

# Repentance and the Liberal State

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*The article defends four broad theses: that repentance is the intrinsically appropriate response to moral wrongdoing (Part II); that legal punishment may seek to facilitate repentance and, when repentance is in evidence prior to the completion of a justified punishment, that it can be a legitimate ground for the merciful reduction of the offender's sentence (Part III); that according repentance the role suggested in Part III is compatible with respecting important constraints that bear on a liberal state (Part IV); and that the state's responsibility for facilitating repentance extends beyond the period during which offenders are subject to formal legal punishment (Part V).*

## I. INTRODUCTION

This article defends the idea that the liberal state may in principle register the significance of repentance displayed by criminal offenders, and foster its emergence, through the institution of legal punishment. Part II outlines the nature of repentance, stressing the cluster of elements that typically constitute it, and gives an account of its value in terms of atonement. In Part III, I argue that there are two main kinds of significance repentance possesses within an adequate account of criminal sentencing: those authorized to inflict legal punishment may legitimately seek to induce repentance in offenders, and when offenders are already repentant at the time of sentencing, this can operate as a ground for mercy towards them. In Part IV, four arguments in support of the claim that penal institutions in a liberal state should not accord repentance the dual role I ascribe to it are outlined and rejected: (a) that repentance is an ineliminably religious notion, (b) that legal punishment is properly incurred for legal, as opposed to moral, wrongdoing, (c) that the dual role unacceptably threatens the autonomy of criminal offenders and (d) that this role is inconsistent with the principle of neutrality towards conceptions of the good that supposedly constrains liberal states. Finally, in Part V, I tentatively suggest that the significance of repentance for criminal wrongdoing outruns its implications for the institution of legal punishment and that this justifies in principle the liberal state's promotion of repentance in non-punitive contexts.

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## II. REPENTANCE AND ITS VALUE

Repentance is the *intrinsically* appropriate response to one's moral wrongdoing in a twofold sense. Its appropriateness follows from the fact of one's wrongdoing considered just as a wrongful act for which one is morally responsible and deserves to be blamed. And there is intrinsic (or non-instrumental) moral value in repenting quite apart from any value attaching to the consequences of doing so. Let me elaborate on the first point before returning to the matter of value. The appropriate object of repentance is some prior act of one's own (or, in the case of a group's wrongdoing, an act for which one bears a share of collective responsibility). But in contrast to attitudes such as regret or disappointment, the object of repentance is one's wrongful act *qua* wrongful. It is not any consequences attendant upon the act, or any features of the act, beyond those that constitute its wrongfulness. (I follow a standard view according to which the wrongfulness of an action is a complex function of the harm it causes or risks and the culpability its perpetrator exhibits.). Thus, we can readily imagine a career criminal regretting his life of crime for a variety of reasons. Perhaps he bemoans the lost years spent languishing in prison to no good purpose or else has come to loathe the social opprobrium his criminal status has incurred. These are certainly intelligible reasons to regret his erroneous ways and to desist from criminal activity in the future. But unlike these responses to his prior wrongdoing, repentance takes as its object the wrongful conduct *qua* wrongful and, in cases in which it is justified, it embodies the correct response to the very fact that one has done wrong.

What is the nature of that response? As I understand it, repentance involves a cluster of elements. These elements, in the rough temporal order in which they standardly appear, can be schematically rendered as follows: (a) The wrongdoer is assailed by feelings of guilt for his wrongdoing: these are painful experiences that present his action as wrongful, something for which he is responsible and deserves to be blamed by others and by himself. (b) He comes to judge that what he did was wrong and to blame himself for his wrongdoing. This represents a genuine advance on (a), since the emotion of guilt referred to there may be initially experienced heteronomously. With the onset of stage (b), the way in which his conduct is presented by that emotion, i.e., as a wrongful act for which he is blameworthy, receives the endorsement of his (considered) judgment. Must he judge himself guilty for the correct reasons? A repentant murderer must judge himself guilty of the great wrong of taking another's life without justification or excuse. But he need not be able to offer a correct account, or indeed any half-way plausible account, of *why* murder is wrong. When he does have such an account, it suffices if it falls within certain broad limits of intelligibility—a divine command explanation would count as such, even for an atheist. (c) He confesses his wrongdoing and sincerely apologizes for what he did, avowing his recognition of its wrongfulness and condemning himself for it, thereby disowning the wrongful act. The apology is made to the victim, those close to the victim, and to any relevant community to which he belongs that has a legitimate interest in his compliance with the values in question. (d) He makes moral (and not

just material) reparation for his wrong, which will typically involve publicly accepting deserved blame, including willingly undergoing as a penance any punishment that is properly inflicted. Notice that the significance of elements (c) and (d) does not reduce to that of furnishing interpersonally-accessible evidence of (a) and (b). On the contrary, they have independent significance, since in virtue of confessing guilt and apologizing or accepting punishment as a penance, the wrongdoer as a moral agent assumes responsibility for his wrongdoing and publicly blames himself for it.<sup>1</sup> (e) He resolves not to commit such a wrong again and overcomes the moral defects that led to the original offense. That is, he achieves genuine moral growth by acquiring a better appreciation of the dictates that morality places on him and an enhanced disposition to act in conformity with them, so that confronted with similar circumstances again he would not act, or would be less likely to act, as he did. In cases in which the wrongdoing manifests some underlying defect in the wrongdoer's character, the experience of shame can be an important mechanism through which self-reform is achieved. This follows from the difference in the characteristic objects of guilt and shame: for the former, it is one's wrongful conduct, for the latter, it is one's character or the kind of person one is.<sup>2</sup>

The sequence described in this highly schematic form can be found, rendered with all the richness of detail and imaginative power at the disposal of a great novelist, in Dostoyevsky's *Crime and Punishment*; although even he skirts the daunting task of portraying the moral regeneration involved in (e).<sup>3</sup> Still, an advantage of separating out in this admittedly over-simplified way the elements that are constitutive of repentance is that it becomes easier to register two vital facts. The first is that repentance is a moral discipline that comprises a variety of elements and the degree to which they need to be present, and the significance they bear, may vary from case to case, depending on such considerations as the nature of the wrong, the identity of the victim and the character and personal history of the wrongdoer. Second, repentance should not be conceived as an all-or-nothing matter; instead, we can admit degrees of repentance. In particular, it is not necessary that all of the elements be present in every case, nor that they should manifest themselves in their most fully realized form, in order for the offender to be characterized as repentant (even if only very imperfectly so). What recommends this more relaxed understanding of repentance is the sense that even an offender's imperfect fulfilment of some of the conditions (a)–(e) can carry moral weight, especially in deliberating about the justified punitive response to his wrongdoing.<sup>4</sup>

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<sup>1</sup> The autonomous significance of (c) and (d) has implications for the potential intrusiveness of a state's concern with repentance. See *infra* Part IV.C.

<sup>2</sup> There is an interesting discussion of the relation of guilt and shame as responses to one's wrongdoing in Jeffrie G. Murphy, *Shame Creeps Through Guilt and Feels Like Retribution*, 18 *LAW & PHIL.* 327, 340–41 (1999).

<sup>3</sup> There is an instructive discussion of Raskolnikov's transition from (a) to something like (b) in Dostoyevsky's *Crime and Punishment* in RICHARD WOLLHEIM, *ON THE EMOTIONS* 191–92 (1999).

<sup>4</sup> See *infra* Part III.

The pressure to adopt a more stringent interpretation, one resistant to both of the preceding points, comes mainly from advocates of certain religiously-inspired conceptions of repentance. For them, repentance always involves a high pitch of emotional intensity, accompanied by a deep-going and permanent transformation of the offender's character and subsequent behavior. There is an associated tendency to think of repentance as an all-or-nothing condition: God has either touched the sinner's heart or He has not; there is no recognition of a qualified or imperfect repentance. Something like this conception is advanced in Montaigne's essay *On Repenting*:

But these men would have us believe that they do feel deep remorse and regret within; yet no amendment or improvement, no break, ever becomes apparent. But if you do not unburden yourself of the evil there has been no cure. If repentance weighed down the scales of the balance it would do away with the sin. I can find no quality so easy to counterfeit as devotion unless our morals and our lives are made to conform to it; its essence is hidden and secret: its external appearances are easy and ostentatious . . . Before I call it repentance it must touch me everywhere, grip my bowels and make them yearn—as deeply and as universally as God does see me.<sup>5</sup>

Presumably, it is this more exacting conception that is at work in *Crime and Punishment* when it is emphatically stated that Raskolnikov “did not repent of his crime”:

And if fate had only sent him repentance—burning repentance that would have rent his heart and deprived him of sleep, the sort of repentance that is accompanied by terrible agony which makes one long for the noose or the river! Oh, how happy he would have been if he could have felt such repentance! Agony and tears—why, that, too, was life! But he did not repent of his crime.<sup>6</sup>

Of course, this assertion has some basis: a part of Raskolnikov still clings to his hybrid utilitarian/Napoleonic justification of his crime, portraying himself as a would-be “benefactor to mankind” for killing the vile money-lender, “a woman who made the life of the poor a hell on earth,”<sup>7</sup> and castigating himself for failing to live up to an ideal according to which an “extraordinary man” arrogates to himself the right to “step

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<sup>5</sup> Michel de Montaigne, *On Repenting*, in THE COMPLETE ESSAYS 916–17 (M.A. Screech trans., 1991). See also SØREN KIERKEGAARD, PURITY OF HEART IS TO WILL ONE THING 46 (1956).

<sup>6</sup> FYODOR DOSTOYEVSKY, CRIME AND PUNISHMENT 552 (David Magarshack trans., Penguin Books 1966). The claim that Raskolnikov would have been “happy” had he felt “burning repentance” indicates one way repentance is potentially self-subverting. See RICHARD MORAN, AUTHORITY AND ESTRANGEMENT: AN ESSAY ON SELF-KNOWLEDGE 170–82 (2001). I must put this interesting problem to one side in this paper.

<sup>7</sup> DOSTOYEVSKY, *supra* note 6, at 529–30.

over” established moral boundaries.<sup>8</sup> On this view, he comes to accept his punishment not as deserved hard treatment for wrongdoing, but on his own terms, as a defiant acknowledgment of his miserable failure to live up to his personal ideals. Yet, this is hardly the full story. For by this point in the narrative, Raskolnikov has undergone painful feelings of guilt to the extent of becoming ill and mentally unbalanced, groped his way toward self-blame, confessed his killings to the saintly prostitute Sonia, experienced the powerful urge to make a public display of repentance and turned himself in to the police although he was no longer officially under suspicion. It is Raskolnikov’s fundamental decency that underlies these expressions of bad conscience and to which both Sonia and the detective Porfiry, in their different ways, respond in their dealings with him. In view of all this, the bland denial that he had repented, even if only imperfectly, seems unduly austere.

So, although we can certainly acknowledge the demanding conception of repentance invoked here as an ideal—the most thoroughgoing manifestation of the repentant spirit—we need not deny the name, and any significance, to less full-blooded manifestations. One reason for this is that we are interested in the role of repentance might play in the secular context of criminal punishment. Most crimes, unlike religious sins, are of a lower order of wrongfulness, such that the sort of response described by Montaigne would verge on the pathological in its excessiveness. Yet even in relation to crimes for which something more closely approximating the Montaignean ideal is appropriate, we should acknowledge the significance of imperfect repentance, and for reasons not necessarily attributable to the shift to a secular context. Speaking of the related phenomenon of religious conversion, William James rightly described as “shallow” those skeptics who dismissed it on the grounds that a convert’s change of heart is likely to be short-lived.<sup>9</sup> Similarly, imperfect repentance has significance in the case of criminal wrongdoing, even if one believes that ideally a more full-blooded version would have been preferable. The convert or the offender’s transformed relation to God or to genuine moral demands retains its significance, even if it is ephemeral or incomplete.<sup>10</sup>

A more promising line of thought insists not on the presence of each of the elements (a)–(e) in order for repentance to obtain, let alone on a full-blooded instantiation of each element. Instead, it affirms that the presence of one or more of these elements, to some requisite degree, is a necessary condition for the characterization of a response as one of repentance. In this vein, Herbert Morris asserts that the pain *essentially* (as opposed to characteristically) connected with restorative responses by the guilty party is one that is “relatively disconnected from

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<sup>8</sup> *Id.* at 276.

<sup>9</sup> WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* 256 (1977) (“It misses the point of serious interest, which is not so much the duration as the nature and quality of these shiftings of character to higher levels. . . . [T]hat it should even for a short time show a human being what the high-water mark of his spiritual capacity is, that is what constitutes its importance—an importance which backsliding cannot diminish, although persistence may increase it.”).

<sup>10</sup> *See infra* Part III.

choice even when compared with the pain that we may unthinkingly inflict upon ourselves in the expression of feeling guilty.”<sup>11</sup> Thus, the pain constitutive of feelings of guilt, i.e., (a), would be essential to repentance, whereas that associated with such choice-dependent expressions of our guilt, e.g., confession and apology or willingly undergoing a punishment ((c) and (d)), are not. However, consider a wrongdoer who suffers from some affective disability and therefore does not meet condition (a), but seemingly amply fulfils the other elements of repentance. His response is not what it might ideally be, even in his own eyes, but must we therefore deny that it is a form of repentance? Alternatively, consider a wrongdoer who satisfies all the elements of repentance except (a) because, having suffered the loss of a loved one, he is so swamped by his grief as to be incapable of sustained feelings of guilt for a wrong (e.g., shop-lifting) that, by comparison, seems rather insignificant.

The case for making (b) a necessary condition seems stronger, but may still be inconclusive when one reflects on cases, such as Raskolnikov at the time of his trial, in which strong and persistent feelings of guilt, confession and willingness to make material reparation and undergo punishment co-exist with various psychological mechanisms (self-deception, arrogance, insecurity, etc.) that inhibit an unambiguous judgment of self-blame on the part of the wrongdoer. Perhaps, in the end, the closest we come to a necessary condition in this vicinity is a disjunctive condition, one demanding the presence of either (a) or (b). This might be represented as the outer boundary between meaningful repentance and a minimal kind of rehabilitation, thus bringing out the essentially path-dependent character of the former: it is a transformation in the wrongdoer’s feelings, judgments, conduct and character that is mediated by an appropriate affective or cognitive appreciation of his wrongdoing *qua* wrong. Repentance is a righting of one’s wrongdoing, not just a change for the better in its aftermath. The failure of Stanley Tookie Williams’ plea for clemency—assuming one completely discounts his claims of innocence—might be taken as illustrative of that boundary: the fact that he had transformed from gang-leader to an apparently sincere and effective campaigner against gang violence could not constitute repentance in the absence of an appropriate acknowledgement of his prior wrongdoing. Since I am doubtful that the identification of general necessary conditions for complex moral responses such as repentance is an especially profitable exercise, I shall not pursue the matter further.

Return now to the second of the two contentions from which we began: in what does the intrinsic value of repentance consist? There are two main ways in which repentance bears such value, the second being derivative from the first, and both being subsumable under a more general value, which we may call atonement. First, as I have already claimed, repentance is the intrinsically correct response by the wrongdoer to his wrongdoing. The wrongdoer is a responsible moral agent, someone who has both the capacity to grasp the moral values that apply to him and to discern

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<sup>11</sup> HERBERT MORRIS, *Guilt and Suffering*, in ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 89, 102 (1976). I take the reference to restoration to equate with repentance, or the atonement that repentance constitutes.

and act in conformity with the reasons for action they generate. In committing a moral wrong, he transgresses values that he has stringent (typically, obligation-imposing) reasons to comply with. In this way, he alienates himself from those values; he is also thereby alienated from his own nature as a responsible moral agent, a being whose essential character is such as to be properly subject to the authority of morality.

The appropriate response to this alienation is to experience the burdens of guilt, burdens that can dominate a person's mental horizon, sapping their capacity to engage with what ordinarily gives life its value. In experiencing guilt, and coming autonomously to blame himself, the wrongdoer acknowledges his diminished or imperfect standing in relation to the values that ought to command his respect as a moral agent. Of course, that any particular offender may fail to experience guilt or judge himself blameworthy is beside the point; what is crucial is that these responses are required by his wrongdoing, with the result that any such failure of response is a defect that should be overcome. Through repentance, the wrongdoer re-establishes his standing in relation to those values by realigning his actions and attitudes with them. The process of blaming himself, apologizing, making moral and material reparation for his wrongdoing, and reordering his future attitudes and conduct are all constitutive means to that realignment. At the end of the process, he will have atoned, in the sense of having become at one both with the values he transgressed and also with himself *qua* moral agent whose nature is such as to be subject to moral requirements.

The second, related, way in which repentance is intrinsically valuable turns on the deeply other-involving dimension of our relationship to morality. The wrongdoer is not an atomistic being confronting, in complete isolation from others, the demands of morality but rather one moral agent among others, all of whom are subject to the same values. In this way, we may speak of the community of moral agents in general—those with at least a certain threshold capacity to grasp and comply with moral reasons. The notion of “community” here is used somewhat loosely, but it refers to more than the existence of a bare plurality of moral agents. For partly in virtue of being such an agent, one has reasons to act or respond in various ways to other such agents (e.g., to praise, censure, reward, punish them, etc.) in light of how they are oriented with respect to morality. But, of course, moral agents typically also belong to local communities, such as the family or the state, the members of which have special reasons to facilitate the realization of certain moral values among themselves, including a special standing to react in various ways to the success or failure of other members in responding to moral demands. In committing a wrong, and so being alienated from moral values, the wrongdoer equally alienates himself from the relevant communities to which he belongs that are subject to those values and have an interest in his compliance with their demands.

By repenting he not only re-integrates himself with those values but also works towards healing the rift with the relevant communities to which he belongs, thereby restoring (at least something) of his lost standing. There are various means by which the restoration of standing can be secured. At an interpersonal level, his repentance

may enable him to be properly forgiven by his victims, and may even place them under an obligation to forgive him. At a large-scale social level, he may have restored to him the full rights of citizenship or the full trust and fellowship of other family members or citizens. I say he may recover at least something of his lost standing because, given the nature of the wrong he has committed or of the community to which he belongs, a complete return to the *status quo ante* may not be possible or may partly depend on the discretionary judgment of others. But, to the extent that it is possible, and to the extent that he achieves it, he is at one with the communities whose values he transgressed, and at one also with himself as someone whose identity is bound up with membership of them.

The essence of repentance, so understood, is atonement for wrongdoing through suffering brought on by guilt (self-blame, in its affective and judgment-involving forms) and the work of apology, reparation and moral regeneration. This logic deeply informs the reaction of Sonia to Raskolnikov's confession of guilt. Her anguished cry "How you suffer!" upon hearing his confession is followed by the injunction "Accept suffering and be redeemed by it—that's what you must do," a redemption that involves restoration to life and, with it, the possibility of full human community. "How can you possibly live all your life without human companionship?" "[S]ay to all men aloud, I am a murderer! Then God will send you life again . . ." <sup>12</sup> Of course, I have done nothing to vindicate the logic of wrongdoing-repentance-atonement against the skepticism it attracts from consequentialist or Nietzschean critics. <sup>13</sup> Instead, I am inclined to accord this logic the status of a ground-floor moral commitment that does not straightforwardly admit of rational vindication but rather forms an indispensable part of the background for whatever justification is attainable in this difficult and perplexing domain. Nevertheless, one way of coming to accept that the nexus of wrongdoing-repentance-atonement has this deep significance is by finding attractive, on reflection, the view of punishment that emerges from it.

### III. REPENTANCE AND PUNISHMENT

What, then, is this conception of the nature and aims of legal punishment? According to the version of the communicative theory of punishment I have developed elsewhere, <sup>14</sup> the overarching formal aim of punishment is the communication of *justified* (and not merely deserved) censure to wrongdoers. This is an abstract characterization of the most general justifying purpose of punishment, one

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<sup>12</sup> DOSTOYEVSKY, *supra* note 6, at 433–34.

<sup>13</sup> For critics of the former sort, this skepticism is primarily directed at the idea that elements (a)–(e) of repentance, especially the painful self-awareness involved in a guilty conscience, have *intrinsic value*, see Rüdiger Bittner, *Is it Reasonable to Regret Things One Did?*, 89 J. PHIL. 262–73 (1992); for critics of the latter sort, their skepticism is part and parcel of a more general hostility towards common sense (or "slave") morality, see GIANNI VATTIMO, *NIHILISM AND EMANCIPATION: ETHICS, POLITICS, AND LAW* ch.14 (2003).

<sup>14</sup> John Tasioulas, *Punishment and Repentance*, 81 PHIL. 279 (2006).

given its substance by more specific norms and values subsumed under this purpose. The key norm is that of retributive desert, according to which wrongdoers deserve blame proportionate to the severity of their wrongdoing (again, taken as determined by the culpability and harm their conduct involves). In suitable cases, it is appropriate to convey the blame that is deserved by inflicting hard treatment on the wrongdoer. Desert here functions as a *sine qua non* of punishment, as a consideration which may be sufficient to justify the infliction of punishment, and as a standard setting an upper limit on the amount of punishment that may be justifiably imposed. A vital presupposition of the punitive process is that the wrongdoer was at the time of his offense a responsible moral agent, i.e., one able to apprehend the reasons for action embodied in the criminal law and to conform his behavior to them. A related presupposition is that he retains this status at the time of sentencing. If he does not retain it—if, for example, he is stricken with a severe psychological disorder in the intervening period between his crime and the moment of sentencing—then he is unable to grasp the reprobative message conveyed by punishment. This renders him ineligible for punishment as opposed to some kind of therapeutic treatment or containment. The status of responsible agency involves a capacity for rational self-direction that distinguishes the wrongdoer from non-human animals, the insane and very young children. And, integral to this status is the capacity to repent of his wrongdoing: his capacity to realign his attitudes and behavior with the values he has transgressed.

On this line of thought, repentance has a threefold significance. First, and most fundamentally, repentance is a hoped-for response to the punishment justifiably inflicted upon a wrongdoer. Punishment justified as censure is related in two ways to that response. First of all, it bears a *constitutive* relationship to the wrongdoer's repentance, in so far as it can serve as a penance through which he can develop and manifest his repentant understanding of the wrong he has committed. A vital feature of the communicative theory is that punishment expresses an important form of respect for the wrongdoer, paying tribute to his status as both a rational agent and a member of the relevant legal community. But, at the same time, the censure communicated by punishment is a public expression of the wrongdoer's diminished standing *qua* rational agent and member of that community. This is what enables the punishment to serve as a publicly understood penance. The main point of contact with our schematic account of repentance is element (d), although (b), (c) and to a lesser extent (e) are also implicated. By accepting that his punishment is justified (when it is justified), and willingly undergoing it, the punishment operates as a public means of acknowledging his guilt and making moral reparation for it.

It is important to be clear about the relationship between the communication of censure and the response of repentance that this theory contemplates as the ideal case. The retributive norm—according to which punishment should convey deserved blame for wrongdoing—does not allow, let alone require, that the amount of punishment to be inflicted is that which will bring about the repentant response. This instrumental interpretation is multiply problematic. Perhaps its gravest flaw is that it unacceptably

renders deserved punishment a shifting function of whatever potentially skewed value system has been internalised by the wrongdoer.<sup>15</sup> Instead, the idea is that the justified punishment is that which conveys justified reprobation of the wrongdoer's offense. Inflicting the punishment on the offender provides him with an *opportunity* to repent by undergoing the justified punishment as a penance and for wrongdoing. Punitive hard treatment understood as a penance can, in this way, bear a constitutive relation to the process of repentance: he repents *through* undergoing precisely the punishment that is justified. And this explains why it is impermissible to carry on inflicting punishment until the hoped-for response is eventually forthcoming. The prompting of that response does not determine what counts as deserved punishment; instead, it presupposes an independent determination of the amount of punishment that is justified as censure.

This constitutive relationship between punishment and repentance sits alongside a subsidiary, instrumental relation that the infliction of hard treatment can bear to the hoped-for repentance. By forcibly removing the offender from the standing temptations and routines of his daily existence, by subjecting him to hard treatment as a response to his wrongdoing, the punishment can be not only a *constitutive* component of his repentance, but also an instrumental *means* of stimulating the process of repentance. That is, punishment can help spark in the offender the remorseful recognition of his wrongdoing that leads him to undergo his punishment as a penance, as something he willingly embraces as justified, thereby enabling him to make a forceful apology to his victim and the wider community.

The constitutive and instrumental links between punishment and repentance, the way in which punishment can be both a vehicle for, and a prompt to, repentance, helps explain why we should reject forms of punishment that are incapable of performing either role as well as existing punitive methods, at least potentially, are capable of doing. So, for example, the hypothetical proposal to replace imprisonment or community service orders by a method of incarceration that involves drugging offenders and placing them on a life-support system, so that they lose consciousness and the capacity to deliberate or function as agents for a specified period, should be rejected, *inter alia*, because it is a mode of punishment that is deficient both as a penance as a means for encouraging repentance. Since an offender does not consciously undergo hard treatment, it is not well-suited either to express one's repentance, nor is it as potentially effective as forms of punishment that work on the offender's understanding in fostering repentance. A similar sort of case can be made for rejecting many "shaming" punishments, such as those that place offenders in humiliating postures, making them objects of public hostility and derision. No doubt one sufficient reason for rejecting 'shaming' punishments is that they are incompatible with recognizing the offender as a rational agent, a status presupposed by the legitimate infliction of punishment. But, in addition to this, there is also the fact that subjection to the scornful gaze of others—which threatens either to crush the

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<sup>15</sup> *Id.*

offender's spirit or else counter-productively encourage him to brazen out the ordeal—is more likely to inhibit, rather than facilitate, the offender's development of a penitent understanding of his deed.

The two links between punishment and repentance mean that hard treatment should be inflicted with an eye on repentance. The amount of punishment inflicted must be justified as censure, and when faced with a choice among punishments of equal severity, any one of which would convey the requisite measure of justified censure, the sentencing authority may be guided by their relative efficacy as instrumental and constitutive means of repentance. In particular, it may be influenced by the relative efficacy of the different forms of punishment in enabling this particular offender to make a vivid apology and to undergo his punishment in a sincerely repentant state. Considered as independently justified, then, punishment offers the offender the opportunity of repentance. But there may be further features that distinguish one justified punishment from another, and it is acceptable for a sentencing authority to select that mode of hard treatment which, in virtue of its other characteristics, is judged more likely to foster the offender's repentance.<sup>16</sup>

The crucial feature, however, is that the instrumental relationship between punishment and repentance always operates under the aegis of the constitutive relationship which in turns presupposes an independent determination of the amount of punishment that is deserved as blame. On this view, when the institution of punishment is functioning at its best, the infliction of hard treatment serves as a penance for wrongdoing that operates as a two-way means of communication. On the one hand, it enables society to communicate its justified censure of the offender and the diminished moral/communal standing this entails; on the other hand, it is a vehicle whereby the offender can communicate his repentant understanding of his crime to his victim and the wider community. In order to perform the latter role, the hard treatment must respect the rational agency of the offender throughout.

Andrew von Hirsch has argued that allowing punishment to play this instrumental role in securing repentance threatens to undermine the proportionality that should obtain between the severity of the punishment and the gravity of the wrong. We have already seen why the strong version of this objection fails: the instrumental concern operates under the auspices of the broader requirement that the amount of punishment imposed must be justified as censure for wrongdoing, and the key determinant of the amount of punishment that is justified is the retributive norm that insists on precisely the proportionality that von Hirsch demands. Instead, the instrumental concern provides a reason for a sentencing authority to select, among equally deserved punishments, that which would be more effective in inducing a penitent state. Countering the suggestion that proportionality should restrict the operation of the instrumental concern with repentance, von Hirsch claims that this merely illustrates the tension between the two: “such restrictions on severity would make it more difficult to suit the penalty to the actor's expected responsiveness; on the

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<sup>16</sup> For a compelling endorsement of this sort of view, see R.A. Duff, *Penance, Punishment and the Limits of Community*, 5 PUNISHMENT & SOC'Y 295, 300–01 (2003).

other hand, easing those restrictions in order to facilitate the achievement of penitence sacrifices proportionality.”<sup>17</sup> But this objection simply presupposes that the instrumental concern functions as an autonomous norm, whereas the operative notion of penance is one of achieving repentance precisely through undergoing a deserved penance (hence one proportionate to the gravity of the wrong).<sup>18</sup>

There is a genuine problem in this vicinity, however, but it is somewhat different from that identified by von Hirsch. It arises because pure moral reasoning will not standardly single out one precise quantum of punishment as proportionate to the gravity of the wrong in each and every case; instead, it will be likely that a punishment falling within some fairly broad range of severity can be properly inflicted as deserved. If so, a sentencing authority might have reason to punish offender A more severely than offender B, even though their crimes were of equal gravity, provided there was a sufficiently strong repentance pay-off in prospect. The potential conflict here is not directly with proportionality, but with the rule of law (which requires predictability and the fettering of discretion) and, perhaps, with some norm of horizontal equity or fairness (which requires that like cases be treated alike). But even if there is a genuine conflict here, it is far from obvious that the latter values should always trump the instrumental concern, let alone lead us to deny its validity. Just as importantly, the idea of tailoring the mode of punishment with a view to bringing about repentance might involve certain practical problems of implementation. For example, the diversity of modes of punishment may undermine the emphatic quality of the law’s condemnation of wrongdoing and render judgments of proportionality across punishment modes harder to make. But no theory of punishment can purport to offer a recipe for solving all such practical problems; they are matters best left to the judgment of those concerned with institutional design or who operate within the relevant institutions.

So far, we have discussed the significance of repentance as a hoped-for response to punishment. But what of cases in which elements of repentance are manifested independently of, and prior to, the infliction of punishment? Call these cases of antecedent repentance.<sup>19</sup> There are two main types of situation at issue here: those in which antecedent repentance is a ground for mitigation and those in which it is a ground for mercy. First, there are cases in which the repentance affects the amount of punishment that the offender deserves: it is a ground for mitigation, a consideration in

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<sup>17</sup> ANDREW VON HIRSCH, *CENSURE AND SANCTION* 75–76 (1993).

<sup>18</sup> Even in his most recent book, co-authored with Andrew Ashworth, von Hirsch’s criticism of the repentance view (in the form advanced by Duff) is undermined by the problematic assumption that proponents of that view must hold that the fostering of repentance “alone supports the existence of the criminal sanction,” that repentance is the “central purpose of the sanction” or “the very point of the penal process.” ANDREW VON HIRSCH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* 101, 104–05 (2005).

<sup>19</sup> There are also cases of “anticipatory repentance,” in which the sentencer thinks the offender is likely to repent—perhaps likely to repent precisely by being shown lenient treatment in advance of any repentance. But I leave these cases aside.

favour of reducing the amount of punishment the offender deserves. The retributive norm demands that the hard treatment must be deserved as blame for wrongdoing. The amount of hard treatment inflicted as blame must be proportionate to the gravity of the wrong that has been committed, where the latter is a complex function of the culpability the wrongdoer manifested in acting as he did (e.g., intention, reckless indifference, negligence, etc.) and the harm his conduct caused or risked. Now, sometimes repentance will affect our estimation of the gravity of the offense. This will usually be so when elements of repentance are evident immediately upon the commission of a crime. If the wrongdoer is straightaway shocked and appalled at what he has done, apologizes to the victim, seeks to redress the harm caused, and unhesitatingly turns himself in to the police despite having every opportunity to evade capture, then we can probably infer a reduced level of culpability. His wrongful conduct can be conceived as an aberration or slip, rather than something to which he was wholeheartedly committed. Moreover, when the harm that the crime inflicts consists in significant part in the demeaning message that it sends to the victim, showing him to be someone whose interests do not count in the offender's eyes, the fact of immediate repentance might be seen as retracting the message sent by the original conduct and therefore ameliorating the harm sustained by the victim. This reduction in the gravity of the wrong is a *pro tanto* reason in favour of a reduction in the severity of the punishment that is deserved.<sup>20</sup> Notice, however, that no question of character assessment is at issue in cases of this sort: the nature of the conduct itself (the complex of *mens rea* and *actus reus*) remains the steadfast focus of mitigation throughout.

In both of these cases, the significance of repentance is captured under the norm of retributive desert itself. But there is also a second class of cases in which repentance has significance without affecting the offender's just deserts. The repentance may occur well after the wrong has been committed, and not in such a way as to affect our estimation of the latter's gravity. The result is that such repentance does not determine the level of punishment that is deserved, and this has induced leading advocates of the communicative theory, such as R.A. Duff and Andrew von Hirsch, to deny it *any* role in sentencing decisions. The elaboration of the communicative theory I have offered, however, enables us to avoid this unremittingly hard line while still maintaining the integrity of the retributive norm and the irrelevance of antecedent repentance of this sort to the level of punishment the offender deserves. This is because the overarching point of punishment is not merely the communication of *deserved blame*, but of *justified censure*. The retributive norm is the fundamental norm in determining what is justified as censure, but it is not the only one. There is also a norm of mercy, according to which the impact of the deserved punishment on the well-being of offenders in certain cases generates a

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<sup>20</sup> See, e.g., R.A. DUFF, PUNISHMENT, COMMUNICATION AND COMMUNITY 120–21 (2001); Jeffrie G. Murphy, *Repentance, Punishment and Mercy*, in REPENTANCE: A COMPARATIVE PERSPECTIVE 150 (Amitai Etzioni & David E. Carney eds., 1997).

countervailing reason of charity to inflict a milder punishment on them than that which could be imposed as deserved.

Antecedent repentance, on this view, figures as a *pro tanto* ground for mercy to the offender: a reason, grounded in concern for his well-being, for inflicting a more lenient punishment than might be imposed as deserved, which may either be defeated by, defeat, or be incommensurable with the reason for punishing him grounded in considerations of retributive desert. Mercy here finds its place within the communicative framework of punishment as a consideration of charity rather than justice—a source of reasons, even sometimes obligations, but not of a right to lenient treatment—one that is responsive to the plight of the wrongdoer as someone facing a deserved punishment. This is one obvious way to interpret the relatively lenient sentence—“penal servitude in the second division for a term of only eight years”—that the court imposed on Raskolnikov. Despite the narrator’s bland statement that Raskolnikov had not repented, the court found that sufficient elements of repentance were present in his case (along with other factors) to justify leniency towards him based—I would claim—on mercy:

The sentence of the court, however, was much more lenient than could have been expected from the nature of the crime, and that was perhaps almost entirely due to the fact that the criminal, far from trying to justify himself, seemed to be anxious to incriminate himself more and more . . . The fact that he had made no use of the things he had stolen was ascribed partly to his awakened remorse and partly to the circumstance that at the time the crime had been committed he was not in full possession of his mental faculties . . . Finally, Raskolnikov’s confession at the time when the whole case had become so unusually confused as a result of the false confession in a fit of depression of the religious fanatic (Nikolay), and moreover at a time when there was no direct evidence against the real criminal and practically no suspicion against him . . . all this greatly contributed to the mitigation of the sentence.<sup>21</sup>

To clarify the view I am advancing here, let me contrast it with some other prominent lines of thought about (a) mercy and (b) the punitive significance of repentance.

(a) First, mercy is a genuine value alongside retributive justice. It grounds a charitable concern for the welfare of offenders as agents liable to (deserved) hard treatment and is a source of *pro tanto* (or defeasible) reasons for punishing them less harshly than they deserve. In this way, it is distinguished from mere leniency in sentencing, which may or may not have value and, even if valuable, may or may not realize the specific value of mercy. Lenient treatment involves punishing an offender less severely than one is entitled to punish them on the grounds of retributive desert or legal authority. But an act of leniency may have no moral value, indeed it may even

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<sup>21</sup> DOSTOYEVSKY, *supra* note 6, at 545.

be grossly unjust and corrupt, as in cases in which mild sentences are motivated by racism or class prejudice. And even when leniency in sentencing has moral value, it need not possess the value of mercy. Judges may legitimately impose shorter prison sentences than those deserved by criminal offenders in order, say, to reduce the massively escalating cost of the penal system. Although a clear case of leniency, this is not a manifestation of mercy, since the mild treatment is not motivated by concern with the offenders' well-being but rather by large-scale considerations of social utility.

The contrast between mercy and leniency explains why we should treat with caution James Q. Whitman's provocative thesis that the Nazi regime's widespread deployment of "grace" powerfully exemplifies the European tradition of "the sovereign as merciful patron."<sup>22</sup> Whitman claims that both the Nazi and contemporary American criminal justice systems give expression to a politics of mass mobilization that tends to issue in a harsh form of retributivism. But in the Nazi case, there was a countervailing force, i.e., the Continental traditions of mercy, "and to that extent, there was a shade *more* of a drive toward dignity, and even mildness, in punishment in Nazi Germany, at least for ordinary criminals, than there is in America today."<sup>23</sup> To establish that the Nazis extensively engaged in the merciful treatment of offenders, rather than the morally ambiguous activity of dispensing of leniency, we should have to be convinced that (a) the punishments that were reduced or withheld were genuinely deserved as a matter of retributive justice (Whitman's qualifying reference to "ordinary criminals" is presumably partly addressed to this concern), and (b) that the lenient deviation from what might have been imposed as deserved reflected an appropriate sensitivity to charitable reasons. In the absence of establishing (a) and (b), Whitman can at best claim that Nazi officials were more lenient than their contemporary American counterparts. Since leniency as such is not valuable, his portrayal of "merciful Nazis" lacks the sort of ironic significance it might otherwise have possessed.

Two widely-credited dogmas about mercy are also worth addressing here. The first is that the granting of mercy is inherently "free," "discretionary" or "gift-like" in character.<sup>24</sup> If the discretionary character of merciful acts means that they are not grounded in reason, then this is incompatible with mercy being an authentic value and, therefore, a source of objective reasons for punishing certain offenders less severely than they deserve. If, instead, the claim is that there can never be an *obligation* to grant mercy to offenders, then it seems implausibly pre-emptive. Obligations are reasons of a certain stringent kind, i.e., they are categorical (they apply to us independently of how we are motivated) and exclusionary (they put out of play some reasons that might otherwise bear on us, as opposed to being weighed against them in all-things-considered deliberation). It is not obvious that the standard grounds for

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<sup>22</sup> JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 150 (2003).

<sup>23</sup> *Id.* at 203.

<sup>24</sup> I summarize in this paragraph arguments developed more fully in John Tasioulas, *Mercy*, 103 *PROC. OF THE ARISTOTELIAN SOC'Y* 101 (2003).

mercy—e.g., the offender’s repentance, illness or deprived background, etc.—are inherently incapable of generating an obligation to temper the punishment that is deserved as a matter of retributive justice. There is certainly no reason to accept a mere stipulation, either way, on this point. The thesis that there can never be an obligation to show mercy seems to fare no better when the obligation is understood as one imposed by law. Instead, the grain of truth in the supposedly “free” quality of mercy is that, even when there is a moral duty to show mercy, the offender standardly does not have a *right* to it, i.e., the duty is an “imperfect” one. And the reason for this is that, on an interest-based conception of moral rights, the offender’s interest in mercy, taken by itself, is ordinarily insufficient to generate such a duty (especially in light of the standing obligation of justice to mete out a deserved punishment).

The other familiar dogma about mercy is that it is importantly distinguished from justice by its “particularity:” it is a value that demands attention to the intricate details of an offender’s conduct, attitudes, character and life-history in a way that eludes capture in any set of legal rules or principles.<sup>25</sup> Insistence on this feature underlies much unhelpful waxing lyrical about mercy’s “inexorable mystery.”<sup>26</sup> But mercy is no more inherently particularistic than its foil, retributive justice. The demands of retributive justice, too, cannot be exhaustively captured once and for all in any set of legal rules or principles. This is why recourse is traditionally had to equity, conceived as a particularized sense of justice that takes into account all the relevant features of a case at the stage of adjudication, in order to rectify injustices that would be consequent upon a strict application of legal norms.<sup>27</sup> Of course, one reason mercy has been strongly identified with a “particularist” focus is that the distinction between equity and mercy is frequently ignored, so that the latter is simply identified with the former. That it should be so identified is unsurprising, given that modern liberal political thought confers on justice such an exalted status that other political values tend either to fade from view or else to be re-interpreted as modes of justice. But it is a key feature of the pluralistic version of the communicative theory of punishment that I have developed that it accords retributive desert a central role in justifying punishment without making desert the *exclusive* determinant of whether to punish or how much to punish in any given case.

Another way of trying to make sense of “particularity” as a distinguishing mark of mercy is by requiring that the granting of mercy be responsive to features of the criminal wrongdoer’s actions, attitudes, life-history, etc. over and above the mere fact that he is liable to a certain level of deserved punishment. Perhaps this is what lies behind Austin Sarat’s rhetorical question about Illinois Governor George Ryan’s mass commutation of the sentences of all death row prisoners: “how could his decision be merciful when it was directed not to particular individuals, but to everyone on death

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<sup>25</sup> This is a major theme in AUSTIN SARAT, *MERCY ON TRIAL: WHAT IT MEANS TO STOP AN EXECUTION* 79, 84, 118 (2005).

<sup>26</sup> *Id.* at 115.

<sup>27</sup> For more on the relation between equity and mercy, see Tasioulas, *supra* note 24, at 110–14.

row?”<sup>28</sup> Now, it is true that in general the justified granting of mercy conforms to this revised particularity condition: mercy on the basis of repentance is a paradigm case in this connection. But this condition hardly seems a *necessary* feature of merciful decision-making. Recall, for example, that the deserved punishment for a given type of crime, even when the details bearing on the gravity of a particular instance of it are taken into account, is likely to fall within some fairly broad range. Let us assume, for example, that both capital punishment and life imprisonment are within the range of punishments that may be inflicted as deserved on the perpetrators of certain especially heinous murders. Knowing this, a legislature (or a judge, or a governor, etc.) might impose the lesser of these punishments out of a generalized concern for the welfare of offenders who are convicted of such murders. If they do so, why should we deny that their decisions realize the value of mercy? They certainly don’t believe that the offenders do not deserve to be punished more severely or that they have a right to the milder punishment. But nor are their actions arbitrary, hence lacking in value: they are based on a charitable concern for those who might otherwise be subject to the harsher punishment.

(b) On the second theme, let me compare Jeffrie Murphy’s discussion of the significance of antecedent repentance within a broadly retributive theory of punishment with my account. Murphy contends that such repentance can be a ground for leniency in sentencing under both character and grievance versions of retributivism. Character retributivism holds that “evil people are to be punished in proper proportion to their inner wickedness.”<sup>29</sup> Even if its proponents adopt the further requirement that an act or omission is necessary to trigger criminal liability, the amount of punishment deserved according to this theory will depend upon the underlying wickedness of character that the act or omission manifested. Now, it is fairly evident that, if the amount of punishment deserved must be proportioned to the wickedness of the wrongdoer’s overall character, and if since committing the wrong he has shown genuine signs of repentance, there will be a reason to suppose that his character is morally superior to an unrepentant offender in otherwise similar circumstances. This means he deserves to be punished less severely than he might have been but for his repentance; and, because this is what he deserves, the conclusion is an implication of retributive justice rather than some independent norm of mercy that tempers the requirements of justice.<sup>30</sup>

However, as Murphy himself has argued, character retributivism is a deeply problematic theory. It is both morally problematic and, more to the point for our purposes, it faces grave problems as a justification of punishment in a secular liberal state. As Murphy observes, character retributivism has its origins in the context of divine punishment.<sup>31</sup> We can certainly credit God with the power to perceive, and

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<sup>28</sup> SARAT, *supra* note 25, at 118.

<sup>29</sup> Jeffrie G. Murphy, *Moral Epistemology, the Retributive Emotions, and the “Clumsy Moral Philosophy” of Jesus Christ*, in *THE PASSIONS OF LAW* 153 (Susan A. Bandes ed., 1999).

<sup>30</sup> Murphy, *supra* note 20, at 157.

<sup>31</sup> Murphy, *supra* note 29, at 153.

accurately weigh up without succumbing to bias, self-deception or hypocrisy, the facts that determine the moral worth of our characters. The ability of legal officials of the state, by contrast, to arrive at such assessments is subject to serious cognitive and moral limitations. But even with these constraints factored out, there remains the basic problem that character retributivism is highly intrusive in its implications for state action. It requires the state to delve into the innermost moral condition of its citizens, to make an exhaustive accounting of all those features of our lives—desires, wishes, deeply-held convictions, many of them unspoken, hidden and even sub-conscious—that form part of our moral characters. But this sort of activity runs foul of the requirement that the liberal state should respect the autonomy of its citizens. After all, how can we be autonomous centres of decision-making if every aspect of our thoughts, motivations and character traits is liable to be held up to public scrutiny with the severity of the sentence hanging in the balance?

It is largely for reasons of this sort that the retributive norm I endorse is a species of what Murphy calls “grievance retributivism.” On this view, punishment is deserved as blame for certain forms of harmful and culpable conduct for which individuals may be held responsible. So, it is conduct, rather than character, that is the trigger of criminal liability. Moreover, the severity of the deserved punishment must be proportionate to the harm and culpability the wrongdoing involves. The considerations that fix the gravity of the wrong can ordinarily be identified without any deep-going investigation into the wrongdoer’s moral character. However, Murphy believes that even under the theory of grievance retributivism, it may be obligatory to show leniency to the repentant offender. This is because we can take the repentance he has already exhibited as a form of suffering, which can in turn be seen as punishment he has already undergone.<sup>32</sup>

This is the view that Murphy himself finally endorses. Mitigation of punishment on the grounds that an offender has already been “punished” by an unauthorized third party—for example, a beating administered by a vigilante mob—seems appropriate. Why not extend the possibility of such mitigation to cases in which the punishment is self-inflicted? However, this argument suffers from two large difficulties, and this is so even if we are willing to countenance the slightly strained idea that punishment can be self-inflicted. First of all, the scope for repentance-based mitigation is severely restricted. Punishment involves the infliction of hard treatment, some form of material deprivation over and above the pangs of a guilty conscience. Only those cases of antecedent repentance in which the offender has undergone a self-imposed penance, e.g., years spent donating his services to a soup kitchen or working in a disaster area, are plausibly interpreted as involving self-inflicted punishment in the relevant sense. This fails to cover those far more numerous cases, like Raskolnikov’s, in which some significant degree of repentance is evident, but nothing like a penance has been undergone. Second, even when the offender has undergone a penance, it will normally be qualitatively different from legal punishment. For it will have been

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<sup>32</sup> Murphy, *supra* note 20, at 157.

undergone at his own discretion and will typically also be a private act of contrition rather than one that bears a public meaning accessible to the victim and the wider community. Legal punishment, by contrast, is something inflicted on the offender irrespective of his choice, and it provides him with a *public* vehicle for manifesting his repentance.

The view I have advanced, by contrast, is that antecedent repentance can have significance under a norm of mercy. This norm is distinct from the norm of retributive desert, whether in its character or grievance forms, which is a norm of justice. Mercy expresses charitable concern for the wrongdoer, and it generates *pro tanto* reasons to punish him less severely than he deserves. Not being a norm of justice, there is no implication that mercy is a basis for concluding that the offender deserves to be punished less severely because of his repentance or that he has a right to less severe punishment. Desert and rights fall within the domain of justice, not charity. But, in appropriate cases, there may be an obligation to show mercy, one that stands in a potentially conflictual relationship with the obligation of justice to impose the deserved punishment. The version of the communicative theory I have relied on here has the advantage that it enables us to affirm an attractive value pluralism within the overarching structure provided by the formal end of communicating censure for wrongdoing. This allows both considerations of justice (in the guise of retributive desert) and those of charity (in the guise of considerations of mercy that temper justice) to contribute to an all-things-considered judgment regarding whether to punish an offender or how much punishment to inflict in a given case.

#### IV. LIBERAL UNEASE ABOUT REPENTANCE: “ANOTHER UNIVERSE OF DISCOURSE”?

Let us now consider some of the unease my argument is liable to excite among those with broadly liberal political sympathies. The sort of reaction I have in mind is nicely crystallized by an episode in J.M. Coetzee’s novel *Disgrace*.<sup>33</sup> The chief protagonist, David Lurie, is a literature professor who is brought before a university committee of inquiry to face accusations of sexually abusing a student and falsifying academic records. Not satisfied with his seemingly imperious and unrepentant plea of guilt, members of the committee urge him to sign a public statement (which they have prepared in advance) apologizing to both the victim and the university and affirming his preparedness to “accept whatever appropriate penalty may be imposed.” Unwilling to succumb to the mixture of threats and entreaties, Lurie eventually declares:

I appeared before an officially constituted tribunal, before a branch of the law. Before that secular tribunal I pleaded guilty, a secular plea. That plea should suffice. Repentance is neither here nor there. Repentance belongs to another world, to another universe of discourse.<sup>34</sup>

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<sup>33</sup> J.M. COETZEE, *DISGRACE* (1999).

<sup>34</sup> *Id.* at 58.

This response will, I think, strike a sympathetic chord with many. It is simply not the role of a public institution such as a university, they will insist—let alone the more powerful and anonymous organs of the state—to be in the business of eliciting repentance, as opposed to inflicting punishments for proved wrongdoing. Repentance, it seems, belongs to “another universe of discourse”? But in what sense, if any, might this claim be true?

#### A. Religion

One explanation fastens on the adjective “secular.” It is not without some symbolic significance that the chairman of the committee of inquiry into Lurie’s misconduct is a professor of religious studies. Repentance is a notion with a rich religious heritage.<sup>35</sup> Religious tradition construes sin as a violation of God’s law, hence the alienation of the sinner from God, and conceives of repentance as a way of atoning for the sin, a return to communion with God. It demands a complete transformation of the sinner, a re-orientation of his innermost being towards God and away from sin. If so, how can repentance play the role I have assigned it in a liberal state, whose public actions are supposed to be justified by reference to values that do not presuppose the truth of (any particular) religious faith?<sup>36</sup> Now, we should not underestimate the formidable difficulties involved in seeking to validate, for use in the domain of secular politics and law, concepts that carry a historical deposit, as Bernard Williams would put it, of religious interpretation. The vital positive component of any response to this problem is that the concepts in question, even though they are often driven underground because of their religious associations, are indeed necessary to proper deliberation in the political sphere. This is what I have been trying to show about the notions of repentance and mercy, despite the tendency for both values either to be eliminated or re-interpreted in terms more hospitable to our secular self-image, such as the attempt to construe leniency in sentencing on the basis of repentance as a matter of retributive justice. The negative component of the response will stress two familiar points. First, that the *genealogy* of any particular concept is a matter distinct from whether that concept may be properly affirmed by us, here and now, as eligible to play an important role in our political and legal thought. Second, that the notion of repentance, as I have elaborated it so far, makes no appeal to the religious concept of sin or to one’s standing in relation to a supreme being; instead, I have characterized it as a *morally* required response to *moral* wrongdoing. And moral wrongdoing, in turn, has been explicated in terms of non-compliance with reasons that are generated by correct moral values. Atonement through repentance involves recovering one’s

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<sup>35</sup> There is a helpful exploration of the idea of repentance in Judaism, Christianity and Islam in SOLOMON SCHIMMEL, *WOUNDS NOT HEALED BY TIME: THE POWER OF REPENTANCE AND FORGIVENESS* (2002).

<sup>36</sup> For reasons of this sort, William Blackstone contended that atonement was a matter to be “left to the just determination of the supreme being.” 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* \*11, *quoted in* GEOFFREY SCARRE, *AFTER EVIL: RESPONDING TO WRONGDOING* 133 (2004).

standing in relation to those values as a responsible moral agent who is properly subject to their authority and should align his attitudes and behavior with them. Of course, it might be claimed that we cannot make sense of correct moral values—especially if the notion of correctness is meant to import some meaningful element of “objectivity”—except as the values that God has laid down for us. But the latter claim is deeply controversial, and addressing it would lead us too far afield.

### B. *Moral Wrongdoing*

The emphasis in the preceding reply on repentance as a moral response to moral wrongdoing might only serve to provoke a further challenge. For it may be thought that criminal wrongdoing is *sui generis*, not a species of moral wrongdoing (as the communicative theory supposes it to be in making it the object of moral censure and in hoping for repentance from the wrongdoer). Instead, criminal wrongdoing simply consists in the violation of certain properly enacted legal rules: this is one way of understanding Lurie’s claim that he entered a “secular plea” of guilt. But it is only *moral* wrongdoing that is an appropriate object of repentance, hence repentance has no place in legal punishment.<sup>37</sup> We find an echo of this line of thought in one of Raskolnikov’s self-justifying soliloquies:

“Why does my action strike them as so hideous?” he kept saying to himself. “Is it because it was a crime? What does ‘crime’ mean? My conscience is clear. No doubt I have committed a criminal offence, no doubt I have violated the letter of the law and blood was shed. All right, execute me for the letter of the law and have done with it!”<sup>38</sup>

Still, this line of argument is multiply flawed. To begin with, it is arguable that the very idea of *legal obligation* is morally-freighted, so that to claim that one is under a legal obligation is to assert (whether sincerely or not) that a moral obligation exists in virtue of the law.<sup>39</sup> Second, regarding the argument’s invocation of *criminal law* in particular: how is it possible to distinguish a law establishing a crime and imposing a punishment for its commission from one imposing a licence fee except by reference to the fact that the former involves a condemnation of the behavior as morally wrong? Third, if punishment is incurred simply for breach of legal rules, rather than for moral

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<sup>37</sup> This argument was advanced by J.D. Mabbott, who considered it one of its merits that it explained why repentance is irrelevant to whether offenders should be punished or how much punishment should be inflicted on them. See J.D. Mabbott, *Punishment*, 48 MIND 152, 157 (1939). It has been revived, more recently, by Leszek Kolakowski: “Legal punishment is for transgressions of the law, but retribution is for sin, and sin is part of the moral order of the universe. The ideas of sin, of evil, of guilt, of repentance, are beyond the scope of the legal system; the law can function well without them.” LESZEK KOLAKOWSKI, MY CORRECT VIEWS ON EVERYTHING 188 (2005).

<sup>38</sup> DOSTOYEVSKY, *supra* note 6, at 552.

<sup>39</sup> See Joseph Raz, *Hart on Legal and Moral Duties*, 4 OXFORD J. LEGAL STUD. 123 (1984).

wrongdoing (in virtue of such breach), then it becomes extremely hard to see how legal punishment might be justified. Why should the breach of legal rules—any more than violations of the laws of etiquette or football—justify the infliction of the sort of hard treatment that is characteristic of the institution of criminal punishment?

Perhaps what underlies this objection is the reasonable liberal resistance to progressing seamlessly from identifying conduct as morally wrong to proposing its criminalization. Not all species of moral wrongdoing should be criminalized, e.g., essentially “private” wrongs such as adultery or supposedly “harmless” wrongdoing such as mildly offensive or inconsiderate behavior. But what is valid here can be retained without denying that violations of the criminal law are properly punishable only if they involve genuine moral wrongdoing. First, not all moral wrongs should be criminalized; instead, only those wrongs that attract the appropriate public interest are even candidates for criminalization. There is no commitment, therefore, to the extravagant thesis that an action’s being morally wrong in itself generates a *pro tanto* reason to criminalize it. Second, even if a species of moral wrong is in principle criminalizable, the state’s legitimate power to inflict that punishment will usually be subject to the satisfaction of various rule of law requirements. For instance, it must have clearly prohibited that form of conduct and specified the relevant punishment by a legal enactment that affords those subject to it adequate prior notice—*nulla poena sine lege*. Third, some forms of conduct are morally wrongful in virtue, in part, of the legal rules that have been appropriately laid down. That is, they belong to the category of *mala prohibita* as opposed to *mala in se*: the wrongful character of these actions is not fixed independently of convention or institutional fiat. Thus, it is morally wrong to drive on the right hand side of the road in Britain only because there is a properly enacted law to that effect. But, of course, the moral force of that law derives from the independent moral requirement to establish a rule of the road and to comply with it once it has been established. So, even *mala prohibita* are a species of moral wrongdoing.

### C. *Autonomy*

A critic might reply that we have not yet confronted the fundamental objection to my argument. This is the conflict generated with the central value of political liberalism—freedom itself. Now, in pursuing this objection, it is helpful to employ James Griffin’s distinction between autonomy and liberty when explicating the idea of freedom.<sup>40</sup> Both values are protections of our status as responsible moral agents (or “personhood,” as Griffin calls it), i.e., our status as beings with the ability to choose and pursue, from a range of options, our conception of a valuable life. Autonomy and liberty protect different stages in the unfolding of this capacity. *Autonomy* protects us in assessing various options regarding how to live—in seeking to distinguish between true and false values, good and spurious reasons—and reaching a decision in the light

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<sup>40</sup> In this paragraph I draw on JAMES GRIFFIN, HUMAN RIGHTS: COMPLETING THE INCOMPLETE PROJECT chs. 6–7 (forthcoming 2007).

of this assessment. The standing threats to autonomy include indoctrination, domination, manipulation, conformity, false consciousness and certain kinds of immaturity. But even if we are autonomous in this way, we need in addition the *liberty* to pursue the decisions we have reached. The standing threats to liberty are compulsion, constraint and impoverishment of life options.

Equipped with this distinction, someone might insist that any attempt by sentencers to make wrongdoers repent unacceptably violates their autonomy. Many forms of hard treatment inflicted as punishment, e.g., incarceration, fines, community service orders, and so on, deprive the offender of the liberty to which he is normally entitled. But even in being so deprived, there is no attempt to interfere with his autonomy, i.e., with his assessment and choice among different conceptions of a worthwhile life. Consistently with the communicative theory, these sanctions can be understood as having a purely “external” aim: to visit upon the offender hard treatment that communicates justified censure for his wrongdoing. There need be no attempt to bring about some “internal” effect in the wrongdoer, such as a thoroughgoing change of heart. Whether or not he undergoes his punishment as a penance is entirely a matter for him, not something that should guide the sentencing authority in imposing a punishment.<sup>41</sup> But the problem with trying to engineer repentance through hard treatment, it will be said, is that it is a gross interference with the offender’s autonomy. This sort of intrusion into his innermost self fails to respect his status as a responsible moral agent: it is an attempt coercively to manipulate his deepest moral feelings and convictions, pre-empting his own decision-making about how it is best for him to live. If the process succeeds, the resultant condition will have been achieved heteronomously and, as in indoctrination or domination, the offender’s rational capacities will have been overborne. If it fails, then the offender will at best have been forced to make certain insincere protestations of guilt and repentance that he will inevitably find demeaning. But either way, his status as a responsible moral agent is violated.

The autonomy objection can be readily extended to my proposal that repentance is a ground for mercy. This is one way of interpreting what is disturbing about the episode from *Disgrace*. The pressure exerted by the committee on Lurie to issue a public apology is susceptible to the version of the autonomy objection we have already considered: it is an attempt to manufacture repentance in a way that rides roughshod over Lurie’s capacity to respond autonomously to his wrongdoing. But one might also be troubled on autonomy grounds by the very fact that the committee sought to probe the moral quality of his response to his own wrongdoing in the first place, rather than simply confining itself to determining whether he was guilty. For, the objection goes, subjecting an offender’s moral responses to public scrutiny (especially when the amount of punishment to be inflicted turns on the outcome of that scrutiny), invades and threatens to manipulate those responses. This fails to respect his nature as a rational agent whose attitudes and decisions on such matters

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<sup>41</sup> See the contrast between “externalist” and “internalist” versions of the communicative theory of punishment in VON HIRSCH, *supra* note 17, at 73.

should reflect his own independent appreciation of the balance of reasons. Now, just this objection might be made to my claim that repentance is a ground for mercy towards the offender, since it involves licensing the same sort of public scrutiny of the offender's responses, generating a comparable threat to his autonomy.

These concerns about autonomy are undeniably important. The mistake is to suppose that they totally preclude the role for repentance that I have advocated, as opposed to constraining the character and fulfilment of that role. First, the concern to encourage or identify repentance can be pursued consistently with respecting autonomy; indeed, it is a presupposition of genuine repentance that it is a manifestation of the wrongdoer's autonomy. Second, the sort of repentance at issue need not always be of the deep, character-transforming sort, the fostering of which by the state seems to pose the gravest threat to autonomy. Let me elaborate both replies.

The defender of the communicative theory accords intrinsic value to repentance achieved through undergoing punishment as a penance only insofar as it manifests the offender's own autonomous response to his wrongdoing. So, there is no sense in which autonomy stands here as an independent consideration that contradicts the pursuit of repentance through punishment. On the contrary, it belongs to the very character of repentance as a morally correct response to the offender's wrongdoing that the change in attitudes, beliefs, future conduct and character that it requires should be the product of the offender's autonomous decision-making. To coerce, dominate or manipulate an offender into feeling guilt, apologizing and reforming his conduct and character is not to bring about genuine repentance. Indeed, one of the strengths of the communicative theory is that it takes seriously the offender's status as a responsible moral agent, thereby ruling out special or general deterrence as an independent rationale for punishment. A related consequence is that the hoped-for repentance cannot be secured in a way that bypasses or disrespects the offender's rational agency.<sup>42</sup>

What this first line of response suggests is that, in pursuing the instrumental concern with repentance, sentencing authorities need to be extremely mindful to do so in ways consistent with the value of autonomy. It does not follow that acting on this concern is destined to transgress the requirements of that value. When a judge, for example, imposes a community service order on a teenaged offender convicted of damage to property, in preference to an equally severe fine or period of detention, and

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<sup>42</sup> As R.A. Duff has put the point:

[Penitential punishment] is an exercise in forceful moral communication, which we hope will persuade them to recognize and repent their wrongdoing, and to accept their punishment as an appropriate penance, through which they can make appropriate reparation for their crime. But—as with any mode of communication with a rational agent—it must be left to them to be persuaded, or not, by the rational moral force of their punishment; it must, in particular, be left open to them to remain unpersuaded and defiant. We can try to force them to hear the message that their punishment aims to convey; but we must not try to force them to accept it—or even to listen to it or to take it seriously.

Duff, *supra* note 16, at 302.

does so in the hope that by being required to remove illegal graffiti the offender will be confronted with, and led to reflect upon, the misery that criminal activity of the kind in which he engages causes to his own community, why should we suppose that disrespect must have been shown to the latter as a rational agent capable of reaching his own assessment of his past conduct? On the contrary, the punishment can only perform this communicative function if it respects the agent's self-determination: he is required to hear the message, but remains free to ignore it or reject it. This is not to say that imposing punishments that perform this repentance-fostering role without transgressing the offender's autonomy is a straightforward task—but no defender of the view assumes that it is.

A similar conclusion seems warranted regarding the role of repentance as a ground for mercy. The concern with autonomy sets limits to the permissible means that sentencing authorities may adopt in seeking to determine whether the offender has repented. There are undeniable and complex problems here. But their nature is essentially practical, to a large extent raising questions of institutional design; they do not justify the wholesale exclusion of repentance as a ground for mercy. Two related points are worth underlining. First, the facts indicative of repentance will often in any case be readily discernible without any intrusive probing of the offender's personal responses, *e.g.*, cases in which the offender has already apologized to the victim and turned himself in to the police or exhibits good behavior whilst undergoing a prison sentence. Second, even if further, more intimate information about the change in the offender's attitude and character might be thought relevant, there are certain procedural safeguards that can be adopted to protect his autonomy. Perhaps the most important of these is that mercy on such grounds is ordinarily for the offender to request, rather than for the state to take the initiative in bestowing. Related to this, the offender should retain discretion as to what information of this sort is disclosed to the sentencing authority in making his case for mercy.<sup>43</sup>

Let us turn now to the second broad reply to the autonomy objection. That objection thrives mostly on the assumption that it is full-blown repentance, of the character-transforming Montaignean variety, that is the primary focus of the communicative theory I have elaborated. For it is the fostering of such deep-going repentance that seems to pose the gravest threat to autonomy, as does the attempt to establish whether such an inner transformation has taken place. But this assumption is doubly mistaken. First, as I argued in Part I, there are many cases of criminal wrongdoing in which the process of repentance, even if tolerably complete, need not sound a deep note in the offender's psyche. In these cases, the external manifestations

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<sup>43</sup> This raises a second self-subversion problem, in addition to that noted in footnote 5, *i.e.*, when the repentant offender pleads for a reduced sentence on the grounds of his repentance, how is such a plea compatible with genuine repentance, given that the latter involves willingness to accept a deserved punishment? Again, I must put this problem to one side, noting only in passing that a starting-point for its resolution consists in the following observation: on the pluralist account of punishment I defend, making a claim for *mercy* on the basis of repentance does not commit one to the belief that one *deserves* to be punished less in virtue of one's repentance. Hence, one can believe that one deserves a certain punishment yet also enter a plea for mercy on the grounds of repentance.

of repentance—formal apology, an apparently sincere avowal of guilt and a commitment not to re-offend—will usually suffice, both to meet the instrumental concern and to provide a basis for mercy. Second, even in cases in which a deeper, character-transforming form of repentance is appropriate, this does not deprive more outward manifestations of their significance. Three considerations assume importance here. First, the significance of hope as a political value, especially in the context of showing leniency to offenders on the grounds of repentance: this is a value that bids us to take an open, uncynical attitude towards our fellows, embracing the possibility that those who have committed serious wrongs may undergo a change of heart. The second is the fact that formal apologies and confessions, and similarly the undergoing of punishment as a penance, i.e., elements (c) and (d) of repentance distinguished in Part I, have a significance independent of the evidence they furnish for the sincerity of the offender's feelings and judgment of self-blame. In making a formal apology, for example, the wrongdoer interposes himself, as an agent, between his wrongdoing and his audience, and deliberately acknowledges his wrongdoing, takes responsibility for it, and makes a public declaration of his self-blame. This is the difference, as Richard Moran aptly puts it, between "remorse . . . *expressing itself* in a person's face or action, and *the person* giving expression to his remorse."<sup>44</sup> The value of his doing so does not reduce to further confirming the presence of elements (a) and (b), as is shown by the fact that an offender can feel the need to make a public apology even when the sincerity of his self-blame is beyond doubt both to him and to his audience. Equally, (c) and (d) can have significance even when we are still far from completely confident of the sincerity of the wrongdoer's penitent understanding of his wrongdoing. This is because of the third feature that is relevant here: the ritualistic character of formal expressions of repentance, such as confession, apology and penance. For example, the fact that an offender is prepared to plead guilty to the charges laid against him, to apologize to the victim and to condemn himself for his wrongdoing, all have significance as part of a process of repentance. They are formal rituals of repentance, just like the ritual of acquiescing in a properly imposed penance. There is no necessity to probe the inner workings of his psyche to see if they are truly revelatory of the underlying state of his character before they are accorded significance. The same may be said about mercy-grounding facts, such as that an offender has voluntarily confessed to his wrongdoing or endured his punishment up until now in a co-operative, undefiant spirit, desisting all the while from any criminal behavior. Of course, these repentance rituals can be subverted or nullified if we have independent reasons to doubt the sincerity of the self-understanding to which they purport to give expression. But this does not deprive them of significance when such countervailing evidence is absent.

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<sup>44</sup> This is a specific manifestation of a general distinction between "expression in the impersonal sense of the manifestation of some attitude or state of mind, and expression in the personal sense as the intentional act of one person directed to another." Richard Moran, *Problems of Sincerity*, 105 PROC. OF THE ARISTOTELIAN SOC'Y 341, 351 (Supp. 2005).

*D. Moral Perfectionism*

Our imagined liberal skeptic may remain undeterred. Even if the place accorded to repentance does not directly transgress the offender's autonomy, it nevertheless puts the state in the business of trying to foster healthy moral responses and improved moral characters among its citizenry. But the role of giving moral lessons is not one that the liberal state may legitimately undertake, he might claim, since doing so constitutes moral perfectionism: deploying state power on the grounds that it will lead to the moral improvement of those subject to it. In von Hirsch's words:

The State cannot be expected to have the kind of insight and sympathetic understanding that an abbot should have for a small number of voluntarily-enlisted charges explicitly sharing a common purpose. And citizens have not entrusted their moral development and spiritual welfare to the State. Why, therefore, should the State be entitled to use its coercive powers to seek to induce moral sentiments of repentance? . . . A penance seeks to reach deeper than mere penal censure does: in order to elicit the requisite attitudes of repentance, the sanctioner needs to inquire into the person's feelings—or at least, fashion the sanction so that it is designed to reach those feelings. Might this not be overreaching on the State's part . . . Might not the person object, nevertheless, that the penance is an inappropriate form of State intrusion, that while he should be treated as *capable* of moral judgement, the nature of his *actual* attitudinal response to the State's censure is his own business?<sup>45</sup>

I leave aside von Hirsch's reference to the cognitive and affective limitations of the state—its supposed limited insight and sympathy. These are at best practical constraints; it would take a heroic effort to convert them into principled objections to the whole enterprise of pursuing a concern with repentance through legal punishment. We should also sideline the question of voluntary membership, but the reasons for doing so merit elaboration.

It is certainly the case that the voluntary character of an association can influence how those in authority may legitimately treat its members. But it does not follow that the concern to elicit or identify repentance has no place outside of a voluntary community of shared value commitments. The state's authority to concern itself with repentance stems not from any voluntary commitment made by its citizens but from the fact that doing so enables those citizens better to comply with the values that they already have reason to comply with.<sup>46</sup> In particular, it facilitates criminal wrongdoers in atoning for their wrongs by reintegrating themselves with those values. And here it must be stressed that the correct values are to be understood as objectively correct,

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<sup>45</sup> VON HIRSCH, *supra* note 17, at 73–74.

<sup>46</sup> For this view of authority, see JOSEPH RAZ, *THE MORALITY OF FREEDOM* pt. I (1986).

rather than whichever values happen to be highly prized or treated as correct by a given community. This contrasts with a worrying—or, perhaps, just potentially misleading—tendency among some defenders of the importance of repentance in legal punishment to articulate their theory under the auspices of a general political communitarianism.<sup>47</sup> One consequence of this has been to accord excessive significance to the political community and its values and, relatedly, to stress the need for the state to act in the light of values that the offender also shares as a member of that community. But, of course, all too often community values are flawed and, even when they are not, offenders may not recognize them as their own. The latter fact motivates von Hirsch's objection to penitential theories of punishment. But no such requirement of "shared values" follows from my explication of the value of atonement. Atonement, as I explained it, is first and foremost reintegration with objective values that apply to the offender whether he identifies with them or not. If these values are "shared," it is primarily in the sense that all rational agents have good reason to comply with them. Of course, we best comply with these values only in the context of membership of a political community, partly because only in this way can they acquire the determinacy needed to be adequately action-guiding. So in becoming at-one with correct values we also become at-one with our community; but, as my discussion in part II stressed, the latter form of atonement is derivative from the former, since it is only if our community adheres to sound values in some measure that reintegration with it has value. It is a great mistake to put the community, and the values it happens to espouse, in the driver's seat.

Consider, now, some further objections under the heading of (supposedly, illegitimate) moral perfectionism. The general objection asks how a liberal state, committed to neutrality with respect to the good, could possibly justify its actions by reference to the value of repentance. The more specific objection asks why the concern with character, which was sidelined with respect to retributive desert, suddenly acquires such importance when it comes to furthering repentance and granting mercy on its basis. How can this asymmetry be justified as anything other than arbitrary?

The two-pronged reply to the first question is that it is possible to maintain a liberal political perspective while rejecting state neutrality, i.e., that perfectionism is entirely compatible with due respect for the values of autonomy and liberty, and that the strongest version of liberalism is perfectionist in the manner of John Stuart Mill, T.H. Green, and contemporary philosophers such as Joseph Raz, William Galston, and George Sher. From the vantage point of a liberal perfectionism, the state can justify punishments in part by reference to the moral quality of the effect they have on the responses and characters of offenders, while at the same time respecting the autonomy of the latter. Clearly, vindicating such a general liberal perfectionism is not possible within the confines of this paper. But it is worth elaborating on a further point: the role I have advocated for repentance is fundamentally compatible with the political

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<sup>47</sup> See, e.g., DUFF, *supra* note 20; Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801 (1999).

theory of the most influential liberal advocate of anti-perfectionism, John Rawls. This is important because some defenders of the repentance view of punishment have, I think, needlessly raised the stakes in the dispute with their opponents by denying that an anti-perfectionist liberal could accept the idea of punishment as a penance (and repentance as a ground for mercy).<sup>48</sup>

Now, Rawls is hesitant in his embrace of the idea of neutrality, since its connotations are highly misleading and apt to suggest unworkable principles. In particular, he rejects any doctrine of neutrality of *effect* on the grounds of impracticability;<sup>49</sup> instead, he endorses a version of the principle enjoining neutrality of *aim*, i.e., “that the state is not to do anything intended to favour or promote any particular comprehensive doctrine rather than another, or to give greater assistance to those who pursue it.”<sup>50</sup> The basic idea, then, is that the justification of any state policy should never be that it will advance some comprehensive doctrine derived from philosophical theory, perfectionist ideals, or a religious creed. Now, this seems flatly inconsistent with the account of punishment I have advocated, since the latter presupposes objectively correct values, and appeals—among other things—to a philosophical theory of punishment, i.e., the communicative theory. This is true, but it is not yet the end of the story because it is reasonable to suppose that a Rawlsian liberal could embrace the practical substance of the view I have advocated as flowing from a *political* conception of justice, rather than any *comprehensive* doctrine (such as the doctrines of objectivity and retributivism on which I have relied).

A conception of justice is political in the Rawlsian sense, as opposed to being a comprehensive doctrine, only if (a) it is a moral conception that takes as its primary subject-matter the basic structure of a constitutional democratic regime, (b) it can be presented without presupposing any particular comprehensive religious, philosophical or moral doctrine, and (c) it is formulated in terms of certain fundamental ideas latent in the public political culture of a democratic society.<sup>51</sup> Rawls’ anti-perfectionism amounts to a rejection of the idea that furthering values that are not political in this sense can be the underlying rationale of state policy. However, this is perfectly compatible with the state aiming to foster certain moral virtues, beliefs, and responses among its citizens, provided doing so can be justified by reference to *political* values:

Even though political liberalism seeks common ground and is neutral in aim, it is important to emphasize that it may still affirm the superiority of certain forms of moral character and encourage certain moral virtues. Thus, justice as fairness includes an account of certain political virtues—the

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<sup>48</sup> See, e.g., Garvey, *supra* note 47, at 1857–58.

<sup>49</sup> This is the doctrine that “the state is not to do anything that makes it more likely that individuals accept any particular conception [of the good] rather than another unless steps are taken to cancel, or to compensate for, the effects of policies that do this.” JOHN RAWLS, *POLITICAL LIBERALISM* 193 (1993).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 192.

virtues of fair social cooperation such as the virtues of civility and tolerance, of reasonableness and the sense of fairness . . . The crucial point is that admitting these virtues into a political conception does not lead to the perfectionist state of a comprehensive doctrine.<sup>52</sup>

On the Rawlsian view, the liberal state may adopt policies with the aim of encouraging certain virtues and character traits—e.g., toleration and mutual trust—and also certain “forms of thought and feeling,” on the grounds that they help sustain a just basic structure in which there is fair social cooperation consistent with mutual respect between citizens regarded as free and equal.<sup>53</sup>

Now, my claim is that it is open to the Rawlsian liberal to endorse the practical substance of the views on repentance that I have advocated, but to do so on the basis of *political* values. This is because repentance can be plausibly construed as involving forms of thought, feeling, and character that help sustain a just basic structure. I cannot argue for this fully here, but simply stress three features indicative of the possibility of interpreting repentance as a component of a political conception of justice.

First, the repentance view concerns the state’s role in fostering, and acknowledging, an appropriate response to the violation of just criminal laws, not to wrongdoing in general. A central feature of a just basic structure is a system of criminal law, the purpose of which is to “uphold basic natural duties, those which forbid us to injure other persons in their life and limb, or to deprive them of their liberty and property, and punishments are to serve this end.”<sup>54</sup> Nothing has been suggested regarding the promotion of repentance more generally, e.g., in connection with moral or religious sins that do not involve (or are not considered under the aspect of) the violation of just criminal laws. Second, the value of repentance in response to the violation of just criminal laws can be plausibly elaborated in a free-standing way, without presupposing a comprehensive doctrine. Third, it is plausible to regard repentance as a value that flows from certain fundamental ideas implicit in the public political culture of a democratic society. To begin with, those values vindicate a conception of retributive justice, one that is desert-based. Indeed, Rawls goes so far as to endorse a form of retributivism.<sup>55</sup> There is no reason to deny that repentance is the appropriate (or, in Rawlsian terms, “reasonable”) response by the wrongdoer to his violation of criminal laws that uphold natural duties. Provided that the state respects the autonomy of offenders in fostering it, and in invoking it as a basis for mercy, there appears to be a powerful case for classing repentance among the values that form part of a political conception of justice for a constitutional democracy. That case consists

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<sup>52</sup> *Id.* at 194.

<sup>53</sup> *Id.* at 195.

<sup>54</sup> JOHN RAWLS, A THEORY OF JUSTICE 276 (1971).

<sup>55</sup> Indeed, in Rawls’ brief exposition, it appears to be a form of character retributivism: “Thus a propensity to commit such acts is a mark of bad character, and in a just society legal punishments will only fall upon those who display these faults.” *Id.* at 277.

in the idea that repentance by offenders helps strengthen the basic structure of a just society, since it involves actions, attitudes, character traits and virtues that manifest an acceptance of the natural duties enshrined in a just criminal law. In short, a doctrine substantially equivalent to the one I have advocated can be endorsed by a Rawlsian anti-perfectionist, since the former can be plausibly re-interpreted in strictly political terms.

I turn now to the specific objection, which is *ad hominem* in character. Don't the considerations that justify rejecting character retributivism also militate against the idea that the criminal justice system should be concerned with repentance? After all, in the case of the gravest crimes, it is a deep-going repentance that is called for, one that involves a transformation in the offender's orientation towards moral values. But if the state is debarred from positively justifying punishment on the grounds of the offender's morally defective character, how can it be concerned with bringing about a superior moral character or accord significance in sentencing to whether such a change has taken place? Perhaps a Rawlsian might be able to endorse the role for repentance I have advocated, and do so on strictly political grounds. But, the critic will then point out, Rawls also endorses a form of character retributivism. Yet I shied away from the latter in favor of grievance retributivism, while wanting to accord considerations relating to the *improvement* of the offender's character significance elsewhere within the theory of punishment. Isn't this inconsistent, or at least arbitrary?

I think not. The asymmetry with respect to the relevance of character can be justified in various ways. The most important point is that I have articulated the concept of retributive justice in terms of the notion of desert. And desert, in turn, I have suggested is most illuminatingly understood as action-focused. Now, of course, a character-based concept of retributive desert is not incoherent. So this first point is not decisive. But a second point takes up a lot of the slack. This is the differential impact that the asymmetry has on an offender's interests. By resisting assessments of character as a basis for retributive desert, one narrows the grounds of liability to criminal punishment. By contrast, repentance on the view I have proposed cannot perform the role of an independent basis for inflicting punishment. Instead, it has two roles: (a) in its instrumental role, it justifies the selection of an independently *deserved* level and mode of punishment that would be more efficacious in expressing and fostering repentance, and (b) in its role as a ground for mercy, it justifies inflicting a punishment on the offender that is less severe than that which might be inflicted as deserved. Thus, while repentance cannot justify punishing the offender more severely than he deserves (on the basis of grievance retributivism), it can justify punishing him more leniently than he deserves (on the basis of mercy). The offender, therefore, does not have the autonomy-based reason to resist my emphasis on character in the way that he does in the case of character retributivism. Two supplementary observations, already made in connection with autonomy, bear repeating here. First, the kind of repentance that the court is concerned to foster needn't be of a character-transforming sort; however, even when it is, its incidence may be legitimately inferred from public

statements and actions (e.g., a formal apology, a period of good behavior in prison) that do not require any intrusive investigation into the offender's psyche. Second, to a large extent, the claiming of mercy on the basis of repentance will be at the offender's discretion, so that it will be up to him to decide whether to make a plea for mercy and to decide what information he should deploy in making it. In character retributivism, by contrast, there is an obligation on the part of the sentencing authority to investigate the state of the offender's character.

So, in place of the specific objection's somewhat crude, "all-or-nothing" assumption that character is either relevant across the board in legal punishment, or it has no relevance whatsoever; my view articulates its *limited* yet significant relevance. This is just what we should expect from a theory, like the communicative theory of punishment, that is explicitly tailored to registering the import of a diversity of ethical considerations, some of which will be character-focused while others will not.

#### V. REPENTANCE BEYOND PUNISHMENT

Let me conclude by briefly registering the state's role in facilitating repentance achieved other than through legal punishment inflicted under the auspices of the criminal justice system. Now, this is in one sense a familiar topic in contemporary debates about punishment. Partisans of so-called restorative justice stress the importance of state-sponsored "repentance rituals"—such as family group or "community accountability" conferences—as a general *alternative* to legal punishment. If the offender is willing to undergo such a ritual, and does so successfully, then the need to subject them to punishment is obviated.<sup>56</sup> However, I would resist the supposition that repentance can, in this way, radically displace the concern with retributive justice embodied in the institution of punishment. Just as defenders of traditional retributive theories of punishment can be faulted for allowing justice to take up all the space of penal justification at the expense of mercy, so too the more unrestrained proponents of restorative justice can be faulted for the converse error of squeezing out retributive justice in the name of something akin to repentance-based mercy. Indeed, the mistake made by the latter goes deeper, since mercy is not a self-standing value; instead, it only generates dependent reasons, i.e., reasons that presuppose the existence of reasons of retributive justice that favour inflicting a certain level of punishment.

By contrast, my interest in the topic of post-punishment repentance arises mainly from the following facts. First, under the communicative theory an offender who has suffered the justified amount of punishment might remain stubbornly unrepentant. He may have had the opportunity to undergo the punishment as a penance, but he refused to take it up. But that he remains unrepentant is not a basis for inflicting any further punishment on him: the retributive norm is not instrumentalized to the goal of achieving repentance. So, additional punishment is not a permissible vehicle for

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<sup>56</sup> For an overview, see John Braithwaite, *Survey Article: Repentance Rituals and Restorative Justice*, 8 J. POL. PHIL. 115 (2002).

inducing his repentance. Second, even if the offender is not unrepentant after having undergone justified punishment, he may not be fully repentant. The work of repentance can be long and arduous, and it is completely unrealistic to expect that most offenders will, through undergoing their punishment as a penance, emerge fully repentant. Thirdly, even when the offender is fully repentant upon the completion of his sentence, others in society may fail to acknowledge this in the proper way, regarding him with apprehension and mistrust as an “ex-convict.” To some extent, his full *de facto* reintegration into the community depends upon others meeting him at least part of the way, and there may be little or no preparedness to do so among his fellow citizens.

All of these considerations suggest that offenders will often have an interest in repenting—or in making publicly manifest their repentance—that survives the expiration of their sentence. This is especially so when the offender, in virtue of his wrongdoing, suffers as part of his punishment some enduring demotion in standing (e.g., disenfranchisement) or incurs a social sanction that is not strictly part of the state-inflicted punishment (e.g., being struck off his profession’s register of authorized practitioners). Moreover, the community to which the offender belongs shares in this interest, given that atonement is a common good. The question is, what steps might the state take to facilitate and make vivid this process of repentance?

That repentance can be fostered outside the punitive context is a major theme of both novels to which I have made occasional reference throughout this article. In *Crime and Punishment* it is foreshadowed that Raskolnikov comes to full repentance through his love for Sonia and, in the notoriously sketchy ending of the novel, through the love of God. In *Disgrace*, it is the experience of caring for unwanted dogs at an animal refuge that moves Lurie towards a qualified form of repentance. In both cases it is not punishment but love—personal love for another, compassion for fellow living creatures—that is the principal vehicle of repentance.<sup>57</sup> Through love for another (including, in Raskolnikov’s case, coming to appreciate the suffering his wrongdoing has caused his loved one), the wrongdoer can transcend those defects in his persona—selfishness, pride, and so on—that led to his original wrongdoing. But it is precisely the importance of love in this context that may generate doubts as to whether the state could—or should—play a significant role in fostering repentance beyond punishment. However, any such skeptical conclusion would be too quick: that the state should have a role in fostering post-punitive repentance is compatible with a recognition that its role can only be a modest one, that repentance is also worked out in a private sphere in which the state has no business intruding.

In a thought-provoking essay on repentance, the sociologist Robert Wuthnow observes that “repentance has never been considered a purely private (or subjective) act on the part of the individual criminal alone but has consisted of *social activity*

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<sup>57</sup> For the same point made in connection with religious conversion—i.e., that “a relationship of genuine and warm love forms part of the way of redemption”—see the discussion of the story of Pelagia and Nonnus in BENEDICTA WARD, *HARLOTS OF THE DESERT: A STUDY OF REPENTANCE IN EARLY MONASTIC SOURCES* ch.4 (1987).

involving the local community, churches, courts, and others institutions.”<sup>58</sup> However, as he also points out, by the late twentieth century the idea that repentance should be a concern of the criminal justice system, or of the state more generally, had fallen from favor.<sup>59</sup> The causes of this decline in the perceived importance of repentance in the criminal justice system identified by Wuthnow are many and varied: a tendency to emphasize, in the name of fairness, the standardized treatment of all offenders, so that inherently individualized concerns with repentance are overshadowed; the tendency to differentiate more sharply than in the past attitudes and behavior, so that penitent behavior (e.g., work at a homeless shelter) is not seen as a reliable guide to people’s attitudes and characters whilst even sincere protestations of apology and change in attitude are not regarded as reliable guides to the offender’s future conduct; the associations of repentance with religious conversion and the desire on the part of the state not to show favoritism to religious believers or to endorse any particular religious creed; the tendency to ascribe criminal wrongdoing to large-scale social defects, or even to such factors as dysfunctional family backgrounds or a genetic propensity to engage in violence, rather than individual responsibility; the realization that imprisonment does not typically induce repentance but, instead, functions mainly to “stigmatize, imprint a deviant identity, and impart skills for further acts of crime,” and so on.<sup>60</sup>

But, as Wuthnow rightly insists, that there is some truth in all these objections to repentance does not eliminate the importance of facilitating and affirming the repentance of offenders through publicly understood rituals. The task is a difficult one: it is necessary to find vehicles of repentance that do not illegitimately transgress the requirements of other values (such as individual autonomy and the avoidance of religious sectarianism) but that also cannot be reasonably dismissed as a hollow gestures. This seems to me a topic on which much more empirically-informed work needs to be done. But, there are at least two observations that are worth making.

The first is that, insofar as legal punishment can itself serve as a penance that facilitates and gives expression to the offender’s repentance,<sup>61</sup> then it might well be advisable for offenders to be granted the opportunity to carry on with some elements of their legally-imposed penance on a voluntary basis, even after their sentence has been served. Thus, an offender who, as part of a community service order, is required to undertake work in a soup kitchen, might be given the opportunity to carry on working there even after he has served his sentence. From the offender’s point of view, this would help confirm the sincerity of his repentance, though of course his primary motivation for carrying on with the work, if he is genuinely sincere, cannot be the impression his doing so would be likely to convey. In addition, some of the

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<sup>58</sup> Robert Wuthnow, *Repentance in Criminal Procedure: The Ritual Affirmation of Community*, in REPENTANCE: A COMPARATIVE PERSPECTIVE, *supra* note 20, at 176.

<sup>59</sup> *Id.* at 179–80.

<sup>60</sup> *Id.* at 177–79.

<sup>61</sup> See *supra* Parts II–III.

repentance rituals that advocates of restorative justice have suggested as alternatives to punishment might, instead, be supported as supplements to the punitive process. It is plausible to think, for example, that a repentance conference involving the offender, the victim and other interested parties that is conducted *after* the offender has been sentenced, or even served a significant part of his sentence, would be more likely to induce forgiveness and reconciliation than one clouded by the suspicion that the offender is insincerely mouthing apologies in the hope of getting off lightly.

Second, the state's facilitation of repentance can be indirect, by supporting various institutions in civil society—such as churches, charities, schools and so on—that provide ex-offenders with ritualized means of repentance. This indirect strategy has the benefit that the state disengages from any further direct involvement with the offender. This enables respected individuals involved in the running of these institutions to form a close enough relationship with the offender to vouch for the genuineness of their remorse and improved character. An official of the state, by contrast, might find it harder to form such a relationship given his association with the body that meted out the punishment. Moreover, in thus marking a clear contrast between the offender's punishment and his subsequent voluntary penance, doubts about the value of repentance in a punitive setting can be quelled. But the suggestion also faces problems. One is the difficulty of supporting these institutions in civil society without necessarily endorsing the broader ideology to which they subscribe, a problem that is particularly acute in relation to faith-based institutions. Another difficulty is that widespread use of community service as a repentance ritual can lead to a general undermining of the social meaning of such service, by calling into question its voluntary and charitable character. But, it seems to me, one can accept that these are genuine difficulties that will need to be confronted at the level of institutional design without abandoning the idea that repentance should have the kind of significance I have claimed for it in this paper.