

Punishment and the Limits of Evolutionary Analysis

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MORRIS B. HOFFMAN, *THE PUNISHER'S BRAIN: THE EVOLUTION OF JUDGE AND JURY* (Cambridge 2014).

I. INTRODUCTION

In *The Punisher's Brain*, Judge Morris Hoffman explores the foundations and development of our punishment practices through the lens of evolution. Drawing on his experiences as both a trial judge and research fellow, Hoffman combines a wide-ranging evolutionary, historical, and scientific analysis of punishment with colorful examples drawn from law and life. The result is an accessible and engaging account of punishment that raises a number of provocative possibilities for understanding, and potentially reforming, the institution of punishment.

I confess to have opened the book with some trepidation. It has become fashionable (again) in recent years for scholars to import wholesale the methods and mindset of the natural and social sciences into the study of punishment. Too often, the result is a crude reductionism that neglects the social meaning and moral significance of this complex human institution. Science can surely inform law, but it must never be permitted to occupy the field. While Hoffman's analysis occasionally succumbs to the imperial temptations of the genre, it is generally measured and modest in its claims and conclusions. In this way, *The Punisher's Brain* advances an important and fascinating debate without presuming to have settled—or conquered—it once and for all.

II. COOPERATING, CHEATING, AND PUNISHING

Hoffman begins by crediting punishment as essential to social cooperation and human flourishing. Thus, “one key to civilization is our willingness to punish each other.” (P. 1.) From an evolutionary perspective, humans¹ have (and always have had) significant incentives to cooperate with one another for mutual benefit. At the same time, we always face the temptation to cheat—to gain the advantages of group cooperation and effort without making the individual contributions and

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¹ Hoffman relies on various animal species, especially social animals, to illustrate the evolutionary phenomena he describes. For convenience, I will generally refer only to human animals, noting here that many of the behaviors and dispositions obtain more broadly throughout the animal kingdom. From the perspective of evolutionary biology, this suggests the general adaptability of these traits.

sacrifices that generate those advantages. The tension between our cooperative and cheating natures—what Hoffman calls “The Social Problem”—requires a regulatory mechanism to manage these conflicting instincts. In short: “Evolution built us to punish cheaters.” (P. 1.)

Hoffman enriches this evolutionary narrative with social science research that seeks to isolate and study human instincts to cooperate, to cheat, and to punish in the controlled setting of experimental games. This research consistently suggests that humans (among others) will endeavor to work cooperatively—to share and grow the distribution of goods—but will punish perceived unfairness even at the expense of their own distributive shares. These studies, backed by neuroscience research, also reveal the complex set of emotions engaged by even simple interactions involving relatively small stakes, with player conduct reflecting sensitive judgments about the motives and expectations of other players as well as one’s own feelings of trust and guilt. In the evolutionary environment (and in the experimental setting), this complex set of behaviors and emotions points to “two core rules of right and wrong”—that transfers of property must be voluntary and that promises must be kept.² The third rule is that serious violations against property and promise-keeping must be punished. (P. 44.)

Hoffman conceptualizes punishment in three forms. The first line of defense against defection and cheating—“first-party punishment”—is the individual’s own conscience. Thus, “[b]rains with built-in systems that make their owners feel bad when they cheat, and even when they contemplate cheating, are brains that will not cheat as often as brains without conscience.” (P. 94.) The painful feelings of guilt that occur after one has cheated serve as a further deterrent to future bad behavior. In this way, Hoffman contends, the emotions associated with conscience and guilt—and the capacity for empathy that underwrites them—serve as a kind of “short-cut to [a] utilitarian decision about whether to cooperate or cheat.” (P. 95.) Indeed, the system is so effective that we rarely have occasion to consciously contemplate (or calculate) the costs and benefits of serious wrongdoing.³ An interesting discussion of psychopathy highlights the significance of these moral emotions and their potential relevance to anti-social behavior.

Second-party punishment is reflected, paradigmatically, in acts of retaliation and revenge, but may also take the form of “a simple refusal to reciprocate.” (P. 128.) In any of these forms, second-party punishment serves as a deterrent to would-be wrongdoers. Thus, despite the cost to those who inflict it, retaliation

² MORRIS B. HOFFMAN, *THE PUNISHER’S BRAIN: THE EVOLUTION OF JUDGE AND JURY* 41 (2014). Property, in Hoffman’s broad conception, includes life and health, so the principle of voluntary transfer encompasses both criminal and tort law; the enforcement of promises is the domain of contract law.

³ Hoffman also includes a discussion of neuroimaging research that maps the “neural correlates” of conscience and guilt. *Id.* at 100. These results suggest that conscience and guilt may take an abstract and a more contextual form, each engaging different circuits in the brain. *Id.* at 101. Hoffman (among others) speculates that these distinctions may have implications for the institution of punishment and other forms of violence. *Id.* at 130–06.

served indirectly to promote cooperation and trust. This dynamic plays out in the experimental setting as well and is consistent with neuroscience and brain chemistry research in the context of trust and retaliation games. Hoffman also suggests that the moral and legal bases for self-defense reflect a form of second-party punishment, though this claim seems somewhat strained. More convincing is the claim that the partial defense of provocation, which mitigates murder to manslaughter, reflects a recognition of the powerful, and to some degree reasonable, urge to retaliate.

Hoffman posits that the transition from second to third-party punishment is associated with a variety of evolutionary forces and consequences. In particular, the capacity for empathy allows us to identify with the victim of wrongdoing—to imaginatively experience a degree of the victim’s pain. At the same time, because we do not actually suffer the victim’s pain, our retaliatory instincts are milder and more controlled and thus less destructive of social cooperation. Moreover, because group well-being is bound up with individual well-being, a blow to a group member represents a potential threat to the group itself. This willingness “to punish each other for generalized wrongs to each other” marks, for Hoffman, a crucial step in the march toward civilization. (P. 152–53.) It facilitated promise-keeping and accountability, as well as greater security against various forms of interpersonal harm. This, in turn, made it possible to expand the size of the group and delegate punishment to designated authorities.

Hoffman notes that the instinct for third-party punishment is, in essence, retribution.⁴ Such third-party punishments ranged from banishment and death to calibrated fines and, eventually, the more familiar modern practice of imprisonment (itself a kind of banishment). Because they could be graded according to culpability and harm, fines and prison terms allowed for a measure of proportionality, consistent with the principle of *lex talionis*. Indeed, among the distinguishing features of retribution is the notion that the punishment should in some sense fit the crime. Revenge, limitless in principle, risked over-punishment and “damaging cycles of violence.” (P. 169.) Finally, Hoffman considers various forms of legal excuse and justification, which are widely understood to shed light on the bases of responsibility. Getting clear about the circumstances in which we are inclined to suspend judgments of liability—in the case of young children, for example—sharpens our focus on the proper grounds for punishment.

Another basis for withholding punishment is one or another form of forgiveness. Indeed, according to Hoffman, the term forgiveness applies to any situation in which the urge to blame and punish is instead restrained. On this broad view, “[i]f blame is a rough proxy for optimizing deterrence, then forgiveness is its opposite—a rough proxy for when we should not punish because its costs outweigh its deterrent benefits.” (P. 194.) Hoffman maintains that forgiveness ranges from situations in which harm is so minimal that we simply

⁴ He is careful here to note the “political baggage” the term has acquired and the sense in which it has become a pejorative, associated with punitive excess. *Id.* at 158.

withhold blame, to the natural dissipation of feelings of blame once a wrongdoer has been punished, or when enough time has passed since the offense that we no longer feel the urge to retaliate. Hoffman goes on to consider the ways in which such “forgiveness,” and the related concepts of apology and atonement, can help facilitate a wrongdoer’s reintegration into the group.

The final chapters of the book focus on the legal implications of the evolutionary perspective, evaluating the ways in which our institutions of crime and punishment do—or should—reflect our essential nature. Specifically, Hoffman highlights “dissonances”—instances where our legal rules appear to conflict with our evolved intuitions. In the trial setting, this can result in jury nullification and, ultimately, undermine respect for the law in general. But Hoffman argues that our intuitions should not always trump the positive law. Consider, for example, the evidentiary rule against informing jurors of a defendant’s prior criminal record. From an evolutionary perspective, knowledge of another’s prior behavior would have been highly relevant in determining whether the person could be trusted or whether he posed an ongoing threat. Precisely because such information is so potentially powerful, however, we have made the policy judgment to exclude it from the modern criminal trial on the grounds that it is likely to be more prejudicial than probative of guilt.

To address the problem of dissonance—to determine when to embrace our powerful instincts and when to restrain them—Hoffman develops a five-part framework. The “dissonance test” is designed to gauge the evolutionary strength of both the intuition and the conflicting legal doctrine, the degree and direction of tension between them, and the integrity of the dissonant rule—that is, whether it includes significant exceptions that suggest it has been undermined by the pull of the intuition with which it conflicts. Hoffman goes on to consider the legal processes designed to counter certain of our evolved instincts (to make snap judgments, for example), then to test various substantive doctrines using his five-part framework.

In the final chapter, Hoffman contends that evolution provides a fruitful vantage point from which to assess the institutions of blame and punishment, concluding that traditional punishment theorizing can neither explain nor usefully guide our practices. Instead, Hoffman favors a version of retribution rooted in deterrence, for “retribution *is* deterrence, seen through the lens of natural selection.” (P. 344.) Whatever the practical results of this perspective—he predicts more custodial sentences of shorter duration—he is ultimately more focused on illumination than reform. “A legal system that explicitly recognizes the evolved moral nature of blame, punishment, and forgiveness will be a better, more just, legal system, quite apart from whether those evolutionary insights result in any legal reforms at all.” (P. 347.)

III. PHILOSOPHY, DISSONANCE, CANARDS & CLICHÉS

Hoffman's exploration of the evolutionary origins and implications of punishment is illuminating. The evolutionary narrative—at times “just-so”⁵—is generally compelling, thought-provoking, and nearly irresistible. In what follows I will suggest some of the limitations of the perspective, highlighting the conceptual shortcomings and unconvincing speculations that undermine the plausibility of Hoffman's analysis as a tool for understanding or evaluating existing legal doctrine.

Perhaps the most glaring omission from Hoffman's project is the sort of careful conceptual analysis generally associated with the discipline of philosophy. Although he occasionally acknowledges the complexity of the moral concepts he is invoking, he seems disinclined to meaningfully engage the “philosophical ramblings” (P. 133.) that might lend precision and focus to his efforts. Indeed, in what may amount to a telling error, he misidentifies John Darley, the eminent Princeton social psychologist, as a legal philosopher. (P. 59.) Apart from the scurrilous libel this would surely represent in certain quarters, it highlights a more fundamental problem with Hoffman's undertaking. Although our evolutionary origins may shed light on modern punishment practices, the picture is ultimately distorted without the conceptual clarity that would allow us to distinguish justified from unjustified punishment on the basis of morally relevant reasons.

Some of the confusion stems from Hoffman's reliance on a broad notion of forgiveness. Although forgiveness, as a moral concept, is generally reserved for situations in which the forgiver has a change of heart toward a blameworthy wrongdoer,⁶ Hoffman conceptualizes as forgiveness any instance of, or basis for, withholding punishment. Thus, declining to punish the insane or the self-defender counts as forgiveness, as does withholding punishment for minor harms. At the same time, Hoffman maintains, forgiveness is possible even after punishment is inflicted or in cases where it is not inflicted but enough time has elapsed that the urge has passed.

In fact, however, withholding punishment in the case of an insane offender has nothing to do with forgiveness as conventionally understood; it reflects a moral (and perhaps practical) judgment that the offender lacked sufficient capacity to be held accountable in the first place. If he cannot be blamed, he cannot be forgiven.⁷ Similarly, a person who defends himself against another's aggression does not stand in need of forgiveness, for he, too, is without moral blame. Talk of

⁵ *Id.* at 35 (Acknowledging the “just-so” critique of evolutionary psychology as “[n]ot knowing how our ancestors really behaved, it is easy to assume in hindsight a behavior that just-so happens to make evolutionary sense.”).

⁶ See Jeffrie G. Murphy, *Forgiveness and Resentment*, in FORGIVENESS AND MERCY 14, 15 (1988) (arguing that forgiveness entails a change of attitude toward the offender, which may or may not be associated with a corresponding change in treatment).

⁷ Although Hoffman at one point endorses this idea, his broader analysis does not reflect that understanding. See HOFFMAN, *supra* note 2, at 191 (“We cannot forgive what we don't blame.”).

forgiveness in these cases is simply out of place.⁸ Finally, letting go of resentment and the attendant urge to punish due to the passage of time seems less like forgiving than forgetting, which sometimes just happens. By the same token, forgiving—letting go of justified resentment—does not entail forgoing punishment.

These distinctions matter. The point is not that “forgiveness” has a single, authoritative meaning that Hoffman is bound to respect; it is that his indiscriminate usage makes it impossible to know (or evaluate) what we are actually talking about. From a legal and philosophical perspective, “[f]orgiveness is the sort of thing that one does for a reason, and where there are reasons there is a distinction between good ones and bad ones.”⁹ As an experienced trial judge, Hoffman surely knows this, but he seems drawn to a conception of forgiveness that neglects these distinctions. Bromides about the restorative power of forgiveness—“we never fully recover until we forgive” (P. 191.) —are morally obtuse absent a careful assessment of the context and circumstances. Forgiveness may come as an appropriate response to a wrongdoer’s remorse or repentance; or it may reflect a person’s lack of self-respect or indifference to the moral order.¹⁰ Sound moral and legal judgment depends on the difference.

A similar confusion plagues Hoffman’s discussion of mercy and justice. Hoffman is critical of a fellow jurist, who reportedly denied a plea for mercy on the grounds that judges “are not in the mercy business; we are in the justice business.” (P. 137.) According to Hoffman, this judge has confused second and third-party punishment, improperly denying mercy a role in just sentencing. That is, the judge, a third-party punisher, has taken on the role of a second-party punisher (i.e., a victim) by rejecting the possibility of mercy. Elsewhere, Hoffman asserts that mercy is the distinct prerogative of third-party punishers: “Judges show mercy; victims simply forgive.” (P. 190.)

Hoffman’s analysis of justice and mercy (and forgiveness) betrays a fundamental misunderstanding of some well settled legal and philosophical distinctions. Thus, traditional mercy is controversial in the criminal law precisely because it is taken to involve a set of emotions and judgments more naturally suited for private relationships (i.e., the second-party context). To the extent that justice consists in giving offenders their due, mercy represents a departure from justice.¹¹ Although this is largely unproblematic in the interpersonal setting—

⁸ See Murphy, *supra* note 6, at 15 (“Forgiveness, Bishop Butler teaches, is the forswearing of resentment—the resolute overcoming of the anger and hatred that are naturally directed toward a person who has done one an unjustified and non-excused moral injury.”).

⁹ *Id.*

¹⁰ *Id.* at 24 (“Acceptable grounds for forgiveness must be compatible with self-respect, respect for others as moral agents, and respect for the rules of morality or the moral order.”).

¹¹ *Id.* at 169. To be sure, the role of mercy, and its relationship to justice in the criminal law context, remains unsettled. See, e.g., Carol S. Steiker, *Criminalization and the Criminal Process: Prudential Mercy as a Limit on Penal Sanctions*, in *THE BOUNDARIES OF THE CRIMINAL LAW* 27 (R.A.

where family, friends, and acquaintances do not have an obligation to do justice—it creates problems in the criminal law, which is predicated on that obligation. Moreover, because mercy requires a degree of discretion that defies systematic legal codification or application, it is generally thought to be in tension with the rule of law. As a result, a sentencing decision to show mercy raises questions of equality, legitimacy, and justice.¹²

All of this suggests that Hoffman’s judicial colleague who eschewed mercy in sentencing was clarifying rather than confusing the roles of justice and mercy as conventionally understood. As before, Hoffman is not bound by these conventions, but he undermines his argument by failing to engage them. One may take the position that mercy should play a greater role in sentencing, but a persuasive defense of that position would involve an acknowledgement of the relevant moral considerations.

Hoffman’s discussion of excuses and justifications in the criminal law is also unsatisfying. Hoffman notes that historically, doctrines of excuse, such as insanity, applied in cases of mental impairment that affected the wrongdoer’s brain function. However, an excused wrongdoer generally would not escape punishment. In contrast, doctrines of justification, such as self-defense, “deal with the problem of ordinary brains having their moral judgment acutely disabled by some extraordinary circumstances that would cause most of us to commit the same wrong.” (P. 174.) A successful justification defense would result in an acquittal and no punishment. Hoffman contends that the distinction is less relevant in the modern era, however, because “[j]ustified and excused actors are generally treated the same” (P. 175.) —a successful defense precludes punishment in either kind of case. Moreover, he believes the distinction is meaningless in any event, for “our evolutionary take on responsibility resonates with one particular position: that excuse and justification are grounded on the idea that the wrongdoers’ brains, although healthy enough to form intentions and act on them, are simply not rational enough to be blamed.” (P. 176.)

This is a truly puzzling analysis. As an initial matter, a justified act is, by definition, not wrongful. In the case of self-defense, for example, when we say that the actor is justified in using deadly force (to fend off a deadly attack), we are saying in effect that he did the *right* (or at least permissible) thing under the circumstances. Although killing another person is *prima facie* wrong, it is justified—not wrongful—for an innocent to fend off an aggressor. The actor—the innocent—far from being “not rational enough,” acted not only rationally but morally.¹³

Duff et al. eds., 2010). The point is that calls for mercy in the legal and philosophical literature acknowledge, as Hoffman does not, the conceptual tension at the heart of the issue.

¹² Historically, official mercy is most associated with God and monarchs. Its legitimacy is less obvious in a liberal democracy. See Mary Sigler, *Mercy, Clemency, and the Case of Karla Faye Tucker*, 4 OHIO ST. J. CRIM. L. 455, 482 (2007).

¹³ Similarly, an actor’s heightened rationality—choosing to act wrongfully to avoid some other harm—is what gives the duress defense (mentioned by Hoffman) what claim it has to being a

Insanity, by contrast, involves conduct that is not justifiable—killing a police officer whom the actor believes to be an invading space alien, for example. Thus, excuse defenses like insanity reflect the judgment that the offender is blameless not because he did the right thing, but because he lacked the capacity to know or act on what is right. We let the insane wrongdoer off the liability hook (when we do¹⁴) because his mental impairment renders him ineligible for blame and thus for punishment.

What is the source and significance of these misconceptions? I believe they are traceable to Hoffman's broader conceptual framework, which is largely instrumentalist and consequentialist. According to Hoffman, because the practice of punishment, in its various forms, flows from an evolutionary imperative to deter conduct that threatened individual, genetic, and group survival, the institution of punishment in the modern era must be similarly oriented around that imperative. On this view, deterrence is not only the key to responsibility, but the key to retribution and justice as well. This leads Hoffman to neglect the nuances of meaning that lie behind ordinary usage. Although he sometimes reveals that he is attuned to the distinctions, his insistence that retribution is the same thing as deterrence leads him into further confusion.

This confusion produces some basic misapprehensions about our blaming practices and the nature of individual responsibility. In particular, assimilating all instances of withholding punishment under the heading "forgiveness"—and ignoring the morally relevant differences between justified and excused conduct—is inconsistent with the conception of human agency that animates our doctrines of responsibility. The criminal law, in the modern liberal state, is predicated on the (rebuttable) presumption that individuals have the capacity for rationality—that our conduct generally reflects our choices. In this way, punishment in proportion to our blameworthiness (a mix of culpability and harm) reflects a validation of our moral personhood, our capacity to choose. To withhold punishment, absent a countervailing justification,¹⁵ is to deny our capacity not only for rational agency, but for the range of rights and responsibilities grounded in the liberal conception of the person.¹⁶

form of justification. Most modern courts and commentators treat duress as an excuse, however, because it involves situations in which the actor's will is overborn by a wrongful threat. This contrasts with necessity—typically a justification defense—which involves choosing the lesser of two evils in a forced-choice situation. In these circumstances, choosing the lesser evil is morally justified. To be sure, the law—and courts—are not always consistent in their application of these doctrines, but the distinction itself reflects an important moral difference. For a thorough discussion, see JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 217–20 (6th ed. 2012).

¹⁴ In the actual case where a teen killed a police officer based on such a delusion, the jury rejected the insanity defense. See *Clark v. Arizona*, 548 U.S. 735 (2006).

¹⁵ Of course where the conduct is justified—in a case of self-defense, for example—punishment is inapt not because the actor lacks rationality but because his conduct was not wrongful.

¹⁶ See generally Herbert Morris, *Persons and Punishment*, 52 *THE MONIST* 475 (1968) (arguing that respect for human agency requires holding individuals accountable for their misconduct).

To be sure, if Hoffman were only interested in tracing the evolutionary origins of punishment, his imprecise use of terms like forgiveness and excuse might not matter so much. But Hoffman aims more ambitiously to draw normative insights from the evolutionary narrative to justify and potentially reform modern penal practices. In that pursuit, he is of course free to challenge conventional understandings—to reject, for example, the liberal conception of the person. Instead, he mostly ignores them, and the resulting failure to engage this set of moral distinctions undermines the relevance of his analysis.

There is also an irony in Hoffman’s neglect of moral philosophy. The familiar knock on modern normative philosophy concerns the degree to which it is thought to rely on individual speculation about right and wrong. According to Paul Robinson, for example, whom Hoffman frequently cites, modern moral philosophy is hobbled by a methodology that amounts to “winging it”—deriving moral principles from the philosophers’ own personal reflections.¹⁷ The results, on this view, are biased by the philosopher’s inclination to reject otherwise sound principles that fail to accord with his own intuitions.¹⁸

In Hoffman’s analysis, a variety of speculations about the evolutionary roots of popular intuitions raises doubts about the validity of his enterprise. The problem is not that speculation is illegitimate per se; it is rather that many of Hoffman’s evolutionary speculations simply fail to resonate. Consider, for example, degrees of blameworthiness tested in the experimental setting. Asked to rank a series of offenses, participants overwhelmingly agreed that brutally killing one’s grandmother for an inheritance (by burning her alive) is worse than shooting to death a co-worker as revenge for getting fired. Hoffman, convinced of the validity of evolutionary explanations, concludes that the result “most likely” reflects “the kin/non-kin difference.” (P. 70.) Really? It strikes me as much more likely that the result reflects our moral sense that murdering a vulnerable person—granny was an invalid with an oxygen mask—and causing extreme suffering is more egregious than a garden variety gun murder. Indeed, Hoffman goes on to note the possible *secondary* relevance of vulnerability—even to observe that “youth seems to trump kin when we are talking about injuring unrelated young victims versus related old ones.” (P. 70.) In these cases, it is unclear what work the evolutionary perspective is doing, except perhaps distracting Hoffman from the most plausible account of relative moral blameworthiness.

¹⁷ Paul H. Robinson, *The Role of Moral Philosophers in the Competition Between Deontological and Empirical Desert*, 48 WM. & MARY L. REV. 1831, 1840 (2007).

¹⁸ In the domain of philosophy, this limitation is offset by a complex process of testing a wide range of intuitions not only against one’s own principles, but also critically evaluating them in light of a broader set of theoretical commitments. See JOHN RAWLS, *A THEORY OF JUSTICE* 40 (1971); Norman Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76 J. PHIL. 256, 258 (1979).

In another context, Hoffman tries to generate an evolutionary account of attempt liability.¹⁹ He suggests that our instinct to punish attempts less (if at all) than completed offenses is based on the difficulty of determining a defendant's intentions in the absence of conduct. But Hoffman cites studies to show that people feel very strongly about attempts, even unsuccessful ones. Thus, study participants rated an unsuccessful murder attempt (intent without harm) as more serious than an accidental killing (harm without intent). After trying unsuccessfully to identify an evolutionary basis for this result, Hoffman suggests that it could be a "modern cultural artifact." (P. 313.) Maybe, but isn't that always a possibility? I'm not sure Hoffman has provided any reliable mechanism for distinguishing such cases.²⁰

Indeed, Hoffman's evolutionary focus in the context of attempts seems to lead him even further astray. In the course of exploring the point at which conduct constitutes a criminal attempt, Hoffman speculates that at an early stage in the course of a would-be murder attempt, liability would be inappropriate "because of course at that point, without more, we have no idea whether" a murder is actually afoot. (P. 309.) Although Hoffman is surely correct about the epistemic challenges of determining intent based on otherwise innocent conduct, by focusing on the "detection" problem he overlooks an important moral point. Attempt liability is complicated not only because of the practical challenges of trying to determine when someone mentally crosses the line; it also raises the possibility of a premature legal intervention. That is, at least part of the challenge of enforcing attempt liability is the liberal state's reluctance to ascribe conclusive intent to an actor who might yet desist from criminal conduct. Because the state generally does not punish for thoughts (or innocent conduct), it cannot readily *justify* criminal liability—even if we could know an actor's intentions—at an early stage in the process.

The limitations of the evolutionary perspective in understanding attempt liability point to a more general limitation of Hoffman's dissonance test. Recall that the dissonance test is Hoffman's framework for evaluating questionable legal doctrines by determining their compatibility with our evolved intuitions. He is careful to note that sometimes our intuitions should give way, sometimes our doctrines; further, that we cannot always be sure that our intuitions are genuinely

¹⁹ Hoffman focuses on failed attempts in which the intended victim is not physically harmed. HOFFMAN, *supra* note 2, at 309.

²⁰ Another misfire is Hoffman's implication that subjective awareness is a necessary element of harm. Hoffman notes that that an unsuccessful murder attempt can still be harmful to a person, "assuming he became aware of the attempt on his life" and experienced emotional distress as a result. *Id.* at 309. While it seems clear that someone could be psychologically harmed in this way, it does not follow that, absent the would-be victim's (or witness's) awareness, there would be no harm. For example, it seems clear that if a person were drugged and raped, but suffered no physical injury and remained completely unaware of the incident, it would be inaccurate to say that he suffered no harm. Although the two kinds of cases are obviously distinguishable, the rape example shows that conscious awareness is not a condition of harm.

evolutionary in origin. (P. 253) As a result, he does “not pretend that this framework will revolutionize law.” (P. 267.)

I certainly hope not. Although it’s tempting to imagine a mechanism that would allow us to sort good doctrine from bad,²¹ Hoffman’s own examples show the challenges of generating meaningful results. Apart from the inconclusive attempt analysis already noted, Hoffman speculates about the evolutionary bases (or not) of conspiracy liability, the felony-murder rule, and corporate criminal liability. In every case, Hoffman’s ruminations seem to reflect a degree of thoughtful policy analysis, but in no case does the dissonance test provide truly instructive insights from the evolutionary perspective. Thus, despite Hoffman’s hope that “the evolutionary perspective [will] shift the debate from a mere clash of policies to a clash between policy and human nature,” (P. 308) the latter simply remains too speculative to establish a normative standard. Instead, Hoffman’s insights—more psychological than evolutionary—at most highlight the challenges of convincing legal decision makers (like juries) to follow the law when it seems to be counterintuitive.

In the end, for all of the scientific rigor that Hoffman attempts to marshal, he nevertheless falls prey to some familiar canards and clichés about our punishment practices. In the course of discussing legal dissonances, for example, Hoffman notes that, despite what is popularly supposed, sentencing outcomes in the United States are generally harsher than individual citizens actually favor in an experimental setting. Hoffman purports to identify an evolutionary explanation for this “troubling political phenomenon,” citing the “one-way punishment ratchet” that only moves upward. (P. 258.) On this view, the general public’s undifferentiated feelings of (vicarious) second-party *blame* prompt politicians to ratchet up third-party *punishment*.

As an initial matter, the so-called “one-way ratchet” actually moves fairly readily in both directions. As Hoffman’s own historical account shows, our modern modes of punishment are generally less harsh than they once were. More generally, punishment practices are prone to cyclical changes in response to prevailing social and political conditions. Presumably this is exactly what we would expect on the evolutionary analysis, vacillation between punishment and forgiveness (in Hoffman’s broad sense) as a community works to strike an optimal balance in the shadow of the Social Problem. Too much punishment makes group life unstable; too little makes cooperation impossible.²² Indeed, the modern sentencing practices that prompted the upward ratchet metaphor are in the process of, well, ratcheting downward. For a variety of policy reasons, recent trends in

²¹ I found myself trying (unsuccessfully) to apply the framework to omission liability, a sometimes counterintuitive area of the criminal law. At the same time, I was disappointed that Hoffman did not analyze the Model Penal Code approach to attempt liability, which treats attempts and successful crimes as equally blameworthy.

²² HOFFMAN, *supra* note 2, at 191 (“Too much forgiveness and not enough punishment would have unraveled our groups in anarchy; too much punishment and not enough forgiveness would have unraveled them in rebellion.”).

sentencing reflect a determination to cut back on the length and breadth of prison terms.²³ Although Hoffman cannot be faulted for failing to anticipate exactly when the ratchet might move in the other direction, his own analysis should have made him more circumspect about blithely endorsing the “one-way” slogan.

Finally, given the scientific orientation of Hoffman’s project, he seems improbably drawn to some standard platitudes about forgiveness. Quoting Christian theologian Lewis Smedes, Hoffman intones, “when we forgive ‘we set a prisoner free and discover that the prisoner we set free was us.’” (P. 196.) In a similar vein, he quotes South African writer Alan Paton: “When a deep injury is done us, we never fully recover until we forgive.” (P. 191.) Although we can easily imagine the power of these insights in their original context, in Hoffman’s analysis they are hard to take seriously. Holding on to resentment can be unhealthy, but it can also reflect a healthy sense of one’s own self-worth. And letting go of resentment does not entail forgiving; sometimes it’s just a matter of moving on. In any case, Hoffman’s take on forgiveness manages to offer the worst of both worlds—too broad to capture the variation and texture of our moral experience, too vacuous (at least out of context) to provide meaningful moral insight.

IV. CONCLUSION

Despite these shortcomings, *The Punisher’s Brain* is both a worthwhile contribution to the literature on punishment and an engaging read. My principal criticism is that it would have been more compelling if Judge Hoffman had approached the analysis of legal and moral concepts with the same precision and care reflected in his scientific analysis. A book on punishment need not be a work of philosophy, but it should reflect a clear understanding of the moral concepts that structure and inform legal meaning and practice. After all, conceptual clarity is not the exclusive purview of philosophers.

To Hoffman’s credit, his dissonance framework does reflect the importance of distinguishing between a scientific explanation of a phenomenon and a normative prescription for our legal institutions and practices—between what is and what ought to be. He is careful to point out that “moral questions...require answers that evolution alone cannot supply.” (P. 260.) Hoffman’s project also calls to mind the

²³ See, e.g., Erik Eckholm, *In a Safer Age, U.S. Rethinks Its ‘Tough on Crime’ System*, N.Y. TIMES, Jan. 14, 2015, at A1 (describing bipartisan efforts to achieve cuts in federal sentencing); Editorial, *Strong Steps on Sentencing Reform*, N.Y. TIMES, July. 22, 2014, at A20 (“In 2013 alone, 35 states passed at least 85 reform-minded bills that created community-based alternatives to prison, helped inmates re-enter society, and increased the use of data to help judge a person’s risk of re-offending, according to the Vera Institute of Justice.”); E.J. Hurst, II, *Federal Sentencing and Prison Reform now Bipartisan Issues*, THE HILL (Aug. 13, 2014, 7:00 AM), <http://thehill.com/blogs/pundits-blog/crime/214998-federal-sentencing-and-prison-reform-now-bipartisan-issues> (noting that younger Republicans “are working with Capitol Hill Democrats to shorten federal sentences, reduce populations in overcrowded prisons and even to count (and reconsider) the thousands of federal crimes on the books”).

idea that “ought implies can”—that the content of our moral obligations may be constrained by our natural capacities.²⁴ On this view, there is value in understanding the kind of animal we are and its implications for what we can reasonably expect of one another. Hoffman’s analysis of the evolutionary origins of punishment advances this important conversation.

²⁴ For a thoughtful discussion of the possible meanings (and misuses) of the expression, see Robert Stern, *Does ‘Ought’ Imply ‘Can?’*, 16 *UTILITAS* 42 (2004).