Coupling and Decoupling Remorse and Forgiveness in Legal Discourse

Richard Weisman

Abstract
In a remarkable paper published in 2001 and addressed specifically to the Truth and Reconciliation Commission of South Africa, Jacques Derrida argued for the radical decoupling of remorse and forgiveness claiming among other considerations that for forgiveness to be meaningful, it must be offered without conditions and, in particular, without any expectation that the wrongdoer or transgressor demonstrate remorse for their misconduct. While this purist conception has been adopted in some religions, demonstrations of remorse occupy center stage in many legal regimes as conditions for mitigation, clemency, parole, positive characterization, as well as other determinations that overlap with theological notions of forgiveness. In this paper, I want to confront Derrida's conception with sociological explanations for why remorse and forgiveness are coupled in law and in public discourse as part of a larger drama of transgression, acknowledgement, and reinclusion in the larger community. But I also want to unsettle this coupling of remorse and forgiveness in law by showing some of the problems it has generated. Using examples from my research into how remorse is attributed in Canadian and US law, I want to argue that sociological reasons for decoupling remorse and forgiveness in law are as compelling as the reasons for making remorse a condition for forgiveness. .

Key Words: Remorse, apology, forgiveness, law, discourse.

*****

In a remarkable paper entitled 'On Forgiveness,' Jacques Derrida postulated a concept of forgiveness that, with the license we accord to brilliant philosophers, he himself suggested was mad and impossible. Simply put, what he suggested was that the only pure forgiveness was that which was unilateral, undeserved, and unconditional. If you have to demonstrate change through remorse or repentance in order to be forgiven, this cannot be forgiveness- for in this case there is nothing any longer to forgive- the sinner, wrongdoer, transgressor, or

perpetrator has changed- he or she is no longer in need of forgiveness. Only those who are intransigent, unrelenting, unchanged, and unwilling to change are forgivable because only for such persons is there is still something left that can be forgiven. So we can see that once again Derrida manages to turn common practice upside down. What from the standpoint of much of the literature and theology on forgiveness constitutes the unforgiveable- that is the commission of a sin or transgression with no confession, remorse, atonement, apology- is for Derrida the only circumstance in which forgiveness is appropriate. But we should also take seriously his own demurral- his characterization of his own position – "If I say, as I think, that forgiveness is mad, and that it must remain a madness of the impossible, this is not to exclude or disqualify it.[1]" But even if it is not to be disqualified, this pure conception of forgiveness, he himself propounds, could never serve as a foundation for law. According to Derrida, where law is conditional, proportional, and calculated- forgiveness is arbitrary, unbounded, and disproportional at its core. And, of course, Derrida is not very specific about what he means by forgiveness. But if what he means is consistent with other usages – that the person who is forgiven – even if they do not change or repent or show remorse- will no longer be the target of resentment or retribution or punishment, then he is certainly right that the pure conception of forgiveness is foreign to law.

But Derrida's stark formulation forces us to question the obviousness of its obverse. For – if for the moment I use Canadian and US criminal law as points of reference- nothing is more taken for granted in both popular and judicial discourse in both jurisdictions than the proposition that mercy, clemency, mitigation, parole, valorization, or any other tangible institutional decision to lessen punishment must be coupled with an expression of remorse by the wrongdoer. Failure to show remorse- which of course is itself a concept in need of explication- can be the difference between life and death under a

regime of capital punishment in the US and the difference between limited and indefinite incarceration in Canada. I want to illustrate this process with one extreme example because it so vividly demonstrates how the theologically rooted narrative of sin, redemption, and salvation continues to influence what is ostensibly a secular judicial discourse. Harold Otey was sentenced to death in 1978 by the state of Nebraska for the rape and murder of a 26 year old woman- a crime he denied committing through to his execution in September, 1994. His date of execution on 1990 was stayed by the Supreme Court of Nebraska after which he applied for clemency and was turned down 2-1. In his final appeal to the Governor, one of the five concerns expressed by the governor was whether "Otey was genuinely remorseful about the crime.[2]" In the final meeting between Otey's attorneys and the governor, the governor stated that " it bothers me that Otey recanted his confession and still does not admit that he committed the crime.[3]" Otey was executed shortly afterward. I mention this case not in judgement of the process or the verdict but simply to make the point that forgiveness- whether it be clemency that results in life over death or mitigation that may result in probation rather than a short term in prison or any other lifting of punishment for a crime for which someone has been convicted is linked throughout our system of criminal justice in the United States and Canada to evidence that the recipient of this forgiveness has felt and expressed remorse for their offense.

Moreover, this coupling of forgiveness with remorse is virtually hegemonic in character. Each of the major philosophies of punishment with which the coercive power of the state is justified support the conditionality of institutional forgiveness albeit in somewhat different form. Retributive approaches whether expressed as just deserts or in the language of distributive justice or in the language of atonement- speak of remorse as part of the merited suffering that should be experienced by a perpetrator as part of the rebalancing that must

occur between the harm done to the victim and the advantage gained by the transgressor[4]. In the moral economy of retributive penology, the pain and suffering that results from feelings of remorse can be discounted from the deprivations wrought by the punishment. The more dominant penal philosophy in Canadian and American judicial discourse, however, is deterrence theory, and it is in these terms that courts and parole boards are most likely to justify their insistence on expressions of remorse. From the standpoint of deterrence theory, mitigation and other reductions in punishment as a result of remorse are justified because, it is argued, remorseful perpetrators are less likely to reoffend. Deterrence theory suggests that persons who show remorse have acquired the inner emotional controls that are the most reliable preventatives against anti-social conduct since the person is inhibited not by fear of consequences which is occasional at best but by conscience which is purportedly rooted in the person's core personality. Even the more recent approaches to criminal justice that are grouped under the rubric of restorative justice and stress the restoration of ruptured relationships as the goal of state intervention often require as a precondition for any dialogue between offender and victim that the offender has taken responsibility for their crime. In these more informalized encounters, the remorse of the offender is often seen as a requisite for the healing that is hoped for as well as any further understanding or agreements between victim and offender that might be reached.[5]

And if that were not enough to banish the thought that forgiveness and remorse can ever be decoupled, we have sociological approaches to apology and remorse that assert the centrality of this coupling for social and moral regulation. From this vantage point, apologies, demonstrations of remorse, and acts of repentance can all be subsumed under the broader category of rituals of inclusion by which the transgressor splits themselves into the person who performed the offending act and the person who now aligns with the victim in condemnation of

the act. Integral to all such processes is the very coupling that has been entrenched in law. In return for the apology, there is the potential for reconciliation between victim and offender, as formulated by Erving Goffman; or the possible reestablishment of the offender as a member of the moral community, to use the language of Nicholas Tavuchis[6]. Moreover, it has also been argued that the forgiveness attached to apologies or successful demonstrations of remorse and the moral condemnation that results from the lack of apology or the absence of remorse when they are expected contributes to the creation, maintenance, and change in the moral boundaries of community. Through the courts but also through public favor or disfavor, the community comes to define those acts for which members are expected to show remorse as well as how that remorse should be expressed. The coupling of forgiveness with remorse that is so embedded in judicial discourse and popular discourse is made to appear even more essential and inevitable in the sociological theories that have been used to explain it.

But all is not well in this legal and ideological edifice and a moment's reflection on how forgiveness and remorse are joined is sufficient to show why. If the offering of an apology, the demonstration of remorse, and repenting bear a certain resemblance in terms of the relationship of wrongdoers to the community and the remedies posited for their reinclusion- indeed, they are close enough so that at least the making of an apology and the showing of remorse have been treated as indistinguishable in the sociological literature- I want to suggest that there are nevertheless important differences that make the coupling of remorse and forgiveness even more problematic than that between forgiveness and apology or repentance. If the offering of an apology or the showing of remorse can accomplish similar remedial ends, the means by which these ends are accomplished differ in significant ways. In the apology, our attention is directed towards the words rather than the feelings that accompany the words. It is not necessarily a failing

in an apology for it be planned, for the words to be carefully chosen or even formulaic in content, or for there to be a gap between what is expressed and what is felt. . But the language used to describe expressions of remorse make clear that here there is no room for such a disparity. Demonstrations of remorse are expected to correspond to true feelings of remorse. It is the spontaneity, the involuntariness, and, indeed, the unwantedness of these painful feelings that lend them credibility[7]. As observed by one author of a major study on how jurors attribute remorse in cases involving capital punishment, awkwardness, broken speech, and other gestures that imply a loss of emotional control enhance the believability of expressions of remorse while articulate and calmly delivered speech tends to be regarded as glib or unconvincing.[8]

But ironically it is this emphasis on authenticity-this privileging of feelings over words-that makes the coupling of forgiveness and remorse so problematic. The benefit that accrues to persons who display remorse casts suspicion and doubt on the very same moral emotion that it is intended to reward. For every claim by a wrongdoer or their advocate that their remorse is genuine and heartfelt, there is always the possibility of a counterclaim that what is presented as a true expression of what the transgressor feels is instead strategic and ulterior- that the suffering that is demonstrated is a mere artifice- a counterfeit emotion enacted to manipulate a favorable outcome. Judicial and public reaction to expressions of remorse amply reflect this ambivalence. There is an ineluctably adversarial component to claims to remorse- no matter how powerful or vivid the expression, a full suspension of disbelief requires that what was shown was entirely uninfluenced by the prospect of a lighter punishment. In cases involving crimes of great severity, it is rare to encounter a claim to remorse that is uncontested.

A few years ago, when I asked a graduate class in a Canadian law school consisting of practicing defense lawyers

and crown attorneys(equivalent to district or assistant district attorneys in the US) to give an example where they were convinced that the wrongdoer felt remorse, a member of the class gave me an article recently published in one of Toronto's major newspapers. In this article, the reporter described a case about a man who had been charged with criminal negligence that resulted in the death of three persons and a grave injury to a fourth person[9]. Not only had he driven late at night on the wrong side of a highway under an advanced state of inebriation, he had used every possible legal means to delay the trial contesting every piece of evidence, changing lawyers, and mounting the most aggressive defenses throughout the three years it took to bring the case to trial. When at last he was convicted, he was asked by the judge before sentencing if he had anything to say- he answered in the negative. It was only after the judge had pronounced sentence indicating in his statement that the complete absence of remorse had contributed to the length of the sentence, that the offender spoke to the families of the victims who had followed the trial and were in court on this day. He told them that he was profoundly sorry for the pain he had caused them –" I would surely surrender my life if this could return your brother, your husband, your friend, your son"- and that he had waited until after the sentence to make his statement because " it was the only way I had to show you that I meant what I was saying." So in offering this vignette, what the members of the class were communicating is that the only expression of remorse that they could view as credible was one that had been decoupled from any possible benefit, mitigation, or crediting of character – what I have argued is the legal equivalent of forgiveness.

In another account, Janet Landman has described what I take to be a narrative with a similar conclusion. Here she recounts the efforts of Katherine Anne Power – a student radical in the 1970's who participated in a bungled robbery in Massachusetts in 1970 that resulted in the murder of a Boston police officer.

After numerous parole hearings in which the family of the slain officer opposed Power's release partially on grounds that her remorse was not genuine, what finally convinced them that Power was sincere was her words of contrition accompanied by a withdrawal of her request for parole. It was this act of decoupling that prompted the daughter of the deceased to comment- "I was very happy and I was very surprised… it wasn't what I expected. I have to say I respect it."[10] These examples suggest that the coupling of remorse with forgiveness so compromises its credibility that it can only be restored by breaching legal decorum- by remaining silent when invited to show remorse or by declining the benefits of remorse when they are offered.

Yet the problems go even deeper. It is not just the suspicion that expressions of remorse are prompted by the benefits they confer. What is equally troubling is the pressure placed on those who do not show remorse. If forgiveness is the possible outcome of showing remorse, it is clear that those who refuse to show remorse face additional deprivations and punishments and often in proportion to their intransigence. The refusal to grant mercy to Otey because of his unwillingness to show remorse is part of a much more complex problem that affects not just those who deny responsibility for the crime for which they were convicted but those who actually are wrongfully convicted and who stubbornly persist in their denial even if on impeccable moral grounds and those who also are wrongfully convicted but confess and demonstrate remorse for a crime that in fact they did not commit. The two groups bear witness to the force that the state is willing to deploy to bring about the remorseful surrender of those who have been found guilty. Persons who have been wrongfully convicted and who maintain their innocence after conviction suffer far more deprivations than those who are guilty and show remorse.

In Canada and the United States, the impact of this intransigence is not just a longer sentence but delays or

indefinite postponements of parole, loss of privileges such as escorted or temporary absences- all of which are justified by pointing to the wrongdoer's lack of remorse which in turn reflects a lack of insight which in turn makes this person purportedly more likely to reoffend. The most recent example of these practices is one such case of a man who consistently denied responsibility for a murder for which he was convicted and as a result served 31 years in prison- six more years than the normal period of detention for persons convicted of first degree murder. His murder conviction was overturned by the Court of Appeal in Ontario and he was never granted parole because he refused to admit guilt[11].

But the impact of the official demand for remorse is perhaps nowhere more graphically illustrated than in the grim calculation that innocent defendants make when they plead guilty to crimes they have not committed for fear of the far longer sentences they could receive if their defense were unsuccessful. In Ontario, recent revelations of mistaken and perjured forensic evidence in the deaths of infants and young children have brought to light the stark choices faced by innocent defendants whether or not they choose to show remorse. In one case, in which a mother was falsely convicted of the murder of her 4 month old infant but refused to admit guilt, the court took the unusual step of sentencing her to a term in prison contrary to the sentences given in most cases of infanticide. The sentence was combined with the following denunciation- "Finally, I would say this. Who speaks for Joshua? Is his life so unimportant that his mother, who killed him, without explanation, without apparent remorse, should go free without punishment? What signal does that send to this accused? To this community? Well I speak for him now. He was important. He was a human being. He was only four months old. And Madam, you killed him[12]." In another case of miscarriage of justice resulted from same now discredited forensic scientist, a father wrongfully charged with the death of his two month old infant pleaded guilty in return for a six month

sentence after having been informed that if were found guilty without a plea, he might have received a sentence of 6-8 years[13].

In the majority of cases, the coerciveness of the law is not apparent because most offenders usually make an effort to demonstrate remorse. It is in moments of outright defiance- or at least in moments when this defiance is contemplated- that the state is most likely to reveal its heavier hand. But the harsh response to those who decline to show remorse gives added weight to the proposition that whatever remorse is expressed operates under the shadow of fear. And if it is fear rather than the pangs of conscience or empathy with the victim or a desire to change out of a wish never to cause harm again that prompts wrongdoers to show remorse then we can not be sure that the moral emotion to which we entrust the protection of the community has not been emptied of its content.

So far, we have only examined the effect of the coupling of remorse and forgiveness on the content and expression of remorse. But what about the impact on forgiveness itself? If remorse is a condition for forgiveness in law, do expressions of remorse that are viewed as credible require forgiveness or can remorse be acknowleged but unrewarded with any reduction in punishment? A review of case law in Canada and the United States suggests that there are virtually no instances among the thousands of judgements each year in which the offender is credited with remorse and then given no reduction in punishment. Nor is there evidence in the hundreds of Canadian parole board judgements that I have reviewed in which a positive finding of remorse is not also accompanied by at least some reward whether in the form of accelerating the date of release or removing restrictions or conferring some other benefit. On the other hand, I want to rely on other research that I have done to suggest that persons who are sentenced to death in the United States are also viewed as lacking in remorse and that prosecutors are virtually uniform in their determination to invalidate claims to remorse advanced by the offender or their

advocates at every level of legal contestation. What this suggests is that at least in practice if not in law, the coupling of remorse and forgiveness works in both directions- that it is not just that forgiveness as mercy or mitigation demands a show of remorse but that a show of remorse that is validated as sincere obliges the state to dispense mercy or offer mitigation. Indeed, so powerful is the narrative that relates remorse to redemption and reconciliation that some have argued that even in the far more informal workings of restorative justice, similar constraints bear upon victims to forgive the wrongdoer if the wrongdoer credibly demonstrates remorse[14].

But I am less interested in establishing this as a proposition than in bringing out its somewhat ironic implications. In order not to have to forgive- if forgiveness means a reduction or mitigation of sentence, it becomes necessary to discredit the offender's claim to remorse- no matter how this remorse is expressed. This discrediting is important because of the meanings that are attached to remorse. Conceiving of the offender as remorseful reimagines them as a member of our own moral community- as someone with whom we share a sensibility- and as someone who is able to suffer for the wrongs they have done as we imagine we might suffer if we were to commit these wrongs. Placing the offender in the category of the remorseless does more than negate their claim to mercy or mitigation. How a wrongdoer feels towards their own misconduct is as important in terms of its public representation as the act itself- one of the recurring questions in crimes of great intensity and violence is whether the offender has ever felt remorse for their actions. To consign an offender to the category of those who are hopelessly incapable of feeling remorse for their misconduct is to cast them as permanently beyond reconciliation with the victim and beyond reinclusion in the moral community. Indeed, the category for individuals who are most feared in contemporary society- those classified as psychopaths or persons with antisocial personality disorder- are

defined less by the violence of their conduct than their utter inability to experience remorse no matter what damage they inflict on others.

The coupling of remorse and forgiveness leads to the conundrum that the state must find no remorse in the wrongdoer if it is not prepared to mitigate the punishment. In the rites of punishment that prevailed in Anglo-American criminal justice through to the late 19th century, it was still possible to execute or punish a wrongdoer without mitigation without also debunking their claim to repentance – forgiveness as a divine prerogative was possible without requiring any mitigation by the state. The wrongdoer who repented their crime would be rewarded in the hereafter even as they were being executed by the state. In the more secularized world of modern criminal justice where forgiveness is dispensed by the state instead of as a divine prerogative, those who receive the ultimate penalties of the state must be found to be not only guilty but morally unworthy by invalidating any claim they might have to feelings of remorse for their wrongdoings. The unknowability of feelings of remorse, the irreducible ambiguity in the way such feelings are measured and authenticated lends itself to this process of nihilation or erasure of the perpetrator as a moral entity. No matter what emotional acrobatics the wrongdoer performs, the standard for what counts as 'true' remorse can always be raised to exceed that which has been shown.

So let us return to the 'mad' and impracticable formulations of Derrida. We must agree with his own verdict that his proposed decoupling of forgiveness and remorse produces a moral absurdity that could not form the basis for any system of justice. What could possibly be the policy objective served by forgiving and presumably showing mercy only to those who were intransigent and unchanged while punishing only those who asserted or demonstrated a willingness to change their transgressive behavior? On the other hand, the obverse policy of coupling remorse and forgiveness, I have suggested, is equally

problematic because it results in the state forcing the expression of a moral emotion the validity of which depends on the belief that it is spontaneous and unforced by external inducements. So what is to be done?

Perhaps Derrida has it right after all. Neither forgiveness nor remorse should play a part in the dispensing of punishment or in the balancing and rebalancing processes that underpin our notions of justice. Just as the act of forgiveness is fatally compromised when it is offered conditionally, so is the value of remorse negated when it is offered in fear of consequences or in promise of reward. Within Judaism as interpreted by David Blumenthal, a distinction is made between repentance through fear and repentance through love[15]. In the former, the wrongdoer desists from reoffending through fear of consequences whereas in the later, the wrongdoer desists through a process that involves remorse and culminates in self-transformation. Based on the foregoing analysis, the argument I want to advance is that a regime that frightens wrongdoers into compliance is incompatible with a regime that entrusts change to the power of remorse.

Notes

[1] Jacques Derrida, *On Cosmopolitanism and Forgiveness*, Routledge, London, 2001, p. 39.
[2] Larry Myers, "An Appeal for Clemency: The Case of Harold Lamont Otey," in *The Death Penalty in America*, Hans Bedau(ed), Oxford University Press, New York, p. 376.
[3] Ibid., p.379.
[4] For discussion of retributivism, see Stephen P. Garvey, "Punishment as Atonement," *UCLA Law Review*, vol.46, 1999, pp. 1836-1839.
[5] Allison Morris, "Shame, Guilt, and Remorse: Experiences from Family Group Conferences in New Zealand," in Ido Weijers and Antony Duff(eds), *Punishing Juveniles: Principle and Critique*, Hart Publishing, Portland, Oregon, 2002, p.157

[6] Erving Goffman, *Relations in Public: Microstudies in Public Order*, Basic Books, New York, 1972, pp. 113-118; Nicholas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation*, Stanford University Press, Stanford, California, 1991, pp.7-8
[7] Richard Weisman, "Being and Doing: The Judicial Use of Remorse to Construct Character and Community," *Social and Legal Studies*, vol. 18(1), 2009, p.50-51.
[8] Scott Sundby, "The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and Death Penalty," *Cornell Law Review*, Vol. 83, 1998, pp. 1564-1565.
[9] Susan Clairmont, " 'Unrepentant" Drunk Driver Offers a Stunning Last Word," *Toronto Star*, May 29, 2001, p.5
[10] Janet Landman, "Earning Forgiveness: The Story of a Perpetrator, Katherine Ann Power, " in Sharon Lamb and Jeffrie G. Murphy(eds) *Before Forgiving*, Oxford University Press, New York, 2002, p.257.
[11] Kirk Makin, "Phillion's murder conviction overturned", *Globe and Mail*, March 6, 2009, p. A4.
[12] *R. v .Sherrett*, Ontario Court of Superior Justice, June 2, 1999, Paragraph 9.
[13] Kirk Makin, "Case puts focus on justice system's 'dirty little secret," *Globe and Mail*, January 14, 2009, A7.
[14] See Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice*, UBC Press, Vancouver, 2004, pp 71-72.
[15] David R. Blumenthal, "Repentance and Forgiveness," *Cross Currents*, vol. 48, no. 1, Spring, 1998, p.77.

Bibliography

Acorn, Analise. *Compulsory Compassion: A Critique of Restorative Justice*. UBC Press, Vancouver, 2004.

Blumenthal, David R. "Repentance and Forgiveness". *Cross Currents*, vol. 48, no. 1, Spring, 1998, pp. 75-81.

Clairmont, Susan. "'Unrepentant' Drunk Driver Offers a Stunning Last Word". *Toronto Star*, May 29, 2001, p.5.

Derrida, Jacques. *On Cosmopolitanism and Forgiveness.* Routledge, London, 2001.

Garvey, Stephen P. "Punishment as Atonement". *UCLA Law Review*, vol. 46, 1999, pp. 1801-1858.

Goffman, Erving. *Relations in Public: Microstudies in Public Order.* Basic Books, 1972.

Landman, Janet. "Earning Forgiveness: The Story of a Perpetrator, Katherine Ann Power", in *Before Forgiving.* Sharon Lamb and Jeffrie G. Murphy(eds), Oxford University Press, New York, 2002, pp.232-264.

Makin, Kirk. "Case puts focus on justice system's 'dirty little secret'". *Globe and Mail*, January 14, 2009, A7.

Makin, Kirk. "Phillion's murder conviction overturned". *Globe and Mail*, March 6, 2009, p.A4.

Morris, Allison. "Shame, Guilt, and Remorse: Experiences from Family Group Conferences in New Zealand", in *Punishing Juveniles: Principle and Critique*. Ido Weijers and Antony Duff(eds), Hart Publishing, Portland, Oregon, 2002, pp. 157-178.

Myers, Larry. "An Appeal for Clemency: The Case of Harold Lamong Otey" in *The Death Penalty in America.* Hans Bedau(ed), Oxford University Press, 1997, pp.361-383.

R. v. Sherrett. Ontario Court of Superior Justice, June 2, 1999, Paragraph 9.

Sundby, Scott. "The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty". *Cornell Law Review*, vol. 83, 1998, pp. 1552-1598.

Tavuchis, Nicholas. *Mea Culpa: A Sociology of Apology and Reconciliation.* Stanford University Press, Stanford, California, 1991.

Weisman, Richard. "Being and Doing: The Judicial Use of Remorse to Construct Character and Community". *Social and Legal Studies*, Vol. 18(1), 2009, pp. 47-70.

Richard Weisman is Graduate Program Director of the Graduate Program in Socio-Legal Studies at York University in Toronto, Canada. He is currently completing a manuscript entitled *Showing Remorse; An Inquiry into the Legal Construction of Character and Community.*