

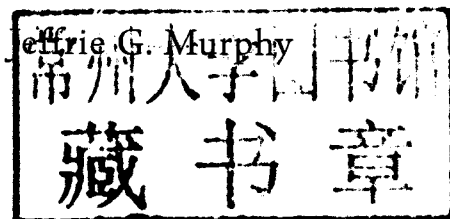
PUNISHMENT AND THE MORAL EMOTIONS

Essays in Law, Morality, and Religion

JEFFRIÉ G. MURPHY

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Introduction

This is the fourth and, given my age, surely the last essay collection that I will publish. The essays reveal a shift in focus from much of my previous work and also some change in my views on the topics I have previously explored. The shift in focus involves an increasing interest in the *moral emotions* that can legitimately drive or can also corrupt our responses to criminals and other wrongdoers and the contribution that a religious perspective can make to our understanding of some of these emotions. By the “moral emotions” I mean emotions essentially tied to (not always correct) moral judgments—emotions such as love (in some of its forms), guilt, shame, remorse, resentment, and jealousy.

The change in perspective, a function to a large degree of my focus on the moral emotions, mainly involves a softening of my overly confident belief that punishment and other responses of strong condemnation are justified on retributive grounds, justified by what wrongdoers deserve rather than projected future good that will—it is hoped—be the consequence of condemning or punishing them. I now try to make a place for the future good of character reformation and even the common good in what is still, in its essence, a softened version of retribution. Related to this is a more generous view of when mercy and forgiveness of wrongdoers may be appropriate.

I first became interested in the role of emotions in punishment and condemnation when, in the mid-eighties, I was invited by the journal *Midwest Studies in Philosophy* to contribute an essay on

punishment or a related topic. Having written so much in defense of punishment (the hard response to wrongdoing) I decided to write an essay on forgiveness (a softer response)—a topic to which I had never before given any thought at all. So I accepted the invitation in the hope that it would generate within me both ideas and enthusiasm—a hope that was indeed realized.

Following a colleague's suggestion that I work my way into the topic of forgiveness by reading Bishop Joseph Butler's sermons on resentment and forgiveness, I found myself fascinated by the topic of the emotion of resentment (what Peter Strawson called a reactive attitude) and even more fascinated by Butler's claim that this negative and potentially destructive emotion can be a legitimate part of a moral view dominated by the Christian love commandment that one should love one's neighbor as oneself.

My first views on forgiveness may be found in my chapters of the 1988 book *Forgiveness and Mercy*—a book that I joint authored with the late Jean Hampton. I contributed three of the book's five chapters (the first in essence the essay noted above), and Jean contributed two. I expressed some positive views about forgiveness, but what readers mainly noticed were the strong negative views that I expressed—suggesting that forgiveness could easily be seen, not as a virtue, but as the vice of servility, a failure to show proper self-respect. (I quoted with some glee S. J. Perelman's quip “to err is human, to forgive supine” and even defended a form of hatred that I called “retributive hatred.”) What was also noticed by many readers was my totally secular—even rather antireligious—take on the topic. This was in sharp contrast to Jean's explicitly Christian commitments.

Over the years I have never abandoned my view that there is too much uncritical boosterism of forgiveness in much of the literature on the topic—a literature that does not sufficiently notice the dangers to self-respect, respect for victims, and respect for the moral order itself when forgiveness is bestowed in a hasty and uncritical way.

I began to think, however, that my previous understanding of forgiveness had been too narrow (too limited by Butler's idea that its essence is overcoming the emotion of resentment—which cannot, for example, account for self-forgiveness) and too stingy about the conditions required before it may legitimately be bestowed. Although I still believe that repentance by the wrongdoer is the best way to open a door to forgiveness by the wronged, I tended to overestimate its role and gave rather short shrift to other possible doors. I have more recently considered with sympathy other possibly legitimate acts of forgiveness—in at least some meaningful senses of the concept of forgiveness—that do not demand repentance as a precondition.

Some of my change in view on these matters may be found in my 2003 book, *Getting Even—Forgiveness and Its Limits*—a book that revealed an increased sympathy on my part with a religious framework, particularly with Christianity and its gospel of love. Some of the essays in the present collection—particularly “The Case of Dostoevsky’s General: Some Ruminations on Forgiving the Unforgivable”—expand on this sympathy and produce a view of forgiveness that is, I hope, more nuanced and complex (and even openly conflicted) than that present in my earlier work. I have stopped trying to offer a general theory of forgiveness, since I have come to believe that such theories only achieve, to use Herbert Hart’s fine phrase, “uniformity at the price of distortion.” Instead I seek, now stealing a phrase from Richard Rorty, simply to “advance the conversation” by sharing my current thinking, including the conflicts and uncertainties in that thinking, in the hope that this will engage in productive ways others interested in the topic. I try to defend this looser methodology (or lack of methodology if one prefers) in “Response to Neu, Zipursky, and Steiker”—drawn from an American Philosophical Association symposium, “The Work of Jeffrie G. Murphy,” in which Professors Jerome Neu, Benjamin Zipursky, and Carol Steiker presented critiques of various aspects of my

philosophical work. Zipursky in particular expressed his wish that I would state and defend a settled view in a more rigorous way than he had found in my writings.

As a general introduction to my transitional thinking about forgiveness, I have opened this collection with my essay "Forgiveness, Reconciliation, and Responding to Evil." This is the transcript of a keynote address I gave at a conference on "Forgiveness in the Law" at Fordham Law School in 1999. As a general introduction to my increased interest in the moral emotions and Christianity, I have included my essay "Moral Epistemology, the Retributive Emotions, and the 'Clumsy Moral Philosophy' of Jesus Christ"—which is in part a critique of Michael Moore's important essay "The Moral Worth of Retribution"—and the essay "Christian Love and Criminal Punishment."

In 2006 I was selected to be president of the American Philosophical Association, Pacific Division, and I decided that for my presidential address—"Legal Moralism and Retribution Revisited"—I would do a kind of survey of my philosophical career, particularly my career in legal philosophy that has emphasized the philosophy of punishment. In drafting this survey, I found that I was no longer comfortable with the strong versions of the retributive theory of punishment that I had earlier defended. Under the influence of such diverse people as Jesus, Freud, and particularly Nietzsche, I began some self-analysis and started to ask myself what had really drawn me to such a theory. Could it have been possible that, instead of all my high-sounding philosophical talk about justice and desert, I had been drawn in part by what Nietzsche claimed was the actual emotional basis for punishment: the passion he called *ressentiment*, an evil brew of malice, spite, envy, and cruelty? I regretfully concluded that the answer was in part yes and that the "reflective equilibrium" that I had attained from retributivism as a theory of punishment was probably to be explained, at least in part, not by purely intellectual consider-

ations but by the fact that the view engaged some of my baser passions. I thus drew back from the uncritical enthusiasm of my earlier defenses and decided that considerable modification of my own defense of retribution was needed. I still thought that a version of the theory was defensible (certainly preferable to classic utilitarian theories of punishment), but this version had to be purged of any emotion of hatred (including the “retributive hatred” I had earlier defended) and had to be compatible, as I argue in “Christian Love and Criminal Punishment,” with a doctrine of Christian love properly understood. What I articulate about such love, by the way, is not a happy-clappy “let us all be very nice” version of love, but one that is to some degree stern and demanding—something much more complex than simply trying to make everybody happy through preference satisfaction

At this point I had reached an awareness that emotions are deeply important in our understanding of moral judgment and legal punishment. Butler was right: legitimate emotions, such as a properly constrained resentment, can serve the interests of both morality and law. But Nietzsche was also right: just resentment can easily slide into evil *ressentiment* and corrupt morality and law at their very foundation—making them instruments of self-deceptive cruelty. So extreme caution is in order—a caution that should make us resist the temptation to see too wide a gap between us (the good and law abiding) and them (the evil and criminal) and the related temptation to think that, in punishing, we are doing God’s work in the service of a righteous crusade. We simply are not good enough and do not know enough legitimately to assume such a posture of arrogance.

Once one has decided, even if a bit regretfully, that some system of punishment is required, one must start to think about the proper design of the system. One crucial component is sentencing. Following conviction, what should be relevant to the sentence actually imposed in those cases where judges or juries have some discretion? Given my

increasing interest in the emotions, it was natural that I began to think about the emotions of shame, guilt, and remorse—their nature, their moral legitimacy, and the role (if any) that they might legitimately play in criminal sentencing. I explore these issues in the essays “Shame Creeps through Guilt and Feels Like Retribution,” “Remorse, Apology, and Mercy,” and “Repentance, Mercy, and Communicative Punishment” (a critique of an essay by Antony Duff). After arguing for the moral and spiritual importance of these emotions, I suggest that their use in criminal sentencing—although clearly relevant *in principle*—should be met with great skepticism *in practice*. Why? Because these emotions are so easy to fake; and permitting reduced sentences for people who express repentance and apology simply gives them incentives to fake and thereby cheapens the currency of the real thing. (As some Hollywood mogul once said, “Sincerity is the most precious thing in the world. When you have learned to fake that, you’ve got it made.”) I also suggest that such expressions may have a more legitimate relevance at clemency hearings, when, typically, sufficient time has gone by to lessen the risk that the relevant authorities will be fooled by insincere claims of remorse, repentance, and moral and spiritual rebirth.

“Remorse, Apology, and Mercy” was selected as one of the core texts for the book *Criminal Law Conversations*, and I was asked to prepare an abridged version of the essay for inclusion in that volume. Critiques of the essay were presented by several insightful legal scholars: Professors Sherry F. Colb, Stephanos Bibas, Susan A. Bandes, Lisa Kern Griffin, and Janet Ainsworth. I have included my all too brief response to those critiques as an appendix to the full version of the essay reprinted in the present collection. I have also added to the appendix my brief reply in the same volume to Susan Bandes’ core text “The Heart Has Its Reasons” since it pursues some of the same themes present in her critique of my own core text.

Another situation in criminal law in which emotions play a role is, of course, in the generation of crime itself. Many crimes are generated by strong emotions (greed and anger, for example), and serious crimes—particularly crimes against women—are often generated by the emotion of *jealousy* (“If I can’t have her, nobody can!”). In my essay “Jealousy, Shame, and the Rival”—a response to Jerome Neu’s influential essay “Jealous Thoughts”—I try to gain an understanding of this sometimes legitimate but often dangerous emotion.

Just as punishment is rendered suspect if it is motivated by the base passion of *ressentiment*, so is criminalization rendered suspect if it is motivated by hatred. The history of constitutional challenges to the criminalization of homosexual sodomy from *Bowers v. Hardwick* (1986)—discussed in my “Moral Reasons and the Limitations of Liberty”—through *Lawrence v. Texas* (2003) illustrates the gradual realization by the US Supreme Court that mere brute hatred and disgust, no matter how widely shared by citizens, cannot justify the kind of intrusion into liberty represented by criminalization and punishment. (The Court left less severe intrusions on liberty—bans on gay marriage, for example—for another day.)

Writing for the majority in *Lawrence v. Texas*, Justice Anthony Kennedy argued that the earlier Supreme Court decision in the case of *Bowers v. Hardwick* was mistaken and thus had to be overturned. In that case, the Court had held (Justice White writing for the majority) that there is no fundamental constitutional liberty to engage in homosexual sodomy and thus that strict judicial scrutiny (requiring that the government demonstrate a compelling interest before encumbering the liberty) would not be applied. What was applied instead was what is called minimal scrutiny—a “rational basis test” that requires only that the government has a legitimate, even if not compelling, interest in encumbering the liberty in question. The state of Georgia argued that its interest was in maintaining a “decent society” by using the criminal law to enforce the strong moral convictions of

the citizens of Georgia that homosexuality is morally evil. Justice White agreed that this interest was legitimate and thus upheld the constitutionality of a Georgia statute that made it a felony, punishable by up to twenty years in prison, to engage in an act of homosexual sodomy.

In *Lawrence*, Justice Kennedy did not argue that there is a fundamental liberty to engage in homosexual sodomy and thus did not apply strict scrutiny. He did, however, argue that—when the encumbrance to liberty is something as intrusive as criminal imprisonment—a proper application of the rational basis test requires strong if not compelling government interest. Certainly more is required than the mere animus of the citizenry.

I would be willing to bet the farm that my essay “Moral Reasons and the Limitations of Liberty” was never read by Justice Kennedy and certainly never influenced him in any way. I take a certain amount of pleasure, however, in knowing that his line of reasoning about the rational basis test—with which I generally agree—overlaps substantially with an essay I wrote some time before the *Lawrence* decision. And this essay, like many of the others in the present collection, ties in with the topic of emotions. In it, I argue that a decent society cannot count as a good reason for incarcerating people the mere fact that citizens—even a majority—have an emotion of hatred (Justice Kennedy’s word is “animus”) or disgust toward certain kinds of people and the liberties they would like to enjoy.

The background moral vision that sets the framework for all the essays in the present collection remains my commitment to a quasi-Kantian idea of human dignity, but this increasingly strikes me (contra Kant) as needing a religious foundation—the idea that human beings have a special moral preciousness because they are created in the image of God and are his beloved children. This is a foundation about which, alas, I run hot and cold, sometimes embracing it and at other times dominated by skepticism. The essay,

“The Elusive Nature of Human Dignity,” explores the various ways in which the concept of human dignity might be understood and defended.

The final essay in the collection, “Kant on the ‘Right of Necessity’ and other Defenses in the Law of Homicide,” has not been previously published. In it, I return to the subject of most of my first writings in philosophy: Kant’s moral, political, and legal theory. Here I explore the three criminal defenses that Kant discusses in his writings on punishment: the kind of necessity often claimed for killing to save one’s life in cases of shipwreck, a woman killing at birth her illegitimate baby, and a soldier killing another soldier in a duel. Although much of Kant’s discussion is surprisingly unsatisfactory, he does explore some issues relevant to the theme of the present collection—the role, for example, that shame might play as an excusing condition that might at least mitigate homicide in such a way as to remove it from the class of homicides for which the death penalty is appropriate. Kant’s commitment to human dignity is also addressed in order to expand and sometimes to critique Kant’s discussion of these possible defenses.

One final word: All of the essays in this collection were written by invitation—written to be given as public lectures, presented at symposia, or for volumes on specific topics. Because of the different venues and audiences, I could never assume that my listeners or readers would be familiar with the general framework I bring to bear on the topics in question. As a result, there is some overlap in material in the essays I have here included. Also, since written at different times, there are some inconsistencies or at least tensions among some of them. In spite of these overlaps and tensions, however, I have tried to make sure that each essay selected for inclusion contains substantial material that is not duplicated in discussions in any of the other essays.

SOURCES AND ACKNOWLEDGMENTS

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8. "The Case of Dostoevsky's General: Some Ruminations on Forgiving the Unforgivable" originally appeared in *The Monist*, Volume 92, Number 4 (October 2009), copyright © 2009 The Monist: An International Quarterly Journal of General Philosophical Inquiry, Open Court Publishing Company, Chicago, Illinois. Reprinted with permission.
9. "Response to Neu, Zipursky, and Steiker" originally appeared as a portion of a symposium "The Work of Jeffrie G. Murphy" held at the meetings of The American Philosophical Association (APA), Pacific Division, 2008, and sponsored by the Committee on Law and Philosophy, American Philosophical Association. The symposium was originally published in the Newsletter of the Committee on Law and Philosophy (copyright © 2008 American Philosophical Association) and was reprinted, with APA permission, in *Criminal Justice Ethics*, Volume 27, Number 2 (Summer/Fall

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10. "Jealousy, Shame, and the Rival." This essay was originally published in *Philosophical Studies*, Volume 108, Number 2 (March 2002), copyright © 2002 Springer Netherlands. Reprinted with permission.
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 13. "Kant on the 'Right of Necessity' and other Defenses in the Law of Homicide" has not previously been published.

I want here to thank the Divinity Faculty of Cambridge University for their invitation to deliver the 2010 Stanton Lectures. Health problems prevented my giving the lectures in person—just as well since volcanic ash from Iceland closed Heathrow Airport the day I was scheduled to arrive—and Cambridge kindly arranged for me to give the lectures with the assistance of video conference technology. These lectures drew heavily on some of the essays contained in this collection, and preparing them helped me to form the judgment (which I hope is correct) that the essays do hang together around common themes and thus make the present collection a genuine book and not just a random assortment.

Since I have become an old man, and since this will surely be among the last things that I will publish, I want to express here my gratitude for the many undeserved blessings that I have received in the course of my life and career. I had loving and supportive parents who lived lives of integrity and dedication—my father making a

career in the United States Navy during periods of war and my mother often left to manage things on her own during these difficult times. They always made me feel safe in the world—even when (as I later came to realize) their own safety was threatened by war, separation, and (after my father's retirement) financial distress. They made considerable sacrifices so that I could have a chance for success and happiness in life, and one of my greatest regrets is that I never expressed to them the full nature of my love, gratitude, and admiration for them—something that I did not bring to my full consciousness until I outgrew being consumed by the claims of my “dear self” (to use Kant's phrase).

I have also been blessed with two fine sons who are good and honorable men whom I love and of whom I am very proud. They have had their share of problems and disappointments in life, but these have never deflected them from their core values. As Gandhi said, “all else is dross.” Their mother, my first wife, is a good person who has been kind to them and has assisted their development into the men that they are.

I have had the good fortune to have had a few exceptional teachers, colleagues, and students who have stimulated and supported my intellectual life and improved my work through their discussion, criticism, and example. Many of these people have been noted and thanked in my earlier publications, but I would here like to add the names of Svetlana Beggs, Richard Dagger, and Mary Sigler.

Finally, I want to thank, as I always do, my wife Ellen Canacakos for the valuable discussions we have on my intellectual work. She draws on her experience as a lawyer and a psychotherapist in illuminating ways and, even more important, brings to bear on our discussions—and our entire life together—her remarkable moral decency and goodness. These are qualities that I envy and admire. I know that she is the primary cause of the happiness in my life, and

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I think and hope that she also influences me toward being a better person. Just being in the same room with her and our beloved dogs gives me a kind of peace and contentment that I find nowhere else in my life and without which I could not work up enthusiasm for my intellectual work or, indeed, for anything else. I dedicate this book to her with love.

Jeffrie G. Murphy
Tempe, Arizona
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