

Retribution

*Jeffrie G. Murphy**

Many scholars and jurists who rightfully deplore the excessive punishments in our system of criminal justice—excessive in both length and cruelty—place the blame for this excess on the influence of retribution and what they view as the vile emotions of anger, hatred, and vengeance that drive retribution. This understanding of retribution is totally mistaken and, indeed, the best corrective for the evils in our present system of punishment is to be found in retribution properly understood. When properly understood retribution will be seen as grounded not in vengeance but in respect for human dignity and a concept of desert grounded in human dignity.

I. RETRIBUTION MISUNDERSTOOD

It is now almost universally agreed among informed and thoughtful people that there is something deeply wrong with America’s so-called system of “criminal justice.” Too many social problems are dealt with through criminal punishment—problems (such as the “war on drugs”) for which the system is mal-adapted—and many of those who are incarcerated in the system are often incarcerated with terms of excessive length in prisons that are rampant with cruelty—rule by gangs and rape being the order of the day—or subject to such soul-destroying treatment as long-term solitary confinement.¹ Such conditions are likely to render inmates worse people when they come out than they were when they went in, particularly given the limited opportunities for adequate health care (including mental health care) and for education or other rehabilitative programs in prison.² For those who have served their sentences,

* Regents’ Professor of Law, Philosophy, and Religious Studies, Arizona State University. The first section of the present chapter has been drawn (with permission) from my essay, *The Justice of Retribution*, 18 HEDGEHOG REV. 100 (2016). The remainder of the present chapter contains ideas that have been pursued at much greater length and detail in my chapter, *Last Words on Retribution*, in THE ROUTLEDGE HANDBOOK OF CRIMINAL JUSTICE ETHICS (Jonathan Jacobs & Jonathan Jackson eds., 2017), and in my book, PUNISHMENT AND THE MORAL EMOTIONS: ESSAYS IN LAW, MORALITY, AND RELIGION (2012).

1. See generally Jeffrey A. Miron, “Drug Prohibition and Violence,” in Volume 1 of the present Report; Scott H. Decker, “Gangs,” in Volume 1 of the present Report; Sharon Dolovich, “Prison Conditions,” in the present Volume.

2. See, e.g., Margo Schlanger, “Prisoners with Disabilities,” in the present Volume; Francis T. Cullen, “Correctional Rehabilitation,” in the present Volume.

few mechanisms exist to gain re-entry into society that will allow them to lead meaningful lives.³ In some important respects, we might even say—without too much distortion—that our system of punishment functions as a mechanism for condemning some of our citizens to live in the state of nature.

This is of concern, not just to those who might be dismissed as bleeding-heart, soft-on-crime sentimentalists, but also to those whose credentials as hard-headed realists cannot be doubted. Consider, for example, these comments from Judge Richard Posner dissenting in a prison-conditions case:

There are different ways to look upon the inmates of prisons and jails in the United States. ... One is to look upon them as members of a different species, indeed as a type of vermin, devoid of human dignity and entitled to no respect. I do not myself consider [them] in this light. We should have a realistic conception of the composition of the prison and jail population before deciding that they are scum entitled to nothing better than what a vengeful populace and a resource-starved penal system chooses to give them. We must not exaggerate the distinction between “us,” the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration.⁴

What is the cause of the deplorable state of the American penal system and what can be done about it? A variety of distinguished scholars and jurists—most recently, Martha Nussbaum in her expanded John Locke Lectures⁵—have suggested that the villain is easy to identify: retribution as the value now dominating the system. Get rid of that value (and the vengeful and angry emotions that drive it) and replace it with something else—mercy or even love perhaps—and the system will be on the road to recovery.

I believe that this diagnosis and suggestion for a cure rests upon a misunderstanding of the concept of retribution. A part of the problem is that jurists and scholars have not always been entirely clear or consistent on what is meant by the concept of retribution. I have, for example, changed my mind about the nature of retribution several times, and, a few years ago, I identified and articulated six different conceptions of retribution—all with some merit in my view.⁶ Alas, the existence of different conceptions may have contributed

3. See, e.g., Susan Turner, “Reentry,” in the present Volume.

4. *Johnson v. Phelan*, 69 F.3d 144, 152 (7th Cir. 1993) (Posner, C. J., dissenting).

5. See MARTHA C. NUSSBAUM, ANGER AND FORGIVENESS: RESENTMENT, GENEROSITY, JUSTICE (1996).

6. See JEFFRIE G. MURPHY, PUNISHMENT AND THE MORAL EMOTIONS: ESSAYS IN LAW, MORALITY, AND RELIGION ch. 6 (2012).

to the belief of many that the very idea of retribution is inherently vague—too much so to play a significant role in deciding which people, if any, may legitimately be punished

Problems of clarity, of course, are not the only problems facing retributivism. In recent times, I have become alarmed at the degree to which the forces of darkness—those willing to support cruelty and perhaps wanting even more of it—have often co-opted the term “retribution” for their own uses. We will find them using the concept of desert—a core concept of genuine retributive thinking—in totally perverted ways. The language of retributive desert has been exploited in claims that absurdly long prison sentences and unspeakably horrendous treatment of prisoners do nothing more than give criminals exactly what they deserve. I have also come to realize that the high-sounding rhetoric of retribution and desert often functions as a cover (perhaps unconscious) for the base passion that 19th-century philosopher Friedrich Nietzsche called ressentiment: an unwholesome brew of malice, spite, envy, and cruelty.⁷

Retributive language remains susceptible to similar corruption in our own day. In response to the serious problem of prison rape, for example, some will simply assert—as one of my law students recently said—that prisoners (even those young people in prisons for nonviolent drug offenses) are just getting what they deserve. Likewise, some of my fellow citizens expressed the view that a recent execution in Arizona that took over two hours and seemed to cause the victim non-trivial pain was deserved—one even saying that the convicted man deserved to take longer to die in pain. Unsurprisingly, sophisticated speakers have described retribution as a receptacle for man’s worst impulses, giving “spurious sanctity to society’s craving for vengeance and its desire to make criminals suffer with as little discomforting reflections as possible.”⁸ Members of the U.S. Supreme Court have repeatedly referred to retribution as synonymous with “vengeance” or “revenge.”⁹ In his valedictory against capital punishment, Justice Stevens proclaimed that “our society has moved away from public and painful retribution toward ever more humane forms of punishment. … [B]y requiring that an execution be relatively painless, we necessarily [undermine] the very premise on which public approval of the retribution rationale is based.”¹⁰

7. See *id.*, chs. 2 & 4.

8. David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1656 (1992).

9. See, e.g., Furman v. Georgia, 408 U.S. 238, 343 (1972) (Marshall, J., concurring); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 189 (1963) (Brennan, J., concurring); Morissette v. United States, 342 U.S. 246, 250-51 (1952).

10. Baze v. Rees, 553 U.S. 35, 80-81 (2008) (Stevens, J., concurring).

Punishment must be harsh, painful, vengeful—ostensibly pursuant to a theory that, when interpreted as it should be, demands none of these things and, in fact, would reject as unjust the cruel excesses of America’s system of crime and punishment. My view is that what the system needs is more retribution, not less, and that one of the main things wrong with the present system is a significant compromise of that value properly understood. We need, in short, to reclaim retribution in its original and proper sense.

II. RETRIBUTION RECLAIMED

What is retribution’s original and proper sense? If we go all the way back to ancient Greece, the word generally translated as “retribution” is nemesis. Although these days nemesis is often used (as is the word “retribution”) to mean “imposing harsh punishment,” the actual meaning of both words is “dispensing what is due or deserved.” So when contemporary philosophers of criminal law such as Michael Moore claim to be retributivists,¹¹ they are claiming that a central concept in the justification of punishment should be desert—that punishment should be imposed on criminals because they deserve it and not simply because of, for example, a utilitarian notion of future crime control. Understood in this way, retributive values can just as easily be used to condemn some punishments as too severe as well as condemning some others as not severe enough. The claim that retribution represents a special fondness for harsh punishment is simply false.

As mentioned, both prominent jurists and philosophers have condemned a retributive account of punishment because of a belief that those who favor punishment on such grounds must favor causing pain, something that these critics believe can never be justified by the claim that it is deserved.¹² When the retributivist views punishments as justified suffering, however, the meaning of “suffering” at play here is not “pain.” It is rather suffering in the sense of enduring. (Think here of such phrases as “he does not suffer fools gladly.”) To suffer punishment is to endure having at least a portion of one’s life taken out of the voluntary control of one’s will.¹³ There is no reason to think, however, that what will be endured by the wrongdoer must be painful—unwelcome, of

11. See generally MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* (1997).

12. See *supra* notes 5 & 8-10 and accompanying text; see also T.M. Scanlon, *Giving Desert its Due*, 16 PHIL. EXPLORATIONS 101, 102-04 (2013).

13. Herbert Fingarette, for example, made a powerful retributive case that the criminal wrongdoer, having presumed to exercise a level of will that is incompatible with the rule of law, must endure having his will “humbled”—deserving to have his ability to control his own life by his own will limited or restricted to some degree. See Herbert Fingarette, *Punishment and Suffering*, 50 PROC. & ADDRESSES AM. PHIL. ASS’N 499 (1977).

course, but not necessarily painful in any ordinary sense of the word “pain.” Indeed, punishments such as torture that involve physical agony will be condemned by the retributivists since they involve reducing a human being to a screaming and defecating animal and are thus incompatible with respecting the humanity or dignity of the person being punished.

Finally, it is important to realize that the common claim that retribution is really the same as revenge or vengeance is simply false. Vengeance is punishment inflicted by victims to whatever degree will satisfy them. This will, of course, often involve inflicting a level of punishment far in excess of what wrongdoers actually deserve as a matter of justice or, if certain victims are committed to the values of love and forgiveness, punishments far less than the wrongdoers actually deserve as a matter of justice. Revenge also engenders an atavistic disdain for the type of procedural guarantees that protect against punishing the innocent. For the retributivist, intentionally punishing an innocent person is a grave wrong—wrong precisely because that person does not deserve to be punished—which cannot be justified as placating the demands of a riotous mob or by appeal to hoary notions of the “blood feud.”

The introduction above of the concept of justice leads naturally to the background moral view that might be used to justify preferring a backward-looking desert model of punishment over a purely future-oriented utilitarian crime-control model. A good place to start here will be with the Enlightenment philosopher Immanuel Kant.¹⁴ Although Kant’s overall justification of punishment is less than fully clear and consistent, a strong thread that runs through it is retributive—using a concept of retribution that draws heavily on the concepts of humanity and dignity and the requirement of justice that human beings must always be treated in ways that respect these values. Since this is not an essay in Kant scholarship, I will in what follows briefly lay out what I regard as an essentially Kantian (if not literally in all ways Kant’s) view of punishment and its retributive foundation.

The Kantian view of the basic dignity of human beings lies in the fact that they are (except for such obvious exceptions as severe mental illness) to be respected as free and autonomous rational beings who can be trusted with the freedom to manage their own lives and who can legitimately be held responsible for what they do—praised for acting rightly and condemned (and sometimes legitimately punished) for doing wrong. A Kantian on punishment could thus

14. I have discussed in detail Kant’s views on punishment in Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509 (1987).

welcome the claim by another German philosopher, Georg W.F. Hegel, that we as human beings have the right to be punished¹⁵—a right to be treated as responsible agents and not condescendingly insulted by the claim that we are such victims of our genes and social circumstances that we are really defective or diseased individuals more in need of therapy than punishment. (This will be true of some people, of course, but the Kantian will not accept this as the default position.) To say that a person deserves punishment is, when one considers the condescending therapeutic alternative or pure social-control rationale, to pay that person a kind of compliment.

The idea of human dignity is the basis of Kant's famous categorical imperative—a fundamental principle of morality that, in one of its forms, claims that human beings must never be treated as means only but must always be respected as ends in themselves.¹⁶ This would rule out the punishment of the innocent or punishment of those who for other reasons (a valid excuse or justification for example) do not deserve to be punished no matter how much future crime control might be accomplished by this punishment. It would also rule out punishing offenders in excess of what they can reasonably be thought of as deserving simply to obtain some hoped for good future consequence. “You are being punished, whether you really deserve it or not, as a means to the future social good of crime control.” How could a person of conscience look a criminal in the eye and say that? A person of conscience could, I think, look a criminal in the eye if one could truly say “You are being punished because, given your culpable wrongdoing, you brought it on yourself and deserve it.”

Some will, of course, argue that so many criminals are from groups so oppressed by poverty or racism that there is a sense in which their crime is society's fault—not theirs—and that therefore they did not bring their criminality on themselves or deserve punishment for it. Put in such a simplistic form, the claim is in my view insulting to poor people and members of racial minorities—most of whom manage, in spite of the obstacles they have faced, to live exemplary moral lives of which they can legitimately be proud. To the degree that there is some truth in the claim—and there is indeed some truth—I believe that the best way to formulate that claim is within the framework of a retributive outlook on punishment. These true claims do not, in my view, cry out for the application of some value such as mercy or love or compassion but rather serve as the basis for an argument that the relevant individuals do not

15. See G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 123 (Allen W. Wood ed. & H. B. Nisbet trans., 1991) (1821).

16. See IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 52-54 (Robert P. Wolff ed. & Lewis W. Beck trans., 1969) (1785).

deserve punishments of a certain kind or level and that it would be unjust for them to receive such punishments.¹⁷

One of the important things to realize about desert and justice is that they are obligatory—they impose specific and clear non-optional duties. Mercy, on the other hand, is generally regarded as a free gift—an act of grace that is good to perform but not a matter of justice or duty since nobody has a right to it. (“The quality of mercy is not [con]strained” as Shakespeare’s Portia has it.)¹⁸ Christians of course regard love as a duty, but former Archbishop of Canterbury William Temple has some useful counsel about the social and legal role of that duty: “It is axiomatic that love should be the dominant Christian impulse and that justice is the primary form of love in social organization.”¹⁹

If, as psychologists are increasingly claiming, long-term solitary confinement is soul-destroying—destroying the very core of a person’s character and sense of self—then mercy is not the value that will form the basis of a powerful condemnation of this practice. The condemnation would become a kind of generosity—a non-obligatory way of being nice. Surely it must be said that the condemnation is more than this: a binding duty of justice, a duty to respect the rights that all persons (including criminals) have as human beings possessed of human dignity. Kant put the point this way: Punishment must “be freed from any mistreatment that could make the humanity of the person suffering it into something abominable.”²⁰

The philosopher of language J. L. Austin placed a very high premium on clarity. A critic of his once said that clarity is not enough, and Austin replied that there will be plenty of time to go into that after we have achieved clarity on something.²¹ There surely is more to love and compassion than justice, but perhaps there will be plenty of time to go into that after we have managed to achieve a level of justice far in excess of what can now be found in our present system of criminal punishment.

III. A FEW LIMITS AND CAUTIONS ON RETRIBUTION

Properly understood, retributive desert is always a very strong reason that favors punishment and, other things being equal, the punishment that is

17. Cf. Cassia Spohn, “Race and Sentencing Disparity,” in the present Volume.

18. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act IV, sc. I, l. 181 (Jay L. Halio ed., 1993) (1596).

19. LORD DENNING, THE INFLUENCE OF RELIGION ON LAW 3 (1997) (quoting Temple).

20. IMMANUEL KANT, THE METAPHYSICS OF MORALS 142 (Mary Gregor ed. & trans., 1991) (1797).

21. See J.L. AUSTIN, *A Plea for Excuses*, in PHILOSOPHICAL PAPERS 137 (1961).

deserved should be inflicted.²² But other things are not always equal since not all evils are part of the legitimate concern of the liberal state (a point I will discuss below) and since consequences of sufficient gravity sometimes require that certain principles be overridden. As I have noted above, for example, I believe that much of the treatment given prisoners in the United States is so inhumane that it is wildly beyond what any human being deserves. Does this mean that I believe that the doors of all the prisons in America should immediately be opened and everyone in them, including the most violent and dangerous, be allowed to run free and prey on the innocent? No. (I might, however, favor letting out many nonviolent offenders for these reasons.) Conversely, I would support not punishing those who deserve to be punished if so doing would, for example, cause serious threat of the collapse of democratic government and a return to tyranny or something of a similarly horrendous nature, as may have been the case in Chile after Pinochet left office or in South Africa with the end of apartheid. Absent such threats, however, I would favor punishing at least the worst of them (the torturers, rapists, and murderers and those in power who instructed them to act in this way).

So it is false to claim that retributivism will never allow consequential considerations to override considerations of retributive desert in cases in which not to do this seems just plain wrong.²³ In saying this, however, I would insist that we should keep vividly aware that—when desert values are being trumped by consequential considerations—we are not simply doing what is right (end of story) but are rather, out of a regrettable necessity, violating an important principle if we continue to punish in excess of desert or do not punish those who are deserving. This is a choice between evils and in such a choice the evil that is left in place (because one chose to avoid an ever greater evil) remains an evil. A retributive outlook preserves this sense of something wrong having regrettably been necessary in a way that a consequential theory would not.

With this understanding, one might acknowledge that a (if not the) general justifying aim of having the practice or institution of criminal law is the consequential one of crime control.²⁴ But this aim, I think, must be joined by retributive desert as another general justifying aim or, at the very least, have the aim of crime control constrained by a variety of related retributive desert

22. Indeed, many critics of retributivism (and some of its defenders) think that retribution always requires punishment. See, e.g., T.M. Scanlon, *Punishment and the Rule of Law*, in DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS 257 (Harold Hongju Koh & Ronald C. Slye eds., 1999); CARLOS NINO, RADICAL EVIL ON TRIAL (1996).

23. For discussions of consequential considerations, see Daniel S. Nagin, "Deterrence," in the present Volume; and Shawn D. Bushway, "Incapacitation," in the present Volume.

24. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY ch. 1 (1968).

considerations—considerations that include, of course, legal guilt but also involve far more than legal guilt. One important reason for having a system of punishment is to give morally evil people the suffering that they deserve but that only a subset of such people, for consequential reasons, will actually be identified as legitimate targets for punishment—namely, bad people whose badness has a tendency to undermine the social order of rights that it is the business of the liberal state to maintain.

For this reason, I believe it would be a great mistake to say that the sole purpose of criminal punishment is to make people suffer for doing evil and being culpable for that evil. If we adopted such a broad view of the goal of punishment, we would need to punish people for things that are really not the business of the liberal state and would compromise important liberal values. Consider, for example, betrayals of intimacy. I happen to regard the betrayal of a friend or spouse, in selfish pursuit of one's own personal interests, as a very grave evil and I will be happy if those who commit such evil wind up being miserable. I would not, however, want such people to be subject to criminal punishment since I do not think that attempting to regulate private intimacy among adults is a legitimate goal of the liberal state and would, if attempted, involve intrusions into personal privacy that would be quite unacceptable.

Think of this in social-contract terms. Would rational people, in seeking to form a society, adopt the highly intrusive and costly mechanism of criminal punishment simply to achieve the moral result that evil people suffer in proper proportion to their iniquity? Surely not. Such people will very likely as a first crack adopt such a system and its associated costs (in liberty and treasure) for Hobbesian reasons—namely the desire to remain secure in the enjoyment of their rights and liberties and not have these threatened or undermined by those who would wrongfully subject them to attack. If morally decent they will come to want the coercive apparatus of the state, even when pursuing the laudable goal of crime control, to be constrained by a commitment to the kind of retributive desert values that I outlined in the earlier part of this chapter but aiming at such values as the sole purpose of criminal law will not seem a rational option for them.

Also, as I have argued in several of the essays in my book *Punishment and the Moral Emotions*,²⁵ there are important cautions in the writings of those who condemn retribution and advocate its replacement by such values as love, mercy, and forgiveness. Although such replacement is unwise and rests on a misunderstanding of retribution, these writers have seen an important danger

25. See MURPHY, PUNISHMENT AND THE MORAL EMOTIONS, *supra* note 6, chs. 3 & 6-8.

in a retributive approach—namely, that it will tempt some people (all of us perhaps) to become self-righteously censorious and become so enthusiastic in our desire to give people their just deserts that we become tempted to punish too many things and punish with excessive severity—thereby compromising the very values for which retributivists stand.

Retributivists are no more immune to the temptations of human depravity than are those who advocate punishment on other grounds, and so it is good to keep in mind Friedrich Nietzsche's wise counsel that we should mistrust any person in whom the urge to punish is strong. "Anyone who fights with monsters should make sure that he does not in the process become a monster himself."²⁶ Even Kant was able to see the dangers of being consumed by a corrupt version of his own brand of retributivism and counseled against this corruption in his *Doctrine of Virtue*: "[N]o punishment ... may be inflicted out of hatred. Hence men have a duty to cultivate a conciliatory spirit. ... But this must not be confused with placid toleration of injuries."²⁷ So those who recommend that love, mercy, and forgiveness play a role in our thinking about criminal punishment are, in my view, best interpreted as providing not an alternative to retribution but rather an important caution about its dangers.

RECOMMENDATIONS

Suppose that retribution, correctly understood, started to play a significant role in penal reform. What might some of these reforms be? I have already suggested retributivist grounds for opposing the soul-destroying results of long-term solitary confinement. Here are a few more suggestions:

1. **There should be significant limitations of the current practice of avoiding trials through plea bargaining.** Although plea bargaining has legitimate functions, it too often involves frightening a defendant (who may be of limited intelligence and provided with poor legal representation) into pleading guilty to something he did not do by persuading him that if he goes to trial he will almost certainly be convicted of something even worse (that he also did not do) with a longer sentence.²⁸ When prosecutors are able to stack multiple (and often overlapping) charges against a defendant, he is in effect terrorized into pleading guilty to avoid the risk

26. FRIEDRICH W. NIETZSCHE, BEYOND GOOD AND EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE 168 (Marion Faber trans., 1998) (1886).

27. IMMANUEL KANT, THE DOCTRINE OF VIRTUE 460-61 (Mary J. Gregor trans., 1964) (1797).

28. See generally Jenia I. Turner, "Plea Bargaining," in Volume 3 of the present Report.

of trial. This kind of assembly-line justice may be economically efficient but ignores the kind of individuation that is required by respect for the dignity of persons. Surely the defendant deserves better.

2. **The crime itself will be defined with retributive desert playing a significant role—e.g., mens rea will be required for all crimes (no strict liability), even if this undermines utility to some degree.²⁹** This will require significant reform in defining so-called “public welfare” or regulatory crimes, for instance, and will require the abolition of the strictest form of the felony murder rule.
3. **The grading of criminal offenses will be a function of retributive desert—the higher the grade, the heavier the punishment.** Given the influence of the Model Penal Code, this condition is widely satisfied already but there are still some areas that would benefit from more thought. Consider, for example, the grading of homicide offenses—premeditated deliberate intentional killing often graded as the most severe. However, as Samuel Pillsbury has suggested, there are retributive reasons why this ranking may be mistaken.³⁰ If the goal is to give a wrongdoer the punishment that he deserves, then does the mercy killer deserve being thought of as the worst of the worst simply because his killing is intentional, deliberate, and premeditated? Is he worse than those who are guilty of what is called in some jurisdictions “depraved-heart murder”—a killing that results from recklessness so extreme that it reveals a wanton indifference to the value of human life? As things now stand, the premeditated killer will be convicted of first-degree (perhaps capital) murder and the depraved-heart killer of second-degree murder. My own retributive instincts tell me that this ranking is wrong.
4. **After conviction, considerations of desert will play a significant role in clemency or parole—at which time such states of character as remorse or its absence may be regarded as relevant.** As a general matter (there are some exceptions), the truly remorseful and reformed criminal strikes me as deserving a shorter prison term than the criminal who remains hardened, hateful, and unrepentant. The dangers of faking are always significant, of course, and so it would be reasonable to suggest that these considerations play a greater role in clemency than in sentencing. One will generally have

29. See Douglas Husak, “Overcriminalization,” in Volume 1 of the present Report.

30. See SAMUEL PILLSBURY, JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER (1998).

a more reliable assessment of the sincerity of claimed repentance when one has over time had an opportunity to observe the criminal while in prison—more time than one has at the trial and sentencing stage.³¹

5. **Prison conditions will be considered a part of punishment and Eighth Amendment constraints against cruel and unusual punishments will meaningfully and significantly apply to them.** Except in one kind of case (a case in which prison officials are reckless with respect to prevention) the United States Supreme Court has been unwilling to extend the Eighth Amendment ban on cruel and unusual punishments to such things as a failure to prevent rape, failure to control abuse from prison gangs, or putting a stop to those long periods of solitary confinement that are destructive of an inmate's very personality. The general court doctrine has been that these are not punishments but are rather prison conditions—a piece of pure formalism if ever there was one. When sending people to prison, we are now in effect often simply throwing them into the state of nature and have forgotten the wisdom of the old maxim that we send people to prison as punishment not for punishment. There may be considerable deterrence value in leaving things as they are since any normal person will surely be terrorized by the fear of being thrown into an environment of rape and abuse. But does any human being deserve such callous and inhumane treatment? Such treatment shows no consideration at all for what his dignity as a human being demands.
6. **Punishments of excessive length are to be avoided.** Consider the individual who commits fairly low-level nonviolent drug felonies. Does this individual deserve to spend the rest of his life in prison—even if he has committed three such felonies and thus falls afoul of the “three strikes and you’re out” slogan? Does he deserve the same sentence that might be given for a rapist or murderer? I think not.³²

I have in this chapter attempted to make a case that retribution, properly understood, should guide much of our thinking about the reforms needed in our criminal justice system. It should not be all that guides our thinking, of course, but it deserves to reclaim a place at the table where such reforms are being discussed—a place to which it has long been denied because of misunderstanding and even misrepresentation of what retribution is and because the language of retribution has often been co-opted by the forces of darkness.

31. See MURPHY, PUNISHMENT AND THE MORAL EMOTIONS, *supra* note 6, ch. 7. For a discussion of clemency, see Mark Osler, “Clemency,” in the present Volume.

32. See, e.g., Erik Luna, “Mandatory Minimums,” in the present Volume.