

**Remorse in the Courtroom:
Structural Concerns Surrounding the Treatment of Remorse as a Mitigating Factor
and the Lack of Remorse as an Aggravating Factor in U.S. Criminal Law**

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Abstract

From a philosophical perspective, emotions are human experiences defined by the integration of beliefs and thoughts, feelings, desires, and actions. The dynamism and complexity of human emotions drastically affects the way in which human beings interact with and perceive one another.

In U.S. criminal law, the presence and absence of the emotion of remorse can fundamentally alter the way in which we, the general public, as well as the judge and the jury, perceive the defendant and the victim. Because juries are responsible for both convicting a defendant and determining the length of the sentence given to the defendant, it is imperative that juries have a concrete, standardized method by which to determine whether the presence of remorse is genuine and should therefore serve as a mitigating factor, and whether lack of remorse is indicative of a cruel mind and should therefore serve as an aggravating factor.

This paper will explore this issue by first defining remorse as a complex emotion from a psychological perspective. I will then turn the discussion to the role of remorse in criminal law by analyzing the “acceptance of responsibility” standard outlined in Section 3E1.1 of the Federal Sentencing Guidelines, and discussing how courts equate this standard to the “display of remorse,” even though the Guidelines do not provide any concrete measures by which to assess the validity and the adequacy of the remorse being displayed by the defendant. These structural concerns lead me to conclude that remorse should not be used as a mitigating factor in criminal trials.

I will then explore what happens at the opposite end of the spectrum, i.e. how courts treat the lack of remorse in criminal trials. The paper will outline the variety of reasons, both psychological and neurological, that can cause a lack of remorse within the defendant. I will turn to psychopathy as a case study in order to explore how lack of remorse is treated by many courts as an aggravating factor because it reveals something sub-human about the defendant. However, I will argue that courts should not treat the lack of remorse in psychopaths as an aggravating factor, but should instead consider the neurological basis for why these individuals are ego-centric and unable to empathize with the victims of their actions.

I will thus end the paper on a cautionary note – that courts in the United States should not place an emphasis on the display of remorse or the lack of remorse, especially because such an emphasis can lead the jury or judge to issue an unjust sentence that does not fit the nature of the crime. Of course, I understand that entirely removing remorse from the courtroom is unrealistic, and as such, I will expand on Michael Proeve’s and Steven Tudor’s suggestions for the factors that juries *should* take into consideration to ensure a fair assessment of remorse in the courtroom.

Remorse in the Courtroom:

Structural concerns surrounding the treatment of remorse as a mitigating factor and the lack of remorse as an aggravating factor in U.S. criminal law

Introduction

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In U.S. criminal law, the presence and absence of the emotion of remorse can fundamentally alter the way in which we, the general public, as well as the judge and the jury, perceive the defendant and the victim. Because juries are responsible for both convicting a defendant and determining the length of the sentence given to the defendant, it is imperative that juries have a concrete, standardized method by which to determine whether the presence of remorse is genuine and should therefore serve as a mitigating factor, and whether lack of remorse is indicative of a cruel mind and should therefore serve as an aggravating factor.

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PART I – Remorse Defined: A Psychological Approach

Remorse is categorized as a “retractive” emotion in that the self withdraws from an action or a personality trait that is otherwise seen as belonging to or associated with the self.¹ The most common thoughts associated with remorse, thus, are: “I wish I had not taken this action” or “I wish my personality were different in x, y, z respects” (Proeve and Tudor, 31). The complexity of the emotion of remorse arises from the various motivations that lead individuals to have these thoughts. On one end of the spectrum is “prudence-based remorse,” in which one regrets a past action because of the consequences it has produced for oneself (Proeve and Tudor, 32). This form of remorse can therefore be described as selfishly-motivated. The focus of this paper, however, will be remorse that arises from the sense that an action is morally wrong and needs to be rectified on this moral basis. This wrongful action can occur at three levels: 1) at the level of

¹ Proeve and Tudor provide a comprehensive definition of “remorse” that evaluates the roles of all actors involved in or affected by a wrongdoing, and the nature of the wrongdoing itself. As such, their definition, as opposed to dictionary definitions sometimes cited in court cases, e.g. *United States v. Dyce* (91 F.3d 1462 [D.C. Circuit]), will be used. The risks and implications of using a simple definition in the assessment of remorse will be discussed within the body of this paper.

the individual, in which the wrong is a wrong done to someone in particular; 2) at the level of society, in which the wrong is a breach of societal norms or a disobedience of authority; and 3) at the personal level, in which the wrong prevents the wrongdoer from living up to ethical standards of conduct that she has set for herself (Proeve and Tudor, 32).

In order to experience remorse, a person must have thus committed a wrongdoing. This requirement can be traced back to the etymological roots of the term “remorse,” which derives from the Latin term “remordere,” which means to vex or torment. The Latin term in turn can be traced back to “mordere,” which means to bite or sting; “re” indicates that this feeling is continuous and repetitive, even omnipresent. Remorse is therefore a sharp and biting sensation, specifically a sense that one’s deed is cutting into one’s very soul (Proeve and Tudor, 33). Thus, the basis of remorse is the belief that one has wronged another (Proeve and Tudor, 37). It is not necessary that this statement be true (in fact, person A may not have wronged person B at all), but if person A firmly holds this belief, then person A can feel genuine remorse.

There are additional nuances that must be explored in order to understand the complexities of remorse. Let us first discuss what constitutes the wrongdoing. In order for one to feel remorse about an action, the wrongdoing committed must take the suffering of the victim beyond that which is experienced as a result of physical harm. That is, the victim must feel as if they have been disrespected, abandoned, or even dehumanized, by the person who has committed the wrongdoing (Proeve and Tudor, 43). Secondly, an individual can only be remorseful about her own action. If one feels sorrow for a wrong committed by another individual, then that emotion cannot be classified as remorse, but rather as a form of spectator regret (Proeve and Tudor, 41; Miller, 82-83). Of course, when a wrongdoing is not committed by a sole actor, identifying who is accountable for the wrong and who should thereby feel the pangs of remorse can become difficult. Furthermore, the object of the wrongdoing must be an external actor, i.e. I cannot experience remorse at having done a wrong to myself (Proeve and Tudor, 41).

If one does commit an act of self-harm that one regrets in retrospect, then the experience is one of private shame rather than remorse. The presence of the external victim is therefore a key feature of remorse. Because remorse is an emotion that occurs as a result of an interaction between two (or more) individuals, the dynamics of relationships between these individuals can change. Where there was no relationship between the wrongdoer and the wronged prior to the wrongdoing, then the wrongdoing creates a relationship; if a relationship did exist, then the relationship is altered as a result of the wrongdoing (Proeve and Tudor, 41). In both cases, the remorseful wrongdoer feels a sense of obligation to respond to the person who has been wronged. The response can manifest itself in various forms – through an apology, amends, material reparations, etc. (Miller, 81-82). Remorse can therefore be classified as a “backwards-looking emotion,” in that it concerns a past action, and as a “forward-looking emotion,” in that it is centered on the remorseful offender’s duty to set things right or at least begin making amends (Proeve and Tudor, 41). The remorseful person’s self-perception is also altered as a result of the wrongdoing and the subsequent sense of obligation. The remorseful person, who is attentive to the consequences of her action, realizes that she herself has changed as a result of the wrongdoing and so has her relationships with others’, including family, friends, as well as the victim (Proeve and Tudor, 43).

PART II – Remorse As a Mitigating Factor in the Courtroom: Case Study of Section 3E1.1 of the US Sentencing Federal Guidelines (2012)

Now that we have unpacked the various components of remorse, let us discuss how remorse is perceived in the sentencing phase of criminal trials in the United States. The following discussion focuses on the 2012 U.S. Sentencing Federal Guidelines in order to determine the role of remorse in the sentencing of individuals who have been convicted of felonies and class A misdemeanors.

Section 3E1.1a of the Guidelines provides a reduction in sentence by two levels “to the defendant who clearly demonstrates acceptance of responsibility for his offense” (O’Hear, 1508, 1515; USSC 2012). The offense level can be decreased by an additional level if the defendant “has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently” (USSC 2012, S3E1.1).² A two or three level deduction can be translated into a sentence that has been reduced by as much as 40% (O’Hear, 1512). It is important to note that the defendant who originally challenges her guilt at trial is not given an opportunity to attain this reduction, regardless of whether her remorse is genuine (O’Hear, 1518; USSC 2012, S3E1.1 Application Note 2). This means that a prerequisite for remorse to be viewed as a mitigating factor during the sentencing phase of trials is a guilty plea, which places profound limitations on the role of remorse in sentencing, regardless of the intent of the Sentencing Guidelines; the limitations and their subsequent implications will be discussed later.

There are two competing thought camps on what constitutes “acceptance of responsibility” – one group interprets “acceptance of responsibility” through the lens of the “remorse paradigm” and the other, through the “cooperation paradigm.” Under the remorse paradigm, section 3E1.1 calls for an inquiry into the defendant’s state of mind by allowing judges to reduce sentences by two or three levels for defendants who (1) fully and freely admit to committing the offense; (2) accept punishment as an appropriate consequence for the offense; and (3) who demonstrate sincere commitment to avoiding future criminal activity (O’Hear, 1511). Under the cooperation paradigm, section 3E1.1 is concerned not with the defendant’s state of mind but rather with her

² Subsection B only applies if the original level of the offense is high (16 or higher) because “at offense level 15 or lower, the reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) (which is a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table) is adequate for the court to take into account the factors set forth in subsection (b) within the applicable guideline range” (O’Hear, 1516, supra note 34).

post-offense conduct. This paradigm advocates for encouragement of the defendant's behavior if it contributes to the recovery of the victims and if it protects the community from additional criminal activity (O'Hear, 1511-12). These two paradigms may sometimes overlap each other (e.g. one's post-offense conduct can demonstrate one's remorse for committing a wrongdoing), but there is a fundamental analytical difference between the two paradigms. Specifically, the cooperation paradigm warrants that a judge examines "a defendant's conduct from the standpoint of its social desirability" whereas the remorse paradigm warrants that the judge examines "the same conduct as part of a broader inquiry into the defendant's subjective state (O'Hear, 1516). In the case of a person who does not feel genuine remorse for carrying out an action but who still proceeds to assist state officials in clarifying the details of the crime out of a sense of societal obligation, for example, the judge who emphasizes genuine remorse would reach a different outcome in sentence reduction as compared to a judge who emphasizes cooperation with state officials. It is because of this discrepancy that forming a consensus on the interpretation of "acceptance of responsibility" in the Federal Sentencing Guidelines is an imperative concern.

In order to facilitate the process by which judges can determine whether a defendant who has pled guilty has indeed accepted responsibility for her wrongdoing and is therefore deserving of the two- or three-level reduction in sentence, the Sentencing Commission has outlined eight post-offense factors judges should take into consideration. The factors are:

- (a) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct;
- (b) voluntary termination or withdrawal from criminal conduct or associations;
- (c) voluntary payment of restitution prior to adjudication of guilt;
- (d) voluntary surrender to authorities promptly after commission of the offense;
- (e) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;
- (f) voluntary resignation from the office or position held during the commission of the offense;
- (g) post-offense rehabilitative efforts; and
- (h) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility (USSC 2012, S31.1 Application Note 1).

Application notes 1b-1h are conventionally interpreted in line with the cooperation paradigm in that they constitute socially desirable actions and are not explicit displays of remorse (O’Hear, 1521-1522). Factor 1a seems to be indicative of the remorse paradigm in that truthfully admitting the extent of involvement in the offense requires taking responsibility for one’s action, acknowledging harm to the victim, and arguably also ascribing a sense of responsibility within the wrongdoer to attempt to rectify or at least ameliorate the effects of the wrongdoing. However, even though factor 1a requires judges to evaluate a defendant’s “remorse,” factor 1a, in addition to factor 1c, do not explicitly enumerate any actions typically associated with remorse – for example, what constitutes restitution? Is the defendant responsible for monetary payment of damages for restitution? Is the defendant expected to compensate for emotional damage that may have been inflicted on the victim as part of the wrongdoing? The definition of remorse presented in the introduction of this paper states that the dynamics of the relationship between the wrongdoer and the wronged is shaped by the wrongdoer’s obligation to rectify all (or as many as possible) aspects of the wrong. Because no explicit references are made to remorse (in contrast to cooperation with state officials) in the application notes to S3E1.1 of the Federal Sentencing Guidelines, and because the Sentencing Commission itself does not state whether remorse should be prioritized over cooperation (nor does it define remorse or refer to remorse explicitly), we can thus make a case that the Federal Sentencing Commission expects for the acceptance of responsibility to be viewed through the cooperation paradigm.

The reality, however, is that many courts use Section 3E1.1 to determine whether the defendant is adequately remorseful for her action, even though no explicit guidelines to determine remorse are enumerated within the section itself or in the application notes. In *United States v. DeLeon Ruiz*, for example, the First Circuit court determined that “the reduction for acceptance of responsibility serves two distinct purposes: to recognize a defendant’s sincere remorse and to reward a defendant for saving the government from the trouble and expense of

going to trial” (46 F.3d 452). However, this court opinion is distinct in that it identifies the latter as a purpose of section 3E1.1, because reality is that “many courts equate acceptance of responsibility with remorse, leaving the cooperation paradigm out of the picture – at least at the level of articulated principle” (O’Hear, 1524). In *United States v. Dyce*, for example, the court defined remorse as a “gnawing distress arising from a sense of guilt for past wrongs,” in accordance with the Webster’s Ninth New Collegiate Dictionary (91 F.3d 1462 [D.C. Circuit]).

The court further noted that, in regards to section 3E1.1:

While acceptance of responsibility may be an essential component of “remorse,” the latter is not a necessary element of the former. A person may accept responsibility for a crime (“yes, I killed my wife”) without feeling remorse (“she had it coming”). In its commentary, however, the [Sentencing] Commission made it clear that it contemplated a moral element to the section 3E1.1 reduction.... We [the court] hold, therefore, that implicit in the phrase “acceptance of responsibility,” as used in section 3E1.1a, is an admission of moral wrongdoing.

However, as described previously, remorse is a complex emotion that requires the interaction of at least two actors, an obligation to rectify the impacts of a past wrongdoing, and a redefining of the relationship between the actors. Even though the court defined “remorse,” it failed to provide any guidelines as to how it would determine whether the defendant was truly feeling a “gnawing sense of guilt” for her wrongdoing – how is the court expected to evaluate the “moral” aspect that is inherent in “acceptance of responsibility?” The same issue arises in *United States v. Fagan*, where the court iterated that “several circuits have specifically held that a moral element is implicit in acceptance of responsibility” and expression of remorse would be indicative of the morality that would be necessary for reform of the person to occur (162 F.3d 1280 [10th Circuit, 1998]). Additionally, in *Riggins v. Nevada*, the court reasoned that “in a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies” (504 U.S. 127). In both cases, thus, we see that the appellate courts reached their verdict on the duration of the sentence primarily based on the defendant’s display of remorse as opposed to post-offense conduct; in both cases, display of

remorse was characteristic of “acceptance of responsibility.” Because the Sentencing Guidelines do not detail a procedure by which to determine whether the defendant is demonstrating genuine remorse and fail to specify whether the genuine display of remorse should be seen as a prerequisite to “acceptance of responsibility,” we can conclude that the verdicts reached by these courts overextend section 3E1.1 in its application.

Why have courts interpreted “acceptance of responsibility” through the lens of the remorse paradigm if the application notes to section 3E1.1 seem to endorse viewing “acceptance of responsibility” through the lens of the cooperation paradigm? Stephanos Bibas and Richard Bierschbach contemplate that because expressions of voluntary remorse are indicative of an offender’s capacity for reform, those who display remorse are viewed by judges as deserving a lesser sentence (Bibas and Bierschbach, 24). In *Brady v. United States*, for example, the court stressed that a defendant who accepts responsibility for his action demonstrates that “he is ready... to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary” (397 U.S. 742). This view is further elaborated upon in *United States v. Beserra*, in which the court specified that “a person who is conscious of having done wrong, and who feels genuine remorse for his wrong... is on the way to developing those internal checks that would keep many people from committing crimes even if the expected costs of criminal punishment were lower than they are” (967 F.2d 254). Similarly, in *United States v. Blake*, the court stated that reflection and introspection are aspects of rehabilitation, and defendants who displayed these two aspects by accepting responsibility for their wrongdoing and subsequently apologizing to the victims and victims’ relatives were well on their way to rehabilitation (89 F. Supp. 2d 328).

Structural Concerns & The Treatment of Remorse as a Mitigating Factor

We are thus presented with a wide array of court cases in which judges evaluate the offender for fulfillment of “acceptance of responsibility” on the basis of the remorse paradigm. As stated previously, the primary concern that arises is that there are no set standards by which courts can determine what constitutes adequate remorse, especially because the eight standards specified in Application Note 1 are written from the perspective of the cooperation paradigm.

This concern is exacerbated by structural impediments in the U.S. criminal justice system, which prevents expressions of remorse by defendants. In theory, the court system is supposed to encourage expressions of remorse, especially if many courts emphasize remorse as constituting the moral element of “acceptance of responsibility.” In practice, however, “far more attention is devoted [by courts, judges, juries] to prevention and punishment of crime than to ways in which criminals might be encouraged to repent and resume normal lives” (Bibas and Bierschbach, 96). When an individual is first arrested, she enters an adversarial system in which the two lawyers, as opposed to the defendant and victim, are the main actors – the two lawyers are the ones who meet frequently to ensure that their clients are getting the best deal possible in the most efficient way possible (Bibas and Bierschbach, 97). This interaction between the two lawyers, however, overtakes and even replaces that of the defendant and the victim, such that the defendant and the victim generally do not even meet each other from the time of arrest to trial and sentencing (Bibas and Bierschbach, 97).

This disconnect spills over into the pre-sentencing and sentencing phases of the criminal trial process. In the context of sentencing allocution (a direct address between the judge and the convicted felon prior to sentencing), a display of meaningful remorse is not possible. Sentencing allocutions are tightly scheduled and often in front of a judge who did not preside over the guilty plea (Bibas and Bierschbach, 98), meaning that the judge presiding over the sentencing allocution may not be able to adequately determine whether the defendant was truthful in “admitting the conduct comprising the offense(s) of conviction” at the time of the guilty plea

(not just by relaying concreted details of the wrongdoing, but also in her emotions and display of regret for having committed the wrongdoing) and how actively involved the defendant was in “assisting authorities in the recovery of truths and instrumentalities of the offense” (USSC 2012, S3E1.1). Moreover, the sentencing allocution does not help bridge the gap between the defendant and the victim. The two main parties in the allocution are the defendant and the sentencer (usually a judge), as opposed to the defendant and the victim. During the actual sentencing process, many victims are absent from the courtroom; when they are present, the defendant does not face them. In fact, defendants who wish to turn to their victims to relay an apology have to do so by turning their backs on the judge, which is not in line with expected court etiquette (Bibas and Bierschbach, 98). Many of the apologies that do occur are usually rehearsed or read off of pieces of paper; this is to be expected because the sentencing hearing is the defendant’s first true opportunity to apologize to the victims and their relatives for the crime they committed (Bibas and Bierschbach, 98). The question thus becomes: if these structural impediments exist, is it fair for courts to be evaluating acceptance of responsibility through the remorse paradigm? To exacerbate this issue, there is no concrete protocol in place that allows judges to evaluate (1) if the remorse displayed is genuine; and (2) whether remorse should be evaluated prior to cooperation to determine adequate acceptance of responsibility. To safeguard against those who feign remorse, the opinion of the court expressed in *United States v. Hammick*, stated that “in the absence of sincere remorse or contrition for one’s crimes, a guilty plea entered for the apparent purpose of obtaining a lighter sentence does not entitle a defendant to a reduction for acceptance of responsibility” (36 F.3d 594 [7th Circuit, 1994]). However, the court case does not specify how the court can determine if the remorse is sincere or insincere. Moreover, if defenders are aware of the factors for consideration listed in Application Note 1 to Section 3E1.1, then how are judges expected to distinguish between defenders who are displaying sincere remorse and truly

accepting responsibility for the crime they have committed from those who are following the “checklist” of eight factors to give off the appearance of being remorseful?

Numerous other psychological concerns surround the corroboration of remorse. Human beings can sometimes misinterpret their own emotional states and even deceive themselves about the emotions they are experiencing, so there can be a disconnect between an individual’s true emotions and the emotions she conveys to the public (Proeve and Tudor, 49). This means that some offenders may not be able to adequately convey remorse, especially in the formal and alien environment of the courtroom (Proeve and Tudor, 111). As such, judges may make incorrect conclusions about the presence or absence of remorse. Moreover, different judges, and sometimes even the same judge, might make inconsistent decisions across different cases (Proeve and Tudor, 112). What one judge sees as remorse, another may not; e.g. some judges may look for displays of humility inside the courtroom as a demonstration of remorse, whereas other may emphasize the role of monetary payment outside the courtroom. Moreover, if the presence of remorse is to serve as a mitigating factor (in that it aptly satisfies the criterion of “acceptance of responsibility,” then how should judges draw the line as to how much remorse is “enough.” Can adequate remorse be characterized as monetary payment? A private apology? A public apology? It is no secret that different cases of remorse vary in their depth, intensity, effect and meaning (Proeve and Tudor, 122). These concerns continue to exacerbate the ambiguities of determining whether a defendant is deserving of a decreased sentence because of display of remorse. It is for this array of structural concerns that appellate courts in the U.S. should not treat remorse as a mitigating factor.

PART III – Remorse as an Aggravating Factor in Courtrooms: Case Study of Psychopathy During the Penalty Phase of the Capital Trial

Why Do Some Individuals Lack Remorse? Psychological and Legal Perspectives

As we have seen, the “acceptance of responsibility” described in section 3E1.1 of the Federal Sentencing Guidelines has been interpreted by many appellate courts as being equivalent to “display of remorse”; in other words, display of remorse has been treated as a mitigating factor in sentencing,³ despite the fact that no set standards for evaluation of genuine remorse exist.

The natural question that thus arises is whether lack of remorse is treated as an aggravating factor by U.S. courts. No federal statutory or decisional recognition exists in the U.S. that establishes that lack of remorse must be treated as an aggravating factor in criminal law cases, meaning that the treatment of lack of remorse falls in the hands of local courts (Proeve and Tudor, 156-7). Before we can discuss how the court systems in various jurisdictions have treated lack of remorse, we must first enumerate the reasons as to why individuals may not show remorse for having committed a crime. It is important to note that the lack of remorse, similar to the display of remorse, is case-specific, meaning that a remorseless individual is one who has committed a wrongdoing to another individual but does not experience the sharp pangs of guilt at a point or at a stage at time when societal norms dictate that such a display would be fitting, if not expected (Proeve and Tudor, 140).

Let us first discuss individuals who may lack remorse because they refuse to believe that they are guilty of having committed a wrongdoing. Two scenarios exist: first, an offender may not believe that she is guilty of any crime (which may be a result of irrational self-deception that shifts the blame to another person, or as a refusal to believe that the crime was committed by the offender herself, or similar mistakes of fact and errors of interpretation); second, an offender may accept that she is guilty of a crime but not guilty of the moral wrongdoing associated with the

³ The first phase of a criminal trial (including capital trials) addresses culpability and intent and the second phase is concerned with aggravating and mitigating factors as well as “considerations of character.” In this second phase, “the jury that has already decided in favor of conviction for a capital crime reconvenes and decides between life without parole or death by execution” (Weisman, 2).

crime (Proeve and Tudor, 141-2).⁴ This may be because the defendant believes that the crime committed was “victimless” and that there is one to feel remorseful towards because no one was wronged.

External factors, especially heavy medication, can cause individuals to feel a lack of remorse in situations where they may otherwise feel remorse. In fact, in *Riggins v. Nevada* (also discussed previously), the court ordered a retrial on basis of the defendant being so medicated that he was unable to show remorse. In his opinion, Justice Anthony Kennedy noted that “serious prejudice could result if medication inhibits the defendant's capacity to react to proceedings and to demonstrate remorse or compassion. The prejudice can be acute during the sentencing phase of the proceedings, when the sentencers must attempt to know the heart and mind of the offender.” This opinion indicates the importance allotted to remorse as a mitigation factor, but also points to just how detrimental lack of remorse can be in determining the sentence that is given to a defendant.

Individuals may also feel a lack of remorse to a mental incapacity. Mental incapacities for remorse can be both non-culpable and culpable. Individuals who have non-culpable mental incapacities for remorse are those who may suffer from an intellectual impairment or mental disorder that prevents them from understanding “the basic nature of what [they] have done, and so undercuts the capacity to have the appropriate emotional reaction” to having committed a wrongdoing (Proeve and Tudor, 143). In most cases, the person is tried and found not guilty by reason of insanity. This was the case in *Atkins v. Virginia* (536 U.S. 304), in which the court determined that individuals who were deemed mentally retarded were exempted from the death penalty in part because... their demeanor may create an unwarranted impression of lack of remorse for their crimes” (Weisman, 3-4). In addition to the mentally insane, young offenders are also deemed to have a non-culpable mental incapacity for remorse. These young offenders

⁴ Recall that this is the indicative of the definition of remorse provided in the introduction of this paper.

are characterized by their inability to understand their wrongdoing either due to emotional immaturity or failure to conduct effective cost-benefit analyses for taking a particular action (Proeve and Tudor, 143). What offenders are “young” enough to fall into this category? The answer to this question is usually determined by the concept of *doli incapax*, which is a statutorily determined age cutoff that deems that children under a certain set age are “incapable of committing criminal offenses”; this may differ across jurisdictions (Proeve and Tudor, 143). Both young offenders and the mentally insane have a mental incapacity that renders them morally non-culpable for their crime. Because these individuals do not (generally) move onto the penalty phase of the trial, they will not be the focus of this discussion. This non-culpability can be contrasted with psychopaths, who are seen as morally culpable and fit to be tried and punished; the case of the psychopath will be discussed shortly.

Some individuals lack remorse for having committed a wrong in addition to actually displaying a positive, affirming emotion towards their wrongdoing. These individuals are those that derive pleasure from seeing the victim suffer, a “kind of malicious joy or *Shandenfruede* [that is the very] antithesis of compassion” (Proeve and Tudor, 144). Some may gloat from having inflicted pain and suffering onto others. This category also encompasses psychopaths, who may experience pleasure from manipulating and exploiting others (Proeve and Tudor, 143).

The Case of the Psychopath: Neurobiological and Psychological Perspectives

Let us now discuss the case of the psychopath, who *is* considered legally and morally culpable for committing a crime (Proeve and Tudor, 143). Let us first define what we mean by psychopathy. The current edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) and the upcoming edition of DSM (DSM-5) do not have criteria specifically addressing the diagnosis of psychopathy; rather, they include a broader checklist for antisocial personality disorders that address specific behavioral patterns that psychiatrists can use to assist

in the diagnosis of a patient as a psychopath. We will be using neurobiology, the behaviors listed in the DSM, as well as accounts from Robert D. Hare, an expert on psychopathy, to describe the general behaviors of a psychopath, with a specific emphasis on the role of remorse (or lack thereof) for committing a wrongdoing. We will then use both neurobiology and psychology to determine how, and whether courts should, treat psychopathy as an aggravating factor.

What makes psychopaths distinct from “normal” individuals from a neurobiological perspective? The amygdala is the core structure in the brain that is responsible for emotional regulation, as well as instrumental learning. The amygdala is thus the “structure involved in all the processes that, when impaired, gives rise to the functional impairments shown by individuals with psychopathy” (Blair, 5). A study by Tiihonen et al. used volumetric magnetic resonance imaging (MRI) to explore the relationship between amygdaloid volume and degree of psychopathy in violent offenders and found that the higher levels of psychopathy were associated with reduced amygdaloid volume (Blair, 5). Kiehl et al. also used functional MRI to examine neural responses in individuals with high and low scores for indicators of psychopathy, and determined that the higher-scoring group (the more “psychopathic” group) had reduced amygdala response (Blair, 6). The orbitofrontal cortex (OFC), in particular, the medial OFC, receives projections from and sends projections to the amygdala and is responsible for emotional and social decision making; researchers have found that lesions in the OFC can therefore lead to behavior traits characteristic of psychopathy and acquired sociopathy. Damage to the OFC, as well as administrations of propranolol (a beta-adrenergic blocker) can disrupt the processing of sad facial expressions, as explained by Harmer et al. (Blair, 6-7). A recent study conducted by Kiehl and Buckholz (27) has revealed that brain damage to a horseshoe-shaped band of tissue in the innermost part of the paralimbic system can affect other interconnected brain regions in addition to the OFC and the amygdala, including the anterior cingulate (controls empathy and decision making), the posterior cingulate (which controls emotional memory and emotion processing), the

insula (responsible for awareness of body states), and the temporal pole (integrates emotion and perception). When these regions are affected, the individual is unable to assess or control their emotions and symptoms of psychopathy can arise. Lifestyle, of course, can also lead to neurobiological impairments – substance abuse, for example, can lead to impairment of the amygdala, especially in younger children (as young as 5 years old) (Blair, 6-7).

We will now define psychopathy using a psychological framework. Hare states that a psychopath is a “person, who among other traits and behaviors, lacks a capacity for empathy and remorse... [and] lacks concern for the effects [her] actions have on the lives of others” (Hare, 34, 40). In general, psychopaths claim to have goals, but they show little understanding of the qualifications or steps required in attaining those goals; rather, they feel that their abilities will enable them to become anything they want to be (Hare, 38). Compulsive lying, including lying to impress others of the deeds they have committed, feeds into these images of grandeur (Hare, 40).

Moreover, as stated previously, psychopaths do not display remorse for committing a wrongdoing. Hare provides the example of serial killer Ted Bundy, who stated that guilt “is a mechanism we use to control people. It’s an illusion. It’s a kind of social control mechanism”... and the “past is just a dream” (Hare, 41). Bundy’s account reveals two significant points: (1) his refusal to admit guilt, and (2) his implicit concern that guilt is a structural mechanism that is impinging on ego-centrism and control over his actions, both of which are behaviors that are characteristic of antisocial personality disorders as described in the DSM-IV and DSM-5. Unlike Bundy, some psychopaths do verbalize remorse but then contradict themselves in words or actions. Psychopaths, because of their keen perception, “quickly realize that remorse is an important word in prison” so they claim to be remorseful for their actions; however, these individuals do not understand the moral self-evaluation that genuine remorse mandates. Hare gives the example of an inmate who claimed to have felt remorse when pressed further, revealed that he “didn’t feel bad for his crime” because the murder victim “benefited from... learning a

hard lesson about life” (Hare, 41). We thus see that lack of remorse internally assists psychopaths in rationalizing their behavior and excising themselves from any personal responsibility they may have for their actions (Hare, 42). Lack of remorse, in addition to the other behavioral patterns listed in the DSM, also means that psychopaths can ““torture and mutilate their victims with about the same sense of concern that we feel when we carve a turkey for Thanksgiving dinner” (Hare, 45). Hare, however, notes that crimes committed psychopaths do not tend to have this dramatic effect because psychopaths have the insight and sense of ego-centrism that allow them to “parasitically bleed other people of their possessions, savings and dignity; aggressively... take what they can’t; shamefully neglect the physical and emotion welfare of their families; engage in an unending series of causal, impersonal and trivial sexual relationships” (Hare, 45).

Because psychopaths have an awareness of their actions and are able to conduct cost-benefit analyses for taking actions, psychopathy does not excuse an individual from criminal responsibility (Proeve and Tudor, 143). In fact, the psychopath’s incapacity for remorse “is often seen as making the psychopath all the more obnoxious and dangerous and thereby meriting more severe punishment” because she is aware of the act and has, in most cases, strategically and deliberately planned to carry out the act in a certain manner so as to give rise to desired consequences (as opposed to the “mentally insane,” who are unaware of their actions or unable to control their actions (Proeve and Tudor, 143). Moreover, the psychopath’s inability to feel remorse means that she is seen as someone “who does not suffer and cannot suffer for [her] misdeeds,” which furthers many scholars’ view that the psychopath must be punished legally through prison confinement or the death penalty (Weisman, 20). Furthermore, “the psychopath, for all his skill at mimicking sanity, is afflicted with a disturbance as intransigent and encompassing as those with the most obvious symptoms of psychological disorder” (Weisman, 18). The psychopath is also cast into a realm of “biological otherness” because the early onset of

psychopathological behaviors have traditionally been “unresponsive to any of the treatment modalities currently available” (Weisman, 18). The social framing of the psychopath as someone who is a dangerous Other sets the stage for the treatment of lack of remorse, especially in psychopaths, as an aggravating factor in many legal jurisdictions throughout the United States.

We will look specifically at capital trials, where the decision in the penalty phase is between life without parole or the death penalty (in jurisdictions that still allow the death penalty), in order to demonstrate how prosecutors have used lack of remorse as an aggravating factor to encourage juries to choose the death penalty over life without parole in such cases. In *Shelton v. State* (744 A.2d 465, 501), for example, the statement of the defendant to the jury did not demonstrate any remorse, but rather just recounted the procedural rules for a capital trial: “The jury has found me guilty of these allegations, and now it’s the jury’s turn to render a verdict. And that verdict is either life in jail or death. That’s all I have to say” (Weisman, 23). Similarly, in *State v. Stephenson* (22 Ill.205 Ind. 141), the prosecutor rebutted the defense’s claims that the offender was a “changed man” by stating that “nowhere in this record... have you heard one person say that the Defendant has shown any remorse or any sorrow over the death of his wife, over what he has done. None” (Weisman, 24). We, once again, the prosecutor calling attention to the defendant’s lack of remorse as exacerbating the suffering of the victim; after all, one of the core aspects of remorse is that it affects the victim’s and the community’s perception of the wrongdoer. Some prosecutors also characterize the defendant as something other than human in order to make the contrast between the defendant and the victim stark. In *People v. Jurado* (38 Cal. 4th 72[Cal 2006]), the prosecutor told the jury that “the defendant’s grandmother testified... that she not only prays for [the defendant] but she prays for the victims and the victim’s family... What a human thing... He’s not like them [the defendant’s family]. He doesn’t share their goodness... their humanity” (Weisman, 25). In *People v. Farnam* (28 Cal. 4th 107 [Cal. 2002]), the prosecutor also characterizes the defendant as sub-human:

No matter what words may be used to try and convince us that this defendant feels remorse and cares for others, et cetera, et cetera, those are words... the sadism, premeditation, and ritualistic repetition shown in these crimes are the classic trademark of the psychopath who feels no remorse and has no concern for anyone outside of himself. He's the beast that walks upright. You meet him on the street. He will seem normal, but he roams those streets, parasitic and cold-eyed (Weisman, 28).

In the preceding cases, we see that the defendant who does not display remorse is presented by the prosecutor as the Other, as the animal that should be confined for this personality and for the potential danger that she poses to the community. This characterization, in turn, makes it easier for the jury to view the defendant as someone who is sub-human and sentence them to the death penalty or life without parole.

The core concern that arises from treating lack of remorse as an aggravating factor is that personality and subsequent "inhumanity" overrides the neurological basis of the psychopath's lack of remorse. As described previously, impairments of the paralimbic system can lead to a misrecognition or lack of recognition of emotions, especially if core structures like the amygdala and OFC are damaged. Prosecutors need to move away from the portrayal of psychopathy as a *choice* that psychopathic individuals have embraced. Rather, it is necessary that jurists recognize that damage to the brain, as opposed to an intrinsic lack of humanity is what is at the core of the decisions that psychopathic individuals make. At the very least, MRI scans of the brain of the psychopathic individual should be made available to the jury before they have to determine between life with parole and the death penalty. Of course, at the same time, one must recognize that substance abuse and lifestyle choices can exacerbate the damage to the brain, and these factors too must be taken into consideration if the court chooses to assess lack of remorse as an aggravating factor. Moreover, jurists should be given the opportunity to hear what leading experts in psychopathology have to say about the causality between the irregularities in a psychopathic individual's brain and her lack of remorse.

Conclusion

We have thus explained why courts should not treat the display of remorse as a mitigating factor and the lack of remorse as an aggravating factor. Of course, because emotions are an intrinsic part of what makes us human, it would be unrealistic to expect that the emotion of remorse can be completely excised from the courtroom. If US courts do generally continue to treat remorse as a mitigating factor, it is imperative that courts (attorneys, juries, and judges) use a comprehensive model, in line with the complex definition of remorse, to assess whether remorse is truly absent or truly present. Proeve and Tudor propose a model that takes the role of the defendant, the victim and the nature of the wrongdoing itself into consideration; they state that a remorseful person should demonstrate:

- (1) recognition that she has wronged or harmed another person
- (2) recognition that she was responsible for her action, which was voluntary
- (3) a sense that her life has changed in some way as a consequence of her action
- (4) various feelings of internal prickling, vexation or turmoil (can be expressed through one's demeanor or verbal expressions)
- (5) a desire to atone or make reparation, for example by expressing remorse, apologizing, making restitution to the person harmed, undergoing penance, and/or behaving differently in the future
- (f) a desire to be forgiven
- (g) some form(s) of having acted upon the desires to atone, make reparation, or be forgiven (Proeve and Tudor, 48)

These guidelines thus would ask the court to consider not only the physical state of the defendant (e.g. is the defendant weeping?), or her verbal expressions (e.g. did the defendant make a public apology to the victim?), but also requires the jury to truly contemplate whether the defendant recognizes that she has harmed a person, and that the relationship between the defendant and the victim, and the defendant and the rest of society has been forever altered.

Lack of remorse should *not* be a mere negation of these factors. Rather, in the case of psychopaths, neurobiological evidence (MRI scans, for example) should be presented before the jury so that the jury itself (based on expert opinion) can determine whether there is a causal link between irregularities in the brain and the lack of remorse being displayed by the defendant.

The treatment of remorse, thus, must be nuanced in order to ensure that the sentence given is indeed a form of justice in line with the foundational principles of our criminal justice system.

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