

BOOK REVIEW

FORGIVENESS AND MERCY

J. G. Murphy and J. Hampton

(Cambridge University Press, 1988, £22.50, xii + 194pp)

A review by Dr Norman Doe (Cardiff Law School, University of Wales)

This volume represents an attempt to cross the boundaries of theology, philosophy, and law. It focuses on the concepts of retribution and forgiveness in Christian theology and analyses critically their use in contemporary legal thought. The book takes the form of a dialogue between the two authors: Murphy challenges what he perceives as the tendency of Christian theology to overvalue forgiveness and mercy and to undervalue retribution; Hampton seeks to defend, though with qualifications, what she sees as the basic Christian requirements of forgiveness and mercy. The questions which the writers address are these: when, if ever, is hatred or anger (the 'retributive emotions') toward wrongdoers appropriate? when, if ever, should hatred be overcome by sympathy or compassion? what are forgiveness and mercy? and what role should forgiveness and mercy play in law?

In the Introduction Murphy postulates the view that it is insufficient to examine simply the law itself and its doctrines: we must look, rather, to 'underlying causal forces that in part generate both the doctrines and the intellectual rationales for them'. Systems of retributive justice, for example, must be understood as rooted in specific passions (feelings or emotions): for Murphy the criminal law 'institutionalizes certain feelings of anger, resentment and even hatred that we typically direct toward wrongdoers'. As punishment is the 'hard' response to wrongdoing, based on the retributive emotions and being a means of 'defending' rules of law, Murphy sees forgiveness as a 'soft' response to wrongdoing. In Chapter I he explores the nature of and justification for forgiveness. For Murphy, forgiveness (which he distinguishes in an interesting way from excuse, justification and mercy) is, broadly, an attempt (and even a duty) to overcome feelings of resentment, harboured by victims and society against wrongdoers, when there is an appropriate moral reason to forgive (such as the repentance of the wrongdoer). Forgiveness is not justified, though, when it reveals a lack of respect for others, such as victims, or involves acquiescence in wrongdoing. Yet, as forgiveness is about victims changing heart toward wrongdoers (in overcoming resentment felt), Murphy considers it has little real relevance to law, though he does show some sympathy (though this is left largely undeveloped) to the view that 'the law institutionalizes resentment, then to that same degree the law has reason to go easy on those persons who have been forgiven or for whom forgiveness is appropriate'.

In Chapter II Hampton discusses permissible types of hatred (simple and moral hatred) and unacceptable types (malicious-spiteful hatred) and challenges Murphy's ideas on forgiveness as being too much like an emotional change inside the victim: they are insufficiently 'active'. Not only must the victim 'drop' the judgment of the wrongdoer as a wrongdoer 'so that each party can approach the other without the sin in full view'. Rather, forgiveness also involves the victim

'reapproving' of the wrongdoer by which there is a new understanding of the wrongdoer 'as a person one can be for rather than against': forgiveness, in short, involves disregarding the wrongdoer's acts (overcoming resentment) *and* coming to see the wrongdoer 'as still decent, not rotten as a person, and someone with whom he may be able to renew a relationship'. Yet this forgiveness does not condone something bad by forgiving, 'because the forgiveness is precisely the decision that *he* [the wrongdoer] is not bad (even though his action [is]): the forgiver never gives up his opposition to the wrongdoer's *action*'. In Chapter III Murphy develops and adds to Hampton's distinction between acceptable moral and unacceptable malicious-spiteful hatred arguing (from Kant) that 'retributive hatred' is acceptable to see (and let the victim see) that people get their just deserts – 'retributive hatred [is] in principle the natural, fitting and proper response to certain instances of wrongdoing': 'the wrongdoer gets his just deserts (and what is wrong with that?), and the victim gets some personal satisfaction from seeing the justice done (and what is wrong with that?) . . . Retributive hatred is thus in principle vindicated as a *permissible, if not mandatory, response of a victim to wrongdoing*'. But hatred is not justified in all cases and Murphy explores two points: first, we do not know 'for certain' if a person is truly evil and, as such, should be cautious in exercising the emotion of hatred; secondly, we should be cautious because 'no one of us is sufficiently better than that person to be qualified to demand or inflict suffering'.

Hampton describes in Chapter IV the standard defects of retributive theories, criticising in particular the work of Herbert Morris, Mackie and Nozick, and arguing that for the retributivists, constructing their ideas around notions of desert, 'retribution may be nothing more than revenge': 'the wrongdoer inflicts one pain; the victim (or the society which represents him) reciprocates with a second'. (Though at the same time, drawing upon Scripture, she concedes that there is in the sayings of Jesus Himself a tension between the demands of love and forgiveness and anger as a response to wrongdoing.) For her the principal justification for retribution is not revenge but (i) to defeat the wrongdoer at the hands of the victim: 'to reaffirm a victim's equal worth in the face of a challenge to it . . . Thus punishment has a *telos*, but the *telos* is not so much to produce good as it is to establish goodness' – the wrongdoer's 'humbling is seen as a way of symbolizing the value of the victim whom he transgressed'; and (ii) to vindicate the value of the victim (as not suffering wrong) through protection: 'if legal punishment is a protection of one's value, then its infliction on a wrongdoer is a reflection of that value', and this functions to protect insofar as it 'can deter the commission of a crime against someone (or even something) as having value'. Now, the victim can make this demand for retribution but can still forgive the wrongdoer since 'forgiveness is a change of heart towards the wrongdoer in which one drops any emotions of hatred or resentment towards him and his deed'. And 'whereas forgiveness is a change of heart towards a wrongdoer that arises out of our decisions to see him as morally decent rather than bad, mercy is the suspension or mitigation of a punishment that would otherwise be deserved as retribution, and which is granted out of pity and compassion for the wrongdoer'. Hampton concludes that a legal system should eschew retribution and retaliation and allow for mercy 'if it admits to being interested . . . in the well-being of the offenders it punishes'.

In the final chapter Murphy presents an account of his view of mercy and compassion and discusses some of the points of contact between his thesis and Hampton's. The virtue of mercy he regards in the orthodox manner as the

expression of compassion by which an offender suffers a hardship less than his just desert (and there is an interesting discussion of the ways in which mercy may actually be conceived as ‘injustice’). This value, which is institutionalized in the criminal law, he compares (as he did in Chapter I) with excuses (which treat a wrongdoer as not responsible for his acts) and justifications (which treat the ‘offender’s’ act as not wrongful but just). Moreover, mercy is different from forgiveness (which he sees as merely a change of feelings to a wrongdoer – Hampton sees this as a prelude to forgiveness): mercy not only requires a change of feeling but a specific kind of action, treating wrongdoers less harshly; and whereas forgiveness comes from the victim, he argues, mercy can come from someone other than the injured party. Hence mercy can be institutionalized in the criminal law: but Murphy tends to the view that it ought not to be when a judge acts from his *own* pity or compassion: if a judge ‘is moved, even by love or compassion, to act contrary to the rule of law – to the rules of justice – he acts wrongly (because he violates an obligation) and manifests a vice rather than a virtue’: instead, mercy should be confined to the wronged party (the litigant in a civil suit or the state in criminal proceedings – according to the standard view that crime is a wrong against the state) ‘by waiving the rights they have’. It is only by acting as a delegate of the wronged party that a judge may properly exercise a power to show mercy out of compassion and love and give effect to the wronged party to waive the right that a guilty person be punished: then the judge is not acting personally and thereby waiving the wronged party’s rights. In short, ‘since individuals may legitimately show mercy in waiving their rights, a judge or any other official may exercise mercy in a criminal case *if* (and it is a very big ‘if’) it can be shown that such an official is acting, not merely on his own sentiments, but as a vehicle for expressing the sentiments of all those who have been victimized by the criminal and who, given those sentiments, wish to waive the right that each has that the criminal be punished’.

The book is not without its defects. Three might be mentioned. First, though Murphy explains how mercy can be institutionalized in the law there is no explicit and systematic explanation of whether this means that forgiveness (which he distinguishes from mercy) can also become institutionalized in law: he mentions only it seems in passing the important idea that mercy is ‘the legal analogue of forgiveness’; we do not see any development of the idea that forgiveness *through* the exercise of mercy may be the form by which forgiveness is institutionalized or, indeed, any developed analysis of the role of the retrospective *executive* (as opposed to *judicial*) pardon. Secondly, the book is generally disappointing as it does not give a systematic account of the virtue of forgiveness from a theological perspective – though Murphy refers, by means of the occasional proof-text, to a general biblical idea of vengeance and Hampton to the tension in Jesus’ thought between love and anger, there is no thorough discussion of scriptural notions of forgiveness or their treatment in contemporary theology: there is, for example, no discussion of the problem and permissibility of ‘judging’ in order to determine whether or not to exercise the right to forgiveness against a wrongdoer. Thirdly, perhaps (from the lawyer’s point of view) there is too great an emphasis on the emotions: the important thing is to look at the actions that people perform and whether those actions are permissible or not, whether they are just or unjust (though it is not denied, of course, that an examination of the emotions may supply reasons for those actions and may help clarify, in looking to see what people are like, what people ought to be like).

The book is of considerable value, however: not only for its discussion of ideas central to the functioning of secular law. It is valuable for the student and practitioner of ecclesiastical law insofar as it prompts us to consider in precise

terms the relevance for and the likely roles of retribution, forgiveness and mercy in the law of the Church. One lesson it teaches is that, if the concepts are to play a role in canon law, it is essential first to be able to determine, so that there is a reasonable prospect of their practical application, the meaning of retribution, forgiveness and mercy: it requires, that is, a clear and workable understanding of these ideas, and their justification, particularly from the perspective of theology. The book also serves to encourage us to question whether these concepts ought to be institutionalized in the canon law and, if so, by what means and in what form. Two points might be made. First, it urges the canon lawyer to examine the basic justification for the imposition of sanctions in the law of the Church, and to address critically the theological basis for coercive power. What, for example, is the extent to which ideas of retributive justice surface in relation to violations of the law of the Church? Ought the retributivist thesis play any part, for instance, in the imposition of sanctions for clerical indiscipline or in denying a sacrament like Holy Communion to an individual who 'by reason of malicious and open contention with his neighbour, or other grave and open sin without repentance' ought not to be admitted to the Lord's Table. Secondly, if forgiveness ought to be built into the law of the Church might the so called 'doctrine of necessity', which as Garth Moore observes is largely undeveloped in English canon law, be able to function as an appropriate vehicle? Ought the doctrine of necessity, based as it is upon notions of relaxation, to be treated as an explicit institutionalizing of values of forgiveness? In the Roman Catholic Code of Canon Law we certainly see, through the system of excuses and justification (Canons 1323, 1324), which are allowed for violations of canonical rules, and possibly through the general idea of 'canonical equity' (Canon 19), something like an institutionalizing of ideas of forgiveness and mercy.

Overall *Forgiveness and Mercy* is an interesting and imaginative book. And it is an important book for it deals with a set of large ideas whose relevance for canon law must be analysed thoroughly if we are to be able to see that the law for the Church is obedient to ideas fundamental in Christian thought.