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Remorse, Probation and the State

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ABSTRACT

Philosophical debate on the role of remorse in criminal justice has largely focused on whether remorse should play a role in sentencing decisions. In this chapter, I argue that this focus is unhelpfully narrow. Even though there are, I believe, good reasons to think that remorse should not influence sentencing, there are other valuable roles for remorse in a well-designed and well-functioning criminal justice system. In defending this conclusion, I look at the nature and value of *probation*. In particular, I look at the role that the encouragement of remorse might have in a well-structured and open probationary relationship. It is not always inappropriate, I will conclude, for state officials to take an interest in whether offenders are remorseful for what they have done.

Philosophical debate on the role of remorse in criminal justice has largely focused on whether remorse should play a role in sentencing decisions. In this chapter, I argue that this focus is unhelpfully narrow. Even though there are, I believe, good reasons to think that remorse should not influence sentencing, there are other valuable roles for remorse in a well-designed and well-functioning criminal justice system. It is not always inappropriate, I will conclude, for state officials to take an interest in whether offenders are remorseful for what they have done.

In defending this conclusion, I look at the nature and value of *probation*. In particular, I look at the role that the encouragement of remorse might have in a well-structured and open probationary relationship. Even if we have good reason not to treat remorse as a factor in sentencing decisions, it does not follow that remorse is irrelevant to *any* criminal justice context. Rather, our reasons for giving remorse a place in criminal justice decision-making may differ depending on the stage of the criminal process that we have in mind, and the aims

and culture of the state agency that is charged with dealing with that stage of the process. If this were correct, it would raise interesting questions about the differentiation of state agencies, and the different levels of involvement that it is appropriate for public officials in those agencies to have in the lives of private citizens, given the specific purpose and culture of those agencies. In particular, I will argue that a nuanced assessment of the place of remorse involves rejecting a monolithic view of the state. A well-designed and well-functioning probation process, I will claim, may legitimately have a role for the pursuit of remorse as an aspect of an open relationship of assistance and trust that the probation officer aspires to develop with the probationer.

1. The debate over remorse at sentencing

Philosophical debates about the role of remorse in criminal justice have often tended to focus on the question of whether credible displays of remorse should be taken as mitigating factors at sentencing.[1] For instance, when Steven Tudor talks about what he calls 'the remorse principle,' the principle he has in mind consists in a positive answer to this question about sentencing:

> 'where a sentencing judge is satisfied that an offender feels genuine remorse, then the judge, first, must always at least consider whether or not to mitigate the sentence due

[1] M. Bagaric and K. Amarakesara, 'Feeling Sorry? – Tell Someone Who Cares: The Irrelevance of Remorse in Sentencing,' *Howard Journal of Criminal Justice* 40 (2001): 364-376; S. Tudor, 'Why Should Remorse be a Mitigating factor at Sentencing?' *Criminal Law and Philosophy* 2 (2008): 241-57; R. Lippke, 'Response to Tudor: Remorse-Based Sentence Reductions in Theory and Practice,' *Criminal Law and Philosophy* 2 (2008): 259-268; H. Maslen, *Remorse, Penal Theory and Sentencing* (Oxford: Hart, 2015). For an influential communicative conception of punishment that motivates much support for remorse-based sentence reductions, see R. A. Duff, *Trials and Punishments* (Cambridge: Cambridge University Press, 1986). For another another author who supports the idea that criminal justice interventions should aim to evoke remorse in offenders, see N. Smith, *I Was Wrong: The Meanings of Apologies* (Cambridge: Cambridge University Press, 2008).

> to the offender's remorse, and, secondly, should normally so treat that remorse as a mitigating factor.'[2]

Tudor argues that if punishment is 'a communicative interaction, whereby the judge (representing the state or the community) reproaches or censures the offender through the imposition of sentence' then 'a reduction of sentence can be seen as a recognition of the remorseful offender's remorse that is communicated to her.'[3] Arguing for the same conclusion by a different route, John Tasioulas claims that one way in which compassion and mercy might justifiably enter into consideration in criminal justice is by treating evidence of remorse or repentance as grounds for reductions in sentence.[4]

By contrast when Mirko Bagaric and Kumar Amarasekara argue for the irrelevance of remorse, they again focus on sentencing, arguing that 'that there is no justifiable doctrinal basis for according a sentencing discount to offenders who evince regret for what they have done'.[5] They put the point bluntly:

> 'Criminal offenders have engaged in conduct which is prohibited by the criminal law. Minimum standards of human decency demand that a person should not unjustifiably encroach on legally protected interests of others. It follows that it is hardly too much to ask that offenders should show some contrition when they violate this proscription. In no other human activity do agents get credit for doing the minimum that is expected of them. The surgeon who saves a patient's life, the police officer who effects an

[2] Tudor, 'Remorse as a Mitigating Factor,' 243.
[3] Tudor, 'Remorse as a Mitigating Factor,' 248. See also Duff, *Trials* and Maslen, *Remorse*.
[4] J. Tasioulas, 'Mercy,' *Proceedings of the Aristotelian Society* 103 (2003): 101-132.
[5] Bagaric and Amarakesara, 'Feeling Sorry,' 364.

> arrest, the plumber who fixes the broken pipe, all are merely doing what is expected of them. Despite the enormous utility of their actions, they are not entitled to extra privileges and are not relieved to any extent of other societal duties. The reason for this is simple: rewards are not handed out for merely doing what is expected – only for clearly going beyond one's moral and/or legal obligations.'[6]

However, despite taking the lion's share of philosophers' attention, the issue of sentence reductions does not exhaust the way that remorse might have a legitimate role in criminal justice. In previous work, I have argued that there are five further ways in which displays of remorse, when perceived as credible, can make a difference in criminal justice.[7]

First of all, there is what I called the 'pre-emptive' role of remorse. This is where a wrongdoer's displays of remorse are sufficient to cancel someone's motivation for reporting a potentially criminal incident to the authorities. Secondly, the lack of a capacity for remorse is thought by some writers to undermine criminal responsibility.[8] Thirdly, a credible display of remorse can convince a jury to reject a charge of intentional harm or homicide in favour of a lesser charge of causing death negligently or recklessly. Fourthly, a display of remorse can be taken to be a requirement of successful completion of some rehabilitative sentences: for instance, those that require the offender to undertake a program to confront and address the causes of their offending behaviour. Fifthly, remorse can play a role in parole decisions, where it might inform an assessment of the risks of reoffending that a particular offender may pose (and where credible remorse might help to convince the board that the risks are lower).

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[6] Bagaric and Amarakesara, 'Feeling Sorry,' 364.
[7] C. Bennett, "The Role of Remorse in Criminal Justice," *Oxford Handbooks Online* (New York: Oxford University Press, 2016).
[8] E.g. Duff, *Trials*.

Furthermore, it might be argued that this wide range of roles for remorse is no accident. For it might be claimed that, on many accounts of what a criminal justice system should aim to achieve, remorse accords with those basic aims.[9] Theoretical approaches to criminal justice attempt to give a general justifying aim for classifying some people as offenders and treating them in certain, usually detrimental ways as a result. A range of different general aims have been claimed to be justify such treatment: retribution; deterrence; incapacitation; communication; rehabilitation. Whichever of these approaches one thinks most apt, however, they each take offending[10] to be in some way an aberration within the social and moral order, and a problem that needs to be addressed by the criminal process. And each of these approaches has some picture of a more beneficial state that could be restored, and at which it is the role of criminal justice to aim (and hopefully to bring about). While the details will differ, furthermore, all of these theories have reason to see remorse as a welcome mediating phase in the transition from the problematic, conflictual stage represented by offending to the resolution that criminal justice aims to bring about. This is because remorse involves the offender recognizing their own behaviour as problematic, focusing their attention on their victim, and becoming motivated to take responsibility and put things right. Most theories that look for some justifying purpose in criminal justice have a reason to approve of and welcome remorseful responses in an offender as a sign that resolution is closer than it was.

For instance, if one favours the view that criminal justice interventions are most justifiable when aimed at crime- or harm-reduction then one might see remorse, when genuine, as a sign of pro-social motivation and hence as a credible predictor of desistance. On the other hand, if

[9] Bennett, 'Role of Remorse.'
[10] By 'offending' I mean the commission of acts that, according to the relevant theories, are *appropriately* labelled as 'crimes.'

one favours a retributive view on which criminal justice should aim at a proportionate, deserved response to moral wrongdoing, it is to be welcomed when the offender comes to accept their guilt and endorses their own punishment. This conclusion seems particularly plausible in the case of those communicative theories that hold that wrongdoing deserves proportionate censure. If, in response to being blamed, the offender accepts the blame, and even shares it in the shape of remorse, this would appear to be a state-of-affairs to be regarded as an ideal result by the proponents of such censure theory. It should be noted that the claim about congruence that I am making here is not that each of these theories should necessarily see the presence of remorse as a reason to punish less. It is rather that, given their reasons for thinking that criminal justice responses such as punishment are justifiable, a proponent of such a theory has reason to welcome offender remorsefulness. Other things being equal, this might also give them a reason to think that such remorse is to be encouraged, either directly or indirectly, by criminal justice agencies.

Furthermore, while my discussion has until now been ecumenical in its approach to theories of punishment, my own view is that, when justified, punishment and criminal justice interventions have the distinctive function of responding to perceived moral wrongdoing, and treating offenders as responsible moral agents, rather than simply a problem to be managed. In my own view, this suggests that the most likely way to find a justification for punishment will be a censure theory, and in particular an *Apology Ritual*, where the form that censure takes involves compelling the offender to undertake the kinds of amends that they would undertake spontaneously if they were appropriately remorseful for the offence.[11] On my account, the form of the sentence thus directly expresses *how sorry the offender ought to be*

[11] C. Bennett, *The Apology Ritual: A Philosophical Theory of Punishment* (Cambridge: Cambridge University Press, 2008).

for what they have done. While I have argued that – for the reasons canvassed below – punishments should be so designed that offenders can meet the conditions of successful completion of their sentence whether or not they display the appropriate feelings of remorse,[12] there is nevertheless a clear link, on the Apology Ritual view, between deserving censure and the appropriateness of remorse.

Thus it is not simply descriptively true that remorse *does* figure as a factor in many decision-making contexts in the criminal justice system. On many accounts of the basic aims of criminal justice, and in particular on the type of censure account that I favour, there is reason to think that the presence or absence of remorse is something that the state *should* be concerned with, *somewhere* in the criminal justice system. It may turn out, on closer scrutiny, that the reasons in favour will turn out to be overridden by stronger reasons against. However, the accord between remorse and the various possible aims of criminal justice gives us an initial reason to expect there to be some justifiable role for remorse, and hence at least to investigate the possibility.

It would be consistent with there being a justifiable role for remorse *somewhere* in the criminal justice system, however, that the presence of remorse does *not* justify sentence reductions. That is, there might be decisive reasons to reject remorse as a ground for reducing a sentence while holding that a well-designed and well-functioning criminal justice system will have a role elsewhere in the criminal process. Indeed, that is a possibility that I will aim to make convincing in this chapter, by showing how the active encouragement of remorse in

[12] C. Bennett, 'Taking the Sincerity Out of Saying Sorry: Restorative Justice as Ritual,' *Journal of Applied Philosophy* 23 (2006): 127-143; Bennett, *Apology Ritual*. My claim that punishments should be insensitive to the actual presence of remorse in offenders has been criticised by those who would like to see remorse and apology have a more direct role in criminal justice. See e.g. Smith, *I Was Wrong*. The present chapter can be read as an attempt to acknowledge what is correct in those criticisms, while restating my concerns about the direct approach to evoking remorse in criminal justice that theorists such as Smith adopt.

probation is not subject to the same kinds of objection as is the appeal to remorse in justifying sentence reductions.

2. Five objections to the relevance of remorse to criminal justice

To begin to make a case for this conclusion, I will now look at five objections to the relevance of remorse in criminal justice. We will see that, while there may be grounds for thinking that these objections show that remorse is an inappropriate factor in sentencing decisions, they do not show the encouragement of remorse in the context of probation to be similarly inappropriate.

We have already looked at one initial objection to the relevance of remorse: this is Bagaric and Amarasekara's thought that an offender's remorse should not be rewarded since it is nothing more than should be expected of the offender. Spelling the objection out a little, we might say that some actions and attitudes are so obviously inappropriate that requirements to avoid such actions and attitudes are a basic and minimal responsibility. Thus responsible agents can reasonably be expected, without external supervision and assistance, to register this fact and as a result to avoid such actions and attitudes. They can reasonably be blamed for failing to avoid these actions and attitudes, and do not deserve special praise when they do avoid them. Remorse for serious wrongdoing is the kind of attitude that is obviously appropriate given the relevant standards. So those who have committed serious wrongdoing can be blamed for failing to experience remorse and deserve no praise or reward for experiencing it.

Our second objection concerns the practicalities of knowing whether remorse is credible or not. This objection revolves around a cluster of issues. One problem is the general issue of

sincerity in emotional displays, and how reliable our ability is to distinguish sincere from insincere displays of emotion. There would be a problem of false positives - of being taken in by convincing but insincere displays – and a problem of false negatives – of failing to recognise genuine remorse for what it is. These problems are compounded if we accept the existence of cultural 'feeling-rules'[13] that regulate issues such as: which emotions are to be experienced in which situations; which emotions can be displayed in which situations; and what it is for an emotion to be proportionate to the seriousness of one's situation. It might be argued that there are some universal basic emotions which cannot easily be faked or mis-read. However, remorse is not a basic emotion. Unlike simple sadness, remorse involves culturally developed perceptions of one's action as wrongful and as one's own responsibility. Reading the signs of remorse is thus likely to require familiarity with the feeling-rules of the offender's culture as well as their personal expressive style. It can be difficult to recognise such displays for what they are when exhibited by members of communities distinct from our own.

The lesson here is that the genuineness of remorse can be hard to discern. It would require sensitive judgement, sympathetic but critical perception, and careful questioning. However, the emphasis given to 'processing' large numbers of offenders in short periods of time is likely to make it extremely difficult for officials to foster such habits of discriminating perception. Furthermore, the likely unevenness in perceptions of remorse is an obvious way in which cultural and other stereotypes can be introduced into decision-making. Since it is disadvantaged groups who are most subject to stereotyping, and least likely to have a public

[13] A. R. Hochschild, 'Emotion Work, Feeling Rules and Social Structure,' *American Journal of Sociology* 85 (1979): 551-575

image in which they are represented as the individuals they are, this will foreseeably compound unjust disadvantage.

The third objection is that allowing remorse as a factor in decisions in criminal justice gives offenders an incentive to feign remorse in order to get a lighter sentence or an early release. If the motivation for making remorse a factor is a morally serious appreciation of remorse as an important element of moral progress, the unintended but foreseeable consequence of this, so the objection goes, would be to give the offender strong reason to focus on *appearing* remorseful at the right times. Offering leniency in exchange for displays of remorse can therefore end up corrupting the laudable moral ends of the process. Jean Hampton puts the point as follows in relation to evaluations of remorse by parole boards:

> 'The parole board uses the threat of the 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 communicated to the criminal, and probably no real reformation takes place … As one prisoner put it: "If they ask if this yellow wall is blue I'll say, of course, it's blue. I'll say anything they want me to say if they are getting ready to let me go.'[14]

This third objection thus again points to the need for public officials to be able to distinguish genuine from feigned remorse, and the epistemic issue of difficulties in doing so. The objection focuses on foreseeable effects arising from such difficulties – that it foreseeably

[14] J. Hampton, 'The Moral Education Theory of Punishment,' *Philosophy and Public Affairs* 13 (1984): 208-238, at 233

gives the offender strong incentive to perform in order to get better treatment rather than reflecting on those features of their conduct that genuinely call for remorse.

Our fourth objection concerns the need to acknowledge that some proportion of the 'offenders' being dealt with by the criminal justice system at any given point will be innocent of the crimes of which they have been convicted. However carefully the criminal process is designed to avoid this – and we cannot always say that our systems are designed as carefully as they could be in this respect – we will foreseeably have a problem of punishing those who are innocent. This fourth objection arises because of the problems of demanding remorse from such wrongfully convicted 'offenders.'[15] The objection says, firstly, that it is grotesque to put such 'offenders' in a position where they are being asked to display remorse for crimes they did not commit; secondly, that it is highly unequitable for genuine offenders to be treated more leniently than these innocent 'offenders,' should the former be more willing and able to express remorse than the latter; and thirdly, that such inequity compounds the initial injustice done to such individuals.

Our fifth and final objection has been articulated powerfully by Andrew von Hirsch and Andrew Ashworth in a set of criticisms of R. A. Duff's communicative conception of punishment.[16] Von Hirsch and Ashworth share Duff's view that censure is one of the purposes of punishment. However, they reject Duff's claim that, as they put it, 'the aim of the sanction would be actually to seek to generate in the offender specified sentiments of shame, repentance and the like'.[17] Von Hirsch and Ashworth deny that this kind of concern with an

[15] Bennett, 'Taking the Sincerity Out.'
[16] A. von Hirsch and A. Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press 2005). See Duff, *Trials*; and *Punishment, Communication and Community* (Oxford: Oxford University Press, 2001).
[17] von Hirsch and Ashworth, *Proportionate Sentencing*, 92

offender's remorseful state is the proper business of the state. They acknowledge that it might be appropriate among friends for one to attempt to induce remorse in the other after some breach in their relationship; but they deny the 'standing' of *the state* to concern itself with an offender's remorsefulness. 'How far I may properly go in trying to elicit the morally appropriate response from him depends on the character of our relationship.'[18] Their implication here, I take it, is that the state is *not* a community of friends. They illustrate the point with a memorable analogy:

> 'There is no doubt the head of a monastic community has standing to visit a penance upon an erring monk, since his function is to attend to the moral welfare of his charges. For a university disciplinary committee to undertake this role, however, would be questionable. Yes, the committee is entitled to censure a faculty member who has misconducted himself, after the proper procedures have been undergone; and in appropriate cases the response may properly embody some form of deprivation – say, a period of suspension. It would also be hoped that the penalty might elicit in him sentiments of regret, or the like. But if the committee characterized the sanction as a penance whose discomforts provide the vehicle for achieving a penitent understanding, one might well think they had overstepped their proper role.'[19]

As with the university disciplinary committee, but unlike the monastic community, von Hirsch and Ashworth think, the state has no justifiable orientation to its citizens' moral welfare. Rather the state should acknowledge that there is a limit to its right to inquire into matters, such as an offender's remorsefulness, that are properly private to individuals.

[18] von Hirsch and Ashworth, *Proportionate Sentencing*, 95.
[19] von Hirsch and Ashworth, *Proportionate Sentencing*, 95.

3. Assessing the five objections

If we now briefly review the plausibility of these objections, we will see, I think, that they are sharpest when pressed against remorse-based leniency in sentencing or parole decisions. However, I will claim that they do not give us grounds to exclude a concern for offender remorse from the criminal justice system altogether.

The first objection argues that remorse is not the kind of thing that merits reward. This objection, if valid, would suggest that remorse does not affect what the offender deserves in the way of poor treatment, since their deservingness of censure or punishment would be unaffected by behaviour that merely meets minimal requirements. This would then count against remorse-based sentencing reductions on the assumption that such deservingness should be a significant factor in sentencing decisions. However, even if this is the case, this objection does not give us grounds to deny congruence between remorse and the aims of criminal justice. Given that congruence, it might follow that the state has reason to concern itself with offenders' remorsefulness insofar as it has aims other than meting out deserved punishment. Bagaric and Amarasekara thus do not give us reason to think that the criminal justice system should eschew a concern for remorse altogether.

The second objection pointed to the unreliability of judgements about remorse, and the role that such judgements might play in penalising offenders from marginalised communities and hence reinforcing disadvantage, given the particular difficulties of reading emotions cross-culturally. If this objection is valid, however, it applies most sharply to high-pressure and time-limited decision-making, based on fairly cursory observation of and interaction with the offender by public officials who have no special training in what we might call the

anthropology of remorse. Thus it applies to sentencing and parole decisions, where even pre-sentence reports from psychologists or other public officials have to be prepared on the basis of brief interviews rather than a long-term relationship with the offender. However, if that is the case, by the same token it would not rule out a concern for remorse in the context of a criminal justice intervention that was based on precisely such a long-term relationship between official and offender.

The third objection concerns the corruption of the criminal justice system's moral communication with the offender when the prospect of leniency provides a motive to concentrate on performance over genuine grounds for remorse. However, again the issue here seems to be the entanglement of remorse with the prospect of leniency, rather than the unsuitability of a concern for remorse in itself. If valid, this objection warns us against the possibility that criminal justice officials might make decisions about remorsefulness in such a way as to give offenders the incentive to game the system. This objection would not tell against an intervention in which seeking remorse had a primary place, and where a public official was empowered to encourage remorsefulness, but where such judgements were not determinative of the length of the offender's confinement.

The fourth objection suggests a similar line of assessment, at least up to a point. This objection focused on the problem of wrongful convictions. It is highly inappropriate, according to this objection, to demand displays of remorse from one who is morally innocent; and inequitable to withhold leniency from them when it is available to the genuinely guilty. However, while this problem again seems sharpest when it is applied to the question of sentencing, it might also be argued that it would be grotesque to require such an offender to enter into a relationship in which their remorse would be 'encouraged.' Nevertheless, this

concern, while apt, does not seem insurmountable. Rather it suggests that entering into any such relationship should be left as a voluntary matter rather than being imposed on the offender.

Having reviewed the first four objections, we can start to see the shape of a potential way forward. We saw at the outset that there are various reasons to welcome offender remorse: that it is a predictor of desistance; that it involves the offender accepting their desert of punishment; that the offender has understood and accepted deserved censure. Thus we have some reason to expect that remorse will play a role in criminal justice somewhere or other. Nevertheless, some of the contexts in which judgements of remorse might be made are open to objection. The objections that we have looked at so far, however, focus on judgements of remorse that may be based on cursory observation and interaction, but that have significant consequences for the possibility of leniency or release. The objections claim that attempting to take remorse into account in such decisions is either inherently inappropriate, or counter-productive, or likely to reinforce inequity and disadvantage. However, these objections do not necessarily give us reason to think that public officials evaluating, welcoming and encouraging remorse is inappropriate in all criminal justice decision-making contexts.

However, the von Hirsch and Ashworth objection does, on the face of it, seem to be more far-reaching than those we have reviewed so far. Their point seems to be that the state does not have the kind of relationship with its citizens that would give it the standing or the right to inquire into offenders' remorsefulness. If correct, this would presumably apply not only to sentencing and parole, but also to the general issue of public officials taking an interest – in their role as public officials – in offenders' remorsefulness. However, we should now consider the validity of this objection more closely. To begin with, we can ask how their

objection relates to the point, noted earlier, that numerous justificatory accounts of criminal justice, including the censure theory that von Hirsch and Ashworth favour, do seem to have reason to be interested in whether and to what extent offenders are remorseful. If the character of the relationship between state and citizens is such that the state has a legitimate interest in deterring, censuring or retributively punishing citizens' wrongdoing, we might ask why it does not simply follow that the state *thereby* has an interest in whether or not citizens who offend are or are not remorseful for what they do. Would this not follow given the congruence between the appropriateness of remorse, on the one hand, and the aims of deterrence, censure and retribution on the other?

Von Hirsch and Ashworth might respond by suggesting that their objection is grounded, not in the aims of censure and deterrence, but rather in an independent concern for privacy that constrains the pursuit of such aims. However, as they note, what should remain private depends on the character of the relationship: what one's colleagues should regard as a matter private to oneself differs from what one's friends should regard as private. If the state has a legitimate interest in deterrence, censure or retributive punishment then it already has a certain kind of relationship with citizens to which the presence or absence of remorse does seem relevant. Again, von Hirsch and Ashworth might point to the plausibility of their example of the University disciplinary committee. Does it not seem correct to say, as they do, that such a committee would be overstepping the mark if it followed up with inquiries about whether its censure had brought about remorse? Perhaps. However, we should bear in mind that the University disciplinary committee is the type of decision-making body that was the focus of our previous three objections, one that makes decisions on how an offender is to be sanctioned. We have already seen independent grounds for excluding judgements of remorse from such decision. However, we saw that these objections did not give us reason to think

that it would be inappropriate for the state to monitor or encourage remorsefulness in a context other than the adjudicative one. The question is whether von Hirsch and Ashworth's objection gives us more general grounds to exclude remorse from state concern. By contrast, however, if we imagine that there is an agent of the University who does have some concern for whether the offender is remorseful, but that this is a mentor rather than the University disciplinary committee, and hence someone who has a relationship with the offender that is closer to that of a probation officer than a judge, our intuitions about this example might be quite different.

Another way in which von Hirsch and Ashworth articulate their concern with Duff's theory of punishment is that it will lead to 'compulsory attitudinising.' In other words, punishment is a coercive institution, and if we make the aim of punishment the evocation of certain attitudes in the offender, then we inappropriately force them to display those attitudes. In previous work, I have attempted to articulate this objection as a concern with forced inauthenticity: that it can be humiliating and degrading to have to publicly espouse sentiments that one does not feel or believe in in order to avoid further harsh treatment, or in order to gain leniency.[20] However, even if this concern is valid, it again does not give us a general reason to object to a state interest in offenders' remorsefulness as such. The source of concern is again the entanglement of state interest in remorse with contexts in which an individual's subjection to or freedom from coercion and hard treatment is being decided. The concern with forced inauthenticity does not give us reason to object to a voluntary, supportive relationship in which remorse can be encouraged.

[20] Bennett, 'Taking the Sincerity Out.'

Having established that the objections leave room for an alternative approach to remorse within the criminal justice system, we will now flesh out our understanding of such an alternative by introducing the idea of probation. Probation can and does take various forms, and it will turn out, I believe, that some forms of probation are just as vulnerable to these objections as sentence reductions are. However, I will argue for a conception of probation as being concerned – perhaps amongst other things – with the prospects for the offender's reintegration into society. Part of such reintegration, I will argue, is a concern for the offender's attitudes towards their wrongdoing, and towards the values violated by their action. Nevertheless, the success of the probationary relationship should not be determinative of the offender's release into the community. Probation should be thought of more on a befriending than a disciplinary or supervisory model. On this basis, I will claim that there are forms of probation that can escape the criticisms we have looked at in this section and the previous ones. There are forms of probation, in other words, that are important and beneficial ways in which the state can and should be dealing with offenders, and a central part of which lies in encouraging remorse as an aspect of a full understanding of the offender's past behaviour and its significance.

4. What is probation?

Probation can be conceived in various different ways, and there are examples of something like probation working differently in numerous different jurisdictions.[21] An initial taxonomy

[21] For the debate around probation, see e.g. A. E. Bottoms and W. McWilliams, 'A Non-Treatment Paradigm for Probation Practice,' *Journal of Social Work* 9 (1979): 159-202; F. McNeill, 'A Desistance Paradigm for Offender Management,' *Criminology and Criminal Justice* 6 (2006): 39-62; G. Robinson and P. Raynor, 'The Future of Rehabilitation: What Role for the Probation Service?' *Probation Journal* 53 (2006): 334-346; F. McNeill, I. Durnescu and R. Butter (eds), *Probation: 12 Essential Questions* (London: Palgrave Macmillan, 2016); P. Raynor, 'Back to the Future? The Long View of Probation and Sentencing,' *Probation Journal* 65 (2018): 335-347.

might be as follows, where the options are to be thought of as non-exclusive (in many jurisdictions probation officers will carry out more than one of these types of tasks):

(i) Probation as a form of punishment. Here the idea is that probation involves the convicted offender being subject, not to incarceration, but rather to a supervisory relationship with a probation officer. This can still be thought of as a punishment since it involves a loss of liberty. However, the loss of liberty is less drastic than that involved in incarceration. The conditions of probation would involve requirements to meet with the probation officer on a regular basis and to discuss progress towards permanent desistance. Here the idea of probation is something like a maximally open form of imprisonment.

(ii) Probation as the supervision and enforcement of sanctions. Sometimes sanctions are imposed that the offender has to undertake not in custody but 'in the community.' These sanctions typically involve restrictions on liberty and this can be supplemented with requirements to undertake particular actions. Thus the sanctions might include restrictions on movement (at particular times, or in particular places), or community service requirements, or behaviour-change requirements, including undertaking forms of treatment or training. On this conception of probation, the probation officer's role is to supervise compliance with these sanctions. That is to say that the probation officer would guide and verify the offender's compliance with these conditions, and would be in a position to trigger sanctions against the offender, such as a return to incarceration, if the conditions are being violated.

(iii) Probation as support for judicial decision-making. On this conception of probation, the role of the probation officer is to provide reports, based on observation of and interaction with the offender, which are intended to inform sentencing or parole decisions made by

judges, etc. Here the reports might seek to aid a risk-assessment by focusing on the potential for re-offending, or an assessment of the level of an offender's culpability for their crime to aid the process of sentencing.

(iv) Probation as social work. On this conception, probation involves a process of personal care and supervision of the offender by a state probation official whose role, according to the (now repealed) Probation of Offenders Act 1907, is to 'advise, assist and befriend' the defendant, and who is thus concerned both with the defendant's welfare and their likelihood of reoffending. This is a process through which the probation officer and the offender work to change the probationer's patterns of behaviour, with the dual purpose of preventing further criminal action and helping the offender to change their patterns of behaviour and put their life on a more secure footing.

This gives a rough idea of the ways in which the main purposes of probation services might be conceived. I will also take it, for the purposes of the argument, that each of these ways of conceiving of probation has at least something important to be said for it, and hence that probation conceived in that way could play some non-negligible role in a well-ordered criminal process. If this is allowed, we can then ask two questions. First of all, do any of these conceptions of probation give a role to remorse? And secondly, does the conception of probation deploy judgements about remorse in ways that escape the objections that we looked at above?

The answer to these questions seems to be mixed. If probation itself is conceived as the punishment, as on (i), this would perhaps mean feelings of remorse being taken to be essential to the successful completion of the probationary period. On (ii), although most

sentences are such that an offender can complete them with or without feeling remorse, remorse might be seen as an indicator of the completion of the sentence, for instance, if the sentence has to do with undergoing e.g. an anger-management course. On (iii), judgements of remorse might be taken to be important as evidence for predictions of reoffending, or judgements about how seriously the offender takes their wrongdoing, and hence how callous they were in committing it. However, this brief assessment suggests that these forms of probation will be vulnerable to objections we canvassed above. These conceptions of probation raise questions about the competence of probation officers in judging genuine remorse; about giving offenders an incentive to game the system by displaying remorse; as well as concerns about looking for remorse from someone who is wrongfully convicted. While probation officers might have more time and greater ability to discern genuine remorse than judges, it remains the case that their dealings with individual offenders are limited and fairly sporadic. By contrast, I will argue, the conception of probation as social work, (iv), can be thought of as having an important role for encouraging remorse that is not vulnerable to these objections. Let us now look in more detail at that conception.

Peter Raynor has recently explored the conception of probation as social work (my term, not his) in a paper that looks back to a better age of probation and regrets some of the ways in which probation has developed over the past thirty years. As Raynor describes this conception:

> 'The development of probation services [in England and Wales] in the third quarter of the 20th century was supported by the same processes of post-war reconstruction that led to the development of other aspects of the Welfare State, making resources and opportunities available to people in difficulty and also enacting a newly widespread

> belief that the state had a broad responsibility for the welfare of citizens. A new social contract obliged the state to create and maintain the conditions which offered citizens the opportunity to develop themselves and aspire to a reasonable standard of living and way of life, in return for citizens' willingness to behave prosocially and contribute to society. The criminal justice system was to be rebuilt around opportunities for rehabilitation and reform …, and the expansion and professionalisation of probation was part of this effort.'[22]

For Raynor, three basic principles underlie the conception of probation as social work: 'diversion from custody, engaging the co-operation of probationers, and trying to help them to comply by finding ways of living without crime.'[23]

Raynor claims that probation so described could be thought to represent 'the most creative and innovative part of the criminal justice system, working towards a new model of justice and a new way of dealing with people who offended if they show[…] interest in the possibility of turning their lives around.'[24]

If we now ask whether the social work model of probation gives a central place to remorse, it might seem that the answer is no. The social work model is sometimes identified with what Anthony Bottoms and William McWilliams famously criticised as the 'treatment' model of probation. On the 'treatment' model, the probation officer should approach the offender non-judgementally, with the sole aim of solving problems and giving the offender a new opportunity. On this model the probation officer has no place for backward-looking

[22] Raynor, 'Back to the Future,' 336-7.
[23] Raynor, 'Back to the Future,' 337.
[24] Raynor, 'Back to the Future,' 337.

judgements about culpability. However, Bottoms and McWilliams famously criticised this model for downplaying the significance of wrongdoing in the continuing life of the offender, and hence failing to take the offender seriously as a moral agent. They identify the 'treatment' model with what P. F. Strawson identified as 'the objective attitude,' and that this led to a failure by probationers to deal with offenders 'as people.'[25]

While I am sympathetic to these criticisms of the 'treatment' model,[26] it would be a mistake, I believe, to think that their implication is that the social work model needs to be abandoned wholesale. The social work model can be conceived, I will argue, in such a way as to do justice to the fact that many crimes are genuine moral wrongs for which the offender is culpable; that they therefore call for remorse and a process of moral repair on the part of the offender; but that such wrongs are often not the result of a simple culpable failure of will on the part of individuals, but rather have complex causes, meaning that offenders might need assistance from more socially powerful actors in order to help them change their social conditions and desist from crime.

5. Developing the social work model

On the social work model, the role of the probationer is a distinctive part of the criminal justice system, and the skills, virtues and attitudes of the good probation officer might therefore be quite different from those of a good police officer, or magistrate, or prosecutor or prison officer. The probation officer so conceived is licensed to take an advisory, welfare-oriented approach to the offender. However, this does not mean that the approach of the good probation officer can be summed up as 'I don't care what you have done, the question is what

[25] P. F. Strawson, 'Freedom and Resentment' in *Freedom and Resentment and Other Essays* (London: Methuen, 1974): 1-25; Bottoms and McWilliams, 'Non-Treatment Paradigm,' 170.
[26] See e.g. my discussion of Strawson in Ch. 3 of *Apology Ritual*.

you are going to do now.' The probation officer should befriend the offender, but that does not mean that they are licensed entirely to bracket the offender's past behaviour and to concentrate on making the most of the current situation. Past offending is relevant to the probation officer in the sense that it sets the nature of the problem that needs to be solved for the future. Furthermore, if we are to treat the offender as a moral agent then part of this problem is a moral problem. The offender's situation cannot be thought of except in a way conditioned by their past wrongdoing and the obligations of repair that any moral agent would incur by behaving as they have done. Nevertheless, on the social work model so conceived, the probation officer is to bring a forward-looking, problem-solving approach that helps the offender both to confront what they have done but nevertheless find a way forward, both practically and morally. This looks as though it might require a certain sort of professional training that is very different from the training needed by a good judge or prosecutor or police investigator – that is, very different from those roles in which agents are trained to track down those who are guilty of conduct worthy of authoritative censure and determine the nature of that conduct and the proper vehicle of censure.

Regarding the role of the good probation officer in this way, and indeed holding that probation so described is an important *part* of the criminal justice system, is thus not to say that probation is the *only* important element of criminal justice, or that it could or should *replace* other, more reprobative elements in that system. In particular, it might rather be argued that is precisely because the probation officer is working within an institutional context that includes those other, more reprobative roles, that they can be licensed to take a befriending approach to offenders who may have committed serious crimes. The idea might thus be that the varied institutions through which the state deals with offenders allow it to reflect the multi-faceted nature of crime. Insofar as a crime is a moral wrong, and insofar as

the offender is responsible for it in the way that legal and moral responsibility requires, there needs to be a reprobative institution that issues censure of the crime that is proportionate to the seriousness of the wrong. This is necessary in order to reflect the fact that the offender had responsibilities (for instance, responsibilities to the victim) not to act as they did. But insofar as the crime may also reveal that the offender faces obstacles to law-abidingness that the state could assist in removing, the state could provide such assistance, or at least offer it to the offender, without thereby undermining censure or the ascription of responsibility to the offender.

Some such as Bagaric and Amarakesara might worry that there is a contradiction between claiming, on the one hand, that it is the offender's responsibility to make sure that they do not wrong their victim – and hence that they are culpable for their wrong and deserve censure for it – and recognising, on the other hand, that there are difficulties that some (perhaps many) offenders face for which they do not bear responsibility and which the state is in a position to give them assistance in overcoming. They might argue that there is a contradiction between saying on the one hand that the offender can quite reasonably be expected to comply with their responsibilities, and on the other hand that it might in fact be quite difficult for them to do so. However, I believe that these two claims are not in fact contradictory. It is one thing to recognise that there are difficulties that stand in the way of the offender's compliance with a given responsibility, and quite another to say that those difficulties are so significant that the offender no longer has the responsibility in question. In some situations, we excuse agents because the obstacles to compliance are too great. But there are also many situations in which we can recognise that, while the conditions for legal and moral responsibility are met, it is nonetheless difficult for a person to be law-abiding: perhaps the wrong is committed under the influence of social pressures of poverty, or lack of education, or growing up in a gang

culture. The probation response we are imagining does not deny the offender's responsibility, but simply offers help, an offer that the offender is left free to decline. There is no contradiction in arguing that, although an offender had a responsibility to avoid the behaviour in question, and could fairly and appropriately be held to that responsibility, their behaviour nevertheless indicates the presence of environmental pressures, obstacles and frustrations that others, in particular the state, can help to alleviate, or in dealing with which it can help the offender to develop greater resilience.

Indeed, it might plausibly be claimed that we need to go further, and argue that it is *only* in a context in which the state has probation services available to disadvantaged offenders that it could be justified in also subjecting such offenders to reprobative treatment. Given the background moral relationship amongst citizens in a democratic society, or between state and citizen, it might be claimed that offenders would themselves be wronged if the state, or wider society, declined to take up available opportunities to deal with such challenges.[27] Thus we could extend the argument of this section to the conclusion that the state would be wronging offenders if it holds them responsible yet fails to offer them the kind of assistance that is involved in probation.

This point suggests a further revision to the social work model discussed by Raynor. According to Raynor, as well as helping the offender, another aspect of the probationary relationship was the suspension of a custodial sentence. Raynor talks of this aspect approvingly, because the fact that the probation officer had it in their power to trigger a return to custody if the offender did not comply provided offenders with an incentive to engage with

[27] C. Bennett, 'Invisible Punishment is Wrong – But Why? The Normative Basis of Criticism of Collateral Consequences of Criminal Conviction,' *Howard Journal of Crime and Justice* 56 (2017): 480-499. These positive duties would become yet more stringent if, as some think, we have some shared responsibility for *creating* those social conditions that make it more difficult for disadvantaged offenders to abide by the law.

the probationary process. However, it should now be clear that having this threat hanging over the relationship between offender and probation officer would be inimical to the form of probation that we have been imagining here. The process of growing remorse, and the relationship between probationer and probation officer by which that process can be sustained and encouraged, must remain no-strings-attached if its character is not to be corrupted. This process can avoid the objections raised earlier against making judgements of remorse in decisions about leniency only if there is nothing at stake for the offender in whether or not they are remorseful. Only then can the relationship be a genuinely constructive and trusting. The knowledge that the probation officer was scrutinising each interaction with a view to appropriate censure would destroy such trust, or prevent its birth.

Once we make this further revision to the social work model, we can see that von Hirsch and Ashworth's worry about the state using coercion to elicit remorseful emotions and motivations does not apply. Furthermore, because on this model remorse may be sought by the probation officer, but its absence may not be penalised, the social work model is not vulnerable to the other objections that have to do with unfair or inequitable treatment, or compounding injustice. On the social work model as I am imagining it (as with Bottoms and McWilliams's 'non-treatment model'), the probation officer makes an offer of engagement in a relationship of help and moral repair that the offender is free to decide to engage with fully, partially or not at all. The social work model as I have described it here is thus, I submit, an attractive model of probation that has a place for public officials judging and encouraging remorse, but where doing so is not vulnerable to the objections that we looked at earlier .

6. Conclusion

In this chapter I have formulated a way of thinking about remorse in the criminal justice system that is an alternative to the focus on sentencing that has tended to dominate philosophical debate. Although important conclusions have emerged from debates about sentencing, restricting ourselves to that topic might lead us towards generalisations to the effect that it is simply no part of the state's business whether or not offenders are remorseful. Against this kind of generalisation, I have argued that there is an affinity between seeking remorse and the very general structuring aims of criminal justice. And I have claimed that, if we take a view of the apparatus of the state that is appropriately sensitive to the differences in culture and ends among state agencies, we will see that there are ways of structuring the criminal justice system such that at least one of its agencies, namely the probation service, could have a culture and purpose that involves a legitimate concern for whether the offender is appropriately remorseful. It is therefore not true to claim that it is inherently inappropriate that public officials should *in their role as public officials* take an interest in the remorsefulness of offenders. Insofar as we should object to such an interest, it is when it is tied to a coercive context in which gradations of due censure are being determined. If a probation service were insulated from the reprobative part of the criminal justice system as in the template I have suggested, it need not be illegitimate for its officers to pursue remorse as a part of rehabilitation.

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