

Remorse and Psychopathy at the Penalty Phase of the Capital Trial- How Psychiatry's View of 'Moral Insanity' Helps Build the Case for Death

Cite- *Studies in Law, Politics, and Society*, 2007, Vol. 42, pp.187-217.

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Abstract- This article documents how the shift in psychiatric representation from the 'morally insane' perpetrator of the 19th century to the modern psychopath or person with antisocial personality disorder involves a recasting of the offender from someone afflicted with an illness whose criminal misconduct is merely a symptom of their disorder to someone whose criminal misconduct is perceived as an expression of their true character. Drawing upon recent case law, the article then shows how prosecutors deploy this modern psychiatric reconfiguring during the penalty phase of the U.S. capital trial to persuade jurors to decide in favor of death over life without parole. Central to the building of this narrative is the reframing of the offenders' silences as well as what are taken as their unconvincing attempts to show remorse as evidence of a pathology whose primary manifestation is the incapacity to feel or experience moral emotions. Applying but also modifying Harold Garfinkel's work on degradation ceremonies, the article shows how the pathologizing of the offender's lack of remorse involves a rite of passage in which he or she is symbolically demoted from someone worthy of life in spite of their grievous crime to someone for whom death is the only appropriate penalty.

If, as one writer has recently suggested, the criminal trial has from its inception served as a veritable ‘theater of contrition’ (Kadri, 2005, pp. 213 et. passim.) in which defendants come before court and community with humility and remorse, perhaps in no other legal arena is this drama enacted with greater intensity than in the modern bifurcated American capital trial. If the first phase of the capital trial addresses the familiar questions of culpability and intent, the second phase includes as part of its ambit not just the enumerated aggravating and mitigating factors that are more or less replicated in each of the states in which capital punishment is permitted but what is more loosely described as considerations of character. It is in this second phase of course that 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.

Recent systematic inquiry – the prolific National Capital Jury Project above all- has amply demonstrated the prime importance to jurors of whether in their view the offender has demonstrated remorse when they decide in favor of life or death.¹ One of the major articles from this project shows that regardless of whether or not remorse is included statutorily as a mitigating factor or its absence as an aggravating factor, it plays a larger part in the actual decision-making process than all the other enunciated factors except prior history of violent crime and predictions of future dangerousness (Garvey 1998: 1560-1561) - the later of which I will argue below is not independent of evaluations of remorse. Anecdotal evidence as gleaned from the mass media supply even more dramatic evidence of how evaluations of an offender’s remorsefulness contribute to the

ultimate decision. To cite from just one recent example, newspaper reports of the jury deliberations in the penalty phase trial following John Muhammed's conviction for one of the murders committed during a series of sniper attacks that resulted in ten murders quote a number of jurors as stating that it was his lack of remorse that finally persuaded them to decide in favor of the death penalty. As one juror explained, "I tried to pay attention to his demeanor the whole time... I looked for something in him that might have shown remorse. I never saw it." (Dao and Bacon, Nov. 25, 2003, p.1) suggesting that even with the likelihood of multiple murders, remorse stood out as the principal factor in deciding for death.

It is this raw but passionate response to the remorseless offender that reveals what is at stake in the moral performances or nonperformances of capital offenders and their representation as persons who feel remorse or do not or can not feel remorse.² The Supreme Court in *Riggins v. Nevada*(1992) gave tacit acknowledgement of the centrality of this attribution when it ordered a retrial on grounds that the defendant had been so medicated that he was unable to show remorse. As Justice Anthony Kennedy wrote in a concurring opinion, "... as any trial attorney can attest, 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" (*Riggins v. Nevada*, 1992, p.1824). More recently, another Supreme Court judgement held that persons who fell in the category of the 'mentally retarded' would heretofore be exempted from the death penalty in part because such defendants "are typically poor witnesses, and their demeanor may create an unwarranted impression of

lack of remorse for their crimes(Atkins v. Virginia, 2002, p.2252).” The significant impact of characterizations of the offender as remorseful or not to all judicial outcomes, but especially those involving capital punishment, has been quietly if selectively acknowledged within law for some time and is now supported by recent empirical investigation.³

But the reactions of jurors do not take place in a vacuum.⁴ The character of the offender is shaped by the narratives and counternarratives that are entered or allowed entry into the legal forum. It is at this juncture that the attribute of remorse plays a pivotal role in portraying the offender as deserving of death or worthy of life. The task of the prosecutor is to somehow convince the jury that life without parole is an insufficient response to the crime that has been perpetrated. The sheer volume of appeals and counter-appeals that focus on challenging the characterization of the offender as remorseless bear witness to how crucial a contribution this designation makes to the narrative that is communicated to jurors and to the public. No item of speech in the postconviction phase of the capital trial is more likely to be contested as inflammatory or prejudicial to the character of the defendant than statements by the prosecutor and others that call into question the offender’s remorsefulness for his crime. In capital cases in the past twenty years, there have been 232 separate appeals in which one of the grounds is prosecutorial use of inflammatory statements that characterize the capital offender as without remorse.⁵

At the same time, the efforts of advocates to craft a portrait of the offender as remorseful is no less critical to the process of separating the act from the person by which defense argues that, despite the gravity and severity of the crime, the offender is not

beyond redemption. There are few Meursaults in the penalty phase of the capital trial—apart from those who claim to have been wrongly convicted, most offenders endeavor to present themselves as remorseful or, at the very least, as not unremorseful. It is in this sense that the modern trial for capital punishment involves a life and death struggle over how the offender will be defined and, hence, it is no wonder that interventions whether in support or in opposition to a claim of remorse are a site of intense contestation. One of the objectives of this paper is to draw from a recent population of capital cases to show how attributions of remorse are deployed to build an identity for the capital offender that will persuade jurors to decide in favor of death.

The analysis would remain incomplete, however, without consideration of one of the most significant developments in the modern approach to remorse in law in which the absence of remorse becomes not merely a breach of expectations that invites severe moral condemnation but a symptom of an underlying pathology that marks the wrongdoer as variously diseased, impaired, or otherwise incapable of feeling what a normal member of the community would feel under similar circumstances. In the first section, I discuss the history of this shift not in order to document the gradual, circuitous evolution from the early 19th century category of moral insanity to the contemporary diagnoses of psychopathy and anti-social personality disorder as much as to place in historical relief the particular configuration of assumptions by which remorse and pathology are currently associated. Once I have identified the distinctive way in which the absence of remorse is pathologized in contemporary medical- psychological discourse, it then becomes possible to show more clearly how this approach has been

translated from its uncertain and tenuous status within forensic psychology and psychiatry to its currently ambiguous and controversial status in American law.

In the second section of this paper, I hope to bring out the representations of the remorseless offender that help to promote the intense moral indignation sufficient to decide in favor of death when life without parole is the only other option. Here I will also show the critical contribution of the pathological approach both in framing how the feelings of the capital offender are to be interpreted and in supplying a rationale for death as the appropriate punishment. In developing this analysis, I have built upon and modified the classic formulation of the ritual of public denunciation culminating in dehumanization offered by Harold Garfinkel in “Conditions of Successful Degradation Ceremonies(Garfinkel, 1956).”

My primary objective is to look at what the absence of remorse comes to symbolize about the wrongdoer and the consequences of identifying the act with the person. I want to show how the casting of wrongdoers as without remorse separates them from the community not just by virtue of their transgression but by the purported personal qualities that are embodied in the act. The pathological approach to remorse widens even further the difference between those who show remorse and those who do not even as it enlarges the population to whom the designation of remorselessness can be applied. Here the disregard of feeling rules embodied by the refusal or incapacity to express remorse is not only condemned for its rejection of the moral-emotive foundation of community but also naturalized as a psycho-biological condition from which the wrongdoer can not be rehabilitated. It is this explosive combination of moral condemnation and medical pessimism that gives added justification for imposing on the psychopathic perpetrator the

most grave sanctions available in US law. That the term ‘monster’ is not infrequently used in newspaper and popular accounts to describe persons who commit atrocious crimes with no show of remorse should not surprise us- if a working definition of the monster is someone who is dangerous, incurable, with no empathy for his or her victim, no feelings of remorse for their wrongdoing, and psychologically and perhaps biologically different from the rest of us, then this is the expectable outcome of the social practices that have been described.

II- REMORSE, PSYCHOPATHOLOGY, AND THE LAW- BUILDING THE FRAMEWORK FOR INTERPRETATION

a. From Affliction to Abnormality

In 1826 , in his *Discussions medico-legale pour Henriette Cornier*(Georget, 1826, pp.71-130), Dr. Etienne Georget, a French physician and one of the forerunners of modern forensic psychiatry, reported on a case that occurred in Paris and that that would be retold in England, the United States, and elsewhere in 19th century Europe as representing a turning point in the history of mental disorder and the interrelationship between law and psychiatry. What was so remarkable and anomalous about Henriette Cornier was not her atrocious act of violence but the impossibility of making sense of it within the legal, medical, or psychological frameworks then available. One day, after a ‘singular change was observed in her character,’⁶ Cornier, a 27 year old servant, left her place of employment to visit a neighboring shop to buy some cheese for the family where she resided. She had always shown affection for the shopkeeper’s daughter and so was able to persuade her to entrust her with the child for a walk. She then took the child back to

her mistress' house, and, laying it across her own bed, severed the child's head with a kitchen knife. She was reported later to have felt no particular emotion- 'without remorse or grief' in the original narrative as well as in subsequent published accounts- during the commission of this deed. When the mother came for her child some two hours later, Cornier informed her that 'Your child is dead.' The mother who did not at first believe her entered the chamber where she was confronted with 'the bloody sight of the mutilated fragments of her child(Ray, 1838, p. 220).'" At that point, Cornier picked up the head of the murdered child, and threw it into the street from the open window. Why did she do this, she was later asked? She replied that she wanted to attract public attention so that people might come up to her room and see that she alone was responsible for the murder.⁷

I dwell on this case because it constituted the first time a court in Europe or North America was asked to consider as a defense to criminal culpability a new category of insanity for which the primary symptom was the criminal act itself. Because Cornier demonstrated no defects in cognition- she understood the consequences of her action and was fully aware that it violated the laws of her community- she did not belong in the more familiar category of 'insane' perpetrators who committed crimes in a state of delirium or who exhibited other signs of cognitive disorientation. At the same time, because the prosecution could establish no motive for her behavior that was intelligible to contemporaries- no prior history of grievance with the family of her victim to build a narrative of revenge and no hope of personal gain consistent with any instrumental objective- her act of violence could not be situated within the conventional parameters of willful criminal misconduct. Cornier presented the anomaly of someone who 'knew' that

her act was immoral and unlawful and yet could offer no motive for why she had done it. As viewed by her contemporaries, the only evidence of insanity in this 'lucid' perpetrator was what she had done.

A decade after this much discussed trial, leading Anglo-American interpreters of the link between law and madness were still debating how to understand and categorize her affliction in the language of the faculty psychology of the period.⁸ Was it a form of moral insanity- “ a perversion of natural feelings, affections, inclinations, temper, habits, and moral dispositions without any notable lesions of the intellect or knowing and reasoning faculties, and particularly without any maniacal (Ray, 1838, pp.169-170)”⁹ Or was it a disease of the will – a form of homicidal madness- in which the perpetrator demonstrated a fatal incapacity to resist her homicidal urges, as James Cowles Prichard would suggest¹⁰(Prichard, 1842, pp.19-20; 93,95)? But regardless of which faculty was affected- that of the feelings or the will- it was already clear to contemporaries that expanding the insanity defense to include those who were not cognitively impaired when they committed their wrongdoing constituted a major redrawing of the boundaries of responsibility with sweeping implications for criminal law. How would one now distinguish the cognitively unimpaired murderer whose actions were willful and deliberate from the cognitively unimpaired insane offender whose wrongdoings were caused by their affliction? It is in the crafting of this distinction that we can discern the vast changes that occurred during the 19th century in how the lucid perpetrator would be portrayed.

Early commentaries would describe Cornier whether as morally insane, or as afflicted with homicidal madness as radically different from those who belonged in the category of

criminally culpable offenders. As Ray would write in 1838, the Corniers of this world were not to be classed among those who were depraved or perverse- instead, such persons had characters that were ‘mild and peaceable, and their days were spent in the quiet and creditable discharge of the duties belonging to their station, till a cloud of melancholy enveloped their minds, and ... they perpetrated a single deed the very thought of which they would have previously shuddered with horror(Ray, 1838, p.275).’ What precipitated the atrocious act was a striking change in the conduct of the individual signaling the onset of the pathology – or, as Foucault would describe Cornier’s defense at her trial- “a crack appears and there is no resemblance between the act and the person(Foucault, 2003, p.127).” The atrocious act would cast no reflection on Cornier’s character- only on her pathology.

Even her lack of grief and remorse for so horrifying an act, however ‘unnatural’ , was not the same absence of appropriate affect as that which would be exhibited by the true murderer. While Cornier had shown no emotion when her homicidal act was revealed, this was consistent with her ‘manie sans delire.’ As Esquirol¹¹ had written in a passage quoted by both Ray and Prichard, “ the homicidal monomaniac¹² testifies neither remorse nor repentance, nor satisfaction, and, if judicially condemned, perhaps acknowledges the justice of the sentence(Ray, 1838, p,232).” Cornier, for example, made no effort to escape custody nor to evade responsibility for her actions- not only did she make it clear that she alone perpetrated the deed but her comment to the magistrate during her examination was that she knew her crime deserved death and that she desired it. (Ray, 1838, p. 221; Foucault, 2003, p.125) “This deserves the death penalty.” On the other hand, Ray continued, “the criminal either denies or confesses his guilt: if the latter, he

either humbly sues for mercy, or glories in his crimes, and leaves the world cursing his judges and with his last breath exclaiming against the injustice of his fate.”(Ray, 1838, p.232). The murderer who kills willfully may repent of his crime but only for the ulterior purpose of obtaining a mercy that is undeserved- and when he or she is finally sent to their execution, their criminal character will once again be demonstrated through their anger and defiance.

Whether afflicted with homicidal madness or with moral mania, Henriette Cornier committed an act that shocked the sensibilities of her contemporaries- her brutal decapitation of her infant victim was discussed on both sides of the Atlantic. Yet, at this earliest stage of formulation, the lucid but insane perpetrator is still entitled to a measure of the same solicitude and exemptions that are granted to those afflicted with other illnesses- treatment rather than punishment is the remedy even if there was no likelihood of release from detention for acts of such brutality. In the accounts at trial as offered by the physicians for the defense and in the later commentaries, Cornier is described as herself a victim of her affliction- she is portrayed by Ray when on trial as trembling, melancholic, and in ‘profound chagrin(Ray, 1838, pp.221-222).” As Prichard would suggest about the morally insane, “such persons must be admitted to be morally guilty and to deserve to suffer. But the calamity with which we know them to be afflicted is already so great, that humanity forbids our entertaining the thought of adding to it(Prichard, 1842, p.178).” In this early representation of the cognitively lucid but insane transgressor, where the act, however despicable, does not define the person and where the perpetrator’s being is still separated from their doing, there lingers the perception that but

for their affliction, such persons are not so different in terms of how they feel about what they did from the rest of the community.

Yet, by the early twentieth century, the cognitively unimpaired insane offender now firmly incorporated within the category of the ‘morally insane’ would be reconceived in ways that would be much closer to contemporary formulations. Richard von Krafft-Ebing’s *Text-book of Insanity*, one of the most widely disseminated manuals of forensic medicine and psychiatry, originally published in 1875 in the first of four German editions- finally translated into English in 1905- and cited as one of the defining texts on insanity by English and American medical and legal authorities well exemplifies the changes that occurred in the intervening 50 years.¹³ Profoundly influenced by the biological and evolutionist turn in psychiatry and early criminology¹⁴, Krafft-Ebing’s work reformulates moral insanity less as an illness that is transitory than as a condition that at its worst and most frequent, is hereditary and organic, and at best, is acquired as the result of other neurologically based mental defects. In the former case, the prognosis is hopeless incurability- in the later, successful removal of the mental defect may result in remission of the abnormality(Krafft-Ebing, 1905, p.625).

More importantly, the wrongdoing of the morally insane, whether criminal or otherwise, is conceived as a true expression of their underlying personality- “moral insanity affects the innermost nucleus of the individuality in its emotional, ethical, and moral relations(Krafft-Ebing, 1905,p.622).” What radically distinguishes those who have this condition is what Krafft- Ebing calls a ‘more or less complete moral insensibility’(p.623) by which he means that even when the morally insane are conscious of moral standards, they lack the feelings and affects that engender commitment to these

standards. The best they can do is memorize the rules and codes “but if they enter consciousness they remain uncolored by feeling and affects and are dead ideas.” At their core, persons who fall into this category are unable to experience or demonstrate the feelings that come naturally to persons with normal ‘social instincts’ as evidenced by their ‘coldness of heart, their indifference to the lot of their nearest relatives, (their absence) of scruples of conscience or repentance(p.623).” By recasting moral insanity as no longer merely an illness but a congenital abnormality that penetrates to the nucleus of the person, the wrongful deeds of the morally insane have become an expression of their essence. In this new approach to moral insanity, act and person are now shown to correspond.

How then is the morally insane wrongdoer to be distinguished from the willful criminal if repeated and incorrigible wrongdoing is one of the primary manifestations? Here, Krafft-Ebing suggests that their ‘moral blindness’ fails them even in their criminal pursuits. For here, their lack of judgement makes them astonishingly negligent- lacking in the ‘most elementary rules of prudence in committing their criminal acts.” Just as the morally insane are not able to conform their conduct to legal restrictions, they are also not free to obey these restrictions- unlike the putatively rational criminal, they are unable to prevent themselves from engaging in ‘strange, immoral, or criminal acts(p. 625).” Their defiance of the law and their proclivity to immoral behavior differ from criminal misconduct because these tendencies are so unrestrained, so ruthless, and so contrary to their criminal purpose of benefiting from their ill-gotten gains.

In Krafft-Ebing’s work, the descriptions of the morally insane reveal a stance towards the pathology that is different in tone and orientation from all the other case studies that

are included in the volume. For each of these other illnesses, conditions, or impairments, no matter how transgressive the symptom, the patient is viewed as suffering from or otherwise adversely affected by their affliction. It is only when we turn to the morally insane that the language shifts to one of severe moral condemnation devoid of compassion for the offending pathology. The woman whom Krafft-Ebing uses to illustrate the abnormality is described as “impossible, very irritable, unsocial, coarse and without feeling, and inciting other patients to disobey hospital regulations(p.626)”- what is mentioned is not how she has suffered from her condition but how the interpersonal and behavioral manifestations of her condition have adversely affected others. At the end of the case, it is noted that she was transferred to an institution for the chronic insane- that she has been judged incurable. By the time of Krafft-Ebing’s work, moral insanity has been transformed from an affliction from which one suffers and which might well be temporary to an abnormality that is hereditary, untreatable, and a continuing source of danger to others. As his prescription for dealing with the condition, Krafft-Ebing writes- “these savages in society must be kept in asylums for their own and the safety of society(p.626).” The morally insane wrongdoer has become less someone entitled to exemptions from criminal responsibility than one from whom the community needs protection. As we shall see, it is a version of this representation that is reflected in the contemporary understanding of those classed as manifesting psychopathic disorder or anti-social personality disorder who also engage in criminal wrongdoing, who are cognitively intact, and who are perceived as incapable of feeling remorse.

b. Contemporary Representations of Remorselessness as Pathology

In the most recent edition of the DSM, (DSM IV TR, 2000), the first criterion for the diagnosis of Antisocial Personality Disorder specifies ‘a pervasive pattern of disregard for and violation of the rights of others since age 15 years, as indicated by three or more of seven factors among which is included “lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another(DSM-IV-TR, 2000, p.706).” But just as the absence of remorse serves as one of the indications of anti-social personality disorder and psychopathy , so also the meaning of this absence can only be understood in the context of these psychiatric constructs. For present purposes, I will treat the categories of antisocial personality and psychopathy as interchangeable in conformity with what I take to be contemporary usage. Despite efforts by some to confine anti-social personality disorder to what is behavioral and descriptive as distinct from psychopathy which focuses as well on those elements of character that require a greater degree of interpretation(Hare, 1996), the two dimensions of the disorder- behavioral and characterological- are intermeshed not only in DSM IV TR but in much of the current literature for both categories. One further caveat- I use the term representation in full recognition that this is not how authors of texts in forensic psychiatry would refer to their clinical insights and observations- my purpose in applying this concept is to bring out the interpretive work that is involved in developing these formulations while bracketing their correspondence to veridical reality. I believe that historical shifts in perception as well as contemporary debates over the validity of the category justify this bracketing of reality by demonstrating that there is variation in interpretation and therefore interpretive choice or agency in how to formulate the construct(Petrunik and Weisman, 2005, p.77).

As indicated above, the chief defining feature of psychopathy and its antecedents is the engagement in transgressive behavior with full cognitive awareness of both the wrongfulness of the conduct and the likelihood of moral- communal condemnation. Within this larger context, for all the changes that have occurred since Krafft-Ebing's work with regard to etiology, nosology, and theories of psychopathology, at the level of clinical description, there are important similarities in what the lack of remorse has come to signify about persons placed in these categories. Most important is the perception that the legal and moral wrongdoing of persons so diagnosed are linked inextricably to deeply rooted and relatively unalterable personality traits. Whether in influential specialized texts such as Hervey Cleckley's *Mask of Sanity- An Attempt to Clarify Some Issues about the Psychopathic Personality*, reprinted in five editions between 1941 and 1982, or in more popularly oriented works such as Robert Hare's *Without Conscience- The Disturbing World of Psychopaths Among Us*(1993), or Martha Stout's *The Sociopath Next Door*(2005), the psychopath is someone whose irresponsible, destructive behavior is fully consistent with and inseparable from what Hare has referred to as the interpersonal and affective features of the condition. The examples and illustrations contained in all these works make it clear that the harm that the psychopath inflicts on others whether through material or emotional exploitation or any other form of violence is strategic, deliberate, and that the psychopath as perpetrator is at least intellectually cognizant of the relationship between action and consequence. But what is emphasized in contemporary formulations is that while the troublesomeness of the psychopath may be manifested in behavioral transgressions, the disturbance is primarily characterological. If social deviance may be one highly visible way in which the disturbance reveals itself, the core

of the pathology lies in deeply rooted character traits of the individual. For the psychopath, action is a reflection of being.¹⁵

In what then does the disturbance identified by Cleckley, Hare, and others consist? Psychopathy is first and foremost an affective disorder- an abnormality that results in an incapacity to feel or experience emotions in a way that is central to interpersonal relations. It is as if the entire spectrum of human emotions is truncated to the point that the psychopath has access only to the most shallow and superficial of feelings whether it be anger, love, fear, or hatred.¹⁶ But the primary locus of the deficiency is in what moral philosophers have referred to as the moral emotions or those emotions that promote or maintain ethical conduct towards others. The psychopath is someone who lacks remorse, guilt, or shame for the harm that he or she may inflict on others, feels no empathy for the suffering that he has caused, and refuses to accept responsibility for any wrongdoing. While these are separate items in the clinical profile offered by Cleckley(Cleckley, 1976, pp.337-364) and in the Psychopathy Check List Revised as developed by Hare(Hare, 1998, p.106), all point to the inability of the psychopath to experience from within the feelings that restrain exploitative and callous behavior towards others. At the deepest level of character -beneath what is expressed in public- the psychopath lacks the emotive ability or capacity to attach himself to others or to the moral codes that sustain communal life.

Equally significant to the modern representation of psychopathy is its intractability as indicated by both its severity and its resistance to treatment. Cleckley's central metaphor for psychopathy- given in the title of his book- *The Mask of Sanity*- is grounded in the paradox of appearance and reality. The condition that most resembles normality in its

outward manifestations- the psychopath lacks even the social awkwardness and nervousness of the neurotic- is in actuality the condition with the most devastating prognosis¹⁷. Just as the least visible of aphasic disorders- semantic aphasia- is also the most disabling, 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. Adding to the gravity of the condition is its incurability. With few exceptions in the current literature, psychopathy is represented as a condition with an early onset that is virtually unresponsive to any of the treatment modalities currently available. Nor do the persons who fall into this category generally volunteer to be treated thereby worsening an already dismal prognosis. The therapeutic pessimism expressed by Krafft-Ebing in his case study of moral insanity is thus closely paralleled by the despairing prognosis offered for persons diagnosed with psychopathy or anti-social personality disorder today(Arrigo and Shipley, 2001, pp.328-329). Contributing further to this pessimism is the elision of the social as a significant factor in the etiology of the condition. Clinical profiles portray persons with these conditions as demographically diverse- unaffected by considerations of class and status- and as likely to grow up in well-functioning loving families as in families with severe dysfunction¹⁸. Indeed, the thrust of much of contemporary research is towards naturalizing psychopathy as a condition that is correlated with physiological and neurological differences and potentially traceable to bio-genetic causes(Blair et. al., 2005, especially Chapter 3; Abbott, 2001, and Hare,1998.) This casting of the psychopath into biological otherness further widens the gap between psychopathy and normality even as it strengthens the case for therapeutic pessimism.

Yet, for all the gravity of the abnormality, its recalcitrance to change, and its possible biological causation, psychopathy is evaluated as a condition that should not entitle those so designated to an exemption from criminal responsibility. Both Cleckley and Hare, for example, assert that the incapacities of the psychopath – however resistant to change- do not negate the ability to make choices and weigh consequences.¹⁹ But if the psychopath is someone who can make choices and who is nonetheless likely to engage in criminal wrongdoing, what is the difference between willful misconduct that is a manifestation of psychopathy and willful misconduct that is merely criminal and non-pathological? In an argument reminiscent of Krafft-Ebing, both authors, among others, suggest that there is a non-instrumental purposelessness to the criminal misconduct committed by psychopathic offenders in contrast to those who are non-psychopathic, and that, unlike those not so afflicted, they are unable to learn from experience. Indeed, Hare goes so far as to urge a rigorous separation between those who exhibit only the behavioral manifestations associated with psychopathy (heretofore to be designated as anti-social personality disorder) and those who in addition demonstrate the affective and interpersonal dimension of the disorder lest they who have only anti-social personality disorder be unfairly ascribed the dismal prognosis of the true psychopath (Hare, 1996). Hence, the criminality of the psychopath is if anything more virulent, less purposeful, and less susceptible to control through punishment than that of non-psychopathic offenders even though both are credited with free will.

The final piece in the modern representation of the psychopath is perhaps the most significant in terms of the role of remorse. Unlike the late 19th and early 20th century conceptions, the middle to late 20th century has reconfigured the psychopath as the

consummate social performer²⁰. Indeed, one of the signature characteristics of the modern psychopath is the ability to read the reactions of their victims or their helpers and to build trust and good will only in order to further their exploitation. What Cleckley called superficial charm and Hare refers to as impression management call attention to the ability of the psychopath to simulate emotions and feelings that he is not able to experience. The same persons whose innate sensibility is one that lacks empathy with the victim or experiences no remorse or guilt is nonetheless able to perform these emotions- to 'mimic' normality in Cleckley's terms- in order to achieve ulterior objectives. The gap between appearance and reality in which the psychopath is able to mask his deep disturbance is paralleled by his extraordinary ability to appear to be moved by emotions that he cannot possibly experience. In place of the clumsy, inarticulate, and unattractive exemplars of the late 19th century, contemporary forensic psychology reconceives the psychopath as, if anything, more competent than the ordinary person in controlling the impressions of their audience.

But it is not merely the likelihood of imposture that distinguishes the psychopath from the non-psychopath. Underlying his inevitably insincere moral performance is an even more damning deficiency. The psychopath is someone who does not suffer and cannot suffer for his misdeeds. Remorse, shame, empathy, or guilt all involve some degree of emotional pain either in advance of harmful conduct towards others or as a result of having engaged in harmful conduct. Those who cannot experience these emotions do not suffer for their wrongs – nor do they even suffer as deeply as others for the punishments that may result from these wrongs. Texts on psychopathy remark on the adaptability of persons in this population to the harshness and humiliations of prison life, the low level

of anxiety experienced in situations that would cause severe stress to non-psychopaths, and the general ineffectiveness of deterrents that might cause pain and suffering in others²¹. The inability to feel remorse- no matter how adept the performance- is linked to the psychopath's general immunity from the anguish of emotional pain for the harm he does and from the punishments that might follow.

In the following section, we shall see then that those who have been diagnosed as psychopathic enter the legal domain under a heavy burden not only as someone who is likely to reoffend, who is unresponsive to treatment, and who is psychologically and possibly biologically different from non-psychopaths but also as someone who can perform but not experience or suffer from the moral emotions that are used to demonstrate character. From this vantage point, we can say that contemporary representations offer a set of instructions for reading the emotions of those who have been diagnosed with psychopathy or anti-social personality disorder. The moral performance of the psychopath is framed in such a way that appearance and reality are reversed- the more convincing the performance to the layperson, the greater the proof that the performer is an accomplished psychopath. How this expert framing of the psychopath's demonstrations of remorse contributes to the death narrative will be considered below.

III- MOBILIZING MORAL INDIGNATION- CAPITAL TRIALS, PSYCHOPATHY, AND REMORSE

Below, my focus is on how the characterization of the offender as remorseless is used to mobilize moral indignation in behalf of a sentence of death. I base my discussion of

these narratives on those judgements and appeals of judgements that cite as one of the grounds for the appeal the inclusion or exclusion of evidence regarding remorse during the penalty phase.²² Where possible, I have also supplemented these texts with other accounts in books and newspapers of the same events. As mentioned above, I have drawn from but also modified Garfinkel's typology of public denunciation in identifying the different components of this process. At the core of the denunciation is a rite of passage from one status to another- a transitional process in which the person or social object is symbolically reconstituted in such a way as to demote him in the social order- in this case, from someone worthy of life in spite of his grievous crime to someone for whom only death is the appropriate penalty. It is the representation of the remorseless offender that lies at the heart of this transformation and it is towards a deeper understanding of this process that the following analysis is directed.

(a) Reading silences- Conceiving the remorseless offender

When it comes to demonstrations of remorse, there is no such thing as a non-performance. Silence, reserve, or impassivity, when judicial and communal expectations demand a visible display of feeling, are construed as signs no less revealing than the most elaborate of self-presentations. Yet, for a variety of reasons, whether strategic, principled, or simply misconceived, some among the convicted choose or are instructed to remain silent or, if willing to speak at all, exercise their right to allocution to deliberately not call attention to their feelings of remorse. In some cases, the evidence available to the prosecution is so damaging to any credible claim of remorse that arguably, the raising of it will only invite a devastating rebuttal. But other cases suggest the deeper dilemmas

that confront the capital offender. It is not just that, as others have concluded, those who did not plead guilty in the first place, face insuperable hurdles in now convincing the same jury that they have moved from hope for acquittal to sincere self-condemnation(Sundby, 1998.) The gravity and the intensity of the crimes are such that, from the standpoint of moral economy, the offender and their counsel may decide that since no expression is commensurate with the harm wrought by the offense, avoidance of the issue is the best option. Such calculations appear to have figured in at least one instance in which the defendant in consultation with his lawyer decided that since “this was such a grievous, horrible murder, that there is nothing I could put in front of this jury that would make them have enough mercy on me to give me life rather than death... they may feel that because, after being found guilty of this crime, if I come in here and plead for mercy, that may turn them off, and make them want to give me death(*Shelton v. State*, 1999, p.501). “ As a result, his statement to the jury merely recounted his circumstances:

Ladies and Gentlemen of the Jury, I stand before you not to plead for my life. I feel that’s wrong and improper and basically disrespectful to the victim’s family and to mine. ...The State has pictured me as being a monster, as being a rapist, as being a violent individual., but as you heard from my family, that’s not so. The State only presents one side of the picture. There’s two sides to every story. And the State just presents the negative side. 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. (*Shelton v. State*, 1999, p.501).

Even in cases where the defendant has pleaded guilty, silence may be a plausible strategy in light of the daunting expectations of what might be required²³. Yet, legal forums, as do other settings for moral performances, operate on the assumption that what is not shown

is also not felt. The silence of the defendant then becomes the blank slate on which the prosecutor can map the identity of the remorseless offender.

Indeed, it is this silence that will define the essence of at least some of the offenders for whom capital punishment is sought. In the following excerpt, the prosecutor addresses the jury about a defendant who chose not to testify despite his guilty plea for the crime for which he was convicted:

I was waiting for M to express remorse, to apologize to somebody for what he had done and what he had taken. I did not hear any of that remorse...(Sims v. Brown, 2005, p. 74) .

Later, in the same speech, the prosecutor continues:

Now, at no time did I hear any remorse. Hear a tear. I mean, we have all felt guilty about things in life. It's a human reaction, but granted, we haven't killed people. We are not mass murderers. But there's no feeling of guilt. There is absolutely no feeling of guilt (p.75).

In another case, it is this absence that negates any other claim that the offender might make to show that he is no longer the same person who committed the crime:

“But I submit to you that there's one thing that cuts against this man having changed and become a Christian, and that is simply nowhere in this record, nowhere from that witness stand have you heard one person say that this Defendant has shown any remorse or any sorrow over the death of his wife, over what he has done. None(State v. Stephenson, 2002, p.59) .

Or the absence is demonstrated at a crucial moment when the true character of the defendant is revealed:

What did he do at the scene after he's just done this to these two people? Does he say, I feel bad? Does he say, God, what have I done? No. He's worried about himself, as he always is, first and foremost. He tells his brother T., I may go to prison for this if I'm caught....

Does he have a breakdown when his mom asks him, gee, son, what happened, your hands are cut? I got jumped by some Mexicans at McDonald's. He is able to say that with a straight face. Does he seem like he

is feeling any remorse at that time, knowing the scene he has just left? Does he make an anonymous call to the authorities, hey, you might want to run out to the residence and take a look, so that maybe they (the victims of the murder) don't have to be discovered by a member of their own family or neighbor. He is content to just let them rot there(*People v. Pollock*, 2004, p.1184) .

The impact of this absence lies in the contrasts to which the prosecutor calls attention. For one, these revealing moments stand out as the extreme obverse of how a 'normal' member of the community would feel in a similar circumstance. Here the connection is explicit:

I listened as the defense witnesses testified yesterday for any evidence or testimony pertaining to the victim. And there was. The defendant's grandmother testified, bless her heart, that she not only prays for (the defendant) but she prays for the victim and the victim's family. What a nice thing. What a human being. What a nice person from a nice family....

Do you see what I mean? He's not like them. He doesn't share in their goodness., he doesn't share in their compassion, he doesn't share in their humanity(*People v. Jurado*,2006, p. 141.)

The gap between what one should feel and what the offender has shown is enough to expel them from the moral community as defined by the presence or absence of feelings of remorse- which in turn incorporates other moral emotions such as empathy and compassion- that members are expected to experience and show in similar circumstances.

But there is another contrast that is equally important to the portrayal of the defendant as apart from the moral community- the gap between his suffering and the suffering he has inflicted. Almost all the crimes for which contemporary courts seek the death penalty involve forms of violence that are grouped under such categories as brutality , heinousness, and the like- categories that by themselves already call into question the defendant's remorsefulness at the time of the murder. The prosecutor can then summon

moral indignation by pointing to the imbalance between the harm wrought by the remorseless defendant and the defendant's own lack of mental anguish:

The life in prison, is he going to spend it brooding and contemplating about the evil he has done? You think he is going to have that knot in his stomach? You think he will think about the lives he has taken? The years he has stolen? Has he yet? Has he come out and said to anyone that tearfully he is sorry for what happened, that he thinks about it every day, that can't sleep at night? That he can't eat? That he feels guilty and he can't take it any longer? Will he spend the rest of his life in remorse or will it be like you hear on the tape: ... me first, satisfy my needs today(*Sims v. Brown*, 2005, p.75).

Or, there is the contrast between the suffering that is inflicted and the fear – 'cowardice' as the prosecutor calls it- of suffering the consequences :

Is it any wonder that a person who would attack a helpless, fragile, arthritic little old lady and stab her as many times as he did, brutalize her, slit her throat, ripped her clothes off, ... any one who would do something so cowardly, is it any wonder that when he runs, he is silent after he runs? He doesn't go to the police. He isn't filled with remorse. ... Is it any wonder that that type of coward would not fess up to all the details of his confession to the police? Of course not(*Raby v. Dretke*, 2003, p.327)

The suffering of the innocent and untainted victim stands in stark contrast to the indifference and callousness of the remorseless perpetrator. He is separated from the rest of humanity not so much by his violent deed as by his failure to acknowledge what he has done and his unwillingness to suffer for what he has done.

Yet, as Garfinkel has stated, the project of the degradation ceremony is not just to condemn the act and the perpetrator but to render the act and the feelings that accompanied it as the embodiment of who the perpetrator is- "What he is now is what, 'after all,' he was all along(Garfinkel, 1956,p. 422)." The absence of remorse- the callousness and indifference toward the victim that was expressed in this particular crime and at this particular time- must be shown to be devoid of 'contingency, accident, or

coincidence.’ The true status passage in the movement from convicted capital offender to deathworthy capital offender is proof that the remorseless, callous, unempathetic individual who performed deadly acts of violence with no feeling for his victim is who he will be for all times and all places.

It is this transformation that is accomplished through the lay and expert invocation of the clinical categories of anti-social personality disorder and psychopathy. Consistent with contemporary clinical representations, the offender is ‘reconstituted’ as someone whose absence of moral emotions is the defining attribute of their pathology – a pathology that had an early onset and is virtually incurable. Let us consider the following excerpt from a cross-examination of an expert witness conducted during the penalty phase:

Q. One of the features of a person with an anti-social personality disorder is that he tends to be irresponsible; correct?

A. Well, one of the features of anti-social personality can be irresponsibility. I don’t know if that’s necessarily a criteria that fits him. He fits a number of the other criteria. ...

Q. They also tend to express no remorse, don’t they?

A. That’s true.

Q. No remorse about the effects of their behavior on other people?

A. They often don’t have insight into the effects of their behavior on themselves or on other people.

Q. In other words, a lot of people who have anti-social personality disorders can’t play by the rules in a civilized society, correct?

A. True. (Bronshtein v. Horn. 2005, p.718).

Or another excerpt in another prosecutor’s address to the jury that similarly naturalizes the absence of remorse:

He shoots C., and there’s no remorse. Let’s talk about the definition of remorse. I looked it up in the dictionary: ‘ A deep torturing sense of guilt felt over a wrong that one has done. ‘

Which we know sociopaths can't do. He shoots C. , no remorse. Killed A., no remorse. Shoots C. again, it's getting easier, No remorse(*People v. Boyette*, 2002, pp.454-455).

Remorse may be differentiated from empathy, shame, and the admission of responsibility on the Hare scale or circumscribed on the MMPI- but there is no indication that jurors or legal advocates work with such fine distinctions. Remorse is shorthand for a host of feelings that one should have when one does grievous injury to another- all of which are absent in the remorseless offender- The visceral loathing that remorselessness attracts is then translated into an essentialist portrait of the offender- he is literally made into something apart from the human. Consider the following representations during the penalty phase:

But, ladies and gentlemen, his act is transparent to the neutral and critical observer such as you are and you all know that 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, stalking his prey behind a veneer of civility(*People v. Farnam*, 2002, p. 199).⁴³

Indeed, one must beware of his outward appearance of normality and his superior capacity to control impressions. As another prosecutor warns the jury:

(Defendant) is a very remorseless, cold-blooded individual. ... Remember, appearances can be deceiving, and he's been working on you, watching you come and go, smiling and waving when he's introduced to you. Appearances, ladies and gentlemen, can be very deceiving(*People v. Boyette*, 2002, 434).

Identifying the capital offender as remorseless forms a crucial part in his reconstitution as a deathworthy subject. If the showing of remorse purports to reveal something deep and fundamental about the character of the defendant, so does its

absence. This true mark of character when coupled with its clinical recasting as a sure sign of unalterable pathology invests the absence of moral emotions with the force of nature. Not only is the capital offender expelled from the moral community as someone who cannot conform to the most rudimentary norms of civil society- he is made into something apart from the human, appearances to the contrary. He is the carrier of a deformation that is rooted in his incapacity to feel even though its primary manifestations are in the working of grievous harm on others. His actions are antisocial- his absence of feeling unnatural. It is this absence that makes him unfit for the mercy of the jury and the court. As one prosecutor expressed it to the jury- “And it seems to me that before you consider allowing Mr. C. to live under a sentence of life without the possibility of parole, you’d ask to see at least some evidence of remorse from Mr. C. for the perpetration of these crimes(*People v. Crittenden*, 1994, p.146).”

b. Reframing the Moral Emotions:

But what about those defendants who do attempt to show remorse or for whom a claim to remorsefulness is made by their counsel? A demonstration of remorse that is credible is enough to interrupt the process of degradation by which the defendant is made deathworthy. The narratives that urge a jury to vote for death do not for a moment concede to the defendant- although you are remorseful, you have committed an atrocious and brutal crime for which you must still receive the death penalty. The deathworthy defendant must be shown to deserve death not only for what he has done but for the kind of person he is. The capacity for empathy, shame, and guilt- all subsumed under the signifier of remorse-tend to restore the perpetrator to membership in the moral

community in spite of the grievous deed. To complete the denunciation, the defendant's claims to remorse must be countered by rebuttals by which they will be discredited or by reframing whatever evidence is put forward as not what it appears to be.

On the one hand, because of 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 counternarrative that can also be crafted from the same pool of evidence. Indeed, the polarization described by one judge in her dissent in a case in which the defendant was sentenced to death can be generalized to other capital cases in the penalty phase:

There were essentially two narratives about D. that could be culled from the facts. ... The former narrative cast D as unregenerate; the latter, as capable of redemption. Whether D's life would be saved depended in great measure on which of those narratives the jury believed (*State v. DiFrisco*, 2002, p. 276).

For example, , weighing against one defendant who went to the police and confessed to the murder he had committed is a quote from the initial interview in which he is reported to have said about his victim- "we should have just tied her up and taken her life savings and split the country (*People v. Sakarias*, 2000, p.645)." The later statement is accompanied by the commentary- "again, a selfish concern with with his own well-being, never expressing a type a remorse-, 'm sorry I did it, I'm sorry I caused pain.' " Or another defendant's statement to the jury that "I feel a lot of remorse. It was a terrible thing. And if it could be changed, it was within my power, I would change it (*People v. Marshall*, 1990, p.943)" is rebutted by an earlier interview just after his arrest in which when asked if he felt remorse, he replied that yes- because his plans to travel were interrupted. Or the prosecutor points to a revealing moment in which a witness testifies to a conversation in which the defendant "laughed and thought it was funny" and "thought it

was no big deal that he killed three people” to counter an earlier claim to remorse (*Cooper v. State*, 2003, p.978). Or the show of remorse claimed by another defendant after her conviction is challenged as inconsistent with her earlier attempt to have her confession excluded as evidence (*People v. Mulero*, 1997, p.460). If silence allows the state to call attention to the conspicuous absence of feelings that should have been felt and communicated, alleging that remorse has been demonstrated affords the opportunity to discredit the claim through counternarrative- by recasting what is portrayed as genuine as instead counterfeit or strategic- one identity showing the defendant to be responsive to the moral claims of community pitted against another identity in which he is cast as unregenerate and beyond redemption.

The other approach to discreditation involves reframing what might be taken as expressions or gestures of remorse in persons who are perceived as psychologically normal as having a different meaning when viewed in the context of anti-social personality disorder. Thus, for example, suicide attempts that might otherwise be construed as expressions of mental anguish or suffering consistent with remorse are reinterpreted as “gestures” that are variously “feigned” or designed to “manipulate (their) environment” or ‘to gain sympathy (*State v. Daniels*, 1994, p.289)’, all founded on the premise that someone with anti-social personality disorder would not be able to ‘feel remorse for (his) crimes and for killing his victim, but would (only) be able to feel remorse for himself.’” Consider, for example, the following excerpt from the cross-examination of an expert witness by defense counsel after he (the expert witness) had already testified that his client was a ‘sociopath.’ In this highly publicized case, the

central issue in the appeal concerned whether the defendant's various attempts at suicide were true signs of remorse²⁴:

And in your opinion that person(some one who hypothetically has anti-social personality disorder) would not show remorse?

A- Dr. G.- psychiatrist- Well, it doesn't hold true ironclad to all such individuals, but it is one of the typical characteristics, yes.

Q. And you can't say , can you, Doctor, whether or not R feels remorse for these crimes?

A. Not precisely, no.

Q. You haven't examined him since July 7th

A. No, I have not.

Q. So you venture no opinion as to whether or not he is remorseful at this time?

A. No opinion except that I would doubt it very much(*Harris v. Vazquez*, 1990, p. 613).

Given the incapacity of the defendant, external signs of remorse must be read in a different way. Here, expert opinion is deployed to instruct the juror to disregard appearances – to understand that behaviors that might otherwise suggest complexity or contradiction conform to the same underlying substrate of a person who is incapable of experiencing remorse.. Therefore, the actions of such persons - even if they appear otherwise- are indicative of strategic or insincere expressions of remorse rather than true expressions of what the offender actually feels.

Attaching the incapacity for remorse to anti-social personality disorder also invites consideration of all the other traits associated with the condition. For example, in another cross-examination during another penalty phase trial, once the expert witness had admitted that the defendant had anti-social personality disorder, he was then asked about the other characteristics of such persons, replying that in addition to the fact that “persons

with this disorder show little remorse for the consequences of their aggressive acts and blame the victims for being foolish or helpless,” the condition includes other characteristics such as “ a pervasive pattern of violating the rights of others,” “lying, manipulation, and malingering(*Bucklew v. Luebbbers*, 2006, p.1014).” In another reframing, a defendant who claimed to feel remorse for his crime was described by the expert witness as “incapable of the kind of deep feelings for someone else implied by the word ‘remorse(*State v. Campbell*, 2002, p.57)” by virtue of his anti-social personality disorder. Other capital cases point to strategic decisions by defense teams not to call expert evidence to corroborate a claim of remorse for fear that the expert’s finding of anti-social personality disorder will not just negate the claim but place the defendant in the most unfavorable of categories²⁵.

Among those who have committed grievous wrongs against the community, it is not only those who are silent or who refrain from showing remorse who are the objects of public denunciation. By means of counternarrative and reframing, the bar is raised to also include those who confess, who profess to feel remorse, even those who claim to have suffered for their wrongs. Remorse plays a critical role in this process because it supplies an instrumentalist justification for the visceral moral outrage directed at those who fail to show any feelings of empathy or inner anguish for the harm they have caused. The failure to feel remorse is not just the infuriating absence in those who do not belong to our moral community and therefore have no ‘humanity’ to demonstrate- it is in addition a symptom of a pathology that marks its bearer as incapable of reformation and therefore a continuing danger to the community. The ritual destruction of the capital offender as a social object demands that he be condemned not only for the brutality of his crime but for

the viciousness of his character and the intractability of his pathology. The remorseless offender is rendered deathworthy by proving a correspondence between the irredeemable act and the unredeemability of the person. But the thrust of this analysis is to suggest that the moral performance that results in this degradation is one that is artfully mediated by strategic considerations, the building of competing narratives, and the reframing of common sense reality.

One of the ironies of this process is that, if it achieves its purpose, the jurors will come to divest themselves of the very same qualities of empathy, suffering over the harm wrought on another, and identification with the victim that they found so conspicuously absent in the remorseless offender. The degradation process not only transforms the offender but also those who will decide the offender's fate. Ultimately, the remorseless offender who has been reconstituted as no longer belonging in human society is someone towards whom the juror has had to learn to overcome his or her own feelings of remorse in order to vote for death²⁶.

FURTHER REFLECTIONS ON THE MORAL ECONOMY OF REMORSE

The murders for which the state recommends the death penalty by and large represent the extremity of individualized violence against others- brutal, multiple, or desecrating or all at once. Those who commit these acts but yet claim to experience remorse present the jury and the larger community with an uncomfortable paradox. How can someone who has committed acts of such grievous harm feel towards their actions the same way as do members of the moral community? The more transgressive the behavior, the more problematic it becomes to even entertain the possibility of a shared sensibility. If the

perpetrator of violent crime is like us in how he sees his own actions, are we then as different from him or her as we might wish? The refusal to grant the murderer the moral capital of feelings of remorse is also a reassurance that the boundaries that separate us from the violent act also separate us from the violent person who committed the act. Garfinkel suggests that the moral indignation mobilized by the degradation ceremony generates group solidarity(Garfinkel,1956, p.421). Yet, in the denunciation of the capital offender as without remorse and as the abnormal, pathological other, this solidarity is as defensive as it is integrative. We unite in moral indignation against those who commit acts of extreme transgression – but we also defend against their proximity to our own inner emotional life by denying them the possibility of shared moral sentiments.

Does this mean that the moral outrage directed against those who have committed acts of grievous harm but who do not show remorse is ingenuous? That no matter how much the despised transgressor tries to show remorse, rejection and ridicule are the inevitable responses? If we take one recent capital case as illustrative, it would seem that for persons who are placed in this position, the barriers to official and public acceptance as someone capable of remorse may well be insurmountable. Even the willingness to stipulate to the death penalty was not enough to credit Michael Ross as remorseful for the murders he had committed. In this highly publicized case, Ross, who was eventually executed on May 12, 2005, had in 1987 confessed to the rape and murder by strangulation of three young women in Connecticut. Although he had committed five other murders in New York and Rhode Island, to which he eventually confessed, he claimed to have chosen initially to admit only to the crimes committed in Connecticut because at the time it was the only one of the three states that had the death penalty.

Even in cases such as this in which the death penalty is a foregone conclusion both because of the aggravating factors and the consent of the defendant, the prosecution would not allow the claim to remorse to go unchallenged, in this instance, portraying Ross as seeking publicity and notoriety through his quest for the death penalty (*State v. Ross*, 2004, p. 322). When he finally was executed, an item in the *New York Times* quoted the father of one of the victims that “it was just a cowardly exit on his behalf in that he couldn’t even face the families.” In response to the question of whether his volunteering for death was ‘truly out of sympathy for the victims,’ psychiatrists were quoted as suggesting that instead it was “a grand act of vanity” performed by “a narcissist with a need to appear noble (Yardley, *New York Times*, May 14, 2005, p.1).”

The destruction of the violent offender as a moral entity would appear to be as much an imperative of the death penalty as his actual execution.

NOTES

1. A continuing research project set up in 1993, the National Capital Jury Project (using a sample of 1,155 real jurors from 340 capital trials in 14 states, has been investigating how, among other considerations, jurors determine whether or not someone is remorseful. For statistical analysis demonstrating importance of remorse in jurors’ decisions, see especially Garvey (1998), Sundby (1998), and Eisenberg et. al. (1998.)
2. Garvey captures these strong sentiments when he writes that jurors are “apt to respond to the remorseful defendant not only with good will but also *without fear and disgust*, both of which tended to recede in the face of the defendant’s remorse. (Garvey 2000: 58-59)” (My emphasis)
3. “Quietly acknowledged” because in the fictive world of the criminal trial, evidence of lack of remorse is allowed never as “an aggravating factor but only to respond when it is offered in mitigation” (*People v. Davenport*, 1985, p.288-289) to quote from one frequently cited case whereas the thrust of recent research

as well as above cited case law seems to recognize the aggravating impact of characterizing a defendant as remorseless.

4. In order to protect jurors' confidentiality, the responses of jurors in the National Capital Jury Project could not be analyzed in relation to specific trials. Hence we do not know from the research how jurors' perceptions of the defendant's remorse might have been shaped by the details of the crime or by how he or she was portrayed by prosecution, defense, or other witnesses. See Mark Costanzo and J. Peterson(1994) for examples of prosecutors' emphasis on remorse in their address to the jury.

5. I have relied upon Lexis Nexis to look at inflammatory statements during the penalty phase of the capital trial between 1/1/1986 and 6/30/2006.

6. See accounts by Isaac Ray(1838, pp.219-222) and James Cowles Prichard(1842, pp.95-102) for the most influential of the many contemporary accounts; See also Michel Foucault(2003, pp.112-134) for highly informative discussion and analysis of case.

7. "Pour qu'on fut bien assure en montant dans la chambre qu'elle seule etait coupable(Georget, 1826, p.79)"

8. The dominant school of psychology in the early 19th century held that the mind could be divided into the separate faculties of will, feeling, and intellect and that each of these faculties operated independently of the other two(Rippa, 1992.)

9. Ray, *Treatise*, p.169-170. Ray is quoting from Prichard's definition of moral insanity which in turn he subdivided into *general moral mania* and *partial moral mania*. If the derangement was manifested in all the affective faculties, it fell into the former category; if it was confined to 'one or a few of the affective faculties'(p.180), as in the case of Cornier- she was insane only when she committed the act- then it fell into the later category.

10. It may reflect the imprecision of these categories that Prichard, who had introduced the concept of moral insanity, categorized Cornier's affliction as a disease of the will whereas Ray, borrowing from Prichard, considered her affliction to be a derangement in the faculty that controlled feelings.

11. J.E.D. Esquirol,(1722- 1795), a founder of clinical psychiatry along with Philippe Pinel and one of Etienne Georget's teachers.

12. Early 19th century French psychiatric nosology grouped both those who were cognitively disoriented and those whose mental disorder centered on the emotions in the same category of *monomanie* whereas the Anglo-American approach was to confine monomania to delusional thinking while placing affective disorder without cognitive defect in a separate category – that of moral insanity following Prichard(1837, pp. 36-61) ; or moral mania, following Ray(1838, pp.168-170.). For a relatively clear formulation of these distinctions, see *Report of the Metropolitan Commissioners in Lunacy*, London, 1844.

13. Dr. R. von Krafft-Ebing's *Text-book of Insanity, Based on Clinical Observations*, 1905. Krafft-Ebing's clinical insights on moral insanity are cited by Havelock Ellis(1890, p.229) and in Enrico Ferri(1897, p.26) among others.

14. For useful overview of shift in meaning of category, see Nicole Rafter(2004.)

15. See, for example, the opening sentence in Hare(1998: 105) - "Psychopathy is a socially devastating personality disorder defined by a constellation of affective, interpersonal, and behavioral characteristics, including egocentricity, manipulateness, deceitfulness, lack of empathy, guilt or remorse, and a propensity to violate social and legal expectations and norms." Affective, interpersonal, and behavioral characteristics all contribute to the disorder. Indeed, the tendency to equate personality disorders such as psychopathy or antisocial personality with social deviance has been sharply criticized by another important contributor to modern formulations: Theodore Millon writes in (Millon, 1996, p.429) that " I have never felt comfortable with the write-up for the antisocial personality disorder. I very much agree with those who contend that the focus given I oriented too much the "criminal personality" and not sufficiently towards those who have avoided criminal involvements."

16. For example, Cleckley writes in answer to the question of what ultimately distinguishes the psychopath for those with other mental disorders, " My concept of the psychopath's functioning postulates a selective defect or elimination which prevents important components of normal experience from being integrated into the whole human reaction, particularly an elimination or attenuation of *those strong affective components that ordinarily arise in major personal and social issues.*(Cleckley, 1976, 260.)" (my emphasis)

17. "His mask is that of robust mental health. Yet he has a disorder that often manifests itself in conduct far more seriously abnormal than that of the schizophrenic(Cleckley, 1976, p.383.)"

18. For example, Cleckley writes – “ A very large percentage of the psychopaths I have studied show backgrounds that appear conducive to happy development and excellent adjustment.”, 1976, p.410. See also Hare, 1993, pp.174-175, “We found no evidence that the family backgrounds of psychopaths differer from those of other criminals.” Or regarding the onset of psychopathy, Hare observes - “ In sharp contrast(to other criminals,) the quality of family life had absolutely no effect on the emergence of criminality in psychopaths. Whether the family life was stable or unstable, psychopaths first appeared in adult court at an average age of 14.”

19. Cleckley(1976, pp.423-424) maintained this position through to the last edition of his work- “For many years, I have consistently tried to emphasize my strong conviction that psychopaths should not be regarded as psychotic in the sense of being ‘ innocent because of insanity’ of the wrongs they do.... Whatever in the psychotic patient there is that may render him not responsible, or less than normally responsible, for crime, cannot, in my opinion, be found in the psychopath’s defect.” Or , similarly Hare(1993, p.143) writes – “ In my opinion, psychopaths certainly know enough about what they are doing to be held accountable for their actions.”

20. On the remarkable abilities of the psychopath, Cleckley writes- “Not only can he(perhaps involuntarily) mimic sanity in superlative fashion but also moral rebirth, salvation, and absolute reform, or perhaps transformation into a supercitizen(1976, p.434).” Or Millon(1996, pp.445-446) - “Unconstrained by honesty and truth, they(antisocial types) weave impressive tales of competency and reliability. ... Alert to weaknesses in others they play their games of deception with considerable skill.” See also Hare(1993, pp.46-51)who offers numerous vignettes illustrating the psychopath’s skill at impression management and pleasure in duping others.

21. This inability to experience painful emotions is sometimes referred to as shallowness of emotions. For example, Hare writes- “While the cognitions and interpersonal interactions of most members of our species are heavily laden with emotion, the inner life, experiences, and behaviors of psychopaths seem shallow and emotionally barren(1998, p.105).” On superior adaptability of those with psychopathic or antisocial personality disorders to prison life, see Cleckley- “Even when under life sentence, the psychopath tends more readily than others to obtain parole and become again a social menace (1976, p.434).” Regarding the ineffectuality of punishment, Millon observes “(Rather) than being a deterrent, it may reinforce their

rebelliousness and their desire for retribution (Millon, 1996, p.454).” More generally, Blair et. al. (2005, p.48) report on substantial body of research about psychopath’s “attenuated experience, not of all emotional states, but specifically anxiety or fear.”

22. The population of cases for this analysis was generated in the following manner. Using *Lexis-Nexis*, I used the search advisor to identify judgments in capital cases in which remorse or its derivatives were mentioned at least five times in decisions pertaining to the penalty phase. The search instruction that I used was atleast5(remors!). I selected the time period from 1/1/1990 to 6/30/2006. I chose 1990 as the starting point because it was only by this time that a substantial jurisprudence dealing with remorse in capital punishment had begun to accumulate. The data base from which I drew these cases is listed in *Lexis Nexis* as “Federal and State cases combined.” I chose this data base because it has the most complete listing of published cases currently available to researchers. Since my concern was to identify how prosecutors characterized death penalty defendants to jurors in terms of the presence or absence of remorse, I selected from my population (of all capital cases between 1/1/1990 and 6/1/2006 in which remorse was mentioned at least five times in judgements pertaining to the penalty phase) only those cases in which portions of the prosecutor’s address to the jury regarding the defendant’s remorse was excerpted in the judgement. I ended with 147 cases that met these criteria. Since only one of these 147 cases involved a female defendant, I have used *he* as the generic pronoun in this section of the paper.

23. In another instance, the defendant had drafted a statement that alludes to other problems in showing remorse- “People say that I don’t show any emotion but that is not true. When I think about what happened I do cry and ask forgiveness from the (victims’) families when I am in my cell at night or think about what happened. ... I have told them that I am sorry and meant it, when I say these things to them tho, someone say’s(sic) that I don’t mean it or when I don’t say anything they say that I don’t have any remorse but the people who make these statements have not sat down with me to see what I am feeling....” Ultimately, on advice of defense counsel, the statement was not read to the jury. (*State v. Bey*, 1999, p.301).

at 110.

24. I refer to *Harris v. Vazquez*, 1990. The legal debate over whether Robert Alton Harris’ execution would be televised forms the point of departure for Wendy Lesser’s *Pictures at an Execution*, 1993.

25. In *Kimbrough v. State*,(2004), the prosecutor in a case in which the death penalty was imposed defended the strategy of the defense for not calling expert evidence that would have identified the offender as a 'psychopathic deviate' suggesting that had this diagnosis been available, "he would have gone into the characteristics of psychopathy, would have quoted some of the less favorable descriptions of psychopaths, and would have equated psychopathy to antisocial personality disorder" at 14. See also *State v. DiFrisco*(2002) for another strategic decision not to call potentially useful expert testimony because the psychologist consulted by the defense had diagnosed the defendant as having antisocial personality disorder.

26. For a more psychologically oriented approach to this process of desensitization or moral disengagement, see Craig Haney(1997).

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