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Considering Murphy on Human Executioners

Christopher Bennett

I am very grateful to Jeffrie Murphy for his response to my paper¹ and to Jonathan Jacobs for the chance to respond in turn to Murphy's criticisms. It is a particular honor for me to respond to Jeffrie Murphy, whose inspiring writings on retribution, the emotions, and human interaction I have long admired and taken as a guiding point for my own work. No excuses, however: I do not mean to attribute the weaknesses in the paper under discussion to Murphy's influence, or to curry favor. Murphy places some significant charges at my door; in what follows I re-state his target as I understand it, and then examine whether my argument has the resources to meet his criticisms.

Capital Punishment and the Virtuous Executioner

In the original paper I argued that new light could be shed on the old arguments about capital punishment if we consider them from the perspective of the executioner. In particular, I argued that a successful theory of capital punishment should provide a "general justifying aim" on which an executioner could act and still be a virtuous agent. In drawing some conclusions about where this desideratum would take us, I made some assumptions about what the "virtuous executioner" would be like. First of all, I assumed that the virtuous executioner will not simply take his social role for granted, but will ask questions about whether it is a job in which he can take pride. That is, an executioner who wants to do his job, not simply as a source of income but as a craft, who wants to contribute his life's work to some worthwhile enterprise, should be able to find in this general justifying aim the basis of a satisfying vocation. Secondly, I assumed that the virtuous agent has a standing commitment to interacting with people in a certain way that I – perhaps not very helpfully – labeled

“human interaction.” This assumption involved two interrelated points. On the one hand, that it is part of virtue in the carrying out of any role that one is capable of treating those for whom one is responsible not simply as “the next case” but as possessing a kind of individuality (and that one has some insight into what makes them individuals) – that this capability is part of what it is to see them as human. And, on the other hand, that one carry out one’s role in a way that does justice to the distinctively human capacities of those with whom one deals, so that they cannot walk away from the interaction thinking that they were simply treated as animals or as numbers or as obstacles: for instance by engaging them in very basic but distinctively human practices such as making requests of them, awaiting their responses, engaging in the back-and-forth of address and response. These points are interrelated since it seems to be a mark of individuality that one can be engaged in address and response: the interaction I am concerned with is not something one can have with one’s computer operating system, however informative it might be. Thus the general justifying aim should be something that the executioner can carry into interactions with those for whom he is responsible, and offer to them as a justification for the way his job requires him to treat them, while at the same time maintaining his attitude to them as individual subjects of address and response.

I then argued that some justifications of capital punishment fall foul of this desideratum. I was concerned in particular about the Social Control model that sees capital punishment as justified for reasons of incapacitation or general deterrence: though I also argued that my favored interpretation of retributivism – the redemptive conception that sees punishment as atonement – would need to do some work to establish that only death can be proportionate atonement for certain wrongs. I argued that the Social Control model takes it that the decisive reasons to end someone’s life are reasons of social efficiency, and that we can better see the deficiency in this justification if we think of the psychology of a virtuous

executioner attempting to act on this justification while also looking at his craft as a source of pride, and treating those in his care as individuals. The deficiency emerges, it seemed to me, as we imagine the virtuous executioner trying to reconcile his role-obligation to treat reasons of social efficiency as decisive reasons to execute a particular criminal (this is not strictly speaking a role-obligation; nevertheless, I take it that this captures the attitude of someone who sees his serving the institution of social control as a matter of pride), with his standing commitment to do justice to the individuality he can see in each person. My underlying thought was that the Social Control model of punishment has to see people as capable of being substituted one for another, so that the extinction of one person can be compensated for – and more – by the fact that others are thereby made better off; and that this perspective is difficult to reconcile with appreciating and honoring individuality. In advancing this view, I adapted longstanding objections to consequentialist accounts of punishment that have been put forward by Hegel, Duff and others. My own contribution was simply meant to put these objections in a new light by asking us to think about making social control reasons our own if we were in the position of carrying out an execution – though I also put forward the view that, as a question of moral epistemology, or the deep normative structure of moral theories, our basic grasp of the moral landscape may come when we are thinking imaginatively and vividly about what it would be like to actually act on a given set of reasons in a reasonably concrete situation.

The Social Control Model

Murphy describes my characterization of the Social Control view as “so crude and distorting that any reasonable person would reject it.”² It is not the case, he thinks, that all social control theorists recommend treating a person as a piece of social garbage to be disposed of. For instance, any social control theorist can recognize that there are values in play in addition to

those that require execution, values which may require the offender to be treated as a human being; and that, anyway, the offender will have undergone a process of investigation and trial that involves accountability and not simply social hygiene. I agree of course that social control theorists can recognize side-constraints and the necessity of a trial. In that sense capital punishment for reasons of deterrence or incapacitation is not like disposing of garbage. Nevertheless, I don't think that with this criticism Murphy has addressed the heart of the issue. My point concerns what it is like to treat social efficiency reasons for capital punishment as decisive at the point at which one is physically involved in executing an offender. Of course there may be many other reasons in play, but my question regards what it is like not to see those other reasons as defeating the claims of social efficiency to justify execution. To see reasons of social efficiency as decisive one must see the offender in a certain light – as a being capable of being substituted by others; I claim that by looking at the experience of the executioner who is capable of recognizing the offender as a distinctive individual and potential participant in a range of interactions, we can see how hard it is to reconcile the decisiveness of social efficiency with the spirit of the side-constraints: Individual preciousness as manifested in interpersonal interaction on the one hand, substitutability on the other. Thus Murphy is correct to point out that my “treating as garbage” claim is not literally true. But like Hegel's “raising a stick to a dog,” I take it that the comparison is really meant to shed light on the fact that the Social Control view is incompatible with doing full justice to what makes someone human.

In my paper I acknowledged that a full argument against the Social Control view would have to deal with recent attempts to argue that punishment can be employed as a form of defense and should therefore be assimilated to the norms of self-defense and war.³ I didn't attempt to provide a full reckoning with this view, but I did argue for a moral difference between killing in war and killing through execution. Even though the aim in both cases may

be the justifiable one of preventing harm and death to innocents, it makes a difference that when we punish our aim is to impose harm, whereas in defense the aim is to prevent it, using force only if necessary. In a footnote, Murphy questions this distinction, arguing that it is a corrupt use of the doctrine of double effect to attempt to distinguish between “what the agent is aiming at” in this way, and giving examples of soldiers (such as the sniper) who presumably must have the settled intention to kill in order to do their job successfully.⁴ Nevertheless, it does seem important that the soldier’s motivational structure should be conditional in a way that the executioner’s need not: whereas the executioner can have a settled aim despite the fact that his target currently poses no threat, it at least makes sense for the soldier to continue to review whether force is necessary until the last point at which the decision can be made. It is important, therefore, that in defense, killing is a last resort, whereas in punishment some sense of fittingness to the crime is required, which means that the appropriateness of killing has already been determined. If this difference in the norms relevant to defense and punishment can be maintained, we can distinguish two versions of the “defense” form of the Social Control model: one on which something that really qualifies as punishment is used for the purposes of defense, and another on which punishment is effectively abolished and replaced with an institution of defense. The second is the more radical, but also the simpler, since it accepts no reasons for inflicting harm that do not stem from necessity and proportionality in prevention; whereas the first invites the question of how these aims could be harmonized, given that punishment settles the question earlier than can be justified for purposes of defense. If this suggests that the abolitionist form of the “defense” view is the more promising of the two, it also suggests that it can only be successful if we have a reason to abolish punishment. If, on the contrary, we do have some grounds for retaining punishment, say as an important form of accountability, abolishing it would leave us treating offenders only as if they were to be defended against, and not as though they were

accountable. If this position seems unacceptable, it may be that one of the strongest arguments against the Social Control model generally is that it aspires to exclude or replace what should be the most salient response to wrongdoers, that is, an accountability-based response.

Professional Technique

Murphy interprets me as saying that Pierrepont is concerned only with efficient professional technique, and not with wider values that might inform the nature and use of that technique. He points out that Pierrepont was indeed concerned with the sanctity of life and thus criticizes me for overlooking this fact. However, I think this is a misunderstanding of my view on Murphy's part – a misunderstanding arising from the lack of clarity in my original presentation of the point. The interpretation of Pierrepont's professionalism for which Murphy criticizes me is only one of three that I put forward, and one that I acknowledge myself to be insufficient to explain Pierrepont's conduct and attitudes – the other two concern the way in which Pierrepont's professionalism interacts with his receptivity to wider values. I agree very much with Murphy that it is Pierrepont's openness to questions about the wider basis of his professionalism that make his testimony about being an executioner so insightful and worthy of consideration.

Punishment as Retributive Redemption

As Murphy points out, I see the retributive model of redemption through atonement as more likely to provide Pierrepont with the satisfying justification he seeks; this on the grounds that I understand the call and response of demands for atonement and their fulfillment as taking place within the field of human interaction rather than as requiring its suspension. However, Murphy makes two criticisms of my presentation. Firstly, he takes issue with my

interpretation of what it is to treat someone as an end in herself, arguing that my interpretation, which he thinks requires us to engage in a “rich” range of interactions with one another, sets the bar too high, and that his (perfectly virtuous, as it sounds to me) interactions with his students fail to meet it. And secondly, he argues that I may be guilty of “colossally” begging the question, since the range of interactions I discuss require that the person be alive, thus providing a very quick and easy argument against the death penalty and “making the rest of [my] complex essay unnecessary.”⁵ On the first point, Murphy is right that we are not engaged in an argument about Kant scholarship; we are rather engaged in arguing about how best to understand the intuition (insight?) that Kant found compelling. However, for the argument on this latter point to be fair, I need to point out that Murphy has misquoted me. The relevant passage in the original says: “appreciating someone as an end in herself involves being confronted by her reality as a potential participant in a range of valuable and fulfilling interactions” (my italics, designating the words Murphy omits). This qualification is important because the omitted words in the original passage are there to stress that the requirement to treat someone as an end does not mean a requirement actually to engage with her in the range of activities I then go on to list (and which Murphy quotes). If it did, it would indeed look overly demanding. Rather, I have in mind the thought that an essential part of what is involved in someone having moral status as an end in herself is for her to have the kind of phenomenological presence and depth that arises when one is seen as the kind of being with whom one could have various rich interactions. I take it that Murphy, in giving his lectures, does view his students as the kinds of beings who are capable of engaging in the activities I mention, and that he directs his conduct and attitudes to them on the basis that they do have the corresponding depth and presence. This point also shows that I do not beg the question by running the quick and easy argument Murphy has in mind. If what we were required to do were to interact with people in certain ways, then, I agree, it would be

impermissible to put them to death; but if what morality requires is rather that we do justice to their identity as potential participants in a range of valuable interactions and to their possession of the capacities that such interaction requires and expresses, the question of whether it is compatible with such “doing justice” to put someone to death seems to me still open.

Conclusion

Murphy argues that Pierrepont’s real reason for disillusion about his vocation was not his inability to justify capital punishment – disillusion that Murphy thinks is not called for – but his being at the mercy of demands of popularity and influence that were contrary to the integrity of the role as he saw it. I agree that these considerations – as well as the considerations Murphy mentions about the structural, institutional biases and cruelties in the penal system – might undermine the capacity of morally sensitive individuals to take pride in their work in such an institution. But as I have tried to explain, I also believe that Pierrepont’s experiences do illuminate the case against capital punishment. I regret not having convinced Murphy on this score; I would be happy, however, at least to have furthered the conversation.

Comment [A1]: Or, alternatively: “on this score”

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Notes

¹ Murphy, "People We Hire."

² Murphy, "People We Hire," 5.

³ For the fullest such attempt, see Tadros, *The Ends of Harm*.

⁴ Murphy, "People We Hire," 98 n. 6.

⁵ Murphy, "People We Hire," 8.