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Book Review: Punishment And The Moral Emotions: Essays In Law, Morality, And Religion

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Punishment and the Moral Emotions: Essays in Law, Morality, and Religion, by Jeffrie G. Murphy. Oxford University Press, 2012. ix–xxiii + 305 pages. \$74 (hardcover).

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In this new collection of essays, Jeffrie Murphy explores again deep and important questions about the role of moral emotions in personal relations and criminal punishment. With a rare clarity, moral sensitivity, and humility, he revisits the relatively hard-edged and inflexible stances in his earlier work on retributive punishment, legal moralism, and the tension between forgiveness and self-respect. Drawing from a rich array of examples and literary quotations, Murphy explores ideas of resentment, indignation, guilt, shame, remorse, love, jealousy, respect, and more. He continues to warn us of the shallowness of uncritical reliance on positive sentiments, such as sympathy, and he affirms the legitimacy of negative moral emotions, such as resentment, in appropriate contexts. The new essays, however, go beyond the previous work for which Murphy is justly admired. A deeper appreciation of forgiveness, mercy, and humility is evident and compellingly presented. Even more surprisingly, perhaps, Murphy has backed off from his once confident anti-religious stance and now, for example, seems at least open to resting belief in human dignity on a faith that goes beyond rational arguments.

The present volume brings together twelve essays previously published in various books, journals, and law reviews, along with a new essay on the right of necessity. As Murphy explains, the essays were written to be given as public lectures or for inclusion in books on specific topics and so there is some overlap in their content. This is not a problem, I think, as each essay offers a fresh self-standing discussion with new material. The topics are wide ranging but cluster around these main questions: (1) How should we understand moral emotions, such as resentment, guilt, shame, love, and respect, and how are these related? (2) What is forgiveness, when is forgiveness morally appropriate, and why? (3) What are the grounds and limits of justifiable punishment in the criminal law, and what role, if any, does it allow for retributive emotions, mercy, and a right of necessity? (4) Should we attribute human dignity (or any moral value) to those who commit the most evil atrocities and, if so, why and what would this entail? In my comments here, I will first describe Murphy's approach to these topics, then summarize briefly how his views have shifted on some main themes, and finally propose a reading of Kant on dignity and punishment that differs from Murphy's reading but is more in line with Murphy's current thinking about retribution.

Although Murphy remains, as always, a clear-headed analytic philosopher, he joins Aristotle, Herbert Morris, and Martha Minow in resisting the aim for artificial "precision," "uniformity at the price of distortion," and "temptations of closure" in the "quite messy" area of ethics (5). Influenced

by Jesus, Freud, and Nietzsche, he is keenly aware that philosophers are not immune to the influence of distorting emotional biases (xii–xiii, 87–88). With disarming honesty, for example, he expresses the suspicion that his own strong advocacy of retributive punishment may have had psychological roots in tendencies to resentment, self-righteousness, and rigidity (88). He often uses personal stories to focus vividly on particular moral emotions, explaining that in his view “the best way (at least initially) to test a philosophical account of an emotion is to test the account against one’s own experience of that emotion” (107). He describes himself as “an essayist” who thinks “mainly in terms of the big picture, not of details” and who “generally paint[s] impressionistically in rather broad strokes” (222). This modest description of his methodology fails to do justice to the subtlety of his work, but it partly explains why his essays are so accessible, thought-provoking, and moving.

Three main topics on which Murphy’s views have shifted are forgiveness, legal moralism, and retributive punishment. Behind the shift towards more qualified, softer views seems to be an increased appreciation of Christian ethics, emphasis on human dignity, and awareness of the extent to which retributive punishment may be rooted in vindictive motives. First, earlier in his exchanges with Jean Hampton (*Forgiveness and Mercy*, 1988) Murphy argued that it is servile and contrary to self-respect, to forgive an offender who failed to meet certain conditions (repentance, reform, and so on) that cancel the demeaning message inherent in the offense. Now, with a more nuanced view that does not deny the importance of self-respect, Murphy acknowledges the reasons for forgiveness inherent in Christian thought as opening a door to reconciliation even in the absence of prior repentance. Second, strict moral legalism (represented by Lord Patrick Devlin) holds, contrary to liberals (such as John Stuart Mill, H. L. A. Hart, and Joel Feinberg), that the belief that certain acts (for example, prostitution) are morally wrong is a good reason for their being prohibited by the state even if acts of that kind are not harmful to others. In his earlier work, Murphy defended the liberal perspective. Now Murphy, trying to find the best in Devlin’s extreme position, expresses more ambivalence and openness to the need for qualifying the liberal position. Finally, Murphy earlier defended a strong retributive theory of punishment, and even the value of “retributive hatred,” but now he thinks that the retributive theory must be modified, “purged of any emotion of hatred,” and made “compatible . . . with a doctrine of Christian love properly understood” (xiii and 43–65). The clear thinking and good spirit behind these changes are admirable, and they certainly will (as he hopes) “advance the conversation.”

Even a friendly reviewer, I suppose, is obliged to raise some questions, and so I propose the following two points for further thought. First, as Murphy reflects on the atrocities that human beings have committed, he confesses doubts that there is a rationally compelling basis for affirming the dignity of all human beings. The belief in universal human dignity, he concludes, must in the end rest on faith rather than secular reason.

Here Murphy seems to have genuine ambivalence about Christian faith, contrary to his earlier anti-religious stance. My question is whether (as Murphy apparently thinks) the horrible atrocities committed by unrepentant and apparently “evil” persons are sufficient to undermine the Kantian rationale for affirming human dignity. As I see it, Kant argues for a moral law that attributes to every moral agent, good or bad, a human dignity or “an unconditional and incomparable worth” that should constrain our treatment of even the worst criminals. His arguments are complex and may be doubted at several stages, but his conclusion that they affirm the dignity of humanity is not supposed to be based on empirical evidence (for example, that the most hardened criminals reveal traces of a conscience). The conclusion is supposed to follow from the (presumed) fact that the evil-doers (unlike wild animals) have the capacities essential for them to count as morally responsible agents. If atrocities were caused by demented psychopaths who lack the essential capacity to be moral, then admittedly they, like dangerous animals, would lack humanity in Kant’s sense even if they remained biologically human. Unlike morally accountable evil-doers, they would not (as individuals) share in the special value that Kant calls “dignity.” We cannot know for sure, of course, who falls into this category, and absent proof otherwise there are strong moral reasons not to classify anyone as sub-human. The real controversy about human dignity, however, is not so much concerned with these pathological cases as with very bad (“evil”) persons who commit atrocities on their fellow human beings. Insofar as these have the basic moral capacities needed for accountability, Kant’s argument implies, I think, that they still count as having human dignity though they may be severely punished. Kant’s affirmation of human dignity even in these worst cases is not derived from his belief in God but, to the contrary, belongs to a system of ethical thought that Kant believed provides some basis for religious faith. If so, Kant at least thought he had good reasons for rejecting Murphy’s suggestion that belief in human dignity must be based on non-rational religious faith.

Second, although it is not Murphy’s purpose in these essays to develop an interpretation of Kant’s theory of punishment, he often refers to Kant’s theory as a paradigm of retributive punishment. In particular he implies that Kant held a strong moralistic version of the retributive theory according to which the worst criminals should be punished for their “inner viciousness” or, more generally, that the severity of punishments should vary according to the moral quality of the offenders’ character. In one passage emphasized by Murphy and others [6:333–334], Kant does suggest that, in the case of Scottish rebels of 1745–1746, it is fitting that while facing execution the rebels who murdered from “inner viciousness” would suffer more than the idealistic murderers would. This illustrates Kant’s idea that people can differ in their “inner” moral deserts even if their “external acts” are the same and the crime that they commit is the same under the law. This idea was important in Kant’s argument for a reasonable faith

that God will ultimately reward and punish persons according to their inner deserts, which only God (and not human judges) can truly discern [5:124–138]. Arguably, however, the passage about the Scottish rebels is meant to vindicate the use of *lex talionis* (“an eye for an eye”), and not punishment according to moral character, as the standard of human judicial punishment. In Kant’s theory of right, *lex talionis* prescribes making the offenders’ punishment vary according to the judicially determinable losses that they wrongfully imposed on others. The basic justification of having a system of punishment is that it is just for the state to use coercion (for example, by laws imposing credible threats) to “hinder hindrances to freedom” [6:230–231]. Arguably *lex talionis* is a principle that Kant regarded (mistakenly) as internal to a just practice of punishment, the ultimate purpose of which is to protect the equal liberty of citizens. If so, then Kant’s theory of legal punishment is “retributive” *in a sense* but does not advocate that our judicial systems punish offenders because of or in proportion to the offenders’ inner moral desert as this might be assessed by fallible human beings in a court of law. Murphy’s reading of Kant may be more widely accepted than mine, but if I am right, the welcome result is that Kant’s theory of punishment is in line with Murphy’s current thought that our judicial system should not be in the business of making criminals suffer for their “inner viciousness.”

In sum, Murphy’s essays are wise reflections on questions that matter to general readers as well as philosophers, judges, psychologists, and other professionals. Murphy’s extraordinary openness, intellectual honesty, and respect for his critics invites just the sort of philosophical engagement with these topics that seems sadly missing in much of contemporary philosophy. His work is a pleasure to read, undogmatic, and sparkling with memorable quotes and moving stories. It should be widely read.