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HATING CRIMINALS: HOW CAN SOMETHING THAT FEELS SO GOOD BE WRONG?

Joshua Dressler*

FORGIVENESS AND MERCY. By Jeffrie G. Murphy and Jean Hampton. New York: Cambridge University Press. 1988. Pp. xii, 194. \$29.95.

"We are Gentle, Not Really Angry People."

— *Sign in Concordia University Women's Centre in Quebec, Canada, put up after fourteen women were gunned down on December 6, 1989, by a self-proclaimed anti-feminist man.*

"We are Gentle, Not Nearly Angry Enough People."

— *The same sign, after it was changed by a Centre occupant.*¹

People with hearts of gold are more attractive to us than those with hearts of stone.² In moral discourse we value warm and soft emotions, such as compassion, mercy, and forgiveness. We are critical of cold, hard feelings, such as resentment, revenge, and hatred.

How then do we explain the harsh emotions expressed daily by presumably decent people? How can we account for college students standing outside a prison late at night cheering the execution of a murderer;³ New Yorkers greeting hotel owner Leona Helmsley with jeers and taunts as she leaves the courthouse where she has received an unusually stiff prison sentence for tax fraud;⁴ a rabbi admitting that he cannot let go of his anger toward a genuinely repentant young man who desecrated a synagogue by painting a swastika on it;⁵ and a sign-defacer calling on women to be a little less gentle and a lot more angry

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1. Sweeney, *The Shadow of Death*, The Detroit News, Dec. 16, 1989, at C1, col. 1, C8, col. 2.

2. Sabini & Silver, *Emotions, Responsibility, and Character*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 163, 169 (F. Schoeman ed. 1987) [hereinafter RESPONSIBILITY].

3. See Moore, *The Moral Worth of Retribution*, in *id.*, *supra* note 2, at 179, 193 ("Surely one of the uglier spectacles of our time are the parties by fraternity boys outside the gates of prisons when an execution is taking place.").

4. Glaberson, *Helmsley Gets 4-Year Term for Tax Fraud*, N.Y. Times, Dec. 13, 1989, at B1, col. 5.

5. Blumenthal, *An "Aryan" Who Now Attacks Anti-Semitism*, N.Y. Times, Dec. 18, 1989, at 1, col. 2, B8, col. 1.

in response to their collective victimization?⁶

Perhaps these cases tell us only the obvious: that "good" people sometimes have "bad" emotions. But perhaps there is more to it than this. If these emotions are bad, why do they often feel good when we experience them, and why does holding on to them often seem right? Could it be that, in fact, hatred is not as bad as we say it is, and that forgiveness and mercy are not so good?

These questions are rarely asked in nonreligious, academic circles.⁷ Now, however, along comes *Forgiveness and Mercy*, a wonderful book that tackles these issues in a warm-blooded but scholarly fashion. The book is a lucid, candid,⁸ sometimes playful, always open-minded⁹ dialogue¹⁰ between two philosophers¹¹ who share the belief that some emotions are cognitive states (and, therefore, can be morally evaluated and, to some extent, controlled),¹² and that retributivism has a legiti-

6. See *supra* note 1 and accompanying text.

7. North, *Wrongdoing and Forgiveness*, 62 PHIL. 499, 499 (1987) (the moral nature of forgiveness "has largely been ignored by modern moral philosophers who work outside the confines of a religious context"); see also A. KOLNAI, *Forgiveness*, in ETHICS, VALUE, AND REALITY 211, 211 (1978) (stating that the concept of forgiveness has a "Christian tinge" to it).

8. Candor is a consistent feature of Murphy's scholarship. For example, he is willing to admit in writing that he has changed his mind on a subject. See, e.g., *infra* note 13; *infra* text following note 87. Readers should also look at Murphy's revealing comments at the end of the book, in which he discusses how his temperament and upbringing have affected his attitudes regarding the present topics. Pp. 184-86.

9. It should not be remarkable that scholars are open-minded. That is part of their job description. Unfortunately, some "scholars" believe in a secular version of the automobile bumper sticker that reads, "God [substitute here: Kant, Bork, or some other intellectual guru] said it. I believe it. That settles it."

The authors' open-mindedness is evident throughout the book. The tone of their dialogue is respectful; they obviously take each other's arguments seriously. They seem to believe, as Hampton has observed elsewhere, that "implicit in genuine philosophical argumentation is respect for one's opponent . . . [O]ne respects him and seeks to win him over to one's side . . . by appeal to the truth, an appeal which might unexpectedly show one to be wrong and one's opponent to be right." Hampton, *Should Political Philosophy Be Done without Metaphysics?*, 99 ETHICS 791, 811 (1989). On Murphy's side, he forthrightly concedes in the final chapter that some of Hampton's arguments "raise[] some profound worries that will prompt me to rethink many of my views" (p. 162), a prediction I take seriously.

10. The authors say that the book is not, strictly speaking, a dialogue. P. x. What they have done is write alternate chapters, in which each uses the preceding chapter as a basis to move the discussion along. Murphy and Hampton do not attempt to dot every "i" and cross every "t" in the process; at times this means that a particular subsidiary issue raised by one author is not touched upon by the other. Except in their discussion of mercy, see *infra* Part III, this approach works well.

11. Murphy is Professor of Law and Philosophy at Arizona State University. At the time of publication of the book, Hampton was Associate Professor of Philosophy at the University of Pittsburgh. She now teaches at the University of California at Davis. Hampton describes herself as a political philosopher and Murphy as a philosopher of law. P. 10.

12. The cognitive theory of emotions — the idea that passions such as guilt, shame, hatred, resentment, compassion, mercy, and forgiveness are "idea-ridden" (p. 54), rather than mere involuntary, purely physical occurrences — is controversial. For an overview of the subject, see Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655 (1989). Except for a few footnotes and minor textual comment, the authors do not defend this theory; they merely accept it as true (as do I). Those who reject this idea will find the book of marginal interest.

mate role to play in criminal punishment,¹³ but who still reach different conclusions regarding the issues that are raised.

Jeffrie Murphy's thesis is that "[r]esentment (perhaps even some hatred) is a good thing" (p. 16), that forgiveness of wrongdoers is overvalued in our culture, and that there is little room for mercy in the sentencing of wrongdoers (or, as Murphy bluntly suggests: those involved in sentencing and punishing offenders should "keep their sentimentality to themselves for use in their private lives with their families and pets" (p. 174)). In contrast, Jean Hampton provides a qualified defense of the traditional moral and religious teachings that hatred of wrongdoers is wrong, that forgiveness of them is good, and that acts of mercy by those who mete out criminal punishment are often desirable.¹⁴

Ultimately, I conclude that Hampton has the best of the dialogue. I must admit at the outset, however, that because Murphy's arguments run counter to our basic teachings, he starts from a disadvantage: he seems to be driving the wrong way on a one-way street, conduct that is not easy to justify. Perhaps it is for that reason that I am not persuaded by his thesis, for I come to the discussion with a desire to reject his views in favor of Hampton's. At least she is driving in the same direction that I am.

Nevertheless, it is not Murphy's goal to convince us to drive in a different direction, even sometimes. His object is more limited: he wants us to be a little less comfortable in our beliefs; he wants us to have doubts. In this, he succeeds. If there are truths in moral discourse (and I think there are), few of them are self-evident. We need someone to remind us that a little skepticism, particularly in matters of this sort, is a good thing.

13. Murphy is a long-time retributivist. See generally J. MURPHY, *RETRIBUTION, JUSTICE, AND THERAPY* (1979) (a collection of Murphy's essays on retribution). However, his justification of retribution has undergone change. Compare Murphy, *Kant's Theory of Criminal Punishment*, in *id.* at 82-92 (advocating a Kantian reciprocity-of-benefits-and-burdens theory) with Murphy, *Retributivism, Moral Education, and the Liberal State*, *CRIM. JUST. ETHICS*, Winter/Spring 1985, at 3, 7 [hereinafter Murphy, *Retributivism*] (conceding that "I have now been persuaded that there are serious problems with [the Kantian view] as a moral justification for punishment"). His newest vision of retributivism is seen in *Forgiveness and Mercy*.

Hampton espouses a "moral education" justification of punishment, which previously she took pains to distinguish from retributivism. Hampton, *The Moral Education Theory of Punishment*, 13 *PHIL. & PUB. AFF.* 208, 215, 236 (1984). However, some commentators link the theory to retributivism, because of its respect for the human autonomy of the wrongdoer. See Lipkin, *The Moral Good Theory of Punishment*, 40 *U. FLA. L. REV.* 17, 28-29 (1988). In *Forgiveness and Mercy*, Hampton defends "teleological retributivism," a qualified version of retribution. See *infra* note 18.

14. Because the concept of forgiveness has a religious tinge to it, see *supra* note 7 and accompanying text, it is not insignificant that Christian faith apparently plays a more significant role in Hampton's life than in Murphy's. Murphy describes himself as an "outsider" to interpretations of Christianity (p. 163) who wants only to "mine these religious traditions for nuggets of secular value" P. 30. In contrast, Hampton discloses in the preface (p. xi) and introduction (pp. 10-13) a deep religious faith. This difference in point of departure has an impact on the discussion, particularly of forgiveness. See *infra* notes 72-76 and accompanying text.

I. STAKING OUT THE ISSUES

The authors' discussion of hatred, forgiveness, and mercy presupposes that there is a legitimate retributive sentiment that at least partially justifies criminal punishment. It is useful, therefore, to put the dialogue into philosophical context.

The theory of retributivism is divisible into "negative" and "positive" variants.¹⁵ Negative retributivism, accepted by many or perhaps most scholars,¹⁶ holds only that it is morally wrong to punish an innocent person even if society might benefit from the action, *i.e.*, that the retributive principle of just deserts is a necessary condition of punishment. A person can accept this retributive limitation on utilitarian goals without being a full-blown retributivist.¹⁷

Positive retributivism is more controversial. It takes the stronger position that not only must an innocent person never be punished; but, affirmatively, one who is guilty of an offense *must* be punished, *i.e.*, retributive justice is a necessary and sufficient condition of punishment. Although neither Murphy nor Hampton goes quite this far,¹⁸ they both believe that people possess a retributive emotion, that this emotion is good, and that it is an important ingredient in a morally just penal system (p. 164).

Positive retributivism is further divisible into two categories, "assaultive" and "protective" retribution.¹⁹ The most famous exponent of the assaultive variety is James Stephen, who claimed that "it is morally right to hate criminals."²⁰ Under Stephen's view, punishment is justified without any consideration of the criminal's rights or best interests; indeed, according to Murphy, Stephen "regard[ed] criminals as rather like noxious insects to be ground under the heel of society" (p. 3).

The difficulty with this thesis — even if one is not appalled by

15. Mackie, *Morality and the Retributive Emotions*, CRIM. JUST. ETHICS, Winter/Spring 1982, at 3, 4.

16. See *id.* at 4 (observing that the principle of negative retributivism is "widely, perhaps universally, felt to have . . . an immediate appeal") Murphy, *Retributivism*, *supra* note 13, at 6 (observing that even "[r]ational social contractors . . . might well adopt such a side constraint as an essential feature of the legal system they are creating").

17. Hart has made the case for a mixed theory of punishment. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 3-13 (1968). However, because this limitation on utilitarianism allows retributivists to determine who can be punished, it "gives away everything to the retributive view." Weinreb, *Desert, Punishment, and Criminal Responsibility*, LAW & CONTEMP. PROBS., Summer 1986, at 47, 49.

18. Murphy believes that justice permits, but does not require, retributive punishment. P. 180. Hampton defends "teleological retributivism," a term coined by Robert Nozick. See R. NOZICK, PHILOSOPHICAL EXPLANATIONS 370-74 (1981). As the term implies, it is an impure version of retribution, because it assumes that punishment has a *telos*, a goal. According to Hampton, however, the goal is not to produce good but "to establish goodness." P. 126.

19. The terms were coined by Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1168-69 (1980).

20. 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81 (1883).

Stephen's attitude toward criminals — is that the "extermination value" (p. 3) of offenders is based in significant part on revenge-utilitarianism²¹ rather than on retribution. In other words, Stephen's assaultive retribution justifies punishment of criminals because it deters private vengeance and sends a useful denunciatory message to would-be offenders that such conduct is wrongful. What Murphy seeks to do in *Forgiveness and Mercy* is to provide a nonutilitarian justification of Stephen's assaultive "hate-the-criminal" ethic.

However, there is another way to justify positive retribution without accepting the principle that criminals should be hated. In stark contrast to assaultive retribution is protective retribution, an idea eloquently defended in recent years by Herbert Morris.²² Protective retribution is based on the proposition that not only does a just society²³ have a right to punish voluntary wrongdoers, but that criminals also have a right to be punished.

Morris' defense of this theory is based on a principle of reciprocal benefits and burdens. Each person benefits from laws that "define a sphere for each person . . . which is immune from interference by others."²⁴ In order to obtain the law's benefits, however, people must accept the burden of exercising self-restraint. When people obey the laws, therefore, a moral equilibrium exists.

This equilibrium is disturbed when a person voluntarily violates a criminal law, for in doing so "he renounces a burden which others have voluntarily assumed and thus gains advantage, which others, who have restrained themselves, do not possess."²⁵ The wrongdoer, in short, unfairly obtains a double-benefit: the benefit of other people's compliance with the law, and the physical, psychic, and/or economic benefits derived from his criminal conduct.

Punishment of the wrongdoer is fair and just, protective retributivists assert, because it restores the moral equilibrium. The wrongdoer benefits from the punishment as well, because he repays his debt to society and can return to it. To forgo punishment, therefore, violates the offender's right to be restored to a just place in the community.²⁶ Moreover, punishment is a sign of respect for the wrongdoer, because it suggests that, at the time of the crime, he had the capacity

21. Radin, *supra* note 19, at 1169.

22. Morris, *Persons and Punishment*, 52 *MONIST* 475 (1968). Murphy, no longer a proponent of the theory, *see supra* note 13, describes Morris' essay as one of "the most persuasive brief presentations of retributive thinking." P. 95 n.10.

23. The theory will not hold in an unjust society, such as one based on apartheid, in which the benefits and burdens of society are not fairly apportioned.

24. Morris, *supra* note 22, at 477.

25. *Id.*

26. Consider how Gary Gilmore, a Utah death row inmate subsequently executed, explained retribution:

Recently it has begun to make a little sense. I owe a debt, from a long time ago.

. . . It seems that I know evil more intimately than I know goodness and that's not a

to function as an autonomous person, that he was bad and not simply sick. Thus, unlike assaultive retribution, which treats the criminal as a hated person without rights, Morris' theory "captures . . . the uplifting thought that human society owes even its most inimical members respect as responsible, moral agents."²⁷

Hampton rejects both Murphy's hate-the-criminal defense of retribution and Morris' benefits-and-burdens conception.²⁸ Therefore, her goal in *Forgiveness and Mercy* — one that she concedes "is not an easy task" (p. 122) — is to develop an alternative retributive justification that is not based, even in part, on the criminal's interests, but which also does not fall back on the hatred that Stephen glorifies and Murphy qualifiedly justifies.

II. RESENTMENT, HATRED, AND FORGIVENESS

A. Murphy's Thesis

Murphy lays out his basic defense of resentment and "retributive hatred" of wrongdoers and his related objection to forgiveness in Chapter One,²⁹ then adds flesh to his arguments in Chapter Three. The essence of Murphy's claim — which I discuss in greater detail below — is that a wrongdoer³⁰ conveys an insulting message to his victim in addition to the obvious harm he causes.³¹ That message is

good thing either. I want to get even, to be made even, whole, my debts paid . . . to have no blemish, no reason to feel guilt or fear.

N. MAILER, *THE EXECUTIONER'S SONG* 305-06 (1979).

27. Deigh, *On the Right to Be Punished: Some Doubts*, 94 *ETHICS* 191, 191 (1984).

28. Hampton's critique of Morris' theory is only three pages long (pp. 114-16) and is, I think, unpersuasive. However, it is enough to say for current purposes that reasonable minds differ regarding the plausibility of his justification of punishment. Other scholars have criticized aspects of the theory on nonutilitarian grounds. *E.g.*, G. FLETCHER, *RETHINKING CRIMINAL LAW* 417-18 (1978); Deigh, *supra* note 27, at 195-201; *see also* G. SCHER, *DESERT* 74-90 (1987) (discussing various criticisms of the theory, but ultimately justifying its core features).

Persons who find Morris' thesis defensible do not need to look for a retributive alternative to Stephen's or Murphy's assaultive form of retribution. That being said, as this essay suggests, I find Hampton's justification of the retributive sentiment more compelling than Murphy's.

29. His arguments relating to mercy conceptually are separate from the rest of his claims, so I discuss them in Part III.

30. For purposes of the book and this essay, a "wrongdoer" is a person who inexcusably commits a wrongful or criminal act. Those who are properly excused for their conduct, such as those who are insane or very young, are not subject to blame or punishment. Therefore, feelings of resentment and hatred toward such persons are inappropriate, and, because they are not morally guilty, forgiveness and mercy is unnecessary. Both authors accept this conclusion, although their terminology in explaining this point differs. *See* pp. 20, 52.

Following the example of the authors, in this essay I use the terms "wrongdoer," "offender," and "criminal" interchangeably, although the latter term is admittedly too narrow in some circumstances, such as when dealing with the subject of forgiveness.

31. The authors do not define the term "victim." Only when the discussion turns to mercy is this ambiguity troubling. *See infra* note 88 and accompanying text. Ordinarily, the law considers every member of the community to be a "victim" of criminal wrongdoing. *See* J. DRESSLER, *UNDERSTANDING CRIMINAL LAW* 1 (1987). Because the authors focus on crimes against the person, such as murder and rape, the term "victim" is used in this essay, unless otherwise indicated, to describe the person immediately harmed or that person's family.

that the offender's desires matter, whereas the victim's rights and wishes do not. The criminal says, in essence, "I count, but you don't." In this manner, he "attempts (sometimes successfully) to degrade us" (p. 25).

Typically, the victim's response to the insult is to resent the wrongdoer's attitude. The rest of us resent the wrongdoer for taking unfair advantage of our own exercise of self-restraint. We express that resentment, Murphy argues, by experiencing the retributive emotions of anger toward, and even hatred of, the criminal.

These emotions are a form of psychological self-defense: we respond to the wrongdoing this way because we value ourselves, *i.e.*, we have self-respect, and the criminal's insulting message calls into question our self-worth. Resentment and hatred, therefore, are good emotions (at least in principle, if not always in practice³²) because they are evidence of something good, our self-respect. On the other hand, "a failure to resent moral injuries done to me is a failure to care about the moral value incarnate in my own person" (p. 18), which is bad.³³

Because resentment and retributive hatred are justifiable emotions, forgiveness — giving up one's hard attitudes toward the wrongdoer — is sometimes a vice. To forgive too quickly is evidence of insufficient self-respect; in such circumstances, forgiveness is "a miserable, crawling, snivelling way to go . . ."³⁴ For example, for the victim of a rape to be angry and to hate the rapist for what he has done is "natural, fitting, and proper" (p. 92); to charge the victim with the vice of failing to forgive him, or to attempt to make her feel guilty for her feelings is "indecently insensitive and presumptuous" (p. 92).

Murphy does not rule out forgiveness, but limits its legitimacy to circumstances (he suggests five possible classes of cases³⁵) in which the victim can draw a reasonable distinction between the evil act and the actor, so that it is possible to forgive the wrongdoer without condoning his insulting message.

Hampton disagrees with some, but not all, of these claims. However, her analysis of the passions of resentment, hatred, and forgiveness is more complex than Murphy's, so it is easier to evaluate her claims by dividing Murphy's thesis into its four components: (1) the insulting message; (2) the resentment that arises from the message; (3) the hatred that is an outgrowth of the resentment; and (4) the emotion

32. See *infra* note 49 and accompanying text.

33. Although not necessary to his argument, Murphy argues, reminiscent of Morris' claim, see *supra* note 22 and accompanying text, that our feelings of resentment toward the criminal demonstrate our respect for him as a responsible moral agent, *i.e.*, as one who deserves to be resented and hated rather than pitied.

34. P. 14 (quoting F. WELDON, *FEMALE FRIENDS* 54 (1974)).

35. See *infra* text accompanying note 62.

of forgiveness that can suppress retributive feelings. I turn to these elements serially.

B. *The Criminal's Insulting Message*

Murphy claims that criminals — or more accurately, intentional wrongdoers — attempt to degrade us by their conduct. Hampton largely agrees, although her observation is slightly different: wrongdoers (including negligent ones) treat victims “in a way that is objectively demeaning,” (p. 52; emphasis omitted) “that is, disrespectful of these individuals’ worth” (p. 53; emphasis omitted). Under her analysis, the insult might not be intended, although it objectively demeans us (p. 52 n.13).

It is doubtlessly true that by his conduct, the ordinary wrongdoer conveys an insulting message. Nonetheless, two (perhaps nit-picking) observations are in order. First, Murphy is right not to include the negligent wrongdoer in his “attempt-to-degrade” indictment (even assuming that the charge is otherwise valid, which I question³⁶). All of us, even those who care deeply about the rights of others, occasionally fail to act with reasonable care. At least in our current justice system, if we cause serious harm as a result of our gross negligence we are subject to blame and criminal punishment. Yet it would be false to say that our negligence inevitably shows that we intended to degrade our victim or to show disrespect. We may be as bothered by what we have done as is the victim.³⁷

Second, it is not true, as Murphy claims, that all intentional wrongdoers attempt to degrade their victims or show them disrespect.³⁸ The image of the criminal presented by Murphy, and to a lesser extent by Hampton, is of one who has a seriously flawed character: who else would communicate disrespectful messages? This representation, however, does not fit all cases of intentional wrongdoing.

Good people sometimes commit criminal acts in moments of extreme emotional desperation. Their actions are intentional, and they have the capacity and fair opportunity to conform their conduct to the law; therefore, their conduct is not excusable, regardless of their exemplary character.³⁹ But such persons do not necessarily intend to con-

36. See *infra* notes 38-42 and accompanying text.

37. This is not true in all cases of negligence: some people are habitually negligent because they are morally indifferent to other people's rights. My point is simply that people who respect others' rights at times act negligently.

38. See Morris, *Murphy on Forgiveness*, CRIM. JUST. ETHICS, Summer/Fall 1988, at 15, 16 (Murphy is wrong “in speaking of all wrongdoers as degrading or attempting to degrade us. . .”).

39. See Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 692-702 (1988). For a thoughtful argument for expanding the role of character in our blaming judgments, see Arenella, *Character, Choice and Moral Agency: The Relevance of Character to Our Moral Culpability Judgments*, 7 SOC. PHIL. & POLY., Spring 1990, at 59.

vey any message of disrespect, although the victims, at least initially, might interpret it that way.

Consider a father who takes the life of his terminally ill child, who is near death and in great pain. The law does not justify active euthanasia, and for current purposes let us agree that this judgment is correct. We can say, therefore, that he has committed an unjustified homicide. And, even if his emotional state could justify a reduction of the charges to manslaughter,⁴⁰ his actions are punishable.

Yet it is implausible to argue that the father intends by his actions to send the symbolic message to his child (or to anyone else who is "listening") that "you (my child) don't count." The real message is, "I love you (my child) deeply; I want what I believe is best for you." There may be no degrading or disrespectful implication at all in this message, but if there is one imbedded there, it is unintended.⁴¹

If I am right that wrongdoers (negligent *and* intentional) do not always attempt to send an insulting or degrading message to their victims, it is intuitively harder to accept Murphy's ultimate proposition that hatred of them is always deserved.⁴²

C. *Resentment*

Putting aside negligent wrongdoing and admittedly rare cases of "good motive" wrongdoers, Murphy is surely correct that criminals purposely send the disrespectful message that he and Hampton describe. But is he right that the victim's resentment is morally good because it demonstrates his self-respect? Hampton provides a more complicated psychological interpretation of resentment (pp. 43-60),

40. *E.g.*, MODEL PENAL CODE § 210.3(1)(b) (1962) (recognizing an affirmative defense to murder for homicides "committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse").

41. We can make the case stronger for the proposition that the father is sending a disrespectful message if we were to add the fact that his wife does not want him to take their child's life. In these circumstances, we may conclude that the husband intentionally sends his wife (and, for that matter, the rest of us) the message that her (our) wishes do not matter.

But, even here, what he is probably attempting to say is, "Your wishes matter, but I must do what I think is right, and accept the consequences of my actions, because my wishes matter, too." Notice, however, that he is *not* necessarily saying that he does not respect his wife's (or society's) opinion, only that he will not respect her (our) wishes.

42. Perhaps (despite his "attempt to degrade" language) Murphy agrees that intent is not required. He suggests at one point that forgiveness — putting aside one's hatred — may be morally permissible in circumstances in which the offender acts with good but unjustified motives. P. 26. Such persons, he says, are "misguided and morally insensitive," but do not "mean[] to convey that they hold us in contempt or think we are of less worth than they are." From this, he says (rather weakly, it seems to me) that "the case for forgiving [in such circumstances] . . . (at least the first time) strikes me as having some merit." P. 26.

My point, however, would be stronger: although the father deserves to be punished, hatred is wholly undeserved, even for a moment. Moreover, forgiveness — for example, from the man's wife if she opposed the killing of her child, *see supra* note 41 — is obligatory, not merely permissible.

one that strikes me as more accurate, but which does not substantially undermine Murphy's basic claim.

Hampton constructs a continuum. At one end are people who are "beyond resentment." They, like Jesus on the cross (pp. 58-59), have great confidence in their self-worth; they know that the wrongdoer's insulting message is wrong, and they do not worry that their real worth is jeopardized by the demeaning conduct. These people are properly indignant, and they may (and should) protest the wrongful conduct, but they are not resentful.

At the other end of the continuum (here, she and Murphy agree) are people who are unable to feel resentment because they lack self-esteem; they believe that they deserve what has happened to them. Thus, the rape victim who feels no resentment may well be a woman who has been psychologically (if not, also physically and sexually) beaten down over the years, who consequently believes that women (or, at least, she in particular) "asked for it."

In the middle, then, are the resenters: they want to and partially believe that they deserve better treatment, thus explaining their anger, but they fear that the criminal's message may be right, thus explaining their resentment. A victim's resentment, therefore, is not simply an indignant protest against a wrong; it is a sign that the criminal's actions have called into question in the victim's mind her own self-worth (pp. 54-55).

Thus absence of resentment is an ambiguous sign. One who does not resent a wrong may be a person of great personal strength⁴³ or, quite the opposite, a perpetual victim. At the same time, the fact that a person *is* resentful does not result in a moral bright line: to doubt one's self-worth is morally wrong,⁴⁴ but resentment is also a sign that the person retains some sense of self-value and wants to protect herself. In such circumstances, as Hampton says, "the attempt to repair a battered sense of self-worth . . . [is] useful and welcome" (p. 60).

Hampton, I think, is correct to see resentment as a psychological "mixed bag." The urge to get back at those who hurt us is often "based . . . upon an experience of impotence."⁴⁵ As Michael Moore has observed, "our real or perceived helplessness transforms the anger

43. Hampton believes that people can transcend resentment in specific cases, even if they lack Jesus' sense of self-worth. She provides an unsatisfying example: a mother who is lied to by her child should protest the lie — be indignant — but "we would think it strange of the mother to *resent* the lie" P. 55 (emphasis in original). However, the real reason why the mother should not resent her child's lie (as Murphy points out) is that the youth's age demonstrates that he is not a moral wrongdoer. P. 90; see *supra* note 30 and accompanying text.

44. Of course, a person can have an inflated sense of self-worth, and thus resent actions that seek to lower her self-esteem to a *proper* level (or, which seek, at least, to communicate the message that the person should not consider herself "so high and mighty"). In such circumstances, feelings of resentment are wrong because the message being sent is right.

45. M. SCHELER, *RESSENTIMENT* 46 (W. Holdheim trans. 1961).

into the brooding resentment of those who lack power.”⁴⁶

That being said, however, as a practical matter there are precious few people who can transcend resentment. As Murphy points out, “Jesus — being divine — perhaps had certain advantages that mere mortals lack” (p. 94). Once we rule out all but the few people who fall into this remarkable category, the choice is between the nonresentful perpetual victim and the “insecure” person who uses resentment in self-defense.⁴⁷ Given the choices, resentment is good; at least, it is better than the alternative.

D. *Hatred as an Element of Justified Retribution*

As the preceding discussion suggests, Murphy and Hampton agree on a great deal. They both believe that criminals send a degrading or insulting message to their victims and society. They both believe that resentment at this message is, at least, a preferable response to passive acquiescence rooted in low self-esteem. Indeed, Hampton’s real concern about resentment is that “[i]t is . . . perilously close to the beliefs that are constitutive of hatred” (p. 60). It is at the point of hatred, in other words, that Murphy and Hampton significantly part ways.

Murphy believes that hatred is an element of the retributive sentiment and, as such, is a rational and “permissible, if not mandatory, response of a victim to wrongdoing” (p. 95). In contrast, Hampton believes that retribution can be justified without connecting it to feelings of hatred; independent of this, she believes that hatred is morally wrong, except in rare circumstances (pp. 60-87). I leave the latter claim for the following section.

Murphy explains that “retributive hatred” is the emotion felt by the victim of a crime who wants the wrongdoer to be hurt, to suffer. The victim wants this because he believes that the victim’s “current level of well-being is undeserved or ill-gotten . . . and that a reduction in that well-being [through the suffering experience of punishment] will . . . represent his getting his just deserts” (p. 89).

As Murphy explains it, this hatred is often expressed by crime victims who appear at sentencing hearings wishing to influence the judge; it is these feelings that he believes it is insensitive and presumptuous to condemn.⁴⁸ As he says, “The wrongdoer gets his just deserts . . . , and the victim gets some personal satisfaction from seeing the justice done (and what is wrong with that?).”⁴⁹

46. Moore, *supra* note 3, at 192.

47. Indeed, Murphy agrees that resentment, “as both Nietzsche and Hampton suggest, [is] a sign of weakness; for if one is certain of the value of one’s self, it will not be truly threatened by attack . . . and will not stand in need of defense.” P. 93. But, he argues, no person is wholly free of doubt. Therefore, he denies that there is a “beyond resentment” category, except in theory.

48. See *supra* text following note 34.

49. P. 95. Although Murphy justifies retributive hatred in principle, he cautions against “enter[ing] at full speed the wide and wonderful world of hatred” P. 96. He warns that

Well, what *is* wrong with that? On its face, it is hard to see anything wrong with the hatred he describes — getting personal satisfaction from seeing justice done. Nonetheless, Murphy's analysis is troubling on various levels. First, there is an irony — no more than that, but nonetheless an irony — in the way he defends his thesis. He uses a (not *the*) feminist argument to support his case by asserting, for example, "that women have been taught to forgive and accept when they should have been taught to resent and resist" (p. 10). In essence, women should have enough self-respect to resent and hate those who wrong them.

This is a little like the outdated common law view of male judges that, to be a victim of rape, a woman "must follow the natural instinct of every proud female to resist, by more than mere words, the violation of her person She must make it plain that she regards such sexual acts as abhorrent and repugnant to her natural sense of pride."⁵⁰ Although there are other ways to interpret the resistance rule,⁵¹ one reading of it is that unless the woman has enough pride (self-respect) to resist her attacker, the law will not recognize any legal injury in the assailant's conduct.

But, as Susan Estrich has observed, this doctrine is an example of " 'boys' rules' applied [as if] to a boy's fight."⁵² Indeed, an alternative feminist view of the subject is that the retributive urge to get back at one's attacker is "an instance of a male and macho stereotype that is itself no virtue."⁵³ It is possible, in other words, to read Murphy's thesis as counter-feminist, an example of boys' rules winning again.

It is almost as if Murphy were heard to be asking, "Why can't women be more like men, and resent and hate rather than forgive?" In fact, however, if there is a female way of dealing with moral sentiments, perhaps women had it right in the first place: forgiveness is better than hatred.

But, as I said, this is an irony, not a reason to reject his claim. A more weighty point is that Murphy too often connects justifiable resentment to hatred, as when he says of resentment that it exists "in its

people have a tendency to magnify the harm they have experienced, to overmoralize, and thus to treat their victimization improperly as if it were part of a "cosmic drama." P. 100. Furthermore, he warns that victims should not quickly assume that they are better persons than those whom they would hate; at least, we should not assume quickly that we would have acted any differently from the object of our hatred, had we been born into the latter's environment. Pp. 100-02.

50. *State v. Rusk*, 289 Md. 230, 255, 424 A.2d 720, 733 (1981) (Cole, J., dissenting).

51. The least cynical interpretation of the rule is that resistance is an evidentiary doctrine: it proves the element of the victim's nonconsent or, at least, ensures that the perpetrator was aware of her nonconsent, so that his culpability is adequately proved. The difficulty with this reading is that courts often treated resistance as a substantive requirement: there could be no rape in the absence of resistance, even if there was independent evidence of the woman's nonconsent and the man's knowledge of it.

52. S. ESTRICH, *REAL RAPE* 60 (1987).

53. Moore, *supra* note 3, at 195.

range from righteous anger to righteous hatred . . ." (p. 16). He seems at times to be suggesting that if resentment is justifiable (which we assume it is), it inextricably follows that "righteous anger" and hatred toward the criminal also are.

However, although it is true that resentment often leads to hatred, the two are not necessarily linked because resentment is an emotion directed at an act, whereas hatred is directed at people. In other words, I resent what is done to me; I hate the person who does it to me (p. 60). Even if it is good to resent a wrongful act, therefore, it does not always follow that it is good to direct a negative emotion toward the person connected to the bad act.

For example, if someone intentionally spits in my face in order to insult me, I am justified in feeling resentment at this contemptuous act. It is also understandable if this resentment manifests itself in the form of anger. Anger, however, is an emotion that can be channeled in various directions and expressed in different ways. It does not inevitably follow that because I am justified in being "righteously angry" at the spitter, that I am also (partially or fully) justified in killing the provoker. If this were the case, the criminal law's "heat of passion" defense would be a species of justification rather than what it is, a partial excuse.⁵⁴

To the provoked killer we say, in essence, "[W]e understand (even justify) your resentment and anger, but the expression of your anger by killing the provoker is entirely unjustified."⁵⁵ It is also perfectly reasonable, therefore, to respond to Murphy in his discussion of the rape victim's hatred, by saying: "Yes, her anger and resentment is justified; and, of course, it would be 'indecently insensitive and presumptuous' to make her feel guilty for her feelings of hatred, but not because those feelings are right, but rather because they are understandable, perhaps excusable."⁵⁶ To justify hatred, therefore, Murphy must do more than simply connect it to the actor's appropriate resentment: he must show that it is independently justifiable.

What is Murphy's argument, therefore, for justifying hatred, as distinguished from resentment? As far as I can see, it consists of the claim that if it is morally permissible to hurt a wrongdoer intentionally, which is what a retributivist espouses, it is also justifiable to desire to see the wrongdoer hurt, to want to see him suffer — to experience

54. See Dressler, *Provocation: Partial Justification or Partial Excuse?*, 51 MOD. L. REV. 467 (1988); Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMIN. 421, 450-67 (1982).

55. See von Hirsch & Jareborg, *Provocation and Culpability*, in RESPONSIBILITY, *supra* note 2, at 241, 248-51.

56. Hampton answers Murphy this way: "Perhaps the only reason we are reluctant to criticize these victims for their hatred is because we believe that they are already experiencing too much pain to make it right to inflict any more." P. 120.

retributive hatred.⁵⁷

No wonder Murphy asks, "What is wrong with that?" The simplest answer is that there is nothing wrong with it, because he sanitizes the concept of hatred to the point that it has an almost alien meaning. Of course a retributivist believes that it is right to hurt a wrongdoer in the sense that he believes that it is right to punish a wrongdoer, which is a form of "pain or other consequence[] normally considered unpleasant."⁵⁸ But as we have seen, even protective retributivists want wrongdoers to be punished (thus, to feel pain, to be hurt), although their reasons are antithetical to the sentiment of hatred.⁵⁹

It simply does not follow that because a person wants an offender to suffer pain, he necessarily hates the offender. Even one who loves another person very deeply sometimes believes that the latter, *e.g.*, an alcoholic, must be forced to suffer great hardship before his life can be straightened out.

Of course, protective retributivists do not get personal pleasure from seeing the criminal suffer — it is just a necessary means to return the parties to their proper state of equilibrium. And I would not deny that most victims of serious crimes *do* want the guilty person to suffer in the assaultive, rather than protective, sense. But, although they may say (and even believe) that all they want is justice, what many victims really want is to see the criminal degraded the way they were, such as when a rape victim expresses (or silently harbors) the wish that the perpetrator be sexually assaulted, as she was. *That* is the type of hatred, couched perhaps in the attractive disguise of "just deserts" or the somewhat less glittery clothing of "retributive hatred," that gives retribution a bad name.

How can Murphy say that wanting a rapist to be raped is a morally good sentiment? It is here that Murphy's response falls especially short. He says that even when retributive hatred is justified, moral decency probably imposes constraints on the expression of that hatred, *i.e.*, cruel punishment is out of place:

[T]here is a sense in which it seems that the only punishment adequate for a torturer and mutilator is torture and mutilation One's repugnance at taking advantage of a person's utter vulnerability to treat him in ways one regards as morally indecent may thus take precedence over one's hatred of that person and one's just desire for revenge. For one may find that one accepts, on the level of personal morality, something very much like the . . . Eighth Amendment ban on "cruel and unusual punishment" or Kant's injunction [against maltreatment of criminals]. . . . Thus one's retributive hatred, . . . and . . . desire to make

57. Murphy does not justify any other form of hatred. In particular, he does not condone what Hampton calls "malicious" and "spiteful" hatred. See *infra* note 65 and accompanying text.

58. H.L.A. HART, *supra* note 17, at 4.

59. See *supra* notes 22-26 and accompanying text.

sure the perpetrator of the outrage gets his just deserts, may be doomed by one's own better nature to go forever unfulfilled . . . because one's inherent moral decency blocks the steps necessary to attain perfect retribution. [p. 107]

Ouch. The moral person who experiences retributive hatred might not want to see her mutilator mutilated (at least if her personal morality requires it). If she does not seek his mutilation, however, it is not the underlying premises of retributive hatred that save the day (or the criminal). In such cases, personal morality limits the application of retributive hatred. Under Murphy's moral structure, a victim (or society) that chooses not to limit her hatred by external moral constraints, and thus permits the mutilation, acts in full compliance with the principles of retributive hatred. That, in my book, renders "retributive hatred" a morally suspect emotion.

Nor must those who believe in retribution choose between the protective variety and Murphy's thesis. Hampton constructs a very attractive justification of retributive sentiments, which includes the desire to see the wrongdoer suffer, but which is not based on hatred, and which *intrinsically* prohibits indecent forms of punishment (pp. 124-43).

Hampton argues that the offender's insulting message — that the victim deserved to be treated as she was — is a false moral claim; moral reality, therefore, must be affirmed. Thus, the retributivist wants a wrongdoer punished, not for the sake of the criminal (distinguishing Hampton's approach from protective retribution), but in order to express society's affirmation of the victim's worth in the face of the criminal's demeaning attack. The pain and suffering experienced by the criminal is the symbol that conveys the message both of the offender's defeat and of the latter's false claim. Punishment proportional to the seriousness of the criminal's wrongdoing "symbolizes the correct relative value of wrongdoer and victim" (p. 125).

Punishment that degrades the criminal, however, is morally inappropriate to Hampton, as this would also send an incorrect message, namely that the criminal is not entitled to be valued as a person. Under Hampton's model, punishment should not imply that the victim is entitled to greater moral value than the wrongdoer, but only that she is not valued *less* (pp. 125-26). Thus, under retribution, mutilation of a mutilator (or any other form of degrading punishment) is morally impermissible — and this result is grounded securely in the theory itself, not on the basis of some nebulous external morality.

Retribution and hatred, therefore, are not necessarily linked. And if retributive hatred is not *by itself* limited to decent forms of punishment, which it is not, I fail to see why it is an independent virtue, or why we would want to justify it.⁶⁰ Ironically, the closest the book

60. Murphy says that the emotions that a crime victim directs at the wrongdoer are some-

comes to convincing me that hatred is morally justified is in Hampton's portion, but that is more easily understood by focusing on the principle of forgiveness.

E. *Forgiveness*

Christians are taught (I am told) that forgiveness of wrongdoers is a moral virtue.⁶¹ Not surprisingly, Murphy does not approve of this teaching as a commandment in all circumstances. Perhaps more surprisingly, Hampton also rejects the teaching in its absolute form, although she reaches this conclusion more grudgingly and by a different path. In their dialogue about forgiveness, Murphy walks down a mountain only to climb part of the way back up, while Hampton climbs up the same mountain only to come back down, very close to Murphy. Yet, as I will argue, it is also possible to conclude that the two are hiking on different mountains.

Murphy begins from the "blessed peak" of forgiveness and marches down. He says at the outset that forgiveness is good, but not always (p. 17). Indeed, he concludes that forgiveness is a vice when it is a sign of weakness (p. 31), as when the recipient of the offender's contemptuous message too quickly puts aside his retributive hatred.

Forgiveness ceases to be a vice, however, when it is compatible with self-respect. Here, Murphy begins to march back up the mountain. This is possible when the victim can properly separate the wrongful act from the actor (*i.e.*, distinguish the sin from the sinner), so that forgiveness is not an endorsement of the insult.

Murphy discusses five cases in which forgiveness and self-respect can co-exist (pp. 24-29). Forgiveness is not necessarily improper if the wrongdoer: (1) repents; (2) has a long history of good relations with the victim (what he calls forgiveness for "old times' sake");⁶² (3)

times therapeutic. P. 90. I agree that it is psychologically healthier in the short term for victims to externalize their emotions — to get their angry feelings out of their system — rather than to let the feelings fester. But I doubt that the expression of hatred, as distinguished from the emotion of anger (which can be directed in a variety of ways), is therapeutic, unless it is that by expressing the feeling the victim can get rid of it.

At various times Murphy describes the victim's feelings of hatred as "understandable," "natural," and "not obviously irrational." *E.g.*, p. 90. As Murphy well realizes, however, to "understand" is not to justify (or even to excuse); feelings we think of as "natural" are not necessarily morally good; and to say that an emotion is "not irrational" is only to say that there is a reason for the emotion, which hardly tells us that it is a virtue.

61. In Jewish tradition the duty to forgive is conditioned upon repentance by the wrongdoer and a request by him for forgiveness. Newman, *The Quality of Mercy: On the Duty to Forgive in the Judaic Tradition*, 15 J. RELIG. ETHICS 155, 165 (1987).

62. Murphy says very little to defend this form of forgiveness, except that "[w]hen you are repentant, I forgive you for what you *now* are. When I forgive you for old times's sake, I forgive you for what you *once were*." P. 29. Perhaps a way to explain this type of forgiveness is that, because of the prior relationship between the parties, each has earned moral credits with the other. These credits help to pay off debts when one hurts the other. The wronged party says, in essence, "You have earned my forgiveness in advance, because of all of that has occurred before.

meant well (e.g., acted wrongly, but with a good motive);⁶³ (4) has suffered enough; or (5) has undergone humiliation, even of a ritual nature (such as begging for forgiveness). In each of these circumstances, Murphy believes that a case can be made — the strength of which varies — that forgiveness and self-respect co-exist because the wrongdoer is no longer “intimately identified” (p. 24) with his prior message.

I found it hard to tell precisely how far Murphy walks back up the mountain. This much is clear: he believes that it is irrational to harbor hard feelings toward the genuinely repentant wrongdoer, who now shares with his victim an abhorrence of his prior message. In such a case, the victim ought to forgive the offender. In the other circumstances, Murphy apparently concludes that forgiveness is a morally permissible, or nonwrongful, act, but not necessarily that it is an obligatory or virtuous act.⁶⁴

Hampton's analysis of forgiveness is more complicated. She discusses in elaborate and fascinating detail three types of hatred that can block forgiveness (pp. 60-87). Briefly, Hampton distinguishes between, on the one hand, “malicious” and “spiteful” hatred — hatred that resentful people often express in order to prove themselves better (or, at least, no worse) than the object of their hatred⁶⁵ — and, on the other hand, “moral hatred.” Hampton considers malicious and spiteful hatred irrational; therefore, it is wrong to permit these forms of hatred to block forgiveness.⁶⁶ Hampton concedes, however, that moral hatred is sometimes “respectable” (p. 146).

Moral hatred is a feeling sometimes experienced by persons who are justifiably indignant about wrongful conduct. They may feel moral hatred when the wrongdoer is especially closely identified with the wrongful conduct, as when a Nazi leader commits a barbarous act. In such cases, the victim may be unable or unwilling to separate the act from the actor: not only does she justifiably seek victory against the immoral cause, but she may obtain pleasure in seeing the wrongdoer, the agent of the immorality, defeated (which, in the context of “punishment,” means that she will get personal satisfaction in seeing the

I will give you the benefit of the doubt that you remain what you once were, a decent person, and, therefore, that you did not intend your insulting conduct.”

63. See *supra* note 42.

64. P. 29. My confusion lies in the fact that Murphy says that moral humility (the realization that all of us wrong persons for whom we care deeply and want to be forgiven in such circumstances) makes it “incumbent upon each of us to cultivate the disposition to forgive” and to be “at least . . . willing[] to be open to the possibility of forgiveness . . .” P. 32.

65. A *malicious* hater feels psychologically diminished — her self-worth lowered — by the criminal's actions; her feelings of weakness cause her to resent the wrongdoer; therefore, she seeks to bring the criminal down as a means to elevate her own shaky sense of self-worth. The *spiteful* hater wants the wrongdoer punished or otherwise hurt in order to have company “at the bottom.” Pp. 60-79.

66. Murphy does not disagree with this conclusion. See *supra* note 57.

wrongdoer suffer). Hampton believes that Murphy's "retributive hatred" is actually the legitimate retributive urge (which, as she shows, does not itself require hatred) coupled with moral hatred.⁶⁷

Hampton makes a strong case against moral hatred and for forgiveness. She argues, for example, that one unfortunate effect of hatred is that it prevents the victim who experiences it from learning more about the wrongdoer as a person. Thus, hatred blinds the victim to potentially good aspects of the wrongdoer's character — evidence that he is not, in fact, without decent qualities. Hatred also blinds the victim to explanations of circumstances that could make the wrongdoer's actions appear "more pathetic than evil" and the wrongdoer as one who should be pitied rather than hated.⁶⁸ One virtue of forgiveness is that it can have the beneficial effect of "softening [the wrongdoer's] hardened heart and thus breaking his rebellion against morality" (p. 84), such as when the bishop's pardon of Jean Valjean helped him to "look upon Satan by the light of Paradise."⁶⁹

Having climbed the mountain of forgiveness this far, however, Hampton turns around and begins to descend. Although she says at one point that forgiveness involves trust that a person who is not yet morally reborn is still good enough to be seen in a more favorable moral light (p. 84), she concludes that this "generosity of judgement" is not appropriate in all cases. Murphy is right, she says, "to insist that there are occasions when it is not morally appropriate [to forgive] — in particular, when too much of the person is 'morally dead.'"⁷⁰ With some qualms, Hampton agrees that "Murphy's [five] conditions for bestowing forgiveness make sense"⁷¹

67. P. 146. Murphy believes that retributive hatred "combines elements of her categories of moral and malicious hatred" P. 89.

68. P. 150. Hampton recognizes that compassion for a wrongdoer because of the latter's pathetic life does not stand in the way of retributive-based justified punishment. P. 150. Compassion for wrongdoers is often a virtue, but it is not a proper measure of moral desert, which is based on the actor's free choice at the time of her wrongful conduct. Dressler, *supra* note 39, at 682-89; Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1360-67 (1989). This is further evidence, as Hampton points out, that one can justify retributive punishment without hating the offender.

69. V. HUGO, *LES MISERABLES* 96 (C. Wilbour trans.; Modern Library ed.). As Hugo explained, Valjean's "conscience weighed in turn these two men thus placed before it, the bishop and Jean Valjean. Anything less than the first would have failed to soften the second." *Id.*

70. P. 153. She says, however, that moral hatred "ought to be resisted as long as possible." P. 153.

71. P. 83. Hampton describes as problematic Murphy's "good motives" condition because, as she analyzes it, one who thinks that she is acting properly should be *excused* for her wrongdoing; therefore, there is nothing to forgive. Pp. 83-84 & n.33; see *supra* note 30.

However, we are not dealing here with a reasonable mistake of fact, which is an excuse, but with the decision by the wrongdoer to do what she believes is morally right, although she knows (or can be held to know) that it conflicts with society's norms. Because of such knowledge, she deserves to be punished (although, as I have argued earlier, see *supra* notes 39-42 and accompanying text, she is not intentionally sending a contemptuous message) and thus may be in "need" of forgiveness.

Hampton ultimately agrees with Murphy that forgiveness is a virtue "sometimes, but not always." This basic agreement, however, belies a difference in their approach that deserves attention, and perhaps explains why she and Murphy are marching up and down different mountains.

A reader cannot easily miss the fact that the authors write, and I assume think, about forgiveness very differently. Herbert Morris, commenting on an earlier written version of Murphy's forgiveness thesis, wrote, "I believe Murphy may have too quickly moved away from the mystery that lies at the heart of forgiveness."⁷² In response, Murphy remarked, "I . . . must admit that I embrace the generally secular world view (including a mistrust for mystery and edification) that is characteristic of [traditional values of liberalism]."⁷³ In *Forgiveness and Mercy*, Murphy makes the same point: "I know that some people value obscurity and mystery for their own sake, but I am myself inclined to resist these leaps into special realms" (p. 30). Morris' response was to suggest that "perhaps he should willingly take, if not a leap, at least a short step."⁷⁴

Murphy did not take that short step in *Forgiveness and Mercy*. He continues to believe that "we can sometimes avoid leaps into the mysterious . . . if we will simply think about the matter a bit more" (p. 30). But, even I — a person who values skepticism and shares with Murphy an "unashamed[] . . . commitment, currently unfashionable . . . , to some of the values of individualism that are a part of traditional liberalism"⁷⁵ — wish he had taken that small step that Morris beckoned to him to take.

My teenage son, when asked what it takes for him to forgive, told me, "I forgive when my heart tells me so." I appreciate that Murphy and Hampton try to go beyond that level of analysis. As scholars and philosophers, it is their professional responsibility to make the effort. Yet I am not sure that a discussion of forgiveness is complete without some recognition that there *is* something about forgiveness — and why people generally consider the sentiment virtuous — that may not be susceptible to cold, clinical analysis. Hampton, I think, appreciates this, and it shows in her more impassioned writing.

Murphy defines forgiveness simply as "forswearing resentment on moral grounds" (p. 24). For Murphy, forgiveness has two elements. First, resentment (and related emotions of anger and hatred) must be overcome. This involves a change of heart by the wronged party; unlike mercy, however, it requires no external act, although it does re-

72. Morris, *supra* note 38, at 16.

73. Murphy, *A Rejoinder to Morris*, CRIM. JUST. ETHICS, Summer/Fall 1988, at 20, 21.

74. Morris, *supra* note 38, at 19.

75. Murphy, *supra* note 73, at 21.

quire a "voluntary" emotional process.⁷⁶

That voluntary process points to the second feature of Murphy's version of forgiveness: it is not enough that resentment has ceased of its own accord, as when someone forgets the wrong that has occurred and now no longer resents the other person (pp. 22-23). Nor is it enough that a person voluntarily overcomes his resentment for "non-moral" reasons. For example, forgiveness is not involved when a wronged person puts aside his feelings of hatred for the selfish reason that the emotions are causing him to suffer sleepless nights. The "moral grounds" for forswearing resentment apparently are those five conditions that permit the victim to separate the wrongdoer's immoral act from the actor himself.⁷⁷

Murphy's cramped definition will not do. First, forgiveness should be possible even when the feelings felt by the wronged party are not those of resentment and hatred. For example, if my son seriously wrongs me I may feel deeply hurt by his actions, enough so that I no longer can trust him, but under no circumstances would I hate him. If I can overcome my hurt feelings, it would seem that I am forgiving him in a morally relevant sense.⁷⁸

Second, and more significantly, as Hampton points out (pp. 36-37, 84-86), Murphy's definition fails to capture the most important and uplifting feature of forgiveness, which is that one who forgives does so because she wants to transform the relations between her and the person who hurt her.⁷⁹ Forgiveness is not simply an internal psychological "act" of seeing the "wrongdoer in a new, more favorable light" (p. 84), although this is a part of it. It usually includes some external act — opening one's arms to the wrongdoer — that demonstrates this new inclusive attitude.

Third, there is much validity to my son's observation that he forgives people when his heart tells him to do so. The essence of his remark is that one can cease to resent another person and forgive him for no reason at all,⁸⁰ or for the "simple" reason of love. Why, one may ask Murphy, is it not virtuous to change's one heart under *these* circumstances?

Murphy's answer, of course, is that it may be a sign of weakness, namely of low self-esteem. But, as I suggested before,⁸¹ this is too much like the old-fashioned "macho" view that strength is demon-

76. Thus, one can forgive the dead, but it is not possible to show mercy to a dead person.

77. See *supra* text accompanying notes 62-63.

78. See Richards, *Forgiveness*, 99 *ETHICS* 77, 78 (1988).

79. As Morris observes, forgiveness does not so much restore a relationship as transform it. By overcoming the new obstacle (the wrongdoing) to the relationship, the forgiver "place[s] the relationship on a level not attainable without the preceding history . . ." Morris, *supra* note 38, at 18.

80. See *id.*

81. See *supra* notes 50-53 and accompanying text.

strated by being hard. The softness of forgiving (even in the absence of the moral grounds Murphy requires) in fact can be evidence of genuine strength. A person who forgives another allows herself to be vulnerable to future injuries; she takes a risk in order to improve relations.

The whole point of forgiveness, as Hampton shows, is that we grant it even before the person "deserves" it. Forgiveness is an independent virtue because we are willing to bestow it even if the wrongdoer has not reached the stage of "moral redevelopment" that makes forswearing resentment a "rational" act or one of simple justice. That is why forgiveness is an act of generosity and why it is a sign of courage, not weakness. If there is some mystery in that, so be it.

III. MERCY

The weakest part of the book is the authors' discussion of mercy. Hampton's contribution is only four pages long. She says so little on the subject that I suspect that it is there only to provide Murphy with a justification for expressing his views on the topic. His remarks are interesting (although they interest me much less than his comments on hatred and forgiveness) and important, but in view of the fact that he gets the last word on the matter (after Hampton had very few *first* words), the reader loses the benefit of the dialogue approach.

Hampton and Murphy agree that mercy is a gift that can be bestowed on a wrongdoer; it is not a right to which the offender is entitled. This conclusion is important, and logically follows from the premise that mercy is distinguishable from justice, *i.e.*, from the retributive concept of just deserts.⁸²

Under Hampton's retributive scheme, for example, punishment is intended to humble the wrongdoer in order to vindicate the victim's moral value (p. 151). The criminal's interests, therefore, are not relevant in determining what the justly deserved punishment should be (except to the extent that the punishment inflicted must not degrade the wrongdoer). In contrast, mercy "is granted out of pity and compassion for the wrongdoer" (p. 158; emphasis omitted).

Hampton recognizes that mercy conflicts with retributive justice. If x units of punishment are deserved under retributive principles (taking into consideration all applicable excusing conditions), and the judge mercifully sets punishment of the wrongdoer at " $x - 5$ " units, an

82. Murphy discusses this at some length. Pp. 169-74. As he shows, sometimes suspension or mitigation of punishment appears to be an act of mercy when in fact it is based on recognition of an excusing condition. For example, if a judge punishes a young offender less severely than an adult, this decision probably is based on the view (whether correct or not) that the youth's age renders him less deserving of punishment. Thus, the decision to be lenient is an attempt to act justly, not to act mercifully. Although desert (justice) and mercy are independent concepts, it is sometimes hard, even for persons sensitive to the difference, to determine which moral virtue is involved. See *infra* note 86.

injustice has occurred. Presumably, it is as unjust to inflict five units *too little* punishment as it is to mete out five units *too much*.⁸³

How does Hampton justify this injustice? Her answer is traditional: sometimes it is "hard-hearted" to inflict retributively justified punishment (p. 159). The punisher must be sensitive to two different moral parameters: the victim's right to have the wrongdoer punished as an expression of her moral worth as a person; and the offender's well-being. In both cases love is the paramount sentiment: in the first case, justice is an expression of love of the victim; in the second, mercy is an expression of our love of the offender (p. 161).

Hampton does not tell us how the punisher should resolve the conflict between justice and mercy. She apparently believes, however, that it is self-evident that we would consider it "unacceptably harsh," although deserved, to sentence a murderer to life imprisonment if he "has repented of his crime, suffered profound remorse, and devoted his life to helping the poor in order to atone for his deed."⁸⁴ Although she is surely right that life imprisonment for a such a murderer is harsh,⁸⁵ is it *unacceptably* harsh, in view of the fact that it is just? And, if so, "unacceptably" to whom?

The latter question highlights Murphy's concern about mercy. His attack on it is indirect. He accepts that mercy is a virtue, and one that has a proper place in interpersonal relations, as when a creditor waives a right to be repaid out of compassion for the debtor's circumstances. Instead, his argument is limited to the criminal law context, and is in the nature of a political powers (or, perhaps, Robert Borkean separation-of-powers) type of claim. Murphy claims that it is improper for a judge (or any other person involved in criminal punishment) to apply her own "sentimental" conceptions of mercy in individual cases of criminality, and thereby allow an injustice — punishment less than deserved — to occur. If the judge acts mercifully, Murphy says, she acts outside her institutional "job description," which is to uphold the rule of law, to act justly.

It should be emphasized what Murphy is *not* saying by this. First, he is not claiming that judges should not have sentencing discretion. Discretion is permissible in his scheme as long it is exercised on the basis of relevant characteristics of *desert*. Thus, a judge may properly sentence a convicted defendant to less than the maximum punishment

83. Of course, only in the second case is there excessive punishment, so a constitutional claim of cruel and unusual punishment would not lie in the first situation. Nonetheless, the injustice is of the same magnitude.

84. P. 159. As discussed *infra* at note 86, Murphy apparently thinks that a reformed criminal (I assume the person described in the text fits this category) has a right as a matter of *justice* to a reduced or suspended sentence. But, as I argue there, Hampton is right to treat this case as one that calls for mercy.

85. As Hampton recognizes, the penitent wrongdoer may wish to be punished as a means of demonstrating the wrongfulness of his prior actions. P. 133.

if the offense was less-than-ordinarily serious, or if the offender was less-than-ordinarily culpable, even though no full or partial excuse might apply in the case.⁸⁶

Second, although in a previous article⁸⁷ and in the first part of the chapter on mercy (pp. 165-77) Murphy argues that mercy has no place in the sentencing process, his conclusion in the *Forgiveness and Mercy* is more limited: the judge must never show mercy based on her own personal feelings of compassion, but only on the basis of the unanimous wishes of the victims of the crime.

Murphy credits Professor Peter Westen for this change (p. 177). Westen posited the following case in correspondence with him: a public official uses public funds, in violation of a city ordinance, to feed the homeless. As a result, the townspeople unanimously enact a new ordinance pardoning the official. Westen argued, and Murphy now agrees, that if the public has the authority to do this (which nobody suggests that it does not), then it must also have the authority to call on the governor to pardon the official; and if the people can do this, they can delegate to the governor or the judiciary "the power to exercise mercy on their behalf whenever he believes that they would, out of love or compassion, so desire . . ." (p. 178).

Murphy's new position, then, is that judges may properly exercise mercy

if (and this is a very big "if") it can be shown that such an official is acting, not merely on his own sentiments, but as a vehicle for expressing the sentiments of all those who have been victimized by the criminal and who, given those sentiments, wish to waive the right that each has that the criminal be punished. [pp. 179-80]

Why is unanimity required?⁸⁸ Why is it not satisfactory if the judge expresses the majority will? If the problem is one of acting

86. It is difficult at times to distinguish a desert-based sentencing decision from an act of mercy. Murphy argues, for example, that justice, not mercy, explains a decision to reduce the punishment of a murderer who is genuinely reformed, *i.e.*, is a "new person." He states that if such a "new person" can really exist, "then it is obviously a matter of justice that one does not punish one person for the crimes of another. Why talk of mercy here?" P. 173.

But, I think this is a facile analysis. Obviously, the phrase "new person" is metaphorical, so that the "obvious" principle of justice that he cites is not relevant, except metaphorically. Ordinarily, the question that must be answered in a retributive system is whether, at the time of the offense, the defendant had the capacity and fair opportunity to obey the law. If he did, punishment is deserved.

The defendant's subsequent change of character does not reduce the level of his deserved punishment, based as the latter is on his culpability at the time of the offense. Reduced punishment of a reformed criminal is an act of grace by the punisher, based on a compassionate concern for the suffering of this now-good person; the guilty party does not have a *right* to suspension of punishment, which would be the case if Murphy were correct in asserting that the wrongdoer's post-crime change of character is relevant to the issue of desert. That is why Hampton's reaction — that it is unacceptably harsh to ignore his change of character and not show mercy — is plausible.

87. Murphy, *Mercy and Legal Justice*, SOC. PHIL. & POLY., Autumn 1986, at 1.

88. Murphy fudges on the word "unanimous." In a footnote he says that "some kind" of unanimity is required "or at least desirable — if not actual unanimity, then perhaps projected

within a job description, society can always rewrite the employment contract to permit mercy. Indeed, as a descriptive matter, "mercy" probably is already in the job description of most judges.⁸⁹

The answer, which merits far more discussion than Murphy gives it, is that each victim of a crime has a right — one that cannot be taken from him by the majority — to see that justice is served, *i.e.*, that the wrongdoer is fully punished. Therefore, one person (perhaps a retributive hater) can stand in the way of everyone else's compassionate wish to see mercy expressed. Ironically, the case for this position strikes me as more palatable if one accepts Hampton's conception of retribution (valuing the worth of the victim) than if one adheres to Murphy's "I-have-a-right-to-hate" principle.

Murphy's argument is plausible, but how compelling is it? As a reader, I was frustrated (particularly in view of the format of the book) that Hampton, who has expertise in political philosophy,⁹⁰ did not get an opportunity to respond. It strikes me as at least plausible that people can, do, and should delegate to government officials the power to act mercifully, even at the expense of justice, at least in those cases where the majority believes that justice should be subordinated to mercy.

Indeed, I wonder whether any political system that denies the possibility of a tear in the eye of justice is worth commending to others. Consider the following hypothetical (based on a recent unreported case in Michigan): a young criminal, sentenced to long confinement, is diagnosed to be suffering from a terminal disease. He is in great pain,

hypothetical unanimity of all rational persons or at least all rational immediate victims." P. 178 n.16.

This "clarification" deserves much more attention than he gives it. What does he mean, for example, by "rational"? Surely he intends to exclude an insane person (however one would make that judgment in this context) from the "vote" on mercy, but what about the views of an eight-year-old victim of child abuse? And is a malicious or spiteful hater "irrational"?

I assume, although I wish he were more precise, that the adjective "immediate" is intended to convey the idea that with crimes against the person or a person's property the wishes of the general society (who are attenuated victims in a criminal case) need not be considered in the "mercy poll." With a crime such as treason or theft of public funds (as in the Westen hypothetical), however, everyone would be an "immediate" victim.

89. For example, currently in states with capital murder statutes, the sentencing authority, ordinarily the jury but sometimes a judge, *e.g.*, ARIZ.(REV. STAT. ANN. § 13-703 (1989)), may choose to be lenient, on the basis of evidence of any aspect of the defendant's character that the wrongdoer introduces at the hearing. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Thus, the sentencing authority may consider a defendant's signs of remorse, *State v. Arnett*, 125 Ariz. 201, 204, 608 P.2d 778, 781 (1980), or his exemplary conduct while awaiting trial in jail. *State v. Schad*, 129 Ariz. 557, 573, 633 P.2d 366, 382 (1981). Clearly, these are not desert-based characteristics: the sentencer is permitted to show mercy.

Even outside the death penalty field, the Supreme Court has observed that "it generally has been agreed that the sentencing judge's 'possession of the fullest information possible concerning the defendant's life . . . is '[h]ighly relevant — *if not essential* — [to the] selection of an appropriate sentence.'" *Lockett*, 438 U.S. at 603 (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)).

90. See *supra* note 11.

has only a few weeks to live, and wants to go to his parents' home to die. Should mercy be shown and his request granted?

Of course, we can play games with the hypothetical, as any good lawyer might. We can simply send him home under police guard to die, and thus claim that his sentence was not commuted; we simply changed the site of his incarceration. The truth of the situation, however, is that what the youth seeks is an act of mercy.

Suppose, however, that a victim of the youth's criminal conduct tells the judge or parole board that he does not want mercy shown, that he wants justice to be done. Thus, unanimity is lacking. The rest of the community (perhaps including another immediate victim) might want mercy to be shown — the public may consider the holdout victim terribly cold-hearted, a person with a heart of stone — but if Murphy is right, that cold-hearted victim retains an absolute veto.

Thus, troublingly, Murphy would permit a victim to waive his right to see the offender given his just deserts, but only "so long as his reasons for so doing are noble rather than the base" (p. 180), whereas the victim can *refuse* to waive his right to retribution for no reason at all, or if he values vengeance more than he values mercy. Under Murphy's construct, we become a society of strict, unbending justice, no matter how harsh it may be, as long as one relevant person demands it.⁹¹

I think it is safe to say that most of us do not want such a society. We want a penal system that allows for both justice and mercy. And, since we cannot fully have both, we treat justice as the primary goal, but one which we are prepared to compromise in unusual circumstances out of compassion for the person who must suffer our justice.

I am not sure whether this means that justice is not an absolute good — that, at the boundaries, it "often become[s] blurred, indeterminate, subject to judgments of prudence"⁹² — or that I (and most people) are ethically inconsistent. What I do know is that if I were a judge I would occasionally act mercifully, even without the requisite unanimity of approval and even if my act violated my job description. Perhaps some judges would refuse to act this way, even in the most compelling circumstances. If so, I might commend them for their judicial restraint, but for little else.

CONCLUSION

Forgiveness and Mercy is an immensely valuable, intellectually nourishing book by two fine scholars. They set as their goal to stimulate thought, illuminate issues, and enrich our understanding of the

91. *But see supra* note 88 (acknowledging the uncertainty in Murphy's requirement of unanimity).

92. C. FRIED, *RIGHT AND WRONG* 31 (1978).

moral significance of the emotions of resentment, hatred, forgiveness and mercy. In this, the authors succeed admirably, Murphy by raising reasonable doubts about traditional moral teachings and Hampton by quieting the doubts (at least for me).

Although Hampton quiets my doubts, one can never put the genie of doubt back in the bottle, which is probably good. We should not take our moral teachings for granted. It is better to question them, even if this sometimes means that we must give up our prior beliefs. Nonetheless, Hampton has satisfied me that our commonly held views regarding hatred, forgiveness, and (probably) mercy are correct. Indeed, her finely textured defense of forgiveness and her critique of hatred are so well-developed that she invigorates the principles she defends. Our moral teachings no longer seem as commonplace as they did before I read *Forgiveness and Mercy*.