

SOME SECOND THOUGHTS ON RETRIBUTIVISM

JEFFRIE G. MURPHY

When, in the mid-sixties, I first began working on the philosophy of punishment, two related issues tended to dominate the current discussion: (1) legal moralism and (2) explorations of the degree to which, if at all, a retributive justification of punishment could be rendered consistent with a consequentialist justification.

The legal moralism controversy had at its core the Hart-Devlin debate. Lord Patrick Devlin, in his influential Maccabean Lecture "The Enforcement of Morals", had challenged the liberal idea that, as a matter of principle, some things are simply not the legitimate business of the criminal law. In particular, Devlin challenged the famous harm principle that John Stuart Mill had introduced in his On Liberty. According to this principle, the only purpose that justifies society in coercing any one of its members is to prevent harm to others, where harm is understood as posing what Justice Holmes would later call a clear and present danger to the rights or interests of others. Coercion for a person's own good or coercion for the perceived general long range moral good of society are in most cases to be ruled out. Devlin's own view came to be called "legal moralism" because of his belief that one legitimate use of the criminal law is to enforce the moral values of the community, even if these values have little or nothing to do with the kinds of harm that Mill had in mind. (Devlin was as concerned with harm as was Mill, but the two men had very different understandings of what constitutes relevant harm.) Devlin argued that the appeal to Mill's harm principle--or indeed, to any other totally general and

abstract principle--obscures rather than clarifies the values that are at stake in criminal punishment, and he suggested that the limits on the scope of the criminal law should be thought of primarily in pragmatic terms.

In his book Law, Liberty and Morality, Herbert Hart mounted a sustained attack on almost every aspect of Devlin's account. My first publication in legal philosophy was an uncritical endorsement of Hart's critique and a muddled expansion of that critique - a publication so truly dreadful that I no longer even list it on my CV. Since I have expressed in detail my current thoughts on legal moralism elsewhere, I will address it in this essay only insofar as it has a bearing on retribution--namely, with respect to the relevance of character in criminal sentencing.

Devlin explicitly raises the issue I have elsewhere called "character retributivism in criminal sentencing" and argues that liberals such as Mill and Hart probably want to count such virtuous states of character as remorse and repentance as relevant factors in sentence reduction. And this is certainly true of such later liberal theorists as Joel Feinberg, Herbert Morris, and the late Jean Hampton, since they have all argued that the truly repentant criminal in general deserves less punishment than the unrepentant criminal--a moral claim quite different from the empirical (and possibly false) utilitarian claim that repentant criminals tend to be less dangerous (likely to cause harm) than unrepentant criminals. But, asked Devlin, if such beliefs about personal virtue and vice are legally relevant here--at this point in the criminal law--how could it be in principle wrong to make all questions of personal virtue and vice relevant to deciding what

to criminalize in the first place? So if a certain sexual practice is regarded as a moral vice and the liberal seeks to argue against criminalizing the practice on those grounds, he cannot in consistency give as his reason the general principle "issues of personal vice and virtue have no place in the criminal law"--not, at any rate, unless he wants to give up his belief that they are relevant in criminal sentencing.

Jean Hampton and Herbert Morris are two liberal theorists who embraced a version of Joel Feinberg's view that the criminal law should be grounded in what he called "grievance morality"--a morality solely concerned with protecting the rights and interests of others, rights that give rise to a legitimate grievance on the part of those who find them violated; and yet all three of these philosophers also claimed that remorseful and repentant criminals should receive less punishment than remorseless and unrepentant criminals. According to Jean Hampton, to quote just one of these philosophers, "what makes a state liberal ... is its rejection of the idea that any enforcement of moral behavior should include punishment of immoral behavior which nonetheless has no victim other than the offender himself". But if a sentencing judge, after giving the criminal a punishment properly proportional to the injury he has inflicted, adds on a little extra because of the defendant's vicious character--his smug unrepentance, say--is that not simply to punish him for an aspect of his character that has no victim? If so, is not the liberal who approves this inconsistent when he crusades against using the criminal law against victimless immorality? What does repentance have to do with grievance or rights violation?

Now there is one way in which one might attempt to make repentance relevant to grievance--at least with respect to some crimes--and thereby keep alive at least a part of the argument defended by Feinberg, Morris, and Hampton. But this way would still have to concede to Devlin the criminal law relevance of certain virtues and vices of character--embracing a view of harm closer to Devlin's than to Mill's.. I have defended such a view in other writings, and I will sketch it here. It goes like this: for at least some crimes (rape is perhaps a good example) part of the injury itself (and thus the grievance) may be a function of the symbolic message that the criminal act conveys--the message, "I matter in a way that you do not and can use you, like a mere thing or object, for my own purposes". This is a degrading and insulting message, one that the victim would surely want to reject. If the wrongdoer manifests sincere repentance, however, then the evil message is being withdrawn--the wrongdoer now standing with the victim in condemning the act--and the victim might now, for example, forgive the wrongdoer without fearing a compromise of self-respect. There are problems with this view. To the degree that it does work, however, then to that same degree will victim grievance be less as a result of repentance and thus repentance could count toward sentence reduction even in a theory of criminal punishment based entirely on grievance. In short: repentance could reduce the harm and culpability and thus the penal desert of the offender and would be relevant, on retributive grounds, to criminal sentencing.

I have argued elsewhere that, on all plausible versions of retributive desert, counting remorse and repentance is in principle a relevant factor justifying some reduction in sentence, so I will not pursue this matter any further here.

Having introduced the idea of retributive punishment in the context of the legal moralism debate, I would now like to discuss it as an issue in its own right. In particular, I am here going to sketch some of the reasons why I no longer have the unqualified enthusiasm for the theory that I once did. I hope that the reasons will reveal-- not just my own personal anxieties--but matters that really do deserve more thought from all of us.

Put in the simplest terms, a retributivist is a person who believes that the primary justification for punishing a criminal is that the criminal deserves it. The devil (or maybe the angel) is in the details, of course, and so what is really needed to defend retributivism is a persuasive answer to three questions: (1) What is desert? (2) Why is it morally important that punishment be based on desert? (3) Why should the state (which does not seek, after all, to promote all moral values) be concerned with moral desert as an aim in its system of criminal punishment? I have written on question 3 elsewhere, and so I will not discuss it here.

I have already mentioned the characterization of desert given by those writers, such as Rawls and Hart, who wanted to render retributivism compatible with consequentialism: desert is simply legal guilt. This is surely unsatisfying as a full account of retributivism, however, and hardly captures the robust view that such classic retributivists as Kant and Hegel had in mind. It is the robust versions of retributivism that will concern me in the remainder of my address-- versions that do not analyze desert merely as legal guilt and will not regard desert merely as a side constraint on a system that has, as its primary purpose, the utilitarian objective of crime

control. To use Hart's language, the robust retributivist will see desert as central in answering the question, "What is the general justifying aim of punishment?" and the retributivist answer to this question is this: to give criminal wrongdoers the punishment that they deserve.

According to the retributivist, the substantive offenses of the criminal law should be designed to prohibit acts of moral evil, and the punishments mandated by such a system should be proportional to the personal evil displayed by the criminal in what he has done and by his reasons and motives for doing it. Kant defended such a version of retributivism in terms of the classic principle of lex talionis--a principle that is often unhelpfully rendered as "an eye for an eye". What Kant actually advocated was that punishment be proportional to the moral iniquity that the crime represents, and he saw this iniquity as a function both of the injustice of the criminal's act and of what he called the "inner viciousness" (inneren Bösartigkeit) of the criminal in performing that act.

There will, of course, be very welcome crime control benefits from such a system, but those benefits are--for the true retributivist--secondary to the primary purpose of imposing on criminals the suffering that they deserve.

If so much weight is going to be placed on the concept of desert, then we need a very clear understanding of exactly what we are going to mean by desert. If desert is not simply to be understood as legal guilt, then what is it? We know that for the retributivist the desert in question must be moral desert. But what is that?

In seeking to answer this question, I was once very charmed by a version of retributivism that analyzes desert in terms of the concept of a debt owed for free riding and which has sometimes been referred to as a theory of moral balance. Instead of taking retributive justice as a foundational primitive in one's moral and legal theory, the moral balance theory seeks to derive a justification of retributive punishment from a more general moral principle--a principle of fairness. The best defense of this view is to be found in Herbert Morris's 1968 essay "Persons and Punishment". This essay, one of the classics of 20th Century jurisprudence, almost single-handedly rescued robust retributivism from obscurity and rendered it philosophically respectable again.

The essence of the moral balance version of retributivism is this: every citizen benefits from living under the rule of law--a benefit that is possible only because most citizens, most of the time, give the law their voluntary obedience. This compliance involves assuming the burden of self-restraint--refraining, simply because the law requires it, from doing things we would very much like to do or that would benefit us. The criminal, on this model, violates a basic principle of fairness by being a free-rider on this cooperative scheme since he derives the benefits without making the appropriate sacrifice. His punishment is thus a debt that he owes to those of us who have been law abiding, for without it the unfair advantage he has taken of us will be allowed to stand--a result that is clearly unfair. This is why the criminal deserves punishment. To this fairness-based theory Morris also adds the important Hegelian idea that criminals have a right to

punishment, since punishing them is a way of showing that we respect them as free and responsible beings rather than viewing them as sick and non-responsible.

As anyone familiar with my 1973 essay "Marxism and Retribution" will recall, I very early in my career expressed grave doubts about the legitimacy of applying this version of retributivism to a society of great inequality. In the essay I drew on some insights from Marx, but I could have made my main point just as well by drawing on John Rawls's idea of luck on the natural and social lottery or even on some wonderful lines from William Blake. (It will give you some idea of how old I am that I was actually required in school to memorize these and many other passages from plays and poems.) The lines are these:

Every night and every Morn
Some to Misery are Born.
Every Morn and Every Night
Some are Born to sweet delight.
Some are Born to sweet delight,
Some are Born to Endless Night.

Although I realize that this is an overly simplistic way of putting my concern, societies of radical inequality often seem to be societies in which the Sweet Delight folks are imposing punishment on the Endless Night folks and adding insult to injury by justifying this to the Endless Night folks by telling them that they owe this sacrifice to the community as a kind of

debt. Unless they pay this debt, so the story goes, they will be unfair freeriders on a mutually beneficial scheme of social cooperation, receiving all the benefits of the society in which they live without making the sacrifice of obedience to law required to make the system work. This might make a kind of sense for corporate criminals or other members of the Sweet Delight Club, but it strikes me as rather indecent to say this sort of thing to those who might understandably have a difficult time naming all the wonderful benefits that have supposedly put them in debt to the rest of us.

Even given the worries about inequality that I expressed in that 1973 essay, I for quite some time remained committed to the debt/moral balance version of retributivism at the ideal theoretical level even if not at the level of concrete application. Eventually, however, under the influence of Richard Burgh, David Dolinko, Joshua Dressler, Antony Duff, Robert Nozick, and others, I came to doubt this and certain other versions of retributivism even at the theoretical level. With respect to moral balance retributivism, I came to find problematic the idea that one could acquire such important obligations merely from the passive receipt of benefits and thus became suspicious of any debt model of crime and punishment. Also, I came to think that the theory could not provide a plausible ranking of criminal offenses on a scale of severity. Murder and rape, for example, should surely be ranked as much more serious crimes than tax evasion, but I-- like most decent, well brought up, and (let's face it) lucky people--am conscious of exercising no self-restraint in not raping or not murdering while being very conscious of great self-restraint in being honest in filing my tax returns. Others may have different priorities here, of course, but even that would illustrate the radical and unpredictable subjectivity that would be

introduced into ranking offenses if one tried to do it in terms of some notion of the burden of self-restraint. Finally, it struck me that the moral balance theory at least flirts with explaining the obvious in terms of the controversial. If someone asks me why a murderer deserves to be punished, I would be far more inclined to answer this question simply by saying with emphasis, "because he is a murderer" rather than by saying "because he is a free-rider."

So I moved away from regarding desert merely as legal guilt and moved away from regarding desert as merely owing a debt. But I still had very strong retributivist intuitions--was even prepared to defend some degree of vengeance and, in the book Forgiveness and Mercy that I joint authored with Jean Hampton, to defend an emotion that I called "retributive hatred". Gradually I began to realize that what had always really drawn me to retributivism was some version of Kant's idea of punishing, not just wrongdoing, but human evil - vile deeds performed by people of "inner viciousness". I learned that such a notion had even found its way into American homicide law where such phrases as "cruel, heinous, and depraved" and "flowing from a hardened, abandoned, and malignant heart" occurred in statutes and in sentencing guidelines. This appealed to me.

Such a strong notion of just deserts is, of course, in some ways a secular analogue to traditional notions of divine justice--the judgment that God will administer in the Last Assizes. Indeed, Michael Moore (the legal philosopher, not the maker of propaganda films) defends a robust version of retributivism very like the one that I am sketching here but claims that, if he believed in God, he would not be so concerned to organize secular systems of criminal law

around retributive values. As an atheist, however, he sees no other way to target moral desert in punishment and regards this value as too important to leave unrealized.

This analogy with divine punishment is interesting; but it should, I now believe, alert us to some dangers of thinking of secular punishment along these lines. It is not for nothing that we often find ourselves condemning people who--as we put it--"play God," and even Scripture famously teaches, "Judge not that ye be not judged".

The Living Bible, that wonderful source of unintended theological humor, once rendered--if I recall correctly--"Judge not that ye be not judged" as "Don't criticize, and then you won't be criticized". But the true point of the passage is surely not a prohibition against making any critical moral judgments at all but is rather a caution against making final judgments of deep character--of presuming to declare any fellow human being as simply vermin or disposable garbage--evil all the way down--and a legitimate object of our hatred. And why should we be reluctant to make such judgments? There are two reasons: (1) we do not know enough ("only God can read the heart" as Scripture puts it) and (2) we are not ourselves good enough to presume such a sharp us/them distinction. This, I take it, is at least part of the point of Jesus's remark, "let him who is without sin among you be the first to cast a stone at her."

Jesus's remark can, I think, be taken as potentially applicable to cases other than that of a woman caught in adultery. According to Michael Moore, however, Jesus's remark--when thus

generalized--may be an inspiring slogan but is, as he puts it, "pretty clumsy moral philosophy".

He writes as follows:

It is true that all of us are guilty of some immoralities, probably on a daily basis. Yet for most people ... the immoralities in question are things like manipulating others unfairly; not caring deeply enough about another's suffering; not being charitable for the limitations of others; convenient lies; and so forth. Few of us have raped and murdered a woman, drowned her three small children, and felt no remorse about it.

Moore's point seems to be this: in the relevant sense most of us are without sin, and so we might as well feel free to pick up some stones and cast away.

Is this an adequate answer to the concern raised by Jesus? I think not. The response is too shallow, for it fails to reflect the kind of serious introspection that the passage should provoke. The point is not to deny that many people lead lives that are legally and morally correct. The point is, rather, to force such people to face honestly the question of *why* they have lived in such a way. Is it (as they would like to think) because their inner characters manifest true integrity and are thus morally superior to those people whose behavior has been less exemplary? Or is it, at least in part, a matter of what John Rawls has called "luck on the natural and social lottery"? Perhaps, because of favored circumstances, they have never been adequately tempted, for

example. Perhaps if they imagined themselves possessed of Gyges's ring (a ring that in Plato and Herodotus makes its wearer invisible) they might--if honest with themselves--have to admit that they might use the ring, not to perform anonymous acts of charity, but to perform some acts of considerable evil--acts, if not identical to, then still comparable in evil to those for which they seek the punishment of others. "There, but for the grace of God, go I" is a thought that might well occur to them at this point.

Many persons will, of course, associate the perspective I have just been outlining with a kind of sloppy sentimentality about crime and criminals. In an attempt to lay such associations to rest, let me call your attention to passages from two writers--Immanuel Kant and Judge Richard Posner--who can hardly be regarded as bleeding heart soft on crime sentimentalists.

Those who know only Kant's rather bloodthirsty passages on retribution from his Metaphysical Elements of Justice may be surprised by this passage on blame and self-deception from his Religion Within the Limits of Reason Alone:

[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 inmost nature, they would not have practiced similar vices, had not inability, temperament, training,

and [non imputable] circumstances of time and place which serve to tempt one, 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 is, if not to be termed wickedness, at least deserves the name worthlessness, and is an element of the radical evil in human nature which constitutes the foul taint of our race.

And here is Judge Richard Posner writing in dissent in Johnson v. Phelan, a case dealing with prison conditions:

I do not myself consider [the inmates of prisons and jails] as a type of vermin, devoid of human dignity and entitled to no respect. We should have realistic conceptions [of these people] 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 distances between "us," the lawful ones, the respectable ones, and the prison and jail populations; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration. (No. 93-3753, United States Court of Appeals, Seventh Circuit, 1995 WL 621777 7th Cir. [III.]

Finally, as a further step on the road to my increasing lack of enthusiasm for robust retributivism, vengeance, and retributive hatred, I was pulled up short when, in teaching my undergraduate course in Existentialism (a recent interest of mine), I had my students reflect on Nietzsche's claim that we should mistrust any person in whom the urge to punish is strong. It seemed to me that Nietzsche had a potentially profound insight here and the insight made me uncomfortable about my own long-standing defense of a retributive theory of punishment--uncomfortable because of a fear that my defense of such a theory perhaps in part grew out of my own strong and unexamined urge to punish rather than exclusively from objective moral and intellectual considerations. If Nietzsche was in part justified in his skepticism about the conscious rationales of justice, rights, and desert that we generally give for retribution, and if he was partly correct in diagnosing the retributive urge as ressentiment (an ugly emotional brew of malice, spite, envy, and cruelty) then one will, to put it mildly, want to rethink one's own urge to punish and any theories one builds on that urge. Surely I needed at least to consider the possibility that the retributive theory had put me and many others in what Rawls called "reflective equilibrium" in part because our pretheoretical intuitions about punishment and wrongdoing were corrupt. Those who embrace, as I do, reflective equilibrium as an important test for the adequacy of a moral theory must be willing to explore the deep psychology of their pretheoretical intuitions and not simply dismiss such explorations as examples of the genetic fallacy.

I now come to the final section of this brief essay where I will address what I call "The Two Faces of Retribution". I will note one face that draws us, in its stress on moral desert, toward the recognition of human dignity and responsibility and another face that tempts us to self-deceptive cruelty. It is this second face that has given me second and even third thoughts about retributivism. And where do these second and third thoughts leave me? They leave me as what I will call a "reluctant retributivist." I still hold a variety of retributivist convictions, but I hold many of them much more cautiously than was once the case for me.

To the degree that a retributive outlook on punishment involves a respect for the dignity of human beings as free and responsible agents--even if it sometimes tempts us to overstate their degree of responsibility--then retributivism surely makes an important point and is, as Herbert Morris has persuasively argued, dramatically preferable to some alternatives--e.g., advocacy of a therapeutic state in which wrongdoing is regarded as illness and criminals are subjected to involuntary chemical and other personality destroying intrusions in order to turn them into compliant members of the social order. Some concept of desert, even if not what might be called "desert all the way down", is vital to our conception of ourselves and others as responsible beings, having the value that Kant called "dignity". This insight by itself is sufficient to keep me somewhere within the retributivist camp.

Also consider this: A retributive outlook on punishment is often identified with excessive harshness in punishment. This is a mistake, however. Such an outlook can, of course, sometimes urge us toward harsh punishments, but it can just as frequently urge us to greater concern with

the humanity of criminals and thus to greater justice, goodness, and decency in our punitive practices. For example: surely one of the most powerful ways to confront the conditions of terror, assault, and rape that are common in the pest holes of many American jails and prisons is to remind ourselves that the people in those facilities are our fellow human beings, possessed of the basic human rights that attach to such a status. As such they simply do not deserve to be treated in such inhumane ways--no matter how much criminal deterrence society gets, and perhaps subconsciously welcomes, from such abusive treatment. Many of the people in these facilities have committed crimes for which such a level of abuse is radically disproportionate--e.g., on what theory of lex talionis is it just to ignore repeated gang rapes inflicted on persons who have been convicted of drug possession, or of criminal fraud? And even in cases where we may be tempted to think that the inmate has done such malicious evil that an environment of rape is properly proportional punishment for him, the Kantian retributivist will surely be guided by Kant's own injunction that all punishments, even those directed at the worst criminals, must be kept free of any maltreatment that would degrade the humanity of the criminal or of those administering the punishment. If even the worst criminals are not human beings possessed of basic human rights, then the whole language of desert and just punishment would not even apply to them--as it does not apply to beasts. Thus, in spite of the deviation from strict proportionality, a decent society will not, according to Kant, torture the torturer or rape the rapist.

Given that I acknowledge some considerable virtues present within a retributive outlook on punishment--virtues that represent a very good face--why have I qualified my endorsement of

retributivism and called myself a "reluctant retributivist"? To answer this question, let me briefly explore the bad face of retribution.

One of Nietzsche's great insights, I think, was his realization that our abstract theorizing-- at least in moral theory-- cannot fully be divorced from its social setting and from our own personal human psychology, a psychology that may affect us in ways of which we are not fully conscious. He claimed that all philosophy should be seen as the psychological autobiography of its writer, and--following in his footsteps--Iris Murdoch said that the first question that should be asked of any philosopher is, "What is he afraid of?". C. D. Broad put a similar point in his characteristically flip way simply by observing that "we all learn our morality at our mother's knee or at some other joint". All of these statements are obviously exaggerations, but they still contain important insight.

Although, like any decent philosopher, I try to get some critical distance from all these social and psychological and autobiographical factors, I am sure that to some degree I remain a prisoner--in ways of which I am often unaware--of my own resentful and vindictive Irish nature, some tendencies toward self-righteousness, a certain rigidity of character, and my lifelong back and forth struggle between the gospel of love stressed in my Christian upbringing and my not-always-loving personality. At the very least, these factors surely influence the framework I choose for discussion--the questions that I decide to ask first. At most and at worst, these factors may have inclined me to favor philosophical accounts for less than fully honorable reasons-- reasons that may reveal that my enthusiasm for settling scores and restoring balance through

retributive justice may in part have been extensions of what Nietzsche called "a soul that squints"--the soul of a shopkeeper or an accountant. If I had been a kinder person, a less angry person, a person of more generous spirit and greatness of soul, would robust retributivism have charmed me to the degree that it at one time did? I suspect not.

Let me emphasize, by the way, that this observation about my character is not a narcissistic confession of some unique and perhaps even perversely heroic depravity on my part. I do not think that I am at all unique in the way in which some of my principled intellectual views may at least to some degree be an extension of less than admirable aspects of character. If what is now usually called virtue ethics teaches us to worry about such matters, then I think that virtue ethics teaches a good lesson and should be welcomed by those of us who might have mistakenly thought that their Kantianism could proceed without such introspective reflection.

Let me take the slippery slope of retributive thinking as an example to illustrate the concerns that I have expressed above. The transition from "because your act and your mental state at the time of your act were blameworthy, you deserve punishment" to "you have a vicious character" to "you have a hardened, abandoned, and malignant heart" to "you are evil and rotten to the core" to "you are scum" to "you deserve whatever cruel indignity I choose to inflict on you" is, of course, not a logical transition. Not a single step logically follows from its predecessor. I fear, however, that the transition is psychologically a rather common and in some ways compelling one; one that ultimately may tempt us to endorse cruelty and inhumanity. I fear that I have myself sometimes succumbed to this temptation while talking the grand abstract

language of just deserts, and I know that others have--and always will--succumb to this temptation as well. As recent reports of torture and humiliation of prisoners--both by "our side" and by "their side"--have reminded us, there are enormous subterranean reservoirs of terrifying cruelty within the human personality just waiting to be tapped. An overly confident retributive outlook on crime and punishment--particularly one that would presume to target deep character--has great potential to tap those resources, and this is why my commitment to a retributive theory of punishment has now become reluctant and cautious.

Judgments about deep character and responsibility for that character go far beyond the mere attribution of intention and other mens rea mental states. My worries about such judgments are to some degree applicable at all points in the criminal justice system, but they are most obviously applicable at the time of sentencing--most dramatically in capital sentencing. And it is these judgments--judgments about what Kant called "inner viciousness"--that will, I fear, both exceed our epistemic capacities and risk engaging the cruelty latent in all of us.

Symmetrical obstacles will also be present, of course, if we seek to reward good character--e.g., by imposing less punishment on a criminal whom we believe manifests the character virtue of deep and sincere repentance. This problem is obviously logically similar to the problem about punishing inner viciousness, but I tend to find it less practically worrisome because it will have no tendency to engage our capacities for cruelty. I tend to worry more about engaging these capacities than I do about engaging our capacities for trust, generosity, and kindness--in part, I suppose, because I think that there is already too much of the former in the

world and precious little of the latter, Excessive generosity can be dangerous, of course, if it leads us to free dangerous people to prey again upon the public. But we can surely accomplish the legitimate goal of just crime control with concepts of blameworthiness and desert that do not, as do ultimate negative judgments of deep character, invite hatred and the denial of the human dignity and worth of even the worst among us.

I realize that closing with expressions of uncertainty and unease is something of a philosophical disappointment. However, such lack of total clarity and comfortable confidence may be a moral and political good. To the degree that we are nervous and unsure of exactly what we are doing when we punish our fellow human beings, then I am inclined to think that to that same degree we will, at the very least, be less cruel.

I know, of course, that there are dangerous, even monstrous, people in the world-- both within and outside our national borders--and that they do not become less dangerous or monstrous simply because they are often our creatures--to some degree products of how we have treated or ignored them--ignored them because, as Simone Weil noted, the poor and other outsiders are invisible to most of us unless seen, as they rarely are, with the eye of love. Because of this and our at least partial responsibility for it, we should, of course, seek to correct when we can the conditions that breed such dangerous people, In the meantime, however, we must for the survival of our communities find ways to contain the threats posed by these people; and sometimes criminal punishment even very severe criminal punishment--will emerge as the method of choice. But even when it comes to that, I think that it is probably wise not to be too

charmed by such retributive slogans as "giving them what they deserve" and not to be too enthusiastic in the belief that one is on a righteous retributive crusade. Better, I think, that Nietzsche be given the last word here: "He who fights with monsters should look to it that he himself does not become a monster."

(This essay has been published in *Retributivism—Essays on Theory and Policy*, edited by Mark D. White, Oxford: Oxford University Press, 2011.)

Jeffrie G. Murphy is Regents' Professor of Law, Philosophy, and Religious Studies at Arizona State University. He is the author of books and articles on punishment, forgiveness, mercy and the moral emotions. His most recent book is Getting Even--Forgiveness and its Limits (Oxford University Press, 2003).