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The Role of Remorse in Criminal Justice

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ABSTRACT

In this essay I review the role that remorse does and ought to play in criminal justice. Evidence of remorse appears to influence decision-making in a number of stages of the criminal process. But should it? I explain how remorse might have an appropriate role given certain assumptions about the general justifying aim of criminal justice. I also look at the nature of remorse as an emotion, and how differing conceptions of the emotions can inform our understanding of the role remorse might play. However, I also look at some serious challenges that face any proposal to give criminal justice officials powers to evaluate remorsefulness and to treat offenders differently on their basis. I conclude that it may be that the best we can do is to attempt to design a system that acknowledges the appropriateness of remorse but does not disadvantage those who are unable to display it to the satisfaction of a designated official.

KEYWORDS: REMORSE; CRIMINAL JUSTICE; SENTENCING; MITIGATION; EMOTION; PUNISHMENT

1. Introduction

Edward Hyde - the villain of Robert Louis Stevenson's 'The Strange Case of Dr Jekyll and Mr Hyde' - is an iconic figure of evil in modern Western literature. His depiction tells us something important about the role of remorse in the moral consciousness of its intended audience. Stevenson first reveals the horror of Hyde's character when a witness, Mr. Enfield, recounts an incident that took place late one night:

'All at once, I saw two figures: one a little man who was stumping along eastward at a good walk, and the other a girl of maybe eight or ten who was running as hard as she was able down a cross street. Well, sir, the two ran into one another naturally enough at the corner; and then came the horrible part of the thing; for the man trampled calmly over the child's body and left her screaming on the ground. It sounds like nothing to hear, but it was hellish to see. It wasn't like a man; it was like some damned Juggernaut. I gave a view halloa, took to my heels, collared my gentleman, and brought him back to where there was already quite a group about the screaming child. He was perfectly cool and made no resistance, but gave me one look, so ugly it brought out the sweat on me like running' (Stevenson 1950 [1886], pp. 336-7)

This incident, being the first description of Hyde, is clearly meant to shock. As it turns out, however, the child is not badly hurt. The shocking thing is meant to be

Hyde himself, his actions and reactions, and the insight they give into the emptiness, even unintelligibility, of his inner life. Hyde's evil, from the point of view of the story, lies in the fact that he lacks all fellow-feeling. The child means nothing to him. He doesn't seem to have noticed her, or if he did, he didn't seem to have taken any steps to avoid knocking her over. This attitude of Hyde's before the event, moreover, is mirrored by his cool attitude after the event. Just as it didn't matter to him that if he kept on walking like a juggernaut he would trample the child, so it doesn't seem to matter to him that he has caused the child harm. The screaming that would – the narrative implies – touch the heart of any decent human being seems not to register with Hyde. Furthermore, the utter emptiness in Hyde's attitudes towards his fellow human beings is manifested in his body, his demeanor and his gestures, so that his evil is there for all to see, to wonder at and be repelled by.

I begin with this excerpt in order to fix some ideas about the place of remorse in our social and moral life, and to raise some questions that we will investigate in what follows. We should not take literary sources as infallible guides to moral standards, of course. Nevertheless, as with marketing, stories like this one play on firm expectations of their readers, and one can use highly successful stories to see what those expectations are, and hence learn something about the readers to whom they are directed. First of all, Stevenson's narrative shows the intimate connection between perceptions of wrongdoing and judgments regarding the suitability of remorse on the other. It is a deep feature of the moral life that we expect someone who realizes that they have done wrongfully harmed another person, and to whom it matters that they have done so, to feel remorse. Indeed a lack of remorse is taken to show a lack of care about other people altogether, as though one cannot have a sense of the importance of other people and yet harm them without remorse (or, as we say, 'remorselessly'). Secondly, the absence of remorse can provoke even greater anger (or revulsion, frustration, incomprehension) towards the apparent wrongdoer than the commission of the wrong itself. A person who has committed some wrong can compound it by failing to experience appropriate remorse. Thirdly, we expect remorse to make itself manifest, to break out of one's inner life and express itself in forms that all can see and understand. Remorse should appear on the body, and it is part of Hyde's horror to observers that there is none to be found there.

What has all this to do with criminal justice? Remorse matters insofar as criminal justice takes an interest in the attitudes that defendants and convicted offenders have towards those whom the criminal justice system is – at least on the face of it – designed to protect and serve. As we will see in the next section, it looks as though criminal justice does have such an interest – although whether it should, and the precise character of its interest, will depend on various issues that we will pursue throughout the rest of the essay. In the sections to follow we will ask how remorse fits in to various conceptions of the general justifying aim of criminal justice (section 3); what kind of emotion remorse is, and what difference that makes to its relevance to criminal justice (section 4); and whether there are further moral and practical reasons not to have criminal justice officials making decisions based on their perceptions of an alleged wrongdoer's remorse (section 5).

2. Six Roles For Remorse In Criminal Justice

It is almost certain that large numbers of criminal acts go unreported, and hence never lead to action at any level of the criminal justice system (Coleman and Moynihan 1996); it would be a plausible though hard-to-confirm hypothesis that prompt and convincing displays of remorse on the part of perpetrators account for at least some victims deciding not to report what has been done to them and have it labeled as a crime. This would be a further role for remorse in addition to the roles to be considered in this section. We might call it a potentially *pre-emptive* role for remorse in criminal justice. But once an action is designated potentially criminal and an investigation begins, there are at least six places in which remorse can play a role in criminal justice.

First of all, there is the relevance of a *capacity of remorse* to determinations of whether a person is criminally responsible. Lack of such a capacity is often thought to be a feature of psychopathy (Hare 1996). While standards of criminal responsibility do not currently tend to include an explicit exemption based on psychopathy (the Model Penal Code specifically rules it out: Sec. 4.01(2)), the basis for criminal responsibility is widely taken to be rationality, or an ability to be guided by reasons; and because the reasons in question in criminal law are moral reasons, there is a live debate about whether a psychopath, lacking a capacity for remorse, thereby lacks a capacity to be guided by moral reasons, and hence should be excluded from criminal responsibility (Murphy 1972; Duff 1986; Garvey 2008).

Secondly, remorse can play a role at trial, for instance, in swaying a jury to convict on a lesser offence in a case where the defendant admits causing serious harm or fatality. Say the defendant admits causing death negligently or recklessly, but pleads not guilty to a charge of murder on the grounds that the action was unintentional. If the defendant shows remorse in the witness box, the plea may appear more convincing. One who appears remorseless, untroubled by the fact that they have been a cause of death, may give judge or jury the impression that he or she could well have done it intentionally; whereas someone who is clearly troubled by remorse may thereby give evidence of strong psychological barriers against intentionally taking life. This was arguably a feature in the 2014 trial in South Africa of Oscar Pistorius, the Olympic athlete who shot his wife Reeva Steenkamp in the bathroom of their home in the middle of the night, claiming he suspected her of being an intruder. Pistorius's retching in the courtroom as evidence was being presented, and his apparently remorseful performance on the witness stand, were relentlessly analyzed as evidence of whether he was guilty of premeditation. Because of the absence of reporting restrictions in South African trials, this became an international conversation, as Pistorius was surely aware it would (Surette 2015).

Thirdly, remorse can play a role as a mitigating factor at sentencing (Bandes 2016; Maslen 2015). For instance, the United States Sentencing Commission Guidelines (2014) devotes Part E of its Chapter Three on 'Adjustments' to 'Acceptance of Responsibility.' The defendant's acceptance of responsibility for the crime is taken as a consideration potentially warranting a decrease in the

sentence that would otherwise be given. Although remorse is not mentioned explicitly in this section of the Guidelines, it does appear to play a central unspoken role. To see this, notice that this section contains the provision that: 'The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.' Now, this provision is a strange one on the face of it, since the features that are explicitly mentioned as forms of acceptance of responsibility – for instance, 'voluntary termination or withdrawal from criminal conduct or associations'; 'voluntary payment of restitution prior to adjudication of guilt'; 'voluntary surrender to authorities promptly after commission of the offense'; 'voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense'; and 'post-offense rehabilitative efforts (e.g., counseling or drug treatment)' – are all publicly verifiable features that the sentencing judge is in no special position to determine. Hence the view that the sentencing judge *is* in a special position seems rather to reflect the assumption that an important evidential ground for determining whether or not the defendant accepts responsibility consists in behavior that the judge is in a privileged position to observe and assess, namely, his or her behavior and demeanor at the trial and in post-trial meetings, and specifically whether that behavior is such as to show remorse. In the U.S., the role of remorse in sentencing decisions takes on a particularly urgent cast in relation to capital cases where a jury is appointed to make the decision whether the death sentence should be deployed. Jurors who decide in favor of the death penalty cite lack of remorse as the most compelling reason for doing so (Sundby 1997-8). And prosecutors emphasize the defendant's lack of remorse whenever possible in their closing arguments (Costanza and Peterson 1994).

Fourthly, remorse can be implicated in rehabilitative sentences that require the offender to undertake a program to confront and address the causes of their offending behavior. For instance, the U.K. *Criminal Justice Act* (2003) introduced a range of such 'community sentences,' which can include: 'Programme Requirements' such as sex offender treatment programs, anger-management programs, and general offender behavior programs; 'Mental Health Treatment Requirements'; and 'Alcohol Treatment Requirements'. On the assumption that one cannot 'pass' such programs simply by turning up to them, and must rather be judged by an appropriate official as having successfully completed them, it is hard to see how such a judgment could be made if the official does not at the same time judge that the offender has taken responsibility for his or her previous action, and now sees them as objects of painful remorse that they must work not to repeat.

Fifthly, remorse can play a role in parole decisions, when a board is deciding whether to allow early release or otherwise ameliorate the terms of the sentence. Parole boards tend to have assessment of the risks offenders pose to the public as their official rationale. However, in reality such assessments often hinge on whether or not the offender displays remorse. This can throw up problems. Commenting on the notorious U. K. case of convicted killers of black teenager Stephen Lawrence – in which one of the convicted men had told the

jury: 'You have convicted an innocent man. I hope you can live with yourselves' – Harry Fletcher, leader of the union of probation officers, said:

'My experience is that a continued claim of innocence is always a barrier. A lifer, in order to get out of jail on licence, needs to demonstrate that he or she has shown remorse, completed rehabilitation programmes and is therefore low-risk. By definition, if the prisoner says they have not committed the crime, they are not able to tick the relevant boxes for release.' (Doward 2012)

Sixthly, and perhaps more abstractly, remorse might be said, not just to play a role in particular decision-making stages of the criminal process, but to have a structuring role in the criminal justice system as a whole (Duff 1986, 2001). To put it more precisely, we might say that perceptions of the appropriateness of remorse – and the appropriateness of connected reactions such as 'paying one's debts' and 'making amends' – helps to explain, not just some of the official rhetoric about criminal justice, but also some of the rituals according to which criminal justice is structured. Criminal justice is not simply an efficient technocratic method of social control or social hygiene. Rather it centers around what would otherwise appear to be the clunky and archaic forum of the trial, where a defendant is asked to appear before his or her peers (or the judicial representatives thereof), and to answer a charge. The very form of this forum suggests a public interrogation, but also an opportunity for the convicted defendant to be told in no uncertain terms of the moral attitudes that are appropriate for his or her situation, and to be given the chance to display them. In addition, the result of conviction can end up being a spell 'paying one's debts' in what in some places is still non-accidentally called a 'penitentiary.' The structure of the criminal process, from the temptation that leads to crime, through the investigation, the arraignment, the condemnation from the judge, to the time for reflection and repentance in prison, until eventual release, reformed back into the community, captures a narrative of transgression, alienation, confrontation and reconciliation that lies deep in our moral psychology (and which is captured neatly by Dostoevsky in the structure of *Crime and Punishment*). The criminal justice system, on this view, is a complex system with numerous official goals. But the fact that states pursue those goals specifically through a criminal justice framework – and the presence of a criminal as well as a civil process for dealing with socially unacceptable behavior – strongly suggests a historical connection with wider social conceptions of the appropriateness of remorse and 'making amends' for criminal wrongdoing.

This list of six roles that remorse plays within criminal justice could be expanded – for instance, if we were to take into account the role it plays alternatives to conventional criminal justice such as restorative justice, as we touch on below. However, a number of authors have challenged whether remorse *should* play a significant role. It is to this question we turn now.

3. The Place Of Remorse In The Philosophy Of Criminal Justice

The discussion so far has been descriptive, offering an account of how perceptions and determinations of remorsefulness can shape an individual's

passage through the criminal process. However, the criminal justice system is not simply something that happens to us; it is a human creation, one that in principle we sustain and direct on the basis that it reflects judgments that we endorse. Of course, it would be naïve to think that the criminal justice system we have at the moment reflects our values perfectly; it would be similarly naïve to think that we can reform something as large and complex as our criminal justice system at will, simply by coming to the conclusion that it doesn't reflect our values. But criminal justice has a huge effect on individuals and communities, and we can't easily escape responsibility for asking ourselves whether what it does is acceptable simply by pointing to the complexity of reform. On this basis we turn from the descriptive to the normative and ask whether the criminal justice system is *right* to give remorse the roles that it does.

If remorse is to play a role in an institution like criminal justice, it might seem a natural implication that it will need to give officials¹ within that system responsibility for making evaluations of remorsefulness – that is, whether defendants or convicted offenders are experiencing remorse that is appropriate in its depth, adequacy, and sincerity – and that these evaluations will affect the way that offenders are treated by the system. However, as we will see below, it is possible to deny that implication; furthermore we will also see that there are important challenges that any provision for officials to make such evaluations would have to meet (Bagaric and Amarakesara 2001; Lippke 2008; Weisman 2014). These challenges focus on whether officials have the *competence* to make such evaluations; whether subjecting individuals to such evaluations is *counter-productive*, particularly in the coercive context of criminal justice; and whether, even if the evaluations were competently made and useful, the state and its officials would have the *right* to make such evaluations. Before we broach those questions, this section will place the role of remorse in the context of philosophies of criminal justice, while the following section will look at the nature of remorse as an emotion.

Any answer to normative questions about the appropriate role of remorse in the criminal justice system will be informed by one's view of what is the most adequate 'general justifying aim' of criminal justice. Indeed the relevance of remorse is an excellent illustration of the dividing lines amongst normative theories of criminal justice (Murphy 1997). For instance, if one thinks that the point of criminal justice is to deter or reduce crime, one's interest in remorse will be limited to whether one sees its presence as good evidence of future desistance. If one thinks of the aim of criminal justice as rehabilitation, one may be interested in remorse as a sign of moral or social improvement. If one thinks of criminal justice as properly meting out retributive justice, one will be interested in remorse to the extent that one thinks that remorse can affect what a wrongdoer's deserves. If one thinks that the proper aim of criminal justice is the communication of collective condemnation for the commission of acts that cannot be tolerated in decent society then one might see remorse as a sign that the message has been heard and understood. These all show ways in which

¹ Or lay people co-opted on to a jury; or lay people making up 'public opinion,' if officials' decisions are deemed to have to be responsive to public opinion.

remorse might be taken to be relevant, for instance, to determining the quantum of punishment appropriate for a particular offender, and hence might inform decisions about sentencing or parole. A similar point might be made about fitness to be tried and punished. If punishment is a matter of moral communication then only those who are capable of the relevant remorseful response would be apt for punishment. However, if punishment is for pure general deterrence then there may be no reason to think that the punishment of those who are incapable of remorse would be any less effective than the punishment of those who are so capable, and hence capacity for remorse would not set an important threshold for criminal responsibility.

It is beyond the scope of this chapter to investigate which conception of the general justifying aim of criminal justice is most adequate. However, it is worth briefly setting out some of the major fault lines in order better to illustrate why the relevance of remorse is a central dividing issue. Perhaps the major fault line is between *forward-* and *backward-*looking approaches; that is, between those who think that what justifies criminal justice is that it is the best available technique for bringing about some future good (normally, that good being security, or the settled avoidance of harm), and those who think that criminal justice is justified by the need to mark the seriousness of the wrong itself (independently of future good), in order to vindicate the rights and standards that were violated. Deterrence; incapacitation; many varieties of rehabilitation; some forms of censure view: these are purposes that fall into the 'forward-looking' camp in so far as they justify criminal law, trial and punishment as a means to a further end. If the criminal process – criminalizing actions, policing them, investigating them, trying apparent transgressors and punishing those convicted – were not the most cost-effective technique for bringing about security then, on a purely forward-looking view, there would be no reason to have such a process. By contrast some see the criminal process as something we need to have in order to do justice to the human significance of wrongdoing, independently of whether it brings about future security: amongst the supporters of this approach are retributivists, and some types of censure views, and some rehabilitationists.

One thing that may appear to count in favor of the forward-looking approach is the apparent strangeness of a modern liberal state having an institution that is not directed at welfare or security – as there would be if the backward-looking camp had its way. 'We pay taxes, not so that we are better off, but to make sure that wrongdoers get what they deserve?' – seems like a fair and pointed rhetorical question. Healthcare, national defense, social security, public amenities: these are publicly funded services that each citizen needs in order to go about their business, no matter what that business is. By comparison, it might look as though the backward-looking view of criminal justice, which suggests that there should be a publicly-funded service that vindicates moral standards by punishing those who violate them, is at best a luxury and at worst a throwback to a pre-liberal age (Murphy 1985).

However, a suggestive reply is available to the backward-looking camp, which brings us back to the relevance of remorse. The backward-looking view can

claim that its account of criminal justice humanizes what would otherwise be nothing more than a state-administered technique of social control. The backward-looking view models its approach to criminal justice on the reactions and interactions that play out in non-institutional interpersonal contexts of wrongdoing. Indeed, it can be seen as an attempt to capture such interpersonal interactions in institutional form. Remorse, like other reactions such as indignation, resentment, contempt, blame and so on, is a deeply-embedded feature of our interpersonal practices of accountability. These reactions are not things we engage in with the purpose of deterrence or incapacitation, etc.: rather, the most natural interpretation is that they are reactions that we have and express because we take them to be fitting given the nature of the wrong (Tasioulas 2007). When we expect an apology for wrongs done against us, for instance, it is not (just) because asking for an apology makes a secure future more likely, but rather because an apology is one of the things one is owed when one has been let down, betrayed, or taken for granted. Furthermore, for an apology to be sincere – at least when it concerns serious wrongdoing – is normally for the person giving it to be moved by what they have done (Smith 2005). The apology is an expression of remorse. But this suggests that, in interpersonal moral interactions, remorse plays a role other than its usefulness in predicting desistance. Rather what seems to underlie our interpersonal interactions is a set of assumptions about the ‘cycle’ of wrongdoing, from alienation and separation through remorse and amends to forgiveness, redemption and re-acceptance (Bennett 2008). Remorse plays a constitutive role in this process of repair since it marks the point at which it starts to *matter* to the person that they have unjustifiably caused harm. But if remorse, blame, indignation and so on are themselves backward-looking, and if there is some value in having an institution that embodies those interpersonal interactions – for instance, on the grounds that it thereby embodies an attractive view of political society as itself an interpersonal association – then it may be that there is reason to have, not only those institutions that promote welfare and security, but also an institution that publicly delineates society’s moral boundaries and the values for which it stands.

Some readers might be dissatisfied with the distinctions I have drawn here. They might be asking themselves whether it is not possible that *both* forward-looking and backward-looking considerations are important, and that a system might be better if it could realize both. Indeed they are, and indeed it would be. It seems undeniable that a form of criminal justice would be better the more it can accommodate both backward- and forward-looking considerations. That, on my understanding, is part of the promise of an alternative to conventional criminal justice such as restorative justice. Restorative justice can take various forms. But central to it seems to be an attempt to make room for an authentic interaction between the perpetrator and other affected parties, including the victim, in which a genuine apology might emerge (Van Ness and Strong 2010). As such we might say that the reasons for setting up a restorative justice programme are those we have identified as backward-looking. However, proponents of restorative justice have often defended it rather on the basis that it leads to lower recidivism rates and higher victim-satisfaction, and hence on the basis of forward-looking considerations. If correct, the conjunction of both leads us to see

why restorative justice might be a powerful way forward for criminal justice. Restorative justice might provide a way of dealing with crime that lowers crime rates and increases compliance but at the same time gives those affected by crime a meaningful and human vehicle through which to engage in contrition and forgiveness.

4. Remorse As An Emotion

Remorse is an emotion. But what sort of emotion is it, and how does this bear on its role in criminal justice? Broadly speaking emotions seem to be a cluster of various different elements. Firstly, there are bodily state elements such as agitation, raised heart rate, faster breathing, adrenaline, muscular tension, or their opposites. Secondly, there are distinctive phenomenal qualities of affect or feeling. Thirdly, there are belief- or perception-like elements involving some sort of appraisal of one's environment and whether things are going well or badly in certain respects (not necessarily one's immediate environment, but one's *situation*, where this can extend to one's understanding of the weal and woe of others). And fourthly, there are characteristic forms of behavior that a person in the grip of a particular emotion engages in. What ties these elements together may be said to be the causal links between them and their tendency to appear together as a syndrome. It is by reference to these elements that we individuate the emotions, explaining, for instance, in what ways indignation differs from anger, but also in what ways indignation is closer to anger than it is to jealousy, and so on.

Very broadly speaking again, we find a continuum of theories of the emotions that emphasise one or more of these elements over the others. For instance, we have purely non-cognitive theories that see emotions as nothing more than feelings and bodily changes (James 1884); purely cognitive theories that see emotions as judgements (Nussbaum 2001); behaviourist theories that see emotions as nothing more than dispositions to behave in certain ways (Skinner 1951); and a whole range of hybrid theories that try to explain how emotions can and do combine both cognitive and non-cognitive elements and others (Nussbaum and Kahan 1996). Partly cutting across this categorization, we have a distinction between those who see emotions as more or less automatic physiological mechanisms (or 'affect programs') that have evolved as part of human psychology because of their strategic value to human organisms (Frijda 1986; Ekman 1992), and those who see emotions rather as social constructions that are dependent on culture, ideology and world-view (Averill 1992). On the 'affect-program' view, it is the bodily changes resulting from some perhaps unconscious appraisal of the environment that cause the other features of emotions; whereas on the social constructionist view, it is socially-inculcated belief and understanding that causes the underlying physiology to be adapted to widely differing social meanings.

It may be that none of these accounts is correct for all of the things we intuitively call 'emotions' (Rorty 1981); however, it may also be that what we call 'emotions' are not a single class of things, and hence that each of these accounts is better fitted to some emotions than others. For instance, it may be that the affect program view gives a plausible explanation of an emotion such as fear. On

a simple interpretation of this view, for instance, a person might perceive a tiger in the immediate vicinity, and the realization that the tiger is a threat could trigger a range of bodily changes, experienced as the feeling of fear, but which function to place the body in readiness for certain evolutionarily developed automatic reactions (which it is generally useful for a creature to have automatically, without having to think about them, when it is in such situations) of fight or flight. Fear is a good case for the affect program view because there is evidence of its automaticity and its cultural invariability. However, many theorists of the emotions concede that the affect program view cannot be straightforwardly applied to other 'higher' emotions, for which the evidence of cultural influence is clearer (Griffiths 1997). For instance, if it is possible to have a sense of the 'sublime' in the face of a work of art, or a mountain vista, this may be a deep and authentic emotional response without it necessarily being the case that all human beings in all cultures are capable of having such a response.

Where does remorse fit into all this? First of all, we can individuate remorse by reference to the various elements of emotions that we distinguished above: in particular the appraisals it involves and the behavior to which it leads (Proeve and Tudor 2010). Remorse is distinguished from emotions like fear and anger by virtue of being an emotion of (negative) self-assessment (Taylor 1984). For instance, if I break my mother's favourite vase, my dominant reaction could be the *fear* of what will happen to me as a result; or it might be *anger* that I will now have to pay for a replacement; but if it is *remorse*, my focus is rather on my own failure in some respect (for instance, my clumsiness, or negligence, or lack of due care, or the fact that I lashed out at the case in anger and so on). Remorse concerns the person's assessment of their own performance, achievement or standing in some dimension or other. It constitutively depends on how the person involved understands their action as reflecting on them in some way.

We can elicit something of the specific character of the self-assessment involved in remorse if we contrast it with two other emotions of negative self-assessment, guilt and shame. Shame is conceived in the philosophical-psychological literature in two different ways: either as concerned with how one appears in front of others (as in the shame of being seen naked) (Sartre 1958); or as concerned with how one figures on a scale of excellence (as in the shame of having fallen short of one's aspirations) (Rawls 1971). Furthermore, shame, it is sometimes said, is concerned with how an episode sheds light on one's person or character as a whole, and can hence involve an assessment of one's whole person. To be ashamed of something, then, would involve either feeling that one was (nothing more than, or most importantly) an object of laughter or derision or contempt in the eyes of others, or a failure by one's own standards. The behavior associated with shame can be covering oneself up, or hiding oneself away. Guilt, by contrast, is thought of as focused on a particular wrongful act, or sin, or transgression. The guilty person might see themselves as in some way stained or tarnished by their wrong, and might seek to expiate it, perhaps through penitential action. Remorse takes a different focus from either of these. While remorse is an emotion of self-assessment, involving an acceptance of responsibility for the action, and a repudiation of it, its focus is not (simply) on oneself, nor (simply) on the character of one's action as a transgression, but on the harm done to the other.

The characteristic focus of remorse is the painful awareness of the harm one has inflicted on the other, and the way one has let them down (or worse) by causing it (Gaita 1991; Tudor 2000; Proeve and Tudor 2010).

These distinctions are not simply conceptual categorization. Rather they indicate important potential pathologies that human beings can fall into in reacting to their own failures, and which can serve as distractions from what is most important. One such pathology is that one focuses too much, as shame does, on the way one's action shows oneself to be a failure. Another pathology is that, as in guilt, one focuses too much on the wrongdoing as one's failure to do one's duty. We can imagine someone berating herself for what she has done, or for the failure that she is, and thereby neglecting the victim. Distinguishing guilt and shame from remorse allows us to insist that, by contrast to these pathologies, the proper focus should be on the victim as the person who has been harmed.

The differences among remorse, shame and guilt turn on how the person involved understands their situation – or, to put it better perhaps, what forms of understanding structure their experience of their situation. Remorse is a distinctive form of understanding of those acts that can be categorized as wrongdoing. Because of the level of cognitive elaboration required to make these distinctions between remorse and guilt and shame, it may be implausible that remorse is a basic emotion of the affect-program variety. *Some* form of emotional reaction to acts labeled socially as wrongs may be automatic and universal, as may some form of sympathy, compassion or fellow-feeling. But for the form of this reaction to have become, not simply fear or anger at the consequences, but a complex and elaborated feeling like remorse, requires a person to understand her situation in ways that, though she may find them compelling, are not merely instinctive. They have some grounding in her system of belief, her world-view, her wider outlook and set of attitudes. Hence the more plausible view might be that remorse is at least in part socially constructed. This is not to say that remorse is not a 'real' emotion; most people who have experienced it will know that it feels real enough. And it is not to say that the appropriateness of remorse is morally arbitrary; perhaps the most adequate account of morality that we have available to us would hold that remorse is a necessary and appropriate response to wrongdoing. However, it is to introduce some flexibility. We perhaps cannot expect *everyone* to be capable of experiencing remorse simply by virtue of having the same basic biological-psychological inheritance as we have.

If it is true that the social constructionist approach is a better model for an emotion like remorse, this would have repercussions for the relation between remorse and desistance. When a person is presented with situations that are a trigger for fear, we can expect that, absent a deficiency in their psychology and its underlying physiology, they will experience fear; and we would expect that fear would drive them to a pre-determined range of actions. If a capacity for remorse is culturally learned, however, we might find some people who, because of differences in socialization, have not developed that learned capacity, and yet who do not have any underlying physiological deficiency. Presented with situations that would trigger remorse in us, these people would remain unmoved, or would be moved in a different way. Perhaps Hyde might be such a

person, though not the only type. Furthermore, while fear brings on certain behavior automatically, it is at least possible that some people who have learned to experience remorse have only imperfectly learned to connect their remorse to certain kinds of victim-oriented reparative behavior. Such behavior is not simply, as social constructionists sometimes say, a 'performance' of one's role in the situation. Remorseful behavior can be motivated by one's feelings in such a way as to be spontaneous and authentic; furthermore, reparative action is behavior that makes sense to the agent as fitting given the way he understands his situation from the point of view of his emotion. If one feels the crushing weight of remorse from having harmed something one values, or has come to value, it makes sense to seek to repair that thing in any way still possible. So there is a logic to reparative behavior, a connection with the emotion that it expresses, that is not captured by the language of 'performing' the emotions. Nevertheless, someone who has only imperfectly learned the behavior of remorse may only imperfectly see the connection; and if this is the case then it may be possible to have genuine feelings of contrition, and yet to fail to be motivated to make amends, or apologize, or desist, and so on. While the presence of fear is a good predictor of behavior, the presence of remorse may leave it unclear how it will issue in action. Added to our cautionary note, we should point out that the connection between episodes of remorse and desistance is likely to be yet more tenuous because desistance is not simply a one-off expression of an emotion but a life-change that requires many more things to be in place before it becomes a live option (Bagaric and Amarakesara 2001).

This suggests that, if our concern with remorse is situated within a purely forward-looking crime-reduction picture, we would expect to find the presence of remorse a highly fallible predictor of desistance (Bandes 2016). By contrast, we can now see more clearly why the alternative, backward-looking approach should give remorse a central place. The reason remorseful apology is effective is that it expresses a deep-running understanding of the wrongness of the action: the apology repudiates and retracts the attitude expressed by the wrong. If we think that criminal justice is in some way based on the social rituals of censure, apology and re-acceptance, remorse is clearly pivotal: it is a form of moral understanding that criminal justice aims to endorse, communicate and strengthen. If we are persuaded by the social constructionist account of remorse then it will be true that, just as moral understanding is culturally learned and fragile in its effects on one's behavior, so will be the emotion of remorse. However, it is not for that reason dispensable, or of only conditional importance. The centrality of remorse serves to humanize what can otherwise be a bureaucratic and repressive institution by asserting that its concern remains with the basic material of human moral behavior, its rights and wrongs, and its repair.

5. Should Officials Have Powers To Evaluate Remorsefulness?

The preceding two sections have shown that there are at least some reasons for the relevance of remorse to criminal justice, particularly if one agrees that criminal justice should seek to reflect aspects of our interpersonal practices of accountability, such as censure and apology. However, we now need to ask what the practical implications of this should be. Should the criminal justice system

expect remorse from offenders? And in particular, should officials have powers to evaluate remorsefulness, and to treat offenders differently depending on whether they are remorseful or not?

A number of writers have defended the view that they should, arguing, for instance, that remorse should be a mitigating factor in sentencing (Tasioulas 2004; Smith 2014; Maslen 2015). Proeve and Tudor put it this way:

‘Of the many contexts in which a person may receive misrecognition, that of being subject to the criminal justice system and, in particular, being before a sentencing court is among the most serious and the most critical. To misrecognize an offender at this juncture can itself be a serious wrong to him. Where the offender is experiencing remorse, he is experiencing a significant shift in his self-perception and a reorientation toward himself. This makes the situation of the remorseful offender a potentially critical one in terms of the re-formation of (at least aspects of) his self-conception. To fail to recognize the remorseful offender as a remorseful offender can thus amount to a basic misrecognition of him which disconfirms the value of his remorse, and so can constitute a significant wrong to him. To try to avoid that wrong of misrecognition, it will normally be the case that a reduction of sentence severity is needed’ (Proeve and Tudor 2010, p. 130).

The argument here is that remorsefulness involves a deep reorientation that should be acknowledged by officials and reflected in the way the offender is treated. The offender may justifiably feel overlooked if the justice system gives a central place to remorse, and he is now experiencing remorse, but that makes no difference to the sentence. However, although there is a *prima facie* case for treating remorse as mitigation, putting this into practice unavoidably involves giving officials power to evaluate remorsefulness. Furthermore, it is quite possible to think that the overarching purpose of criminal justice is shaped by the appropriateness of remorse without thereby thinking that the criminal justice system should aim to treat those showing and failing to show remorse differently (Bennett 2006, 2008). Those who think officials should be in the business of evaluating remorsefulness need to recognize that doing so would raise a number of problems (Lippke 2008).

The first challenge forms part of the cluster of factors constituting ‘the decline of the rehabilitative ideal,’ in this case comprising worries about the efficacy, intrusiveness and fairness of coercive rehabilitative treatment (Allen 1981). If criminal justice is to have a rehabilitative element, it needs ways of gauging rehabilitative progress: here remorse may be taken, in a commonsense way, as one predictor of future desistance. But, as might be asked of other forms of rehabilitative treatment, is there solid evidence that penal treatment leads to remorse, or that remorse is a good predictor of desistance? Does the expectation that offenders will feel remorse rest on unrealistic expectations about the extent to which human nature is malleable and oriented to the good? There are also concerns about intrusiveness. Does a focus on remorse resemble mind control, intruding into a sphere of the agent’s mind or soul that should remain private,

particularly where it is coerced? And there are concerns about fairness. Doesn't the inclusion of remorse in sentencing or parole decisions upset proportionality, most dramatically where sentences are open-ended and conditional on sufficient moral progress (von Hirsch 1976)?

Jean Hampton, who herself defends a form of rehabilitationism in her 'moral education' theory of punishment, articulates another challenge:

'The fact that parole boards in this country have tried to coerce repentance is, from the standpoint of this theorist, a grave and lamentable mistake ... The parole board uses the threat of refusal of parole to get the kind of behavior it wants from the criminal, and the criminal manipulates back – playing the game, acting reformed, just to get out. In the process, no moral message is conveyed to the criminal, and probably no real reformation takes place.' (Hampton 1984, pp. 232-3)

Hampton's claim is that incorporating the aspiration to remorse within the coercive framework of criminal punishment is self-defeating and makes it less likely that genuine remorse will emerge. Hampton argues that the moral education theorist 'doesn't want the state to play this game;' although she thinks that the point of punishing people is to get them to see their actions as wrong, she thinks that there are limits to the state's pursuit of that aim. In inflicting the set punishment on a convicted offender, 'the state hopes its message was effective, but whether it was or not is largely up to the criminal himself.' Hampton's theory is therefore an example of a theory in which remorse plays a structuring role in the overarching purpose ascribed to criminal justice, but which rejects what might be taken as the natural implication of this view, that the system should therefore empower officials to make judgements on the quality of participants remorsefulness.

A similar concern about coerced remorse has recently been expressed by Richard Weisman (Weisman 2014). Weisman presents the point in the context of a social constructionist account of remorse, and an analysis of its legal regulation as a form of social control.

'Through the prospect of mercy and moral accreditation but also the concealed threat of violence, judicial discourse shapes the content of remorse in a way that reflects the context in which it is produced. If it is appreciated that remorse is not just a psychological trait inherent in the individual but rather an attribute that is situated in a specific social context, the impact of juridical discourse on the shaping of remorse becomes all the more comprehensible. The form in which remorse must be expressed is that of submission to a greater power – the moral performances that are validated all have as their common point of reference a posture of abjection and surrender by the offender before the authority of the law.' (Weisman 2014, p. 44)

Here the concern is that remorse is not a 'natural' reaction to wrongdoing, but is shaped by social expectations; and that in the judicial system it is shaped both by

the coercive context of the threat of (prolonged) punishment, but also by the authority claimed in that coercive context by the state to pass judgement on what the defendant should feel remorse for and whether her remorse is adequate. The criminal justice system, on Weisman's view, makes individuals' fate depend on whether they can convincingly display the remorse expected of them, where it is legal officials themselves who have the final say on whether they do or not. This means that the remorse in this case is not simply directed towards the gravity of the offence, but cannot but be infected by the need to display deference to those judging one's case. If the criminal justice system expects participants to experience and display remorse, it must be on the system's own terms.

A related challenge – which emerges once we acknowledge the role of social expectations in shaping remorse – is that cultural differences may influence evaluations of the appropriateness of remorse (Bandes 2016). For instance, different cultures may have different rules about who can display remorse, and how, and indeed what appropriate remorse looks like when it is displayed. We need to be open to the possibility that what may look like a lack of remorse to one observer may look different to someone attuned to the norms of the culture from which the person being observed comes. An expression of this concern in the US context is as follows:

'a judge in a region with a large Hispanic population commented on Hispanic males' difficulty in openly and publicly admitting guilt, "to look you in the eye and say they're sorry." Cultural values inculcated in certain racial/ethnic minorities may prohibit such required displays of remorse, just as a judge's cultural values may preclude him or her from perceiving a valid expression of remorse from a member of a different racial/ethnic group.' (Everett and Nienstedt, quoted in Proeve and Tudor 2010, p. 112)

Everett and Nienstedt bring out the dual aspect of the concern: that some individuals may be disadvantaged in a criminal justice context by cultural norms prohibiting remorse, but also by observers' failure to 'read' displays of remorse correctly. This concern becomes particularly acute in multicultural societies where a particular cultural group is already severely socially disadvantaged (in which case it is already likely that its culture of bodily expressions and display rules will be unfamiliar to mainstream society).

A further concern is with the state engaging in what von Hirsch calls 'compulsory attitudinizing' (von Hirsch 1993), that is, not just publicly declaring emotions such as remorse to be appropriate, but asking that they be demonstrated in public settings, on pain of suffering some disadvantage such as being convicted when one could have escaped it, or being denied parole, or losing mitigation at sentencing. This raises a problem of whether a requirement (not a formal requirement, but a strong incentive) to display remorse risks placing offenders in a humiliating position that threatens their integrity. Compulsory attitudinizing prevents a person from being able to behave authentically with respect to their profound convictions; by putting individuals in a position in which they will be seriously disadvantaged if they do not give a convincing show of remorse we

pressure people to display the emotions they think are expected of them even if they don't feel them (Bennett 2006).

Hampton enters a final important reservation about empowering officials to make assessments of remorsefulness. 'Even a good state can make mistakes when it enacts law. It is not just possible but probable that the state at one time or another will declare a certain action immoral which some of its citizens will regard as highly moral.' (Hampton 1984: 233) If states will inevitably have criminal laws that are morally mistaken, it would be grotesque to disadvantage those defendants or convicted offenders who were unable or unwilling to show convincing remorse for committing those 'crimes.' We can add that the same would go for mistaken convictions, which again are inevitable. But if it is clearly inappropriate to evaluate for remorse in these cases, the concern might be that there is no principled way of instructing officials how to distinguish cases in which remorse is not to be expected and those in which it is. After all, from the point of view of the system, criminal laws are valid, and procedurally sound convictions determine how individuals are to be treated. The system has to make those assumptions in order to do its work. Won't it be hard for the system to distinguish between cases in which the offender is not morally guilty, and should not be expected to display remorse, and those in which she is? In which case, given that it is grotesque to expect someone to display remorse when they are not morally guilty, and given that procedural correctness does not distinguish successfully between cases of moral guilt and innocence, should the system not refrain entirely from giving officials powers to make dispositive evaluations of remorsefulness?

Of course, these objections are not the final word (Tasioulas 2007). Whether they can be answered will depend on what is the most adequate view of the extent and nature of individual rights of privacy and conscience, and of the limits of state authority. However, they do give us reason to investigate how to construct a system that, while it may acknowledge and embody the appropriateness of remorse, does not disadvantage those who may be unable to show it to the satisfaction of a designated observer.

6. Conclusion

Readers are now in a better position to return to the various roles remorse plays in the criminal justice system and to make a reasoned assessment of them. Having surveyed the places in which remorse is implicated in the criminal justice system, we noted that any assessment of these roles would have to be informed by some orientation to the more basic question of what criminal justice properly attempts to achieve. We distinguished forward- from backward-looking conceptions of the general justifying aim, and noted that the former might take an instrumental view of the proper role of remorse while the latter gives remorse inherent value as a fitting response within our interpersonal practices of accountability. We then looked at the theory of the emotions, noting that, while 'emotion' is sometimes understood as a universal and automatic reaction generating a pre-determined pattern of behavior, remorse is likely to be best categorized as more cognitive and more socially constructed. This in turn suggested that remorse may be an unreliable predictor of desistance, even if it is

to be welcomed as a moral epiphany and an essential element of the social ritual of apology. We then asked what implications all of this has for whether remorse should play a role in the coercive mechanisms of state criminal justice. Theorists since Kant have worried that it is an inappropriate task for the state and its legal institutions to ask after the inner motivations of action, and that it should stick to the external regulation of behavior: justice, but not virtue (Kant 1996). Kant may have thought that it was simply impossible to know about character and virtue; others may be less skeptical on this front, but may find it intrusive or counter-productive to make such inquiries nevertheless.

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