

Christian love and criminal punishment

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What would law be like if we organized it around the value of Christian love, and if we thought about and criticized law in terms of that value? Christian love as a divine command is, of course, not identical with either *philia* (friendship love) or *eros* (erotic love), although it may incorporate elements of both. Christian love is rather that kind of universal (that is, non-particular) love called *agape* or love of neighbor. American philosopher John Rawls claimed that justice is the first virtue of social institutions. But what if we considered *agape* to be the first virtue? What would social institutions – law in particular – be like?

My primary focus in this chapter will be to explore criminal law and the practice of criminal punishment from a perspective of Christian love. Why should anyone really care about such an exploration? Almost everyone would acknowledge that Christianity's emphasis on the moral and spiritual significance of the inner life exercised great influence on the development of a comparable emphasis on this in Western criminal law – for example, the idea that *mens rea* (intention, for instance) is generally required for conviction of any serious crime. But this general rejection of strict liability, one might think, has more to do with justice than with love, and this may still leave one with the question of why one should care about the value of love in thinking about criminal law.

One might begin to answer this question by noting that one does not have to choose between love and justice and that, indeed, justice (properly understood) may be entailed by love (properly understood). Former Archbishop of Canterbury William Temple put it this way: "It is axiomatic that love should be the predominant Christian impulse and that justice is the primary form of love in social organization."¹ To say that one is acting in a loving way while subjecting a person to unjust oppression can only be seen as a sick joke.

¹ Quoted in Lord Denning, *The Influence of Religion on Law* (Alberta, Canada: Canadian Institute for Law, Theology, and Public Policy, 1997), 3.

In addition to welcoming Archbishop Temple's invitation to think of justice as a part of love, I also have some personal reasons for caring about the issue of love and punishment. Because of my upbringing, I have always been someone whose moral sensibilities are grounded – even when in the past I called myself an atheist – in the Christian tradition, a religious tradition that makes love of neighbor central. When a person brought up a Christian becomes an atheist, he tends to become a Christian atheist. The questions he chooses to make central and many of the answers that tempt him are often framed, even if he does not realize it, by the very set of beliefs he claims to reject. I suspect that this is true for other religions as well. I suspect, for example, that my Protestant upbringing had a great deal to do with the fact that I was early in my studies so drawn to the moral philosophy of German philosopher Immanuel Kant, a philosopher who has been interpreted, with some justice, as seeking a secular and rational defense for what is essentially a Protestant moral vision. The child is father of the man, as Wordsworth reminded us.

Of course, even those outside the Christian tradition generally celebrate some version of the value of love. We know from popular culture and music that “love makes the world go round,” that “love conquers all,” and that “all we need is love.” One might thus find it both interesting and puzzling to consider how, if at all, that value can consistently sit with law – particularly criminal law, which often seems a very harsh and unloving institution.

Finally, there is a great deal of public sermonizing from politicians these days – far too much for my taste – that purports to draw the basic tenets of Christianity into political decision-making. It might be useful to examine what the actual legal consequences of Christianity properly interpreted would be, consequences that could turn out to be quite different from those represented in much current political posturing. As the bloody record of historical Christianity clearly reveals, those in power who speak the language of love do not always act in loving ways but can instead be vessels of intolerance, persecution, hatred, and cruelty.

I realize that I cannot speak for all Christians or survey Christian scholarship in a brief chapter, but I can, at most, give my own “take” on what Christianity has to offer on the topics of crime and punishment. Neither can I explore every aspect of the relationship between criminal law and love. So I shall focus on only one aspect: the nature of *forgiveness* – often seen as a paradigm Christian virtue – and its relation to criminal law and criminal justice. I focus on this aspect because many people seem to think that forgiveness is at odds with criminal punishment, that to the degree we are forgiving then to that degree we will oppose punishment. Indeed, in a

recent provocative essay, Notre Dame law professor Thomas Shaffer goes even farther than this. In developing what he calls a “jurisprudence of forgiveness,” Shaffer argues that forgiveness is not simply incompatible with criminal punishment but with the very idea of law itself. Speaking of those prisoners securely imprisoned on death row, he writes:

There is no rational argument any longer to kill them – much less the common good argument Caiaphas had for killing Jesus. Legal power, it seems, has to kill them anyway, if only because it would not be legal power if it didn't. Law here cannot take the risk of forgiveness. Forgiveness would remove the fear, the accountability, and the responsibility that law provides – and this, as law sees it, would invite chaos [because] . . . forgiveness disrupts legal order.²

Shaffer's claim strikes me as deeply wrong – confused all the way down, if I may say so. I think that he misunderstands both forgiveness and love and thus misunderstands the relationship that forgiveness and love bear to law and punishment. I realize that this is a strong claim made against a distinguished academic who has produced much admirable work, and I will have an uphill fight making a case for it. Since many people share some version of this confusion, however, unmasking it is worth a shot.

THE LOVE COMMANDMENT

Before getting into the details of a law-versus-loving forgiveness debate, however, let me begin with a bit of background, and remind you of the Christian love commandment itself. It occurs most famously in Luke 10:25–37 when a lawyer – yes, a lawyer – interrogates Jesus and asks him how one might gain eternal life. Jesus answers that the lawyer knows the answer to this question already, for it is found in Jewish law: “You shall love the Lord your God with all your heart, and with all your soul, and with all your strength, and with all your mind; and your neighbor as yourself.” Continuing his cross examination, the lawyer then asks: “And who is my neighbor?” Jesus replies not with a definition of “neighbor” but with the parable of the Good Samaritan.

Two things relevant to the present chapter are worth noting about this scriptural passage. First, it must be emphasized that, for the Christian, what happens to the human soul – in this life and the next – is of primary concern. Note that the love commandment is endorsed by Jesus as the

² Thomas L. Shaffer, “The Radical Reformation and the Jurisprudence of Forgiveness,” in *Christian Perspectives on Legal Thought*, ed. Michael W. McConnell, Robert E. Cochran, Jr. and Angela C. Carmella (New Haven, CT: Yale University Press, 2001), 325–26.

correct answer to the question “What must I do to inherit eternal life?” Thus a central question for the Christian with respect to punishment must be, not simply what will happen to the body, but what will happen to the soul. (Those who prefer a less metaphysically rich term might provisionally – but only provisionally – here substitute “character” for “soul.”) One who is impatient with this concern must necessarily be impatient with Christianity at its core and thus with much of what Christianity will have to say about punishment.

Second, and intimately related to the first point, is the importance of not mistakenly interpreting the role played by the parable of the Good Samaritan in this scriptural passage. If one mistakenly sees this parable as primarily an answer to the question “What is love?” one might be led to see *agape* as nothing more than what could be called liberal compassion – helping the sick, the despised, and the poor. The love commandment surely involves that, as it involves justice, but I think that it also involves much more. The actual question answered through the parable, however, is not “What is love?” but is rather “Who is my neighbor?” The answer that seems to emerge from the parable is that *all human beings* are to be seen as neighbors. As Danish theologian and philosopher Søren Kierkegaard puts it: “when you open the door that you shut in order to pray to God and go out the very first person you meet is the neighbor whom you *shall* love”³ – regardless of whether that person is your enemy, a member of some despised group, your king, a criminal, or someone who strikes you as intrinsically and grotesquely unlovable.⁴ This is a doctrine of universalism, in contrast to tribalism, with respect to loving concern. Some Christians like to claim that it is unique to the moral outlook of Christianity, but in fact a similar kind of moral universalism can be found in some aspects of Stoicism and Judaism, and I suspect elsewhere as well.⁵

There are, of course, many fascinating questions that could be raised about the love commandment. Does it command love as an emotion or simply that we act in a certain way? Kant, convinced that we can be morally bound only to that which is in our control and believing (hastily in my view) that emotions are not in our control, called emotional love *pathological love* and claimed that it could not be our duty to feel it. What is actually commanded he called *practical love*, which is simply acting morally as Kant conceived it. In the century after Kant, Kierkegaard in

³ Søren Kierkegaard, *Works of Love*, ed. and trans. Howard V. Hong and Edna H. Hong (Princeton, NJ: Princeton University Press, 1995), 51. ⁴ *Ibid.*, 17–90.

⁵ See further the chapters by David Novak and Brian Tierney herein.

his *Works of Love*, famously raised a variety of additional puzzles about Christian love of neighbor. He assumed that we would all agree that most human beings seem to be anything but lovable. (If you think it is possible to love everyone, just look around in a supermarket as Ayn Rand once suggested.) Given the apparent unlovability of those Kierkegaard called “your very unpoetic neighbors,” would it be possible to love them absent a divine command to do so? Kierkegaard thought not.⁶ And to what degree, if at all, is the command of love of neighbor compatible with those particular loves of lovers, spouses, children, parents, friends, and one’s own country that Kierkegaard calls “preferential”? This was a question of great concern to Kierkegaard. Such loves seem to many of us among the crowning glories of human life and thus most of us will not look with favor upon Jesus’ teaching that “any one [who] comes to me and does not hate his own father and mother and wife and children and brothers and sisters, yes, and even his own life . . . cannot be my disciple” (Luke 14:26). Even most devout Christians will seek some way of interpreting this remark to keep it from having the unhappy consequence it seems to have upon first reading.

Given my limited purposes to explore the place of agapic forgiveness in the context of law, particularly criminal punishment, I think that all I will need to say about love here is the following, what I hope most interpreters of Christianity would find non-controversial: *agape* is not simply a matter of being nice and cuddly – of giving everyone a warm hug, saying “have a nice day,” and sending them on their way. In spite of what the secular mind and even some religious believers might wish, the full doctrine of *agape* is to be found not simply in the social gospel films of Frank Capra but also in the grim stories of Flannery O’Connor and in the hard and demanding theologies of Augustine and Kierkegaard. “God loves you whether you like it or not,” as the bumper sticker says.

One of the things that is manifestly not cuddly about *agape*, at least as I understand it, perhaps shows the influence of ancient Greek thought on love and friendship (*philia*). It is this: such love is concerned not simply with satisfying preferences, alleviating distress, providing for people’s material well-being, and thereby making their lives more pleasant – what I earlier called liberal compassion. It is also centrally concerned with promoting their moral and spiritual good – helping their souls or characters to grow in *virtue*. (Recall Aristotle’s discussion of what he calls “the perfect form of friendship.”⁷) In this way, a legal order dominated by *agape* would

⁶ *Ibid.* ⁷ Aristotle, *Nicomachean Ethics*, 1156b.2f, and generally bks. 8–9.

almost certainly be more paternalistic than would be acceptable to the more value neutral and libertarian versions of political liberalism of, say, John Rawls or Ronald Dworkin. Those motivated by *agape*, as a basic principle, will (subject no doubt to some major side-constraints of a prudential nature) seek to design legal practices and institutions with a view to the moral and spiritual improvement in virtue of affected citizens.

In the area of free expression, just to give one example, such persons will probably seek greatly to restrain the corrupt and corrosive availability of pornography – refusing to see its production, distribution, and consumption as an important human liberty. They might very reluctantly allow pornography for practical or instrumental reasons – if they think that it is impossible to design a legal prohibition that would not constrain legitimate expression. But they would never seek to protect it in principle under the general heading of a fundamental right of personal autonomy. Rather than seeing basic rights as rights to exercise unrestrained “do your own thing” autonomy, they would tend to see such rights (as some perfectionist liberals see them) as rights to choose only among options that could all be part of a good life. Thus they would see conversation about the good life as being central to law and politics, not as in principle a “private” matter that should be left out of the political and legal domains. This suggests that there may be some interesting tensions between some forms of political liberalism and *agapic* love as I have conceptualized it – tensions that might force some choices that many would find hard and unattractive.

For the law of crime and punishment, those motivated by *agape* will seek punitive practices that contribute to, or at least do not retard, the moral and spiritual rebirth of criminals. It is perhaps regrettable but true that there may be little that the state can do actively to promote virtuous character. This might be because the state is sometimes nothing but a collection of inept apparatchiks who cannot even deliver the mail. Or it could be because, even at its best, the state must be very cautious about using state power to encourage a particular vision of the good life, in an environment of religious pluralism and free exercise of religion. For such a vision may capture the moral view from only one segment of those with deep and serious commitments to seeking what they deem to be the good life. I, for one, am less concerned about those who are indifferent to the good life and want only to revel under an uncritical “do your own thing” conception of liberty.

But surely, even under these constraints, it ought to be possible to do *something* for prisoners that is potentially character-building. If Aristotle is right, then virtue is often acquired through a process of *habituation* – becoming by

doing – and encouraging certain habits might promote, for example, a virtuous kind of empathetic kindness often absent or greatly limited in criminal wrongdoers. A small start in this direction might involve something as simple as the Prison Dog Project, a program in which prisoners care for dogs and thereby perhaps develop some of the virtues that come from the receiving and giving of love they have been missing in their prior lives. This program is only one small thing, but great things often consist of many small things.

Even those who remain skeptical of all positive programs of character reform, however, should still at the very least seek to create a prison environment where opportunities for positive character development are not radically minimized or even extinguished by unspeakable conditions. For example, those who claim to champion agapic love should be on the forefront of any movement to eliminate those current aspects of criminal punishment and prison life such as gang rape, that – to put it mildly – are hardly likely to encourage the reflection, repentance, and spiritual rebirth that should be hoped for from those culpable of serious wrongdoing. In this case, religious believers and traditional secular liberals should find, and have found, themselves united. The Prison Rape Elimination Act, for example, enacted by Congress in 2003, was supported by such diverse agencies and individuals as Amnesty International, Human Rights Watch, Senator Ted Kennedy, the Southern Baptist Ethics and Religious Liberty Commission, and Charles Colson's Prison Fellowship Ministries.

Of course, none of this is even worth thinking about if Shaffer is correct that (1) the duty to forgive is mandated by the love commandment and (2) forgiveness is incompatible with criminal punishment. I think he is right about (1) but dead wrong about (2), and so I will now move to a discussion of forgiveness, its nature, and value, and relation to punishment.

FORGIVENESS AND PUNISHMENT

What is forgiveness? I think that one of the most insightful discussions of forgiveness ever penned is to be found in Bishop Joseph Butler's 1726 sermon "Upon Forgiveness of Injuries" and its companion sermon "Upon Resentment."⁸ These sermons are long and carefully reasoned philosophical essays on the character of forgiveness, and they must have greatly tried the patience of his congregation. According to Butler, forgiveness is a moral virtue (a virtue of character) that is essentially a matter of the heart, the

⁸ Both sermons are collected in *Works of Joseph Butler*, vol. II, *Sermons*, ed. W. E. Gladstone (Oxford: Clarendon Press, 1896), 136–67.

inner self, and involves a change in inner feeling more than a change in external action. The change in feeling is the overcoming, on moral grounds, of the intensely negative and reactive attitudes that are quite naturally occasioned when one has been wronged by another – the passions of resentment, anger, even hatred, and the desire for revenge. We may call these the vindictive passions. A person who has forgiven has overcome those vindictive passions and has overcome them for a morally creditable motive – for example, being moved by repentance on the part of the person by whom one has been wronged. Of course, such a change in feeling often leads to a change of behavior – reconciliation, for example. But, as our forgiving of the dead illustrates, change in feeling does not always change behavior. Forgiveness, so understood, is often a good thing because it may allow us to reconcile and restore relationships of value, free us from the inner turmoil that may come from harboring grudges, and free us from an overly narcissistic involvement with our own unjust victimizations, for it seems that the common human tendency is often to magnify such victimizations out of all reasonable proportion.

None of this shows, however, that forgiveness – particularly hasty and uncritical forgiveness – is *always* a good thing. Sometimes forgiveness mistakenly tempts us into restoring relationships that would be better left permanently ruptured. Also, hasty overcoming of anger and resentment through forgiveness may sometimes show insufficient self-respect, since feeling such reactive emotions when wronged is a characteristic sign of self-respect. This is no doubt the point of S. J. Perelman's famous quip: "to err is human; to forgive, supine." The popular self-help literature on forgiveness tends to stress only its benefits, but I think it is important to note at least some of its potential costs.⁹

On my Butler-inspired analysis of forgiveness as a victim's change of heart toward culpable wrongdoing, it is useful initially to distinguish forgiveness from four other responses to wrongdoing with which forgiveness is often confused: justification, excuse, mercy, and reconciliation. Although these concepts are to some degree open-textured and can bleed into each other, clarity is served if one at least starts by attempting to separate them. I discuss each of them briefly.

⁹ Butler believed the benefit of forgiveness is a God-given check on the valuable passions of resentment and anger, which are necessary to defend one's own rights, the rights of others, and the moral order itself. For uncannily similar observations, see Reinhold Niebuhr, "Anger and Forgiveness," in *Discerning the Signs of the Times – Sermons for Today and Tomorrow* (London: SCM Press, 1946), 26–39.

Justification

To regard conduct as justified (as in lawful self-defense, for example) is to claim that the conduct, though normally wrongful, was the right thing to do in the given circumstances and all things considered. In such cases, there is nothing legitimately to resent and thus nothing to forgive.

Excuse

To regard conduct as excused (as in the insanity defense, for example) is to admit that the conduct was wrong but to claim that the person who engaged in the conduct was not a fully responsible agent. Responsible agency is, of course, a matter of degree. But to the degree that the person who injures me is not a responsible agent, resentment of that person would make no more sense than resenting the wasp that stings me. Again, there is nothing here to forgive.

Mercy

To accord a wrongdoer mercy is to inflict a less harsh consequence on that person than allowed by institutional (usually legal) rules. Mercy is less personal than forgiveness, since the one granting mercy (a sentencing judge, say) typically will not be a victim of wrongdoing and thus will not have any feelings of resentment to overcome. (There is a sense in which only victims of wrongdoing have what might be called *standing* to forgive.) Mercy also has a public behavioral dimension not necessarily present in forgiveness. I can forgive a person simply in my heart of hearts, but I cannot show mercy simply in my heart of hearts. I can forgive the dead, but I cannot show mercy to the dead.

This distinction between mercy and forgiveness allows us to see why there is no inconsistency in fully forgiving a person for wrongdoing but still advocating that the person suffer the legal consequence of criminal punishment. Here you see one of my primary disagreements with Professor Shaffer. To the degree that criminal punishment is justified in order to secure victim satisfaction, then of course the fact that the victim has forgiven will be a relevant argument for reducing the criminal's sentence and the fact that a victim still resents will be a relevant argument for increasing that sentence. It is highly controversial, of course, that criminal punishment should to *any* degree be harnessed to a victim's desires. Such considerations are generally considered only in assessing damages in a

private suit in tort. Even if the criminal punishment is partly calibrated by the victim's desires, however, it must surely be admitted that the practice of punishment serves other values as well, such as crime control and justice. With respect to these values, a victim's forgiveness could hardly be dispositive. In short, it would indeed be inconsistent for a person to claim that he has forgiven the wrongdoer and still advocate punishment for the wrongdoer in order to satisfy his personal vindictive feelings. If he still has those feelings, he has not forgiven the wrong or the wrongdoer. It would not be inconsistent, however, to advocate punishment for other legitimate reasons – for example, crime control and just deserts. Of course, the possibilities for self-deception are enormous here. As Friedrich Nietzsche reminded us, our high-sounding talk about justice and public order is often simply a rationalization for envy, spite, malice, and outright cruelty – the cluster of emotions for which Nietzsche used the loaded French term *ressentiment*.¹⁰

But what about mercy itself as a virtue independent of forgiveness? Is it not also required, as an aspect of Christian love, to exhibit mercy in dealing with wrongdoers? And would this not involve mercy to criminals? I think that the answer to this question is yes. Yet it is important to see that the requirement to exhibit mercy is best understood not as a requirement never to punish but rather as a requirement to develop a character that is not hardened and rigidly formalistic – a requirement that leaves room for considering relevant features of a criminal (remorse, repentance, or apology, for example) that might legitimately incline one to favor a reduced sentence for that criminal. This is most appropriately done in an executive clemency decision rather than at the time of sentencing.

Reconciliation

The vindictive passions (those overcome in forgiveness) are often a major barrier to reconciliation. Since forgiveness often leads to reconciliation, it is thus easy to confuse the two concepts. I think, however, that it is

¹⁰ As I have argued in my "Legal Moralism and Retribution Revisited," *Proceedings of the American Philosophical Association* 80:2 (2006): 45–62, one must be careful about how one understands the idea of criminal just desert. This idea legitimately focuses our attention on the criminal's act, the intentionality of that act, and the degree of responsibility for that act. However, if one employs the concept of just desert to target deep character, ultimate evil, or what Kant called "inner viciousness," then one is presuming to judge what no human being should presume to judge. For "thou, [God] thou only, knowest the hearts of all the children of men" (1 Kings 8:39). It is hard enough for us to discern the shallows of intentions to surmise the utter futility of probing the depths of character – for whether, to use some language from American homicide law, the criminal has "a hardened, abandoned, and malignant heart" or a character that is "cruel, heinous and depraved."

important also to see how they may differ – how there can be forgiveness without reconciliation, and how there can be reconciliation without forgiveness.

For an example of forgiveness without reconciliation, imagine a battered woman who has been repeatedly beaten and raped by her thuggish husband or boyfriend. This woman – after a religious conversion, perhaps – might well come to forgive her batterer (for example, stop being angry with him) without a willingness to resume her relationship with him. “I forgive you and wish you well” can, in my view, sit quite consistently with “I will never allow you in this house again.” In short, the fact that one has forgiven does not mean that one must also trust or live again with a person.

For an example of reconciliation without forgiveness, consider the example of the South African Truth and Reconciliation Commission. In order to negotiate a viable transition from apartheid to democratic government with full black participation, all parties had to agree that there would in most cases be no punishment for evil acts that occurred under the previous government. Politically motivated wrongdoers, by making a full confession and accepting responsibility, would typically be granted amnesty. In this process the wrongdoers would not be required to repent, show remorse, or even apologize. I can clearly see this process as one of reconciliation (although I might prefer the term cooperation) – a process that will allow all to work toward a democratic and just future. I do not so easily see this process as one of forgiveness, however. No change of heart was required or even sought from the victims – no overcoming of such vindictive feelings as anger or resentment or hatred. All that was hoped of them was a willingness to accept this process as a necessary means to the future good of their society.

It should now be obvious why I reject Shaffer’s claim that agapic forgiveness is incompatible with legal punishment. On my view, following Bishop Butler, forgiveness is mainly a matter of a change of heart, not of external practice.

So can forgiveness of a person, so understood, still be compatible with the continued demand that the person be punished – perhaps even executed? In my view the answer to this question is yes. It all depends on the *motive* or *reason* for the demand. If the motive or reason is to satisfy one’s vindictive passions, then of course there is immediate inconsistency. If one still retains those passions, one has not forgiven. Thus an appeal to *agapic* forgiveness does constitute a powerful attack on legal punishment to the degree that such punishment is driven by vindictive passions, particularly by hatred.

Of course, if one is doing something truly horrendous to another human being, the chance that hatred and cruelty are behind it should not be too quickly dismissed. In fact, many present penal practices in America are, alas, hard to understand on any other terms. To return to my earlier example of prison conditions, Mary Sigler has recently written on such terrible conditions as subjecting inmates to repeated acts of forced sodomy that are generally tolerated by prison officials and the public. She notes that the popular media freely makes jokes about this. For example, there was a soft drink commercial in which someone is handing out cans to prison inmates, drops one on the floor, and notes that in this environment it probably would not be a good idea to bend over and pick it up. The commercial closes with a scene in which the soft drink huckster is shown sitting at a table with a large inmate who has an arm around him. The voice over says that this drink makes friends, the inmate tightens his arm, and the huckster says in dismay “not that kind of friend.” What kind of a society is it that knows about forced sodomy in prison and feels comfortable making jokes about it? In trying to answer this question, the words “hatred” and “cruelty” certainly come to my mind.¹¹

I think that callous indifference also deserves a place next to hatred as something that is ruled out by *agape* – something that should be guarded against in the realm of punishment. Recall the New Testament parable in which a servant, forgiven his debt out of compassion from his master, is blind to the suffering of one of his own servants and shows no compassion when that servant cannot pay a debt to him (Matthew 18:23–35). The sin of the forgiven servant inflicting harsh treatment on his own servant was not based on any hatred he felt toward his servant. It was, rather, a radical failure of compassion, a total indifference to the adverse life circumstances that caused the servant to become indebted and to fear harsh punishment for failing to pay the debt – the very kind of life circumstances that the master, out of compassion, had taken account of in showing mercy to the unforgiving servant for the non-payment of his own debt. As Raimond Gaita, drawing on Simone Weil, argued in his book, *A Common Humanity*, our indifference to the suffering of those whom we regard as outsiders – an indifference that makes them, as Weil said of the poor, invisible to us – often flows from an incapacity to see anything that could *go deep* in their inner lives, a failure to find it even intelligible that someone could love them. This is, I think, at least part of what Weil meant when she said that “love sees what is invisible.”¹²

¹¹ See Mary Sigler, “By the Light of Virtue: Prison Rape and the Corruption of Character,” *Iowa Law Review* 91(2006): 561–607.

¹² Quoted in Raimond Gaita, *A Common Humanity: Thinking About Love and Truth and Justice* (London: Routledge, 2000), 84.

Suppose, however, that the motive or reason for punishment is not grounded in any vindictive passion or in callous indifference of the kind just noted. Suppose, rather, that it is grounded in the sincere belief that punishment of the kind prescribed is necessary to control crime and thereby promote the common good. Or suppose that it is required by justice (what the criminal deserves for his wrongdoing), or that it will be instrumental in the moral and spiritual transformation of the criminal. Then, even if one has doubts about one or more of these justifications, those doubts cannot legitimately be grounded in the claim that they are inconsistent with the demands of Christian love.

The main point, then, is this: *agape* does not forbid punishment. What it forbids is *punishment out of hatred or other vindictive passions*. What Jesus counseled, it will be recalled, is that we visit and comfort those in prison; he did not counsel the abolition of prisons (Matthew 25:36). To visit and comfort those in prison – even those justly there – is a way of saying that they are still loved and not hated, that their essential humanity is still being acknowledged, and that we have not presumed to banish them from the domain of loving concern. Such loving concern is quite consistent, however, with thinking that it is proper that they be in prison – because they deserve it or for the common good, for example.

As stated above, the possibilities of self-deception here are enormous – particularly the possibility that, as Nietzsche warned, we use the rhetoric of justice and the common good in order to hide from ourselves the fact that our actual motives are instances of *ressentiment* – spite, malice, envy, and cruelty. Thus, although I think that Shaffer overreaches when he uses the virtue of forgiveness to condemn all law and punishment, he has offered an important corrective to much of what we are *actually* doing in contrast to what we say and think we are doing, a contrast dramatically illustrated when we consider the actual conditions present in many of our jails and prisons. For this he deserves our gratitude.

LOVE AND THE DEATH PENALTY

In closing, let me briefly say something about *agape* and capital punishment. The death penalty is so extreme that many might think that, even if much punishment is consistent with *agape*, this punishment cannot be. This was certainly the view of Catholic theologian Bernard Häring. He acknowledged that the Old Testament is filled with what appear to be robust defenses of capital punishment, but then claimed that “it would not be in harmony with the unique fullness of salvation and its loving kindness

to apply drastic [Old Testament] directives without any qualification as obligatory in the present order of salvation and grace."¹³

Not all Christians would agree with Häring, of course, and the fact that so many prominent Christian philosophers and theologians have through the ages been supporters of capital punishment should make us pause before hastily assuming that the practice is inconsistent with *agape*. However, the enthusiasm expressed by these thinkers for capital punishment has often been radically overstated by supporters of the death penalty. The radio show host and newspaper columnist Dennis Prager, for example, has cited Augustine as a Christian authority to support his belief in the legitimacy of capital punishment. He quoted this passage from *The City of God*: "It is in no way contrary to the commandment 'thou shalt not kill' to put criminals to death according to law or the rule of natural justice."¹⁴

Augustine did indeed make this claim, but it takes a great deal of creative free association to turn this into a statement of support for the death penalty. And getting Augustine right is a matter of some importance, since, after Jesus and Paul, he has probably done more than anyone else to set what might be called "the moral tone" of Christianity, at least among educated people. I read Augustine – and here I impose on him a modern distinction – as asserting the *right* of the state to execute but also arguing that *it is almost always wrong for the state to exercise that right*. The state may not be denied to have, in the abstract, the right to execute if this promotes the common good or gives the criminal the punishment that he in justice deserves or promotes the personal repentance and rebirth of the wrongdoer – the only three objectives that could justify it. (And, before you laugh dismissively at the idea of capital punishment as personal reform, recall Samuel Johnson: "Depend upon it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully."¹⁵) One can hold this view of capital punishment's three possible justifications, however – common good, just deserts, and personal rebirth – and also consistently hold that in every particular case that one knows of or can imagine, that execution either does not promote these goals or does not promote

¹³ Bernard Häring, *The Law of Christ*, 3 vols. (Westminster, MD: The Newman Press, 1966), III:124.

¹⁴ Quoted in Dennis Prager, Editorial, "There's A Moral Reason That McVeigh Must Die," *Los Angeles Times* (June 8, 2001): B-17.

¹⁵ Quoted in *Boswell's Life of Johnson*, 2nd edn, 6 vols., ed. George Birkbeck Hill, revised by L. F. Powell (1934; Oxford: Clarendon Press, 1964), III:167 Or, as Flannery O'Connor's Misfit said of his victim: "She would of been a good woman if it had been someone there to shoot her every day of her life." Flannery O'Connor, "A Good Man is Hard to Find," in *Collected Works* (New York: Library of America, 1988), 153.

them any better than less drastic means. Augustine sometimes argues in this way and indeed, for all his reputation to the contrary, offers some of the most eloquent objections to capital punishment ever given in our culture. For example, in a letter to Marcellinus, the special delegate of the Emperor Honorius to settle the dispute between Catholics and Donatists, Augustine is concerned with the punishment to be administered for what must have, to him, seemed the most vicious of crimes: the murder of one Catholic priest and the mutilation of another by members of a radical Donatist faction. He wrote:

I have been prey to the deepest anxiety for fear your Highness might perhaps decree that they be sentenced [to death]. Therefore, in this letter, I beg you by the faith which you have in Christ and by the mercy of the same Lord Christ, not to do this, not to let it be done under any circumstances . . . We do not wish that the martyrdom of the servants of God should be avenged by similar suffering, as if by way of retaliation . . . We do not object to wicked men being deprived of their freedom to do wrong, but we wish it to go just that far, so that, without losing their life or being maimed in any part of their body, they may be restrained by the law from their mad frenzy, guided into the way of peace and sanity, and assigned some useful work to replace their criminal activities. It is true, this is called a penalty, but who can fail to see that it should be called a blessing rather than a chastisement when violence and cruelty are held in check, but the remedy of repentance is not withheld?¹⁶

Of course capital punishment is far too complex an issue and too dependent on a variety of contested empirical claims to be settled here. And philosophy, an *a priori* discipline, is certainly in no position simply to pronounce finally on whether the fear of death as a punishment could ever promote the common good or could ever provoke spiritual rebirth on the part of the criminal. So let me close by making a claim that I can in conscience endorse: to the degree that our willingness to support the death penalty is based on the thoughtless cruel hatred or indifference to the humanity of criminals (and I suspect that much of it is), then it manifestly is not consistent with *agape*, a love that teaches that all human beings, even the worst among us, are precious because created in the image of God. And thus Christians, Jews, and those from many other religions should, I think, be willing to join in endorsing these words of Ezekiel 33:11: "I have no pleasure in the death of the wicked; but that the wicked should turn from his way and live."

¹⁶ Quoted in Donald X. Burt, *Friendship and Society: An Introduction to Augustine's Practical Philosophy* (Grand Rapids, MI: Wm. B. Eerdmans Publishing, 1999), 195–96.

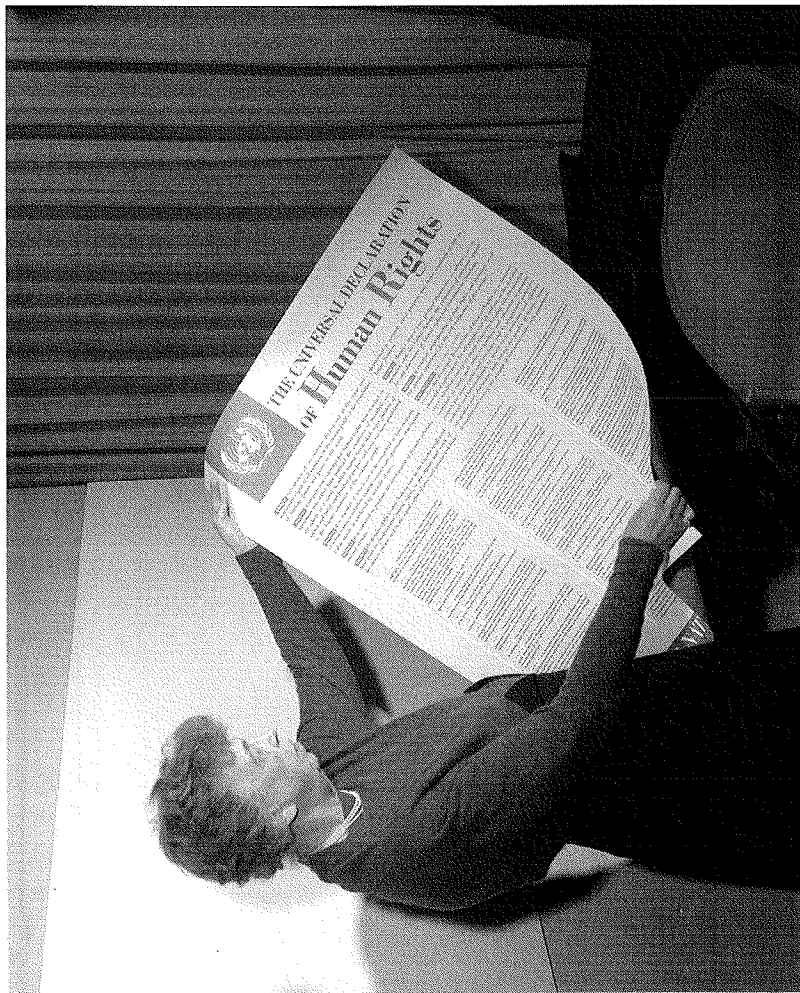
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13 Eleanor Roosevelt holding a poster of the Universal Declaration of Human Rights, November 1949.