

REPENTANCE, MERCY, AND COMMUNICATIVE PUNISHMENT

Jeffrie G. Murphy

We should [look at the] example...of the offender who has genuinely repented his crime before he is convicted and sentenced...[Such repentance], however deep and genuine, cannot alter penal desert (unless it is so immediately and intimately connected to the wrongdoing as to alter our understanding of the seriousness of the wrong): the repentant offender deserves no less severe a punishment than the unrepentant offender.

R. A. Duff¹

Grounding his argument in his well known communicative theory of punishment, Antony Duff has argued that “mercy involves an intrusion into the realm of criminal law of values and concerns that are not themselves part of the perspective of criminal law: a merciful sentencer acts beyond the limits of her legal role, on the basis of moral considerations that conflict with the demands of penal justice.”²

When Duff claims that mercy—even if grounded in the repentance of the wrongdoer—involves an “intrusion” into the realm of criminal law, he does not mean to suggest that such an

¹ Duff 2007, p. 384. Antony Duff is, of course, a man who has made truly significant contributions to criminal law theory. Even when I find myself in disagreement with his claims, I am always stimulated by and always learn from thinking about those claims. He has also been a valued friend for many years. I dedicate this essay to him with esteem and affection.

² *Supra* note 1, p. 361.

intrusion is always an unjustified intrusion—simply that the cases where it is justified are cases in which the values intrinsic to criminal punishment (particularly retributive desert) are being trumped by values from a totally different moral realm. One of my favorite novelists, J. M. Coetzee, may agree with Duff here as David Lurie, the central character in his novel *Disgrace*, explains his unwillingness to provide the university disciplinary board (under which he must defend himself against sexual harassment charges) with the expressions of remorse and repentance that they seek:

[We] went through the repentance business yesterday. I told you what I thought. I won't do it. I appeared before an officially constituted tribunal, before a branch of the law. Before that secular tribunal I pleaded guilty, a secular plea. That plea should suffice. Repentance is neither here nor there. Repentance belongs to another world, to another universe of discourse....[What you are asking] reminds me too much of Mao's China. Recantation, self-criticism, public apology. I'm old fashioned. I would prefer simply to be put against a wall and shot.³

I respectfully disagree with both Duff and Lurie (and perhaps Coetzee also) in this matter. In the present essay I plan to exploit the parenthetical insertion that occurs in the quoted

³ Coetzee 1999, p. 58, 66. Lurie, like Duff, is claiming that repentance belongs to another realm of discourse—one other than the legal realm. He seems to think that the other realm is religious rather than secular, however, and I see no reason to think that this is how Duff would identify the other realm.

paragraph with which I opened the essay. In so doing I will expand on a suggestion I have made in previous publications: that a significant part (but, of course, not all) of the harm and wrong of many (perhaps all) criminal offenses is the insulting communicative message of contempt conveyed to and about the victim (and the larger community) by the commission of a criminal offense. Duff's in passing parenthetical insertion suggests that this sort of thing happens with such infrequency as to be hardly worth mentioning. I disagree. I will argue that repentance, if a genuine withdrawal of the contemptuous message, lessens the harm and wrong in significant ways and thereby has a direct and significant bearing on the retributive punishment that the offender deserves for the crime.

If I am correct about this, it might still be considered controversial whether a reduction of punishment based on repentance should be conceptualized as mercy or rather as a more finely tuned understanding of justice. In this essay, however, I am not concerned to address this issue in any detail.⁴ My concern is simply to argue that giving weight to repentance in sentencing is to give weight to a value that is *in principle* intrinsic to criminal punishment and not the intrusion of a value from a totally different moral realm.⁵

⁴ Since repentance, in my view, to some degree lessens the harm or wrong of the crime, I tend to think it is better to think that counting it as relevant to sentencing is a matter of justice rather than mercy.

⁵ I say "in principle" because of my belief that there are in the real world of sentencing many practical reasons why one should be skeptical of counting repentance at the time of sentencing—one of them being the difficulty of distinguishing genuine repentance from fake repentance as a strategy on the part of the defendant to get a lighter sentence. Also, there is the worry that one who seeks a lower sentence reveals thereby that he is perhaps not really repentant. I have developed these skeptical arguments at some length—along with a suggestion that such skepticism may be less justified in clemency or pardon decisions—in Murphy 2007.

I should perhaps note in passing that I totally agree with Duff that it may sometimes be appropriate to reduce a criminal sentence—and in that sense show mercy—for reasons that are not intrinsic to penal desert itself and that thus represent intrusions into the domain of criminal law. I do not think that this is the case with repentance—which I regard as intrinsically related to penal desert—but other reasons for reducing a sentence would fall into Duff’s category. Kant, for example, imagines a case in which a criminal has so many culpable accomplices that the state itself would dissolve if all of them were punished in accord with their deserts. In a case such as this, Kant believes that the sovereign would act rightly—on consequentialist grounds—in showing mercy that is explicitly at odds with penal desert. This would indeed be an intrusion in Duff’s sense—one that, if Kant is correct, would be a justified intrusion.⁶

A contemporary example of an extrinsic intrusion into the realm of strict penal justice is the practice of reducing a criminal’s sentence because of what are regarded as the criminal’s past “good deeds”—honorable service in the military, for example. This practice has been defended by Carissa Hessick in a provocative recent essay. Among other things, she argues that since we count earlier bad acts (previous crimes, for example) as relevant reasons for increasing sentences, it seems reasonable to count earlier good acts as relevant reasons for decreasing sentences.⁷ Although I do not know if Hessick would agree with me, I think that such a

⁶ Kant 1996, p. 475.

⁷ Hessick 2008. I wonder if the asymmetry that bothers Hessick would be less worrisome if we counted as relevant only previous crimes of the same sort as the crime for which the wrongdoer has now been convicted. It makes more sense (at least to me) to count previous convictions for crimes involving assault in determining the sentence for a current conviction of a crime involving assault than to, for example, count previous convictions for criminal fraud or shoplifting.

practice—unlike counting repentance—has to be regarded as what Duff calls an intrusion into the values intrinsic to criminal law by values of another sort. Repentance is a direct repudiation of the message of contempt carried by the criminal wrong in a way that previous good acts, not having the crime in question as their object, are not.

I will now develop in more detail my argument that repentance is intrinsic to the idea of penal desert and that it is not, in Duff's sense, an intrusion of values from a totally different context.

There is a tendency for the communicative theory of punishment to focus exclusively on what punishment communicates to and about the criminal offender. Since it is a theory of *punishment*, this is of course not surprising. However, it seems to me worth considering—as part of a large communicative theory of *crime* and punishment—what message (literal or symbolic) the criminal wrongdoer may be conveying by his wrongdoing. Let me quote what I have previously written about the relevant communication:

...One reason we so deeply resent moral injuries done to us is not simply that they hurt us in some tangible or sensible way; it is because such injuries are also *messages*—symbolic communications. They are ways a wrongdoer has of saying to [the victim] “I count but you do not,” “I can use you for my purposes,” or “I am here up high and you are there down below.” Intentional

wrongdoing *insults* [and reveals *contempt* for the victim on the part of the wrongdoer]—and thus it involves a kind of injury that is not merely tangible and sensible. It is moral injury, and we care about such injuries. (As Justice Holmes famously observed, even a dog notices and cares about the difference between being tripped over accidentally and being kicked intentionally.⁸) [Normal people] care about what [is thought and expressed] about them—how much [others] think [they] matter. Our self-respect is *social* in at least this sense, and it is simply part of the human condition that we are weak and vulnerable in these ways....

But what if the wrongdoer comes to separate or divorce himself from his own evil act? (True repentance is a clear way of doing this.) Then the insulting message [of contempt] is no longer present—no longer endorsed by the wrongdoer. We can then join the wrongdoer in condemning the very act from which he now stands emotionally separated....In having a sincere change of heart, he is withdrawing his endorsement from his own immoral past behavior; he is saying “I no longer stand behind the wrongdoing, and I want to be separated from it. I stand with you in condemning it.” Of such a person it cannot be said that he is now conveying the message that he holds [both the victim and the relevant legal

⁸ Being a passionate dog lover, I have always wondered how Justice Holmes knew this. I hope it was not based on his own experience of kicking dogs intentionally.

norms] in contempt.”⁹

In addition to what I have said above about the message conveyed to and about the victim by acts of criminal wrongdoing, I would now like to add the thought that this message extends beyond the immediate victim to all members of the relevant community. A message of disrespect is conveyed to all law abiding members of the community when the criminal presumes to place his own will (guided by what Kant called the “dear self”) above the will of the community as realized in its properly enacted laws.¹⁰

Suppose all of the above is true. One still might ask what it has to do with criminal punishment—with the penal suffering that the criminal deserves. I will now attempt to address that issue.

⁹ Murphy and Hampton 1988, pp. 25-26. I have in the quoted passage replaced the original phrase “attempts to degrade” with the phrase “reveals contempt” since the word “attempt” suggests a level of intention that is misleading. I do not mean to suggest that the wrongdoer must have the *intention* of delivering a message—or even to be consciously aware that this is what he is doing. The person who rapes probably just intends to have coerced sex, just as the person who buys a slave probably just intends to have some cheap forced labor. But surely the act of each expresses, at least symbolically or tacitly, a belief or attitude about their victims that conveys a willingness to use them, in Kant’s language, as mere means or things to be exploited for the wrongdoers’ own selfish purposes—all without any regard for the victims’ rights as persons. A society that does not explicitly condemn such acts—perhaps through such powerful symbolism as criminal punishment—can be said to endorse the same message conveyed by the wrongdoers themselves.

¹⁰ My discussion presumes that we are speaking of a just system of laws justly enforced and will ignore the special problems raised by disobedience to law based, not on the claims of the dear self, but on principled and justified moral objection to the law in question.

To punish on retributive grounds is to punish as the criminal *deserves* to be punished.¹¹ Not all those who advocate retribution as a theory of punishment, however, agree on how the concept of desert is to be analyzed. (The first thing one will want to say, of course, is that desert must be analyzed as culpable wrongdoing. But how is that concept to be analyzed?) I will now run through the six (to me) most plausible accounts of retributive desert and try to show that a communicative theory of criminal wrongdoing and harm fits well into each of them.

1. Character. I and others have sometimes distinguished between “grievance retributivists” and “character retributivists”—the former making the punishment a function of the nature and quality of the grievance that the victim (and perhaps society as a whole) has against the criminal, the latter making this a function of the badness or evil of the character of the criminal—focusing on what Kant called the “inner wickedness” (*inneren Bösigkeit*) of the criminal¹². Since repentant wrongdoers are commonly taken to have better characters than

¹¹ At one time I was inclined to defend very strong versions of the retributive theory of punishment. My current support for the theory is much more limited and qualified. See my Presidential Address to the American Philosophical Association (Pacific Division), Murphy 2006. I emphasize retribution in the present essay because of Duff’s reliance on penal desert as an important part of his communicative theory of punishment. I also have some serious worries about communicative theory itself. The more that a particular society is inequalitarian in its distribution of benefits and burdens, and the more that the underlying presupposition that all citizens are in fact regarded as of equal worth and value is not satisfied, then to that degree—in my view—is the communicative theory, however laudable as an aspirational ideal, largely inapplicable to that society. So my paper is in effect of an “if, then” form: *If* one subscribes to a communicative theory, and *if* one believes that penal desert is a central part of that theory, *then* one should count repentance as in principle intrinsically relevant to sentencing.

¹² Kant 1996, p. 474. One might argue that Kant’s phrase “inner wickedness” refers not to character but simply to those mental states (e.g., intention) that constitute the *mens rea* conditions for criminal offenses. Although I will not take time to argue for this here, I believe that the context surrounding Kant’s remark supports my character interpretation. I also believe that *mens rea* considerations are not always easy to separate from considerations of character.

unrepentant wrongdoers, it is fairly easy to see how repentance would count as relevant on this version of retributivism. Surely the willful violation of the norms of the criminal law and the important individual and community rights those norms seek to protect is at least some evidence of bad character; and repentance of those acts of violation some evidence of a better character.¹³

2. *Grievance*. With respect to grievance retributivism, it might initially seem that repentance could have no significant bearing on this. Why, one might well ask, would the grievance I have against a wrongdoer be less because at some later time the wrongdoer repents and even expresses sincere remorse through an act of apology? The communicative theory of harm and wrong that I have earlier suggested has, in my view, a plausible way of answering this question: To the degree that the wrongful harm is a function of the insulting and degrading message symbolically conveyed by the criminal act, then repentance—by a withdrawal of that message—lessens the wrongful harm and thus (at least in most cases) makes the criminal deserve, not acquittal surely, but less punishment than the unrepentant criminal.¹⁴

Consider the *mens rea* conditions for what in American criminal law is generally called “depraved heart murder”—a killing that results from a level of recklessness so extreme as to reveal “a hardened, abandoned, and malignant heart indifferent to the value of human life.” There is no canonical usage of much of the terminology that is involved in discussions of retribution. Some writers, for example, contrast character retributivism with choice retributivism. I have not elected to give choice retributivism a separate treatment in the present essay because I think that its essence—we should punish for bad choices not bad character—is captured in several of the accounts I give below.

¹³ Not everyone agrees with this. Cynthia Ozick, for example, holds the surprising view that repentance is an aggravating and not a mitigating factor. See my discussion of Ozick’s view in Murphy 2007 pp. 426-428.

¹⁴ A total acquittal would typically not be proper since a message of contempt is, in my view, only one factor that contributes to the wrong and harm of the criminal conduct and thus the total package of retributive desert. Also, to the degree that the community should be seen as

3. *Free Riding*. Herbert Morris is well known for defending a version of retributivism in which the criminal is said to deserve punishment as a sacrifice that, in fairness, he owes those who have been law abiding.¹⁵ The law abiding have made the sacrifice of self-restraint—voluntarily obeying laws they would often prefer not to and have thereby made possible the benefits that a cooperative rule of law provides for all. The criminal enjoys these benefits but, unlike the rest of us, has not made the sacrifice of obedience. Thus, by such free riding, he has gained an unfair advantage over the law abiding and owes, as a kind of debt, a comparable sacrifice—a sacrifice that we impose on him in the act of punishment.

Of course one important thing wrong with free riding is its unfairness. I do not think, however, that the deep resentment that most of us feel toward the free rider is solely a function of the objective unfairness of what he does.¹⁶ It is also, I believe, a function of the arrogant

repudiating the message, the most effective way to do this is probably with some amount of actual punishment. Finally, letting the repentant offender off entirely would seem to me to give him too much of a role in what happens to him—as though this is all to be a function of his autonomous choices. It was perhaps excessive claims of autonomy that prompted his criminality in the first place. Herbert Fingarette’s idea of law as “humbling the will,” which I will discuss later in this essay, is relevant here. I use the phrase “at least in most cases” to leave open the possibility that some crimes and some criminals may be so horrendous that it would be improper to give them, even if repentant, any punishment less than the maximum that the law allows—even death if that is the maximum allowed. Are there such crimes and criminals? I have made a start in thinking about this in Murphy 2009.

¹⁵ Morris 1976. It is almost impossible to overestimate the importance of this essay (first published in 1968) in the philosophy of punishment, since it almost single handedly brought about a rebirth of retributivism as a major contender as the primary justification of punishment.

¹⁶ Morris once told me that he first got the idea for his theory on a Los Angeles freeway during a period of gridlock. All drivers were waiting in long lines for their turn to enter an exit lane when Morris saw a sports car speed along the shoulder, illegally pass a great many cars, and push itself

message of superiority that his free riding at least symbolically conveys: “I can claim for myself a liberty in action that—since I value the benefits made possible by the voluntary sacrifices of the obedient—I would not be willing to extend to others.” I, and I think others, might well want to respond to this message in anger with the question “Just who in the hell do you think you are anyway?”—a question that we would probably not raise if the wrongdoer manifested sincere repentance.

4. Reflective Equilibrium. In a justly celebrated essay, Michael Moore argues that retributivism, once freed from assorted confusions and bad arguments against it, captures better than any other theory of punishment the pretheoretical convictions that most of us have about just punishment and its relation to the concept of desert—and thereby puts us into that state of epistemic contentment that John Rawls called “reflective equilibrium.”¹⁷ I believe that many (perhaps most) of us—perhaps particularly those involved in the criminal law—have the conviction that repentance counts as relevant to penal desert and thus a total refusal to count it would disturb our reflective equilibrium. Consider, as a few examples of this, these comments from various actors in the institution of criminal law—one from a state governor denying clemency, one from a prosecuting attorney, one from a sentencing judge, one from a distinguished law professor (Michael Moore), and one from a United States Supreme Court Justice:

into the exit lane in front of those who had been legally waiting their turn. He said he became absolutely furious at the arrogance and presumption of the driver of this sports car. His theory came to him as he asked himself the question “Why does this make me so resentful?”

¹⁷ Moore 1987. He does not use the phrase “reflective equilibrium,” but I think that this is the best way to characterize his methodology.

Is Williams' [claimed redemption] complete and sincere, or it is just a hollow promise? Stanley Williams insists [against overwhelming evidence to the contrary] that he is innocent, and that he will not and should not apologize or otherwise atone for the murders of the four victims in this case. Without an apology and atonement for these senseless and brutal killings there can be no redemption. In this case, the one thing that would be the clearest indication of complete remorse and full redemption is the one thing Williams will not do.¹⁸

Have you observed any repentance by Mr. McCleskey? Has he exhibited to you any sorrow? Have you seen any tears in his eyes for this act that he has done?¹⁹

The vicious acts you committed on December 7, 1993, were the acts of a coward. What could be more cowardly than entering a train filled with unsuspecting, homebound commuters and systematically shooting them at point-blank range?...What is even

¹⁸ This is part of a 2005 clemency decision delivered by California Governor Arnold Schwarzenegger in which he denied Crips founder Stanley "Tookie" Williams executive clemency for his death sentence.

¹⁹ These rhetorical questions were raised in 1978 by Atlanta District Attorney Richard Parker as he argued before the jury that Warren G. McCleskey, convicted for murdering a police officer, should be shown no mercy but should be sentenced to death. (He was sentenced to death.) The quoted passage is from the transcript of the 1978 trial.

more remarkable is your total lack of remorse.²⁰

It is true that all of us are guilty of some immoralities, probably on a daily basis. Yet for most [of us]...the immoralities in question are things like 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.²¹

[S]erious prejudice could result if medication inhibits the defendant's capacity...to demonstrate remorse or compassion....In [capital cases] assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies.²²

²⁰ An excerpt from the transcript of Judge Donald E. Belfi's remarks at his sentencing of Colin Ferguson on March 22, 1995, to 200 years in prison for his conviction on six counts of murder and nineteen counts of attempted murder in an attack on commuters on a Long Island Railroad train.

²¹ *Supra* note 17, p. 188.

²² *Riggins v. Nevada*, 504 U.S. 127, 143-144 (1992) (Kennedy, J., concurring). Realizing that sentencing agents will naturally think that a criminal lacking in remorse is particularly deserving of the death penalty, Justice Kennedy wants to make sure that an offender's failure to express remorse is truly a function of his actual character and not medication. I quote this opinion mainly as one more example of how many will find reflective equilibrium only in an account of punitive desert that makes room for repentance and remorse. It is also, of course, a good

5. *The Humbling of the Will*. In his Presidential Address to the American Philosophical Association (Pacific Division) Herbert Fingarette argued that retribution should not be seen as a moral thesis but rather as a conceptual requirement—something intrinsic to the concept of law itself.²³ Law sets norms that demand obedience—demand that the individual will of the person be subordinated to the relevant norms. The person who disobeys the norms set by law is presuming to exercise his own will in a way that the norms forbid to him. Because of this, the will of the offender must—to use Fingarette’s phrase—be *humbled*. To the degree that repentance shows a will that has already been to some degree humbled, then to that degree—in my view—does remorseful repentance (the *agenbite of inwit*) render legitimate a sentence less severe than one deserved by one whose arrogant presumption remains intact.²⁴

6. *Victim Vindication*. In our 1988 joint authored book, Jean Hampton—drawing I think on the communicative account I had in an earlier chapter given of criminal wrongdoing—argues that the retributive element in criminal punishment should be understood as *victim vindication*—the righting of a wrongful message about the victim that, absent the punishment, would be allowed to stand unchallenged. She thought, indeed, that this was a way to give some sense to Hegel’s puzzling claim that punishment *annuls* the crime:

example of assessments of *character* playing a role in sentencing.

²³ Fingarette 1977.

²⁴ This is my view. Fingarette does not himself make this claim about the relevance of repentance. I use here the phrase “remorseful repentance” (which I regard as redundant since I take remorse to be a component of repentance) to emphasize the painful emotional bite of conscience (the *agenbite of inwit*) that is a part of sincere repentance. I discuss remorse and repentance in some detail in Murphy 2007.

This reassertion [through punishment of the victim's equal value] may be what Hegel meant when he said that punishment "annuls the crime." Of course it can't annul the act itself, but *it can annul the false evidence provided by the wrongdoing of the relative worth of the victim and the wrongdoer*. Or to put it another way, it can annul the message, sent by the crime, that they are not equal in value.²⁵

It is of course absurd to think that punishment annuls the crime in the sense of making it the case that the crime never happened or now goes away. What does go away, however—and is thus annulled—is the message of disrespect for the victim and, I would say, disrespect as well for the legal order of the relevant moral community. Punishment can thus be seen as a social ritual in which, through the symbolism of hard treatment, the message of contempt for the victim—a message that the victim is of less than equal value with the wrongdoer—is emphatically repudiated and another message—that of the full value of the victim as an equal citizen—is emphatically asserted.

And what bearing might repentant remorse (and perhaps public apology as well) have on this vision of wrongdoing, harm, and punishment? Just this: The wrongdoer, through repentant remorse and apology, is on his own withdrawing the contemptuous message and trying to do

²⁵ *Supra* note 9, p. 131.

what he can to restore equality with the victim and seek reintegration into the moral community that he has (he now sees) wrongfully insulted.

Let me now bring my essay to a close by summarizing the essence of what I have been arguing. I have challenged Duff's claim that repentance, if ever relevant to the reduction of a criminal's sentence, must be seen as an intrusion into the realm of criminal justice (particularly its commitment to penal desert) of values from an entirely different realm of discourse. I have argued that part of the harm and wrong of a criminal act is the insulting message of contempt for the victim and for the moral community itself that is conveyed by the act. Because of this intrinsic connection between the message and the criminal harm and wrong—both intrinsic to penal desert—it seems to me proper, from the perspective of penal desert itself, to count repentance (repudiation of the message of contempt) as a relevant ground for a reduction in criminal sentence. In short: If the communicative theory of punishment takes penal desert seriously, it ought in principle to count repentance as a relevant ground for reduction in criminal sentence.

I await with some trepidation Duff's response to the argument I have presented. I suspect that he will have powerful counter arguments—arguments that may force me to change my own views or leave us in the position where, neither of us being fully persuaded by the other, we must simply agree to disagree. Knowing Duff as a man of kind restraint and humility, I can at least take comfort in the fact that I will probably not have to suffer the response that my friend the late Peter Winch told me he once encountered from Jonathan Bennett. Presenting a paper at the

University of British Columbia when Bennett was on the faculty there, Winch received sharp criticism from Bennett. He replied, and received even sharper criticism. Winch said that this increasingly heated exchange went back and forth until he finally said “I think that you and I will simply have to agree to disagree about this, Jonathan.” According to Winch, Bennett at this point replied, “Disagree hell! I refuted you!”

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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).