

Does Forgiveness Violate Justice?

NICHOLAS WOLTERSTORFF
Yale University

ABSTRACT

A charge commonly lodged against forgiveness is that it violates justice. My essay is an evaluation of this charge. Almost always the charge is developed by assuming that forgiveness requires foregoing punishment of the wrongdoer whereas justice requires punishment. My conclusion is that this charge cannot be sustained; though full and complete forgiveness does require foregoing punishment, foregoing punishment is not necessarily a violation of justice. I concede, however, that if a just deterrence system is in place, then, whereas full and complete forgiveness requires foregoing the imposition of deterrence sanctions, justice may well require the imposition of such sanctions.

KEYWORDS

wrongdoing, anger, resentment, justice, forgiveness, repentance, punishment, deterrence

My topic in this essay is the much-vexed issue of whether forgiveness violates or undermines justice. We can usefully begin with a passage from Anselm. Addressing God in the *Proslogion*¹ Anselm asks:

¹ I am using the translation by M.J. Charlesworth. M.J. Charlesworth, *Saint Anselm's Proslogion: With a Reply on Behalf of the Fool by Gaunilo and The Author's Reply* (Notre Dame, IN: University of Notre Dame Press 1979).

How do you spare the wicked if You are all-just and supremely just? For how does the all-just and supremely just One do something that is unjust? Or what kind of justice is it to give everlasting life to him who merits eternal death? How then, O good God, good to the good and to the wicked, how do You save the wicked if this is not just and You do not do anything which is not just? Or, since your goodness is beyond comprehension, is this hidden in the inaccessible light in which You dwell? (§9)

Anselm assumes that forgiveness requires foregoing punishment. Justice, however, requires that the wrongdoer be punished. The ancient formula for justice was ‘rendering to each what is due him or her.’ What’s due the wrongdoer is punishment. Hence to forgive the wrongdoer is to violate justice.

WHAT IS FORGIVENESS?

It would be a happy state of affairs if there were consensus on the nature of forgiveness; we could then proceed immediately to the question. But there is no such consensus. Even a cursory review of the twentieth century philosophical and theological literature on forgiveness turns up fundamental disagreements.² ‘Forgiveness is primarily a matter of how I *feel* about you (not how I treat you),’ says Jeffrie Murphy; ‘thus I may forgive you in my heart of hearts or even after you are dead.’³ On the contrary, says Richard Swinburne. For you to forgive me is to undertake ‘that in future you will not treat me as the originator of an act by which I wronged you.’ ‘Feelings need not be involved.’⁴ Forgiveness is the overcoming of feelings of resentment and indignation, says Murphy, this time citing Bishop Butler. Jean Hampton insists on a distinction. Though forgiveness is the overcoming of hatred for the wrongdoer, it is not the overcoming of feelings of resentment and indignation over what was done to one.⁵ Given these and other such disagreements, there is

² For an excellent review of this literature, see the essay by Nigel Biggar, ‘Forgiveness in the Twentieth Century: A Review of the Literature, 1901-2001,’ in *Forgiveness and Truth*, Alistair McFadyen and Marcel Sarot (eds.), (Edinburgh: Continuum 2001), 181-218. Also useful is Anthony Bash, *Forgiveness and Christian Ethics* (Cambridge: Cambridge University Press 2007).

³ ‘Forgiveness and Resentment’ in *Forgiveness and Mercy*, Jeffrie G. Murphy & Jean Hampton (eds.), (Cambridge: Cambridge University Press 1988), p. 21.

⁴ Richard Swinburne, *Responsibility and Atonement* (Oxford: Oxford University Press 1989), p. 85, and fn. 8, p. 87.

⁵ See Murphy’s and Hampton’s essays in *Forgiveness and Mercy*.

no option but for me to present, all too briefly, the understanding of forgiveness that I will be working with.

Begin with the fact that forgiveness cannot be dispensed hither and yon indiscriminately. Forgiveness presupposes that someone has been wronged, deprived of something to which she had a right. It furthermore presupposes that the one doing the forgiving *recognize* that someone has been wronged. Most writers on the matter take for granted that only the one wronged can do the forgiving. I doubt that this is true. I think I can forgive my uncle for the way he took advantage of my father. But since nothing will hang on the issue, I will on this occasion go along with the crowd.

Let me present my account of forgiveness in two stages. First I will describe the context required if forgiveness is to occur. Then I will state what forgiveness does within such a context. The prerequisite context has five essential components. I can forgive Hubert for the wrong he did me only when (1) Hubert did wrong me, (2) I rightly believe that he was blamable for doing so,⁶ (3) I continue to remember the deed and who did it, and continue to condemn it (4), I feel resentment or some similar negative emotion at the deed done, and (5) I feel anger or some similar negative emotion at Hubert for having done it. Only when these conditions are met is it possible for me to forgive Hubert for the wrong he did me.

I have already cited the first of these as a prerequisite of forgiveness. Let me briefly explain why the others are as well. I can forgive Hubert for wronging me only if I rightly believe that he is blamable for doing so. If I believe that he is not blamable – he acted under duress, out of non-culpable ignorance, out of ineradicable weakness of will, or whatever – I excuse him, I do not blame him.⁷ Though forgiving resembles excusing in important respects, it is nonetheless not only distinct from excusing but forestalled thereby.

Second, it is possible to believe that one has been wronged by someone without experiencing any negative affect toward either deed or doer. One might dismiss act and agent as beneath one's attention. 'I can't be bothered with insults from scum like this.' Such affectless dismissal is not forgiveness; it forestalls forgiveness. It does not treat the deed and its doer with the moral seriousness that forgiveness requires.

⁶ In my *Justice: Rights and Wrongs* (Princeton, NJ: Princeton University Press 2008) I argue that one can wrong someone without being blamable for doing so.

⁷ Most English translations of the New Testament have Jesus on the cross praying concerning his executioners, 'Father, forgive them; for they do not know what they are doing' (Luke 23:34). I think what Jesus is asking God to do is excuse them.

Third, if I am to forgive Hubert for the wrong he did me, I must continue to remember the deed done, I must continue to remember that it was Hubert who did it, and I must continue to condemn the deed. Forgetting what was done to me, or forgetting that Hubert did it, whether because I actively put the memory out of mind or because it just gradually fades away, resembles forgiveness. But forgiving is not forgetting; forgetting forestalls forgiveness. If one has forgotten, one cannot forgive. Forgiving is not to be identified with letting bygones be bygones – no matter whether one lets the bygones be bygones because one no longer holds the agent culpable, because one no longer actively remembers the deed done or who did it, or because one no longer condemns it as wrong.

Given this context, forgiveness, so I suggest, is the enacted resolution of the victim no longer to hold against the wrongdoer what he did to one – to use biblical language, no longer to count the sin against him.⁸ Mere resolution is not enough; forgiveness requires that one *enact* the resolution, act on it. If one resolves not to hold the deed against the wrongdoer but, for whatever reason, never acts on one's resolution – one finds it too difficult, one shortly falls into a permanent coma, whatever – then, though one is willing to forgive, one does not actually forgive.

An explanatory qualification is in order. One's resolution not to hold the deed against the wrongdoer may be partial, in that it consists of resolving not to hold the deed against him in some ways but not all. So too one's enactment may be partial, in that one succeeds in enacting one's resolution in some ways but not all. Further the scope of one's resolution may expand over time, as may the scope of one's enactment. For our subsequent discussion it will be important to keep these points in mind, that forgiveness is often partial in the two ways mentioned, and that it often takes the form of a process rather than a full and complete resolution enacted on the spot.

And what is it no longer to hold against someone what he did to one, no longer to count it against him? He did it after all, one remembers that he did, and one continues to condemn it.

Some writers suggest, implicitly or explicitly, that not to hold against someone the wrong he did one is to treat the deed as not having been done. That seems to me not quite correct; not even when one excuses someone for what he did does one do that. To forgive is not to treat the *act* as not having

⁸ Cf. II Corinthians 5:19: 'In Christ God was reconciling the world to himself, not counting their trespasses against them.'

been done but to enact the resolution *not to hold the act against the wrongdoer*.

For me no longer to hold against Hubert what he did to me is for me to engage him as I would if I regarded that deed as not belonging to his moral history. It does in fact belong to his moral history and I know that it does; I remember it, I condemn it, and I regard Hubert as blamable. But I now act on the resolution to engage him as I would if I believed that it was only part of his personal history, not part of his moral history.

By the *moral history* of a person I mean that ensemble of things he did that contribute to determining his moral condition, things he did that contribute to determining in which respects and to what degree he is a morally good person and in which respects and to what degree he is morally bad. The point of introducing the idea of a person's moral history is that we need not, and do not, regard everything a person does as part of his moral history. If Hubert wronged me, but it turns out that he's not blamable because he acted out of non-culpable ignorance, then, rather than thinking worse of him for what he did to me, I excuse him. To excuse him is to view the deed as not part of his moral history. It is part of his personal history; he did it. But it's not part of his *moral* history; it does not put a blot on his moral condition.

One can imagine a society whose members did not accept excuses. They would count everything a person did that wronged someone as contributing, negatively, to his moral character. If the deed wronged someone and Hubert did it, then it belongs to Hubert's moral history; it places a blot on his moral character. No excuses allowed. Our society is not such a society.⁹

Though forgiving the wrongdoer is not only different from excusing him but precluded thereby, forgiving resembles excusing in that one enacts the resolution to engage the person as one would if the deed done were only a wrong-inflicting component of his personal history, not a negative component of his moral history. While not excusing him, one nonetheless enacts the resolution to engage him as one would if one did excuse him – with the exception, of course, that one's believes, about him, that he is in fact not to be excused for what he did.¹⁰ Full and complete forgiveness comes as close as possible to engaging him as one would if one excused him while nonetheless *not* excusing him. If one excuses him, one declines to hold the act against

⁹ I am told that if someone who is an Eastern Orthodox priest kills someone, he is no longer eligible to serve as priest even if the killing was accidental and he has no moral culpability.

¹⁰ I assume that believing, about him, that he is not to be excused, counts as a way of engaging him.

him for the reason that one believes that it does not belong to his moral history; if one forgives him, one resolves not to hold the act against him even though one believes that it does belong to his moral history.

Is not holding the deed against the wrongdoer a kind of pretence on one's part? I think not. Suppose the officials in some department of justice decide not to press charges against someone even though they believe that he committed an infraction of the law. Though the state will then not hold the infraction against the person, neither the state, nor its officials acting in their official capacity, will henceforth *pretend* that he did not violate the law. Or suppose that some head of state decides to pardon someone who has been judged guilty of some infraction; neither the state nor its head henceforth pretend that he had not been judged guilty.

FORGIVENESS EVOKED BY REPENTANCE

If forgiving Hubert is what I have suggested it is, why would I do such a thing? We in our society do not find it problematic that I not hold against Hubert the wrong he did me when I think he's not blamable. But if I believe he is blamable, why would I nonetheless engage him as I would if I excused him? I remember what was done to me and continue to condemn and resent it; I remember that it was Hubert who did it and continue to condemn and feel angry at him for having done it. In such a situation, why would I enact the resolution not to hold the deed against him in my engagement with him? Why would I forgive him?

If the case is of the usual sort, what leads me to forgive Hubert is that I have come to believe that he has altered his relation to what he did in a morally significant way. He remains blamable for having done it; it's a stain on his moral character. Nothing can change that. But I believe that he has now morally distanced himself from what he did to me by joining me in condemning it. With unmistakable sincerity he has told me that he is sorry for what he did. If the wrong done is the sort of thing for which compensation can be given, he has offered compensation. Hubert's overall moral condition is now significantly different from what it was before his repentance. He is a morally different person from the one who wronged me, better in an important respect. That's why I resolve no longer to hold the deed against him.

If the wrong done was not serious, and if the victim is of a forgiving disposition, forgiveness in response to the recognition that the wrongdoer is penitent may emerge effortlessly. But as I pointed out earlier forgiveness of-

ten requires effort, and many find that the effort is beyond them. Many are the victims who cannot bring themselves to forgive even when they concede that the wrongdoer is penitent. There's a side of themselves that wants to forgive; but they find it impossible to resolve to do so. Or they resolve to do so but find it impossible to carry out the resolution. Forgiveness is often partial, maybe usually, and is often slow and difficult.

CAN ONE FORGIVE AN UNREPENTANT WRONGDOER?

Can I forgive Hubert if I believe that he is not contrite? Believing that he continues to stand behind what he did, can I nonetheless form and enact the resolution not to hold it against him? Suppose I believe that Jesus commands us to forgive the one who has wronged us whether or not he is penitent.¹¹ Can I, out of what I believe to be my Christian duty, form and act on the resolution not to hold against Hubert what he did to me even though I believe that he is impenitent?

I doubt it. I can be *willing* to forgive him – when he repents. I can have a forgiving disposition toward him. But it appears to me that no longer to hold against someone the wrong he did one, while believing that he himself continues to stand behind the deed, requires not treating the deed or its doer with the moral seriousness required for forgiveness; it is to downplay rather than forgive. 'I suppose he did wrong me; but it's not worth making anything of it.'¹²

But suppose I am mistaken about this. Suppose it is possible fully and completely to forgive the person who wronged one while knowing full well that he continues to stand firmly behind what he did. Then I would say that to enact the resolution not to hold the deed against him is to insult him and demean oneself, thereby wronging both alike. Consider the situation. Hubert agrees with me that what he did should be counted as belonging to his moral history; but he insists, over my objection, that what he did was not wrong. Now I say to him, 'We agree that you are responsible for what you did to me, but you don't see anything wrong in it. I disagree. What you did was wrong.

¹¹ Jesus is nowhere in the New Testament reported as issuing such a command. Whereas he enjoins us to love our enemies and seek to do them good, he nowhere enjoins us to forgive them.

¹² An implication of this position is that one cannot forgive the wrongdoer who is dead if one believes he was never penitent, nor the wrongdoer who has sunk into dementia. In such cases, one lives with the regret that forgiveness never became possible. There is no escape in this life from this feature of our human condition. We have to cope with it, not pretend that we have it in our power to undo it.

But I have resolved not to hold it against you. I forgive you. I have resolved henceforth to treat you as I would if I excused you.’ I submit that this is both to demean myself and to insult Hubert by refusing to treat him and what he did with full moral seriousness. ‘Keep your forgiveness,’ he snaps; ‘I did nothing wrong.’ Far better to join with Hubert in treating the deed as part of his moral history but then to insist, against his protests, that it was wrong and to engage him accordingly.

Richard Swinburne makes the point well. Unless the wrongdoing is trivial, it is wrong for the victim ‘in the absence of some atonement, at least in the form of apology, to treat the [act] as not having been done.’¹³ If I have murdered your wife and you decide to overlook my offence and interact with me as if it had never happened, your attitude ‘trivializes human life, your love for your wife, and the importance of right action. And it involves your failing to treat me seriously, to take seriously my attitude towards you expressed in my action. Thereby it trivializes human relationships, for it supposes that good human relations can exist when we do not take each other seriously.’¹⁴

The therapeutic tradition has created a good deal of confusion on this point by denominating as forgiveness a process or activity quite different from that which philosophical and theological writers have in mind by ‘forgiveness.’ I have highlighted the moral and social dimension of forgiveness: forgiveness, in the normal case, is a response by the victim to indications of repentance on the part of the wrongdoer. The pair, repentance and forgiveness, is a moral social engagement. By contrast, what the therapeutic literature has in mind by ‘forgiveness’ is an a-social and a-moral process entirely internal to the victim. The therapist offers to help the victim overcome her negative feelings toward the deed and its doer without in any way engaging the wrongdoer. If the victim finally arrives at the point where those negative feelings are gone, she is said to have forgiven.¹⁵

¹³ Swinburne, *Responsibility and Atonement*, p. 85-6. A few pages back I argued that not holding the deed against the wrongdoer is not to be equated with treating the deed as not having been done.

¹⁴ *Idem.*, p. 86.

¹⁵ Anthony Bash discusses forgiveness therapy in Chapter 3 of Bash, *Forgiveness and Christian Ethics*. Jeffrie Murphy discusses it in Chapter 7 of Jeffrie Murphy, *Getting Even* (Oxford: Oxford University Press 2003). Bash describes the therapy as follows: ‘The result of a ‘forgiveness intervention’ is typically a diminution of unforgiving feelings toward the wrongdoer. This usually comes about through a psychological reordering of a victim’s feelings and thoughts towards the wrongdoer. Forgiveness, so it is thought, is the means to better psychological health and so to the benefits that better psychological health brings’ (p. 37). It is an ‘intrapersonal phenomenon’ (p. 42). The ‘intervention does not involve dialogue and engagement with the wrongdoer’ (p. 41).

Though getting over one's negative feelings toward the wrongdoer is a component of forgiveness, getting over them in this way is not forgiveness. Forgiveness-therapy is a way of getting to the point where bygones have become bygones; it is closely related to, though not the same as, getting to that point by forgetting what was done to one. When forgiveness proves impossible, letting bygones be bygones, or getting them to become bygones, may be the best one can do; sometimes this second best may be indispensable for getting on with one's life. But the moral question I raised is always on the horizon. Is one taking the deed and its doer with sufficient moral seriousness if one consigns the episode to a mere bygone? And if not, is one then not demeaning oneself and insulting the wrongdoer?

THE FOCUSED NATURE OF FORGIVENESS

One last point about forgiveness. Jean Hampton, in her discussion of forgiveness, says that to forgive is to have 'a change of heart towards one's wrongdoer, one "reapproves" of her, so that one is able to consider renewing an association with her. The change of heart is the new understanding of the wrongdoer as a person one can be "for" rather than "against".'¹⁶

I am dubious. Forgiveness, and the repentance that is the counterpart of forgiveness in the normal case, seem to me typically much more focused than they appear to be to Hampton.¹⁷ I think one forgives the wrongdoer for his act of wrongdoing, and that to forgive him for his act of wrongdoing is to enact the resolution no longer to hold that deed against him, this resolution including the resolution to overcome one's anger at him for the thing he did. Thus I can forgive a wrongdoer for what he did to me and still regard him as a bad person overall.

An implication of this focused understanding of forgiveness (and repentance) is that I may forgive Hubert for what he did to me – act on the resolution no longer to hold it against him – and still want nothing to do with him. Forgiveness is often granted in the hope, and sometimes the expectation, of reconciliation. But one can accept someone's apology for the wrong he did

¹⁶ Murphy & Hampton, *Forgiveness and Mercy*, p. 83.

¹⁷ In *Getting Even*, Murphy offers an explanation of repentance that is diffused in the same way that Hampton's explanation of forgiveness is: 'Repentance is the remorseful acceptance of responsibility for one's wrongful and harmful actions, the repudiation of the aspects of one's character that generated the actions, the resolve to do one's best to extirpate those aspects of one's character, and the resolve to atone or make amends for the harm that one has done' (41).

one and forgive him for that wrong while nonetheless holding out little if any hope for reconciliation. Or perhaps the more precise thing to say is that reconciliation will sometimes have to be confined to reconciliation over this one deed. A focused understanding of repentance and forgiveness requires, as its complement, a focused understanding of reconciliation.

THE QUESTION

We are ready for the question: does forgiveness violate justice? Or to put the question more precisely: does *full and complete* forgiveness violate justice? The person who wronged me has made clear that he repents of what he did; in response, I no longer hold it against him and no longer harbor negative feelings toward him because of what he did. What's the problem with that?

The problem, said Anselm, is the relation of punishment to forgiveness, on the one hand, and of punishment to justice, on the other. Forgiveness requires foregoing punishment; justice requires imposing punishment. To the best of my knowledge, everybody who thinks that forgiveness is a violation of justice agrees with Anselm's identification of the problem.

THE REPROBATIVE THEORY OF PUNISHMENT

But what is punishment? Different writers answer that question differently. So just as I had to present the understanding of forgiveness that I will be working with, so too I have to present my understanding of punishment.

In a seminal article titled, 'The Expressive Function of Punishment,' Joel Feinberg articulated a rationale for punishment that I find attractive.¹⁸ Feinberg offers his rationale as an alternative to the traditional retributive rationale. Before we look at Feinberg's rationale, let's remind ourselves of the structure of that traditional rationale.

The idea of retribution is the idea of redressing the injury done to the victim by the imposition of an equivalent injury on the wrongdoer.¹⁹ The

¹⁸ In Joel Feinberg, *Doing and Deserving* (Princeton, NJ: Princeton University Press 1970), p. 95-118.

¹⁹ Some writers use the term 'retributive theory' more broadly, to apply to any theory of punishment which holds that the person being punished must *deserve* the hard treatment of the punishment on account of his guilt. Though I find it not at all clear what's being claimed here with the term 'de-

point of doing this, say those who favor the retributive rationale for punishment, is that thereby an imbalance created by the wrongdoing is rectified. The theory does not claim that this rectification of imbalance is an intrinsic good in the life of either victim or wrongdoer, nor does it claim that it proves always to be an instrumental good in the life of one or the other; rather it claims that the moral order is thereby vindicated. Jean Hampton states the point nicely: the *telos* of retributive punishment 'is not so much to produce good as it is to establish goodness.'²⁰ Punishment strikes 'a blow for morality.' It 'plants the flag of morality.'²¹ Most retributive theorists assume or claim that vindication of the moral order by retribution is not just a good thing to do but (*prima facie*) obligatory.

Feinberg begins the presentation of his alternative rationale for punishment by exploring the difference between punishments and penalties – examples of a penalty being a parking ticket, a library fine, an offside penalty in soccer, and disqualification from some competition for failing to answer all the questions in the application form. Both penalties and punishments belong to the type, *infliction of hard treatment by an authority on a person for his prior failing in some respect (usually an infraction of a rule or command)*. The question is, what differentiates punishments from penalties within this type?

Feinberg's answer is that punishment has a symbolic significance that the infliction of a penalty does not have. Specifically, 'punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishment authority himself or of those 'in whose name' the punishment is inflicted. Punishment, in short, has a *symbolic significance*. . . .'²²

Let me unpack this a bit. By 'reprobation' Feinberg means 'the stern judgment of disapproval.'²³ – that is, *moral* disapproval. Hard treatment for something a person did, on the one hand, and moral reprobation and re-

serve,' I suppose it would be correct to say that Feinberg's account of punishment requires that the person being punished *deserve* his hard treatment. The current Merriam-Webster's Collegiate Dictionary gives, as the first meaning for 'retribution,' *to pay back*. This, of course, is what the Latin *retribuere* meant. For this reason, I think it best to call a theory of punishment a 'retributive' theory only if it sees *redressing the injury done to the victim by the imposition of an equivalent injury on the wrongdoer* as the rationale for punishment.

²⁰ Murphy & Hampton, *Forgiveness and Mercy*, p. 125-6.

²¹ *Idem.*, p. 130.

²² Feinberg, 'The Expressive Function,' p. 98.

²³ *Idem.*, p. 101.

sentment of it, on the other, often occur separately. The fine imposed when one returns a library book late can be rather hard treatment; but its imposition does not have the symbolic significance of conveying a judgment of moral disapproval on deed or doer, nor of expressing resentment or indignation – though moralistic librarians often accompany the fine with such a judgment. It has no particular symbolic significance whatsoever; it's just a device for encouraging people to return borrowed books promptly. Conversely, though a verbal denunciation is a reprobative judgment and expresses the emotion of resentment or indignation, it is not the imposition of hard treatment.

Unique to punishment, on Feinberg's account, is that hard treatment has gotten connected with a judgment of moral disapproval of deed and doer and with feelings of indignation, resentment, and anger. To use the language of speech-act theory: the act of subjecting the wrongdoer to hard treatment *counts as* the illocutionary act of condemning him and his deed. One performs the illocutionary act of condemning him and what he did *by* performing the act of subjecting him to hard treatment. In turn, by performing the illocutionary act of condemning him and his deed, one expresses feelings of indignation and resentment for what he did and anger at him for doing it.

It should be noted that the focus of punishment, on this account, is entirely on the wrongdoer and his deed: the imposition of hard treatment on him counts as condemning *him for his deed*, and it is a way of expressing resentment of *the deed done* and anger at *him* for doing it.²⁴

Feinberg notes that most of the benefits regularly claimed for certain kinds of punishment – rehabilitation of the wrongdoer, deterrence of similar wrongdoing by others, protection of the public from the wrongdoer – are only loosely connected with its nature as a judgment of condemnation and an expression of negative feelings toward deed and doer. Punishment does not always bring about those life-goods; and often there are other ways of achieving those goods than by punishment. However, there is one social benefit of punishment that is intimately connected to its nature, namely 'symbolic non-

²⁴ I hold that institutions, such as the state, can perform illocutionary acts, but that they cannot have feelings of resentment and anger and hence cannot express such feelings. Thus whereas both aspects of Feinberg's theory, the illocutionary act aspect and the expression of feelings aspect, hold for punishment performed by persons, only the first aspect holds for punishment performed by institutions. I will not clutter the text above with explicit recognition of this qualification.

acquiescence,' as Feinberg calls it.²⁵ Punishment conveys to those who have ears to hear that society does not condone what was done.

Above I spoke of the *retributive* rationale for punishment. What shall we call the rationale for punishment that Feinberg has articulated, and what shall we call punishment imposed for that reason? Feinberg calls his theory of punishment the *expressive* theory; he gives no name to the punishment itself whose rationale he spells out. It would be odd to call it 'expressive punishment.' I propose highlighting the illocutionary-act aspect of punishment on his account by calling the rationale for punishment that he articulates, the *reprobative rationale*, and calling punishment imposed for that reason, *reprobative punishment*.

Feinberg introduced his discussion by distinguishing two genera of the type, *infliction of hard treatment by an authority on a person for some prior failing on his part*, one having penalties as its members, the other having punishments as its members. At various points in his discussion he assumes that there is also a third genus of the type. The members of this third genus have no common name, so far as I know. Mentioning some of its most prominent members will give the idea, however: hard treatment imposed on a wrongdoer for the purpose of rehabilitating him, hard treatment imposed on a wrongdoer for the purpose of deterring others from doing the sort of thing he did, and the hard treatment of incarceration, house arrest, or exile imposed on a wrongdoer for the purpose of protecting society from further acts of wrongdoing on his part.

Hard treatment imposed for these reasons is often called 'punishment.' I think Feinberg is right to hold that, strictly speaking, they are not that. Punishment is intrinsically backward-looking; one punishes someone for what he did. Both the retributive and reprobative rationales for punishment incorporate this backward-looking feature. Hard treatment imposed for the purpose of rehabilitation, deterrence, or protection, lacks this backward-looking feature. It is focused exclusively on bringing about some future good.

DOES FORGIVENESS REQUIRE FOREGOING PUNISHMENT?

We are now prepared to address Anselm's two assumptions. Begin with this: does forgiving the wrongdoer require that one forego punishing him for what he did and require declining to support the imposition of punishment

²⁵ Feinberg, 'The Expressive Function,' p. 102.

on him by others? Many who have written about forgiveness have claimed that it does not require this. Here our distinction between partial forgiveness and full and complete forgiveness proves indispensable. I hold that though partial forgiveness is compatible with punishing the wrongdoer or supporting the imposition of punishment, full and complete forgiveness is not.

Let's assume that the punishment in question would be just. Forgiveness consists of engaging someone as one would if one regarded what he did as part of his personal history but not part of his moral history; it consists of engaging him as one would if one excused what he did – with the exception that one continues to believe, about him, that he is in fact blamable for what he did. But punishment, be it retributive or reprobative, is *for* the wrong done; to impose it or support its imposition is to engage the person *as a wrongdoer*. If one engaged him as one would if one excused him, one would oppose the imposition of punishment; a person is not justly punished if his act of wrongdoing is excusable. Partial forgiveness is compatible with imposing and supporting the imposition of punishment; while supporting the imposition of punishment, one might, in other ways, engage the wrongdoer as one would if one excused him. But full and complete forgiveness is incompatible.

The person who has been wronged is thus faced with a choice. He can impose or support the imposition of punishment, but then his forgiveness will necessarily be partial at best; or he can commit himself to full and complete forgiveness, but then he will have to oppose the imposition of punishment. The question to be considered, then, is whether to choose the latter of these is somehow to violate justice. If it is, one should not do it. And if one should not do it, then one should never offer a wrongdoer full and complete forgiveness. We will address this issue shortly.

DOES FORGIVENESS REQUIRE FOREGOING HARD TREATMENT AIMED AT REHABILITATION, PROTECTION, OR DETERRENCE?

What about rehabilitation, protection, and deterrence? Does full and complete forgiveness require that one oppose the imposition of hard treatment on offenders for those reasons? Well, recall that I may believe that the person who wronged me is genuinely repentant of what he did to me and may forgive him for that while nonetheless believing that he is likely to do the same sort of thing again, to me or others. Thus, even though I fully and completely forgive him for this act, I may believe that he should be rehabili-

tated and that society be protected until he is. If I also believe that the best way to bring about these goods is by the imposition of certain forms of hard treatment on him, then I will favor that.

The situation for deterrence is different. We are to suppose that there is a rule or law in effect and that sanctions have been attached to the violation of this rule or law. Let us assume that the law or rule is just, that the sanctions are just, and that the sanctions are justly imposed. The imposition of the sanctions on someone is hard treatment; it's the threat of this imposition that functions as deterrence.

Now if the sanctions are justly imposed, they will be imposed only on those who did in fact break the rule or law; nobody will be 'framed.' And they will be imposed only on those who are blamable for breaking the rule or law – that is, not excusable. Thus to impose or support the imposition of sanctions on the wrongdoer is perforce not to engage him as one would if one excused him. Full and complete forgiveness is incompatible with imposing or supporting the just imposition of hard treatment on a wrongdoer for the purpose of deterrence.

Here too, then, the person who has been wronged is faced with a choice: if he imposes or supports the imposition of deterrence-sanctions, his forgiveness will have to be at most partial; if he commits himself to full and complete forgiveness, he will have to oppose the imposition of deterrence-sanctions. The question to be considered is whether to choose the latter of these is somehow to violate justice. If it is, he should not do it. And if he should not do it, then he should not offer the wrongdoer full and complete forgiveness. Only partial forgiveness of a certain sort would be acceptable.

DOES FOREGOING REPROBATIVE PUNISHMENT VIOLATE JUSTICE?

What we have seen so far is that full and complete forgiveness requires foregoing reprobative punishment. We have also seen that it requires foregoing the imposition of deterrence-sanctions, when the imposition of such sanctions would be just. The question that remains is whether either of these foregoings would violate or undermine justice. Start with reprobative punishment: does foregoing reprobative punishment violate justice?

If one believes in retributive punishment and holds that, whenever possible, it *ought* to be imposed on each and every wrongdoer for each and every act of wrongdoing – a preposterous position, in my view; life would be a horror – then one will of course hold that to forego punishment is to violate jus-

tice. But suppose that one rejects the retributive rationale and instead embraces Feinberg's reprobative rationale. Is it the case, on this rationale, that to forego punishment is perforce to violate justice?

What reason might one have for thinking that it is? Consider the following famous (or infamous) passage in Kant's *Metaphysical Elements of Justice*:

Even if a civil society were to dissolve itself by common agreement of all its members (for example if the people inhabiting an island decided to separate and disperse themselves around the world), the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be regarded as accomplices in this public violation of legal justice.²⁶

Kant gives no indication that he meant what he says here to apply only to unrepentant murderers; one has to assume he meant it to apply both to the repentant and the unrepentant. At the very end of the passage he speaks of *legal* justice as violated by the release of murderers; from the passage as a whole it's clear that he regards this violation of legal justice as also a violation of moral justice.

Kant claims that failure to punish wrongdoers is a double violation of justice. First, what's due a wrongdoer is that he receive a punishment befitting the gravity of his wrongdoing – in Kant's words, that he 'duly receive what his actions are worth.' To fail to impose on him the punishment due him is to violate justice; justice requires rendering to a person what is due him or her. Whether this is true is, of course, the question we are considering. So let's consider Kant's other point: to fail to punish the wrongdoer is to become an accomplice in his wrongdoing; bloodguilt for the deed is now on our hands as well as his. 'Accomplice' is of course used metaphorically. What Kant means, no doubt, is that to forego punishing a wrongdoer is to condone his wrongdoing. It is one's condoning of his wrongdoing that makes one complicit in it.

The point is directly relevant to Feinberg's reprobative rationale for punishment: to punish is to condemn what was done and to send a message of non-condonation.

²⁶ Immanuel Kant, *The Metaphysical Elements of Justice*, John Ladd (transl.), (Indianapolis, IN: Hackett Publishing 1965), p. 102.

Is it true that foregoing punishment of the wrongdoer constitutes condoning what he did – along with sending a message of condonation and perhaps becoming an accomplice in his wrongdoing. Rather than considering the claim in general, let's focus on those cases in which foregoing or urging the foregoing of punishment is motivated by forgiveness. Does foregoing, or urging the foregoing, of reprobative punishment of the wrongdoer because one has fully and completely forgiven him constitute condoning his wrongdoing and sending a message to that effect?

Note the structure of the argument before us. Feinberg's reprobative rationale for punishment holds that if I punish someone, then I condemn what he did and send a message of non-condonation. Kant holds that if I forego punishment, then I condone what was done and send a message to that effect. Kant's conditional is a denial of the antecedent (and consequent) of Feinberg's conditional. Feinberg's conditional does not imply Kant's conditional; to suppose that it does would be to commit the fallacy of denying the antecedent. But the two conditionals are compatible. So we have to consider Kant's conditional on its merits.

I find it implausible to suppose that not explicitly condemning or urging the condemnation of some wrong is perforce to condone it and send a message to that effect. Issuing condemnations of everything that one does not condone would take up far too much of one's time and sour all one's relationships. Whether or not, in a given case, not explicitly condemning or urging the condemnation of some wrong constitutes condoning it and sending a message to that effect depends entirely on context.

Add to this the point that though reprobative punishment of someone for what he did is a way of condemning deed and doer, punishment is not the only means available for issuing a condemnation. So why hold that not doing it this way perforce amounts to condoning it? If a person in authority makes clear by his speech that he firmly condemns some deed and firmly blames the person who did it, but then goes on to declare that, because the offender has repented, out of mercy he will forego punishing him, why would that constitute condoning the deed and sending a message of condonation? It's true that mutely declining to punish an offender is readily interpreted as condoning what he did. But declaring that the person before one is guilty, and then announcing that, because he has repented, one will, for the sake of some good, forego punishment – surely foregoing punishment in that context is not reasonably interpreted as condoning what he did and sending a message of condonation.

So far, then, we have uncovered no reason to conclude that foregoing reprobative punishment of a wrongdoer is, as such, condoning what he did and sending a message to that effect. But what about the following consideration? Feinberg observes that on the expressive theory of punishment, the proportioning of severity of punishment to severity of crime that is traditionally demanded of corrective justice can be understood along the following lines. Take as a given that condemnation is the sort of speech act that comes in degrees of emphasis, and add the thesis that, in general, the worse the crime, the more emphatic should be the condemnation. The way this general principle gets implemented, when condemnation takes the form of punishment, is that the worse the crime, the harder the treatment imposed on the criminal.

Now suppose that an authority, after issuing an emphatic verbal condemnation of what the person before him has done, announces that, because the offender has repented, out of mercy for him or his family or for the sake of social peace he will forego applying the specified punishment. Let our previous point be conceded, that this entire package does not constitute condoning what the person did nor does it send a message of condonation. Nonetheless, this total package would seem to be a weak condemnation compared to that pronounced on someone else who committed the same crime and is sentenced, say, to twenty years in prison. So does not the whole package send the message that this person's wrongdoing is less odious than that of the other person? And that would violate justice, would it not, since the crime was in fact of the same magnitude? If there is a system in place for expressing judgments as to the relative severity of crimes – worse crime, harder treatment – then to break with the system and give some crime a less harsh treatment than the system specifies, or no hard treatment at all, would be to send a wrong message, would it not? Talk as loudly as one will, one's actions carry the message that it was not such a bad crime after all.

I don't see it. Suppose that the criminal code has a variety of words to indicate the relative severity of crimes – as in fact our criminal code does: 'first-degree murder,' 'second-degree murder,' 'manslaughter,' etc. Suppose that the jury convicts the person in the dock of second-degree murder, that the judge gives a speech about the heinousness of such a crime, and sentences him in accord with the criminal code, but that the executive then steps in and, because the offender has repented, he, out of mercy for his plight and that of his family, reduces his sentence. Would any reasonable person interpret this whole package as carrying the message that it was not

such a bad crime after all? Would not any reasonable person conclude that the jury and judge had determined that he had committed a serious crime for which severe punishment was appropriate, but that the executive had decided, out of mercy and because the offender had repented, to reduce the punishment?

Of course, if the executive pardons the wrongdoer because he is white, male, wealthy, socially prominent, or of a certain religion or nationality, that would send a wrong message about morality. But on the face of it, pardoning a repentant wrongdoer out of mercy is significantly different from pardoning on the basis of such features.

Obviously there may be other reasons than the reason Kant gives for the view that to forego reprobative punishment is perforce a violation of justice. But since I know of no such reasons, I conclude that foregoing such punishment does not perforce violate or undermine justice.

DOES FOREGOING DETERRENCE-SANCTIONS VIOLATE JUSTICE?

We saw that full and complete forgiveness of a wrongdoer not only implies that one will decline to impose or support the imposition of reprobative punishment on him; it also implies that one will decline to impose or support the imposition of deterrence-sanctions on him. That raises the question whether this would in some way violate justice. If so, then it would be wrong to extend full and complete forgiveness.

Let us once again confine our reflections to those cases in which the rule or law to which sanctions are attached is just, in which the sanctions themselves are just, and in which the sanctions are justly imposed. As we noted earlier, a condition of the sanctions being justly imposed on someone is that he have violated the law and be culpable for doing so. Let's add that justice requires the existence of a system to deter the actions that this system seeks to deter.

The system seeks to deter all violations of the rule or law for which the violator is culpable – not just those violations for which the violator remains subsequently impenitent, but *all* violations. I doubt that a repentance-exception attached to the rule or law even makes sense; but if it does, such an exception would conflict with the aim of deterring all actions of such-and-such a sort, not just those for which the violator remains impenitent. It would equally conflict with the aim of the system if a repentance-exception were attached to the sanctions rather than to the laws – if it were specified

that the sanctions are to be imposed only on those who culpably violate the law and do not subsequently repent.

What remains to consider is selective *application* of the sanctions. Suppose that Hubert has violated the law in wronging me as he did, but that he is now repentant and that, in response to his repentance, I offer him full and complete forgiveness. I will then decline to impose or support the imposition on him of the deterrence-sanctions attached to the law. Does that restraint on my part violate justice in some way?

Well, consider the following. Suppose that I combine my advocacy of exempting Hubert from application of the sanctions with indifference or even resistance to extending the same exemption to other repentant violators. That would be unfair to those others, unjust; why only Hubert and his wronging of me? So suppose that, to avoid this injustice, I mount a campaign in favor of the general principle that all repentant violators be exempted from the imposition of the sanctions. Were this principle accepted, that would certainly tend to undermine the system. And surely it is wrong to advocate a principle that, if accepted, would tend to undermine the system. The fact, if it is a fact, that one fully expects to be a voice crying in the wilderness to which no one listens would not make it right.

My conclusion is that when there is a just deterrence-system in place and when justice requires the existence of such a system, then to refrain from applying the sanctions to someone who has violated the law because one fully and completely forgives him would be a violation of justice.²⁷ One's forgiveness has to be partial.

My argument raises a theological quandary. Hebrew and Christian scriptures pervasively present God as issuing laws to human beings and attaching sanctions to those laws, and never do they suggest that those laws and sanctions have a repentance-exception attached. Those scriptures also present God as offering full and complete forgiveness to the penitent wrongdoer; this is a manifestation of God's love that we can count on. But my argument im-

²⁷ My argument explicitly presupposes that the deterrence-system is a just system. As to whether the American system of criminal just is a just deterrence-system, the following remarks of Jeffrie Murphy are very much to the point: 'I cannot help thinking. . . that many of the unspeakably brutish conditions that we tolerate in our jails and prisons flow not from stated legitimate desires for justice and crime control but rather from a vindictiveness so out of control that it actually becomes a kind of malice. If we are tempted so to demonize those who have wronged us and start viewing them as monsters, we would be wise to recall Nietzsche's famous warning: "Take care that when you do battle with monsters that you do not become a monster"' (Murphy, *Getting Even*, p. 34).

plies that if this is a principle we can count on, then the deterrence-function of the sanctions is undermined.

My response to this quandary is that God's justice system – if we may call it that – should not be thought of along deterrence lines but along reprobative lines. God's punishment of human beings for their wrongdoing is a condemnation of what was done and an expression of God's anger. Full and complete forgiveness, as we saw earlier, requires foregoing reprobative punishment. But what we also saw is that such foregoing does not, as such, violate or undermine justice.

