Journal of Law and Religion 35, no. 1 (2020): 5–17 © Center for the Study of Law and Religion at Emory University
doi:10.1017/jlr.2019.38

ESSAY

PUNISHMENT, FORGIVENESS, AND MERCY

JEFFRIE G. MURPHY
Regents' Professor of Law, Philosophy, and Religious Studies, Sandra Day O'Connor College of Law, Arizona State University

This essay was presented in draft at a symposium convened at the Inner Temple, London, in October 2018 and will be published in Mark Hill, Norman Doe, Richard Helmholz, and John Witte, Jr., eds., Christianity and Criminal Law *(Abingdon: Routledge, 2020).*

ABSTRACT

Forgiveness and mercy are often thought of as acts that we perform or gifts that we bestow. In this essay the author focuses on character and explores the implications for punishment if one focuses on having a character that is merciful and forgiving in disposition. He argues that the tension that is often thought to exist between justice, on the one hand, and forgiveness and mercy, on the other, is lessened by focusing on the virtue of having a forgiving and merciful character.

KEYWORDS: love, humility, forgiveness, mercy, reform, rehabilitation, punishment, Kant

Any other type of fanaticism [other than a fanaticism for charity] does not come from God and is not pleasing to him. True faith is one that makes us more charitable, more merciful, more honest, and more humane … it makes us see the other not as an enemy to be overcome but a brother or sister to be loved, served, and helped.

—*Pope Francis*[1]

INTRODUCTION

If one accepts the accuracy of Pope Francis's expression of the nature of Christian love, then one might understandably think that devout Christians must reject, and even regard as sinful, the whole practice of criminal punishment—a practice that inflicts hard treatment on criminals from a motivation that seems itself hard and not charitable—either seeing criminals as enemies who must be made to suffer to keep the law abiding safe or to give criminals the suffering that is felt to be what they deserve because of their iniquity or both. In either case we tend to brutalize them and thereby brutalize ourselves—an observation that prompted Friedrich Nietzsche to remark (hardly from a Christian motivation, of course) that we must "[m]istrust all in whom the impulse to punish is powerful"[2] and take care that, "[w]hoever fights monsters … does not become a

1 "Homily of His Holiness Pope Francis," Cairo, Egypt, April 29, 2017, https://w2.vatican.va/content/francesco/en/homilies/2017/documents/papa-francesco_20170429_omelia-viaggioapostolico-egitto.html.

2 Friedrich Nietzsche, *Thus Spoke Zarathustra*, in *The Portable Nietzsche*, ed. and trans. Walter Kaufmann (New York: Viking, 1954), 103–439, at 212.

https://doi.org/10.1017/jlr.2019.38 Published online by Cambridge University Press

monster."[3] Should we then abandon the whole corrupt and corrupting practice of punishment in a spirt of Christian love, forgiveness, and mercy? Is this what Jesus would demand of us?

Presumably not. Even though Jesus and Paul speak eloquently of the virtues of love, forgiveness, and mercy, they never condemn the practice of punishment itself. What they do condemn is a certain *attitude* toward punishment—an attitude of dismissive contempt of those who have done wrong and thus a tendency to stop thinking of them as part of the human community and as sinners, like the rest of us, for whom redemption and salvation should still be hoped. Because of this hope the counsel is not the abolition of prisons but rather a stress on *visiting* those in prison in order to show them that, though they have done wrong, they have not been forgotten or forsaken but are still valued as members of the human community and that there is still hope for them (Matthew 25:36). This will seek to save them from the great sin of *despair*.

SOME DEFINITIONS AND SOME PROBLEMS

One must, it is true, forgive one's enemies—but not before they have been hanged.

—Heinrich Heine[4]

In many of my own writings on punishment, forgiveness, and mercy, I have generally conceptualized these concepts (and their differences) in the following way: *Punishment* is a social practice to be defended mainly in terms of the values of crime control and deserved retribution for wrongdoing.[5] *Forgiveness* is *personal*—the overcoming, on moral grounds, of the negative passions (such as anger and resentment) that are generally present in victims against the persons who have wrongfully harmed them.[6] *Mercy* is the reduction, on moral grounds, of the punishment that might reasonably be thought to be required for crime control or retributive desert. I use the phrase "on moral grounds" to rule out motives for forgiveness or leniency that would keep them from counting as virtues. Purely selfish or evil motives, for example, would keep leniency from counting as a virtue. So if one wanted to give someone a good example of mercy as a virtue, one would not be tempted to use judge Angelo's promise, in Shakespeare's *Measure for Measure*, to spare Isabella's brother from

3 Friedrich Nietzsche, *Beyond Good and Evil: Prelude to a Philosophy of the Future*, trans. Walter Kaufmann (New York: Vintage, 1966), part 4, "Epigrams and Interludes," aphorism 146, page 89.

4 Heinrich Heine, *Gedanken und Einfälle*, section I, quoted in Sigmund Freud, *Civilization and Its Discontents*, trans. and ed. James Strachey (New York: W.W. Norton and Co., 1961).

5 It is important to emphasize that, in spite of a common confusion, retribution does *not* mean vengeance or harsh punishment and does not mean (indeed explicitly rejects) punishment based on hatred, anger, or resentment. It simply means the punishment that is *deserved*—a value that will often incline the retributivist to argue for reduced punishment. Note also that when punishment is described as imposing suffering, this is not to be taken as pain. It is rather the sense of suffering as *enduring* (think of "he does not suffer fools gladly") where the criminal is simply being required to endure a period of confinement in which he no longer enjoys full voluntary control over his life. In short, and as the old saying goes (although many in our increasingly cruel society no longer seem to think in this way, alas), we send people to jail *as* punishment, not *for* punishment. I am personally drawn to a justification of punishment that combines both crime control and retributive elements. I defend such a view in some detail: Jeffrie G. Murphy in my "Last Words on Retribution," in *Routledge Handbook of Criminal Justice Ethics*, ed. Jonathan Jacobs and Jonathan Jackson (London: Routledge, 2017), 28–41.

6 For an elaboration of my previously stated views on forgiveness and mercy see Jeffrie G. Murphy, *Getting Even—Forgiveness and its Limits* (Oxford: Oxford University Press, 2003). My views have been greatly influenced by the sermons on Matthew 5: 43, 44, "Upon Resentment" and "Upon Forgiveness of Injuries" by Bishop Joseph Butler (1692–1752): *Fifteen Sermons Preached at the Rolls Chapel and Other Writings on Ethics*, ed. David Naughton (Oxford: Oxford University Press, 2017), sermons 8 and 9.

https://doi.org/10.1017/jlr.2019.38 Published online by Cambridge University Press

execution if she will have sex with him and would not use it even if Angelo had intended to keep that promise.

Although these definitions may be serviceable as an initial framework in which a discussion can be started, they rather soon can be seen as problematic. For example, the virtue of mercy as defined above immediately seems in conflict with the virtue of justice—a point well made by Saint Anselm:

> [W]hat justice is it that gives him who merits eternal death everlasting life? How then, gracious Lord, good to the righteous and the wicked, can you save the wicked, if this is not just, and you do nothing that is not just?
>
> —Anselm[7]

There are also difficulties that arise if one thinks of forgiveness as defined above. If forgiving is simply the personal overcoming of victim resentment (out of love or some other moral reason), then it seems that forgiveness can only come *from victims* and is a duty only for them. If that is the case, however, there can be little tension between forgiveness and even severe punishment if we retain the common view that crimes (unlike torts) are not simply injuries to individuals but rather injuries to the community as a whole. This is why tort cases bear names such as "Jones v. Smith" whereas criminal cases generally bear such names as "State v. Smith." Even if victims forgive the criminals who have harmed them, this will rarely have any relevance (other than evidential problems caused by uncooperative victim witnesses) to the state's decision to prosecute. Some states even compel victim witnesses to testify and will sanction them if they do not.

Finally, it may seem that punishment itself is not properly understood or justified if, as is common in contemporary philosophical writings on punishment, it is discussed only in terms of crime control and retribution. One might, for example, want to consider a justification for punishment that goes back as far as Socrates and Plato and can be found in at least some strands of Christianity. According to Plato as his views are expressed by the character of Socrates (in *Gorgias*, for example), punishment must be justified in terms of the value of *goodness* as revealed in the attempt to improve the wrongdoer's character and make that wrongdoer a better or more virtuous person. This idea of caring about the character or soul of the wrongdoer first appeared in ancient Greece when Socrates (in *Apology* and *Crito*) argued that it is the one who acts unjustly who is really harmed rather than the one who is treated unjustly since the unjust actor has damaged the thing that is of greatest value and should matter the most—his character or soul. This is why Socrates is able to say, very paradoxically in his day and still in ours, that a good person cannot be harmed. Surely Christians would find some version of this view congenial. The crucified Jesus was being harmed as the world generally understands harm, but he was not being harmed in the Socratic sense.

7 Anselm, *Proslogium*, Chapter IX, in *Medieval Sourcebook*, "Anselm (1033–1109): *Proslogium*," accessed September 26, 2019, https://sourcebooks.fordham.edu/basis/anselm-proslogium.asp#CHAPTERIX.

https://doi.org/10.1017/jlr.2019.38 Published online by Cambridge University Press

A FRESH START

Purity of heart is to will one thing.

—*Søren Kierkegaard*[8]

I have written a great deal about punishment, forgiveness, and mercy within the framework set by the analyses of those concepts as defined above, and I do not want simply to repeat here what I have said in those other writings. Rather I want to pursue the following line of thought: Instead of thinking of mercy and forgiveness as *acts*—as things we *do* or gifts we *bestow*—I want to think of them as aspects of *character* and focus not so much on what it is to perform acts of forgiveness or mercy as on *what it means to be a merciful or forgiving person*. I hope that this will allow us to see how such virtues of character might have some interesting and valuable impacts on our thinking about criminal punishment itself—in particular, on how we apply such values as crime control and retribution. My surprising (to many) inspiration for this hope has come from the Protestant Christianity (often quite unorthodox) of Immanuel Kant. (Kant's Christianity was of the liberal kind that was a product of the Enlightenment and will of course not be embraced by all Christians.) Most people who have been taught Kant's views on punishment have learned them in undergraduate or law college anthologies (even, alas, in my own anthology *Punishment and Rehabilitation*) from excerpts from his *Doctrine of Right*. In that book (the first part of his *Metaphysics of Morals*), he offers in just a couple of pages an extreme (even primitive) form of retributivism in which he claims, for example, that murderers must be punished with death (even if a society is to abandon itself and thus will not need to worry about crime control) in order to prevent the "bloodguilt" of the offense from falling upon the remaining citizens. (This sounds more like something to be expected in ancient Greek tragedies than in the thinking of the greatest philosopher of the Enlightenment.) He also claims that punishment must be exactly proportional to the "inner viciousness" (*inneren Bösartigkeit*) of the offender and that, in order to achieve this, the criminal should (where possible) be punished by having the exact thing done to him that he has done to his victim—a death for a death, for example. These passages are useful in allowing students to see a pure (even if extreme) form of retributivism. If they really represented Kant's full and considered views on punishment, however, he would have to be regarded as something of a monster or at the very least as inviting secular political authorities to presume to play God.

Fortunately (particularly for one who wants to retain admiration of Kant) these brief passages do not represent his full and considered views relevant to punishment, for in other works he offers some valuable correctives to the harshness expressed in the *Doctrine of Right*—correctives that should help to overcome the common view of Kant as a cold rationalist formalist in ethics with no sympathy at all for love or any other emotion. The correctives occur mainly in his *Doctrine of Virtue* (the second part of his *Metaphysics of Morals*) and *Religion within the Limits of Reason Alone*. Here are some brief samples:

> 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 especially because no punishment, no matter

8 Søren Kierkegaard, *Purity of Heart Is to Will One Thing: Spiritual Preparation for the Feast of Confession*, trans. Douglas V. Steere (New York: Harper, 1938).

https://doi.org/10.1017/jlr.2019.38 Published online by Cambridge University Press

from whom it comes, may be inflicted out of hatred. Hence [while still seeking to protect the public] men have a duty to cultivate a *conciliatory spirit*.[9]

[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 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.[10]

[People] may picture themselves as meritorious, feeling themselves guilty of no such offenses as they see others burdened with; nor do they ever inquire whether good luck should not have the credit, or whether by reason of the cast of mind which they could discover, if they only would, in their own in-most nature, they would not have practiced similar vices, had not inability, temperament, training, and circumstances of time and place which serve to tempt one (matters which are not imputable), kept them out of the way of these vices. This dishonesty, by which we humbug ourselves and which thwarts the establishing of a true moral disposition in us, extends itself outwardly also to falsehood and deception of others. If this is not to be termed wickedness, it at least deserves the name of worthlessness, and is an element in the radical evil of human nature.[11]

I quote these passages from Kant for two reasons. First, I want to correct the very common misunderstanding of Kant's thinking about punishment that is based on the few passages generally quoted from his *Doctrine of Right*. Second, and much more important for present purposes, is that these passages in my view contain insights that should moderate to a considerable degree the uncritical righteous enthusiasm with which the values of crime control and retribution are often applied in our own society—an enthusiasm (reaching for some the point of fanaticism of the sinful kind spoken of by Pope Francis) that often results in radically excessive punishments and unspeakably cruel prison conditions. This does not show that there is something wrong with these values, since society must for the common good control crime (a clear utilitarian value) and if just must constrain its crime control measures in ways that respect the dignity and humanity of offenders and thereby treat them with due consideration of their actual moral culpability for the wrong that they have done and for which they deserve to suffer (core retributive values). In short, I argue below that if the criminal law is applied by those with certain Christian (but admittedly not uniquely Christian) virtues (love, humility, and dispositions to forgive and show mercy), then the practice of criminal punishment will be made more just and thus that there is no inherent conflict between forgiveness and mercy and the values of crime control and retribution properly understood. This reveals, for example, that there is considerable truth in the cliché that mercy is not in conflict with justice but rather *tempers* it and thereby makes it stronger and insight in Shakespeare's famous observation (in *The Merchant of Venice*) that justice should be *seasoned* with mercy and thereby made more morally palatable. If Christian purity of heart is to will one thing, then surely that one thing must be *love* as expressed in the great commandments (found originally in Jewish law) "Thou shalt love the Lord thy God will all thy heart, and with all thy soul, and with all thy strength, and with all thy mind; and thy neighbor as

9 Immanuel Kant, *Metaphysical First Principles of the Doctrine of Virtue*, in *The Metaphysics of Morals*, trans. and ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1991), 181–280, at 253.

10 Kant, *Doctrine of Virtue*, 251.

11 Immanuel Kant, *Religion within the Limits of Reason Alone*, trans. Theodore M. Greene and Hoyt H. Hudson (New York: Harper Torchbooks, 1960), 33–34.

https://doi.org/10.1017/jlr.2019.38 Published online by Cambridge University Press

thyself."[12] If a Christian is to accept the institution of criminal punishment, a way must be found to incorporate such love into the institution. I now suggest how one might make a least a start toward doing this.

HUMILITY AND LOVE—LOVING YOUR CROOKED NEIGHBOR WITH YOUR CROOKED HEART

O stand, stand at the window
As the tears scald and start;
You shall love our crooked neighbour
With your crooked heart.

—*W. H. Auden*[13]

The commandment that we are to love our neighbor (and to regard every human being as a neighbor) is a hard saying when we realize that many of the humans we are to regard as neighbors seem anything but lovable or even likable. Kierkegaard refers to them as "our very unpoetic neighbors" and argues in his *Works of Love* that, absent a command of God, we would have no reason to love them.[14] It is perhaps hardest of all to love those—many criminals, for example—who have done us or our communities serious wrongful injury. The natural instinct is to resent them, become angry at them, or even hate them and wish them ill. And yet, as a Christian, one is supposed to overcome those natural inclinations and love them, wish them well, and approach them with what Kant called a *conciliatory spirit*. Is this not to demand of us the impossible?

Difficult, yes; but impossible, no—and Kant has given us a variety of ways in which we can overcome or at least blunt our natural inclinations with respect to criminals. What Kant offers in the quoted passages is in effect a philosophical elaboration of the deeply insightful cliché, "There, but for the grace of God, go I." He advocates a posture of radical humility by arguing that we simply do not know enough and are not good enough to presume a right to make totally dismissive judgements of any fellow human being—to regard any member of our species (every one of them a beloved child of God and created in his image) as so evil at the core as to be beyond any hope of redemption. Even Judas might have been redeemed had he not succumbed to despair and killed himself in the false belief that he had fallen outside the scope of God's love and forgiveness.

So what is the virtue of humility, how does one acquire it, and how might it function to make our treatment of criminals more just?

12 Luke 10:27, King James Version.

13 W. H. Auden, "As I Walked Out One Evening," in *Collected Poems*, ed. Edward Mendelson (New York: Modern Library, 2007), 134–35, at 135.

14 The issue of whether or not the command to love one's neighbor as oneself can be accepted with independence from the metaphysical claims that are a part of orthodox Christianity (the promise of eternal life, for example) is not one that I am able to explore here. Perhaps those of us who are initially skeptical of many of these metaphysical claims can be drawn to them (on certain interpretations) because of the immediate appeal of the value of love. If so, then Kierkegaard may be mistaken in thinking that the belief in a divine command must precede belief in the fundamental value of love. I suspect that more people are drawn into Christianity because of the appeal of the love commandments than because of those metaphysical arguments about God's existence and nature that are generally made central in introductory philosophy courses.

https://doi.org/10.1017/jlr.2019.38 Published online by Cambridge University Press

I have argued elsewhere that humility is what I call a *cluster virtue*—a virtue that consists of three other virtues: *attention*, *recognition of one's own luck*, and *empathy*. I will briefly summarize here what I have explored at greater length elsewhere.[15]

As a start toward understanding the virtue of attention and the vice of its lack, consider one of the most moving passages in Shakespeare's *King Lear*. We find old Lear—suffering on the storm tossed heath the torments of lost status, abandonment by family, hunger, and bitter cold—having an epiphany of self-transformation when he notices (for the first time in his life) the suffering of others, sees an equality with them, and seeks to assist them in the small ways still available to him. He says this to his Fool:

> In, boy, go first—You houseless poverty—
> Nay, get thee in. I'll pray, and then I'll sleep.
> Poor naked wretches, wherso'er you are,
> That bide the pelting of this pitiless storm,
> How shall your houseless heads and unfed sides,
> Your loop'd and window'd raggedness, defend you
> From seasons such as these? O, I have ta'en
> Too little care of this! Take physic, pomp;
> Expose thyself to feel what wretches feel,
> That thou mayst shake the superflux to them,
> And show the heavens more just. (Act 3, Scene 4)

Being aware only of his status and power as king, Lear had previously never even noticed those around him as people of a moral worth and dignity equal to his own; and to see other human beings—even ones that were previously despised—as having human dignity is an important kind of humility—one that breaks down the sharp us-them distinction that the comfortable like to make when they despise the poor or the sick or those who have done wrong. When Chief Judge Richard Posner dissented in the prison conditions case of *Johnson v. Phelan*, he captured this aspect of humility very well and showed its clear application to criminal punishment:

> There are different ways to look upon the inmates of prisons and jails in the United States. . . . One way is to look upon them as members of a different species, indeed as a type of vermin, devoid of human dignity and entitled to no respect. I do not myself consider . . . inmates of American prisons and jails in that light. We should have a realistic conception of the composition of the prison and jail population before deciding that they are scum entitled to nothing better than what a vengeful populace and a resource-starved penal system chooses to give them. We must not exaggerate the distance between "us," the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration.[16]

Chief Judge Posner is not an enemy of criminal punishment and appreciates both its crime control and its retributive value. He also appreciates, however, how these values will be corrupted and will depart from justice (instead of realizing justice) if approached with an attitude of arrogant dismissal of the very humanity of those being punished. This is certainly not to approach them as Jesus, Paul, Shakespeare, or Kant would approach them. Indeed, in addition to advocating a

15 Jeffrie G. Murphy, "Humility as a Moral Virtue," in *Handbook of Humility: Theory, Research, and Applications*, ed. Everett L. Worthington, Jr., Don E. Davis, and Joshua N. Hook (New York: Routledge, 2017), 19–32.

16 Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995).

https://doi.org/10.1017/jlr.2019.38 Published online by Cambridge University Press

"conciliatory spirit" in such matters, Kant insisted that punishment must be "freed from any mistreatment that could make the humanity of the person suffering it into something abominable."[17]

In addition to paying attention to the dignity and humanity of those who do wrong, any initial contempt that those who are law abiding and otherwise virtuous might feel for wrongdoers should be substantially diminished if one is properly humbled by bringing to consciousness the role that *luck* (many Christians would say grace) has played in one's own law abiding life. Kant stresses in the last of the three passages quoted above, from his *Religion within the Limits of Reason Alone*, that what he calls the "radical evil in human nature"[18] (his version of the doctrine of original sin) is dramatically and essentially revealed in our self-deceptive tendency to celebrate our own moral virtue (and thus feel superior to those who have done wrong) without an awareness of how much that virtue may have depended on pure good luck and that we might have "practiced similar vices, had not inability, temperament, training, and circumstances of time and place which serve to tempt one ... kept them out of the way of those vices."[19] (It is not for nothing that the Lord's Prayer contains "lead us not into temptation" as an essential element.) Before one happily embraces the self-deception of "I could never be one of those evil and vile criminals who are just getting what they deserve if they are thrown into prisons that are run by gangs and rape is the order of the day or that subjects them to soul-destroying long term solitary confinement," one should learn about the Milgram Experiment and the Stanford Prison Experiment, read the books *Ordinary Germans* by Christopher R. Browning and *Hitler's Willing Executioners* by Daniel Jonah Goldhagen, and read or see the powerful play (or film) *Death and the Maiden* by Ariel Dorfman.

In *Death and the Maiden* we are given, collapsed from many actual cases, one fictional representative, Doctor Miranda, of the kind of monstrous evil that existed in Chile under Pinochet—a regime that, like Nazi Germany, successfully tempted many "good" people to cooperate in atrocities—in torture, rape, and murder all in the name of keeping the country safe from a communist takeover. (This play might, of course, make many Americans think of "Gitmo.")

Doctor Miranda had for many years been a conscientious physician and family man—a generally kind person. He was then asked to serve as a physician for interrogation sessions of the dictatorial regime. His role is to make sure that the interrogation is not so severe that those being interrogated will be rendered incapable of cooperation or even killed. Since it was not really possible to refuse such a request under the regime in power, he agreed and thought that his task was consistent with his role as a physician. He was at first shocked by the torture and rape that took place in the sessions, but still believed that those being treated in this way were better off with his care than if he refused to play his physician role. Soon he began to be drawn into this web of evil, however, and became a torturer and rapist himself. He describes his descent into evil this way:

> The prisoners were dying on them, they told me, they needed someone to care for them, someone they could trust. ... [I agreed] for humanitarian reasons. We're at war, I thought, they want to kill me and my family, they want to install a [Communist] dictatorship, but even so, they still have a right to some sort of medical attention. It was slowly, almost without realizing how, that I became involved in more delicate operations, they let me sit in on sessions where my role was to determine if the prisoners could take that much torture, that much electric current. At first I told myself that it was a way of saving lives [and I ordered them to stop or the prisoner would die]. But afterwards I began to—bit by bit, the virtue I was feeling turned into

17 Kant, *Doctrine of Virtue*, 142.

18 Kant, *Religion within the Limits of Reason Alone*, 34.

19 Kant, *Religion within the Limits of Reason Alone*, 33.

https://doi.org/10.1017/jlr.2019.38 Published online by Cambridge University Press

> excitement. . . . A kind of brutalization took over my life, I began to truly like what I was doing. It became a game. My curiosity was partly morbid, partly scientific. How much can this woman take? More than the other one? How's her sex? Does her sex dry up when you put the current through her? Can she have an orgasm under these circumstances? She is entirely in your power, you can carry out all your fantasies, you can do what you want to her—everything they have forbidden you since ever, your mother ever urgently whispered you were never to do. . . . and finally I—but not one ever died on me, not one of the women.[20]

The moral of this for our purposes here is simple: Before having utter dismissive contempt for the crooked heart of the criminal, reflect on the crookedness of your own heart either actual or potential. This should at least force you to consider a more modest and realistic conception of the punishment that the criminal actually deserves as a matter of justice. And before you let yourself believe that you are certain that, whatever your potential for evil, there is no actual evil that can be attributed to you, recall this insightful observation on self-deception from Nietzsche: "'I have done that' says my memory. 'I cannot have done that' says my pride, and remains inexorable. Eventually—memory yields."[21]

Simply accepting intellectually the claims that one's pride in one's own virtue can be misplaced because of insufficient attention to the humanity of others or a failure to recognize the role that luck has played in one's own life does not yet produce the full virtue of humility. Intellectual acceptance is not full and genuine acceptance unless it produces an emotional impact and is accepted in one's heart of hearts. (A good illustration of this point is in a story told to me by Peter Geach about an Anglican archdeacon who was asked by a member of the congregation what he expected after death. The archdeacon replied "I expect to sit at the feet of my Lord and Savior enjoying eternal bliss, but please let us stop talking about such depressing matters.") And what should the emotional payoff of these intellectual insights of attention and vulnerability to luck be in order to allow them to develop into the full virtue of humility? The answer, I think, is *empathy*.

What is empathy? I think that there are two different senses of empathy—empathy as love or compassion and empathy as seeing the world (to the degree possible) from another person's (in our case the wrongdoer's) way of conceptualizing himself and his place in the world—to "walk a mile in his shoes" as the cliché goes. In his book *The Better Angels of Our Nature*, cognitive scientist Steven Pinker sees the close relation between these two senses of empathy and even offers a suggestion for how one might develop empathy if one is lacking in it:

> "Empathy" in the sense of adopting another's viewpoint is not the same as "empathy" in the sense of feeling compassion toward the person, but the first can lead to the second by a natural route. . . . Realistic fiction, for its part, may expand readers' circle of empathy by seducing them into thinking and feeling like people very different from themselves.[22]

We human beings have a strong preference for being around and thinking about people like ourselves, and thus it is easy to see "the other" as so mysterious as to be potentially dangerous or even as less than fully human. It is particularly easy to view criminals in this way. Contact with them by visiting them in prison, writing letters for them, teaching a class for them, and other ways of showing them some concern and respect might not just benefit them but might also benefit the one who does the visiting in that it might allow that person to develop a more nuanced and sympathetic

20 Ariel Dorfman, *Death and the Maiden* (New York: Penguin Books, 1991), 58–60.

21 Nietzsche, *Beyond Good and Evil*, part 4, "Epigrams and Interludes," aphorism 68, page 80.

22 Steven Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* (New York: Viking Press, 2011), 175.

https://doi.org/10.1017/jlr.2019.38 Published online by Cambridge University Press

understanding of why the offender developed in the way he did and acted in the way that he did. Even if he did some terrible things, is truly dangerous, and should be in prison, getting to know him might at least allow one to see human connections with him and to see that his time in prison should not be one of cruel abuse and neglect.

As Pinker points out, reading literature can also expand our empathy by allowing us to live vicariously for a bit inside the minds of characters that initially seem so different from us and in the minds of characters who have a human way of relating to characters whom many would despise and shun. Consider, for example, the characters of the murderer Raskolnikov and the policeman Porfiry in the very Christian novel *Crime and Punishment* by Fyodor Dostoevsky. Most readers will develop some sympathy (limited) for Raskolnikov as they read the novel and see his youthful innocence, his hunger and poverty, his low self-esteem that allows him (like many current day American terrorists recruited by ISIS perhaps) to be seduced by crackpot but influential moral, political, and religious ideas that are current in his culture. They will also come to appreciate Porfiry's refusal to give up on Raskolnikov. Continuing to hope for Raskolnikov's redemption, he will not regard Raskolnikov as a "finished man" and will not let Raskolnikov see himself in that way. He counsels Raskolnikov to confess so that his prison sentence will not be so long that he will not still be a reasonably young man when it is finished, and he believes that Raskolnikov can lead a meaningful life when his sentence is over if he uses his time in prison to overcome the corruptions of character that led him to become a murderer.

Finally, at least for Christians, an important way to become more empathetic and expand one's humility is, of course, to *pray* for it. In saying this I am thinking of Kierkegaard's important view of the best kind of prayer—namely, praying not to change God, but to change ourselves.

CRIMINAL PUNISHMENT CONSTRAINED BY HUMILITY

Lost within a man who murdered, there was a soul like any other soul, purity itself it surely once had been.

—*William Trevor*[23]

Let us imagine that one approaches criminal punishment with the "conciliatory spirit" advocated by Kant and with the kind of humility that I have suggested as a complex of attention (Iris Murdoch called this "loving attention"), recognition of luck, and empathy. What will the consequences be?

They will not be the total rejection of punishment as a mechanism to control crime or the rejection of the retributive constraints of limiting, as a matter of justice and fairness, punishment to what is deserved given the criminal's actual culpability for the wrong done. (As former archbishop of Canterbury William Temple said, "It is axiomatic that love should be the predominant Christian impulse and that justice is the primary form of love in social organization."[24]) A civilized society must seek the common good and protect itself from those who do their fellow citizens wrong or inflict grave harms upon them. In so doing, however, such a society will never impose punishments that are excessive or that treat the offender with less than the full respect and dignity that he deserves. As Dostoevsky wisely said, the degree that a society is truly civilized can be seen in the way it treats its prisoners. This is a test that our American system of "criminal justice," alas,

23 William Trevor, *Felicia's Journey* (London: Viking, 1994), 212.

24 As quoted in Alfred Thomas Denning, *The Influence of Religion on Law* (Edmonton: Canadian Institute for Law, Theology and Public Policy, 1997), 107.

https://doi.org/10.1017/jlr.2019.38 Published online by Cambridge University Press

fails dramatically in a variety of ways—for example, excessively long sentences, horrendous prison conditions (gang rape very common), and such soul destroying punishments as long term solitary confinement.

How will the virtue of humility be of help here? First, it will incline those who would punish to see this not as something to be celebrated but something to be done with great regret and always with a sense of loss and disappointment, always open to the possibility that the offender has failed us because to some degree we have failed him. This, of course, is not always the case, but its possibility should be among the things that influence our judgments. We must be careful here, of course, not to carry the idea that social injustice often plays a role in criminality to such an extreme degree that we deprive disadvantaged people of their human dignity by claiming that they are just victims and in no sense responsible for the wrong that they do.

Second, those who punish in humility will try to keep vividly in mind their own shortcomings and limitations and, having forgiving and merciful characters, will always be seeking the least intrusive way to accomplish the legitimate aims of punishment—hoping to find ways to punish less rather than more. They will thus be at constant war against the American tendency to deal with crime simply by adding more years on to oppressive mandatory sentences and to throw convicted wrongdoers into prisons that are in effect Thomas Hobbes's state of nature wherein life is solitary, nasty, brutish, and short—a world in which gangs control much of prison life and prison rape is tolerated or even joked about.[25]

Third, humility should incline one to seek in prisons an environment that will be truly rehabilitative and will provide opportunities for people to become better people and to develop habits of mind and conduct that will aid them in living lives as productive citizens when their term of imprisonment is over instead of, as is now so often the case, making them worse people when they get out than they were when they went in. Certainly spending a few years in a gang controlled environment of rape and other forms of abuse is hardly to be improving of character, but there are positive things that could be done as well—more mental health care, for example, since so many people who are currently incarcerated in America have serious mental health problems. There are also many small things that could be done as well. I, for example, as a passionate lover and respecter of dogs, am particularly fond of the Prison Dog Project as a way of helping to build virtuous characters—characters that are built, if Aristotle was correct, by a process of habituation—learning by doing. In the Prison Dog Project prisoners care for dogs and thereby at least some of them develop the virtues that come from giving and receiving love (dogs are marvelously uncritical in giving love). This healthy exchange of love was something missing in the earlier life of many prisoners and the program seems, at least for some inmates, to help them in developing a sense of responsibility and empathetic kindness. The program is only one small thing, of course, but great things often consist of many small things. Those whose characters are filled with love, humility, and dispositions of character to forgive and show mercy will no doubt be motivated to think of many more small things and perhaps even some bigger things. A society that truly values freedom must be careful about forcing programs of character cultivation on unwilling prisoners, but there is surely no such objection to offering such *opportunities* to inmates—or perhaps even providing positive incentives (possibility of early release, for example) to those who successfully complete such programs.

Fourth and finally, those whose hearts are filled with the virtue of loving humility will always be on the lookout for viable *alternatives* to punishment and will tend to see punishment as a sometimes

25 See Mary Sigler, "By the Light of Virtue: Prison Rape and the Corruption of Character," *Iowa Law Review* 91, no. 2 (2006): 561–608, at 561.

https://doi.org/10.1017/jlr.2019.38 Published online by Cambridge University Press

necessary last resort but never simply uncritically taken as the first resort. Here I take up again the Socratic/Platonic idea that I mentioned above—the idea that what is most important in dealing with wrongdoers is to save them from the damage that they do to their characters or souls simply by being wrongdoers. If we can help them to mold better characters only through humane punishment, then humane punishment it will be. Alternatives to criminal punishment that are better at potential character improvement than even humane punishment, however, are clearly to be preferred—at least with respect to many nonviolent offenders.

A good example here is to be found in America's so-called war on drugs. The use of drugs is out of control in America—deaths from opioid addiction rising all the time—and our system of criminal punishment has shown itself to be radically maladapted to deal with the problem (and the related problems of prostitution and theft in support of drug habits) through its ham-handed mania for mass incarceration with longer and longer prison terms even for those guilty of fairly minor and nonviolent crimes with respect to drugs.

Are there alternatives? Anyone who reads Susan Burton's book *Becoming Ms. Burton: From Prison to Recovery to Leading the Fight for Incarcerated Women* (and Nicholas Kristof's essay about her in the May 4, 2017, *New York Times*—"From Prisoner to Modern-Day Harriet Tubman")[26] may come to see that there can be alternatives. From a life of drug addiction and prostitution her downward spiral ended when she chanced into a drug-treatment program, overcame her addiction, ended the cycle of frequent jail times, and decided that if with the right kind of help she could do it then others could as well. She founded, with the start-up help of billionaire philanthropist Theodore Forstmann, the nonprofit A New Way of Life Re-entry Project. This project (now with five homes) helps women who have been imprisoned for drug and related offenses—some for so long that they have lost all ability to do such simple things in the outside world as shop or apply for a social security card. In addition to receiving some financial support, these women are provided with counseling, shelter, sobriety support, and, where necessary, instruction and help in developing the basic survival skills for living a viable life outside of prison. Kristof closes his essay on Burton with these words: "I am celebrating Burton's new book and amazing second career—but with a bittersweet feeling that there are so many other Susan Burtons out there who never get the help or drug treatment they need, and are still incarcerated in ways that diminish them and all of America."[27] Surely those with Christian love, humility, and forgiving and merciful characters will join Kristof's celebration but will also share his bittersweet sadness as well and may want to do their part to find viable alternatives to the heartless and cruel system of mass incarceration that dominates America's approach to crime and criminals.

In this essay I have suggested that approaching criminal punishment with love (what Kant called a "conciliatory spirit" or a disposition toward forgiveness and mercy) will, rather than undermining justice, make us better at doing justice. If I am right about this, the supposed conflict between justice and love (the conflict that worried Anselm) is at least to some degree resolved. *Legis Plenitudo Caritas*.[28]

26 Susan Burton, *Becoming Ms. Burton: From Prison to Recovery to Leading the Fight for Incarcerated Women* (New York: New Press, 2017); Nicholas Kristof, "From Prisoner to Modern-Day Harriet Tubman," *New York Times*, May 4, 2017, https://www.nytimes.com/2017/05/04/opinion/susan-burton-modern-day-harriet-tubman.html.

27 Kristof, "From Prisoner to Modern-Day Harriet Tubman."

28 "The law will be fulfilled, but only by love."

https://doi.org/10.1017/jlr.2019.38 Published online by Cambridge University Press

ACKNOWLEDGMENTS

I thank all of those (I hope I remember them all) who were kind enough to read and give me comments on earlier drafts of this essay: Terence Ball, Robert Cochran, Richard Dagger, Stephen Garvey, Zachary Gubler, Thomas Hill, Jr., Jonathan Jacobs, Herbert Morris, Mark Murphy, Ashraf Rushdy, Meghan Ryan, Mary Sigler, James Boyd White, Michael J. White, and John Witte, Jr.

https://doi.org/10.1017/jlr.2019.38 Published online by Cambridge University Press