FROM THE GUEST EDITOR, JUDITH WAGNER DECEW

ARTICLES

JEROME NEU
“Rehabilitating Resentment and Choosing What We Feel”

BENJAMIN C. ZIPURSKY
“Coming Clean on Getting Even: Murphy on Hatred and Criminal Justice”

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“Response to Neu, Zipursky, and Steiker”
Edition in Tribute to Jeffrie Murphy

This edition honors the work and writings of Jeffrie G. Murphy, who is Regents’ Professor of Law, Philosophy and Religious Studies at the Sandra Day O’Connor College of Law at Arizona State University. Professor Murphy is the author of over ten books and edited anthologies as well as more than seventy-five articles and entries in such areas as philosophy of law, social philosophy, and moral psychology and in a vast range of journals including Ethics, Criminal Justice Ethics, Philosophy and Public Affairs, Philosophical Studies, The Monist, Social Philosophy and Policy, and Arizona Law Review. His writings have been greatly influential in multiple areas because of his wide range of topics on Hume, Kant, punishment and capital punishment, retribution, legal moralism, resentment and vindictiveness, forgiveness, equal treatment, injustice, and mercy. Professor Murphy’s books, Kant: The Philosophy of Right (Macmillan, 1970), Punishment and Rehabilitation (Wadsworth, 1973, 1984, 1994), The Philosophy of Law: An Introduction, with Jules Coleman (Westview, 1990), and especially Forgiveness and Mercy with Jean Hampton (Cambridge, 1988) and Getting Even: Forgiveness and its Limits (Oxford, 2003) are among his most foundational contributions.

Three of the papers included here were presented as commentaries on various aspects of Murphy’s work, and also included is a response to the three commentaries by Murphy. All of the papers were part of a special session arranged by The American Philosophical Association Committee on Philosophy and Law, which was held on March 22, 2008, at the Pacific Division Meeting in Pasadena, California. The session was chaired by myself and was organized by Julie C. Van Camp, professor of philosophy at California State University at Long Beach, who is chair of the APA Committee on Philosophy and Law. Professor Van Camp invited the speakers based on suggestions from Professor Murphy, after the special session was conceived of and sponsored by the APA Committee on Philosophy and Law. The Committee members for 2007-2008 include Michael Baur, Francis J. Beckwith, Thom Brooks, Judith W. DeCew, Chris Griffin (ex officio), Kenneth Himma, Martin Gunderson, Steven Scalet (ex officio), and Julie C. Van Camp (chair).

In his paper “Rehabilitating Resentment and Choosing What We Feel,” Jerome Neu, professor of humanities at University of California, Santa Cruz, focuses on Professor Murphy’s considerable contributions to moral psychology and the way Murphy has increased our understanding of the subtleties of our attitudes, judgments, and emotions, placing them in an analytical context. In particular, he examines Murphy’s work on resentment, vindictiveness, and forgiveness, and raises the challenging question whether we can control whether we forgive or resent and are jealous: Is it in our power to generate and control our feelings and, if so, how do we manage it? And if it is not in our power, then what follows? Although Neu believes we can try to have certain attitudes or alter our feelings, he nevertheless argues that there are limits on our ability to choose our emotions and motives, which raises both psychological and moral problems.

Benjamin Zipursky, professor of law and James Quinn Chair at Fordham University Law School, writes on “Coming Clean on Getting Even: Murphy on Hatred and Criminal Justice.” In his essay he challenges Murphy to explain what he means in advocating “coming clean” on vengeful passions, and what the implications are of “coming clean” on one’s feelings of hatred, vindictiveness, and retribution. According to Zipursky, the issue raises two types of questions. First, there is a metaethical question about what sort of moral account is necessary to back up claims that certain emotional responses are fitting or appropriate. Second, Zipursky wonders how Murphy reconciles his retributivism with what Zipursky interprets as Murphy’s view that victim satisfaction is not a core but very much a secondary benefit of criminal punishment. Finally, Zipursky asks a broader question: If victims of wrongs are self-respecting beings who appropriately experience feelings of vindictiveness, does that have implications for how a legal system should be set up?

Carol Steiker, Howard and Katherine Aibel Professor of Law at Harvard Law School, focuses on Murphy’s work on mercy. In “Murphy on Mercy: A Prudential Reconsideration” she praises the range of his work from theoretical and foundational questions to concrete applications of moral and political theory in the actual institutions in the world as well as the “timbre” of his voice in providing accessible and humble and modest reflections on the treatment of mercy in criminal justice. She describes Murphy’s shift in approach on mercy, from near complete rejection, to a tentative embrace of mercy in the realm of criminal justice. Steiker argues that this has inspired others to defend a more robust role for mercy within the criminal justice system. Drawing on statistics about the exponential rise of criminal punishment in the United States over the past three decades, Steiker argues for the need for greater exercise of merciful discretion by actors within the institutions of the criminal justice system to combat the current systematic trend of over-punishment. Recognizing this is not unproblematic, partly because of strong race and class biases, Steiker nevertheless defends increased opportunities for actors in the criminal justice system to use more discretionary power to offer merciful dispensation as one way to provide an antidote to the practical problem of over-punishment that is currently so pervasive in the United States.

These engaging essays, and Murphy’s fine response to all three authors, provide a lively exchange of ideas that is sure to lead to more energetic debate about the issues which Murphy has so thoughtfully and passionately rehabilitated as central in philosophy of law and moral psychology. This collection...
of essays is an excellent tribute to Jeffrie G. Murphy and his distinctive contributions to philosophy and law.
Judith Wagner DeCew
Clark University

ARTICLES

Rehabilitating Resentment and Choosing What We Feel
Jerome Neu
University of California–Santa Cruz

I wish to focus on Jeffrie Murphy’s contributions to moral psychology, which have been considerable. Whether his topic has been the justification of punishment, the place of victim impact statements in sentencing procedures, or the nature of forgiveness, Jeffrie Murphy has enlarged our understanding by paying attention to the subtle structure and conditions of our interactive attitudes and judgments. And he has done it while writing with a vigor and a humor rare in the philosophy of law. He has managed to be continually provocative and engaging, from his early writings in Kantian, Marxist, and Darwinian modes, to his most recent religiously informed explorations. Always drawing on a diversity of disciplines and materials (using especially the resources of philosophy, literature, and the law), always offering incisive analysis, and always providing pleasure through the liveliness of his writing. (I still smile every time I recall his irreverent reference to the vengeful God of the Old Testament as a “supernatural sorehead.”)

Murphy and I share what he at another APA session (2001) once referred to as a “rehabilitation strategy” with respect to certain much-maligned emotions. That is, we have taken emotions of which people may be inclined to disapprove and attempted to place those emotions in an analytical context where they can be seen as having valuable aspects, associations, or conditions. I have followed such a strategy in relation to jealousy and pride, and certain other disvalued emotions—arguing in the case of jealousy that the possibility of jealousy is not eliminable without the sacrifice of much else, including perhaps erotic attachment. A psychoanalytically informed developmental understanding can enable us to see how jealousy may have more to do with the conditions of identity formation and with fears about disintegration of identity than with a pathological possessiveness that insists on treating other people as though they were things. Ultimately, I have argued, the links of jealousy to certain forms of love should make us hesitate before insisting on its elimination as a confused, bourgeois, and worthless pathology—were such elimination possible.

Murphy has adopted a similar rehabilitation strategy in relation to resentment and vindictiveness (as he put it at the APA meeting in 2001), “arguing that these emotions, which have suffered so much unfair bad press, may be seen in a better light when it is realized that they may be tied to the goods of self-respect and self-defense.” And he has richly elaborated those insights. Murphy follows Bishop Butler in understanding forgiveness as involving a “foreswearing of resentment” and so his appreciation of the possible values of resentment has enabled him to enter useful cautions against the too-ready and unconditional forgiveness advocated by some on religious or psychological self-help grounds. If forgiveness is to be rational, it must be based on reasons. And if it is to be a virtue, those reasons must be moral.

Much of current pop psychology and many modern recovery movements, as well as certain forms of traditional religion, urge an uncritical forgiveness (including self-forgiveness) as a path to “closure,” self-healing, and peace of mind. Murphy rightly questions the assumptions behind such urgings. Grounding his views on careful analysis of the nature of forgiveness, subtle understanding of the psychology of anger and resentment, and fine appreciation of the ethical issues of self-respect and self-defense, he provides a nuanced approach to a proper understanding of the place of forgiveness in moral, political, and personal life, most fully elaborated in his 2003 book, Getting Even: Forgiveness and Its Limits.

But there is a problem for all of us who would rehabilitate certain emotions, and it is a problem that ultimately also bedevils those who would be content to banish them without ambivalence or regret. Is what we feel up to us? Can we control whether we forgive or resent, are jealous or content to share? Certainly we may be expected to control what we do on the basis of potentially destructive feelings. Our behavior is generally thought to be up to us. But as Murphy consistently and usefully reminds us, forgiveness involves something else or something more than mere outward behavior. Forgiveness is to be distinguished from exercising mercy or pardoning or (as in the Bush administration’s Scooter Libby case) commuting a sentence. In those judicial and executive activities the focus is on the treatment, the outward treatment, an individual or the system imposes on a malefactor. But forgiveness essentially involves something different: a change of heart, a shift in attitude, an alteration of inner state. The question I want to press on Murphy (and myself) is whether that is within our power and, if so, by what means. And if not, what follows?

On Loving Our Enemies
The scripture for today is:

Matthew 5: 43-48: Ye have heard that it hath been said, Thou shalt love thy neighbour, and hate thine enemy. But I say unto you, Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you; That ye may be the children of your Father which is in heaven: for he maketh his sun to rise on the evil and on the good, and sendeth rain on the just and on the unjust. For if ye love them which love you, what reward have ye? do not even the publicans the same? And if ye salute your brethren only, what do ye more than others? do not even the publicans so? Be ye therefore perfect, even as your Father which is in heaven is perfect.

Christ’s message is that, despite its difficulty, loving one’s enemy is valuable, indeed, that the value is evidenced by the difficulty. One might well wonder why difficulty should be thought valuable—is there something morally defective about living in undemanding temperate climates, such as California’s, where one does not need to shovel winter snow? But aside from the question of the nature and evidences of moral value, there is an issue of psychological possibility. Freud, in Civilization and Its Discontents (1930a, 109-12, 142-43), famously ridicules Christ’s commandment of universal love. His complaint is that loving one’s enemy is not merely difficult, but psychologically impossible, and perhaps even morally dubious. After all, what has one’s enemy done to deserve one’s love, and, assuming that love affects what one actually does, doesn’t it have costs in terms of the favor or preferential treatment that one owes and will have to deny to those who have loved one and treated one
well? He suggests impartiality in love may be a kind of injustice. Crucially, for Freud, the special psychological difficulty in loving one’s enemies is connected with natural human aggression. Its objects, like the objects of love, would seem fixed in human nature. You can’t overcome hatred simply because society or religion tells you that you ought, you can’t make yourself love someone because you think you should. Freud quotes Heine’s humorous take on the matter:

Mine is a most peaceable disposition. My wishes are: a humble cottage with a thatched roof, but a good bed, good food, the freshest milk and butter, flowers before my window, and a few fine trees before my door; and if God wants to make my happiness complete, he will grant me the joy of seeing some six or seven of my enemies hanging from those trees. Before their death I shall, moved in my heart, forgive them all the wrong they did me in their lifetime. One must, it is true, forgive one’s enemies—but not before they have been hanged.

(Freud 1930a, 110n.1; Heine, Gedanken und Einfälle, Section I)

What kind of a moral imperative is it that ignores the facts of human psychology? What is the point of telling someone they ought to do something that they, psychologically, cannot? Kant would doubtless respond to Freud that he is misunderstanding the nature of moral imperatives. They are addressed to the pure, not the empirical, will. He writes in the Groundwork,

Undoubtedly in this way also are to be understood those passages of Scripture which command us to love our neighbor and even our enemy. For love as an inclination cannot be commanded; but beneficence from duty, when no inclination impels us and even when a natural and unconquerable aversion opposes such beneficence, is practical, and not pathological, love. Such love resides in the will and not in the propensities of feeling, in principles of action and not in tender sympathy; and only this practical love can be commanded.

(Grounding for the Metaphysics of Morals 
Ak. 399, 1785, Ellington trans.)

Emotions, Kant would apparently agree with Freud, are not in our control. Moral commands are restricted to what is in one’s control. The moral will, which for Kant is the only unconditionally good thing in the world or out of it, is what matters. Moral worth depends on acting from duty, from respect for law in accordance with the Categorical Imperative. Our “principles of action”—what we try to do—are supposed to be for us to determine, even when “tender sympathy” is beyond our powers. But can we really make sense of respect for the moral law apart from our understanding of the empirical world of so-called “pathological” emotions? What, in the end, is “respect”? Is it, too, an emotion? Certainly like emotions in general it is here an attitude and a motive. Kant himself acknowledges it is a feeling, but insists it must be distinguished from the ordinary run of feelings that can be reduced to inclination or fear, are linked to self-love, and are not purely rational (Ak. 401n.14). It is supposed to be the effect on us of recognition of the majesty of the law. We are to act from duty. The dutiful “principles of action” or maxims of our conduct are what Kant equates with the “practical love” that he thinks can be commanded. But can we choose our motives? Do we determine the reasons that move us?

Virtue and Reasons

Bishop Butler prefaces both of his seminal sermons “Upon Resentment” and “Upon Forgiveness of Injuries” with the first words of the passage from Matthew that we quoted a moment ago (1726, 72, 80). He interprets Christ’s command to love our enemies as a call for forgiveness (1726, 84), where forgiveness is at the least a foreshewing of revenge (as Charles Griswold argues—2007, 19-37), but may also involve a more inner transformation, a foreshewing of resentment itself (as on Murphy’s early formulation—1982, 504). Butler starts with a general obligation of benevolence or good-will towards mankind, what amounts to a Kantian respect for the fundamental humanity even of evil-doers. He adds to it a belief that self-love and partiality regularly lead us to take more offense than is proper and a further belief that we are all sinners and that a forgiving spirit is necessary if we are to hope for pardon of our own sins. So our own need for forgiveness, the tendencies to excess in personal resentments (especially when the harms we suffer are considered from more realistic and impartial perspectives), and the wrongness of demonizing those who injure us together make forgiveness compelling. Forgiveness is a virtue.

The objects of the Christian duty to love (if we may call it that) may be unusually extensive on Butler’s account. Butler insists that “It is not man’s being a social creature, much less his being a moral agent, from whence alone our obligations to good-will towards him arise. There is an obligation to it prior to either of these, arising from his being a sensible creature; that is, capable of happiness or misery” (1726, 84). This shifts the basis of a duty of respect to humanity, of treating as ends never merely as means, from a shared rationality to a shared sensibility. This making of a Benthamite sensibility rather than a Kantian rationality central to our distinctively moral humanity may also require a broadening of the obligations of respect, good-will, and love to other creatures. Whether these broadened obligations can be met without control of “pathological” feelings remains to be seen. For now, it should perhaps be noted that Christian love would seem to need to be more robust than simply a universal good-will towards all, at least if it is to enable us to overcome intemperate desires for revenge while still leaving a passion for justice, as Bishop Butler would have it.

Taking his lead from Bishop Butler, Murphy (in his 2003 formulation) treats forgiveness as essentially involving “the overcoming, on moral grounds, of the intense negative reactive attitudes that are quite naturally occasioned when one has been wronged by another—mainly the vindictive passions of resentment, anger, hatred, and the desire for revenge” (2003, 13; cf. 16, 59). Charles Griswold suggests that the understanding of forgiveness in terms specifically of “foreshewing of resentment” is wrongly attributed to Bishop Butler, that his concern was rather simply with the excesses and abuses of resentment, in particular with revenge—so that forgiveness, on Griswold’s reading, is the “foreshewing of revenge” (2007, 19-37 esp. 20, 31). But that seems to me to downplay Butler’s evident concern with the change in inner state involved in forgiveness (he speaks, e.g., of “vices in the heart” and “right temper” as well as of “right behaviour”—1726, 86; and Griswold himself notes that Butler “is preparing the ground for the now standard view that forgiveness is, so to speak, a ‘private’ matter between the wronged and the wrong-doer, and ‘about’ that as well as the relation of an agent to his sentiments [such as resentment, or guilt]”—2007, 32); and Murphy’s understanding in any case seems to me to offer illumination of psychological, moral, and religious issues of the greatest interest and importance (a view Griswold seems to come around to himself, with inadequate acknowledgment of Murphy’s trailblazing). Revenge may
never be nice (however sweet it may be), and it may always risk excess and endless cycles of retaliation, but resentment (properly understood) is nonetheless often appropriate and valuable (e.g., in fueling calls for justice—1726, 78). Forgiveness (at least on “the now standard view”) teaches that there may be reasons to forebear even an appropriate resentment.

Truth be told, however, even revenge may sometimes be seen as a virtue (as it was by Aristotle and other Greeks—leaving Socrates aside). To suppose that a properly administered judicial system could displace (individual) revenge without loss is to imagine that all wrongs can be given legal recognition and legal punishment or remedy. While our legal system may be moving in that direction, it is not (and, I believe, could not) be there; and even for those wrongs which are already given legal recognition, the costs and complications of prosecution and of litigation can be prohibitive. Does that mean that, when they do not amount to crimes or legally actionable wrongs, or when going to law is impractical, we must suffer the lies, nastiness, insult, betrayal, and abuse meted out by those we interact with without retaliation, without hope (or even desire) of “getting even”? Such a desire would seem to remain a part of resentment on Bishop Butler’s account (e.g., 1726, 83)—though he indeed insists that revenge should be restrained and resentment moderated or proportioned to reality), just as a desire for revenge was explicitly a part of the broader concept of anger on Aristotle’s account. And “turning the other cheek,” like revenge (though in other directions), has its risks—as Murphy, following Butler, elaborates.

As one would expect on an Aristotelian understanding of virtue, forgiveness lies at a mean between an excess and a deficiency: it lies between slavishness and servility on the one side, and an unyielding hard-heartedness and vengefulness on the other. Its benefits may be many: in self-healing from consuming anger, restraint of cruelty, and restoration of relationships. Moral humility and the recognition that we may all need at times to be forgiven, and that the ability to forgive is essential to maintaining intimate relationships, to having friends and lovers, make forgiveness a virtue—even if it is an “imperfect duty” in that, at a given time, no one may be entitled to be forgiven.

In his earliest paper on forgiveness, Murphy makes a distinction: “Christians often like to speak of forgiveness as a free gift or act of grace. Insofar as they are making the point that no one has a right to be forgiven, they are making a sound point. But if they are attempting to argue that no reasons can be given in favor of forgiveness, they are mistaken” (1982, 511). Aristotle teaches that virtue is a mean, but also that one must act well out of the right motive. Murphy focuses on forgiveness as a virtue, and as such, forgiveness must be given for the right reasons, the right moral reasons.

It is to be remembered that one of the grounds for rehabilitating resentment is that it, unlike simple anger, always claims to rest on moral principle. Resentment presumes a certain sort of justification not required by anger (at least by anger caused by simple frustration of desire). It is, as Bishop Butler argues, “settled and deliberate” (1726, 73-76). Of course resentment may, like anger, on occasion be unjustified (the beliefs involved may not be true). But resentment, unlike anger, typically asserts a moral claim, as John Rawls explains: “A person without a sense of justice may be enraged at someone who fails to act fairly. But anger and annoyance are distinct from indignation and resentment; they are not, as the latter are, moral emotions” (Rawls 1971, 488). Rawls distinguishes the moral emotions, including resentment and indignation, on the basis of the type of explanation required for a feeling to count as a particular emotion. Rawls writes, “In general, it is a necessary feature of moral feelings, and part of what distinguishes them from the natural attitudes, that the person’s explanation of his experience invokes a moral concept and its associated principles. His account of his feeling makes reference to an acknowledged right or wrong” (1971, 481). As Murphy argues, the value of resentment lies in its ties to “self-respect, self-defense, and respect for the moral order” (2003, 19). Where resentment is justified, there must be good reasons for giving it up.

Forgiveness involves an interplay of attitudes. The forgiver foreswears resentment, but the evildoer, to be morally deserving of that effort, must acknowledge his wrong and repent or in some other way suitably distance himself from his wrong and the message of disrespect so often tied to it. Only then does the forgiver have the sort of moral reasons needed to make his or her act of forgiveness the manifestation of a virtue.

Here the story gets complicated along several dimensions. The ones I wish to draw attention to have to do with the reasons that justify resentment or make it appropriate, and the reasons that might move us to give it up. And here we must be wary. Kant himself points out that there is room for ambiguity, confusion, and uncertainty in our knowledge of our own motives. (This is apart from questions concerning choice, that is, limits on our control over our own motives. Questions we will be coming to shortly.) Even when we do the right thing, we may not be certain that we are doing it for the right reasons (on Kant’s view, reasons of duty), for our motives may be mixed—including, perhaps, simple inclination or self-interest—and sometimes hidden: “We like to flatter ourselves with the false claim to a more noble motive, but in fact we can never, even by the strictest examination, completely plumb the depths of the secret incentives of our actions” (1785, Ak. 407, cf. 397ff, 419). And similar problems may arise concerning feeling the right thing. When we think our resentment is tied to concern for justice and the moral order, we may be self-deceived. Both the individual state of mind and the punitive social practices that it supports may have darker forces behind them—as indeed may apparently more forgiving and loving states of mind and practices.

In addition to Freud’s critique of Christ’s injunction to love our enemies, we should recall Nietzsche’s suspicion that the Christian call to love one’s enemies is fueled by impotent hate, by resentiment. Nietzsche declares (in the voice of his interlocutor):

Weakness is being lied into something meritorious, no doubt of it...and impotence which does not require into “goodness of heart”...[The weak man’s] inability for revenge is called unwillingness to revenge, perhaps even forgiveness (“for they know not what they do—we alone know what they do!”). They also speak of “loving one’s enemies”—and sweat as they do so.

There is a related risk that Nietzschean resentiment—what Murphy describes as “an ugly emotional brew of malice, spite, envy, and cruelty” (2006, 57; cf. 1999 and 2003, 14)—may also lie behind retributivists’ justifications of punishment. Nietzsche continues:

These cellar rodents full of vengefulness and hatred—what have they made of revenge and hatred? Have you heard these words uttered? If you trusted simply to their words, would you suspect you were among men of resentiment?...[And his interlocutor responds] I understand; I’ll open my ears again (oh! oh! oh! and close my nose). Now I can really hear what they have been saying all along: “We good men—we are the just”—what they desire they call, not retaliation,
but “the triumph of justice”; what they hate is not their enemy, no! they hate “injustice,” they hate “godlessness”...

(On the Genealogy of Morals, 1887, First Essay §14)

We should be wary that lies behind retributive urges to punish is less respectable resentment than self-deceptive resentment—and resentment (unlike rational and well-founded resentment) has no redeeming features. Freud, that other great questioner of consciousness, of commonsense self-understanding, has a similar suspicion that it is envy and reaction-formation that lie at the root of calls for justice (1921c, 119-21; see also Forrester 1996). That is to say, there may be motives that we should mistrust lying behind what presents itself as calls for loving fellow-feeling and for equality, as demands for everyone to get respect and their just deserts.

The Nietzschean suspicion that cruelty may lie behind Christian calls for universal love and retributive calls for justice presupposes both the power of self-deception and our lack of power to choose our motives, including our emotional impulses. Both contribute to the uncertainty, remarked by Kant and felt by all, in knowing what moved us on a particular occasion. Self-deception may involve a choice, at some level, of what motives to admit to and self-ascribe, but it does not change the facts about what, in reality, moves us. So are resentment and forgiveness, the foreswearing of resentment, up to us? Are these things about which we have a choice and matters on which reason can move?

Psychological and Moral Possibility

Murphy insists that genuine forgiveness, if it is to be a moral virtue, must be based on moral reasons—and so, it would seem, it must be a matter of choice. And yet, most of the time, we believe that we cannot choose what we feel—at least not directly, and perhaps not even indirectly. We cannot make ourselves love someone because we think we ought. Can we make ourselves forgive someone because we think they (having repented or met other of the moral conditions Murphy spells out) have separated themselves from their wrongful deed and its implications and that we ought to forgive—both for their sakes and for our own, so that we do not become cold unrelenting judges unable to have ongoing relationships? (It would be an odd virtue that one ought never to practice or that it was merely permissible to indulge.) What is needed to have a change of heart? Is it up to us? These are serious issues for moral judgment, for therapeutic aspirations, for educational and would-be reforming institutions (prisons used to be referred to as “penitentiaries”).

Certainly we can try, but trying ( unlike wishing) is limited by belief in the possibility of success. (What would constitute “trying” to leap over the Empire State Building if one believed the mission impossible?) What would count as success? Not just the disappearance and non-recurrence of the feelings of resentment that we are trying to foreswear. Simple forgetting or perhaps disappearance and non-recurrence of the feelings of resentment (having repented or met other of the moral conditions Murphy spells out) have separated themselves from their wrongful deed and its implications and that we ought to forgive—both for their sakes and for our own, so that we do not become cold unrelenting judges unable to have ongoing relationships? (It would be an odd virtue that one ought never to practice or that it was merely permissible to indulge.) What is needed to have a change of heart? Is it up to us? These are serious issues for moral judgment, for therapeutic aspirations, for educational and would-be reforming institutions (prisons used to be referred to as “penitentiaries”).

We regularly try to shape moral character. Take gratitude, which, like forgiveness, is supposed to be a virtue (or at least a moral requirement). We often try to shape our attitudes—whether by appeals to the desire to please, to gain, or to appease—whether by love and gratitude. But gratitude—like forgiveness—appears to depend on a self-understanding, has a similar suspicion that it is envy and reaction-formation that lie at the root of calls for justice (1921c, 119-21; see also Forrester 1996). That is to say, there may be motives that we should mistrust lying behind what presents itself as calls for loving fellow-feeling and for equality, as demands for everyone to get respect and their just deserts.

Certainly we can try, but trying ( unlike wishing) is limited by belief in the possibility of success. (What would constitute “trying” to leap over the Empire State Building if one believed the mission impossible?) What would count as success? Not just the disappearance and non-recurrence of the feelings of resentment that we are trying to foreswear. Simple forgetting or perhaps disappearance and non-recurrence of the feelings of resentment (having repented or met other of the moral conditions Murphy spells out) have separated themselves from their wrongful deed and its implications and that we ought to forgive—both for their sakes and for our own, so that we do not become cold unrelenting judges unable to have ongoing relationships? (It would be an odd virtue that one ought never to practice or that it was merely permissible to indulge.) What is needed to have a change of heart? Is it up to us? These are serious issues for moral judgment, for therapeutic aspirations, for educational and would-be reforming institutions (prisons used to be referred to as “penitentiaries”).

But then, we should be alert to the possibility that therapy and education can lapse into distasteful manipulation. We should remember that advertising too assumes attitudes are subject to change. And torture can transform. Remember that at the end of George Orwell’s 1984 the rebel Winston Smith, through the hard ( or should we say, “difficult”) path of “Room 101,” has been driven to the point where “He loved Big Brother.” The techniques of transformation are in need of scrutiny. There is a literature of “emotion regulation” as well as volumes that explore historically shifting emotional norms.

I myself would be of that school. But if we cannot simply and directly will our anger and resentment away, steps can be taken, and perhaps sometimes ought to be taken. Therapy depends upon the hope that attitudes can be changed—if not by a direct act of will, by a variety of techniques (some involving appeals to reasoning and some not). Education depends on similar hopes. We regularly try to shape moral character. Take gratitude, which, like forgiveness, is supposed to be a virtue (or at least an imperfect duty). We teach children to say “thank you” ( and also to apologize, even when they may not yet feel sorry). We suppose that with the ritual may come the feeling. Aristotle had much to say about the shaping of the dispositions that make up character. And Spinoza has much to say about the improvement of the understanding and correcting beliefs in connection with overcoming passive emotions.

But then, we should be alert to the possibility that therapy and education can lapse into distasteful manipulation. We should remember that advertising too assumes attitudes are subject to change. And torture can transform. Remember that at the end of George Orwell’s 1984 the rebel Winston Smith, through the hard (or should we say, “difficult?”) path of “Room 101,” has been driven to the point where “He loved Big Brother.” The techniques of transformation are in need of scrutiny. There is a literature of “emotion regulation” as well as volumes that explore historically shifting emotional norms. I would look to all these resources to better understand the history of changing attitudes towards various emotions and the techniques that have helped produce changes—though I would emphasize the need to attend to the distinction between changes in the expression of feelings and in the occurrence of the feelings themselves, a distinction too often neglected in social science approaches, as well as to the distinction between social change and individual change. There certainly is a place for discussion of the value of retaining or overcoming certain
passions, whether resentment and anger, or jealousy and pride or any number of other emotions. But in these discussions, the separation between fact and value should not be taken as wider than it is.

Murphy, in the concluding remarks of Getting Even (2003, 115), contrasts the difficulties of forgiveness conceived of as psychological (it can be hard to control strong passions) and as moral (it can be hard to avoid compromising of important values of self-respect, self-defense, and respect for the demands of morality). One of the suggestions of my discussion today is that these matters may be more entwined and the distinction between the psychological and moral (fact/value) more questionable than might at first appear—as much perhaps as the distinction between moral and nonmoral feelings questioned by Murphy (2003, 67). Some of the psychological obstacles to loving forgiveness (especially as detailed by Freud and Nietzsche) may bespeak moral difficulties. And some of the moral obstacles to too-hasty forgiveness (especially as detailed by Bishop Butler and Murphy) may give grounds for caution in connection with the ambitions of certain psychological therapies. And the problem of choosing one’s inner attitude (whether we think of it as feeling, emotion, motive, maxim, principle, reason, or under some other heading) is both pervasive and inextricably psychological and moral.

References


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**Coming Clean on Getting Even: Murphy on Hatred and Criminal Justice**

**Benjamin C. Zipursky**

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**1. Introduction**

“I was born a natural hater,” writes Jeffrie Murphy in the final pages of Forgiveness and Mercy. That is only the most unadorned of the many confessional statements in Murphy’s body of written work on the topics of retribution, vengeance, forgiveness, mercy, and hatred—topics which Jeff Murphy has fortunately placed back into the limelight of philosophical exploration. In addition to the analytically incisive and plainly erudite aspects of Murphy’s philosophical work on these topics, there is also something of a cathartic quality in them. From Forgiveness and Mercy, through several of his essays, through Getting Even right until last year’s presidential address, one has the sense that this body of work shares an attribute famous in Augustine but found throughout the philosophical world—it expresses a desire for self-purification. As the good cop member in an interrogation team might say, it expresses a desire to “come clean.”

What is it that Murphy wants to come clean on? At the simplest level—expressed above—it is that he sometimes feels passions like hatred and vindictiveness intensely, and, more particularly, that he knows what the passion to get even, to settle a score, to give a wrongdoer “what is coming to him”—he knows what these passions feel like because he sometimes has them. I am the kind of person who really desires revenge seems to be secret he wants to let out. But it is more than that, because accompanying these personal desires is a philosophical desire, too.

I shall in this essay entertain the conjecture that what Murphy wants to come clean on is closer to a philosophical belief or conviction than a desire or passion: it is the belief that perhaps this passion is genuinely a justice-seeking desire. Perhaps these are not just feelings to be embarrassed about having and then to get over. On the contrary, what broadly speaking liberal thinkers usually dismiss as regrettable barbaric sentiments are not in fact that at all. Perhaps in some way they are even a glimpse of the moral truth: perhaps the wrongdoers really should be getting the response that the vengeful victim really wants to see that justice is done. Worse yet, Murphy (on this conjecture) harbors the suspicion that perhaps a legal system that in some sense acts upon these vengeful passions is a legal system that does justice. In the 1960s and 70s world of liberal moral and legal thought, the idea that maybe the state-enforced carrying through of vengeful passion was not only understandable but legitimate—maybe even commendable or in some sense right—was almost unspeakable. Perhaps the suspicion that this idea is partly true is the dark secret that Murphy has gradually tried to come clean on over the past thirty years. Of course, it is not a personal coming clean to which he seems to be aspiring—it is coming clean on behalf of those who engage in the enterprise of trying to explain and justify what our vocabulary and institutions of punishment and responsibility are all about.

As we all know, there is often something at least partially illusory about the prospect of coming clean (as there is with getting even). The desirability of “having come clean” is frequently greater before than after. The criminal suspect encouraged by the good cop to “come clean”—to confess it
all—has as temporary feeling of relief, perhaps, but in the long term he may come to believe that it was not worth it. Coming clean in a relationship is not necessarily all it is cracked up to be, either. Equally concerning, one does not need to be an obsessive compulsive to feel a certain unattainability of true “cleanliness”; an observation that of course runs very deep in both Christianity and Judaism. So the desire to come clean is magnetic but full of peril and, perhaps, persistently out of reach. On the other hand, coming clean is typically a noble aspiration. It frequently involves a recognition that the time for half-truths and dissembling is over. And it often achieves genuine success, even if not up to the “as-a-whistle” variety of coming clean we idealize.

The quest to understand the role of anger and responsive aggression in our normative life and our institutions marks Murphy as not only a Strawsonian, but as a powerful thinker in a Nietzschean vein, despite the 179-degree difference in their respective resting places on both resentment and Christianity. If Nietzsche called to question not only the self-abnegation of a too-forgiving Christian Ethics but also the displacement of anger in a too-metaphysical Kantian Ethics, Murphy’s body of work offers a philosophical answer shorn of this denial and displacement, but free of Nietzsche’s strange brew of nastiness, narcissism, and sociopathy, too. There is plenty of room in Murphy’s conception of the virtuous person for the idea that forgivingness is a virtue and, conversely, that vindictiveness is a vice, but there is also a recognition that forgivingness can cross over into a lack of self-respect, and that anger and even hatred of another will sometimes display strength and healthy self-respect, not the vicious aspect of vindictiveness. On a legal level, too, Murphy has made room for the idea that punishment as the infliction of suffering on one who deserves suffering is sometimes legitimate, without denying the commendability on some occasions of the exercise of the virtue of mercy, and without accepting the complete transformation of angry action upon wrongdoer into the metaphysics of retribution.

And so we should be very glad for Murphy’s passion to come clean on getting even. On the other hand, Murphy finds it hard to come clean. He has described himself as a “reluctant retributivist,” and his ambivalence is evident at numerous junctures. Despite my identification with Murphy’s ambivalence about getting even—or perhaps because of that identification—I will focus my remarks today on what I regard as two important equivocations or uncertainties in Murphy’s work on hatred, vindictiveness, and retribution. The first point raises a metaethical question over which he is unsure, and here I am more exploratory than critical. The second is more specifically legal and jurisprudential, and I am more critical; my essential criticism, however, is a friendly one: I think Murphy has given up too quickly on the project of making good on getting even.

2. Murphy on Resentment, Hatred, and Fittingness

The Murphy wit displayed in the “born a natural hater” line is found in two of his chapter titles: “Hatred: a Qualified Defense” and “Two Cheers for Vindictiveness.” I shall argue, however, that the clever and amusing qualities of these chapter titles detract attention from three clues they offer to Murphy’s thought. First, each contains—or even is—a hedge—each is not quite half-hearted but not quite wholehearted either. The reluctant retributivist is clearly there already.

Second, and more importantly, each names an emotion, not a policy, principle, way of acting, virtue, or vice. Third, and relatedly, each title effectively conveys something equivalent to “In praise of,” accurately depicting the content of what follows in the respective chapter: numerous statements about why it may be a good thing for someone to feel hatred or vindictiveness toward a person who has wronged her.

In Getting Even, for example, Murphy offers three “values defended by resentment and threatened by hasty and uncritical forgiveness”: (1) self-respect, (2) self-defense, and (3) respect for the moral order (19). As to the first point, Murphy writes that “resentment stand(s) as emotional testimony that we care about ourselves and our rights” (19). As to self-defense, says Murphy, “[t]hose who have vindictive dispositions toward those who wrong them give potential wrongdoers an incentive not to wrong them.” And finally, resentment “stands as testimony to the allegiance to the moral order itself. We have a duty to support—both intellectually and emotionally—the moral order, an order represented by clear understandings of what constitutes unacceptable treatment of one human being by another” (20).

Here is my first concern about Murphy’s argument: I am not sure that I know what he is claiming. The idea of writing a chapter in praise of an emotion is something philosophers fifty years ago might have scoffed at; I, like Murphy, Hume, Kant, and Aristotle, reject this narrow-minded methodology. Indeed, yet another great contribution of Murphy’s to contemporary moral philosophy is his taking emotions seriously. And yet this recognition does not answer my question. Praising an emotion could be many different things, and we need to know which one it is in order to assess his overall argument.

With regard to self-respect—which I think is Murphy’s most fundamental point—his discussion in Forgiveness and Mercy is helpful.

In my view, resentment (in its range from righteous anger to righteous hatred) functions primarily in defense, not of all moral values and norms, but rather of certain values of the self. . . . The primary value defended by the passion of resentment is self-respect, that proper self-respect is essentially tied to the passion of resentment, and that a person who does not resent moral injuries done to whom [like being assaulted or like having been unfairly taken advantage of] is almost necessarily a person lacking in self-respect.” (16 – emphasis in original)

The most obvious interpretation of these passages is that they caution against moral philosophical criticism of resentment as a response to being wronged, and they indicate a more balanced and accommodating approach toward our moral lives than a certain kind of detached Utilitarian or a conventional Christian thinker might do. A second, and closely related point, is that they comprise a ground for at least a cautious attitude toward the benefits of forgiveness. But does it say more? Does it say, we ought to get out there and resent, hate, or feel resentful and vindictive? Does it say the hater displays a virtue by hating or resenting? Does it say the non-hater displays a vice? The short answer is that it says the non-hater probably has a moral shortcoming (of insufficient self-respect) or lacks a moral virtue (self-respect, self-love), unless the conditions for forgiveness have been met. But I am troubled that this seems merely evidentiary.

I think the correct account of Murphy would say two things, one which tends to dismiss this complaint as simpliminded, the other of which would deepen the concern. First, moral philosophy that does not have a cash value of the sort demanded above is not for that reason unclear, shallow, half-hearted, or equivocal. We do not want philosophical understanding only so that we can set out a list of what to do or what to feel, as a rule book or a code of behavior. Nor do we want a list of which reactions ought to count as displays of virtue or displays of vice. Moral philosophy is a larger enterprise than this for both philosophical and practical reasons. It is larger
for philosophical reasons because understanding of the human experience—and understanding from a moral point of view our emotional experience of the world—is a thing of value, indeed a central thing of value in moral philosophy. It is larger for practical reasons because there is a world of moral education, of blaming practices, and of legal practices that is influenced in myriad ways—many of which Murphy explores—by our philosophical verdict about the appropriateness of resentment as a response to having been wronged, and the strength and nature of the injunction that one ought to forgive. In all of these respects, it is possible that I have overstated the demand for more philosophical exactitude on what he means to claim about the value of resentment and vindictive passions.

In another regard, however, I think I have been insufficiently insistent. For there is a lurking worry here that Murphy means to say something very strong, philosophically, and is simply being cagey. There is a worry that Murphy means to say that resentment or hatred is fitting. There is some evidence for this view in Getting Even and Forgiveness and Mercy. In exploring the objection that vindictiveness is irrational, Murphy comments that “one normally argues for the irrationality of an emotion by attempting to show that it is not fitting to its object,” is harmful to the person who experiences the emotion, is inherently self-defeating, necessarily leads to pathological and dangerous excess (also an argument for its immorality), or is pointless—lacking in any useful purpose” (GE 22) (emphasis added). In his reply (which separates each of these disjuncts), he rejects the “unfittingness” argument, remarking that “[i]t certainly seems fitting that one strikes back when one has been injured” and that a person who feels vindictive toward his injurer seems quite unlike a “neurotic who does indeed have an emotion that is not fitting to its object” (GE 22-23, emphasis in original). In one of the most important discussions of Forgiveness and Mercy, Murphy describes the anger and hatred of the victims of brutal rapes in Phoenix, characterizing their reactions as “natural, fitting and proper” (FM 92). Any serious attack on the justifiability of hatred, argues Murphy, must address this sort of case.

A closer look at both of these passages leaves me unsure, however. First, when a philosopher of Murphy’s quality uses the word “seems” rather than “is” that is a red flag. When he italicizes it and follows up in the same paragraph with another “seems,” there is even further reason to refrain from attributing to him the view that would go along with the “is.” Two further contextual features should be added: Murphy mentions that this may be an evolutionarily encoded response (and he does mean to commit any is/ought argument, fallacious or otherwise). Finally, he clearly is trying to undermine an argument that the emotional response of vindictiveness should be regarded as “unfitting.” In other words, he seems to be imagining an adversary who is responsible for cranking up the moral/metaphysical apparatus of fittingness, and then commenting how implausible it seems that vindictiveness in this case would fail to qualify as fitting, given such apparatus. This is different than saying that vindictiveness is fitting.

The passage from Forgiveness and Mercy is in some respects similar. Murphy’s statement about fittingness is in a context in which he is pointing out how insensitive or presumptuous it would be to criticize these rape victims for having an angry and hateful response. And so perhaps Murphy is saying that the “unfittingness” or “impropriety” critic of these women would be making a wholly untenable criticism; that once the framework of fittingness is being used, their reaction clearly falls on the “fitting” side, not the “unfitting side” of the line.

And yet there is no way to read both of these books without being struck that Murphy really is thinking that sometimes resentment and anger are the right responses to have when one has been wronged—“right” in the sense of proper or fitting. Indeed, part of what is powerful in his account of forgiveness is that it is about why and when one ought to overcome responses that are, in the first instance, proper and fitting to what has been done. In this sense, Murphy’s embrace of the view that vindictive passions are fitting as a first response to having been wronged could fairly be said to be built into his account of forgiveness.

Rather than troubling ourselves over what Murphy means to say, let’s ask what Murphy needs to say. Given Murphy’s overall project on resentment, forgiveness, and retribution, it is sufficient for him to deal with fittingness in the doubly negative sense that, once one is talking about fitting and unfitting responses at all, resentment of having been wronged is typically on the fitting side of the line? Or does Murphy need to have an account of the fittingness of a response of hatred or vindictiveness that is in some ways more extensive, epistemologically, metaphysically, or morally, than that which he provides?

This is too large a question for me to answer adequately in these remarks, particularly given that I want to touch on other points. My initial response is that against a backdrop of both a moral tradition and (at least one dominant) religious tradition (Christianity) highly critical of hatred of wrongdoers, a moral account is needed and this moral account does rest, in part, on claims of normative appropriateness of certain kinds of responses, and in this sense, relies upon notions of fittingness or appropriateness. They would seem to confront epistemic questions about how we can know about such qualities, what it means to say of a response that is fitting or appropriate, and what such qualities consist in. On the other hand, Murphy does not need a separate epistemological, semantic, or moral metaphysical account of fittingness, but he may need more of an account of why he does not need this. A great advantage of recent work on the susceptibility of emotion to rational evaluation—particularly when combined with virtue ethics—is that it holds out the promise of a rich moral epistemology that is part and parcel of substantive moral philosophy. This, I take it, is the point of John McDowell’s important work on virtues as capacities for moral knowledge, and his reading of Aristotle along those lines. If that route is supportable—and I am not about to explore it now—then I think there is a real possibility that the sort of work Murphy and Hampton set out to do in their great book may simultaneously constitute moral philosophy and metaethics for the relevant topics. However, we would still need an argument for why this is so.

3. Retributivism in the Theory of Punishment

The Introduction to Getting Even is called “Responding to Evil.” In it, Murphy writes: “I plan in this book to...present a philosophical overview in terms of which discussion of the question ‘How ought one respond to evil?’ might profitably be structured.” And he adds that the issues of responding to evil will be discussed not only with regard to personal morality, but also with regard to criminal punishment. And in his chapter on “Vindictiveness and the Law,” Murphy rightly criticizes as unseemly an attitude among the educated, sheltered, and privileged that vindictiveness is an attitude “found mainly among those regarded as uneducated rednecks and other assorted trailer trash” (31). And, recall that he believes that a man or woman who has been victimized will typically feel that the wrongdoer should be subjected to the infliction of negative consequences—should be punished, and that this feeling is fitting, appropriate, and a sign of self-respect; indeed, Murphy praises the victim’s rights movement as latching onto something of fundamental importance. Finally, Murphy has long been drawn to a Kantian approach to moral philosophy in general, a contractarian approach to political philosophy, a retribution theory of punishment, and yet he has concluded that a fairness/
reciprocity remake of retributivism along Rawlsian lines will not work. Indeed, Murphy seems to have reached that conclusion in the mid-1980s, around when he was presumably beginning to work on retributive hatred, forgiveness, and mercy.

At a distance, it would seem obvious how all of this adds up. Murphy is offering a form of retributivism that sees the criminal law as fundamentally a set of institutional structures through which the state actualizes the appropriate desire that the wrongdoer be subjected to negative treatment in response to his having done wrong. A punishment is deserved on this view because the state’s act of punishing the wrongdoer is a fitting response to what the wrongdoer did. For contractarian reasons somewhat crudely expressed by Locke, in the first instance, we do not permit victims to exact revenge directly; we, as a political system, treat individuals as protected against individual punishment and channel the power to carry through the vindictive impulse into a state surrounded by procedural and constitutional checks, in a system formed into a rule of law. Writing a book on Getting Even, displaying the fittingness of retributive impulses, embracing social contract theory, parading one’s solidarity with the public sentiment that the state should be empowered to exact revenge from wrongdoers—all of this seems to telegraph Murphy as the new self-respect based contractarian retributivist.

And yet, as I assume most of you are well aware, this is not at all where Murphy comes out: not in Forgiveness and Mercy, not in Getting Even, not in his presidential address. On the contrary, Murphy ends up treating victim satisfaction as very much a secondary benefit of criminal punishment, far from any sort of core. Indeed, while Murphy remains attached to some form of retributivism as a theory of punishment and as a theory of desert, these have very little to do with the theme of getting even and the legitimacy of vindictiveness. He remains a retributivist in two respects (in his account of the publicly available justifications of punishment): first, he insists that both the practice of punishment and the theory of punishment must take seriously the personhood and dignity of the object of punishment: the reason that the object of punishment must be guilty is that the concept of punishment as deserved is dependent on the idea that a criminal is being punished for an act that he chose, and was responsible for as an agent. Second, the punishment must be deserved in the sense that it is commensurate with the degree of badness of the actor that was expressed by the act.²

But Murphy plainly regards this concept of desert as unconnected with the fittingness of a desire for revenge. This is clear in his discussion of the notorious moral luck problem of why our legal system punishes the perpetrator of completed homicide more severely than the perpetrator of an unsuccessful homicide attempt. “I suspect that the answer may lie in vengeance or revenge—the idea that when harm occurs it is necessary to pay back, to get even, for what was done quite independently of consideration of desert or social utility” (GE 30 – emphasis added).

What happened? Many things, no doubt, including the effects of his important philosophical conversation with Jean Hampton, the draw to Christianity, the increasing attraction to the virtue of forgiveness. The simplest answer is that I have now simply disproved my own hypothesis about the aim of Murphy’s quest to come clean in the first place. Perhaps. But my effort at philosophical biography is not, of course, my point, and hardly a role I am qualified for. Rather, I have set up this question for three interrelated philosophical reasons.

First, whatever direction Murphy ultimately chose to go, and whether this was inadvertent or intentional, Murphy’s body of work on the retributive impulses, the legitimacy of the passion to get even, and the disarray of the theory of punishment obviously create an aching question: Is there a plausible retributive theory of punishment to be crafted along these lines? Jean Hampton’s work is, in some ways, an effort to answer that question. I myself have begun to undertake a social-contract based approach focusing less on the retributive passions than on a self-respecting individual’s capacity to blame one who has wronged him and to desire to have the wrongdoer held to account; the state is able, through punishment, to carry out this blaming and holding to account. Justice, on this view, is not a form of getting even. It is what the state offers in place of getting even.

Like Murphy, I am attracted to retributivism in part because I think it has the capacity to lead to greater humanity, not less. In particular, I think it is a common mistake to believe that those who treat victim harm as a ground for extra blame and therefore extra punishment as inclined toward harshness in punishment. For the converse point is that inchoate crimes or victimless crimes—like possession of narcotics with intent to distribute—cannot possibly support the enormous punishments that our system now imposes.

Second, a somewhat sharper and narrower philosophical point. Murphy admits to becoming a weak retributivist, rather than a strong retributivist, because he ceased to hold the strong retributivist belief that it is necessary that a wrongdoer be punished in a way that he could be punished. The recognition of the value of mercy by the state or forgiveness by the victim, which might mitigate or sometimes eliminate a punishment, was the precipitant of Murphy’s change.

It seems to me that the acceptance of mercy or forgiveness does not require nearly the sort of weakening in retributivism that Murphy was led to. One could believe that wrongdoers must be punished, absent grounds for mercy or forgiveness. One could even adopt Murphy’s view that the state has the power to punish for reasons of retributive sort that go beyond the “legal guilt” reasons that Murphy has contemplated, but that this power should not always be exercised. If one believed that the power to punish existed because the crime was a serious one that a serious punishment befit, it would not follow that punishment was necessary. And yet this would be far stronger than merely believing the punishment was permissible. And it might well be a form of retributivism that treated the imposition of appropriate punishments because they were appropriate to what had been done by the criminal as the most important rationale of the system of punishment. It hardly follows that there would not be grounds of mercy counseling the non-imposition of the punishment.

4. Conclusion

Finally, if victims of wrongs appropriately experience a feeling of vindictiveness—if this is something a person with self-respect should feel, does that have implications for how a legal system should be set up? Murphy writes eloquently about the capacity of hatred and vindictiveness to consume those who feel it. Does this not suggest that our systems—either tort or crime or both—should be better designed to afford outlets or action to redress grievance? It is fine to talk about victim impact statements for homicides, but the larger questions involve whether citizens who are wronged—either civilly or criminally—will realistically have access to any means of redressing these wrongs, whether they will just harbor grievances, or whether social conflict and violence are likely to result. As Murphy’s social commentary would suggest, the victims’ rights movement tends to engender contempt and judgmentalism in the privileged and educated, including many moral and legal thinkers. But the issues raised by that movement are but the tip of a much larger set of questions: not simply how we are to deter misconduct,
how we are to compensate injuries, and how we are to settle dispute, but also how we are to redress grievance and anger in a liberal democracy in which private force is disallowed. On this issue, I will come clean: I do not know the answer. It is an enormous accomplishment of Murphy’s work to have shown that these remain pressing practical, political, and philosophical problems.

Endnotes

1. I do not know or purport to know this answer as a personal matter; my acquaintance with Murphy is almost entirely as a reader and admirer of his work, and my psychological-sounding question is of course only a rhetorical device for these comments.

2. In a chapter on Christianity and Criminal Punishment, Murphy casts doubt on the appropriateness of the “personal badness” sense of desert, and, interestingly, displays sympathy with Morris’s and Hampton’s conceptions of desert. Largely, however, the chapter appears to embrace the spiritual education and social benefit rationales. However, elsewhere Murphy has expressed commitment to the liberal idea that the rationales for punishment should be available in a manner that does not depend on a conception of the common good or spiritual regrowth.

Murphy on Mercy: A Prudential Reconsideration
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It is an honor and a pleasure to be asked to comment on the work of Jeffrie Murphy, work that has long spoken to me as a scholar of the American criminal justice system. In the process of becoming an academic myself, I have noticed that there are certain other scholars whose scholarship seems to remain ever close at hand, or close to mind—framing issues, posing questions, remaining quotable even when one disagrees. These works leave an imprint, much in the way that beloved childhood books and music do, becoming part of one’s frame of reference, whether one is consciously aware of it or not. Perhaps this imprinting process occurs most often with the first scholarly works one seriously engages, or with works that address the particular issues that one finds especially compelling, or with works that provide a template of sorts for one’s own emerging voice. All of these reasons apply to some degree for me in the case of Murphy’s work, but I think there are additional reasons for my connection to Murphy’s scholarship that are less personal and more generalizable—that is, that are reasons to celebrate and engage his work at an occasion such as this. On reflection, Murphy’s voice has had particular resonance for me as a consequence of what I would call both its distinctive “range” and its distinctive “timbre.”

Murphy’s work has ranged from such highly theoretical and foundational questions as the moral and political justifications for the institution of criminal punishment to far more concrete applications of moral and political theory to actual institutions in the world. This is a rare and enormously valuable trait. Moral philosophy, including (maybe even especially) moral philosophy about the nature and justification of punishment, can often remain extraordinarily abstract, parsing the nuances of semantics or logic without any consideration of what these parings might mean in particular institutional contexts on the ground—the institutional contexts that lawyers inhabit and legal scholars study. Murphy, however, while entirely comfortable in the abstract world, is never content to remain there; his work constantly mediates between the realm of abstraction and the world of application. Murphy’s concern with the moral philosophical foundations of punishment, for example, has produced both a serious exegesis of Kantian retributivism and a serious challenge to the justice of our everyday practices of inflicting serious punishment on socially disadvantaged offenders. Or consider one of Murphy’s most recent works, which contains an extended treatment of apology and remorse as they relate both to J.L. Austin’s treatment of “performative utterances” and to such real-world settings as the work of the South African Truth and Reconciliation Commission and the refusal of then-Governor George W. Bush’s to grant clemency to death-row killer Karla Faye Tucker.

What is harder to describe, but no less distinctive and important, is what I have called the “timbre” of Murphy’s voice. In terms of style, his tone is conversational and attuned to the many ways we have of “knowing” moral or psychological truths. He frequently uses evocative passages from novels and poetry, examples from history (should repentant Nazis be forgiven?), and even New Yorker cartoons, a favorite reference of mine. But quite apart from his accessibility, and his ability to access our own intuitions through such references, Murphy is also a truly humble and modest thinker. These qualities are not mere window-dressing, or synonyms for an anodyne civility; rather, they are central to what is most estimable about his work: they represent Murphy’s constant willingness to re-evaluate his past positions, refine them, refute them, and even question their origins in his own psychological make-up. Murphy’s path from a “hard” to a “soft” retributivist, and from a mercy skeptic to something less than a total skeptic, present a model of rare and self-conscious intellectual revision. Moreover, Murphy’s recognition that he remains, in his words, “a prisoner” of his foundational assumptions and require us to be wary of our own invisible prisons and prisms.

I take for my particular topic today Murphy’s treatment of mercy in the context of criminal justice. Murphy, along with his co-author Jean Hampton, can be credited with bringing this question to the forefront of scholarly attention in both moral philosophy and law in 1988, with their generative book, Forgiveness and Mercy. Although Murphy has addressed issues relating to the place of mercy within criminal justice in much of his extensive oeuvre, I focus here on what I take to be the three most pertinent texts: Murphy’s 1988 chapter in Forgiveness and Mercy on “Mercy and legal justice,” his 1997 essay on “Repentance, Punishment, and Mercy,” and his 2007 symposium piece on “Remorse, Apology, and Mercy.” These works have framed my own career and engagement with this topic. The Murphy and Hampton book appeared in 1988, the year I finished my judicial clerkships and began a stint as a public defender, making regular pleas for mercy of sorts on behalf of indigent clients to prosecutors, juries, and sentencing judges. A decade later, when the second essay appeared, I was a junior professor just beginning to engage such questions in a scholarly setting. Finally, last year, I was on the advisory board of the scholarly journal that sponsored the symposium on “Mercy and Clemency” of which Murphy’s article formed a part. Thus, Murphy’s voice has been a companion of sorts on my own two-decade long journey as an engaged critic of our criminal justice system.

Murphy’s approach to mercy as a possible public virtue in the context of criminal justice has shifted from a virtually complete rejection to a tentative and narrow embrace, at least in the limited context of executive clemency. Let me chart
Murphy’s own progress with this question and then offer, as I promised in my title, a “prudential reconsideration” of his position. Murphy’s first take on mercy described its paradoxical relationship to justice, drawing on Saint Anselm’s struggle to understand the nature of God, who is supposed to be both infinitely just and infinitely merciful. Asked Anselm:

What justice is it that gives him who merits eternal death everlasting life? How, then, gracious Lord, good to the wicked, can you save the wicked if this is not just, and you do nothing that is not just?11

Here is Murphy, translating this point into contemporary terms:

If mercy requires a tempering of justice, then there is a sense in which mercy may require a departure from justice. (Temperers are tamperers.) Thus to be merciful is perhaps to be unjust. But it is a vice, not a virtue, to manifest injustice. Thus mercy must be, not a virtue, but a vice—a product of morally dangerous sentimentality.12

Murphy goes on to develop the claim that mercy may well be a private virtue by which an aggrieved individual, out of pity or compassion, voluntarily waives a right that he could in justice claim. But as for judges or prosecutors in criminal cases, either leniency is called for as a matter of justice on the ground of individual desert (in which case there is no need to talk of mercy), or leniency is inappropriate (because public officials have no authority to waive the right to punish in the way that private individuals may waive obligations owed to them). Murphy concludes that to conceive of a separate public virtue called “mercy” is both muddled and perilously misguided. In one of his more memorable lines, Murphy proclaims:

There thus simply is no room for mercy as an autonomous virtue with which [the] justice [of judges and prosecutors and parole boards] should be tempered. Let them keep their sentimentality to themselves for use in their private lives with their families and pets.13

Finally, Murphy raises what we lawyers would call the “equal protection” problem of mercy. Just as Saint Anselm queried how God could save only some but not all of the wicked through supreme mercy, while condemning only some but not all of the wicked through supreme justice, Murphy asks how the once-merciful should respond when confronted with similar claims on their forbearance by other wrongdoers. Because Murphy restricts mercy as virtue to the private sphere, he resolves this dilemma by suggesting that mercy is what Kant called an “imperfect” duty—one “that admits of wide latitude in the time and manner of its fulfillment.”14 But the equal protection issue remains a tricky problem for anyone who wishes to develop an account of mercy as a public, rather than a private, virtue.

A decade later, Murphy modified his virtually absolute rejection of mercy in the realm of criminal justice. In “Repentance, Punishment, and Mercy,” Murphy considered the value of genuine repentance and concluded that, in some circumstances, “it would seem irrational—even cruel—not to...bestow mercy.”15 Yet Murphy’s explanation for his embrace of what he calls “mercy” in response to genuine repentance is rooted in his account of retributivism. Murphy thus opens himself up to the critique he offered in his first essay that much of what we mean in common parlance by “mercy” is really just giving people what they deserve based on all of the relevant circumstances. This, says Murphy, is simply doing “justice,” and we don’t need a separate concept of mercy to explain or encompass it. Consider why it is, according to Murphy, that repentance might call for a reduced sentence, or even outright release from prison. On a theory of “grievance retributivism,” under which punishment is deserved for responsible wrongful acts, repentance may go some way (though perhaps not all the way) toward undoing the message of denigration that the unlawful act communicated about the worth of victim. On a theory of “character retributivism,” under which just deserts are a function not merely of one’s wrongful acts but also of the state of one’s character, repentance demonstrates a better character than that of a remorseless offender. Under either retributive theory, the self-torture that the truly repentant offender will inflict upon himself should be counted against the total amount of punishment he should receive: a repentant offender may well have suffered enough through the agony of guilt and shame that true repentance entails. All of this is to say that a repentant offender simply deserves less punishment than an unrepentant one. While Murphy makes a good case that repentance may play a role in the complex calculus of retributive deserts, he is less successful in offering a robust account of what he himself wants to call “mercy” in his first essay: public discretion to punish less than an offender deserves.

In his third essay, Murphy backs off substantially from his warm embrace of repentance as a valid reason to grant merciful dispensation from criminal punishment. He tentatively raises some concerns about the secular state inquiring into and incentivizing certain deep aspects of the soul. But Murphy spends most of his energy here exploring in detail the problem that he flagged, but put aside, in his second essay, of discerning true from feigned remorse and repentance. Worried that defendants in criminal cases have too great incentives to fake remorse and that judges in sentencing hearings have too little capacity to ferret out the charlatans, Murphy concludes that his current inclination “is not to give much weight to expressions of remorse and repentance at the sentencing stage of the criminal process.”16 Says Murphy in another pungent line: “I simply see too much chance of being made a sucker by fakery.”17 Executive clemency, however, is another matter. Murphy thinks that while mistakes “are still possible” in clemency decisions, “the probability of such mistakes is surely reduced by a non-trivial degree” because those making clemency decisions “have a lot more time and a lot more information upon which to base their decisions than would ever be possible given the time and evidential limits imposed on a criminal trial that culminates in a sentence.”18

Thus, at the conclusion of this 2007 essay, one can no longer characterize Murphy’s embrace of mercy as “warm”; rather, he is at most tepid on the possibilities for merciful dispensation from justly imposed punishments. He sees a potential role for those exercising executive clemency to do so if they are convinced that an offender’s remorse and repentance is truly sincere. But in his own words, he remains skeptical about “the trendy celebration of apology and expressions of remorse and to the uncritical extension of that celebration into criminal law.”19 And, citing Governor Arnold Schwarzenegger’s “thoughtful denial of clemency” to famed gang-banger Stanley “Tookie” Williams, Murphy concludes that “a healthy dose of skepticism is well in order [even] in the domain of clemency.”20

Murphy’s work has inspired many to address the apparent paradox of justice and mercy in the public realm of criminal punishment and to defend a more robust role for mercy within the criminal justice system. Consider three examples. One response to Murphy’s mercy skepticism focuses on the process of individuation that Murphy wants to claim as part of justice. Says Murphy, “the demand for individuation—a tailoring of our retributive response to the individual natures of the persons with whom we are dealing—is a part of what we mean by
taking persons seriously as persons and is thus a basic demand of justice. A set of critics that might be called the “equity” school insists that true individuation requires more than careful calculation of retributive deserts. Drawing on both the ancient concept of equity extolled by Aristotle and Seneca among others in the classical world and the more recent Anglo-American legal tradition of equity, the equity school offers a vision of mercy that entails compassionate consideration of all the particulars of an offender and his situation. A second response focuses on the inability of any retributive theory to specify precisely a quantum of punishment and urges a role for mercy in choosing from among a range of punishments that would be authorized by any retributive theory of justice. A third response accepts that the paradox cannot be resolved, but maintains that justice and mercy are incommensurable goods that must be traded off against each other.

These examples by no means exhaust the universe of responses to Murphy’s mercy skepticism, and it is not my purpose here to consider their merits. Rather, I quickly survey them in order to highlight the different nature of my own “reconsideration” of Murphy’s position. Murphy and his critics all seek to work from theory down to the world of criminal justice, positing conceptions of justice and mercy and evaluating the relationship between them, before applying the results to particular questions of appropriate action on the ground. My approach is different in that I attempt to cut, rather than to disentangle, the Gordian knot of the relationship of justice and mercy. I am willing to accept, for the sake of argument, Murphy’s theory of retributive justice, as well its incompatibility, at the level of theory, with the dispensation of public mercy. My argument starts with an examination of the state of criminal justice on the ground and urges the need for greater opportunities for the exercise of merciful discretion by actors within our current institutions of criminal justice. My case for mercy derives from the interplay of psychological and institutional factors that suggest that our present administration of criminal justice is likely to overshoot systematically the mark of deserved punishment. In order to correct this systematic bias, we need to multiply opportunities for the many discretionary actors within the criminal justice system to reconsider and resist punishments that may be overly harsh. Mercy in this conception neither competes with justice nor tempers it (that is, makes it stronger by altering it); rather, it prevents us from doing injustice in the name of justice.

Consider this picture of contemporary American criminal justice: In the past three and a half decades, criminal punishment has seen an unprecedented exponential rise. The number of inmates in state and federal prisons has increased more than seven-fold from less than 200,000 in 1970 to more than 1.5 million by yearend 2006. An additional almost 800,000 are held in local jails, for a total of close to 2.3 million incarcerated. The United States imprisons more of its population, per capita and even in absolute numbers, than any other country in the world (we imprison considerably more people than does vastly larger China—or, at least, than China reports that it does). When those who are under the supervision of the criminal justice system (on probation or parole) are added to figures, the total reaches 7.2 million, an increase of several hundred percent over the past few decades. Nor is there any projected decrease in sight; a recent study projects that current policies will lead to 200,000 more incarcerated over the next five years. There are many reasons to be concerned about this policy of mass incarceration, whose effects fall disproportionately on the poor and on racial and ethnic minorities. But, at a minimum, one has to wonder whether we’re getting it right—whether our institutions can or do purport to be meting out “just” punishment. Compared to our own past, or compared to the judgments of the rest of the countries of the world, we seem to be punishing wildly out of proportion.

Of course, one obvious response—and it might well be Murphy’s—is that our institutions are flawed precisely because they fail to elect retributive justice as their goal. If our law makers and implementers would only respect the limits that retributivism places on just punishment, the excesses of the past decades might well be curbed. Thus, to the extent that moral philosophy speaks to policy, it should tell policy makers and implementers to self-consciously adopt retributivism as the guiding principle of criminal justice, rather than import some different (and amorphous) concept of “mercy.” This response is inadequate for two reasons. First, it is hard to deny the role that retributivism has appeared to play at the level of justificatory theory and of rhetoric in the incarceration revolution of the past decades in the United States. While the promotion of deterrence and the incapacitation of the dangerous no doubt also have fired the engines of some extreme penal policies of the past decades (such as “three-strikes-you’re-out” legislation), it is simply not the case that policy makers and implementers have been unconcerned with the meting out of “just deserts.” Second, there are good reasons to doubt whether steadfast adoption of limiting retributivism could possibly serve as the curb that retributivists hope and expect.

My fear, and the premise from which my argument proceeds, is that even if policy makers and implementers were to adopt, with all good faith, the goal of doing justice according Murphy’s retributivism (or some other version of retributive theory), we should still expect to see the systematic bias toward over-punishment that has helped to bring us to our current criminal justice landscape. This systematic bias is the inevitable result of three factors operating together at the same time—first, what might be called the potential perversity of the psychology of retribution; second, the social conditions of great inequality within which crime policy is born and implemented; and third, the political incentives created by our current institutions of criminal justice. The first of these factors is a given, and the second and third show no signs of changing. Thus, there is every reason to fear that the interplay of these factors will continue to contribute to the promotion of over-punishment and mass incarceration—unless we are able to introduce some sort of counter-ratchet into the same institutions that I allege show no sign of changing. It is here that mercy—discretion to grant compassionate dispensation from what is thought to be deserved punishment—can play a crucial role in ameliorating injustice (if not in promoting justice).

Consider first what I have called the potential perversity of the psychology of retribution. Many scholars and jurists have noted the thin line between retributive theory and simple revenge. Critics of retributivism have worried about the “smugness” and even pleasure that attends the imposition of punishment that is viewed as deserved. Recently, psychologists and neurologists have demonstrated both the willingness of subjects, under experimental conditions, to punish rule-breakers, and the way in which the infliction or willingness of subjects, under experimental conditions, to punish rule-breakers, and the way in which the infliction or
perversity should make us worry about the coarsening effects of cheering the degradation of others, worries shared by some of those who successfully urged the replacement of the public execution with a quieter affair behind prison walls over the course of the nineteenth century.31

The perverse pleasure of punishment aside, psychology offers us even greater reason to worry about retributivism as the basis for a criminal law that will operate in a society as unequal as our own. It is no secret that certain social conditions are “crimogenic”—that those born to poverty and discrimination are far more likely to offend than those who are raised in or achieve high economic or social status. But our substantive criminal law does little to recognize the ways in which social conditions constrain choice or to nuance assessments of moral desert in light of social disadvantage. Doctrines like insanity or duress that exculpate or reduce punishment based on constraints on choice tend to be extremely narrow and to have an on/off quality. This reluctance to nuance punishment may reflect simply a pragmatic willingness to jettison retributive limitations when faced with perceived danger. But this reluctance may also reflect another troubling psychological insight into the actual workings of retributivism—what psychologists call the “fundamental attribution error,” or the tendency to attribute behavior to personality-based or dispositional influences rather than situational ones.32 That is, human cognition tends to systematically overestimate the role of individual character and underestimate the role of situational forces in explaining observed behavior. This is surely bad news for those who might urge the good faith working of a retributive calculus in apportioning punishment. Retributivism as filtered through the lens of this particular cognitive bias in a society of great inequality will inevitably tend toward over-punishment, especially of those whose behavior is most influenced by “crimogenic” situational factors.

To apply retributive theory to the practice of punishment requires that it be filtered not only through the cognitive biases of the human mind, but also through the actual institutional arrangements of our criminal justice system. The structures of contemporary American criminal justice have created a political economy that also predictably skews toward over-punishment. The tough-on-crime rhetoric and punitive penal policies that have dominated American politics at all levels of government since the 1960s have evoked numerous efforts by sociologists to account for these extreme and long-lived phenomena.33 Surely some of the explanation lies in the political economy of our criminal justice institutions. The strong protection of prosecutorial discretion within American criminal justice, coupled with the validation of plea bargaining, have together engendered powerful incentives for legislators to raise potential criminal penalties so as to make the successful prosecution of crime cheaper and easier for prosecutors.

In addition, prosecutors have their own individual incentives to seek high penalties, in a context of intense local accountability, largely through electoral politics, for local crime rates coupled with minimal local responsibility for bearing the costs of high penalties.37

In short, the over-punitiveness of retributivism, as filtered through our minds and our institutions, is unavoidable. Or is it? Some, such as those who promote “therapeutic jurisprudence”38 or “restorative justice,” suggest that our only alternatives lie in radical alteration or even abandonment of our traditional theories or institutions of criminal justice. But is there no way to work with the system we have to make it more just—or at least somewhat less predictably unjust? I suggest that mercy—of exactly the kind that Murphy argues is largely inconsistent with justice—may be an antidote, a counter-ratchet of sorts against the inevitable skewing of our current institutions. Such a proposal surely raises a host of questions and objections, which I can only begin here to anticipate.

What would the kind of mercy that I advocate look like? I suggest that we should try to proliferate opportunities for various discretionary actors within the criminal justice system to question and dissent from the imposition of punishment. Starting with the charging decision, there may be ways to improve the role that lay grand juries play in screening prosecutorial charging decisions.39 Within prosecutorial offices, chief executives might embrace directives that do not call for prosecutors to start, presumptively, with the highest provable offense.40 Juries might be informed of the sentencing implications of their decisions, especially the potential application of mandatory minimum sentences or other especially severe sanctions.41 Judges might have greater authority to depart downward from mandated or recommended guidelines in sentencing.42 Parole boards might have authority to order the release of prisoners in order to prevent the ratcheting up of the prison population beyond a point set in advance.43 Executives might revitalize or restructure their clemency and pardon procedures.44 Of course, the devil lies in the details of any of these proposals. But the basic point remains: our current system consists of many layers of actors with potentially wide discretion to opt out of overly punitive penal policies. If we could collectively recognize our tendency to skew toward over-punishment, then we could engineer more safety valves within the structure of that discretion.

Of course, the mere opportunity to forbear from punishment will not translate into actual forbearance in the absence of some shared understanding of when it is appropriate to reject punishment. Any proposal for merciful forbearance must not only specify how but when such mercy ought to be dispensed. What role, for example, should remorse and repentance play in calling for mercy? Or redemptive good works? The appropriate contours of mercy under my prudential account should derive from both the reasons we have for believing that we currently over-punish and the institutional capabilities of the actor exercising discretion. So, if we recognize that there is a natural human bias toward emphasizing disposition over situation that may skew punishment decisions by both policy makers and implementers, discretionary actors should take seriously evidence of remorse and repentance or redemptive good works as reasons to grant merciful dispensation from punishment. Evidence of this type suggests that cognitive biases might well have played a role in skewing punishment in these sorts of cases. It may well be, as Murphy argues, that grantors of clemency rather than sentencing judges are better suited, institutionally, to considering evidence of this type. Certainly institutional competences should play a role in defining the contours of appropriate merciful dispensation. My hope is that by empowering discretionary actors within the criminal justice system to second-guess punishment decisions in this way, we could create a conversation outside of ordinary politics about the appropriateness of our punishment practices, a conversation that might carry over into the political sphere.

Lest this sound ridiculously utopian, consider the recent decisions of the United States Supreme Court in United States v. Gall45 and United States v. Kimbrough.46 As a legal matter, these cases required the Court to establish the standard of review that federal Courts of Appeals should apply to the sentencing decisions of trial judges when they deviate from the sentences that would otherwise be called for under the Federal Sentencing Guidelines, now that these Guidelines are merely advisory rather than mandatory. In each of these cases, the appellate court had set aside the trial judge’s sentence of a drug offender as too low. One trial judge, in imposing a lower-than-Guidelines sentence, had relied on the apparent
Murphy is highly skeptical of mercy, except perhaps in some narrow institutional settings; I want to proliferate mercy across multiple institutional settings. Despite these differences—and they are hardly quibbles over details—the premises on which my own arguments are based are echoes of Murphy’s own, more elegant observations.

On the problem of over-punishment, here is Murphy: “[C]ontemporary criminal law (at least in America) tends toward radical overcriminalization—punishing many offenses with absurd excess.”

On the potentially perverse psychology of retribution, Murphy is even more eloquent, noting the “two faces of retribution”—one face that “draws us, in its stress on moral desert, toward the recognition of human dignity” and another that “tempts us to self-deceptive cruelty.” Murphy goes on to recognize that “our abstract theorizing—at least in moral theory—cannot fully be divorced from its social setting and from our own personal human psychology, a psychology that may affect us in ways of which we are not fully conscious.” In recognizing the ways in which social conditions may be relevant to the punishment deserved by offenders, Murphy introduces the idea of “collective repentance,” by which he calls upon us to recognize the ways in which we share responsibility for the offenses committed by the disadvantaged:

When one thinks of repentance in connection with criminal punishment, one tends to think that all demands for repentance must be addressed to the criminal. But surely the community, through its patterns of abuse, neglect and discrimination, sometimes creates a social environment that undermines the development of virtuous character and makes the temptations to crime very great—greater than many of us might have been able to resist if similarly situated.... [T]he law too may be legitimately called on for repentance and atonement—attitudes of mind that should prevent us from thinking of criminals as monsters—as beings totally different from us—and should thus moderate our tendencies to respond to them with nothing but malice.

These quotes reveal the debt that much of my thinking on these matters has to Murphy. But my own intervention is perhaps most responsive to the very last lines of Murphy’s 2007 essay on mercy, which describes our current criminal justice system as a “great bloated monster” that calls for “radical thinking and redesign.” Murphy warns that his own attempt to consider the relevance of remorse and apology in our current institutions is akin to rearranging the deck chairs on the Titanic. My own plea for mercy may likewise fail to be radical enough, but it is, at least, a self-conscious attempt to steer clear of an iceberg.

Endnotes

4. See id. at 440-41.
5. See id. at 423, 428-29, 444-45.
8. See id. at 162-86.


11. Prosligium IX, quoted in Murphy, “Mercy and legal justice,” in Forgiveness and Mercy, supra note 8, at 168.

12. Murphy, “Mercy and legal justice,” in Forgiveness and Mercy, supra note 8, at 167.

13. Id. at 174. Murphy purports to reconsider this claim when faced with a hypothetical polity that unanimously wishes to forego punishment. Id. at 177-79. However, this narrow exception—a unanimous vote of all members of a community authorizing a judge or other public official to forego punishment—is so unlikely ever to occur, and so unlikely to be recognized as what we commonly mean by “mercy” (rather than outright exoneration), that it does not meaningfully qualify Murphy’s rejection of mercy as a public virtue.

14. Id. at 183 & n.20.


16. Murphy, Remorse, Apology, and Mercy, supra note 4, at 444.

17. Id.

18. Id. at 445.

19. Id. at 452.

20. Id.


24. This is the position Murphy’s co-author Jean Hampton takes; see Forgiveness and Mercy, supra note 8, at 159. See also R.A. Duff, “Review Essay: Justice, Mercy and Forgiveness,” Crim. Just. Ethics 9 (Summer/Fall 1990): 51, 63 (agreeing that “we should resist the temptation to suppose that life cannot confront us (cannot be allowed to confront us) with such irresoluble conflicts between incommensurable values”).

25. For a sketch of some of the issues these responses raise, see Carol S. Steiker, “Tempering or Tampering? Mercy and the Administration of Criminal Justice” in Forgiveness, Mercy, and Clemency, edited by Austin Sarat and Nasser Hussain (Stanford, CA: Stanford University Press, 2007), 16-35.


31. See Natalie Angier, “The Urge to Punish Cheats: It Isn’t Merely Vengeance,” N.Y. Times (Jan. 22, 2002) (reporting study that found that people under experimental conditions will punish a cheater even when it is costly to them and offers no material benefit); Dominique J.F. de Quervain et al., “The Neural Basis of Altruistic Punishment,” Science 305 (Aug. 27, 2004): 1254-58 (using PET scan to demonstrate that the part of the brain implicated in the processing of rewards for goal-directed actions was activated by the punishment of cheaters in an experimental setting).

32. See De Quervain, et al., supra note 32.

33. See Angier, supra note 32.


41. Compare the different guidance on changing policy given to federal prosecutors by Attorney General Richard Thornburgh under the first President Bush and Attorney General Janet Reno under President Bill Clinton: the “Thornburgh Memorandum” instructed prosecutors to charge “the most serious offense that is consistent with the nature of the defendant’s conduct,” while the “Reno bluesheet” instructed prosecutors to make “an individualized assessment of the extent to which particular charges fit the circumstances of the case, consistent with the purpose of the federal criminal code, and maximize the impact of federal resources on crime.” See Daniel J. Freed and Marc Miller, “Guiding the Discretion of U.S. Attorneys: Department of Justice Policies, 1980-1994,” 6 Fed. Sent. R. 293 (1994).

42. See, e.g., United States v. Pabon-Cruz, 391 F.3d 86 (2d Cir. 2004) (explaining why the Court of Appeals issued a writ of mandamus prohibiting District Court Judge Gerard Lynch from instructing the trial jury on the mandatory minimum ten-year sentence that would be imposed on the eighteen-year-old defendant if convicted of “advertising” the distribution of child pornography); United States v. Polizzi, 2008 U.S. Dist. LEXIS 26223 254-388 (E.D.N.Y. Apr. 1, 2008) (explaining at great length why District Court Judge Jack Weinstein overturned a jury conviction for “receiving” child pornography on the ground that he, the judge, had failed to inform the jury of the five-year mandatory minimum sentence; distinguishing Pabon-Cruz).

43. See the discussion of the Supreme Court’s recent decisions in the Kimbrough and Gall cases, infra.

growth has become a formal goal of most state sentencing guidelines systems.


47. 128 S. Ct. 586 (2007).


49. Murphy, “Repentance, Punishment, and Mercy,” in Getting Even, supra note 9 at 45.

50. Murphy, “Legal Moralism and Retribution Revisited,” supra note 6, at 57.

51. Id. at 58.

52. Murphy, “Repentance, Punishment, and Mercy,” in Getting Even, supra note 9 at 54.

Response to Neu, Zipursky, and Steiker

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Introduction

When Julie Van Camp called to inform me that the Committee on Law and Philosophy planned to schedule a session on my work, I had mixed feelings. On the one hand, I was of course pleased and honored that colleagues whom I respect thought that my work was worthy of such attention. On the other hand, I realized that sessions of this nature are normally scheduled for people whose careers are perceived to be winding down if not essentially over. Although I am conducting a serious flirtation with turning 70, I do not just yet want to think of myself as having acquired the status of an old academic fart.

When I learned who the chair and panelists for the session were going to be, and when I read the papers of the panelists, good feelings moved aside all such reservations. I was honored that some of these colleagues were willing to travel considerable distance to be here—never an easy experience in the contemporary world of air travel, particularly on a weekend when air travel is unusually heavy. To hear so many kind words expressed about my work from people whom I hold in esteem pleased me to the point of embarrassment, and the substantive criticisms and questions raised gave me much more thinking about—so much, indeed, that I cannot possibly do these criticisms and questions justice in the brief time I am allowed for a response.

Given the time limit under which I am supposed to operate, I will simply select one important issue from each paper presented and will comment on that—leaving open, of course, the possibility that other issues will be raised in later discussion. I will discuss the three papers in the order in which they were presented, and I will thus begin with Jerry Neu’s presentation.

Response to Neu

Jerry is worried, and rightly so, about the degree to which acquiring, extinguishing, or modifying our emotions is really in our power. I have conceptualized morally justified forgiveness as the overcoming of resentment for moral reasons; and I have offered, as an example of such a reason, the recognition of sincere repentance on the part of the wrongdoer. But it seems, alas, that one might recognize sincere repentance, believe that this now renders forgiveness appropriate and perhaps even obligatory, and yet still be filled with resentment and thereby find that forgiving in this case is simply not in one’s power, in one’s voluntary control. There may be simple steps to overcome or constrain some emotions—count to ten before losing your temper, for example—but this does not seem to work for resentment and for other emotions such as love. Jerry here reminds us of Kant’s famous distinction in the Groundwork between practical and pathological love—the former (acting as love requires) in our power, the latter (feeling the emotion of love) not in our power.2 And so too, Jerry suggests, for overcoming resentment. It is in our power not to act on our resentments—but not taking revenge, for example—but is it in our power to extinguish or even limit our feelings of resentment?

At this point I want to draw a distinction between direct and indirect control, and drawing the distinction in a way that seems right has made me see a mistake (at least a mistake of emphasis) that has often occurred in my earlier writings on forgiveness. The mistake is in thinking of forgiveness primarily as a kind of specific act (the mental act of changing one’s heart) whereas it should, at least frequently, be thought of as a disposition of character—a virtue in something like the Aristotelian sense. I—like most people—cannot immediately overcome resentment and forgive the person who has wronged me simply by seeing that I have adequate moral reasons to do so and then commanding myself to forgive right now. There is no direct control here. I can, however, work over time to develop a forgiving character—a character disposed to constrain resentment within reasonable and moral bounds. This can often give me indirect control over resentment in that I choose now (a matter of direct control) to set myself on a future course that I have reasonable grounds to believe will in the long run make it likely that (to paraphrase Aristotle) my resentments will be at the right time, directed at the right person for the right reason, proportional to the gravity of the wrong and the culpability of the wrongdoer, and weakening or even coming to an end when this is appropriate. Aristotle called the process of indirect control habituation, and—depending on the general worldview of the person seeking an improved character—this can take many forms: prayer, spiritual counseling, philosophical reading, conversing with wise friends, or psychotherapy, to give a few examples.

Even Kant, interestingly enough, thought that this kind of indirect control is possible and even morally mandatory. In his Doctrine of Virtue, for example, there are passages that will surprise those who think that his sole view on the control of emotions is to be found in the famous distinction between practical and pathological love. I will quote two such passages, the first specifically on forgiveness, the second on the cultivation of love (or at least empathy)—an emotion that can lead to forgiveness:

Doctrine of Virtue (6:460-461): It is...a duty of virtue not only to refrain from repaying another’s enmity with hatred out of mere revenge but also never even to call upon the world-judge for vengeance—partly because a man has enough guilt of his own to be greatly in need of forgiveness and partly, and indeed especially, because no punishment, no matter from who it comes, may be inflicted out of hatred.—Hence men have a duty to cultivate a conciliatory spirit...But this must not be confused with placid toleration of injuries..., renunciation of the rigorous means...for preventing the recurrence of injuries by other men.
Doctrine of Virtue (6:457): ...[I]t is an indirect duty to cultivate the compassionate natural...feelings in us...It is therefore a duty not to avoid places where the poor, who lack the most necessary things, are to be found; instead, it is a duty to seek them out. It is a duty not to shun sickrooms or prisons and so on in order to avoid the pain of pity, which one may not be able to resist. For this feeling, though painful, nevertheless is one of the impulses placed in us by nature for effecting what the representation of duty might not accomplish by itself.

Kant seems to be suggesting that there are tendencies of sympathy and compassion latent in all normal people, that these are often repressed because it can be both painful and inconvenient to have them, but that they can be engaged with a sustained pattern of the right kind of experiences and behaviors.3

Finally, let me close this section with a quotation from the essay “The Idea of Perfection” by Iris Murdoch. In this essay Murdoch portrays a woman who feels it is her duty to develop better feelings toward her initially rather despised daughter-in-law. Her behavior toward her daughter-in-law has always been impeccable—displaying no external signs of how she feels inside—but the woman seeks a change of heart as well. And she seeks—and eventually attains—such a change of heart through something rather like the therapeutic process that cognitive psychotherapists (whose distant ancestors were the Stoic philosophers) call “cognitive restructuring”:

A mother, whom I shall call M, feels hostility to her daughter-in-law, whom I shall call D. M finds D quite a good-hearted girl, but while not exactly common yet certainly unpolished and lacking in dignity and refinement. D is inclined to be pert and familiar, insufficiently ceremonious, brusque, sometimes positively rude, always tiresomely juvenile. ...Time passes, and it could be that M settles down with a hardened sense of grievance and a fixed picture of D, imprisoned (if I may use a question-begging word) by the cliché: my poor son has married a silly vulgar girl. However, the M of the example is an intelligent and well-intentioned person, capable of self-criticism, capable of giving careful and just attention to an object which confronts her. M tells herself: “I am old-fashioned and conventional. I may be prejudiced and narrow-minded. I may be snobbish. I am certainly jealous. Let me look again.” Here I assume that M observes D or at least reflects deliberately about D, until gradually her vision of D alters. ...D is discovered to be not vulgar but refreshingly simple, not undignified but spontaneous, not noisy but gay, not tiresomely juvenile but delightfully youthful, and so on.4

Kant’s virtuous person sets a course—by no means an easy or a quick one—to engage the potential for love, empathy, and forgiveness so that these can come to the fore and feelings of resentment and hatred can correspondingly be diminished—not in a sloppy, sentimental way but in accord with a rational moral view about what the proper balance of values and considerations must be in a properly cultivated “conciliatory moral view about what the proper balance of values and considerations must be in a properly cultivated...[I]n short, I think that Ben has some legitimate concerns—no doubt shared by others—about my philosophical methodology or the lack thereof. However, I find myself in the awkward predicament of realizing that I can only deal with these concerns with more confessions and hedges (or a defense of confessions and hedges) and with an admission (that should embarrass me) that I could not deal systematically and in depth with issues in semantics, epistemology, and metaphysics if my very life depended on my so doing. (I think that at most I have a vague recollection of what was going on in these branches of philosophy when I was in graduate school many years ago, and I suspect that all of this is now regarded as hopelessly out of date.) Let me then briefly lay out how, for better or worse, I do philosophy. Some of you will already be aware of this, others not.

I am essentially an essayist with, at any given time, about a forty-page attention span. (Most of my books have been either explicit essay collections or thinly disguised essay collections.) I think mainly in terms, not of details, but of the big picture and I generally paint impressionistically in rather broad strokes. In each essay I conduct a conversation with myself and share that conversation with others in the hope that they might find their own thinking stimulated by mine. It has been many years since I have attempted anything systematic and final—my Rawlsian inspired Kantianism (or was it my Kantian inspired Rawlsianism?) now being long behind me. Since those days I have tended, rather like Aristotle in ethics, to think and write in the spirit of “on the one hand, but then on the other hand”—attempting nothing final but only to “advance the conversation” in Richard Rorty’s fine phrase. I share what I am thinking at the time of the essay and generally do not give much detailed thought to what I might have said on the same topic in previous essays. To the degree that there are deep systematic connections among my various writings, this is generally not something at which I have consciously aimed and would probably—if it is there—come as news to me.
I think, however, that there is a *temperamental* connection that unites a great deal of my work: I am, to some non-trivial degree, driven by a Socratic irritation at most smug settled convictions—and thus I often write, not to offer a final positive view, but more to show virtues in views currently being rejected. So I found positive things to say about blackmail when there was universal agreement that it was a unique evil that should be a felony, said highly critical things about the role of psychiatry in criminal law when I felt that an overly therapeutic view of social deviance was having a tendency to undermine beliefs in human responsibility—beliefs on which beliefs in human dignity are partly based, said positive things about retribution when most philosophers of punishment were dismissing all but the most minimalist versions of retributivism and justifying punishment with some version of utilitarianism, said positive things about resentment and negative things about forgiveness when people such as Bishop Desmond Tutu, psychologist Robert Enright, and pop psychologists in the self-help and recovery movement were condemning resentment and claiming that only those who forgive exhibit moral and spiritual health, and—most recently—said some positive things about legal moralism and some negative things about retribution (including my own early defenses of it) when many philosophers seem to think that Herbert Hart killed legal moralism once and for all in his attack on Lord Devlin and when both public opinion and our current criminal justice system are dominated by the rhetoric of retribution—something at one time I might have taken as a victory for my then extreme retributive views. The mention of Bishop Tutu, Robert Enright, pop self-help psychology, and our current system of criminal law is significant, by the way, since in recent years I have been increasingly concerned to write not merely for professional philosophers and legal scholars but to address issues in the larger culture that, in my view, raise interesting philosophical issues and might benefit from non-technical philosophical exploration.

One of Noel Coward’s most famous songs contains these lines: “I believe that since my life began/the most I’ve had is just a talent to amuse.” I believe that, for many years now and to the degree I have any talent at all, my talent is—as I have indicated—to write essays that might advance the conversation a bit on issues that interest me. In writing these essays, since they involve my thinking out loud, I do draw on what has influenced me, what has inspired me, what worries me, what I am currently feeling, and conflicts between my various beliefs and attitudes; and in that sense my essays are admittedly confessional. I hope that this is not merely narcissistic self-indulgence on my part, however, but that it provides me with some intimacy of connection with my readers. However, I well realize that some people will be intrigued by the topics of my essays but will respond when reading them much in the manner of the response feared by Eliot’s Prufrock: “That is not it at all/That is not what I meant, at all.”

I do not know if Ben’s primary intention was to force me to think about my philosophical methodology, but I am glad that he has given me a chance to reflect on these matters and the kind of modest contribution I hope that my way of proceeding can make to moral and legal philosophy. I can only stand in admiring awe of those, such as John Rawls, who have the genius to develop in ethics systematic theories of depth and analytical rigor— theories that will be discussed as long as there is philosophy. This is not me, however. I think that much of our moral life is well captured in such phrases as “muddling through” or “stumbling along,” and I would like to think that the sort of thing I do might sometimes be even more helpful than grand theory in assisting the muddling and the stumbling.}

Let me now move to the “prudential reconsideration” of retribution that Carol Steiker urges on me.

**Response to Steiker**

“Philosophy,” wrote Karl Marx, “stands in the same relation to the study of the actual world as masturbation stands to sexual love.” This passage came to my mind as I read Carol’s rich essay, since she—like Marx—reminds us that those of us who do academic writing can often deceive ourselves about the degree to which this writing connects in any useful way to the actual operations of our dominant social institutions and might even unintentionally provide those institutions with covering rationalizations for unspeakable practices. There is no doubt, as Carol points out, that retributive language is now in our society often used merely as a cover for the advocacy of harsh and even cruel treatment of criminals; and, indeed, it is not uncommon to hear people express indifference to such barbaric prison condition as gang rape by describing this deplorable situation as criminals getting no more than they deserve.

Anyone who fully understands classical philosophical retributivism will, of course, realize that such claims are a perversion of legitimate retributivist doctrine. No civilized retributivist (Kant, for example) would ever claim that criminals deserve to endure repeated forced sodomy and would indeed vigorously protest such prison conditions by condemning them as unjust because far in excess of what any criminal deserves. Kantian retributive doctrine is built on respecting the dignity of responsible autonomous human agents, and such respect should protect them from all cruel and unusual treatment. It should also protect them from being severely punished—or indeed punished at all—for actions that should never have been criminalized in the first place or at most treated as less serious offenses. So the environment of radical overcriminalization and often absurdly excessive punishments—the environment in which we in America live—would be condemned by any genuine retributivist. (I say “often”—rather than “always”— “absurdly excessive punishments,” by the way, because it strikes me that some criminals—some white collar criminals, for example—tend to be punished with excessive leniency.)

I do not think that Carol would deny the importance of desert, and indeed I think that at some abstract theoretical level she is herself committed in principle to retributivism because her appeal for more mercy is largely *pragmatic*—based on the idea that we need some corrective value to ratchet down the level of punishment from its currently excessive and cruel (and thus, I assume, undeserved) levels.

But if one embraces the retributive value of never punishing in excess of desert, why not simply assert that value instead of talking, as Carol does, about the need for more mercy? Her answer is that the philosophical language of retribution has been coopted by the political forces of darkness and, because of this, it is positively pernicious to continue to use this language—whatever its theoretical merits—if one wants to make important changes in the actual world of crime and punishment as it operates—as she nicely puts it—“on the ground.” This, of course, is the insight in the passage I quoted from Marx.

I think that Carol has raised some legitimate concerns here, and indeed these pragmatic concerns—supplemented by some insights from Nietzsche on the pathology that may underlie the urge to punish—had a great deal to do with the partial retreat from retributivism that Carol herself has found in my Presidential Address. Why, asks Carol, use the language of what has, in the real world, become little more than a dangerous fiction? Why not try another language—the language of mercy—if there is good empirical evidence that this shift in language (and an
accompanying change in thought) will indeed ratchet us down from the cruelty of our present system. Mercy language may still in some sense involve a fiction since it essentially seems still to aim at preventing people being punished out of all reasonable proportion to their desert and thus may deviate from what a strict philosophical analysis would call mercy. It is Carol’s hope, however, that any fiction here will likely have beneficent rather than evil results. And even if one has philosophical reasons for being reluctant to use the language of mercy, I think that Carol’s essential points could be captured just as well if one thought of her as advocating a larger role for empathy, compassion, or even love in our current system of criminal justice.

I lack Carol’s knowledge of social science and most things empirical, but I find it hard to share her confidence that a shift from the value of just deserts to the value of mercy (or empathy, or compassion, or love) will be beneficent in the way she hopes. The pragmatic or prudential payoff will largely depend on institutional design—how we design social mechanisms that will indeed ratchet down the cruelty, lack of proper proportion, and downright stupidity that currently seems dominant, and Carol is far more sanguine than I am that a wider scope for official discretion will do the trick.

We are all prisoners to some degree of the generation that framed our sensibilities, and most people from my generation who think of official discretion—from trial judges, prosecutors, or juries—will probably have as the first example that springs to mind the fact (made highly visible in the early days of the civil rights movement) of white officials and juries in the American south always finding a way to make sure that white people were never punished even for the murders of black people.

Abuse of discretion in the direction of harshness and cruelty is not a mere relic from the past, however. In my own county in Arizona, for example, we have a local prosecutor (our County Attorney) who—in team with our cowboy county sheriff—uses the discretion at his disposal mainly to show how tough on crime he is. I do not know the degree to which his desire to appear tough is a matter of conviction or merely a strategy of appeal to the voters with an eye to reelection—but, given his and our sheriff’s mania for self-glorying self-advertisement, I strongly suspect that the latter plays a substantial role. Carol recognizes dangers of this sort, but the recognition does not seem substantially to diminish her enthusiasm for expanded discretion and her faith that it is likely to be used in beneficent ways.

So I would not myself be too hopeful that increased exercise of discretion will move our criminal justice system in a more merciful direction. Ultimately, something must be done to change the general mood of the electorate so that our legislatures and public officials will be less inclined to exploit the fears of citizens ("Remember 9/11!") as their best route to political power. I have no recipe, however, for how we might do this, but I do have one fleeting thought.

Liberals of my generation got into the very bad habit of looking at enlightened criminal justice (and other kinds of justice) by judicial fiat—a kind of judicial activism often welcomed, of course, if it is activism in pursuit of one’s own values. I call this a bad habit because it encouraged many liberals (and I include myself) to disengage from the messiness of actual politics—of actually walking the streets for one’s candidate for the state legislature, or contributing money to his or her campaign, or attending town meetings to express one’s values in the hope of persuading others. In short, faith and hope in official behavior encouraged many of us to become too slothful citizens.

Those of us who want a more civilized system of criminal justice in America had better do a lot more than place our faith in the exercise of official discretion since officials—as Carol herself notes—are political animals—either required to seek election or appointed by those who are required to seek election—and are thus likely to reflect the mood currently dominant in the area where they live. With respect to crime and punishment, that mood remains dominantly fearful and cruel, and without a change in that mood there is little to hope for (and perhaps much to fear) in official discretion.

If that mood does change, then my guess is that our best hope for significant criminal law reform will lie, not in official discretion, but in statutory reform—the job of the legislature. Statutory reform, in my view, should involve such things as significant decriminalization in a variety of areas, substantial reduction in the amount of punishment given for many offenses, rethinking of certain criminal law doctrines (felony murder, for example), expanded opportunities for rehabilitation, and significant reforms in the conditions of prison life. (Given the Supreme Court’s general unwillingness to use its discretion to apply in a meaningful way the 8th Amendment ban on cruel and unusual punishment to prison conditions, the only hope for reform here must rest with legislatures.) Any hope for a lessening of the conditions of poverty and alienation that breed crime—conditions dramatically noted by Carol—will also, I think, have to be directed mainly to legislative bodies. So perhaps it is time for philosophers of punishment to focus more on what Jeremy Waldron has called "the dignity of legislation." Such, at any rate, is my guess. I am, however, very open to correction from Carol, who knows much more about empirical and prudential matters than I do.

Let me close by drawing together themes from Ben’s and Carol’s papers and addressing the question of the sense in which I still—at least today—embrace retributivism as at least part of the justification of criminal punishment. To use Ben’s phrase, I will try to "come clean"—or at least be a bit less dusty—on this issue.

(1) I embrace Kantian retributivism’s grounding in the idea that our initial presumption should be that criminals have the dignity of free and responsible autonomous agents—agents who can legitimately be blamed, resented, and held accountable for what they do. I believe, however, that this presumption can sometimes be rebutted by evidence of a damaged character—a damaged character that, as Carol notes, can sometimes be the result of terribly oppressive social situations. Sometimes these oppressive situations do not damage character but put temptations in the way of people that even persons of very strong character would find it extraordinarily difficult to resist. This, too, should guide our retributive responses.

(2) I embrace the classic retributivist idea that punishment should be proportional to the moral gravity of the crime and the culpability of the criminal. I believe that much, if not all, of the evil and irrationality of our present punitive practices is a result of a failure to respect this retributive norm. I also believe that empathy and compassion can play a significant role in allowing us to recognize factors relevant to the determination of criminal desert and, when conjoined with a proper humility, can play a significant role in helping us to avoid the all too common mistake of confusing judgments of criminal desert with judgments that we are dealing with worthless monsters or mere scum who deserve whatever cruel indignity we choose to inflict on them. This will, I think, capture much of what Carol wants to include under the heading of mercy. Also, and in line with something I said earlier in responding to Jerry, I think that mercy is properly understood, not merely as an act, but rather as a disposition of character—a disposition of character that will make us better retributivists than we would be absent such a disposition. (My skepticism about placing weight on expressions
of remorse and apology in criminal sentencing, by the way, should not be read as skepticism about mercy in general.)

(3) Finally, I am currently charmed by what might be seen as a version of Hegel’s annulment theory of punishment. Punishment cannot annul the crime in the sense of making it go away or making it that it never happened. Such a claim would be nonsense. I do think, however, that punishment administered in the name of the community is a way in which the degrading message conveyed by the criminal about the victim’s value or worth can be annulled—not allowed to stand as even tacitly endorsed. Jean Hampton’s view of punishment as vindicating the value of the victim—represented by what the victim could legitimately resent—seems to me a theory of this sort and strikes me as having merit.11 This view is retributive at least in the sense that it involves the righting of a wrong. Of course, this view is plausible only for some crimes. Also—and here is more of my “on the one hand, but on the other hand”—there are ways other than punishment in which victim value might also be vindicated. Truth commissions come to mind, for example. Whatever the mechanism, however, I think that the victim—the victim’s legitimate resentments and grievances—should never be forgotten as one pushes for compassion, empathy, love, mercy, or just deserts for the criminal.

In a letter to his nephew Willie James, Henry James wrote: “Three things in life are important. The first is to be kind. The second is to be kind. The third is to be kind.”12 Although this is clearly an overstatement, it is a valuable corrective to the values that are currently dominant in contemporary life. I think that the criminal justice system—along with almost everything else in the world—would benefit from more kindness (or, if you like, more mercy) and I am not certain that it deeply matters—as a practical matter—if this is thought of as securing more accurate retributive justice, limiting retributive justice by a separate moral principle, or a prudential choice to use a language (perhaps a philosophically inaccurate language) that will ratchet down the current cruelty of our system.13

I believe, however, that the choice between these competing conceptualizations, even if without much practical significance, does matter a great deal philosophically. I think that philosophers (and other academics) should be very cautious before framing their intellectual views around strategic concerns about the way in which misinformed and ill motivated public actors might distort those views. Down that road lies, if not madness, then at least the dangers of intellectual dishonesty and the loss of the kinds of contributions their training qualifies them to make.

Carol brings to the table the perspective of a gifted activist lawyer with a solid grounding in the social sciences. Valuable work done “on the ground” toward the goal of a more humane system of criminal justice depends greatly on people of this kind. In my view, however, the importance of this kind of work should not tempt philosophers to mold their work around it—to abandon theoretical views they believe to be correct because of a fear that the views might be misused by the forces of darkness. (They should be able to depend on people such as Carol to point that out when it happens.) So I am glad, as a philosopher, to continue to embrace a version of retributivism, and will seek just deserts over mercy (as both are correctly analyzed) as the value that should, in my view, control our thinking about punishment.

J.L. Austin, when told that clarity was not enough, replied that there would be plenty of time to go into that when we finally achieved clarity on something. When told that I should shift the focus of my thinking on punishment from justice to mercy, I am inclined to reply that there will be plenty of time to consider that when we finally attain at least a reasonable degree of justice in this domain of law.

As a final word, let me once again express my gratitude to Jerry, Ben, and Carol for presenting me with a few things to lament, a few things to celebrate, and a great many things to think about.

Endnotes

1. This paper has been prepared as a response to papers by Jerome Neu, Benjamin Zipursky, and Carol Steiker for the session “The Work of Jeffrie Murphy” held at the meetings of The American Philosophical Association, Pacific Division, on March 22, 2008. My response is directed to these papers as they were presented at the meeting and does not take account of any changes that may have been made in the papers at a later time. I am grateful to those who organized and participated in this session and to those who earlier read and commented on previous drafts of my response: Svetlana Beggs, Ellen Canacikos, Kirsten Pickering, Mary Sigler, and Michael White.

2. Groundwork of the Metaphysics of Morals, 4:399. All Kant citations are to the Royal Prussian Academy edition of Kant’s works, so the citation given here means Volume 4, page 399. Most English translations of Kant’s works provide the academy pagination in the margins.

3. Sympathetic and compassionate feelings can be inconvenient in that they may prompt us to take steps to minimize the suffering of others and these steps may cost us time and resources—time and resources that the “dear self” would prefer to expend on itself. A New Yorker cartoon of many years ago portrayed two very rich men sitting in soft leather chairs and smoking cigars in a classy private club. One says to the other: “I too once wanted to do something for my fellow men, but I could not think of anything that would not have put me to some inconvenience.”


5. I am not sure where Ben gets the idea that I have been a contractarian in my defenses of retribution. In 1985 I published an essay in which I explicitly argued that liberal versions of contractarianism would not lead to the adoption of any but the most minimalistic versions of retributivism. Rawls, a liberal contractarian if anyone is, does not embrace a non-minimalist version of retributivism. (By a “minimalist” version of retributivism I mean one that sees the dominant purpose of punishment to be crime control but will constrain that goal by such retributive principles as “punish only the guilty.”) See my “Retributivism, Moral Education, and the Liberal State,” Criminal Justice Ethics 4:1 (Winter/Spring 1985): 3-11.

6. “If Love Were All” from Bitter Sweet, 1929.

7. Ben suspects that I have used the term “fitting” in a moderately technical way (when I have characterized resentment as a fitting response to being wronged) and suspects that this commits me to thinking that people who are wronged ought to resent. I fear, however, that I meant nothing very theoretically deep by the word “fitting.” I never meant to suggest that “fitting” means “uniquely fitting”—that resentment is the only fitting response to being wronged. (I do admit, however, that those who do not resent being wronged make me suspicious and wanting some evidence that they are saints and not merely servile.) In speaking of resentment as a fitting response to being wronged I was mainly concerned to oppose those who believe that resentment is an unfitting response to being wronged.


9. I am grateful to Michael White for forcing me to see the necessity of this qualification.

11. Jean’s first development of this idea was in Chapter 4 (“The Retributive Idea”) in our co-authored book *Forgiveness and Mercy*.


13. Although I have no basis for claiming certainty on any pragmatic or prudential matter, I do have at least a hunch that a *properly expressed* retributivism might actually be preferable to mercy language in bringing greater rationality and humanity into our present system. If those administering the current system are in fact using the language of retribution or just deserts, it might be very hard to bring them around by asking them to drop utterly their present conceptualization and get on board with a totally different value: mercy. I think it would be at least worth a try to approach them by saying initially that one is in agreement with them—that retribution (as just deserts) is indeed the right value around which to organize one’s thinking about punishment—and then try to get them to see that their current understanding of this value is defective—that much of what some people call mercy is in reality just deserts properly understood. If one starts by expressing agreement with people—rather than expressing utter distaste for their preferred value—one might have a better chance of getting them to listen and then bringing them around. This is just a hunch, however.