

Showing Remorse: Reflections on the Gap between Expression and Attribution in Cases of Wrongful Conviction¹

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Cet article a pour but premier de démontrer que les personnes accusées de crimes peuvent être perçues, d'une part, comme étant rongées par le remords et, d'autre part, comment étant entièrement sans remords. Il ressort de cette dichotomie une hiérarchie morale ayant de profondes implications pour la caractérisation et la disposition des personnes ainsi désignées. En deuxième lieu, en fonction d'une étude de cas américains et canadiens, on démontre comment l'inclusion dans la catégorie des personnes sans remords influe sur la caractérisation et la disposition de ceux qui ont été injustement condamnés. En dernier lieu, les résultats de l'étude amènent à la conclusion que le remords se trouverait au cœur de conflits entre les personnes qui sont injustement accusées et les fonctionnaires oeuvrant au sein du système de justice pénale et qu'on exercerait des pressions institutionnelles afin d'encourager, d'une part, l'expression du remords et, d'autre part, la mobilisation de ressources individuelles en vue de résister à l'extériorisation du remords.

This paper seeks first to show that persons who are convicted of crimes can be perceived as either remorseful or as lacking in remorse. This division establishes a moral hierarchy that has profound implications for the characterization and disposition of persons who are so designated. Second, using both Canadian and American cases, it looks at how inclusion in the category of the unremorseful affects the characterization and disposition of those who have been wrongfully convicted. Finally, it suggests that remorse is a major site of conflict between persons who are wrongfully convicted and officials within the criminal justice system, conflict that involves the use of institutional pressure to encourage the expression of remorse, on the one hand, and the mobilization of individual resources to resist those expressions, on the other.

In a recent news item, which reports on the sentencing of two men who were convicted of the sexual abuse of young male hockey fans at Maple Leaf Gardens, the judge is quoted as drawing a distinction: "Mr. S. expressed remorse, began work on his rehabilitation while in cus-

tody before sentencing, and pleaded guilty. Mr. R., on the other hand, continues to protest his innocence on every single charge, calls his victims liars and denies ever having had sex, or even a sex drive" (Gadd 2000: A 19).

I cite this vignette because it is so transparent in its dichotomizing of those who have been found guilty. It illustrates the way in which the courts and the media establish a moral hierarchy that defines those who have violated the norms of the Criminal Code. Those who are believed to regret their actions are viewed as more worthy, more deserving of compassion, and more entitled to mitigation than those who have violated these norms but are perceived as not regretting their actions.

Long before their vindication, if vindication ever occurs, the wrongfully convicted are designated as persons who lack remorse and are differentiated from those characterized as having remorse. This paper looks at the impact of this designation on the identity and disposition of those who have been wrongfully convicted – or what Erving Goffman meant, some 40 years ago, when he introduced the concept of the "moral career" (Goffman 1961: 128). In effect, my focus is on how inclusion in the category of the unremorseful affects how the wrongfully convicted are regarded and how they are treated. For purposes of this analysis, I will draw on both Canadian and American data.

The impact of this designation (as remorseful or unremorseful) derives from both its *scope* – the extent of its use – and its *content* – what it comes to signify about the persons to whom it is applied. It has been recognized for some time, although the phenomenon is surprisingly under-researched and unexplored, that attributions of remorse or its absence play an important role in decisions affecting sentencing and parole in both Canada and the United States (O'Hear 1997). Recent developments have increased its significance and have also attracted greater scholarly interest.² It is now understood that attributions of remorse weigh heavily in jurors' decisions over whether or not to impose the death penalty in U.S. capital cases. Moreover, these attributions may be the most important factor in how jurors, in the bifurcated capital trial, decide who among the convicted should be executed.³ 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 (Bowers 1995; Sundby 1998). Given that there is so much at stake in whether or not

remorse is present, it should not be surprising that the process by which expressions of remorse are validated or invalidated has been the subject of frequent and intense legal contestation.

A search on LexisNexis reveals over 1,000 legal actions in the death penalty phase between 1995 and 2002 in which the convicted person's remorsefulness or its absence was an issue. Perhaps the most conspicuous acknowledgement of the crucial role of remorse in death penalty decisions occurred in a U.S. Supreme Court Decision in 1992, *Riggins v. Nevada*. In this case, a man who had been sentenced to death was allowed a retrial, due, in part, to the fact that the medication he received for his depression may have hampered his ability to express remorse. As Justice Anthony Kennedy observed 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* at 1824).

In the Canadian context, the recent impetus for increased concern over the impact of attributions of remorse has come from two sources. The first reflects a partial shift in the language of sentencing practices. In this instance, a retributive approach has given way to a model of restorative justice, where expressions of remorse play a role in whether to impose conditional sentences (*R. v. Proulx*⁴). The second is the recently mandated inclusion of a pre-sentence report under s. 721(3)(a) of the Criminal Code, to assist the court in imposing an appropriate sentence: It prescribes that the "willingness to make amends" be included in the report unless specified otherwise – this phrase has now been interpreted as "tantamount" to requiring an evaluation of whether or not the offender shows remorse (Comment, *R. v. J.M.* 1998). This represents an expansion in the use of these reports beyond what was provided for in the earlier section that s. 721(3)(a) replaced, which had mandated these reports only if required by the court.⁵

Equally important, imputations of remorse play an indirect role as components of other types of attributions that also contribute to the moral ordering of convicted offenders. The absence of remorse has been widely viewed as one of the diagnostic indicators of both psychopathy and antisocial personality disorder. Given that remorse now constitutes one of the items on the increasingly used Hare psychopathy checklist (Harris, Skilling, and Rice 2001), many of the decisions

premised on the classification of the offender as having these disorders are, in part, judgements about the offender's remorsefulness. Specifically, this occurs in cases where determinations regarding dangerous offender status are made or the offender is considered for parole eligibility at such major events as section 745 hearings, so-called "faint hope" hearings.⁶ A canvassing of Canadian case law through LexisNexis shows that, of 558 references to psychopathy or antisocial personality from 1995 to 2001, 203 also made reference to the defendant's remorse or its absence. Hence, a full evaluation of the scope of the attribution of remorse must necessarily include its indirect as well as its direct bearing on decisions affecting those who have been convicted of crimes.

However, even an appreciation of the indirect use of attributions of remorse fails to reveal the breadth of its full application in law. Legal discourse incorporates other specialized discourses that are similarly focused on the remorse of the offender, albeit from different, if complementary, perspectives. From the standpoint of various psychotherapeutic approaches, experiencing remorse is viewed as a necessary stage towards behavioural change (Greenberg and FitzPatrick 1989: 35). From the standpoint of Christian theology and other faiths, expressions of remorse in the form of contrition or repentance may constitute a precondition for forgiveness or even salvation. While an analysis of the sources of this institutional convergence is beyond the scope of this paper, what is important to understand for present purposes is that once a person has been convicted of a crime, multiple pressures can be brought to bear on the purported offender regarding attributions of remorse. Such attributions are used to establish not only whether the person is at risk of reoffending, but also whether they are psychologically fit, or even whether they are deserving members of their faiths.

To understand the impact of this designation, it is even more important to consider what it signifies and how it is imputed. On the one hand, the works of Erving Goffman and Nicholas Tavuchis suggest that expressions of remorse are similar to apologies, in that they both constitute what Goffman refers to as remedial exchanges. These exchanges are said to re-establish relations between a person who offends and a person who might otherwise remain offended (Goffman 1972: 113–118). Both forms of communication entail a splitting of the self into a part that has offended and a part that agrees that the offending act was morally unacceptable. This joining with the other in mutual rejection of the offending act helps to re-establish the offending party as a member of a common moral community (Tavuchis 1991: 7–

8). For present purposes, it follows that people who are believed to have offended but who refrain from expressing remorse or offering an apology fail to re-establish themselves as members of the moral community and fail also to invite the victims' forgiving responses, responses that may, in turn, lead to reconciliation.

On the other hand, the fact that legal discourse claims, contests, and scrutinizes remorse, rather than an apology, reflects the differences between the two forms of expression. While an apology may *refer* to the anguish and pain that the offender feels at having broken the norms of community, an expression of remorse *shows or demonstrates* this pain by making the suffering visible. Conventional usage in law and psychiatry describes expressions of remorse as "signs," "symptoms," "manifestations," or "demonstrations." What this suggests is that remorse is communicated through gestures, displays of affect, and other paralinguistic devices. Both the apology and the expression of remorse can be communicated through simple linguistic formulae such as "I am sorry." With the former, we are likely to attend to the words. With the latter, we focus on how the words are expressed, the feelings that accompany the words; expressions of remorse are shown rather than merely stated.

This representational quality of remorse is allied with another element that further demarcates its expression from that of the apology. Feelings of remorse are supposed to be painful, unwanted, and involuntary. In popular and legal discourse, one is "afflicted," "burdened," or "cursed" with feelings of remorse. That demonstrations of remorse are often described as "breaking down" or "losing control" or as symptoms of emotional collapse fits well with its perceived involuntary character. For example, one of the findings of the Capital Jury Project, in analysing how jurors go about sorting claims of remorse that are credible from those that are not, was that it mattered most whether the person "seem[ed] uncomfortable or ill at ease" when talking about his/her feelings of remorse (Sundby 1998: 1564–1565).

If we combine the foregoing characteristics, we arrive at what may be the most distinctive feature of the attribution of remorse. Because feelings of remorse are expected to originate from inner experience, beyond the realm of appearances, any artifice, dramaturgy, or other effort at the management of impressions is enough to dispel our suspension of disbelief that what is shown corresponds to what is felt. Yet because remorse is perceived as genuine only if it is felt, if it is painful, and if it is involuntary, it cannot be credited or validated if this corre-

spondence is absent. This potential gap between reality and appearance is amplified in the context of sentencing in criminal law. Where so much is at stake in deciding whether or not an expression of remorse is credited as real, there is a continuing suspicion that what is demonstrated may be strategic rather than authentic, motivated by the promise of reward or leniency, rather than by a genuine inner feeling. Paradoxically, the more decisions are made contingent on expressions of remorse, the more likely these expressions are to be viewed as strategic and self-interested rather than authentic and oriented to the suffering of the victim. Yet, as we shall see in the case of the wrongfully convicted, this gap between appearance and reality can also work the other way. Just as a claim to be remorseful can be invalidated by an unconvincing display of feeling or by actions that do not support these claims, so a claim not to feel remorse can also be challenged by what are perceived as underlying feelings of guilt. It is no exaggeration to suggest that the attribution of remorse and its absence in the context of judicial and correctional proceedings is enshrouded in a continuing veil of suspicion. The relationship between what is expressed and what is attributed is a subject of continuing contestation.

The moral career of the wrongfully convicted

There is much at stake in a wrongful conviction, even apart from the rupture of an individual life. As Huff, Rattner, and Sagarin have observed, wrongful convictions frequently involve a multiplicity of errors and occasional wrongdoings, which may implicate different levels of the criminal justice system in what the authors call "the ratification of error" (1996: 144). As is illustrated by some of the *cause célèbres* of the past century, as well as by the most well known of Canadian cases in the past 20 years, the eventual unravelling of a wrongful conviction that restores the reputation of the innocent may also call into question the credibility of those involved. This may include the police, defence and crown attorneys, judges, witnesses, jurors, correctional staff – even high-ranking political officials, who may have contributed to or condoned the injustice that a wrongful conviction represents. At the root of every wrongful conviction is a contest of credibility between the individual who asserts a claim of innocence – and whose reputation and potential liberty depend upon this claim – and the counterclaim of officials in the criminal justice system that a finding of guilt and the punishment that followed were justified.

Remorse is one of the battlegrounds that determine whose definition of the situation prevails. From the standpoint of the authorities, the

assertion of innocence after conviction calls into question the credibility of the entire system of criminal justice. A show of remorse is an affirmation that the institutions that imposed punishment did so with cause. From the standpoint of the person who has been convicted, however, any show of remorse subverts his/her claim to innocence. Even the momentary abandonment of this claim is enough to cast a lingering doubt as to its validity and thus compromise later attempts at exoneration, should the opportunity arise. The net effect of this clash of purposes is to trigger a process in which correctional staff and other officials intensify their efforts to elicit a show of remorse from the purportedly recalcitrant offender, while those who wish to advance a claim of wrongful conviction must embark on a project of long-term resistance.

However, the contest is decidedly unequal. To the extent that those who have been wrongfully convicted maintain their innocence, they are likely to be seen as unremorseful and to suffer the same disabilities as others who have been designated as lacking in remorse.⁷ These disabilities are evident both in the sentencing process and in the way that the sentence is administered. Those who plead guilty to an offence are already credited with the most elemental demonstration of remorse, namely, that they have acknowledged their responsibility for the commission of the offence. Those who claim innocence but are nonetheless found guilty are not given this credit. These presumptions pervade sentencing from the least to the most severe of sentences. Officially, the person who pleads guilty is entitled to mitigation. This is so even though the absence of remorse, as reflected in a plea of not guilty, is not considered an aggravating factor, so as not to interfere with a defendant's right to a trial (*R. v. Ambrose*⁸). In terms of sentencing, pleading guilty translates into measurable and tangible reductions in the severity of sentences⁹; more recently in Canadian law, it also fulfills what appears to be an emerging requirement for receiving a conditional sentence and for sentencing through sentencing circles.¹⁰ Correlatively, the benefit to those who plead guilty means a deficit or harsher sentence for those who do not.

Equally important is what the absence of remorse demonstrates about the person who has been convicted, whether wrongfully or not. Indications of remorse, in the form of acknowledgement of responsibility, are taken as the first step towards rehabilitation and towards renunciation of the offending criminal conduct. Hence, those who maintain their innocence after conviction are perceived as not having accepted responsibility for their actions and are, therefore, considered more

likely to re-offend, more dangerous, and more of a risk to the community.¹¹ As will be discussed below, incorporation within this category of the un-rehabilitated has profound consequences for the disposition of the wrongfully convicted.

Moreover, the unwillingness to express remorse, whatever its source, has deeper cultural connotations in our society, from which legal discourse is not insulated. Individuals define themselves as members of a shared moral community to the extent that their feelings of remorse affirm the seriousness that others attach to moral transgressions. The findings of the Capital Jury Project make clear that jurors are not only more likely to impose a sentence of death on persons who deny guilt on grounds of factual innocence or reasonable doubt (Sundby 1998: 1574–1575)¹² but also that their responses indicate a strong negative characterization of the persons who raise these defences. Especially in cases involving the death of the victim, there is a cultural expectation that those perceived as perpetrators will experience regret commensurate with the gravity of the offence. Those who do not – even on the impeccable moral ground that they were wrongfully convicted – risk adverse characterization as “cold-hearted,” as “utterly without feeling,” or in other terms of disrepute that purport to go to the essence of the person so described.¹³ The moral career of the wrongfully convicted thus begins not just with a harsher sentence, but with the ascription of qualities that define them as more of a risk than others similarly situated and as lacking the moral sentiments – the inner emotional life – shared by other members of the community.

It is in the context of this asymmetrical struggle for credibility that it becomes possible to better understand the pressures put on the wrongfully convicted to show remorse and the tenacity with which these pressures are often resisted. The most obvious pressures consist in the deprivations, which are likely to be far greater for wrongly convicted persons who have been incarcerated than for other inmates. A long list can be compiled from among the annals of the wrongfully convicted in Canada, in which parole was denied or temporary absences refused because of a continued assertion of innocence.¹⁴ Even evidence that would normally favour a positive outcome, such as acquiring a skill, being active on committees, or having a record of no institutional violence, is not enough to outweigh the negative impact of a denial of guilt. But the pressures to show remorse are as likely to be indirect. Programs of therapy that enhance a person's eligibility for parole and other benefits typically require, as a first sign of rehabilitation, that the putative offender admit responsibility for the crime, even though ful-

filling such a condition negates a claim of innocence. The result is that the wrongfully convicted who steadfastly maintain their innocence tend to accumulate a record that attests not only to their denial of guilt but to their non-participation in programs designed to make them safe to return to the community.

However, no occasion touches more directly on issues of credibility than the psychological assessment and treatment of those who maintain their innocence. Here the assertion of innocence is approached less as a factual claim to be contested or rejected than as a symptom that requires therapeutic intervention. From the standpoint of the specialists, whether psychiatrists, psychologists, parole officers, or others who favour this perspective, an unwillingness to take responsibility for a crime is less a matter of defiance than of denial. An excerpt from the *Royal Commission on the Donald Marshall Jr. Prosecution* offers a revealing glimpse into how this perspective was manifested during the time that Donald Marshall was wrongly incarcerated for the murder of Sandy Seale. In the following exchange, the commission is exploring a memo in which a parole officer had denied Marshall's request for a temporary absence "as it [was] felt that in light of his unstableness at the present time, he present[ed] too high a security risk" (Hickman 1989: 110).

Q. What was his unstableness?

A. This was period of time when his behaviour in the institution was extremely aggressive towards the staff, towards myself, and towards the other members of the case management team where in one case he threw a chair at one of the staff members.

Q. Are you able to offer any insight as to what provoked that aggressiveness?

A. I suspect that it had a lot to do with the issue of whether he was guilty or innocent of the crime. Although I was not (putting) a lot of pressure on him to admit that he was guilty, some people were.

Q. Who would these people have been?

A. Some of the other people – members of his case management team who had contact with him far more frequently than I did on a daily basis.

Q. Was it your sense that his frustration in maintaining his innocence in

the face of the response that he was guilty was causing this aggression to a degree?

A. In retrospect, yes. At the time, my belief was that he was coming close to admitting that he was involved in the crime and that it was starting to come out. (p. 110)

Given the presumption of guilt that follows a conviction, the gap between appearance and reality in the expression of remorse makes plausible this quest for underlying disturbances that belie the claim of innocence. As discussed above, just as overt claims of remorse can be challenged by inconsistencies between words and feelings or feelings and deeds, so also can a claim of innocence be invalidated by purportedly involuntary displays of conscience, whether in the form of "aggression" or any other expression of emotional turbulence.¹⁵

A similar search for "abnormal" reactions is also apparent in the therapeutic approach directed at Stephen Truscott during his incarceration for the murder of Lynne Harper at age 14.¹⁶ When Truscott failed to break down and admit guilt, even after being administered Sodium Pentothal and several doses of LSD over an extended period of time, the psychiatric notes read, "... he is so controlled, so pleasant, and so objective that certainly there must be in his subconscious a tremendous control for commanding details" (Sher 2001: 376). In another log entry, the psychiatrist observes, "If he's guilty and is not admitting then this implies that there is a complete repression of the problems involved" (Sher 2001: 395).

Somewhat paradoxically, the assertion of innocence is viewed as no more credible among those who are assessed as demonstrating no affect or an affect consistent with a claim of innocence. In one well-known U.S. case of wrongful conviction, the absence of affect resulted in the psychiatrist's diagnosing the defendant as having a "sociopathic personality disorder" because of "the absolute absence of any type of guilt or remorse" (Adams 1991: 129). In another Canadian case in which the person incarcerated had long asserted his innocence, the psychologist performing the assessment observed that the defendant's "calm, confident, and remorseless exterior was consistent with the reaction of an innocent man" (Harris 1996: 397-398.) However, he also noted, "a similar presentation associated with heinous and egregious behaviour would represent a powerful indicator of psychopathy." It would seem that there is no psychological model of what would be a normal reaction to a wrongful conviction.

In response to these multiple pressures to weaken the resolve of those who claim innocence, the available literature, biographies and journalistic narratives, reveals the different approaches to resistance taken by those who were wrongfully convicted.¹⁷ Most of the wrongly convicted, however undeviating in their claim of innocence, attempt at some point to fashion a measure of relief from the restrictions, deprivations, and adverse characterizations to which they are subjected. A few examples illustrate the challenge of meeting official expectations without forfeiting one's credibility. In one instance, a man who had been wrongfully convicted of sexual assault agreed to attend therapy sessions directed at sex offenders, while refusing to sign a document admitting guilt (Liptak 2002: 4). In another well-known U.S. case, a man who had been sentenced to death but had maintained his innocence asked whether he could express sorrow at the death of the victim he was alleged to have murdered without this being viewed as an invalidating expression of remorse.¹⁸

The Marshall case in Canada illustrates a similar type of resistance. After many years of unrelenting attempts by authorities to bring out a show of remorse, a compromise of sorts was achieved when Marshall was asked by his parole officer to admit that, even if he had not committed the murder for which he was convicted, "he was the sort of individual who could have committed a murder" (Harris 1990: 285). Marshall complied with this condition, in hopes of improving his situation. Much the same occurred in the Truscott case, whereby he eventually produced a generalized statement in his application before a parole board, where he neither quite asserted his innocence nor explicitly claimed responsibility for the crime. This was also an effort to win freedom without negating the original claim of innocence (Sher 2001: 372).

The demand that all persons who are convicted of crimes demonstrate remorse by accepting responsibility for their offences has unintended consequences for those who have been wrongfully convicted and who assert their innocence. Efforts to maintain their integrity in opposition to external pressures – efforts that under other circumstances might well be viewed as virtuous behaviour – result in what Goffman once referred to as the "mortification of the self" (1961). This is a process by which the self is said to be stripped of its social and psychological supports in order that a new identity may replace the identity that has been lost. The moral career of the wrongfully convicted illustrates this process, in which the forces of criminal justice and corrections are directed towards recasting the truths claimed by those who are innocent as pathology, at best, and defiance, at worst.

Notes

1. Earlier drafts of this paper were presented at the Canadienne Droit et Societe / Canadian Law and Society Association Annual Meeting (Quebec City, 2001), at the joint American/Canadian Law and Society Association Annual Meeting (Vancouver, 2002), at the Innocence Project Conference (Osgoode Hall Law School, 2002), and at the Conference on Wrongful Conviction (University of Ottawa, April 11, 2002). I owe particular thanks to Myriam Denov, Kathryn Campbell, David Cole, and Michael Radelet for helpful comments and suggestions.
2. For an interesting current debate on whether attributions play too much of a role in sentencing, see Bagaric and Amarasekara (2001); for arguments for augmenting the role of remorse in capital sentencing, see Robbins (2001).
3. After *Gregg v. Georgia* restored the constitutionality of the death penalty from its temporary abeyance under *Furman v. Georgia*, most states that reinstated capital punishment introduced a two-part or bifurcated trial. In the first phase, the jury decides whether the defendant is guilty, while in the second phase, the jury decides whether the penalty for the offence should be death.
4. See especially *R. v. Proulx* at para. 113: "In determining whether restorative objectives can be satisfied in a particular case, the judge should consider the offender's prospect of rehabilitation; the availability of appropriate community service and treatment programs; whether the offender has acknowledged his or her wrongdoing and expresses remorse ..."
5. A search on LexisNexis gives a rough indication of increases in the importance attached to consideration of remorse. For example, from 1 January to 31 December 1990, under the category of *robbery*, only 22 out of 312 written judgements mentioned the offender's remorse or its absence (7.1% of the total); whereas from 1 January 2000 to 31 December 2000, under the same category, remorse was mentioned in 98 out of 549 judgements (16.1% of the total.) The corresponding figures for judgements in cases involving *sexual assault* are 14.4%, for 1 January to 31 December 1990, and 26.1%, for 1 January to 31 December 2000.
6. "Faint hope" clause hearings refer to sec. 745.6 of the Criminal Code, whereby anyone who has received a life sentence for first degree murder, although technically ineligible for parole until having served 25 years of his/her sentence, may apply for parole consideration at 15 years.

7. It is widely recognized that many wrongful convictions begin with a false confession rather than with a plea of not guilty. For purposes of this analysis, I am assuming that whether or not wrongfully convicted persons maintain their innocence from the outset, at some point, almost by definition, they will have to assert that innocence for the claim to be pursued. At this point, the disadvantages of an assertion of innocence will apply.
8. In the dissenting opinion, in *Ambrose* at para. 92, the delicate balance of rewarding a plea of guilty without undermining the right to a trial is nicely articulated: "The fact that the appellant has chosen to persist in her assertion (of innocence) cannot aggravate sentence; otherwise, every accused who continues to deny that he or she committed the offence of which they have been convicted should receive an aggravated sentence." For a critique of the "remorse discount" as nevertheless threatening the right to a trial, see E. Bush (1985).
9. One of the most candid statements of this principle is contained in *R. v. Layte*, in which two defendants were prosecuted on identical charges, the only difference being that one pleaded guilty and the other pleaded not guilty. In defending the disparity in sentence between the two co-accused, who were convicted of the same crime, the court cited as one among several factors "a plea of guilty is an indication and demonstration of the accused's remorse" (at 206).
10. For conditional sentences, see note 3 above. For demonstrations of remorse as one of the conditions for participation in a sentencing circle, see *R. v. Taylor* at para. 52: "Had the sentencing circle participants not given the matter of Mr. Taylor's remorse, sincerity, and acceptance of responsibility serious consideration and determined that he was indeed remorseful ..., I would have no difficulty finding the circle proceedings fatally flawed."
11. The equation of an absence of remorse with dangerousness is commonplace in Canadian and American judgements; see, e.g., *R. v. Allard* at para. 5: "The trial judge was quite properly concerned with protection of the public, and hence the extent to which the applicant constituted a continuing danger to those he had harmed and threatened to harm, as well as to others. For that purpose, the appellant's apparent lack of remorse was relevant ..."
12. This raises the possibility that persons who are wrongfully convicted and who assert their innocence in the death penalty phase are more likely to receive the death penalty than persons who are guilty and admit their guilt.

13. An example is found in the reaction of the court to Robert Baltovich's denial of guilt, after he was convicted of murder in 1992; see *R. v. Baltovich*, [1992] at para. 25: "The record shows a cold, calculating person, and that person killed a person who had loved and trusted you"; or at para. 26: "You have high intelligence, but you are totally devoid of heart and conscience." Baltovich has since been released from prison, pending the outcome of his appeal from conviction, *R. v. Baltovich* [2000]. See also Finkle (1998). A more famous example of adverse characterization in a wrongful conviction occurred when Lindy and Michael Chamberlain were found guilty of the murder of their daughter in a trial held in Darwin, Australia in 1982. As Norman Young writes: "If Lindy (Chamberlain) had admitted killing her child and with uncontrolled tears confessed that she could not understand what came over her, she might have become the object of pity and compassion. Instead, she boldly proclaimed her Christian faith, did not cry unrestrainedly in public, defiantly asserted her innocence, and stubbornly maintained that a dingo had seized her Azaria (her daughter.) Her uncompromising stand won her little sympathy and set her on a collision course with the public, the media, and the Northwest Territories (Young 1989: 101)." The Chamberlains were pardoned in 1988. The moral outrage directed at persons who are believed to have committed grave offences but who do not express remorse cannot be explained simply as the result of a rational calculation that such persons are more likely to re-offend.
14. For some examples, Thomas Sophonow, wrongly convicted of second degree murder, who was refused parole and temporary absences (Williamson 2001: 15); Wilfred Beaulieu, who was wrongly convicted of sexual assault and denied temporary absence to attend the funerals of his brother and sister (Davis 1997: 30); David Milgaard, wrongly convicted of sexual assault and murder, who was turned down for parole and temporary absences many times during the 23 years of his imprisonment (Karp and Rosner 1991: 129); Donald Marshall, wrongly convicted of murder, also refused parole for the same reasons (Harris 1990: 266); Romeo Phillion, who has served nearly 30 years for a conviction that is currently being challenged under a s.696.1 application and whose requests for parole were also consistently denied, is not altogether mistaken when he was recently quoted as saying that "parole is for the guilty, not for the innocent" (Makin 2001: 1).
15. Interestingly, from this vantage point, those family members and others who believe the claim of innocence are viewed as supporting the underlying pathology and hence continued contact is seen as problematic. Thus, one of Marshall's parole officers included in his appraisal that "there still remains the problem of Marshall himself denying his guilt and being sup-

ported in this by an overprotective mother" (Harris 1990: 283). Or in the case of David Milgaard, one case worker at Stony Mountain wrote that "this writer questions how constructive familial support is. First, if the subject is guilty, familial belief in his innocence provides a firm block to subject even admitting to or working through intra-psychic aspects of the offence" (Karp and Rosner 1991: 130).

16. Stephen Truscott's case is currently under review through the Department of Justice. It is widely believed that he was wrongly convicted for this murder in 1959.
17. See Ewick and Sibley(1998: 48ff) for general discussion of how resistance to law is expressed.
18. Harold Otey, whose date of execution of 5 December 1990 was stayed by the Supreme Court of Nebraska, applied for clemency and was turned down, 2-1, before the Pardons Board of Nebraska. 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" (Myers 1997: 376). Otey wrote a letter expressing his sorrow to the victim's mother, which was dismissed as insincere by the family but verified as genuine by later psychological evaluations. 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" (379). Otey was executed on 2 September 1994.

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