonder, look to migration policy to determine their moral outlook? Perhaps not – but there are some sorts of migration policy that can reliably be felt to undermine our skill at living up to our moral views. An explicitly racist immigration regime, for instance, would give comfort to domestic racists, and would exacerbate those racist ideas lurking below the surface in democratic society. Similarly, an unmerciful policy – one that did ignore the goods of outsiders, and refused to take them as worthy of moral concern – would exacerbate our own tendencies towards moral corruption and selfishness. The skill of empathy is required for particular acts on the part of citizens towards newcomers; the acts of several Republican governors in suing to keep out Syrian refugees, for instance, has certainly given moral support to those who have no desire to assist in creating some sorts of mutual accommodation to those refugees. The point, however, is more general than this. In refusing to listen to the pleas of those outside the state, the state makes it easier to refuse to listen to the pleas of those with whom one disagrees.

At this point, though, I want to transition to my second argument – the argument from democratic agency. This argument is more easily stated, but perhaps more complex in its details. The thought is this: we generally speak as if the state were an agent in its own right. Even those of us who are suspicious of assigning metaphysical status to collective or group entities tend to think that we are right to think of the state as taxing, governing, and so on. If I am subjected to a

tax, it is a mistake for me to focus my resentment on the tax collector; he is only the agent of the state, and it is the state to which my resentment is rightly directed. Now, we might actually dissolve all this, and refer only to natural persons; after all, some individual person proposed the tax bill, people voted on it, and so forth. But we often want to propose some sort of agential structure for a state, one that endures over time and is distinct from the individual persons currently occupying roles within that state. For this to be possible, though, we have to be able to understand the state as having agency in its own right; and for us to be able to do that, we have to understand the state as having the burdens of agency, which include ethical obligations towards those over whom it has power.

This, of course, seems a long way to go for a weak conclusion; no-one thinks that the state does not have *some* ethical duties. What I want to specify, though, is that most of these duties can be rephrased as political duties. The state wrongs me when it violates my right to practice my religion, for instance; this is because the conditions of its being a just state prevent it from exercising this sort of coercive power over me. The state also wrongs me, sometimes, when it fails to provide me something necessary for my agency; a state that does not keep and maintain an adequate police service renders my life less secure than I have a right to expect. Both of these, though, go to whether the state is exercising its power in the right sorts of way. They go to legitimacy, or justice, as a state. The point I am trying to make in the present context is broader than that. I think the state has some ethical duties, not because it is a state, but simply because it *exists*, as a sort of agent to which ethical duties apply.

The reason I want to insist upon this is that I think we cannot think of the state as an agent without thinking that it has some duties towards those whose goods it has power to promote or deny. These duties are not the same as the duties of justification towards those over whom it exercises coercive power; the state has these, as well, but I am not concerned with them at present. Instead, I want simply to note this fact: if we are going to speak of the state as having its own agency, then that agency must accept the burdens of fulfilling the duties that are incumbent on all agents – namely, to exist in a community with other agents, and to develop plans within which they promote the goods of some other agents. This means, though, that the state cannot be fully moral as an agent, without developing some plan with which the goods of other people – those to whom justice owes nothing – are made part of its own plan.<sup>19</sup>

To these thoughts I want to add one last idea: our ethical duties are often made most plain when they are pressed by those with no power to act in their

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<sup>19</sup> One worry here seems to be that this entails that all collective agents must have some plan for taking care of the goods of others; the PTA, for instance, must develop some plan of merciful agency. I think this is true, but not necessarily a difficulty; all collective agents must accept the burdens of caring for the goods of some non-members, *to the extent that their power allows*. The PTA is presumably more limited in its powers than the United States, and so has fewer obligations to build a plan to assist non-members. I do not think, though, that it is so fanciful for us to imagine that the PTA has some minimal duties of this sort.

defense. One way of seeing this is the common thought that character is revealed, not by our actions towards our superiors, but towards those who cannot do us any good or ill.<sup>20</sup> There is an admixture of self-concern in many of our duties; even in domestic politics, despite the importance of solidarity and empathy, we often have the thought that we our opponents good treatment precisely because we might someday be subjected to their rule. This means, though, that we have an obligation – as individuals, and as members of a state – to be very careful to live up to our duties towards those who are most powerless towards us. The state, I think, is defined as a moral agent most powerfully and directly by how it treats those to whom it has no particular obligations, and who themselves possess the least power to contest what is done. This means, though, that migration might indeed be a more important site of mercy than we might have thought. It is possible, as I will discuss, for mercy to be extended in domestic politics; but what is striking about migration is that those to whom rights of migration are given are, in general, not already members, and therefore not especially able to influence that state’s policies, nor use its power to benefit or harm another. If agents are marked by how they treat those who are unable to resist – who are, literally, *at one’s mercy* – then migration is an area in which states reveal their moral character, and their acceptance or denial of the duty of beneficence.

## II. Mercy and migration: love and common carriers

All this is doubtless inadequate, but might be enough for us to begin the process of looking at some applications. I think any number of sites might show the independent importance of mercy for migration; in particular, I have elsewhere examined the issue of amnesty for long-term undocumented residents, using ideas somewhat similar to these.<sup>21</sup> In the present context, though, I want to examine two distinct cases, each of which might be potential sites for the application of a policy of mercy. The first is the unification of romantic partners through migration rights; the second is the use by wealthy states of financial penalties against common carriers transporting migrants without documents. I will deal with these in turn.

### a. Love

Most states have principles that permit the reunification (or unification) of romantic partners; most states, that is, allow the spouses of citizens or long-term residents to enter into their territory, and eventually naturalize. This practice is generally referred to as family unification – a term I will avoid in the present context, since it encompasses both romantic love and the relationship between parents or guardians

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<sup>20</sup> I have looked for a respectable home for this quote, and have found many claimants, but I have to admit that the idea’s most prominent defender is Albus Dumbledore. See J. K. Rowling, *Harry Potter and the Goblet of Fire* (London: Bloomsbury, 2000).

<sup>21</sup> Michael Blake, “Equality without Documents: Political Justice and the Right to Amnesty,” 36 (supplementary volume) *Canadian Journal of Philosophy* (2010).

and dependent children. The latter, I think, requires independent examination, quite distinct from the analysis given to romantic love. Most centrally, the dependent child exists – to my thinking – as a *sui generis* sort of creature, marked by both the capacity for moral agency and a profound dependency on the care and guidance of an adult guardian.<sup>22</sup> This gives rise to important questions of ethics, but they are not the question I ask here. Instead, I want to ask: what reasons could we give, for thinking that it is morally important to unite romantic partners, and to provide migration rights to such partners that are not provided to all those who desire them?

The most powerful defense of this proposition, to my thinking, comes from Matt Lister, who argues that freedom of association requires that just states provide such rights to non-citizen spouses.<sup>23</sup> The argument inverts a restrictionist argument from Christopher Heath Wellman, for whom the right of freedom of association provides a justification for the exclusion of any unwanted would-be migrant. Wellman argues that the right to freely associate includes the freedom to avoid unwanted association; if the migrant is unwanted by the majority, then she has no right to enter. Against this, Lister notes that the law generally takes intimate forms of association such as marriage to have priority over more distant forms of relationship such as sharing a neighborhood or a political community. Indeed, argues Lister, the centrality for the individuals in a romantic relationship *of* that relationship means that the state cannot refuse to allow the couple to unite, to bring about those goods that are only possible when one shares a physical space. The right to associate with one's romantic partner, for Lister, means that the state commits a wrong when it refuses to let a current citizen reunite with his non-citizen partner – by refusing to allow the latter entry into that state's territory, and eventually full membership.

I have said that I think Lister's argument is the best I have seen; I believe, though, that it establishes less than he thinks it does. In the first instance, it is not clear that freedom of association is actually denied when the state refuses to provide the goods needed for the associative relationship. Freedom of association is violated, in the first instance, when the relationship itself is actively prevented; if we were to prevent someone from *emigrating* to a society in which he and his spouse were able to live, then that freedom would indeed be violated. (As we would, of course, if we were to make his marriage illegal, or refuse it the sorts of recognition to which marriages are otherwise entitled in our society.) But what we are doing in refusing to allow the migration of a foreign spouse is something rather different. We are, instead, refusing to provide the means by which the relationship might be made successful; and that seems like something that is not quite as easily justified under the rubric of freedom of association.

Think, by means of comparison, of freedom of religion. My freedom to practice my religion is, obviously and directly, violated when the state makes that

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<sup>22</sup> See Caleb Yong, "Caring Relationships and Family Migration Schemes," forthcoming.

<sup>23</sup> Matt Lister, "Immigration, Association, and the Family," *29 Law and Philosophy* (November 2010).

practice illegal. It is less obvious that the state has an obligation with the tools needed to make that practice successful. If I need an expensive altar, I cannot rightly demand that the public pay for that altar – even if the amount needed were, for any individual citizen, comparatively modest. If I need a community of believers, in which I might worship among like-minded people – and if none of those believers live within my country of origin – it is not clear, to me, that I have the right to have those fellow believers migrate into my country, and join with me in my practice. Freedom of religion prevents my state from doing things designed to prevent my religious practice; it does not necessitate that the state provide me with the means whereby that practice might be undertaken, if that means does not already exist.

More could be said here, of course; the analogy is imperfect, and Lister might well push back against this rejoinder to his view. At this point, though, I want to introduce a second worry, once this time from Luara Ferracioli.<sup>24</sup> The worry is simple: if what we are promoting is the value to the individuals involved of the relationship *for them*, then what confidence can we have that only romantic relationships of a permanent sort provide the values we prize? We do, after all, experience a variety of intense relationships, each of which provides value to us: we are co-writers, friends, fellow-travellers, and so much more. All of these forms of relationship give rise to value for the ones who live them. All of them are capable of being felt as intensely as the romantic love is; even if we generally feel more for our spouses than for our co-authors, it is entirely possible for these non-romantic relationships to be as intimate and significant as an romance might be. What right do we have to privilege the romantic relationships over these non-romantic ones?

One strategy that Lister might use against these worries to rely upon the simple, and true, fact that law has to use statistical probabilities. *Most* co-authoring relationships are less intimate than *most* co-authoring relationships, and so on. This is, I think, the right strategy; but it comes with a significant price. The relationship between empirical generalization and political justice is a rather complex one, and it is dangerous for one to rely upon statistics and probability in justifying individuals. What, in short, can Lister say to the one whose (non-romantic) friendship is intense enough to ground the same sorts of concerns that animated his theory of associative freedom? The only thing, I think, is something along the lines of: we have to make law using bright lines, and your relationship is unusual enough to fall on the wrong side of the right line. This is, again, something that can be said – but I think it is wrong to say this, if we are convinced that Lister is correct, and that there is a right to associative freedom where there is intense intimacy. (We can't wrong someone with a law, and take the fact that the law doesn't *usually* wrong people as a justification.) If intimacy gives rise to rights against the state in this way, then I have the right to unify with the other party to the relationship – regardless of how rare or common that intimacy might be. The law, in other words, would be unjust as applied towards the one whose intense friendship is denied.

I think we might do something else, in view of these worries. As I have said, I believe Lister is right about the importance of romantic love; it generally (although

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<sup>24</sup> See Luara Ferracioli, "Family Migration Schemes and Liberal Neutrality," 13 *Journal of Moral Philosophy* (2013); Yong (forthcoming).

not always) counts as more intimate to the ones experiencing it than other forms of human relationship. What this means, for me, is *not* that we have a right to be unified with our spouses, but that spouses represent a particularly appropriate place for the exercise of mercy.

Let me explain. I think beneficence, as discussed above, is a moral duty incumbent on states. There is no particular policy of mercy demanded by this duty, but *some* such policy must be developed. This policy is not subjected to the same moral strictures as those derived from norms of justice; since no-one given mercy has a right to that mercy, there are fewer constraints on how that mercy is allocated. But there must be some sincere concern paid to the goods of those promoted by the policy of mercy. Here, things are made more complex by the fact that the good of the citizen and that of the non-citizen are both at stake; but we can imagine, to simplify, that both goods are to be promoted when the non-citizen spouse is allowed to enter. I think we might hold both of these things to be true: first, that the non-citizen spouse has no independent right to entry – that she is not wronged by a policy that refuses to let her marry. The second thing to be held true, though, is that we are morally right – we are fulfilling a duty to the world, although we could have fulfilled it in a variety of ways – when we allow that non-citizen spouse to enter.

This may seem harsh, of course; and, indeed, it is. (That is, in part, why this is such an attractive space within mercy might operate). We shy away from thinking that love – or, at least, marriage – could be so denied. And yet we do this all the time; visitors to the United States, including students on F-1 or J-1 visas, are advised that their temporary residency is incompatible with developing the intent to remain, and that romantic entanglements will be viewed as forming that intent. The law, in other words, tells us that the mere existence of a romantic bond will not be enough to create a right for permanent residency. We tell foreign nationals, in other words, that law will trump love; it is hard to see why we could not, in justice, say the same to domestic citizens.

We do not, of course, do so – as I noted at the start, countries generally permit the unification or reunification of spouses, and I think they are right to do so. I accept, moreover, Lister's account of why this unification is a good thing for the spouses. What I assert, instead, is that this is best looked upon as an act of legislative grace – of mercy, that is – rather than something that is required by justice. There are several advantages here. The first stems from the argument about freedom of association, as described above; it makes sense, to me, to think of the provision of a stable home for the couple as the gracious provision of a good – rather than as something mandated by the notion of associative freedom itself. The second stems from Ferracioli's argument, as noted. Ferracioli's challenge has bite, I think, precisely because spousal unification is conceived of here as a right; and probability seems to be a bad basis for the administration of a right. If, instead, the granting of a home for a marriage seems to be a matter of mercy, rather than justice, then we have more room in which to rely on notions of probability and fact. It is hard for us to say to those whose intense friendship is refused as a basis of migration rights that we have chosen, based upon what most friendships are like, to deny their rights. It is, however, entirely open for us to say: in choosing what sites

are those within which mercy will operate, we will rely on statistical generalizations. We can play the odds with grace, but not with moral rights.

This, though, still seems somewhat weak. There is still a great deal of contingency here. If my argument is correct, then a political community could say: we won't admit *any* relationships as sites for migration rights. Would that sort of statement be morally permissible?

At this point, I want to say: yes, it is, but it's absurdly unlikely to be said by any morally acceptable society. One reason we can see this, I think, is that the reunification of spouses is perhaps the easiest site within which the state might exercise its mercy. The benefit to the spouses in question is significant; the cost to the political community, if any exists, is low, given the ways in which those who marry into a society are likely to integrate into that society. It is, further, politically popular, since benefits accrue not only to foreign nationals but also to domestic citizens marrying those foreign nationals. Giving legal rights to spouses is, perhaps, the lowest-hanging fruit in the orchard. A state could, in theory, emerge which gave migration rights to some other set of people, but not to spouses; that state might have some alternative way of living out the concept of mercy, that focused on some other set of individuals. That is a conceptual possibility; but it is unlikely to be found. A state giving up on family unification, in short, is not giving up on mercy as a matter of conceptual necessity; as a matter of practice, though, it would announce that it had no intention to be guided by the concept of mercy in its migration policy.

#### *b. Carrier sanctions*

At this point, we can transition away from matters of love, to a discussion of taxation and common carriers. The wealthy states of Western Europe and the United States – along with Australia – have sought to prevent would-be migrants from Syria and other sites of conflict from arriving at their doorsteps. These states are forbidden, by customary international law and by treaty, from returning individuals with a well-founded fear of persecution to those places in which they would be persecuted. It is a serious, and complex, legal question as to what this actually entails; migrants who make it to the territory of a country are entitled to a hearing on the merits, but what about those intercepted at sea?<sup>25</sup> These complexities have increasingly led states to rely on carrier sanctions – financial instruments by which penalties are ascribed to common carriers (such as airlines and boat companies) that transport people without the correct documentation. These penalties are significant; between 1987 and 1997, almost one hundred million British pounds were assessed in fines against carriers.<sup>26</sup> These financial pressures incentivize carriers to scrutinize the travel documents of would-be migrants carefully; many of those who have the funds needed to travel do not have these documents, and so are pushed out of the regulated market and into the vastly more dangerous unregulated one. The result is

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<sup>25</sup> See *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993).

<sup>26</sup> Amnesty International, *No Flights to Safety*

that a trip from the Bodrum peninsula in Turkey to the Greek island of Kos costs only \$19 if one has a passport – but over \$1000 if one does not.

Understandably, carrier sanctions have made many commentators uncomfortable. One way of beginning a criticism of these sanctions is by insisting that the actions of the carriers here are, in fact, acts ascribable to the state; as such, the obligations of non-refoulement might hold against common carriers as much as they do against states.<sup>27</sup> A related version of this strategy is to assert that the carrier's regime of controls here represents a form of hidden coercion by the state against would-be migrants; as such, the coercive power of the state – exercised against these migrants – gives rise to a demand for justification, which is unlikely to be met. As such, carrier sanctions are unjust, and must be eliminated.<sup>28</sup>

I do not think these arguments about coercion are likely to succeed. Carrier sanctions can represent forms of injustice, when they are directed against those who have an independent right to migrate; here, however, we are obligated not simply to allow carriers to provide those individuals with the means to exit, but to work to provide such means ourselves. More importantly in the present context, though, I think carrier sanctions represent a site within which we are failing to live up to the merciful societies we claim to be. They do not represent – or, at least, do not always represent – injustices; they are, however, policy instruments towards which we are right to maintain a suspicion.

I will make this case, in the first instance, by arguing against the interpretation of carrier sanctions as state coercion. Tendayi Bloom and Verena Risse, most prominently, have recently argued that these sanctions entail coercion against the marginal by the powerful; if we have a right to have coercion justified to us, then the coercion here stands in need of justification. Border coercion is ascribable not simply to guards at the border, but to all those who use coercion to prevent people from entering into the vessels with which they might arrive at the borders. This analysis, however, seems to me to depend upon a confusion: one between coercing a person, by threatening to withhold something from them to which they are otherwise entitled – and *affecting* that person's life, by coercing some third party into not providing a good that would be helpful to the person's life. The two are both susceptible to moral analysis, but the analysis must be distinct for each case.

We can make this case by imagining an island nation, to which there is no exit or entrance except by a stormy sea. We can imagine that the sea is so stormy that we have not developed any boats that can yet traverse it. Under these circumstances, there is no coercion; the inhabitants of the island are not provided with the tools to exit, but there is no agent (nor institution, nor regime) that is making the sorts of threats that are the indicia of a coercive action. They cannot leave, but no-one is coercing them to stay.

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<sup>27</sup> Tilman Rodenhäuser. "Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control," 26(3) *International Journal of Refugee Law* (2014).

<sup>28</sup> Tendayi Bloom and Verena Risse, "Examining hidden coercion at state borders: why carrier sanctions cannot be justified," 7(2) *Ethics and Global Politics* (2014).

We could imagine, next, that technology exists which is capable of traversing the seas – but that the journey simply isn't profitable. The islanders aren't capable of paying for the journey – not enough, at any rate, to justify the risk to the boats. It might be felt that the society that owns the boats has some obligation to risk those boats, in the name of international exchange and opening up new forms of life; this, though, seems a weak basis for our claim of coercion. Unless there is some independent right to travel the world, of sufficient strength to ground the conclusion that we have a right to have others provide us with transit, then we cannot infer any coercion here. Here, again, no-one is coercing the islanders into remaining where they are, and it seems as if the islanders have no right to claim injustice when they are not provided with an exit.

We could imagine, finally, that technology exists to traverse the sea, and it is profitable, but that a government of the state to which the islanders wish to journey enacts a prohibitive tax on that journey, such that it ceases to be profitable. Again, it is possible to analyze these circumstances with a moral lens; the government enacting the tax may or may not be right to do so. But it seems wrong to say that those who are not provided with a means of exit are coerced into remaining where they are. They are, indeed, unable to leave; there is, indeed, coercion going on here. (If they try to jump into a boat, they will be repelled from doing so.) It seems false, though, that the coercion is that of a state against a would-be migrant. Instead, the right description seems that the state in question is using its coercive powers to prevent the common carrier from using its own property to assist those who want to make the journey. The carrier then uses its own coercive power to prevent the would-be migrant from entering the boat – or, to make the example more realistic, the airplane. The migrant, though, had no right to enter into that vessel; they are coerced into leaving property to which they had no rights of entry. A state has coerced the common carrier into using its own rights of property in this way – and that is not reducible to the state itself coercively preventing the migrant from leaving.

All this, though, seems a bit disreputable. Perhaps we could vindicate the thought that the migrants are being coerced, by noting that they had access to something that has been taken away from them by the carrier sanction – namely, the right to use airplanes and boats to leave. But that seems wrong; if we are entitled to something by justice, it is not to the use of other people's airplanes. The state, to use the language of David Miller, is not coercively preventing admission into its society; it is, instead, merely preventing people from physically entering into that society.<sup>29</sup>

And yet we are right – I think – to maintain our sense that the international regime of carrier sanctions is morally disreputable. What could ground this sense?

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<sup>29</sup> I should note that I believe – contrary to Miller himself – that similar things cannot be said about all borders. Holding guns up at national borders, and threatening bodily death should we cross, seems rather coercive – even if regulating the means of travel between borders, so that the tools we use are less open to us, does not always seem similarly coercive.

I think there are two possibilities here. The first is simple: some of these people have the right not only to enter into a new society, but to positive assistance in doing so – and we deny these people their rights when we remove the means by which they would enter into that new society. People fleeing Syria, in many cases, are fleeing not just inadequate lives, but wholesale atrocity and butchery. (They deserve, to return to our analogy, access to the boats, and much more than that as well.) These people, we might think, have the right to be allowed to enter into a new society – and this means not just that we forbear from coercively preventing the entry of those people when they arrive at our borders, but that we also provide them with the means to arrive at those borders. Coupled with this idea is the thought that we have an obligation to err on the side of inclusion; among those who claim the right to relocate are those who do not have that right – but it is a more serious matter to fail to provide what is owed, than to provide something to someone who is not entitled. All this says that we ought to dislike carrier sanctions because of their effects on those who have rights, but not documents. They have presented themselves to common carriers with money, but non-existence or forged papers. They deserve, we might think, a hearing; and it is a matter of moral gravity to prevent that hearing from taking place, by incentivizing a common carrier to remove the means by which it might occur.

All this is true – and yet we should not be quite so complacent; if it is true, then we might be in more trouble than we think. If people are entitled not just to a hearing when they get to a state of refuge, but to have the means required to arrive at that state, then we cannot simply eliminate carrier sanctions and think that we have done our job. The removal of carrier sanctions would assist those who have the money, but not the documents. We are also obligated, by our own moral logic, to offer assistance to those who do not *have* the money, or any other means of acquiring transportation. To put this simply: once we start admitting that people have rights to get on airplanes, we cannot rest comfortable giving those rights only to people who can afford the ride. If migrants are entitled to a fair hearing, and to the means to arrive at that hearing, then refugee rights might be more demanding than we usually think.

The other possibility for our disquiet, though, emerges if we imagine that the situation in question does not actually contain any people who have an independent right to leave. Carrier sanctions, after all, apply to any number of people without documents, not all of whom have the rights associated with refugees. What could be said about the use of carrier sanctions here? As could be expected, I think the notion of mercy might be introduced to make sense of our reaction. There is something morally perverse about sanctioning carriers for carrying precisely those people who are most vulnerable – those who are unable to acquire or pay for legal documentation, state approval, and so on. I will not say that this gives rise to a blanket prohibition on the use of carrier sanctions; as above, these sanctions do not seem to give rise to legitimate complaints on the part of those against whom they are exercised. But in a world wracked by inequality, the use of these sorts of sanctions can be reliably predicted to push people into more risky and less secure forms of travel, simply as a result of a very human desire for a better life. If we were to insist that those people who had the money and the initiative necessary to get to

an international port and purchase tickets on a plane had a *right* to migrate, I think we would be exaggerating; these individuals do not acquire the right to move simply because they have the money to make the journey, and those without that money would at any rate have the same rights to assistance. What I would say, instead, is that we have the opportunity to show ourselves to be merciful, rather than callous and selfish, when these individuals are provided with some goods to which they are not entitled – in this case, at the very least a hearing, and perhaps a permanent home even in the absence of a valid claim to be a refugee. If, as I have said, a state is defined not just by its compliance with the norms of justice, but by the choices it makes in how it makes use of those rights justice provides, then we have here a choice to define ourselves as a merciful people.

All this has been necessarily sketchy, and more needs to be said – both about mercy, and about the policies that might be defended in its name. I will be satisfied, in the present context, if I have shown the need for such a conversation to begin.