

It conveys an impression of gravity and dignity, and at the same time of grace and attractiveness. The first in its dark deep state, the latter in its light attenuated tint; and thus the dignity of the age and the amiableness of youth may adorn itself with degrees of the same hue.

WOLFGANG VON GOETHE, on red, in *Theory of Colours*, trans. Charles Lock Eastlake (Cambridge, MA: MIT Press, 1970)

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Mercy at the Areopagus

A NIETZSCHEAN ACCOUNT OF JUSTICE AND JOY IN THE *EUMENIDES*

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INTRODUCTION

The *Oresteia* ends joyfully: Orestes is acquitted of the crime of matricide; the Furies become honorable; and both of these because Athens initiates the rule of law. According to an intuitively plausible interpretation of the Aeschylean trilogy, this joyful resolution is the result of a coolly rational transition from a primitive cycle of vengeance to a court-centric response to crime.¹ While the House of Atreus was trapped in a net of self-perpetuating vengeance—“the stuff of passion and partiality”—the establishment of the court in the *Eumenides* proceeds via an enlightened grasp of the institutions of punishment, which is subject to robust standards of rationality and impartiality. The prima facie plausibility of this “rationalistic” reading—where “rational” processes are construed as excluding and opposed to the affective—poses a challenge for Nietzschean readings of the *Eumenides*. This is true for two reasons. First, it is incompatible with Nietzsche’s view of the value of tragedy, according to which tragic theater psychologically invigorates the audience member by presenting her with a beautiful transfiguration of the agonizing aspects of life. Second, if the rationalistic interpretation of the *Eumenides* were true, this would entail that Nietzsche reveres Aeschylus partly for the same reasons he disdains “Socratic optimism,” which he takes to mark the *death of tragedy*.²

Fortunately the rationalistic interpretation is largely misguided. This is not to say that the establishment of legal intuitions in the *Eumenides* is the result of *irrational* attitudes; my claim is rather that it involves a joint effort of reason giving, persuasion, and beautiful illusion. Its agents *do* display responsiveness to reasons, but these agents are simultaneously directed by a host of needs and desires, some nobler than others.³ Furthermore the joyful conclusion of the *Eumenides* depends heavily on the persuasive power of the Olympian gods, sometimes in direct opposition to rules of logical inference. In addition to outlining the partly arbitrary character of the establishment of justice, the first section brings attention to the perseverance in historical Athens of privately inflicted sanctioning practices.⁴

Nevertheless a Nietzschean reading of the *Eumenides* would not point to the arbitrariness present in the (genesis of the) rule of law *in order to discredit it*. Rather, as I argue in the second section, given that it puts an end to the cycle of “senseless resentment,” Nietzsche can be read as celebrating the formation of the Areopagus. This event is an instance of what he calls in the *Genealogy* the merciful self-overcoming of justice.

Although justice arrives accompanied by joy in the *Eumenides*, this is not because there exists a constitutive relationship between virtue and happiness, as “the Socratic Optimist” claims. The Socratic Optimist maintains, inter alia, that suffering is inessential for the transformation of individuals and communities. The intellectual apprehension of truths is for him or her sufficient. By contrast, as I argue in the third section, the *Oresteia* evinces commitment to the Nietzschean view that the gates of justice are stubborn and in need of the wisdom of woe to pry open. While suffering *is* essential to this view of tragedy—and to this extent Nietzsche appears to retain a significant kernel of Schopenhauerianism—pessimistic-cum-resignationist it is not. Given that suffering, on the Nietzschean picture, ideally serves as a springboard for a distinctive form of human progress, the view on offer warrants the label *Aeschylean Optimism*.⁵

Why, though, should we care what Nietzsche or Aeschylus might have thought about suffering or justice—not an entirely unfair question. While many aspects of both Aeschylus’s and Nietzsche’s attitudes toward justice will be foreign to contemporary ears, a goal of this chapter is to turn to progressive voices of centuries past in order to illuminate our debate about the role of mercy in criminal law. Accordingly I conclude with a discussion of the transformative potential of merciful criminal sanctioning.

PRACTICAL REASONABLENESS AND THE APOLLONIAN

The just and joyful conclusion of the *Eumenides* is a result of a transformation of suffering endured in the prior parts of the trilogy. That this is not a coolly

rational transformation is evident from consideration of the following three factors: (1) Apollo's arguments and conduct at Orestes's trial; (2) Athena's persuasion of the Furies (*Erinyes*); and (3) historical evidence that motivates the prevalence of passion and partiality in Attic law. I hope to show that Nietzsche's view of the *Apollonian principle* in Greek tragedy bolsters the appeal to each of these factors, which I discuss in turn.

The question of Orestes's punishment is at the core of the *Eumenides*. Having killed his mother, Clytemnestra—in order to avenge his father and to regain the throne from Clytemnestra's adulterer and co-conspirator, Aegisthus—Orestes is now hounded by the Furies, ancient goddesses of (especially familial) vengefulness. Under Apollo's tutelage Orestes requests the counsel of Athena, who, upon the arrival of the Furies in Athens, organizes for Orestes something novel: a trial.

With a jury of twelve Athenians in place, Apollo offers in defense of Orestes's matricide the following "true parent" argument:

The so-called mother of the child
 isn't the child's begetter, but only a sort
 of nursing soil for the new-born seed.
 The man, the one on top, is the true parent,
 While she, a stranger, fosters a stranger's sprout,
 if no god blights it. And I can prove it to you:
 a father can give birth without a mother.
 And here before us is our witness, child
 of Olympian Zeus, daughter who never fed
 and grew within the darkness of a womb,
 a seedling that no goddess could bring forth.⁶

As *proof* that the mother is inessential to reproduction, and therefore that Orestes cannot have killed a *true* parent, Apollo refers to Athena's divine birth. Suspect though this argument may appear to the contemporary reader, the idea that the mother serves as merely an enabling condition (or "soil") in reproduction is endorsed by Aristotle.⁷ In spite of the falsity of its conclusion, then, the "true parent" argument may have been offered (and received) in earnest. We might wonder what evidence could be supplied to justify the argument, but I will not pursue that question here. I put this worry aside because the role of the argument is at least partly undermined by Apollo's lack of consistency about the father's significance as a parent. The Furies criticize Zeus's chaining up of his *own father*, asking Apollo, "How do you square this with your argument?"

Apollo's response? "You stinking, hideous filth, shunned by the gods / We can break bonds, we can slip out of shackles!" (Eu. 748–49).

Apollo's response appears to exploit an ambiguity in what it means to break "bonds": *chains* on the one hand, and contracts on the other. It is no straightforward admission of Olympian dishonesty, but Apollo's illusive nature is not difficult to discern.⁸ At a later moment in Orestes's trial, the Furies (who occupy the role of the chorus) accuse Apollo of having once tricked their half-sisters out of exacting due punishment, that time with the power of wine:

CHORUS LEADER: You did the same thing, too, in Pheres' house:

you persuaded the Fates to let men hide from death.

APOLLO: Is it so unjust to treat someone so kindly,

Someone that pious, in his time of need?

CHORUS LEADER: You overturned the age-old covenant

by duping those ancient goddesses with wine.

APOLLO: And when you lose this trial, you'll vomit all

your venom at the ones you hate—quite harmlessly.

(Eu. 842–49)

Apollo's tendency toward pragmatically driven deception is well accounted for on Nietzsche's theory of tragedy. Nietzsche claims that two principles are interwoven in tragic drama: the Dionysian and the Apollonian, where Apollo is the "ruler over the beautiful illusion of the inner world of fantasy—the imaged world of dreams" (BT 1, 2). While the Dionysian principle maintains that ours is a world awash with suffering, unconcerned with human happiness, tragic art presents us with this terrible aspect of life *but* wrapped in the "pleasurable illusion of dreams" that the Apollonian affords (BT 4). The logic of dreams permits non sequiturs, and while Apollo never admits to having double standards, he *is* self-conscious about the efficacy of anger in coming to an adequate judgment in the trial. In the course of defending Orestes before Athena, Apollo claims he has "spoken as I have to whip up anger in you who are called to set this matter right" (Eu. 747). Athena continues Apollo's trend insofar as she is unconcerned with nonaffectively convincing the Furies, but her tack is one of spiritedness and persuasion (rather than deceptiveness and insult).

First, Athena prefaces her own vote regarding Orestes's culpability thus: "I acquiesce to the man in all matters [*to d'arsen aino panta*] (except that I choose not to marry) and I take the father's side with my whole *thumos* [*hapanti thumoi*]" (Eu. 855–56).⁹ While the spirited element of the soul is sometimes characterized in the *Republic* as irrational and antagonistic to peacemaking,¹⁰ we need only consult Homer for evidence of a conception of *thumos* as politically concerned and

responsive to reasons. Consider Odysseus's manner of deciding how to act virtuously: "O woe is me, what am I to endure? It is a great act of cowardice if I should take flight, terrified by the numbers of men; but it will be worse if I am taken alone; the son of Kronos put the other Danaans to flight. But why has my dear θυμός [*thumos*] discussed these things in me? I know that cowards leave the battle, but he who excels in battle must stand his ground strongly, whether he is hit or hits another."¹¹ Personified as an interlocutor, Odysseus's *thumos* contributes in deliberation over the course of action that he can "stand behind"; "it invigorates him to use his life in a manner that risks life in an honorable way."¹² Similarly, in appealing to *thumos* in casting her ballot for Orestes's acquittal, Athena displays action that is both affective and concerned with political reasons. That is, Athena's action is not "rational" in a narrow, nonaffective sense, nor is it irrational.

There is another way in which Athena's spiritedness is indispensable for the *Oresteia*'s joyful conclusion. After the ballots are counted in Orestes's favor, Athena makes *three* unsuccessful attempts to pacify the Furies. In the final, successful monologue Athena's conciliatory offer is put as follows:

But if you hold in awe Persuasion's glory,
the power of my tongue to soothe and enchant,
you might live here with us .

The way

is free for you to be a landholder here,
enjoying honor justly and forever. (Eu. 1030–38)

Having threatened to express their rage on the entirety of Athens, the Furies are gradually appeased. Like her brother and "spokesman for Zeus" (Eu. 21), Athena is a herald of Apollonian activity. As Martha C. Nussbaum notes, for Nietzsche "Apollonian activity is not detached and coolly contemplative, but a response to an urgent human need, namely the need to demarcate an intrinsically unordered world."¹³ The relevant need in the *Eumenides* is the transformation of vengeance—a chain of vengeance that had claimed the lives of Agamemnon, Clytemnestra, Cassandra, arguably all of Troy, Iphigenia, and most of the Argive fleet. The momentousness of this transformation consists in the detail that, in each instance, vengeance had presented itself as a demand and expression of justice (e.g., Clytemnestra and Aegisthus both justify and explain their acts of vengeance by appeal to *justice* [Ag. 1637, 1814, 1847–52]).¹⁴ While the Furies aim to continue indefinitely this "time-honored" retributive cycle and "suck the half-caked gore out of [Orestes's] living flesh" (Eu. 302–303), their vengeful enthusiasm is gradually, very gradually, curbed.

I have been arguing that the transition from the vengeful order to the legal order does not involve the elimination of a passionate response to crime. According to Danielle Allen, the porousness of the boundary between vengeance and punishment is evident too in historical Athens. For example, Athenian democracy permitted “private citizens [to] execute some forms of punishment without passing through the court system at all. For instance, a private citizen was within the bounds of law if he killed a thief or adulterer whom he caught in his house at night.”¹⁵ Conversely, as David Cohen argues, the civic institutions of punishment were “developed precisely so as to provide public means of carrying on private wars of vendetta: ‘litigation involved the opportunity to contest one’s claims to honor with those of one’s rivals.’”¹⁶ So, in addition to being absent in the trilogy, we have historical reasons for maintaining that a link between just punishment and the “dispassionate” would have been foreign to Aeschylus.

None of this, it should be emphasized, is meant to discredit the grounds of the joy we find in the *Eumenides*’s conclusion. First, given that Athena’s spiritedness is keenly responsive to political reasons, it is only out of misunderstanding that we might demand—as has been demanded in *California v. Brown*, for instance¹⁷—that deliberation over sentencing be free of sentiment. (I return to this point below.) Second, and more important, against the backdrop of human sacrifice, matricide, patricide, decade-long war, and psychological torture spanning the *Oresteia*, the arbitrariness present in this “Apollonian power of transfiguration” (BT 25) can be no objection to it. How can arbitrariness count as a strike against the Areopagus’s worth if its establishment, and *the audience’s* appreciation of its establishment, makes “life possible and worth living” (BT 2)? This reference to the lives of the audience is meant to mark Nietzsche’s insistence that the transformative power of tragedy be operative on two levels: in its content (the Furies and Athens are transformed) and in the form it takes in the audience’s mind; in experiencing an overcoming of extreme suffering, Nietzsche maintains that *we the viewers* will ideally undergo a transformation of consciousness that makes possible not only the endurance of the terribleness of life but a love of it, no longer construed as overwhelmingly terrible.¹⁸ That is, Apollo is representative of rendering beautiful life’s dreadful elements, and for this reason “existence under the bright sunshine of such gods is regarded as desirable in itself” (BT 3).

Although the Apollonian principle consists in the beautification of life, which Nietzsche frequently characterizes in terms of “illusion” (BT 3, 7, 16, 18), it is no mere escape from “the real world.”¹⁹ “Apollonian art,” as Julian Young puts it, “*acknowledges* and does not eliminate from consciousness the terrible in life.”²⁰ For this reason the love of life that the Greeks inspire is no deluded attitude; its ethical significance is manifest in Nietzsche’s discussion of justice’s relation to mercy and resentment. Apollonian transfiguration *does* alter our view of human action, but as

I argue in the next section, this consists in a correction rather than a mere alteration of the default mode of perceiving human action.

FROM RESENTIMENT TO MERCY

Over the course of the *Eumenides* the Furies undergo an important transformation. This is a transformation from what Nietzsche calls an orientation of *ressentiment* to an orientation of mercy. It thus comprises the “self-overcoming of justice.” While discussion of Aeschylus’s work in the *Birth of Tragedy* centers on *Prometheus*, Nietzsche there expresses reverence for the “profoundly Aeschylean demand for justice” (BT 9),²¹ which can be profitably extended to the *Eumenides*. My suggestion is that Nietzsche would welcome the just and joyful end of the *Eumenides* partly because it is put in the service of reshaping (particularly rendering more constructive) attitudes of *ressentiment*. Nietzsche’s own view, as Richard Posner aptly puts it, is that there is a “relation of substitution between law and vengeance,”²² a substitution that is outlined in the *Genealogy*’s second essay, and here it is worth quoting Nietzsche at length:

Law represents on earth the struggle *against* the reactive feelings to impose measure and bounds upon the excesses of the reactive pathos and to compel it to come to terms. Wherever justice is practiced and maintained one sees a stronger power seeking a means of putting an end to the senseless raging of *ressentiment* among the weaker powers that stand under it (whether they be groups of individuals)—partly by taking the object of *ressentiment* out of the hands of revenge, partly by substituting for revenge the struggle against the enemies of peace and order, partly by devising and in some cases imposing settlements, partly by elevating certain equivalents for injuries into norms to which from then on *ressentiment* is once and for all directed. The most decisive act, however, that the supreme power performs and accomplishes against the predominance of grudges and rancor—it always takes this action as soon as it is in any way strong enough to do so—is the institution of law, the imperative declaration of what in general counts as permitted, as just, in its eyes, and what counts as forbidden, as unjust. From now on the eye is trained to an evermore *impersonal* evaluation of the deed. (GM II: 11)

The establishment of legal institutions provides the community with means for redirecting and thereby rendering more productive the energy underlying the community members’ “senseless raging of *ressentiment*.” I follow Nietzsche in his use of

the French (*ressentiment*) since the phenomenon of interest differs markedly from what we mean by “resentment.”²³ A brief word on this difference will be of use. First, we usually take resentment to be an emotion reflecting the violation of a demand made on members within a single moral community.²⁴ Nietzschean *ressentiment*, by contrast, is an “emotional *orientation*” and serves as the basis for a range of moral emotions. Second, *ressentiment* involves an asymmetry between classes that resentment need not involve. Jay Wallace captures both of these features when he says that the orientation of *ressentiment* consists in “a kind of focused hatred that grows out of a structural comparative deprivation.”²⁵ Third, part of what Nietzsche finds objectionable about *ressentiment* is that its source in privation is unacknowledged. More specifically this orientation essentially involves self-deception, particularly *repressed vengefulness* (GM I: 7).

This last aspect may sound strange given how vocal the Furies are about their desire to exact revenge on Orestes. Bernard Reginster’s elucidation of the connection between self-deception and *ressentiment* is particularly helpful here. As Reginster puts it, “The ‘[person] of *ressentiment*’ is divided between two sets of desires (and values): the apparent desires (and values) which he has as a result of his revaluation, and the real desires (and values) which are ‘repressed’ but nonetheless covertly motivate his revaluation.”²⁶ In the case of the Furies, it is not difficult to see that a deep longing for recognition underpins much of their vengeful behavior. In complaining about the Olympian gods, the Furies say, “None of them would feast with us at the same table; we have no part in festivals where white robes are worn” (Eu. 415–17). The desire for Olympian recognition that this complaint expresses renders intelligible the warmth with which the Furies *eventually* ease into their crimson robes. At last their wish to be esteemed by the Olympian gods is fulfilled. That their desire for graciousness has been previously repressed is suggested by the following avowals of pride in pettiness:

Adept at devising,
Unmatched alike in remembering wrong done
As in repaying it;
Awful to men, deaf to their pleas,
Detested and dishonored we fulfill
our given office; cut off
from the gods, we in the dark slime make
the path rough both for those who live in sunlight
and for those in sunlessness. (Eu. 462–70)

On the surface the Furies profess that their lowliness is a virtue, a kind of achievement. Yet given the lack of status that this lowliness implies, by postulating a

repressed desire for Olympian recognition we can better understand the Furies' pensive though *eventually wholehearted* acceptance of Athena's offers of honor (and its concomitant benefits of friendship, sacrificial offerings, and worship). We need not even rule out that the Furies adjust the relative value they attribute to merciful action partly in virtue of the *sheer difficulty* of maintaining their vengeful resolution in the face of Athena's tempting offer. While it is sometimes rational to develop tendencies to *avoid* reconsidering our resolutions, the mechanism underlying this sort of "judgment-shift" is not by itself irrational.²⁷

We might nonetheless worry about the motivation of the Furies. I have claimed that they *become* merciful, but if their vengeful desires are merely overpowered by desire for honor, their change in mind is driven by self-interest. Perhaps they only *appear*, and aim to appear, merciful. Worries of this sort are ill-founded. The fact that the Furies hunger after honor does not rule out their acting mercifully. As Nietzsche claims elsewhere in the *Genealogy*, the very transition from strict retributive justice—and the Furies repeatedly insist that they are motivated by what is "just" (e.g., Eu. 312, 361, 838)—to a model of justice concerned with the well-being of the whole marks a move toward mercy: "The justice which begins with 'everything is dischargeable, everything must be discharged,' ends by winking and letting those incapable of discharging their debt go free: it ends, as does every good thing on earth, by *overcoming itself*. This self-overcoming of justice: one knows the beautiful name it has given itself—*mercy*" (GM II:10). Even if the Furies exercise self-restraint *partly* from self-interest and require a wave of persuasion to adopt a merciful stance, Nietzsche's point is that the contingent factors that contribute to the adoption of the merciful attitude need not discredit its status. Athena's conciliatory power might have been necessary for the Furies to abandon their long-standing retributive resolution, but consider by comparison the young man's being gradually persuaded by his peers to abandon his childhood resolution to never be susceptible to the charm of females. "Surely," as Richard Holton claims, "maintaining that resolution in the face if his later attraction will not be rational."²⁸ Nor need it be right to construe the contributing role of his peers as *simply* providing a motive from peer pressure when the young man changes his mind.

While the cynical reader of the *Eumenides* may claim that the desire for honor rather than mercy is what *really* motivates the Furies to yield in their plans of seeking retribution, I see no reason to choose one over the other. We should note that even prior to the trial, the Furies claim that they need to exact vengeance in order to preserve their honor (Eu. 379). For this reason the "sweeping denigration of any self-interested or desire-based human motives"—in other words, the insistence on "motivational purity"—is foreign to the world I am considering.²⁹

This point furnishes us with tools for responding to a more powerful interpretative objection—namely, that by highlighting discussions of mercy and joy I am presenting an anesthetized Nietzsche, a Nietzsche stripped of his familiar commitment to Thucydidean power politics, a Nietzsche who has forgotten that “justice is thus requital and exchange under the presupposition of an approximately equal power position: revenge therefore belongs originally within the domain of justice, it is an exchange . . . Justice goes back naturally to the viewpoint of an enlightened self-preservation, thus to the egoism of the reflection: ‘to what end should I injure myself uselessly and perhaps even then not achieve my goal?’—so much for the *origin* of justice” (HAH 92). Yet there is no inconsistency in Nietzsche’s claiming, on the one hand, that justice has its *origin* in “repayment and exchange,” the homeland of revenge, and on other hand, that we are well-served by transfiguring this original condition of justice; this is exactly what the merciful self-overcoming of justice requires. Again the “relation between law and vengeance is roughly one of substitution.”³⁰ Furthermore we can accept this Nietzschean point about justice accepting Nietzsche’s undemocratic restriction of the scope of the “we” that would be well-served by the self-overcoming of justice. This is to resist Nietzsche’s view—as characterized by Rawls—that the goods of justice and liberty are to be subordinated to those of human excellence in art and culture, the sources of which are “higher types” of individuals.³¹ (In other words, we can maintain, as Derek Parfit has recently claimed, that “Nietzsche was a brilliant thinker, who made many claims that are original, important and true,” while insisting that “when we encourage people to read Nietzsche’s books, we should admit that Nietzsche made some utterly appalling claims.”³²)

Given, then, that neither Aeschylus nor Nietzsche has a view of motivation that precludes partly self-interested behavior from being merciful (and so concerned with the civic good), there is no reason not to take the Eumenides at their word when they say:

Let citizens
 give joy for joy,
 loving the common good,
 hating a common foe:
 they’ll cure most ills this way. (Eu. 1132–36)

A way of further resolving the apparent tension between being motivated by both mercy and honor is to look at the level not merely of action but of character: Why not think that being a merciful person *is* a way of being honorable? If we accept this idea, we have a concrete way of describing the longevity of the transformation

of the Furies into Eumenides (or “Gracious Ones,” as Athena’s appellation would have it). Furthermore, given that Nietzsche’s “person of *ressentiment*” is self-deceived and so, as Reginster maintains, lacks a trait essential to Nietzsche’s view of “nobility” of character—namely *integrity of self*—we have grounds for thinking that mercy and honor are not only compatible but in this case interdependent.³³ It is not just the *decision* of the Furies that changes; in unifying their behavior with a previously repressed and rational desire (namely a desire to cooperate with the Olympian gods), they themselves *become* honorable (de facto and de jure). In subordinating their aggressive drives to their hitherto repressed desire for recognition, the Furies undergo a sublimation that mirrors their newly formed cohesive relationship toward the state. As Ken Gemes maintains, sublimation, which is integral to psychological health on Nietzsche’s view, is characterized by “integration or unification, while pathological symptoms involve splitting off or disintegration.”³⁴ Given that the transformation of the Furies consists in a change in *affective orientation*, it is no mystery why, as Nussbaum maintains, the Eumenides come to express a unified range of benevolent sentiments toward the state and its citizens.³⁵ In coming to view their previous actions as no longer honorable, the Furies undergo a transformation of attitudes that displays the structure of a recently canvassed (and empirically well-supported) honor-based model of moral revolution.³⁶

So much for compatibility of mercy with honor; let’s now turn briefly to justice. Even if mercy and honor are compatible, this does not by itself render intelligible the compatibility of mercy with justice. The problem is this: if justice demands deserved punishment, and mercy involves punishment that is less than deserved, mercy seems to be unjust. How can the supererogatory nature of mercy be included within the realm of justice while remaining supererogatory? Jeffrie Murphy puts the dilemma thus: “Mercy is either a vice (injustice) or redundant (a part of justice).”³⁷ Given that the Furies originally seek retribution in the name of justice, how can their leniency be anything other than unjust?

We will be well served by briefly attending to the history of the concepts of justice (*dike*) and mercy (*epieikeia*). On Anaximander’s use of the concept (the oldest available to us), justice (*dike*) follows the same sort of regularity that natural processes are taken to exhibit. Like the order of nature, the just judge is not to be moved in the face of ostensible mitigating circumstances. As Nussbaum puts this understanding of justice, “The world of strict *dike* is a harsh and symmetrical world, in which order and design are preserved with exceptionless clarity. After summer comes fall, after fall comes winter, after day comes night; the fact that Agamemnon was not the killer of Thyestes’ children is as irrelevant to *dike* as the fact that the night did not deliberately aggress against the day.”³⁸ On the one hand, this natural symmetry guards against discrimination and guarantees treating like cases alike. Yet I

cannot help thinking that in at least some cases indiscrimination is tantamount to insensitivity to factors unusually relevant in deciding fair punishment. “Justice as revenge,” claims Posner, “has no means of distinguishing between culpable and justifiable injuries or even for developing the distinction. Liability tends therefore to be absolute.”³⁹ This uncompromising character of retribution is especially salient if we put the contrast as one between (1) calculable and unthinking punishment—Anaximander’s nature, I take it, does not deliberate; and (2) punishment *informed by* perception of the relevant particulars.

Given the minimal assumption that the judgment of crime, unlike the unfolding of the seasons, ought to be a *cognitive* process, the Aristotelian account of merciful punishment should strike us as attractive: Aristotle “define[s] equity as a kind of justice, but a kind that is superior to and frequently opposed to another sort, namely strict legal justice . . . Equity [or mercy] may be regarded as a ‘correcting’ and ‘completing’ of legal justice.”⁴⁰ On a model of punishment that takes seriously mercy or equity (*epieikeia*), the “relevant particulars” that the judge is responsive to are broadly those classed as “mitigating circumstances.” The merciful attitude to human action recognizes that the stakes in punishment are much higher than night’s following day or autumn’s following summer—none of these natural events involve parties that *care* about their own well-being or the well-being of society. Nevertheless, since this care is manifest in *intelligent perception*, the judge’s verdict will not abandon the demands of impartiality. That is, the cognitive nature of merciful punishment guarantees that there is something for the merciful judge to *get right*.

The Aristotelian view that just punishment sometimes requires *careful perception* of the circumstances is well-captured by Aeschylus’s imagery of the Furies’ transition from darkness to light. In their default retributive mode the Furies self-identify as “luckless daughters of the Night” (Eu. 921). In this mode they are wholly blind to differences between justifiability and culpability. By contrast, under the tutelage of “All-seeing Zeus” (Eu. 1223) the Eumenides, now dressed in radiant crimson robes, become torchbearers for a humane mode of punishment. It is true that the mitigating factors of Orestes’s case are not what *motivate* the Furies’ leniency—and this marks an important disanalogy between the Furies and the merciful judge—but once transformed, the Eumenides *are* able to recognize factors of this sort. It is from their new vantage point that they make proclamations like “I ban, too, the untimely killing of young men; and you gods who possess the power to do so, let young girls find husbands” (Eu. 1117–21). Having stepped into new light—the light of the merciful orientation—the Furies bear the responsibility of “oversee[ing] the lives of men” (Eu. 1083–84).

Along with the “perceptual shift” of the Furies comes a newfound ability for expression. As Nussbaum notes, early in the *Eumenides* the Furies make repetitive

canine-like utterances: “Their only words are ‘get him get him get him get him’ (labe labe etc.), as close to a doggy hunting cry as the genre allows.”⁴¹ These cries stand in stark contrast to the poetic outpourings of the transformed goddesses.

Metaphors of “entering the light,” “seeing with new eyes,” “finding grace,” and so on have a characteristically optimistic air. This should give us pause. Given, that is, that Nietzsche takes rationalism and optimism to form a union in *Socratic optimism*, the latter must be sufficiently unlike the optimism of the *Oresteia*. In the next and final section I distinguish these two forms of optimism and outline the upshot of my reading for the debate about mercy and criminal law.

VARIETIES OF OPTIMISM

Optimism is for Nietzsche a pejorative term associated with Socratic rationalism. Indeed what Nietzsche calls “Socratic optimism” comprises a set of commitments about happiness, truth, and virtue that he takes to signal the demise of Greek tragedy. In spite of this Nietzsche *is* an optimist of a particular kind, namely an *Aeschylean optimist*. Let me explain.

According to optimism in the Socratic sense, suffering is dispensable for flourishing. “If we had access to the right sort of knowledge,” so the Socratic optimist maintains, “the terrible consequences could have been avoided, and we would be better off for it.” More generally this is a view according to which knowledge is sufficient for virtue and virtue for happiness. Nietzsche’s opposition to Socratic optimism rests on its blindness to the truth of the tragic: “Consider the consequences of the Socratic maxims: ‘Virtue is knowledge; man sins only from ignorance; he who is virtuous is happy.’ In these three basic forms of optimism lies the death of tragedy. For now the virtuous hero must be a dialectician; now there must be a necessary, visible connection between virtue and knowledge, faith and morality; now the transcendental justice of Aeschylus is degraded to the superficial and insolent principle of ‘poetic justice’” (BT 14). Optimism of this sort is antitragic because it aims to eliminate the significance of external contingencies for happiness. If virtue is sufficient for happiness, all unhappiness or suffering must arise from the sufferer’s own vice. We need not follow Nietzsche in blaming the disintegration of tragedy on Euripides—whom Nietzsche brands the “poet of aesthetic Socratism” (BT 12)⁴²—in order to appreciate his insight that the Socratic view of suffering is only amplified in the modern (quasi-) Christian worldview. In the latter, as a matter of divine fairness regarding desert, one’s degree of blameworthiness is construed as proportionate to one’s degree of suffering. As Nietzsche puts it in *Daybreak*, “Misfortune and guilt—Christianity has placed these two things on a balance . . . But this is not *antique*,

and that is why Greek tragedy, which speaks so much yet in so different a sense of misfortune and guilt, is a great liberator of the spirit in a way in which the ancients themselves could not feel it. In antiquity there still existed actual misfortune; only in Christendom did everything become punishment, well-deserved punishment” (78).⁴³ Indeed it follows that if virtue is sufficient for happiness and vice is blameworthy, then all unhappiness must arise from actions that are blameworthy. What is mistaken about the optimism of the Socratic(-cum-Christian) worldview is the simple and well-known truth that bad things happen to good people and that we sometimes suffer in ways grossly disproportionate to our blameworthiness. In addition to separating happiness from virtue, however, Nietzsche severs virtue from knowledge. That Nietzsche takes happiness, virtue, and knowledge to be mutually dissociable, however, should not surprise us. After all, like Aeschylus, Nietzsche holds that there is knowledge to be had from suffering.

The connection between wisdom and suffering abounds in Nietzsche’s corpus. Consider his claim that *everything* that makes life valuable—“for instance: virtue [*Tugend*] art, music, dance, reason, intellect”—arises out of subjection to strict rules, out of “obedience for a long time in a single direction” (BGE 188).⁴⁴ Nietzsche’s view on the wisdom wrought from suffering is particularly vivid in his discussion of Dionysus, specifically of the “chorus of the Greek tragedy, the symbol of the whole excited Dionysian throng”: “In its vision this chorus beholds its lord and master Dionysus and is therefore eternally the *servicing* chorus: it sees how the god suffers and glorifies himself and therefore does not itself *act*. But while its attitude toward the god is wholly one of service, it is nevertheless the highest, namely the Dionysian, expression of *nature* and therefore pronounces in its rapture, as nature does, oracles and wise-sayings: *sharing his suffering* it also shares something of his *wisdom* and proclaims the truth from the heart of the world” (BT 8). Although Nietzsche posits a deep union between suffering and wisdom, he should not be construed as claiming that suffering is somehow *sufficient* for wisdom. Sympathetic though he is to human impulse to render meaningful one’s suffering (GM II: 7), the optimism he endorses is not one according to which suffering inherently *justifies* (or even pushes in the *direction of justifying*) itself through its consequences, by, say, generating “more overall wisdom.” Indeed such a view would bear too close a similarity to *Leibnizian* optimism, on which, owing to the rational structure of the universe, every local negative event is a necessary component of a globally maximal positive state of affairs—or, as Voltaire’s Pangloss puts it, “All is for the best in this best of all possible worlds.”⁴⁵

Apart from its untenability as a reading of Nietzsche, this view displays a deep insensitivity to disproportionate levels of suffering. In the case of the *Eumenides*, is it unimaginable that Athens could have established rule of law without the Argive fleet *entirely* destroying Troy? Or that Nietzsche might have produced great work

with one or two fewer “torments that go with an uninterrupted three-day migraine, accompanied by laborious vomiting of phlegm” (EH I: 1)? Tempting though it is to speculate over Nietzsche’s *own* redemptive self-narrative and its psychological contributions to his late-career explosion of productivity, this is a topic for another paper.⁴⁶

Leaving aside the question of the sufficient *amount* of suffering needed for “wisdom from woe,” it is difficult to deny that Orestes grasps something of significant truth because he has lived through the tumult of the House of Atreus (even if part of it is lived in exile). Seeing what he grasps will help get in view the *kind* of suffering at issue in Aeschylean optimism. Consider Orestes’s claim “I have been schooled by my own suffering” (Eu. 319). Orestes’s assertion is noteworthy in the context of his predecessors’ disavowals of wrongful action. According to E. R. Dodds, Orestes’s difference from Clytemnestra and Agamemnon consists in an understanding of a peculiar sort:

It is not that Orestes is humble where [Clytemnestra] is arrogant, or that his motives are “purer” than hers; he has simple human motives, which he does not conceal (299–304). The deeper difference is that the divine purpose, of which both Agamemnon and Clytemnestra were unconscious and guilty agents, is for Orestes something consciously known and humbly, though not easily, accepted. He is aware that his act is a crime, even before it is committed (903, cf. 106–17 and 1029); but receiving it as a duty, he stands as a type of all those who take upon themselves “the necessary guilt of human action.” Orestes has not merely suffered his situation, he has understood it and in a sense mastered it; it is his *learning* which makes him worthy of salvation.⁴⁷

We get a particularly powerful example of Orestes’s tragic understanding in his expression of grief over his matricide—grief he feels in spite of taking his act to be inevitable and justified. Shortly after murdering Aegisthus and Clytemnestra, Orestes articulates his sorrow thus:

Now I am here to mourn,
Holding this web that killed my father. Still,
I grieve for what was done, for what was suffered,
And for all our race, shouldering, as I do,
A filthy and unenviable triumph. (Lb. 1147–51)

Unlike Agamemnon, who, from the practical necessity of sacrificing Iphigenia, concludes that the act was right, Orestes appreciates that the impossibility of fulfilling

two inconsistent ethical demands does not relieve him from the pain of having committed a serious wrong.⁴⁸ That is, Orestes understands, as Bernard Williams puts it, “If I eventually choose for one side of the conflict rather than the other, this is a possible ground of regret . . . These states do not depend . . . on whether I am convinced that in the choice I made I acted for the best; I can be convinced of this, yet have these regrets.”⁴⁹ Orestes’s mourning is especially noteworthy given that he is told in unambiguous terms by Apollo that the god himself is responsible for Clytemnestra’s death: “I ordered him to kill his mother. I am responsible” (Eu. 675–76). In spite of Apollo’s symbolic alleviation of Orestes’s accountability, Orestes does not attempt to disown the fact that his mother died by his own hand.⁵⁰

Why, though, should we take Orestes’s anguish to speak in favor of a Nietzschean, in contrast to a Socratic, reading of the *Eumenides*? In answering this question it is important to recognize that for Socrates *too* suffering need not be bad. For example, in Plato’s *Gorgias*, Socrates’s argument for the powerlessness of tyrants rests on the principle that it is better to suffer injustice than to commit it (469b–474d). There is thus a sense in which Socrates can agree with Nietzsche that suffering may sometimes be painful without being bad. Although agreement on this general point narrows the contrast between Socrates and Nietzsche, the Socratic view of suffering’s value is nonetheless substantially different from that evinced in the *Eumenides*. Note that for Socrates suffering is valuable only *comparatively*: given the option to either (1) harm someone or (2) be harmed, Socrates thinks we should accept (2), since (1) is shameful and so must be worse. By contrast suffering’s value for Aeschylus cuts across the distinction between committing and suffering harm. Given that Orestes not only undergoes harm but commits it—there is blood on his hands—the value of his suffering cannot be of the narrowly moral sort outlined by Socrates. Rather it consists in bringing about a tragic form of understanding, one that is decidedly anti-Socratic (given the Socratic union of happiness, virtue, and truth).

The importance of Orestes’s understanding, however, is secondary to the wisdom wrought from suffering by the *Eumenides*. It is the latter who enable the long-standing tradition of retribution to be reshaped. The cessation of the Atridae cycle of vengeance acquires the status of political progress in its serving as the occasion for Athens to initiate rule of law. Rule of law provides institutional measures for substantially improving the well-being of Athenian citizens, and it is this presence of human progress that most clearly warrants the name Aeschylean optimism.

Aeschylean optimism differs substantially from its Socratic nephew in that the former places suffering at its center. For all this, however, we should resist pessimistic readings of Nietzsche on tragedy. For example, according to Williams’s “Nietzschean” view of tragedy (at least the sort that qualifies as “stark fiction”), tragic theater presents us with the bleak truth of the “inexplicable necessity” of

“extreme, undeserved, and uncompensated suffering,” for which “there is no justification.” Williams is right to hold that Nietzsche thinks life abounds with undeserved suffering, but why should this lead us to accept Williams’s suggestion that tragedy’s function *consists in* “lay[ing] fictional horrors before us in a way that elicits attitudes we cannot take towards real horrors”?⁵¹

It is worth appreciating why one might be tempted to endorse, in a Nietzschean spirit, a pessimistic reading of tragic drama’s function. Like his educator and exemplar, Arthur Schopenhauer, Nietzsche holds that life is not fundamentally fair; *pace* the Stoics (BGE 9) and other rationalists, the world displays no internal rational structure. It is *we* who justify the sea of suffering that threatens to swallow us, as it has swallowed our friends and forerunners.⁵² On Schopenhauer’s view, however, we are not simply *vulnerable* to suffering; humans are *essentially* and inevitably sufferers, deserving of contempt as a species, yet *individually* deserving pity.

Nietzsche’s indebtedness to Schopenhauer, however, consists not in mimicry but more valuably in his “think[ing] pessimism through to its depths.” In immersing himself fully in the pessimistic worldview, Nietzsche eventually endorses the opposite world orientation: “Anyone like me, who has tried for a long time and with some enigmatic desire, to think pessimism through to its depths and to deliver it from the half-Christian, half-German narrowness and naiveté with which it has finally presented itself to this century, namely in the form of the Schopenhauerian philosophy will have inadvertently opened his eyes to the inverse ideal: to the ideal of the most high-spirited, vital, world-affirming individual” (BGE 56). Elsewhere Nietzsche claims that a serious consideration of pessimism results in the position’s own “self-refutation” (TI IX: 36). Although he does not say exactly why this is so, part of the reason is plausibly that acceptance of thoroughgoing pessimism undermines one’s grounds for issuing prescriptions. According to Schopenhauer, because we are a contemptible species of inevitable sufferers, we ought to “injure no one; on the contrary, help everyone as much as you can.”⁵³ But Schopenhauer’s pity-based ethical project is difficult to motivate if we accept the view that humanity is essentially bad.⁵⁴ What reason can I possibly have for pitying my neighbor if he is essentially contemptible? In short, the pursuit of caring for and helping others appears to be a lost cause if we adopt Schopenhauerian pessimism.

Pessimism, in other words, provides little basis for avoiding resignation in the face of life’s demands. What is essential to the view found in Nietzsche and Aeschylus, by contrast, is the drive for a distinctive kind of improvement. This drive is one for which pessimism cannot adequately account. *Pace* those who take life to be inherently and irredeemably bad, for the Aeschylean optimist there are *things we can do*, within mutable limits, *to make life better*.⁵⁵ Here is where the relevance of my discussion of mercy to criminal law surfaces.

We can imagine a version of the *Oresteia* in which Athena, upon reflecting on the nature of the Furies, judges them to be irreparably vicious. If this were Athena's attitude, there would be little reason to think she would endeavor to persuade the Furies to take up the values of Athens as their own. Fortunately, however, Athena's actions are expressive of Aeschylean optimism: in spite of the Furies' formidable track record of malice and blood thirst, Athena recognizes them as beings with whom one can reason. My suggestion is that the "normative hope" that Athena displays toward the Furies ought to serve as a kind of model for merciful sanctioning practices.⁵⁶

What does this suggestion amount to? First, it commends a model of punishment that is psychologically more robust than that of many deterrence-based views. The Aeschylean judge will not view criminals merely in behaviorist terms, "treating them as objects that through their behavior generate either good or bad social consequences,"⁵⁷ but as persons with historically rich moral psychological lives. On the level of behavior Orestes differs little from Agamemnon, but when we introduce remorse alongside considerations of Orestes's circumstances, it becomes possible to view him with different eyes. I hasten to add that the merciful judge need not ignore the deterrent function of criminal law. Indeed the formation of the Areopagus *can* be endorsed on purely consequentialist grounds, but a virtue of a hybrid view (i.e., one that takes seriously merciful criminal sanctioning) is its ability to render intelligible the importance of the judge's understanding the inner life of the criminal. In the *Eumenides* an understanding of the nature of the Furies' *ressentiment* is surely vital for, inter alia, appreciating the latent desire for Olympian recognition.

Empirical work gathered by Paul Robinson suggests another possible avenue for defending merciful criminal punishment on consequentialist grounds. Merciful criminal sanctioning might more accurately track lay intuitions about proper punishment, such that it "therefore better enhances the criminal justice system's moral credibility, and thereby its crime-control effectiveness."⁵⁸ Thus even if we take the deterrent function of criminal law to be a sole consideration, we should nonetheless pursue merciful sanctioning.

I want to suggest, however, that one lesson of the *Eumenides* consists in its making salient that more matters to us than the deterrent effects of law. This "something more" is captured by the value we perceive in the very transformation that the Furies undergo. To make this point let's focus on another kind of merciful sanctioning that has transformative potential. I have in mind college-in-prison programs. While it is true that programs of this sort drastically reduce recidivism and resultantly cut taxpayer spending on incarcerating prisoners (with an average annual cost of roughly \$29,000 per person in the United States, which has a prison population of

over 2.3 million),⁵⁹ the merciful judge cares about *something more* than these (admittedly nonnegligible) consequences.

This “something more,” I think, consists in the merciful judge’s *caring* about what “went wrong” in the criminal’s civic integration, in the judge’s normatively hoping *that* it go better. Furthermore, without such normative hope we have no reason to prefer (1) a world in which the state’s citizens care about the civic good to (2) a world in which they don’t, provided that the consequences, economic and otherwise, are identical for (1) and (2). “Structural comparative deprivation,” recall, was a part of the explanation for the orientation of *ressentiment* that consumed the Furies. Over and above the costs and benefits involved in criminal sanctioning, the merciful judge strives to understand how and under what circumstances citizens feel and think such that they can flourish as responsible and admirable citizens. In other words, the merciful judge acknowledges that the importance of net deterrence effects is parasitic on our experience of the value of another’s humanity.

Nietzsche’s discussion of the practical significance of the merciful attitude suggests that tragic fiction is well-positioned to teach us about the stakes involved in nurturing certain virtues. For this reason, although Nietzsche *does* claim that tragedy represents some of the immense suffering in human life, his reverence for the “profoundly Aeschylean demand for *justice*” (BT 9) suggests that, in spite of its immensity, this suffering should arouse attitudes other than dismay. This will not surprise us if we keep in mind Nietzsche’s many invocations to self-overcoming (D 192; BGE 61, 257; TI X: 38) and self-creating (TI IX: 10; HAH Pref. 3). Indeed reflection on tragedy can provide us with ethical directives for reasonably overcoming some of the default sources of our suffering. There are measures to be taken toward transforming our circumstances. The merciful self-overcoming of retributive justice is just one example.

NOTES

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1. According to Sommerstein, for instance, the model of punishment at work in Orestes’s trial consists in “an independent authority hearing the arguments on both sides and then coming to a rational decision” (introduction to Aeschylus’ *Eumenides*, 21).

2. Nietzsche, *The Birth of Tragedy*, 14. References to *Birth* will primarily be to this translation. References to other works by Nietzsche start with translations by Kaufmann, Hollingdale, and Norman, making changes as needed based on Nietzsche, *Sämtliche Werke*. I use the following abbreviations for Nietzsche's works: *Beyond Good and Evil* (BGE); *The Birth of Tragedy* (BT); *Daybreak* (D); *Ecce Homo* (EH); *Genealogy of Morality* (GM); *Human All Too Human* (HAH); *Twilight of the Idols* (TI). Roman numerals refer to major parts or chapters in Nietzsche's works; Arabic numerals refer to sections. So, for example, GM II: 7 refers to section 7 of the *Genealogy's* second part.

3. It will turn out that the marks of "rationality," as I take Nietzsche to understand them, are inseparable from truths about *human* mindedness, but this is not to endorse a subjectivist view of practical rationality off the bat. Additionally in this paper I speak of both states and processes as rationally governed, leaving aside the related debate over whether rational requirement governs combinations of attitudes. See Kolodny, "State or Process Requirements?," 462.

4. For an argument to the effect that such sanctions are *never* permissible, see Harel "Why Only the State May Inflict Criminal Sanctions."

5. The formation of the Areopagus *can* be esteemed on something like (1) virtue-theoretic or (2) perfectionist grounds—after all, the development of human excellence undergirds Nietzsche's broader project—yet there are difficult issues here regarding (3) Nietzsche's meta-normative commitments (particularly about what makes it the case that those things Nietzsche esteems *are* valuable, if they are), which preclude the straightforward attribution of either view. I must put these issues aside for present purposes. But for (1) see Hunt, *Nietzsche and the Origin of Virtue*. For two very different takes on (2) see Hurka, "Nietzsche: Perfectionist"; Conant, "Nietzsche's Perfectionism." (These readings differ substantially: Hurka's (anti-egalitarian) perfectionism is a version of consequentialism; Conant's Emersonian perfectionism is not.) For (3) see Hussain, "Nietzsche's Metaethical Stance"; Leiter, "Nietzsche's Metaethics."

6. The *Eumenides*, in Aeschylus, *The Oresteia*, 768–79. Unless otherwise noted, references to the *Oresteia* will be to this translation and are abbreviated as follows: Ag. = *Agamemnon*; Lb. = *Libation Bearers*; Eu. = *Eumenides*.

7. Aristotle does not appear to hold that the mother is *eliminable* for procreation, but he does give her contribution the status of passive matter: "If, then, the male stands for the effective and active, and the female, considered as female, for the passive, it follows that what the female would contribute to the semen of the male would not be semen but material for the semen to work upon. This is just what we find to be the case, for the catamenia have in their nature an affinity to the primitive matter" (*Generation of Animals*, 729a).

8. Apollo's line continues thus: "My father made no healing spell for that [i.e., raising the dead], though he can turn all other things, at will, inside and out, and not pant from the effort" (Eu. 759–61).

9. Allen, *The World of Prometheus*, 137. Shapiro and Burian render this "wholeheartedly" [Eu. 856]. Note that Allen refers to the line numbering of the Greek, which differs from the numbering of the translation, which I cite.

10. Plato, *Republic* X 605d, IX 547e.

11. Translated in Caswell, *A Study of Thumos in Early Greek Epic*. See Euripides, *Cyclops*; *Alcestis*; *Medea*. Cf. Purviance, "Thumos and the Daring Soul."

12. Purviance, "Thumos and the Daring Soul," 7.

13. Nussbaum, "Nietzsche, Schopenhauer, and Dionysus," 359.

14. Similarly, upon returning from Troy Agamemnon announces, "Justice has been exacted from Priam's city" (Ag. 931–32).

15. Allen, *The World of Prometheus*, 20–21.

16. Cohen, *Law, Violence, and Community in Classical Athens*, quoted in Allen, *The World of Prometheus*, 21.

17. 479 U.S. 538 (1987). We can maintain that empathy can be put in the service of genuine moral reasoning while holding that, as Nussbaum claims, "it would also be correct to leave aside any mere gut reaction to the defendant's appearance, demeanor, or clothing, anything that could not be made a reasoned part of the 'story' of the case" ("Equity and Mercy," 120). Empathy of the quasi-contagious and mechanical sort is but an immature stage upon which "mutual *moral* empathy" can develop. For a reading of this kind of view in Adam Smith see Carrasco, "From Psychology to Moral Normativity." I cannot argue for this here, but a Smithian sentimentalist account of moral development earns a great deal from empirical work on the topic; cf. Hoffman, *Empathy and Moral Development*, esp. 221–48.

18. Schacht, "Nietzsche on Art in *Birth of Tragedy*," 203. At least this is what tragic theater did for the Greeks; Nietzsche's hopes were invested, at least for a time, in opera.

19. On this point see Young, *Nietzsche's Philosophy of Art*, 42–45.

20. *Ibid.*, 43. Nietzsche's grounds for turning away from historicism—already held by the time of his inaugural lecture at Basel—help explain the peculiar work of poetic-philosophical philology that constitutes *Birth*. See Franks, "Desdemona's Lie," esp. 235–37.

21. The context here is a comparison to Goethe's poem on Prometheus: "But what is most wonderful in this Prometheus poem, which in its basic idea is a veritable hymn of impiety, is the profoundly Aeschylean demand for *justice*. The immeasurable suffering of the bold 'individual' on the one hand and the divine predicament and intimation of a twilight of gods on the other, the way the power of these two worlds of suffering *compels a reconciliation* [italics mine], a metaphysical union—all of this recalls in the strongest possible manner the center and main axiom of the Aeschylean view of the world which envisages Moira enthroned above gods and men as eternal justice" (BT 9).

22. Posner, *Law and Literature*, 149.

23. On Nietzsche's use of the French, see Risse: "Although 'ressentiment' is a French word (and thus missing from the Grimms' dictionary), the German educated elite had used it since the 17th century. The word was presumably adopted because German lacks a good word for the English 'resentment' and the French 'ressentiment.' At the same time, these words serve reasonably well as translations of each other, except that the French word seems to possess a stronger connotation with memory" ("Origins of *Ressentiment* and Sources of Normativity," 111).

24. See Strawson, "Freedom and Resentment."

25. Wallace, "*Ressentiment*, Value, and Self-Vindication," 116, 128.

26. Reginster, "Nietzsche on *Ressentiment* and Valuation," 303.

27. For a discussion of studies of judgment shift in children see Karniol and Miller, "Why Not Wait?"; Holton, *Willing, Wanting, Waiting*, 98–100.

28. Holton, *Willing, Wanting, Waiting*, 140. The example is David Gauthier's.

29. Pippin, "Williams on Nietzsche on the Greeks"; Williams, *Ethics and the Limits of Philosophy*, 175.

30. Posner, *Law and Literature*, 149.

31. See section 50 of Rawls, *A Theory of Justice*. For disagreement based on Nietzsche's use of *exemplar*, see Conant, "Nietzsche's Perfectionism," and for a rejoinder, see Hurka, "Nietzsche: Perfectionist." And see note 5 of this chapter for citations to both.

32. Parfit, *On What Matters*, 578–79.

33. Reginster, "Nietzsche on *Ressentiment* and Valuation," 283.

34. Gemes, "Freud and Nietzsche on Sublimation," 48.

35. Nussbaum, *Anger and Forgiveness*, ch. 1.

36. Appiah, *The Honor Code*. As readers acquainted with Nietzsche's discussion of "revaluation of values" will know, this transition of justice is not Nietzsche's only model for evaluative change.

37. Murphy, *Mercy and Legal Justice*, 169. As Aristotle puts the issue, "When we reason it out, it seems strange if the equitable, being something different from the just, is yet praiseworthy; for either the just or the equitable is not good, if they are different; or, if both are good, they are the same" (*Nicomachean Ethics*, bk. V.1137b1–6).

38. Nussbaum, "Equity and Mercy," 91.

39. Posner, *Law and Literature*, 55.

40. Nussbaum, "Equity and Mercy," 93.

41. Nussbaum, *Anger and Forgiveness*. Thus the Nietzschean reading stands in stark contrast to readings of the *Eumenides* that claim the retributive anger of the Furies is simply shackled beneath the state, their "assimilation" amounting simply to *another* way of repressing the state's aggressive mode. Such views fail to do justice to either the abundance of transformative idioms and imagery in the text or the historical milieu in which Aeschylus produced the *Oresteia*.

42. See Kaufmann's fn. 2 in BT on the inaccuracy of Nietzsche's claim that Euripides is the most optimistic and antitragic of the tragedians (discussed in BT 12–14). See also Nussbaum, introduction to *The Bacchae of Euripides*. It is plausible that Nietzsche's concern with historical accuracy is subordinated to the aim of reinvigorating *our culture* via myth. On the rhetorical function of Nietzsche's historical distortion, see Young, *Nietzsche's Philosophy of Art*, 30–31. Support for this general idea comes from the fact that, in other texts, Nietzsche's relationship to Socrates is far from wholly negative. In a text written a year after the publication of *Birth*, Nietzsche classes Socrates among his favorite pre-Socratic philosophers. See Nietzsche, *Philosophy in the Tragic Age of the Greeks*, 31. On the symbolic function of Socrates in Nietzsche's narrative of tragedy, see chapters 6 and 7 of Silk and Stern, *Nietzsche on Tragedy*.

43. Later in the passage Nietzsche claims that this conceptual connection between suffering and guilt in the Christian moral framework precludes modern Europeans from having a name for what the *Greeks* called "pity."

44. More fully: "Everything there is, or was, of freedom, subtlety, boldness, dance, or masterly assurance on earth, whether in thinking itself, or in ruling, or in speaking and persuading, in artists just as in ethical practices, has only developed by virtue of the 'tyranny of such arbitrary laws.' I will say it again: what seems to be essential 'in heaven and on earth' is that there be *obedience* in one direction for a long time . This always brings and has brought about something that makes life on earth worth living—for instance: virtue, art, music, dance, reason, intellect—something that transfigures, something refined, fantastic and divine" (BGE 188).

45. To be fair, Nietzsche's would be a psychological thesis and so neither known a priori nor a necessary truth.

46. I have in mind social psychological work suggesting that "people who are able to construct a good narrative, particularly one that connects early setbacks and suffering to later triumph, are happier and more productive than those who lack such a 'redemption narrative.'" Haidt, *The Righteous Mind*, 443n24. This point is extracted from McAdams, *The Redemptive Self*, and McAdams and Pals, "A New Big Five."

47. Dodds, "Morals and Politics in the *Oresteia*," 263.

48. Nussbaum, *The Fragility of Goodness*, 36.

49. Williams, "Ethical Consistency," 172.

50. We should not give Orestes *too much* credit, however. Although he expresses remorse over killing his mother, once cleansed by Apollo he silently joins the latter in denying that Clytemnestra was in fact a blood relative.

51. Williams, "*The Women of Trachis*," 58, 59.

52. For an illuminating discussion of Nietzsche's nonstandard use of "aesthetic justification," see Leiter, "The Truth Is Terrible."

53. Schopenhauer, *On the Basis of Morality*, 69.

54. I owe this thought to Joshua Fox, who also brings to my attention Schopenhauer's claim that humankind "is not exactly *imperfection*, as has often been said, but rather *distortion*, in everything" (*Parenga and Paralipomena*, 304).

55. There is a risk of making a straw man of Williams here. Williams's students sometimes mean something weaker by pessimism: just that one's well-being is subject to many factors beyond one's control. See, for example, Russell, "Free Will Pessimism." Our abilities and actions are subject to conditions of luck; this observation cannot be denied. But if the belief that I lack full control over my well-being is sufficient for pessimism, the debate over pessimism becomes stale: *everyone* who acknowledges her lack of self-sufficiency or vulnerability on external goods will be a pessimist. Presumably, and in order to avoid the near triviality of being a pessimist, it should be necessary for commitment to pessimism that one at least have a certain *affective and behavioral* orientation toward the world, say, one of "dismay"? Nietzsche appears to think about pessimism. He claims, for instance, that Schopenhauer's entitlement to being a pessimist is undermined by his regular flute playing (BGE 186)! Given that Nietzsche opposes pessimism on the grounds that we ought to "rejoice" in the face of the suffering found in life (TI VIII: 5), we can be confident that he does not endorse an orientation of dismay. Furthermore, given that Williams takes the "morality system" to be a contingent historical product, it appears that dismay would be appropriate only relative to unreasonable expectations about what agency consists in. In this case, if dismay (and so pessimism) is ever appropriate, it will be so only in transition away from the deep-rooted belief in the morality system. I borrow the picture of "dismay" as transitional to the appropriate attitude of "affirmation" from Ted Honderich, whose view is aptly, I think, put forward in a Nietzschean spirit; see his *The Consequences of Determinism*, esp. 146.

56. For an elaborate exposition of normative hope, see Martin, *How We Hope*, esp. 118–40.

57. Nussbaum, "Equity and Mercy," 113.

58. Robinson, "Mercy, Crime Control, and Moral Credibility."

59. These figures are from the Bard Prison Initiative website, <http://bpi.bard.edu/faqs/>.

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