SHOWING REMORSE: LAW AND THE SOCIAL CONTROL OF EMOTION, RICHARD WEISMAN (BURLINGTON, VA: ASHGATE, 2014)

I was extremely excited at the prospect of reviewing a book on so central a concept as that of "showing remorse," as this thorny question bedevils the work of judges, prosecutors, and defence counsel on a daily basis. Having now had the pleasure of reading the 149 pages of this carefully crafted study, I am in a position to conclude that it is an excellent text that will assist not only the Bench and Bar, but criminologists, probation officers, social workers, and interested members of the public.

Chapter 1, "Towards a Constructionist Approach to the Study of Remorse," at pages 1–21, provides an excellent introduction to the question being debated, and serves to illuminate the path of the reader. Professor Weisman, who teaches at York University in Toronto, Ontario has carefully set out his objectives and has taken pains to delineate the aims he is pursuing and the means of attaining his objective. I commend in particular the excellence of his opening paragraph: quoting from Albert Camus' *The Outsider*,[1] he makes plain how society and judges expect expressions of remorse and how the community at large may well punish those who fail to "express remorse," including the accused in that instance who has failed to demonstrate any contrition or remorse for his action in taking another's life.[2]

As we read at page 2, "[f]or the crime of murder, [the accused] will go to prison. But for his failure to show the emotions we expect from someone who has been convicted of murder, he will have to die. For not showing remorse, [the accused] has become not merely a man who has committed a murder — he is now a monster whose life must be extinguished."

The author goes on to state, again at page 2:

> This impassioned and sobering response to [the accused's] performance in court illustrates the central proposition of this work — namely, that feelings of remorse are subject to social regulation either through collective approval or, as in this case, collective condemnation. When I suggest that the following analysis takes a different direction to the showing of remorse from most of the academic work that has preceded it, it is because my focus is not primarily on the transgressor who has breached communal norms and from whom we expect a show of remorse, but rather on the community that imposes these norms [footnote omitted]. It is the prosecutor and the judge rather than [the accused] who are the protagonists in this work. My concern is not with the adequacy or inadequacy of [the accused's] response to the expectation to show remorse but rather with the expectation itself and the meanings that the community attaches to whether or not these expectations are fulfilled.

On page 3, the discussion of "feeling rules" is exemplary and serves to mark a path that is required if we are to understand "when it is appropriate or 'right' to experience a feeling, how these feelings should be expressed, and how to distinguish between expressions that are genuine and those that are false." Indeed, Professor Weisman is quite adept at explaining

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1 Albert Camus, *The Outsider*, translated by Matthew Ward (New York: Vintage, 1989) at 74.

2 A further helpful reference to the world of literature that Professor Weisman might include in a future edition is found in *Macbeth*, Act 1, sc. 4, touching upon the execution of Cawdor: "But I have spoke with one that saw him die: Who did report that very frankly he confess'd his treasons, Implored your highness' pardon and set forth a deep repentance: nothing in his life Became him like the leaving of it."

how violations of the rules governing remorse are occasions for moral outrage as such conduct may be seen as betraying the community and of demonstrating a character greatly in need of reformation.

The introductory chapter also serves to highlight how remorse is discussed within the major philosophies of punishment, and I note in particular the initial view according to which there is no empirical evidence to support the proposition that persons credited with remorse are less likely to reoffend. In this vein, the author points to the excellent discussion of this subject by Professor Mirko Bagaric (and Kumar Amarasekara) in "Feeling Sorry? Tell Someone Who Cares: The Uselessness of Remorse in Sentencing."[3] Refer to page 6.

The balance of chapter 1 is devoted to an overview of the chapters that follow, and the author is quite successful in summarizing the complex questions that he addresses thereafter, notably how showing remorse is to be distinguished from the tendering of an apology, and how remorse is an integral part of what permits one to claim membership in the moral community as opposed to the lack thereof, which may justify the expulsion of the offender from our collective midst. Space permits me to only point out the salient references to the socialization of what might be described as "non-remorse" in cases of wartime activity and inappropriate socialization.

Drawing attention at this point to chapter 2, "Being and Doing: The Judicial Use of Remorse to Construct Character and Community," at pages 23–45, I note at the outset that the author once again begins his analysis by means of a striking example of a non-remorseful offender, guilty of a homicide. Professor Weisman is to be commended for selecting a case that includes, by way of striking contrast, a cold offender who is, apparently, greatly remorseful. This juxtaposition of contrasting moral obloquy serves the author's goals quite well as the reader is left in no doubt that, all things being equal, the community will be outraged at an offender's refusal to manifest repentance after committing so heinous a crime. It is more than simply manifesting a "frightening character flaw," as noted at page 24. Indeed, such a lack of concern for society's expectation of contrition appears to justify a more severe sentence because of the fear that such an unrepentant offender will go on to commit further offenses of such gravity.

The author succeeds in this chapter in focusing much needed light on the issue of the merits of the process by which the court ascribes remorse or its absence to the offender and distinguishes between those moral performances it finds credible and those it does not. As we read at page 25, "[i]t is a central premise of this work that these public occasions, in which there is both communal interest and communal reaction to a purported wrongdoer's remorse or absence of remorse, are significant events in the moral regulation of social life." In the ultimate analysis, the author makes plain how the emotion of remorse as manifested or not before courts serves to instruct the community at large about when feelings of remorse are expected and when they are not, as well as what form these feelings should take.

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[3] Mirko Bagaric & Kumar Amarasekara, "Feeling Sorry? – Tell Someone Who Cares: The Irrelevance of Remorse in Sentencing" (2001) 40:4 How L J 364.

In the course of this chapter, the author demonstrates how remorse may be established by means of direct observation, expert testimony, presentence reports, police reports, and observations by third parties. The reader gains a great number of insights demonstrating that guilty pleas are not necessarily sound indications of remorse and that offenders may be quite skilled at manifesting remorse which is not felt and, conversely, somewhat inept at putting forward evidence of remorse which is being experienced, by reason of cultural socialization or ingrained expectations. In addition, the author succeeds in illustrating how techniques of neutralization are often engaged, resulting in a wide variety of factual findings by judges that may be extremely critical in the selection of the ultimate sanction. The cases that are discussed are quite useful in advancing our understanding of this important element in sentencing. Further, I commend in particular the valuable discussion of the notion of "law's mercy" at pages 42–45. It serves to underline how the judicial process both fashions and reacts to expressions of remorse.

In closing my review of this chapter, the only criticism that I can advance is that the author should have pointed out that the prosecution bears the onus, in Canada, of demonstrating all aggravating circumstances beyond a reasonable doubt; by contrast, the offender must satisfy the court on a balance of probabilities of the existence of a mitigating element. Further, the case law is to the effect that the absence of remorse is not an aggravating element in sentencing save in the most unusual circumstances, though one gains the considered view that the number of times the various Courts of Appeal are presented with grievances on this subject demonstrates that it is high time for what might be described as a guideline judgment resolving this area of controversy.

The next chapter is entitled "Making Monsters: Contemporary Uses of the Pathological Approach to Remorse," and spans pages 47–74. In a word, the author is vitally interested in "Character." How the offender's crime bears on the assessment of his or her character and how the offender's confession of guilt and remorse, assuming both strands are present, may serve to attenuate the sentence is at the heart of the analysis for Canadian readers. American readers will gain a greater understanding of the possibility of capital punishment being selected to punish un-remorseful murderers. All readers will profit from the careful review of the many strands of testimony that mediate the presentation (and potential reception) of evidence tending to establish remorse. Once again, the author gains our immediate attention by referencing a dramatic example of this controversy, in this case by pointing to the case of Timothy McVeigh. This example of a "monster" is followed by others and the resulting conclusions, notably how the absence of remorse serves to banish offenders from the realm of mercy in capital cases decided by juries as a result of a finding that such individuals are neither from our community nor of our community, and are thus well-grounded in both the case law and the work of the academy. Of especial interest is the author's ability to point to the contributions from a variety of disciplines in order that we may understand fully how the absence of remorse is pathologized in contemporary medical-psychological discourse. In brief, as we read at page 68, the capital offender who is identified as remorseless is reconstituted as a "death-worthy" subject. On page 69 Professor Weisman pursues his analysis and makes plain, time and again, how the "problematic relationship between appearance and reality in deciding whether or not remorse is genuine, for every narrative that

purports to reveal the defendant as incontrovertibly remorseful, there is an equally compelling counter-narrative that can also be crafted from the same pool of evidence."[4]

"Defiance" is the title of chapter 4, from pages 75 to 101. I found Professor Weisman's guidance on the subject of defiance quite valuable, whether the situation involves an individual who was found guilty but who professes innocence nonetheless, or the second situation of an individual who agrees that a crime was committed through his or her act but who asserts a moral justification for the unlawful act.

I have long struggled with the former situation in my work as a judge, and have advocated in extra-judicial writings that the best perspective is to assign no aggravating weight to the continued claim of innocence, as to do otherwise is to coerce an accused to profess guilt during the sentencing stage, thus denying an appeal based on a fact-finder's erroneous conclusion.[5] Consider the number of wrongly convicted accuseds such as David Milgaard and Robert Baltovich and ponder the implications of an elevated sanction due to defiance that is based on factual innocence, and it becomes obvious why an element such as defiance ought to be irrelevant save in exceptional cases. As Professor Weisman wisely points out at page 92:

> it is important to note that the person who claims innocence is attributed all of the most damning characteristics of the remorseless offender — utter indifference to the suffering of their victim, lack of accountability for their actions, and no display of feeling in a circumstance where such feelings are expected from a member of the moral community.[6]

The second situation, embracing a person who acknowledges legal guilt, but who claims moral innocence, is well illustrated by the discussion at pages 77–91 on the well-known case involving Robert Latimer, who killed his severely disabled daughter, apparently to spare her from further and ever increasing pain. The author's skillful review of the trial records and of the proceedings before the Parole Board are to be commended as they reveal the many different degrees of controversy involved in such cases, that some (but not all) describe as "mercy killings." I note that the author has mined not only academic commentary, but the contents of websites dedicated to both sides of the controversy, and these references are quite valuable in pointing to the insurmountable gulf separating both sides. This highlights how much more research is required in order to understand fully all of the elements of this

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4 In this vein, I refer to Alan Paton, *Cry, The Beloved Country: A Story of Comfort in Desolation* (New York: Charles Scribner's Sons, 1948) at 109: "He will repent … If I say to him, do you repent, he will say, it is as my father says. If I say to him, was is not evil, he will say, it is evil. But if I speak otherwise, putting no words in his mouth, if I say, what will you do now, he will say, I do not know , or he will say, it is as my father says."

5 See Justice Gilles Renaud, *Speaking to Sentence: A Practical Guide* (Toronto: Carswell, 2004) 183–98; Hon Gilles Renaud, *The Sentencing Code of Canada: Principles and Objectives* (Markham: LexisNexis Canada, 2009) at 112–14.

6 A possible example of an exceptional situation (or offender) deserving of an aggravated sentence by reason of dangerousness enhanced by a lack of insight as to his or her wrongdoing is noted in Julian V Roberts & Hannah Maslen, "After the Crime: Post-Offence Conduct and Penal Censure" in AP Simester, Antje du Bois-Pedain & Ulfrid Neumann, eds, *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Oxford: Hart, 2014) at 89, n 1.

dynamic and its influence on both sentencing and the community's view as to how severe judges should be on this question of the unremorseful and self-justified offender.[7]

The final chapter addresses the work of the South African Truth and Reconciliation Commission and provides valuable instruction on the importance of the truth finding function of testimony that cannot be evaluated more favourably (or critically) by reason of emotion and especially by reason of the presence of remorse. In effect, Professor Weisman lays bare the fascinating issue of the value of evidence by an admitted wrongdoer when the witness is neither expected nor rewarded for any precise display of emotion. As a result, it was anticipated that witnesses, especially former members of the State Security forces responsible for countless atrocities would be forthcoming in their description of the crimes they committed during the Apartheid regime, as they would not be expected to display regret or contrition, and the testimony of one precise "monster" is reviewed in depth. Whether this technique succeeded is for the reader to decide, aided immeasurably by the insights and advice put forward by the author as a result of a penetrating examination of the transcripts of the hearings. I, for one, will be reviewing this chapter closely in the near future as I prepare a revised edition of my text on fact-finding, *L'évaluation du témoignage: Un juge se livre*.[8]

The brief concluding chapter, at pages 129–133 continues the pattern of including reference to a remarkable example of the question being examined, in this case how a Nazi butcher could fail to express remorse for his participation in atrocities. The author summarizes his thoughts concisely and points to further work that remains to be done.

The importance of the subject matter of remorse as a subject of study may be judged indirectly by the recent publication of two other excellent books that are also of signal importance in guiding us through the thicket of conflicting rules, principles, and poorly understood norms touching upon remorse and sentencing. The first, *Justice through Apologies: Remorse, Reform, and Punishment*[9] was penned by Professor Nick Smith of the University of New Hampshire, and pursues the groundbreaking work he initiated by his earlier book *I Was Wrong: The Meaning of Apologies*.[10] I note in particular the original examination of the question of "The Ideology of personal responsibility" at pages 136–145 within the chapter devoted to "Apology Reductions in Criminal Law" at pages 94–203.

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7 Readers interested in the question of public opinion as it influences sentencing should see Julian V Roberts "Clarifying the Significance of Public Opinion for Sentencing Policy and Practice" in Jesper Ryberg & Julian V Roberts, eds, *Popular Punishment: On the Normative Significance of Public Opinion* (New York: Oxford University Press, 2014) 228, and should see generally the other chapters in this collection. In effect, the offender continued to attempt to harm the victim by means of verbal harassment and it was thought that this action went beyond affirmation of innocence by exacerbating the victim's suffering and by impeding the confidence of other victims to come forward for fear of similar degrading conduct.

8 Gilles Renaud, *L'évaluation de témoignage: un juge se livre* (Toronto: Thomson Reuters, 2008).

9 Nick Smith, *Justice through Apologies: Remorse, Reform, and Punishment* (New York: Cambridge University Press, 2014).

10 Nick Smith, *I Was Wrong: The Meanings of Apologies* (New York: Cambridge University Press, 2008).

Dr. Hannah Maslen wrote the second, *Remorse, Penal Theory and Sentencing*[11] and I recommend in particular chapter 8, "The Remorseful Recidivist" at pages 161–179 and the concluding chapter, "Implications for Penal Theory and Sentencing," at pages 203–205 as they underscore the practical (as opposed to theoretical) importance of this subject area to the Bench and Bar of the common law jurisdictions. Indeed, all three books are fundamentally concerned with questions surrounding the attitude, demeanour, and character of the offender and whether or not such individuals have, or ought to, express remorse for violating the legal and moral codes of their communities.

In the final analysis, the enduring value of *Showing Remorse* will no doubt be found in the author's ability to discuss so ably how the possible presence of remorse engages so many contradictory elements in sentencing and the processes by which society expects contrition and its responses when this expectation is not met.

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[11] Hannah Maslen, *Remorse, Penal Theory and Sentencing* (Oxford: Hart, 2005).