

From the USA

CHRISTIANITY AND CRIMINAL PUNISHMENT

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Introduction

What difference might one's religious beliefs make to one's views on criminal punishment? Since I am only an amateur in the study of both religion and theology, I am not the ideal person to seek an answer to this question. However, I am going to have a stab at it anyway.

There are, of course, many different religions and thus many different religious perspectives on punishment; and limitations of both space and my own knowledge make it impossible for me to pursue more than one of them here. I will, therefore, generally limit myself to certain aspects of the religion with which I am most familiar: Christianity. Not only is this my own religious tradition but it is also the religion that looms large in the background of the only philosopher of punishment to whom I have devoted serious scholarly attention: Immanuel Kant (Murphy, 1987). Thus my perspective will be somewhat personal but not, I hope, wildly idiosyncratic. This perspective will certainly not provide the last word on the topic, but I hope that it will at least be a useful first word and form a basis for productive discussion.

I suppose that some of my readers may already be wondering why they should even care about this issue. Why is it important to try to understand Christianity and punishment?

The answer to this question is, I assume, obvious to those who are Christians, since Christians are surely committed to viewing all important issues in terms of the best interpretations of their faith; and many of them will also seek to have some of their views enacted as a matter of public policy — unless, of course, they have been argued (wrongly, in my view) into submission by their readings of such philosophers as John Rawls and Robert Audi (Murphy, 2001).

There are at least three reasons why even non-Christians should find the issue of interest, however.

First, the Christian tradition — along with certain other religious traditions — is one of great spiritual, moral and intellectual power. As such it surely contains wisdom that can be appreciated by those of other faiths and even by those who are agnostic or atheist. As I have argued in my own writings on forgiveness, for example, the parables of Jesus contain many insightful nuggets that can be mined for secular purposes (Murphy, 1988, 2000).

Second, some of the greatest philosophical minds that have addressed the topic of punishment were deeply influenced by Christianity. One thinks of such obvious examples as Augustine, Aquinas and Kant. It is common among secular commentators, of course, to argue that Kant's expressions of allegiance to Christianity are insincere ways to keep the censor off his back and to avoid offending his faithful manservant. This, however, is secular hope. It is not historical fact. Some of Kant's interpretations of Christianity are highly nonstandard, of course, but there is no reason at all to think that they are insincere.

Third, the Christian tradition — for better or for worse — has been and remains (at least in rhetoric) highly influential in the moral outlooks of a great many people in a variety of countries — an influence that surely affects the politics of such issues as capital punishment. This is certainly true in the United States, for example, where people on both sides of the capital punishment debate often use biblical references in order to claim the moral high ground. Such references sometimes even appear in remarks of lawyers and judges in actual criminal cases. Whatever one may think of the ultimate legitimacy of such references, it is surely worth attempting to understand a tradition that has such great influence.

Love and Punishment

In seeking to develop a Christian framework for the understanding of criminal punishment — or indeed for any other evaluative issue — a controlling value will surely be that of *love*. The coming of Christ is explained in scripture as a result of God's love of the world, and the imitation of Christ tradition has made love central. Paul famously identified love as the greatest of the Christian virtues (1 Corinthians 13). Writing centuries later on capital punishment, theologian Bernard Haring puts it this way: 'It would not be in harmony with the unique fullness of salvation and its loving kindness to apply drastic [Old Testament] directives without any qualification as obligatory in the present order of salvation and grace' (Haring, 1966).

Not all Christians, of course, would find Haring's claim worthy of full endorsement. It is interesting to note in this regard that some of the most prominent contemporary Christian defences of capital punishment tend to come from the fundamentalist religious right and that they draw heavily and mainly on the very Old Testament teachings that Haring wishes to blunt and qualify. These fundamentalists presumably do not reject the centrality of a gospel of love but rather see no inconsistency between that gospel and the harsh Old Testament teachings.

I shall here thus simply assume that the centrality of love in the Christian perspective can be granted. The difficulty, of course, is in developing the proper interpretation of that value and how it is properly to be applied in the domain of punishment. For example: Does love of neighbour have an important emotional component or is Kant correct that it is simply a matter of doing one's moral duty to others — what Kant calls 'practical' rather than 'pathological' love?

The value of love may initially seem not only different from but at odds with the value of justice that is normally thought to control legitimate thinking about the law and particularly at odds with the harsh treatment that is often demanded under the heading of just punishment. This is not, however, a conclusion to which one should jump in haste. Indeed Archbishop of Canterbury William Temple argued that justice, properly understood, is a part of love, properly understood. He wrote: 'It is axiomatic that love should be the predominant Christian impulse and that the primary form of love in social organisation is justice' (quoted in Denning, 1997).

In trying to think coherently about the relation between Christian love, justice and law, we should try to resist a hasty tendency among some secular liberals to embrace a liberal and sentimental vision of Christianity and then to chide actual Christians for their hypocrisy in not living up to that vision. This tendency is revealed on the topic of punishment — particularly capital punishment — when Christians who support the death penalty may be condemned, without even hearing their reasons, as not really Christian at all. 'How can you claim that love of neighbour is the primary value', it may be asked, 'and then support the death penalty — the most unloving response to another human being that can be imagined?' Even some Christians argue in this way, of course — for example, in a recent essay on capital punishment (*New Kirk Review*, 21 June 2001), Garry Wills suggests that if President Bush would read his 'favourite philosopher' (Jesus) more carefully he would not support the death penalty.

This way of attempting to put Christians on the defensive may involve a variety of mistakes and confusions. First, it is important to note that the initial and primary part of the love commandment is that Christians are to love God. Jesus — reinforcing the Jewish law as taught in Deuteronomy (6:5) and Leviticus (19:18) — endorses this formulation of the command: ‘You shall love the Lord your God with all your heart, and with all your soul, and with all your strength, and with all your mind; and your neighbour as yourself.’ (Luke 10:25). Seen in this context, love of one’s neighbour must surely be constrained by — and in part explained by — the love of God. Thus if there is reason to think that God would command or find permissible the punishment of wrongdoers even with death, then such punishment cannot so easily be dismissed as unloving in the most relevant sense.

Christian love, in other words, is not simply a matter of being nice and cuddly — of giving everyone a warm hug, saying ‘Have a nice day’ and then sending them on their way. In spite of what the secular mind and even some Christians might wish, the full doctrine of Christian love is to be found, not simply in the films of Frank Capra, but also in the grim stories of Flannery O’Connor and in the hard and demanding theologies of Augustine and Kierkegaard. ‘God loves you — whether you like it or not’ as the bumper sticker says.

A second point worth noting is that, for the Christian, what happens to the human soul — in this life and the next — is of primary concern. (Note that the love commandment is endorsed by Jesus as the correct answer to the question ‘What must I do to inherit eternal life?’) ‘Thus a central concern for the Christian with respect to punishment must be, not simply what will happen to the body in this life, but what will happen to the soul eternally; and those who are impatient with such a worry must of necessity be impatient with Christianity at its core and thus with much of what Christianity will have to say about punishment. Physical death, in the Christian view, is not the end of the person and is not the gravest of evils we can imagine or inflict. Physical death is the beginning of a process that can end either in what is the gravest of evils — eternal estrangement from God — or the greatest of goods — eternal communion with God. Jesus puts it this way: ‘Fear not them which kill the body, but are not able to kill the soul: but rather fear him which is able to destroy both soul and body ...’ (Matthew 10:28).

The Christian punishment debate thus cannot ignore, and must indeed emphasise, this question: What effect will punishments of a certain sort have on the soul of the person being punished and on the souls of other members of the community? (If you are more comfortable with secular language that is less metaphysically controversial, you may for the present substitute the word ‘character’ for the word ‘soul’.) If the penalty of death, for example, harms the soul of the person being punished and corrupts the souls of the law abiding, this will be a powerful Christian argument against it. If, on the other hand, the penalty of death does not have these effects — and perhaps even can plausibly be argued to benefit the soul — then something important is being said in favour of the punishment. Indeed even love, on a certain understanding, could provide a justification for it.

There will be those, of course, who will argue that harsh punishment of a person — and particularly execution — cannot possibly be of benefit to the soul or character of that person. Hurting people has the tendency to harden rather than soften their hearts, and execution faces some special problems in the realm of character reformation. In the film *My little chickadee*, Cuthbert J. Twillie (played by W.C. Fields) is about to be hanged and is asked if he has anything to say about his execution. He replies: ‘It’s going to be a great lesson to me.’ We laugh because we sense some absurdity in the idea that a person can be taught something and thus improved by his very extinction.

But our laughter — if uncritical — may be a bit hasty here; for we also tend to laugh at Dr Johnson’s observation ‘Depend upon it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully.’ Here we laugh, not at absurdity, but at the surprising realisation that he might be on to something important. The prospect of death can, after all, provoke soul searching, repentance and open the door to salvation — an intentional theme of Tolstoy’s *Death of Ivan Ilych* and a perhaps unintentional theme of the Tim Robbins film *Dead man walking*, a theme that to some degree undercuts the film’s attempt to be a sermon against the death penalty. The repentance and spiritual rebirth of the Sean Penn character is the single most impressive thing in the film, and one wonders if this would ever have happened had he not been facing execution. My point so far has simply been to plant in your minds the idea that the relationship between Christianity and criminal punishment — even the death penalty — may be much more complex than it initially appears to some. It is not to be understood in terms of a few simple clichés about love, mercy and forgiveness and may indeed emerge as an issue on which Christians may find themselves in great tension.

This tension is dramatically revealed in Kant's writings on punishment. Kant is famous for his defence of retributive punishment and sometimes defends punishment, particularly capital punishment, with an enthusiasm that many regard as unseemly. At other times, however — particularly when he is explicitly writing as a Christian — he provides arguments that raise doubts about such punishment. He thus reveals the kind of instructive ambivalence on the issue that is also found in such other important Christian thinkers as Augustine.

Both Augustine and Kant regard our actual world as fallen and sinful — a world in which even those seeking to promote justice and order and even love will risk having their efforts corrupted by the evil and depravity latent in their own natures. Absent the belief in ultimate grace and salvation, this world view may properly be called tragic; for it condemns even the best of human efforts, such as the rule of law, to the very corruptions those efforts seek to oppose. We always risk doing evil even when we use punishment to restrain evil. As Nietzsche put it, there is always a danger that in doing battle with monsters we become monsters. The Earthly City can never, through human effort alone, become the City of God.

Punishment, Love and Forgiveness

If Christian love is not simply being nice — even very, very nice — then what is it? In a recent essay, Thomas Shaffer suggests that such love, at least in the social and political sphere, is to be analysed in terms of forgiveness (Shaffer, 2001). He speaks of 'the politics of forgiveness' and 'a community constituted by forgiveness' and seeks to develop what he calls a 'jurisprudence of forgiveness'. Influenced mainly by the writings of the late theologian John Howard Yoder, Shaffer sees most current law as unnecessarily coercive and even violent — claiming that 'the Christian religion is fundamentally at odds with the law on the matter of forgiveness'. He makes his point most dramatically in the following passage concerning those securely imprisoned on death row:

There is no rational argument any longer to kill them — much less the common good argument Caiaphas had for killing Jesus. Legal power, it seems, has to kill them anyway, if only because it would not be legal power if it didn't. Law here cannot take the risk of forgiveness. Forgiveness would remove the fear, the accountability, and the responsibility that law provides — and thus, as law sees it, would invite chaos ... [Forgiveness disrupts legal order. (2001: 325, 326)].

I learned a great deal from Shaffer's essay and found particularly insightful much of his interpretation of the parable of the prodigal son. I also share his view that one important way in which Christian love would have to address the issue of crime and punishment is through concern for the poor and the otherwise disadvantaged and the willingness to make significant sacrifices to alleviate their sufferings. ('As ye have done it unto one of the least of these my brethren ye have done it unto me', Matthew 25:40). However, Shaffer's tendency to see law — and particularly legal punishment — as necessarily at odds with forgiveness strikes me as confused and thus quite mistaken. There is no doubt that some of our present penal practices are at odds not only with Christian forgiveness but with any civilised notions of moral decency, but this fact is insufficient, in my view, to support a wholesale indictment of law and punishment.

I would not, of course, wish to deny the centrality of forgiveness in Christian ethics and its role in understanding love of neighbour. There are at least four ways in which Christian commitments should make one more open to forgiveness than those without such commitments:

(1) We are commanded by God to forgive our enemies and those who wrong us.

When at Matthew 18:22 Jesus is asked how many times we should forgive, he answers 'seventy times seven' — which is, I assume, a way of saying 'without end'. One surely cannot be a sincere Christian and not respond 'with fear and trembling' to the duties that flow from divine commands. This response is fear based but it is not to be understood as fear of an unvirtuously slavish nature. As Peter Geach has argued, a fear of the Being who is the very ground of my own being — the one who creates and sustains me — is not like fearing Hitler or some other thug and can, indeed, be a part of love and respect (Geach, 1969).

(2) Christianity introduces a humbling perspective on one's self and one's personal concerns — attempting to counter our natural tendencies of pride and narcissistic self-importance.

According to this perspective, we are all fallible and flawed and all stand in deep need of forgiveness. This perspective does not seek to trivialise the wrongs that we suffer, but it does seek to blunt our very human tendency to magnify those wrongs out of all reasonable proportion — the tendency to see ourselves as morally pure while seeing those who wrong us as evil

incarnate. By breaking down a sharp us-them dichotomy, such a view should make it easier to follow Auden's counsel to 'love your crooked neighbour with your crooked heart'. We should be disposed to forgive because we all need forgiveness — the main point, I take it, of the parable of the unforgiving servant at Matthew 18:21-35.

(3) All human beings — even those guilty of terrible wrongs — are to be seen as children of God, created in His image, and thus as precious.

This vision is beautifully expressed by the writer William Trevor in his novel *Felicia's Journey*. He speaks with compassion and forgiveness even of the serial killer who is the central character of that novel and writes of him: 'Lost within a man who murdered, there was a soul like any other soul, purity itself it surely once had been.' Viewing the wrongdoer in this way — as the child he once was — should make it difficult to hate him with the kind of abandon that would make forgiveness of him utterly impossible. It has been said that God loves even Satan because he loves all that he has created.

(4) Finally, Christianity teaches that the universe — for all its evil and hardship — is ultimately benign, created and sustained by a loving God and to be met with hope and trust rather than despair.

On this view, the world may be falling, but — as Rilke wrote — 'there is One who holds this falling with infinite softness in his hands'.

I find it very difficult, at least on most days of the week, to embrace such a view of the universe and our place in it. (But of course, if you believe Kierkegaard, Christian belief is supposed to be difficult.) To the degree than I can embrace this view, however, then I will not so easily think that the struggle against evil — even evil done to me — is my task alone, all up to me. If I think that I alone can and must make things right, then I risk taking on a kind of self-importance that makes forgiveness of others difficult if not impossible. Given a certain kind of faith, however, I could perhaps relax a bit the clenched anger and resentment with which I try to sustain my self-respect and hold my world together all alone.

Such then are the virtues of forgiveness within a context of Christian love. Why then — given that I recognise and even celebrate these virtues — do I want to reject Shaffer's 'jurisprudence of forgiveness'? It is because I think that his own analysis of forgiveness is fundamentally mistaken.

Forgiveness, as I understand it, is essentially an internal matter of the heart — a change in how one comes to feel about the person by whom one has been wronged. As such, forgiveness can only be bestowed by the victim of wrongdoing and not by the legal mechanisms of the state. (To think otherwise is probably to confuse forgiveness with mercy or pardon.) Forgiveness is a transformation that takes place primarily in the realm of emotion, not of action; and, although the emotional changes involved may certainly have public behavioural consequences, this is not necessarily so. (In my view ‘I forgive you’ is not unlike ‘I apologise’: a performative.) Forgiveness is not a positive emotion — indeed, it is not an emotion at all — but is rather the transcending of certain powerful negative emotions: the vindictive passions of anger, resentment and even hatred that one naturally feels toward someone by whom one has been deeply wronged.

Can forgiveness of a person, so understood, then be compatible with the continued demand that the person be punished — perhaps even executed? In my view the answer to this question is yes. It all depends on the motive or reason for the demand. If the motive or reason is to express hatred, then — of course — there is immediate inconsistency; for, if one still hates, then one has not forgiven. Thus an appeal to Christian forgiveness does constitute a powerful attack on legal punishment to the degree that such punishment is driven by hatred. Of course, if one is doing something truly horrendous to another human being, the chance that hatred and cruelty are behind it should not be too quickly dismissed; and many present penal practices in the USA are, alas, hard to understand on any other terms. Perhaps callous indifference also deserves a place next to hatred as something Christians should guard against in the realm of punishment. Recall again the parable of the unforgiving servant. The sin of the servant in inflicting harsh treatment upon his own servant was not, presumably, based on any hatred he had for the servant. It was rather a total indifference to the adverse life circumstances that caused the servant to become indebted and to fear harsh punishment for failing to pay the debt — the very kind of life circumstances that the master had taken account of when he showed mercy to the unforgiving servant for the non-payment of his own debt.

Suppose, however, that the motive or reason for punishment is not grounded in hatred or some other evil passion. Suppose rather that it is grounded in the sincere belief that punishment of this nature is necessary to control crime and thereby promote the common good or that it is required

by justice. Then there is no inconsistency. Thus these two passages from Kant, which on the surface may strike many people as inconsistent, seem to me not inconsistent at all.

From *Rechtslehre* (The doctrine of right):

Even if a civil society were to dissolve itself by common agreement of all its members ..., the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth [in proportion to their inner viciousness] and so that the bloodguilt thereof will not be fixed on the people ... as accomplices in a public violation of legal justice.

From *Tugendlehre* (The doctrine of virtue):

It is ... a duty of virtue not only to refrain from repaying another's enmity with hatred out of mere revenge but also never even to call upon the world-judge for vengeance — partly because a man has enough guilt of his own to be greatly in need of forgiveness and partly, indeed especially, because no punishment, no matter from whom it comes, may be inflicted out of hatred. Hence men have a duty to cultivate a *conciliatory spirit* (*placabilis*). But this must not be confused with *placid toleration* of injuries (*mitis iniuriarum patientia*), renunciation of the rigorous means (*rigorosa*) for preventing the recurrence of injuries by other men.

Kant's point — a point that would, I think, be embraced as quite orthodox by most Christians — is that love does not forbid punishment. What it forbids is punishment out of hatred. What Jesus and Paul counselled (Matthew 25:42-6; Hebrews 13:3), you will recall, is that we visit and comfort those in jail; they did not counsel the abolition of jails. To visit and comfort those in jail or prison — even those justly there — is a way of saying that they are still loved and not hated that their essential humanity is still being acknowledged. Such love is quite consistent, however, with thinking that they deserve to be there and that society benefits from their being there.

Of course, the possibilities of self-deception here are enormous — particularly the possibility that, as Nietzsche warned, we use the rhetoric of justice and the common good in order to hide from ourselves the fact that our actual motives are spite, malice, envy and cruelty — what Nietzsche called *ressentiment*. Thus emphasising forgiveness may be an important corrective to what we are actually doing in contrast to what we say and even consciously think we are doing (Murphy, 1999).

It is also important to remember, however, that self-deception also poses dangers in the realm of leniency — that the self-satisfactions of being kind and showing mercy to the criminal before us may blind us to the fact that such kindness may be very unkind to others to whom this criminal poses a danger and thus may not be, all things considered, a genuine act of Christian love after all. Kant makes this point when, in *Rechtslehre*, he expresses scepticism about pardons — a scepticism that former President Clinton has, alas, given us all reason to share. The point is also well expressed by Angelo in Shakespeare's *Measure For Measure* when, illustrating that even deeply flawed people can sometimes have great insight, he says:

I show [pity] most of all when I show justice,
For then I pity those I do not know,
Which a dismissed offence would after gall;
And do him right that, answering one fold wrong,
Lives not to act another.

The issue of self-deception in our understanding of punishment is very important, and I will return to it later.

If the argument that I have sketched above is correct, then it is correct to say that Christian love and Christian forgiveness are both quite compatible with the advocacy and infliction of punishment. 'This does not entail, however, that these Christian virtues are compatible with punishment *whatever the purpose of the punishment or whatever the nature of the punishment*.

What should the Christian say about the purposes of punishment and about the range of permissible punishments? I have already noted that punishment based in hatred — punishment the purpose of which is merely to satisfy the hatred felt by victims and the law abiding may be ruled out. Thus, if all the currently trendy psychobabble about punishment as giving victims something called 'closure' means satisfying victim hatred, then Christians may on religious grounds be opposed to such victim satisfaction.

I say 'may' instead of 'must' here, however, since I think that the issue of victim satisfaction is very complex. The great 18th-century moral philosopher Joseph Butler, while preaching at Rolls Chapel in London before he became a Bishop, delivered a powerful sermon — 'Upon Resentment' — in which he noted both the universality and the legitimacy (within limits) of resentment toward wrongdoers. Surely, Butler reasoned, a loving God would not have implanted such a passion in his creatures if it did not have

some useful purpose; and he argued that the useful purpose is defence — defence of the moral and legal order. True allegiance to morality and law is not merely intellectual but also must be revealed in passionate commitment; and indication and resentment (a kind of self-referential indignation) represent such commitment. So, if resentment can be distinguished from hatred (and again the temptations of self-deception here are enormous), then satisfying victim resentment might consistently be a part of a Christian account of punishment. Unlike hatred, resentment may evince a legitimate concern with the validation of the victim's social worth.

On the issue of the nature of punishment, I think that it is reasonably safe to say that contemporary Christians (along with all other decent people) would want to rule out punishments administered in an arbitrary and capricious (e.g. racist) way and, of course, rule out brutally inhumane punishments and brutally inhumane treatment of criminals. All this is surely inconsistent with Christian love as currently understood. Thus such punishments as torture and mutilation and putting prisoners at grave risk of rape should presumably be opposed by contemporary Christians. I stress the word 'contemporary' since some earlier Christians — some medieval Christians, for example — given their views about human psychology and the role of tormenting the body as a therapy for salvation of the soul, could consistently allow some of these penal practices under certain circumstances.

Suppose we now have at least a rough idea of what is ruled out. What is left in? Is *retribution*, for example, a legitimate purpose of punishment? Is *capital punishment* legitimate? These are the issues to which I shall now turn.

Christianity and Retribution

Augustine and Aquinas regarded promotion of the common good to be the primary value that gives secular punishment its legitimacy. The value of living lives that are happy and meaningful in purely human terms has never been denied by any except the most puritanical of Christians, and social order is clearly required for such happiness. Also, such religious values as salvation may be made harder to make the focus of one's attention when one is constantly being tormented by assorted outlaws and thugs — those whom it is the business of the criminal law and its mechanism of punishment to restrain. Even Kant, most famous for the retributive elements in his theory, recognised the importance of such teleological considerations in his account

of punishment. Recall in the passage quoted above from the *Tugendlehre* Kant warns against letting a charitable disposition encourage a laxity in law enforcement that will constitute ‘renunciation of the rigorous means ... for preventing recurrence of injuries by other men’.

In addition to the promotion of the common good, Christians will also presumably unite around any punishments that work meaningfully toward the spiritual transformation of the criminal. The barbarism that is all too common in the pest holes of many American jails and prisons can hardly be imagined to have such an effect, but we can envision changes in the system — changes of a kind that have been richly discussed by Anthony Duff, for example — that might have this effect (Duff, 2001). Faith-based prison programs — though constitutionally problematic in the United States — also seem to have some success in this regard, although much of the evidence for this success remains anecdotal.

On both of these issues — promotion of the common good and character reformation — a Christian evaluation will, like all teleological evaluations, be highly dependent on reliable empirical evidence with respect to the actual consequences of our punitive practices.

But what about retribution? Is it a legitimate objective of a Christian view of punishment? In a recent essay, Avery Cardinal Dulles — stating the orthodox Catholic position originally articulated by Augustine and Aquinas — lists retribution as one of the legitimate common good objectives of criminal punishment (Dulles, 2001).

Is he right about this? This depends, I think, on just what one means by ‘retribution’. In the philosophical literature on punishment, retributive punishment is usually understood as giving the criminal what he, in justice, *deserves*. There are, however, at least six different accounts of what might be meant by ‘desert’ and thus at least six different versions of retributivism: desert as legal guilt; desert as involving *mens rea* (e.g. intention, knowledge); desert as involving responsibility (capacity to conform one’s conduct to the rules); desert as a debt owed to annul wrongful gains from unfair free riding (Morris, 1968); desert as what the wrongdoer owes to vindicate the social worth of the victim (Hampton, 1992); and, finally, desert as involving ultimate character — evil or wickedness in some deep sense (what Kant calls ‘inner viciousness’) — a view that I find present in Michael Moore’s ‘The moral worth of retribution’ (Moore, 1987). (Section 2266 of the most

recent edition of the *Catechism of the Catholic Church* claims that ‘redressing the disorder introduced by the offence’ is the ‘primary aim’ of punishment. This seems to incorporate elements of the views found in Morris and Hampton and is probably what Cardinal Dulles means by ‘retribution’.)

It seems to me that there is no inconsistency between the essentials of Christianity and the first five forms of retributivism. With respect to the sixth, however — what I will call ‘deep character retributivism’ — there does seem to me an inconsistency. Thus this strikes me as a form of retributivism that Christians should oppose (and I doubt that Cardinal Dulles would disagree). Relevant here are the insights contained in the scriptural passages ‘Vengeance is mine, saith the Lord’ (Romans 12:19), ‘Let him who is without sin among you cast the first stone at her’ (John 8:7), and ‘Judge not that ye be not judged’ (Matthew 7:1). Presumably what is being ruled out here is not all judgments of value — unless one wishes to follow the lead of *The Living Bible*, a frequent source of unintended humour, which renders the passage as ‘Don’t criticise, and then you won’t be criticised’. What is rather being ruled out, I think, are ultimate judgments concerning deep character. ‘The Lord does not see as mortals see; they look on the outward appearance, but the Lord looks on the heart’ (1 Samuel 16:1- 13). I have elsewhere argued at length that judging the very soul of another human being and attempting to decide his ultimate desert is beyond the scope of human ability and must be viewed as a task either to be left undone or reserved for God. Human beings simply do not *know enough* to make such judgments with accuracy. Also, human beings are simply not *good enough* to make such judgments without hypocrisy (Murphy, 1994). These are the main points, in my view, of the noted scriptural passages — passages that have, according to D. Douglas Robbins, distorted my views on punishment in unfortunate ways (Robbins, 2001). I hope that what follows will be at least a partial if indirect answer to the Robbins critique.

There is, of course, a puzzle here: If we do not know enough to punish for inner viciousness, how can we know enough to tell if various methods of punishment advance or retard the improvement of the soul? How can the inner self be opaque to us in one context but not in the other? And can even *mens rea* be saved if such sceptical worries are taken seriously? The classic philosophical problem of other minds may here raise its ugly head.

My own hunch — which I can only sketch here — is that this problem grows in seriousness the greater the depth of inquiry into the inner life — for example, I suspect that judgments of intention (and other *mens rea* judgments) are more reliable and safer than judgments of inner viciousness, judgments that a person is hopelessly rotten to the core. They are safer in part because they do not to nearly the same degree tempt us to cruelty and to dismissing the very human worth of the wrongdoer. It is, I think, easier to retain one's loving virtue in ascribing a particular intention to a person than it is in ascribing to that person a 'wanton, hardened, abandoned and malignant heart' — to use some language that has appeared in the law of homicide and in capital sentencing.

Perhaps scepticism about deep character retributivism also involves worries about *responsibility* and not only worries about knowledge and goodness. Except for the famous remark about 'inner viciousness' quoted earlier, Kant is generally sceptical of attempts to use secular punishment to aim at what I have called deep character retributivism. Kant's retributivism, except for that one remark, is better explicated in terms of the ideas of paying a debt and restoring a moral balance.

Kant's scepticism about deep character retributivism — a scepticism particularly vivid in his explicitly religious writings — involves worries about ultimate responsibility. Though this is a great oversimplification, we can sometimes witness in these religious writings the Pelagian Kant's transformation into an Augustinian Kant. In the famous moral writings (e.g. *Grundlegung*), Kant subscribes to a doctrine of radical freedom and responsibility. In *Religion*, however, he seems to accept what John Hare has called 'the moral gap' — the gap between our knowing what we ought to do and our ability to do it (Hare, 1999). In his *Religion Within The Limits Of Reason Alone*, Kant claims that this gap can be bridged only with the aid of what he calls 'an inscrutable outside power' — i.e. the grace of God. To the degree that Kant subscribes to this Augustinian view, he provides additional reasons for rejecting deep character retributivism — reasons raising sceptical doubts about ultimate responsibility that supplement the sceptical doubts about knowledge and goodness that have already been mentioned.

This line of thinking may, of course, pose problems for other aspects of Kant's moral outlook. Since Kant is unwilling to ground human dignity in theological considerations (e.g. that human beings are created in the image of God), he seeks for a secular foundation and often finds it in human

autonomy — a concept that sometimes seems to involve radical metaphysical assumptions about human free will and responsibility. But such assumptions hardly seem compatible with the claim that we may need divine grace in order to do our duty.

Whenever we presume to condemn deep character traits, self-deception again poses a problem, because — as Socrates noted long ago — there are few things we human beings more enjoy than thinking that we know more than we do. To this can be added the narcissistic joys of thinking that we are better than we are or that we are more in control than we are. Seeing criminals as two-dimensional cartoon monsters, instead of as fellow human sufferers, is one way in which this self-deception reveals itself. Although it is not common to use the word ‘eloquent’ with respect to Kant’s prose, the most eloquent exposure I know of this kind of self-deception occurs, not in Nietzsche, but in Kant’s *Religion*. He writes:

A man’s [inner dispositions of character], sometimes even his own, are not observable; and consequently the judgment that the agent is an evil man cannot be made with certainty ... [People] may picture themselves as meritorious, feeling themselves guilty of no such offences as they see others burdened with; [but they never inquire] whether good luck should have the credit, or whether by reason of the cast of mind ... of their own inmost nature, they would not have practised similar vices had not inability, temperament, training, and circumstances of time and place which serve to tempt one ... kept them out of the way of these vices. This dishonesty, by which we humbug ourselves and which thwarts the establishing of a true moral disposition in us, extends outwardly to falsehood and deception of others. If this is not to be termed wickedness, it at least deserves the name worthlessness, and is an element in the radical evil of human nature ... that constitutes the foul taint of our race.

Of course, if inner wickedness is to some degree opaque to us, then so too will be inner goodness; and if we should not judge a person for his deep character viciousness, then it may not be consistent to praise and reward him for (for example) his repentance. As Montaigne reminds us in his essay ‘Of repentance’, ‘These men make us believe that they feel great regret and remorse, but of amendment and correction or interruption they show us no sign ... I know of no quality so easy to counterfeit as piety.’ I wonder if the Christian could avoid the inconsistency by arguing in this way: Mistakes with respect to judgments of goodness are generally less worrisome and

dangerous than mistakes with respect to judgments of deep character evil. (So what if Mother Teresa turns out not to have been — at her core — as grand as we thought when we were singing her praises). Most of us probably do think that it is unjust to hand out praise and prizes to those who are less than fully deserving — but not nearly as grave an injustice as administering blame, humiliation and suffering to those who do not deserve it. Whatever the wrong of thinking that people are better than they in fact are, it at least does not involve giving up on them. And it is *giving up* on people — coming to think that they are unworthy of any attempt at human community with them — that is perhaps the consequence most to be feared from judgments of inner wickedness. And do we want to allow the state — which cannot even deliver the mail efficiently — to act on its hunches about inner wickedness and the punishment that such wickedness deserves?

Christianity and Capital Punishment

The fact that so many prominent Christian philosophers have been supporters of capital punishment should make one pause before hastily assuming that the practice is unchristian. However, the enthusiasm expressed by these thinkers for capital punishment has often been radically overstated by supporters of the death penalty. Radio show host and newspaper columnist Dennis Prager, for example, in a recent quoted piece cited Augustine as a Christian authority to support his belief in the legitimacy of capital punishment. He quoted this passage from *The City of God*: 'It is in no way contrary to the commandment 'thou shalt not kill' to put criminals to death according to law or the rule of natural justice' (The Arizona Republic, 7 June 2001).

Augustine did indeed make this claim, but it takes a great deal of creative free association to turn this into a statement of support for the death penalty. And getting Augustine right is a matter of some importance, since — after Jesus and Paul — he has probably done more than anyone else to create what might be called 'the moral tone' of Christianity. Influenced by Donald X. Burt (Burt, 1997), I read Augustine — and I here impose upon him a modern distinction that he might not have welcomed — as asserting the right of the state to execute but also arguing that it is almost always wrong for the state to exercise that right. The state may not be denied to have, in the abstract, the right to execute if this promotes the common good or promotes personal salvation. However, one can hold this view and also consistently hold, in every particular case one knows of, that execution

does not in fact promote these goals — the only goals that would justify it. Augustine frequently argues in just this way and indeed, for all his reputation to the contrary, offers some of the most eloquent objections to capital punishment ever given in our culture.

In a letter to Marcellinus, the special delegate of the Emperor Honorius to settle the dispute between Catholics and Donatists, Augustine is concerned with the punishment to be administered for what must have, to him, seemed the most vicious of crimes: the murder of one Catholic priest and the mutilation of another by members of a radical Donatist Eaction. He wrote:

I have been a prey to the deepest anxiety for fear your Highness might perhaps decree that they be sentenced to the utmost penalty of the law, by suffering a punishment in proportion to their deeds. Therefore, in this letter, I beg you by the faith which you have in Christ and by the mercy of the same Lord Christ, not to do this, not to let it be done under any circumstances. For although we [bishops] can refuse to be held responsible for the death of men who were not manifestly presented for trial on charge of ours, but on the indictment of officers whose duty it is to safeguard the public peace, we yet do not wish that the martyrdom of the servants of God should be avenged by similar suffering, as if by way of retaliation ... We do not object to wicked men being deprived of their freedom to do wrong, but we wish it to go just that far, so that, without losing their life or being maimed in any part of their body, they may be restrained by the law from their malicious frenzy, guided into the way of peace and sanity, and assigned to some useful work to replace their criminal activities. It is true, this is called a penalty, but who can fail to see that it should be called a benefit rather than a chastisement when violence and cruelty are held in check, but the remedy of repentance is not withheld? (Letter 133, quoted in Burt, 1999).

This is just one of many similar passages to be found in Augustine's sermons and letters — passages that, at the very least, should make supporters of the death penalty stop counting him as among their Christian boosters.

Protestant Kant was, of course, an enthusiastic supporter of capital punishment; and even if his Christianity made him generally sceptical of using secular punishment to target inner viciousness, it never seemed to make him sceptical of the death penalty itself. It can be argued, however, that if Kant had correctly applied his own moral theory he would have opposed the death penalty. Such an argument was developed, for example,

by Hermann Cohen — a leading figure among the Marburg neo-Kantians. Cohen's interpretation of Kant on this and related issues has been instructively explored by Steven S. Schwarzschild (Schwarzschild, 1985).

Conclusion

Let me now draw this somewhat rambling free association on Christianity and punishment to a close. I have suggested that there cannot be anything that might reasonably be called *the* Christian view on punishment. Christianity is compatible with a variety of different views, even about capital punishment.

I do think, however, that it can be said that certain considerations must be regarded as central to any Christian approach to punishment — considerations that should be taken seriously by all Christians even if all Christians (perhaps in part because they read the empirical evidence differently) do not agree on the exact weight to be given to the various considerations. By way of summary and conclusion, I will briefly identify five:

- (1) Punishment must be consistent with the primary value of love — which means, at the very least, that punishments based in hatred must be opposed. Christians will emphasise the virtue of forgiveness as a means of overcoming such hatred.
- (2) Punishment is best justified in terms of promotion of the common good and the spiritual reformation of the criminal. (This second goal, as interpreted by Christians, would surely be rejected as illegitimate by such neutrality liberals as Ronald Dworkin.) The Christian, of course, should seek the best evidence available on whether particular punishments actually accomplish these goals or are only said to accomplish them by those who prefer to think about these matters in a shallow way. Only by such careful attention to relevant evidence can one transcend anecdotes and steer between the Scylla of excessive and cruel harshness and the Charybdis of excessive and sentimental leniency.
- (3) To the degree that retribution is a legitimate goal of criminal punishment, one must not presume that — in giving the criminal the punishment that he deserves — one is giving him the suffering that is appropriately proportional to the inner wickedness of his character. If human beings have the proper degree of moral humility, they will see that punishment on these grounds must be left to God. If they lack that humility, they will simply confirm

Nietzsche's observation that we should mistrust all persons in whom the urge to punish is strong.

(4) Punishment will never be pursued with righteous enthusiasm but always with caution, regret and humility — with a vivid realisation that we are involved in a fallible and finite human institution that is, even if necessary, regrettable. That it may be a necessary evil does not stop it from being an evil. Christians, believing that even the best of human endeavour is tainted with human depravity should be on the watch for self-deception and realise, with Nietzsche, that all the high sounding human talk about justice and desert and the common good often serves simply as a mask for cruelty.

(5) Many Christians, without hypocrisy or inconsistency, will be disinclined to defend an absolute prohibition against capital punishment. These Christians will not, for example, tend to see capital punishment as an evil comparable to the intentional killing of the innocent — something that most Christians will surely regard as absolutely wrong in principle. They will, however, be extremely cautious about supporting capital punishment — nervous about turning over the guilty/innocent distinction to the secular state and seeing capital punishment, with Augustine, only as an absolutely last resort — justified perhaps in the abstract but very rarely, if ever, justified in fact. This Augustinian view is central in the new final paragraph on capital punishment in the most recent edition of the *Catechism of the Catholic Church*. The paragraph draws its authority from the 1995 encyclical *Evangelium Vitae*:

Today, ... as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offence incapable of doing harm — without definitively taking away from him the possibility of redeeming himself — the cases in which the execution of the offender is an absolute necessity 'are very rare, if not practically non-existent' (Section 2267).

Christians will always be alert to the fact that, from a Christian point of view, there is no more serious way of harming a person than to pose obstacles to that person's opportunity to repent, reform, atone and thereby open himself to the possibility of redemption and salvation (Murphy, 1979, 1997). Hamlet, you will recall, did not want to kill Claudius at prayer because he wanted to

send Claudius to Hell and thought that, if he killed him in a state of grace, this would not happen. Hamlet's desire was, of course, deeply sinful; and the modern death penalty, while presumably not aiming at the eternal damnation of the criminal, may show an indifference to the possibility of such damnation that a Christian would find troubling. Of course there is Dr Johnson's observation about the prospect of being hanged focusing the mind, but one would surely want to have more than amusing anecdotal evidence for this before letting it form the basis for justifying execution.

In short: if there is good reason to believe that execution generally stands in the way of repentance and rebirth of the criminal or if there is good reason to believe that such punishment generally reinforces cruelty and other sinful dispositions in the law abiding or if there is no compelling reason to think that capital punishment is required for the common good, then Christians will presumably oppose capital punishment. My own view is in accord with the position taken in the *Catechism of the Catholic Church* — namely, that the case against capital punishment on these grounds is very strong. I know that there is theological controversy over the degree to which Old Testament doctrine is incorporated into Christianity and the degree to which Christianity transcends that doctrine — a controversy that has been richly explored by H. Wayne House (Old Testament highly relevant) and John Howard Yoder (Old Testament less relevant) (House and Yoder, 1991). This is a controversy into which I am incompetent to enter. However, I am reasonably confident that most Christians would want to endorse — and give high priority to — these words of Ezekiel: 'I have no pleasure in the death of the wicked; but that the wicked should turn from his way and live' (32: 11).

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