

An Essay on Vengeance and Forgiveness

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Who sees not that vengeance, from the force alone of passion, may be so eagerly pursued, as to make us knowingly neglect every consideration of ease, interest, or safety; and, like some vindictive animals, infuse our very souls into the wounds of the enemy; and what malignant philosophy must it be, that will not allow to humanity and friendship the same privileges which are indisputably granted to the darker passions of enmity and resentment?***

Magnanimity, or a regard to maintain our rank and dignity in society, is the only motive which can ennoble the expression of this disagreeable passion.***

Vengeance—the instinctive desire to get back at (settle the score with) the source of one’s injury—is accompanied by the moral emotion of resentment and indignation, all of which are natural psychological reactions.¹ With others, I think these emotions rest on their own bottoms; that is to say, they are not derivative of other emotions.² We can and do give

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**David Hume, ENQUIRIES CONCERNING HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 302 (L. A. Selby-Bigge and P. H. Nidditch, eds.; Oxford:Clarendon Press 3rd ed. 1975).

*** Adam Smith, THE THEORY OF MORAL SENTIMENTS 50 (Prometheus Books 2000) (Hereafter, “Smith TMS”).

¹Adam Smith recorded the observation that we even tend to take out our frustration on the cat who refuses to move when we are moving along the path the cat has relaxed herself as we move from one place to another. Cf. Smith TMS at 136-38 (noting that inanimate objects that “cause” injury can become the object of our resentment). He also observed that the “intention or affection of the heart” is all that should matter to assess blameworthiness, but he conceded that in “particular cases the actual consequences which happen to proceed from any action, have a great effect upon our sentiments concerning . . . merit or demerit, and almost always enhance or diminish our sense of both.” *Id.* at 134

²J. L. Mackie, “Morality and the Emotions,” 1 CRIM. JUSTICE ETHICS 3 (1982) (suggesting that retributive emotions promote cooperation in the long–evolutionary–run); Peter Strawson, *Freedom and Resentment*, in FREE WILL 59 (ed. by Gary Watson; Oxford 1982) (originally published at 48 PROC. ARIST. SOC’Y 1 (1952)). See generally Nico H. Frijda, *The Lex Talionis: On Vengeance*, in Stephanie H.

these emotions cognitive content;³ one hopes that they have developed and matured over time with culture, but they are primitive.⁴ They arise when an individual suffers a non-trivial injury that was inflicted without excuse or justification.⁵ Among other injuries suffered, the harm done discounts the value we hold of ourselves as human beings, so that when this discounting (the crime or a substantial tort) occurs, our natural moral trip wires are pulled.⁶ We react defensively; our worth as humans feels threatened. We hope then to impose punishment. Over time we have elected (or otherwise permitted) agents to act for us as surrogates and thus we avoid some of the costs entailed in the process of imposing punishment. Forgiveness comes later, if it ever does. Though it is owed to no one, it seems to reflect an effort to deal with these basic, adaptive reactions. I believe that, at least sometimes, some among us can accept the compromised conditions necessary to grant forgiveness with sufficient compassion and humility to justify this generosity. Ironically,

M. Van Goozen, Nanne E. Van de Poll and Joseph A. Sergeant, *EMOTIONS: ESSAYS ON EMOTION THEORY* 263, 283 (Lawrence Erlbaum, Publishers 1994) (describing vengeance as a “natural emotion seeking natural relief for unnatural suffering inflicted by unnatural offense).

³See Robert C. Solomon, *Sympathy and Vengeance: The Role of Emotions in Justice*, in Van Goozen et al. *supra* note # –, at 291. For an heroic but, I think, flawed effort to give retributivism a genuinely humane cognitive account, see Jean Hampton, *The Retributive Idea* in Jeffrie G. Murphy and Jean Hampton, *FORGIVENESS AND MERCY* (Cambridge 1988).

⁴Smith described the object of resentment as the need “[t]o bring him back to a more just sense of what is due to other people, to make him sensible of what he owes us.” Smith, *THEORY OF MORAL SENTIMENTS*, *supra* note # –, at 139. Although I think that Smith accurately describes the reactive nature of resentment, in fact, much of the conduct which brings out resentment is probably *not* the product of mature cognition; often, it is the product of thoughtlessness—the empty-headedness of an individual whose affective control is deficient. See, e.g., Laurence Tancredi, *HARDWIRED BEHAVIOR: WHAT NEUROSCIENCE REVEALS ABOUT MORALITY* esp. Ch. 11 (Cambridge 2005) (reviewing some of the neuroscientific data that measure incidents of aberrant criminal behavior). See generally Dacher Keltner and Jonathan Haidt, *Social Functions of Emotions*, in T. Mayne and G.A. Bonanno, eds., *EMOTIONS: CURRENT ISSUES AND FUTURE DIRECTIONS* 192 (Guilford Press (2001) at <http://wsrv.clas.virginia.edu/~jdh6n/publications.html> synthesizing evolutionary and social constructivist approaches to emotion theory).

⁵I do not mean to suggest that some significant level of conscious intent is necessary to provoke these sentiments; even negligence can provoke angry feelings. See Judith Andre, *Nagel, Williams, and Moral Luck*, 43 *ANALYSIS* 202 (1983). On the definition of “injury,” see Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goals of Retribution*, 39 *U.C.L.A. L. REV* 1659, 1662 (1992) (defining “harm” or “loss” as a “disruption of or interference in a person’s well being, including damage to a person’s body, psychological state, capacities to function, life plans, or resources over which we take this person to have an entitlement”). Clearly, some of the terms in that definition, not least the last clause, are debatable, yet the tenor of her definition is inclusive.

⁶See Jean Hampton, *Forgiveness, Resentment and Hatred* in *FORGIVENESS AND MERCY*, *supra* note # –, at 43-53; Frijda, *supra* note 3 –.

the ability to forgive could rest on principles of utility that respect these retributive emotions; we might call it a kind of enlightened utilitarianism with a dash of teleology.

I try to untangle these issues by dividing the topic into three parts, beginning with a brief and very basic outline of punishment theory: What are the moral justifications for punishment? These are questions whose answers are central to moral theory and the concept of forgiveness. Thus an understanding of their broad outlines is necessary to put vengeance and forgiveness in their proper perspective. They are also increasingly informed by our understanding of neurobiology. Next, I define vengeance, resentment and forgiveness for purposes of this essay. Finally, I'll try to tie the first two parts together by asking what conditions, *if any*, might permit forgiveness or something like forgiveness to occur in a legal context. The essay ends with a description of and prescription favoring a sort of "Forgiveness-Lite."

I.

Forgiveness roams the outskirts of law, and especially criminal law. As they stand awaiting sentencing, for example, most convicted defendants use their moments of allocution to assure the court that they now know they have made a terrible mistake, that they have learned their lesson, and that they seek forgiveness. Their appeals often sound genuine. And then they are sentenced, usually to a period of incarceration that the judge already has determined to be appropriate. The point is *not* that all such pleas are necessarily disingenuous; many (perhaps most) are, given the dictates of the setting and the statistics on recidivism. It is possible, though, that some first time offenders really have learned their lesson. Who knows? I don't but it does not matter. The broader point is that contemporary retributive justice demands pay back, and it usually is a stern and unforgiving one. Compassion and forgiveness, if they come, must await the parole board.⁷ And there's the rub: Forgiveness, from a moral point of view, makes sense theoretically as a deontological conception, but from a practical point of view, the deontological conception is unreachable in the absence of some utility.

Forgiveness is thus a troublesome topic for the criminal law, both practically and theoretically. The public's embrace of muscular retributivism—a form of vindictiveness that variously couples retribution to some moral foundation or another⁸—makes it virtually

⁷Stephanos Bibas and Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 88 (2004) (noting that "remorse and apology play little role in criminal procedure").

⁸It is genuinely unclear *what* the grounds of retribution are. Kant premised it on the equal dignity of humans that attaches to each individual's autonomy and rationality—the backbones of the categorical imperative—but he reached that conclusion through his famous *a priori* synthetic approach; that is, through some unmediated moral intuitions he had about the human will. Immanuel Kant, *General Introduction to the Metaphysics of Morals*, in THE PHILOSOPHY OF LAW 195 (trans. by W. Hastie; Edinburgh, Augustus M. Kelley, 1974 ed.) (arguing for desert-based punishment, "(f)or one man ought

impossible as a practical matter for politicians to embrace the compassionate side of their own natures⁹—whether that side might reflect incarceration followed by a welcoming back into the community to those who have paid their debt,¹⁰ or the recognition of the need for incapacitation without punishment in light of prima facie neurobiological deficits. On the theoretical side, it is unclear whether forgiveness is even necessary from a deontological perspective.

But I am putting the cart before the horse. First I need to present a brief review of the basics. The jurisprudential question we ask when we talk about theories of punishment is, Why do we punish? What are the moral and rational justifications for this social institution?¹¹ What links pain inflicted with pain imposed? Writ large, these questions traditionally find their answers within one of the two major theoretical foundations of punishment: retribution and utility.

A. Retribution. Modernly we associate our understanding of retribution with Kant and then Hegel and, more recently, with Peter Strawson and Herbert Morris.¹²

never to be dealt with merely as a means subservient to the purpose of another”). Mackie makes the point, rightly I think, that retribution is natural instinct—an urge to hit back. J. L. Mackie, *Morality and the Retributive Emotions*, 1 CRIM. JUSTICE ETHICS, 3 (1982). He also suggests that it promotes cooperation in the long (evolutionary) run. An analogy that I find helpful is to think of retribution as if it acted similarly to a vine of poison ivy: You can destroy the plant by touching or walking through it, but it will leave its deterrent effect with you in the form of a terrible rash that will put you on guard *not* to touch it in the future. It is a post-facto (even post death) method for maintaining its life in the long run. Cf. Jean Hampton, *The Retributive Idea*, in Jeffrie G. Murphy and Jean Hampton, FORGIVENESS AND MERCY 139-40 (Cambridge 1988).

⁹See, e.g., Robert L. Misner, *A Strategy for Mercy*, 41 WM. & MARY L. REV. 1303 (2000).

¹⁰This point was made forcefully by Judge Morris B. Hoffman in his talk at a recent conference titled “Law, Mind & Brain: Interdisciplinary Colloquium” at University College London Faculty of Laws (in association with the Gruter Institute for Law and Behavior), February 13-14, 2006.

¹¹Rational justifications for punishment address the “the reason for engaging in this social practice;” moral justifications address the question “why the practice is morally permissible.” David Dolinko, *Measuring “Unfair Advantage”: A Response to Michael Davis* (1994) 13 LAW & PHIL. 493, 484-95 (1994).

¹²See, e.g., Immanuel Kant, *General Introduction to the Metaphysics of Morals*, in THE PHILOSOPHY OF LAW 195 (trans. by W. Hastie; Edinburgh, Augustus M. Kelley, 1974 ed.) (arguing for desert-based punishment, “(f)or one man ought never to be dealt with merely as a means subservient to the purpose of another”); Georg W.F. Hegel, PHILOSOPHY OF RIGHT sec. 96 (T.M. Knox trans. 1952); Strawson, *supra* note # –; Herbert Morris, *Persons and Punishment*, 52 THE MONIST 475 (1968).

Retributive theorists elaborate different conceptions of the fierceness of retributive goal,¹³ but the transcendent principle of morality goes way back and it is associated with the familiar notion of “desert:” The wrongdoer deserves the punishment society imposes on him because he has injured someone without sufficient *justification*—he wasn’t doing something we approve of—or excuse—he wasn’t grossly defective in his cognition or (in some jurisdictions) volition. The major underlying premise is Kantian: Every person, by virtue of his or her humanity alone, is an autonomous and rational decision-maker capable of doing good because we all possess a will that is capable of unsurpassed goodness. Those capacities—autonomy and rationality—are the bottom-line measures of our moral worth.

That being the case, one logical inference is that when an actor commits a wrong, he’s presumed to have exercised the unfettered choice to commit (or not to commit) that wrong, absent gross and verifiable deficiencies. A second inference follows: If the wrongdoer then chooses to break the law, he violates our equal worth, and *thereby* gains (or potentially gains) an undeserved advantage or benefit for which he must be pay; that is how we honor his humanity. (Obviously, “gain” and “benefit” are problematic ideas;¹⁴ for present purposes we can include within these notions the sense that the wrongdoer at the least has elevated his worth or entitlement above his victim’s.¹⁵) Three conclusions then follow: First, punishment—the intentional, societal infliction of physical harm upon, and/or the deliberate, intrusive confinement of the wrongdoer—is at least morally permissible (if not obligatory) under these circumstances; second, the harm society imposes on the wrongdoer must be rationally and morally defensible as proportionate to (as “fitting”) the wrong done; and third, traditionally, the purpose of punishment may not be utilitarian—*punishment is aimed at the individual wrongdoer and no one else*.¹⁶ This last point is of potential importance here because retributive theories of punishment must have their origin in some non-consequentialist foundation rooted in a universally applicable, *à priori* conception of justice: It is a categorical imperative. The use of tools such as

¹³ Mackie, *supra* note –, at 4, describes three variants of retributivism: *negative*, “the principle that one who is not guilty must not be punished” (that is, guilt is a necessary condition for punishment); *permissive*, “one who is guilty may be punished” (guilt is a sufficient condition for punishment); and *positive*, “one who is guilty ought to be punished” (guilt obligates the state to punish). He also adds a “*quantitative variant*” to the mix: “[E]ven one who is guilty must not be punished to a degree that is out of proportion to his guilt, that one who is guilty ought to be punished in proportion to guilt, or may be punished in proportion to his guilt.”

¹⁴See my *Justifying Punishment*, 14 CAN. J. L. & JURIS. 161, 185-92 (2001) (discussing the problematic nature of “paying back” society for ill-gotten gains).

¹⁵Frijda, *supra* note # –, at 281-82, summarizes the gains revenge seeks as deterrent, the re-equilibration of loss suffered, the re-equilibration of power inequality and self-esteem, and relief from the enduring pain causes by unwarranted injury.

¹⁶See Jami L. Anderson, *Annulment Retributivism: A Hegelian Theory of Punishment*, 5 LEGAL THEORY 363, 365 (1999).

rehabilitation, simple constraint, and deterrence (specific or general) is impermissible.

Kant defined his own approach to punishment with the Latin phrase, *jus talionis*, the “right of retaliation,” which he took quite seriously. Kant maintained famously that imposing the death penalty was a categorical necessity following a conviction for homicide:

Even if a Civil Society resolved to dissolve itself with the consent of all its members—as might be supposed in the case of a People inhabiting an island resolving to separate and scatter themselves throughout the whole world—the last Murderer lying in the prison ought to be executed before the resolution was carried out. . . . If they fail to do so, they may be regarded as accomplices in this . . . violation.¹⁷

Kant provides several reasons for this harsh-sounding command but most important was that imposed death was a simple metric: Death was the only punishment proportioned to the harm done, and to fail to impose the only proportionate punishment available would violate the categorical prohibition against using a person merely as a means to an end. That is to say, the failure to impose the death penalty would indicate a failure to respect the autonomy of the wrongdoer, and that failure would make accomplices of those who fail to effect the appropriate punishment. In essence, we would be *condoning* the crime and affirming the dis-value of the victim. And to treat someone who committed a crime as a means to an end—that is, to impose punishment for the sake of deterring others or simply constraining the wrongdoer or hoping to educate the wrongdoer—violates the wrongdoer’s “Inborn Personality,” which deserves respect “although he may be condemned to lose his Civil Personality.”¹⁸ Yes, we will hang him.

What is important to note is that the moral foundation of retributivism is wholly formal and detached.¹⁹ The unsurpassing nature of the good will, of rationality and

¹⁷Kant, PHILOSOPHY OF LAW, *supra* note # –, at 198.

¹⁸*Id.* at 195.

¹⁹Kant articulated the basic problem he was addressing in his GROUNDWORK PRINCIPLES OF THE METAPHYSICS OF MORALS this way:

Do we think it a matter not of utmost necessity to work out for once a pure moral philosophy completely cleansed of everything that can only be empirical and appropriate to anthropology? That there must be such a philosophy is already obvious from the common Idea of duty and from the laws of morality. Every one must admit that a law has to carry with it absolute necessity if it is to be morally valid, that is, as a ground of obligation.

H. J. Paton, trans., KANT’S GROUNDWORK OF THE METAPHYSICS OF MORAL 55 (New York 1873). Among the most valuable exegeses on Kant’s text is John Rawls, LECTURES ON THE HISTORY OF MORAL

autonomy, are a priori standards that are and (in fact) can be only hortatory. For real people, intellectual and volitional capacities are distributed along familiar, standard measures.²⁰ Some very thoughtful research in the neuropsychology and neurobiology of morality and cognition supports the notion that retribution *as applied* either serve goals that are also utilitarian,²¹ and that both retribution and utility have neurobiological correlates that vary depending upon the nature of the moral problem.²²

B. Utility. Where Kant and traditional retributivists generally recoil at the idea of using a person *solely* as a means to a social end, Bentham and the utilitarians could conceive of no reason *other* than aggregate social benefit as a goal of punishment. The argument is uncomplicated:

The general object which all laws . . . ought to have . . . is to augment the total happiness of the community; and, therefore, in the first place, to exclude, as far as may be, every thing that tend to subtract from that happiness: in other words, to exclude mischief.

But all punishment is mischief; all punishment is evil. Upon the principle of utility, it ought to be admitted . . . only . . . in as far as it promises to exclude greater evil.²³

So we can summarize Bentham's argument as follows:

- (i) All laws should promote happiness, i.e., aggregate social gain;
- (ii) Punishment itself doesn't promote happiness;
- (iii) Therefore, laws requiring punishment should be enforced only when doing so otherwise promotes happiness, i.e., when they produce a net social gain.

Despite his simplicity, Bentham did not oppose retribution in all its aspects. He rejected

PHILOSOPHY 148-289 (ed. by Barbara Herman; Cambridge, MA: Harvard, 2000) .

²⁰See, e.g., Matt Ridley, *NATURE VIA NURTURE: GENES, EXPERIENCE, & WHAT MAKES US HUMAN passim* (HarperCollins 2003).

²¹See, e.g., Eyal Aharoni and Alan J. Fridlund, "Not Just Retribution" *The Role of Behavior Control in Third-Party Punishment*, mss in author's possession.

²²Joshua D. Greene et al., *The Neural Bases of Cognitive Conflict and Control in Moral Judgment*, 44 *NEURON* 389 (2004) (using *fMRI* data to demonstrate that different areas of the prefrontal cortex are recruited to solve difficult issues of personal morality).

²³Jeremy Bentham, *Principles of Penal Law*, in J. Bowring, ed., *THE WORKS OF JEREMY BENTHAM* Ch. XV, §1, at 83 (Edinburgh: William Tait, 1843).

its use as a general moral justification for punishment, but he understood that vengeance was a powerful motivator that could produce useful consequences: “It is the vindictive satisfaction which often unties the tongue of the witnesses; . . . which generally animates the breast of the accuser; and engages him in the service of justice, notwithstanding the [many] expenses.”²⁴

The basic theoretical distinction retributivists and utilitarians is this: For retributivists, treating a person merely as a means to a social end is immoral; it denies the autonomy and rationality of the wrongdoer, formally conceived. For utilitarian theorists, not only is treating a person as a *means* morally permissible, it is generally the *only* morally permissible goal of punishment, which is justified to end mischief if, but only if, the mischief is sufficiently great that failing to punish it would threaten the common good. For the retributivist, the state’s punishment machinery can be described as a kind of “sanitized revenge,” that is, it serves as a substitute for the kind of “simple revenge” that might otherwise occur when “family members of the injured or the injured himself retaliates against the wrong-doer.”²⁵ From the viewpoint of utilitarian theory, punishment serves the aggregate good when it acts to prevent future harm the possibility of which outweighs the harm done by punishment itself.

II.

We humans have recognized almost from our recorded beginnings that human life is vulnerable to invasion and harm by the acts of others, and that the basic remedy for this kind of invasion—vengeance—is an appropriate counter-invasion.²⁶ The evidence strongly suggests that this counter-invasion disposition—the “fight” half of the “fight or flight” response—is a potent adaptive reaction.²⁷ Ethologists have suggested that punishment

²⁴The “radical defect” of retaliation, according to Bentham, was its “inflexibility,” and its tendency, at least in some class of cases, to “err on the side of excessive severity.” Bentham, *supra* note # – , Pt. II, Bk. I, Ch. IX.

²⁵Andrew Oldenquist, *An Explanation of Retribution*, 85 J. PHILOS. 464, 473 (1988) (arguing that retribution fills a moral need in a community as long as conditions of fair process exist).

²⁶Martha Nussbaum, *Equity and Mercy*, in *SEX AND SOCIAL JUSTICE* 157-58 (Oxford 1999).

²⁷*See, e.g.*, Joseph LeDoux, *SYNAPTIC SELF: HOW OUR BRAINS BECOME WHO WE ARE* 7-8 (Penguin 2002) (discussing the role of the amygdala in reaction to fear engendering stimuli); Laurence Tancredi, *HARDWIRED BEHAVIOR: WHAT NEUROSCIENCE REVEALS ABOUT MORALITY* 65 (Cambridge 2005); Isaac M. Marks, Randolph M. Neese, *Fear and Fitness: An Evolutionary Analysis of Anxiety Disorders*, 15 *Ethology and Sociobiology* 247 (1994); John C. Wingfield et al., *Ecological Bases of Hormone-Behavior Interactions: The “Emergency Line History Stage*, 38 *AMER. ZOOL.* 191 (1998) (discussing the biology of freeze reactions to threatening conditions).

makes cooperative adaptation possible.²⁸ Kant called this reaction to injury retaliation; Smith spoke of resentment and punishment; others call it vengeance or revenge.

Revenge should be a personal right. After all, if retaliation is appropriate in any context, it is owed to and ought to be carried out by the individual harmed. It is not always confined to the individual, however; frequently, it is carried out by groups with an historical axe to grind.²⁹ Because groups tend to over-punish, we try to confine it's imposition to the governing authorities. But I want to bracket the political context and define it in narrower terms:

Vengeance is the rational act of getting back at, or desiring to get back at, the person who inflicts a non-trivial harm, where the harm may be physical (with all the variations we can think of in that realm); it may be proprietary; or it may be psychological, that is, some physical or verbal act. In each case, the injury suffered diminishes its victim self esteem such that, in any context, the victim wants to assert or reassert the denial of devaluation.

Forgiveness, in contrast, is a harder concept to corral because if it is a virtue, which is debatable (some argue that it is supererogatory³⁰), it is acceptable only in fairly circumscribed contexts. In contrast to vengeance, which is often a collective process (think about ethnic cleansing), forgiveness is necessarily interpersonal; that is, I think it can exist *only* between two people of relatively equal moral or legal footing.³¹ It makes no sense to me to talk about forgiving a person who has not inflicted a harm directly on me. I may be appalled and think very little of white South Africans who oppressed black South Africans by apartheid or of those who implemented and carried out *Jim Crow* laws in the American South, and I might think it is a horrible invasion when someone steals something from a family member or friend; however, I do not see how I could forgive anyone in any of these contexts when they've either stopped or been stopped: I was never stung by it. So in

²⁸See, e.g., Robert Boyd and Peter J. Richerson, *Solving the Puzzle of Human Cooperation*, in , S. Levinson, *EVOLUTION AND CULTURE* 105(MIT Press 2005); Robert Boyd and Peter J. Richerson, *Punishment Allows the Evolution of Cooperation (or Anything Else) in Sizeable Groups*, 13 *ETHOLOGY & SOCIOBIOLOGY* 171 (1992). Both articles are available on-line at <http://www.sscnet.ucla.edu/anthro/faculty/boyd/Publications.htm>.

²⁹For a disturbing discussion of collective violence in the Hindu-Muslim context, see Sudhir Kakar, *THE COLORS OF VIOLENCE: CULTURAL IDENTITIES, RELIGION, AND CONFLICT* (Chicago 1996).

³⁰See Jeffrie G. Murphy, *GETTING EVEN: FORGIVENESS AND ITS LIMITS* 36-8 (Oxford 2003) (discussing the issue of whether the obligation to forgive is conditional or unconditional).

³¹This does not mean that we cannot feel reactive emotions vicariously; clearly we can. See Strawson, *supra* note # –, at 70-2.

contrast to vengeance, forgiveness makes sense *only* if it's granted by the party who suffered the injury.

Forgiveness begins with an effort to overcome the harm that generates resentment.³² I frame it that way because resentment is an emotion that naturally follows an injury, especially and intentional one. Adam Smith spoke to the origins of resentment in *THE THEORY OF MORAL SENTIMENTS* in 1759. His idea still rings true.

What chiefly outrages us against the man who injures or insults us is the little account which he seems to make of us, the unreasonable preference which he gives to himself above us, and the absurd self-love, by which he seems to imagine that other people may be sacrificed at any time to his convenience or his humor.³³

It may well be that the actor who causes this feeling of diminution was operating carelessly rather than intentionally. Nonetheless, our reactions are of such a nature that we tend to attribute wrongdoing to the character of the individual who caused our injury.³⁴

Before turning to the circumstances under which forgiveness may be appropriate, there is a bit more underbrush to remove. First, it is important to note that forgiveness is not a legal concept; *mercy*, in the form of *clemency* or *pardon*, affects the legal process, but mercy is not necessarily an act of forgiveness. Often, I think, pardon (in particular) reflects a *miscarriage* of justice for which the *prosecution* ought to seek forgiveness; at any rate, clemency and pardon are political acts not legal ones. What makes forgiveness difficult is the fact that if it *is not* deserved, it does not look like a virtue at all; and when it apparently is deserved, it may not be necessary, at least in theory.

III.

This last point is teased out by Aurel Kolnai, who begins by making an important distinction between *forgiveness* and *condonation*.³⁵ *Condonation* occurs when a person clearly knows that someone else has done wrong—he's harmed someone else without justification or excuse—and the condoner disapproves of the wrongdoer's conduct, but she nevertheless refrains from taking any action that signals disapproval, and she knows she's refraining. *Condonation* is close to what we might call an *excuse* in legal or moral

³²Jeffrey Murphy, *Forgiveness and Resentment*, in Murphy and Hampton, *supra* note # –, at 15-19.

³³Smith, *THEORY OF MORAL SENTIMENTS*, *supra* note –, at 139.

³⁴*See infra* text accompanying note–.

³⁵ Aurel Kolnai, *Forgiveness* in *ETHICS, VALUE, & MORALITY: SELECTED PAPERS OF AUREL KOLNAI* 215-16 (ed. by F. Dunlop and B. Klug; Hackett Publ. Co. 1978).

terminology because, in circumstances that warrant an excuse, we both disapprove of the conduct and refuse to visit blame on the wrongdoer, but we assume this stance because the wrongdoer suffers from some gross and verifiable cognitive or volitional deficit.³⁶ Forgiveness, in contrast, *does not* nullify either the wrongdoing or the blameworthiness of the act; forgiving does not and must not acquiesce in the offense. To be justified, forgiveness has to face the wrong squarely—weak responses are not tolerated. In fact, if the person wronged *does* acquiesce in the offense (condonation), that person commits an offensive act of spinelessness: He permits the wrongdoer to walk all over him.³⁷

When one unravels the Kantian premises on which secular conceptions of forgiveness rest, from the moral point of view one finds an apparent paradox. That conclusion begins with the Kantian notion that everyone is entitled to full respect as rational and autonomous individuals, which is the basic premise of retribution. Since we punish to honor the fact of each individual's humanity,

we should forgive if, but only if, the wrongdoer genuinely acknowledges the wrongfulness of his act (he expresses sincere regret) and he promises solemnly and in a sustained way not to treat the victim as he had.

Forgiveness thus requires some *performative* act—an admission of wrong-doing, a plea for forgiveness and so on. If the wrongdoer goes through this kind of process, we once again accept him as a person worthy of full moral (and legal) respect. And now the paradox: If the wrongdoer actually has mended his ways, then the injured party is *required* to accord the wrongdoer the full respect his humanity deserves, in which case forgiveness is unnecessary and redundant.

Can the utilitarian exercise forgiveness? Can there be an aggregate social gain attributed to forgiving wrongdoers? Or, conversely, might we simply be encouraging wrongdoing if wrongdoers know they can receive forgiveness without genuine expressions of sorrow and be united again in the moral community? If utilitarians can embrace forgiveness, it cannot be embraced easily on the terms just described, but perhaps it can be justified on its own terms if the wrongdoer views forgiveness as a positive or pro-virtue. If, however, utility incorporates the individual in its moral calculations *only* as an instrumental contributor to the common good—that is, as one of the many units that maximize aggregate preferences—then it is difficult to envision how forgiveness, defined roughly as welcoming the wrongdoer's return to full moral status, works in a utilitarian system. The basic point is that forgiveness is based on moral respect for the individual, which is problematic from most rigorous utilitarian perspectives.

The orthodox view of forgiveness presented here rests on the idea that we *can*

³⁶See, e.g., " J. L. Austin, *A Plea for Excuses*, 57 PROC. ARIST. SOC'Y 1 (1956).

³⁷;See Smith, *supra* note # –, at 45 ("A person becomes contemptible who tamely sits still and submits to insults, without attempting either to repel or to revenge them.").

overcome our natural desire for revenge and feelings of resentment, which reactions may be hard-wired to some extent.³⁸ But to what extent? One question that needs asking is whether, in theory, our retributive emotions must *always* constrain public policy. The answer is unclear. Smith describes punishment, an institutionalized kind of revenge, as the “natural gratification” of resentment. What does “natural” entail? One interpretation of Smith, the more restrained one, holds that at least some among us have some choice as to whether or not we act on these natural impulses and, if we do, how and to what extent we act them out. So “natural,” on this view, is not synonymous with all-out revenge. A second and huskier view holds that the naturalist bases of this emotion *demand* a muscular form of retribution, for example, mandatory minimum incarceration up to and including capital punishment.³⁹ For Hume, in contrast, the distinction between the naturalist origins of our moral sentiments and the need to act on them is clearer: Although an individual’s moral sentiment of anger and resentment is always directed at the past, punishment always lies in the future; it becomes necessary only when the transgressor “renders himself by his crimes, obnoxious to the public.” When a publicly condemned wrong occurs, then we may suspend the ordinary “rules of justices are . . . for a moment, and it becomes equitable to inflict [punishment] on him, for the *benefit* of society.”⁴⁰ For Hume, then, following unjustified injury there is always an, additional forward-looking question about the need for punishment, which (of course) always has at the very least a minimal retributive feature to it. Although there is some tension here between the idea that our sentiments of resentment are part of our basic human constitution, and the question whether or not those sentiments can be suspended in the practice of punishment, still both seem to allow for some choice at least about the extent of one’s resentment and at least for some people some of the time.

A second question then is whether maintaining resentment, holding onto what Jean Hampton called that “defiant” attitude—“You’ve outraged me by giving an indefensible preference to yourself over my being and you had no right to do so, you rotten S&b, and I’ll . . .”—is a necessary feature of just punishment? Or should we try to provide a different, more compassionate strategy, knowing as we do so (i) that some sufficient portion of the polity can overcome these natural emotions, (ii) that some of the conditions for granting forgiveness will not be fully met, but recognizing (iii) that all conditions must be met to some extent otherwise we sacrifice our moral sensibilities far more than we should? When do *forgetting* and *moving on* enter our thoughts? Are “*forgetting*” and “*moving on*” morally weak combinations, akin to condonation? Or, . . . is “*moving on*” to some extent

³⁸See Lawrence Tancredi, *HARDWIRED BEHAVIOR: WHAT NEUROSCIENCE REVEALS ABOUT MORALITY* 36-6 (Cambridge 2005) (discussing the role of the amygdala in our emotional reactions).

³⁹ See Paul Russell, *Hume on Responsibility and Punishment*, 20 *CAN. J. PHILOS.* 539, 559-60 (1990).

⁴⁰ David Hume, *ENQUIRIES CONCERNING HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS* 187 (L. A. Selby-Bigge and P. H. Nidditch, eds.; Oxford:Clarendon Press 3rd ed. 1975) (emphasis in the original).

a kind of bio-social or pro-social necessity? And, if the latter, when is the overall public welfare served well by forgetting and moving on, even if all the formal conditions for forgiveness can be met only partially? That is what often occurs, for example, when parole is granted; the conditions of good behavior and a willingness to take responsibility, which are steps toward earning juridical forgiveness, are usually necessary conditions for parole.

Certainly there are some people for whom, and there may be some offenses for which, forgiveness and reconciliation just are not possible. From the vantage of criminal law, for example, individuals who lack either basic impulse control or a conscience or both don't seem to be candidates for forgiveness. That kind of outlier—the predatory psychopath, for example—doesn't live within the moral realm and so is outside the realm of forgiveness. And on the offense side, an actor who assassinates or attempts to assassinate the president of prime minister may repent and may even have earned a kind of forgiveness, but he can forget about ever getting out of prison assuming he escapes execution. At the other end of the spectrum are those who are basically decent people for whom the wrongdoing is an isolated act, or an act that may recur but only in fairly isolated conditions. But what of individuals who are in an existing relationship when a resentful act occurs, but for whom the relational benefits are sufficiently important that when the reactive emotions are triggered (because trust and esteem have been broken), some reconciliation is desired? The problem here is that the existence of the retributive emotions and the possibility of reconciliation are clearly in psychological tension and may be—if we expand generously on Joshua Greene's data about the variable neural correlates for moral problem solving that reflect retributive and utilitarian approaches to such dilemmas—in neurobiological tension.⁴¹ All of this suggests that the desired resumption of cooperative relations is going to be difficult. So then the question is: At what point might trust and moral equality be sufficiently re-established to forgive?

Here we can move away from criminal law and consider examples of how these problems arise in a hypothetical commercial and personal relationship. Suppose that Ron owns and runs Company A, which has a long term supply contract with Barb, who owns and runs Company B: Ron's company needs the product Barb's company supplies. Now assume that Barb reneges on a deal; she breaks a promise (her company breaches its contract with Ron's company) and the breach causes an injury to Company A. Ron has lost some measure of trust Barb, and he's angered and feels somewhat diminished by her apparent disregard. If Barb expresses genuine regret, provides an intelligible but non-excusing explanation,⁴² and pledges not to breach Ron's trust in the future, Ron's

⁴¹Some support for this view comes from experiments by Greene and others. See, e.g., Joshua D. Greene et al., *The Neural Bases of Cognitive Conflict and Control in Moral Judgment*, 44 NEURON 389, 398 (2004) (finding neural correlates for solving certain moral dilemmas from deontological and utilitarian perspectives); Greene et al., *An fmri Investigation of Emotional Engagement in Moral Judgment*, 293 SCIENCE 2105 (2001).

⁴²For example, Barb may explain that her company was strapped for cash when a better offer for her product was received. She will not claim that the contract breach arose because she lacked the

forgiveness and reconciliation could have a favorable effect on their relationship. In this sense, forgiveness may serve a consequential goal, namely, making Barb a more reliable partner in the future. Now, some Kantians might view this as a crass outcome—using Barb instrumentally—but it seems to me that it serves the entirely permissible goal of influencing future behavior for the betterment of everyone.⁴³

But what if Barb’s explanation consists of telling Ron that she received a better offer from another buyer, Company C? Full stop! No further explanation. She may still express regret and she may even give her pledge not to breach her promises in the future, but forgiveness seems questionable and reconciliation fairly dubious; she has admitted no wrongdoing. Ron may still need to reconcile; it may be that no other supplier can meet his company’s needs, for whatever reason. But is the “reconciliation” that occurs even genuine, or simply a descent into a mutual, temporary *modus vivendi*? Is there any reason to suppose that Barb will not repeat her behavior again whenever she finds a better price for her product? I think the hard question is whether reconciliation under this scenario will actually make things worse by, in effect, condoning Barb’s promise breaking.

Just how hard this process can be is well illustrated by the kind of mediation that occurs routinely among married couples. Now suppose Barb and Ron are spouses. Ron, the dirty scoundrel, is still trying to maximize his reproductive success, only he’s doing so with “other” women and despite the fact that he has what’s at least an average marriage of 10 or 12 or 15 years and, say, two kids. Now the relationship of trust is deeply personal and it has been severely compromised: Barb may no longer be able even to imagine trusting Ron again when he says he’s working late or going out with the guys. Can reconciliation occur without some genuine expression of sorrow? Or will they have to satisfy themselves with either a divorce or a shaky *modus operandi*?⁴⁴

Forgiveness and reconciliation are acts of beneficence. No one can claim an entitlement to forgiveness and to bestow them, the forgiver (for example, Barb as the victim of her husband in the last hypothetical) has to believe that she’ll achieve a good outcome. That doesn’t mean she should forgive Ron *in order to* improve him, because I think that would devalue her act of kindness and could bring about the worst kind of outcome—namely, forgiving someone who views forgiveness as a weakness amounting to

capacity to comply; she is not seeking an excuse. Rather, she may explain that the conduct that constituted the breach was a one-time phenomenon, she may express genuine regret, and she may seek forgiveness.

⁴³From Michael J. Murray, *Forgiveness and Repentance*, <http://72.14.207.104/search?q=cache:ox0vtvf9cC0J:server1.fandm.edu/departments/Philosophy/staticpages/Murray/forgiveness.pdf+forgiveness+philosophy&hl=en&gl=us&ct=clnk&cd=41>.

⁴⁴I would be foolish to attempt to answer this question without a good deal more background, especially into the nature of the relationship between Barb and Ron, the needs of their children, and so on.

condonation. Whether it can be done at all is answerable only in each specific context and with access to a substantial set of facts.

IV.

Perhaps, one might object, we should distinguish between the *actor* towards whom we feel resentment for diminishing us, and the *act*, and then focus on the latter. After all, that is precisely the stance taken by some Christians when they address an issue like homosexuality: Love the sinner, hate the sin! So now, forgiveness does not presuppose resentment or even a negative attitude toward the offender, but toward the offender's wrongful action.⁴⁵

Although one hears this plea frequently, there are several problems with it. First, at least in the context of homosexuality and perhaps other phenomena that deal with sexual orientation, it tends to collapse the distinction between *wrongdoing* and *illness*; the wrongdoer, on this view, is *necessarily* sick. So there is something troubling to me about this approach. In criminal law, for example, we routinely require *both* a voluntary harmful act (or a voluntary act that causes harm) *and* a culpable state of mind; except for strict liability crimes, we are told never to detach the actor's mental state from the act.⁴⁶ If it were permissible to distinguish between the actor and the act, then I think we'd have to ask frankly when, if ever, moral condemnation of an actor is appropriate. And, of course, if condemning the actor (as opposed to the act) is *never* appropriate, then punishment and moral philosophy are just damaging and ridiculous endeavors. I think the whole approach is semantically and logically suspect: At least in this context, it confuses an *act* with a *status*, which, as a matter of criminal law, it is constitutionally impermissible to punish.

Second, even if this sort of distinction were permissible, it might be psychologically impossible for the victim to make it: After all, we resent the author of the harm *for* doing something, and that something is wrong. When resentment is an appropriate moral emotion, rarely do we condemn the offender's action *and* retain a bullish mental attitude toward him as a person; excusing conditions excepted, usually it is only for our children and loved ones that we balance such dichotomous feelings as a part of their education in moral norms. We are resentful at the actor *for* his wrongful act, *for* devaluing us. Moreover, we tend to over-attribute a bad character to the actor who produced these injuries.⁴⁷ As a result

⁴⁵ See note —, *supra*.

⁴⁶ That this approach provides ample room for fudging is well documented. See, e.g., Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981) (demonstrating that even this bedrock requirement is subject to manipulation by courts that often expand or contract the relevant time frame for this convergence to occur as a matter of public policy).

⁴⁷ “Fundamental Attribution Error,” (FAE) refers the tendency, sustained robustly in the literature, for those who stand in judgment of others to over-attribute blame for wrongdoing to failures of character rather than opportunities and other factors more readily attributed to the situation in which the

of these and other forces, we want to see him defeated, in some way; defeating the perpetrator is the corrective that vindicates our own, pre-injury appraisal of worth, a point Jean Hampton and Nico Frijda make persuasively. I suspect that is why a number of philosophers who have written about forgiveness argue that to grant it, the offender has to be worthy of it; as a pre-condition, he has to undertake some *visible performative* act—some combination of admission of guilt, of blameworthiness or whatever—that reflects that fact that he *deserves* the rebuke or punishment. That visible performance distances the wrongdoer from his offensive act, and in doing so, he actively separates himself from the offense; that act allows both the victim and (one hopes) the offender to retain their negative attitudes toward the act, but it may also permit the victim to see the offender in a new (and forgiving) light.⁴⁸

Can some of the newer institutions of punishment and sentencing, such as victim-offender conferencing and even victim impact testimony, serve to reduce the moral hatred and desire for vengeance that often follows criminal victimization? Retributivism, of which forgiveness is a part, has little room for compassionate responses to wrongdoing in today's criminal justice system: It is as if our theoretical and practical reasoning capacities are at war with one another. However much we may adopt retributivism as a theory with transcendent moral and legal authority, each of us wants safe streets for ourselves, our families, our communities and our nations. And for many, retribution fulfills this personal preference.

That forgiveness may have a utility—(roughly) “get over it and move on”—suggests that we give more attention to the interface between retribution and utility as moral justifications for punishment, and less time debating these issues as if they were either-or propositions. There is some fascinating research on the neural bases for engaging in moral decision-making, all of which suggest that (i) our emotions play a major role in decision-making, (ii) that the type of decision we make tends to trigger areas of the brain with well-studied propensities toward personal as opposed to impersonal actions, and (iii) that how we make decisions has as much to do with the very nature of our wiring as it does with

putative wrongdoers finds himself. *See generally*, Mark D. Alicke, *Culpable Causation*, 63 J. PERSONALITY & SOC. PSYCHOL. 368, 369 (1992); F. D. Fincham and T.R. Shultz, *Attribution of Responsibility: From Man the Scientist to Man as Lawyer*, in 13 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 81 (L. Berkowitz, ed., 1981). I am addressing this question in *The Problems With Blaming* (discussing, among other things, some of the phenomenological consequences of FAE). For a useful work that ties FAE to the doctrinal anomalies of felony murder, to the attempt/completed crime asymmetry in punishment, and to its affect on different theories of punishment that defy the formal principle of grading, *see* Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383 (2003).

⁴⁸*See* note –, *supra*.

whether we pursue a retributivist or utilitarian agenda.⁴⁹

⁴⁹See, e.g., Greene et al., *supra* note # –, Joshua D. Greene., *from Neural “Is” to Moral “Ought”: What Are the Moral Implications of Neuroscientific Moral Psychology*, 4 NATURE REVIEWS/NEUROSCIENCE 847 (2003); Greene et al., *An fmri Investigation of Emotional Engagement in Moral Judgment*, 293 SCIENCE 2105 (2001).